

ETHNIC CONFLICT, MINORITY PROTECTION AND CONFLICT RESOLUTION: HUMAN RIGHTS PERSPECTIVES

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The Harvard Law School Human Rights Program, founded in 1984, fosters coursework; the participation of students in human rights activities through scholarly research and writing as well as practical engagement; and assistance to the worldwide human rights community. The Program forges cooperative links with human rights scholars, activists and organizations worldwide through its student summer internships, visiting fellows (scholars and activists), speakers, applied research and extensive clinical work. HRP also plans and directs roundtables and conferences on human rights issues and publishes the resulting reports and analyses. These publications, together with a description of HRP's many activities, its newsletter and other related documents, are available at the HRP website (indicated below) or upon request.

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The International Centre for Ethnic Studies was set up in 1982 as a multidisciplinary centre with the purpose of conducting research into issues of ethnic conflict, human rights and women's studies. The Centre also engages in advocacy and policy research on important contemporary issues. The Centre specializes in anthropological and historical studies of ethnic identity, violence and social suffering. It is one of the premier institutions in South Asia for the study of human rights, election monitoring and constitutionalism. The Centre engages in training programs on minority rights and also conducts courses on the themes of ethnicity, conflict and violence against women. The Centre has 25 full time employees and 20 research consultants.

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Dedication

On July 29 1999, Dr. Neelan Tiruchelvam, scholar, activist, visionary and friend to the three of us, was assassinated in Colombo, Sri Lanka because of his courageous efforts to bring peace to his war-torn country. Just a month before this tragic event, Dr. Tiruchelvam was at the Rockefeller Foundation conference center in Bellagio, Italy, working on a set of lectures to be delivered at Harvard Law School as part of the course he had been invited to give in the autumn semester. While at Bellagio, he wrote to Lincoln Chen at the Rockefeller Foundation about the need to sponsor a program of activities that would lead to the creation of an international mechanism for the protection of minority rights. After his death, the Foundation—along with Dr. Tiruchelvam's friends and colleagues at the Harvard Law School, the International Centre for Ethnic Studies (ICES) in Colombo, and the Neelan Tiruchelvam Trust—decided to carry his vision forward by exploring the problems of minority protection at the international level, particularly in connection with the resolution of ethnic conflicts. That exploration took place in the conference at Bellagio on October 16-18, 2001 and led to this publication.

Dr. Tiruchelvam was an extraordinary person who combined the moral imperatives of human rights with great experience and fascination in negotiations to end conflicts, often ethnic conflicts. In light of his advice to many governments during their processes of constitution drafting, Dr. Tiruchelvam became one of the world's leading experts on that undertaking and on the provisions of constitutions bearing on human rights. His specialty was in the area of minority protection, particularly in relation to territorially based minorities that sought some form of regional autonomy. In the process of working with successive governments for a solution to the Sri Lankan ethnic conflict, he acquired a great deal of insight not only into the need for substantive provisions but also into the very process of conflict resolution. His experience and concerns led him to appreciate particularly the European work of the Organization for Security and Cooperation in Europe (OSCE) High Commissioner for National Minorities, and he sought to develop that model in other regions as well.

Dr. Tiruchelvam's struggle for human rights in general and minority rights in particular is legendary. He gave much energy and contributed greatly to institutions like ICES, and strove to fight for the highest ideals through rigorous scholarship, persistent advocacy, and a compassionate pragmatism. Young people from all regions came to Sri Lanka to be mentored by him. His legacy continues in the work they now do around the world, fighting against social injustice through human rights and peace activism. We salute his work at the national, regional and international levels to protect the rights of vulnerable people throughout the globe. We lovingly dedicate this volume to his ideals and memory.

Radhika Coomaraswamy
(International Centre for Ethnic Studies)

Ram Manikkalingam
(Rockefeller Foundation)

Henry Steiner
(Harvard Law School Human Rights Program)

Preface

This venture grew out of cooperative planning by the two sponsoring organizations: the Harvard Law School Human Rights Program and the International Center for Ethnic Studies in Colombo. Our purpose was to bring together for an interactive and interdisciplinary discussion a small number of people who had given sustained thought to and had substantial experience in distinct but related aspects of a major problem: violent ethnic conflict stemming from the failure to protect minorities and from related violations of human rights. The participants ranged from human rights experts to experts in conflict resolution, and included both activists and academics.

The format and process for this meeting held at the Rockefeller Foundation conference center in Bellagio, Italy followed generally the pattern of prior meetings that the Human Rights Program had played a role in planning. The Program prepared in advance edited readings on the subjects of the discussions and distributed them to all participants. Part One of the conference consisted of prepared presentations by one participant from each of the four groups represented at it, although no formal papers were presented. In Part Two, the bulk of the conference, all participated in a roundtable about the basic themes. The Human Rights Program, particularly Peter Rosenblum who was then associate director, edited the transcript of the conference and prepared this publication after a final review by Henry Steiner. In this process, the Program benefited from the excellent assistance of Jaskaran Gaur, at the time of the conference a J.D. candidate at Harvard Law School.

Each participant had the opportunity to review and correct a draft of his or her remarks, to be certain that the text as published accurately reflects the views expressed during the discussions. The text considerably shortens the original transcript and occasionally revises the order of remarks, in order to present a readable and cogent exchange of ideas.

The sponsors are deeply grateful to the Rockefeller Foundation for making available its conference center at Bellagio for this event

and for providing further support including transportation costs. The Human Rights Program assumed the cost of the publication.

Radhika Coomaraswamy
Director, International Centre
for Ethnic Studies

Henry Steiner
Director, Harvard Law School
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Introduction

The dedication of this volume to Neelan Tiruchelvam stresses his lifelong commitment to protection of minorities and related human rights, coupled with a deep interest in the process of conflict resolution. The decision of the organizers to devote the conference to precisely these issues left us with many choices of how to proceed. The time did not appear ripe for attempts at further development of human rights norms for the protection of members of minorities or of minorities themselves—for example, by building on Article 27 of the International Covenant on Civil and Political Rights or on the related 1993 UN Declaration on Rights of Members of Minorities.

A more promising path lay in exploring possible institutional innovations growing out of the UN and its Commission on Human Rights or out of regional human rights regimes. The Commission might create a rapporteur or working group to investigate and monitor the situation of ethnic minorities. Perhaps a new body could be formed with which periodic reports would be filed and that enjoyed powers of mediation or related types of intervention in incipient ethnic conflicts. Alternatively a conference might usefully consist of case studies of similar kinds of efforts in the past. In fact, as will appear below, some of these themes did surface in a significant way in the course of the conference.

In the end, we chose a path that gave this conference greater distinctiveness and pointed toward important future research and cooperation. It seemed to us that the scholarship and debates about (1) minority protection and human rights, as well as the ethnic conflicts leading to such massive violations, and about (2) the processes and substance of conflict resolution, had remained apart, each barely taking account of the other, each indeed largely ignorant about the other. Each group of activists or academics often appear to entertain no more than shallow, stereotypical views of the other: human rights advocates see conflict resolvers as willing to ignore human rights imperatives and willing to sacrifice all values in order to achieve the end of violence; conflict resolvers view rights activists as absolutists holding to fixed and certain norms at any cost, including the cost of ongoing violence.

This conference, the organizers believed, could start to bridge this gap in knowledge and perception. It might help to bring activists and academics knowledgeable about human rights into discussion with the practitioners and theorists of conflict resolution. Learning from the others participating in the conference about their perspectives on these issues could greatly benefit each group by suggesting ways in which human rights norms germane to minority protection could be brought into the negotiations for resolution of conflicts and into the settlements themselves.

As a consequence, the participants include human rights advocates and scholars, academic and practical experts on conflict resolution, and officials of intergovernmental and nongovernmental institutions who have participated in conflict resolution. The role of human rights in negotiations to end ethnic conflicts and in settlements ending those conflicts constituted the broad, continuing issues for the participants as a whole.

Our organization of this conference responds to this emphasis. Part One offers introductory presentations by representatives of each of the groups present, followed by comments and discussion. Part Two consists of roundtable discussions about the basic issues: human rights perspectives on ethnic conflict and conflict resolution; case studies of conflict resolution under the auspices of the UN in relation to human rights; possible universal mechanisms for addressing these issues; and possible collaborative roles among the different experts at the conference.

Henry Steiner

PART ONE:

Introductory Presentations from Different Disciplines and Roles

[Part One introduces different perspectives on issues debated at this roundtable through comments of participants from different disciplines and types of practical experience. It starts with a discussion of regional mechanisms for dealing with conflicts between governments and minority groups. The most advanced such mechanism plays an important role in the Organization for Security and Cooperation in Europe (OSCE). Hence Part One begins with remarks of Max Van der Stoep, recently the High Commissioner on National Minorities within the OSCE.]

Max Van der Stoep

I was the first commissioner to be appointed by the Organization for Security and Cooperation in Europe. This appointment took place against the backdrop of the breakup of Yugoslavia and the end of the post-Cold War euphoria. It took a year to bring us back to earth and to see that many problems still had to be solved. The international community realized that we had failed to take substantive action to prevent the events in Yugoslavia. In order to achieve something regarding ethnic tensions, there was the decision to appoint a High Commissioner.

I received the title of High Commissioner *on* National Minorities. That word "on" is very significant. It meant that I was not "for" national minorities. In other words, I was not an ombudsman for their interests. It was a clear intention to see the High Commissioner as an instrument of conflict prevention. The High Commissioner had to be objective. After I was appointed, the then Russian Foreign Minister came to me and said, "My well meant condolences," meaning it would be quite impossible to be objective. However, strictly speaking, objective does not mean neutral.

Looking back, perhaps the word "minorities" has not been the best word. In fact, I had quite a lot of trouble with this word. For instance, ethnic Albanians in Kosovo said, "We would like to speak to you as a private person, not as the High Commissioner, because

we are not a minority. We are a majority." Perhaps it would have been better to choose the title of High Commissioner on Inter-Ethnic questions. "Minority" also, for many people, has a taste of something inferior.

Perhaps it is important to analyze the question of the extent to which the experiences of the High Commissioner would be relevant for other contexts. In this respect, I have to explain those things that made it easier for the Commissioner to do his work. First, in the mandate, I was granted a great measure of independence. In other words, I didn't have to get the consensus of the OSCE member states before deciding to do anything. This independence has been very essential to my work. The only thing I had to do was to inform the country which had the chairmanship of the OSCE that I intended to get involved in a certain situation. If you apply this model in other regions of the world, its most important factor was that I was able to act quickly without endless discussions preceding any step. This is the essence of conflict prevention; the best chance of containing the conflict and finding solutions is at an early stage. Once the shooting starts, it becomes more an issue of conflict management than of conflict prevention.

Second, it is important to base oneself on existing, generally recognized norms and standards so that it is more difficult for any of the parties to the conflict to oppose the OSCE role. The OSCE has a number of standards and norms that we elaborated relative to minorities, including the Copenhagen Document and the Framework Convention.^{*1} I also refer more specifically to the Moscow Document on the Human Dimension of 1991.^{*} This document has been accepted by all OSCE states. It states that questions relating to human rights cannot be considered as an exclusively internal matter of the country concerned, but are just as much a matter of concern for the OSCE as a whole.

As minority rights also are part of the human rights referred to in the Moscow Document, they legitimize my involvement in minority problems in the OSCE area, an involvement that could lead to serious tensions. I was also not forced into the position of knocking on doors to request entry. My mandate includes a provision that requires states

¹ Documents marked by an asterisk (*) are identified in Annex I.

participating in the OSCE to accept my visits. In fact, all states that I wanted to visit did receive me, usually at the highest level. During my period of office as High Commissioner, only Turkey refused me entry. It stated that it recognized only minorities that were mentioned in international treaties to which Turkey was a party, and that in its view there were no tensions involving these minorities.

Third, the role of the European Union in supporting the work of the Commissioner was instrumental. In 1993, the European Council agreed that the admission of new members would be linked to political conditions, including the proper treatment of minorities. This has proven to be a very important factor. It has created more willingness by states to consider my recommendations.

Fourth, what I have tried to do is to work as much as possible behind the scenes and follow the policy of quiet diplomacy. That is, I have tried to refrain as much as possible from making public statements. Experience has shown that public statements, even with the best of intentions, are inevitably followed by statements of both sides, emphasizing their specific view, and resulting in a hardening of positions. Nonetheless my practice had some disadvantages. The High Commissioner did not get headlines and his work was not sufficiently known. But in order to get adequate support for the Commissioner, the institution must be sufficiently known.

Henry Steiner

I wonder what effect the normative element in the treatment of minorities has on Max Van der Stoep's interventions, and how those interventions proceed in different states. An almost baffling variety of instruments must tempt the intervener: regional conventions, universal instruments, and declarations. But so much of the described work seems to be in the limbo area, the world of argument about what the norm is or ought to be, rather than in the area of settled understandings about rules and standards. Moreover, the applicable standards are extraordinarily broad. Were they relevant to the confidential talks and to the drafts that were developed and presented to governments? To point to one field where states' duties are open to argument, what about those rights that may impose affirmative duties on states to act? For example, should or must states support theatre in a minority language? Must they give financial support to help to

maintain other aspects of group culture? I wonder how governments respond to such argument of the High Commissioner, which may indeed appear to be norm-based, and whether such argument helps to settle the dispute.

Max Van der Stoep

That question requires several answers. First of all, standards are generally accepted. It is sometimes amazing how general principles with human rights content can be used. In Latvia, for example, we built an entire case of discrimination on the basis of language.

Of course, there are norms and standards with a very general nature or that are not easily applicable because they include escape clauses. Against this background, a few years ago we started asking for help from groups of eminent international experts in working out more concrete rules on minority rights. That process brought us to the Hague Recommendations regarding the Education Rights of National Minorities*, the Oslo Recommendations regarding the Linguistic Rights of National Minorities*, and the Lund Recommendations on the Effective Participation of National Minorities in Public Life.* These recommendations have never been adopted as such by the OSCE system, but mainly because of the high prestige of their authors they do play a role in discussion.

Henry Steiner

Do you see part of your role as building norms through these interventions, particularly when your arguments reach beyond a prevailing consensus about a standard's content and meaning—say, a standard affecting linguistic minorities? Do you see yourself as building international norms that will have some effect throughout Eastern Europe?

Max Van der Stoep

Certainly we hope that the recommendations I just mentioned will have this effect. But I also hope that the methods we used in dealing with specific cases can provide some useful guidance and help us to come forward with specific solutions. We hope that we can project our experience and the lessons that we learned. On the other hand, we must not forget that no inter-ethnic situation resembles another.

John Packer

Periodically, we would come across the limits of what international standards might prescribe and find ourselves in case-specific arguments. On three occasions, Mr. Van der Stoel invited groups of independent experts to elaborate further clarifications of existing standards. In two of those cases, we engaged in what was normative elaboration rooted in already accepted norms—the Hague Recommendations regarding the Education Rights of National Minorities* and the Oslo Recommendations regarding the Linguistic Rights of National Minorities.*

The Lund Recommendations on the Effective Participation of National Minorities in Public Life* took us further into the delicate area of the division of political power. In the case of Crimea, Mr. Van der Stoel asked for a note on international law and autonomy. We realized that there was very little international law about autonomy from which to proceed. We had a couple of consultations in 1998 for brainstorming. That was followed by an intergovernmental conference we organized in Locarno, Switzerland. We never used the word “autonomy.” Rather, we spoke about “integrating diversity.”

Not only were no states against this discussion, they were all delighted to hold it. They were looking for a conceptual framework in which to bring order to diversity. We followed that up almost immediately by putting together a group of experts to elaborate what are now called the Lund Recommendations. In that whole text, you won't see the word autonomy. But it is about autonomy. We used “effective participation” because it was the only phrase in the international standards that we could find—and that only appears three times: in the 1992 UN Declaration on Rights of Persons Belonging to Minorities,* the 1995 Framework Convention* and, originally, the 1990 Copenhagen Document.* It has been broadly accepted, even by countries like Turkey.

What we did in the end was to give normative direction, but the question remains what this phrase means with respect to the application of the conceptual framework to conflict situations. That question has been analyzed by Steve Ratner, who called the High

Commissioner a “normative intermediary,”² which seems to me appropriate in helping the parties to understand existing standards.

William Zartman

When we talk about norms, we often forget to look at “normal” as opposed to normative. How do things actually work out? What do we know about language rights? Under what conditions do language rights promote integration and under what conditions do they destroy integration? It seems to me that to push the normative side, we have to know about the normal side.

Alvaro De Soto

I think the “normal” in Europe may be quite different from the rest of the world. The idea of a High Commissioner on the protection of minorities is suited for Europe but probably politically premature and perhaps counterproductive in most of the rest of the world; it would simply frighten. In Africa and Asia, there are too many multiethnic states that would view a foreign agent of the minorities as a threat and mechanism to promote fragmentation. And in Latin America, there is the growing indigenous movement as well as the extreme sensitivity to the question of sovereignty—not without historical foundation, I might add.

Eileen Babbitt

I am grappling with the idea of the normative intermediary that John Packer mentioned. What does it mean to come as an intermediary without leverage or an ability to provide incentives? How can you act in this normative role? John said he didn’t think that leverage issues are the most important factor. There are other factors in the way that the High Commissioner can proceed that might make this normative process more functional, and I’d like to understand better how that might work.

Martti Ahtisaari

My experience in Bosnia relates to Eileen Babbitt’s comment. When I was associated with Cyrus Vance and David Owen, I started

² Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U.J. INT’L L. & POL. 591 (2000).

wondering whether you could function in a situation like Yugoslavia if you come from a small country. My basic sources of information were only the *International Herald Tribune* and the *Financial Times*. At the same time, I noticed that somebody from the British mission arrived twice a day carrying classified information to David Owen. In other words, if you don't have your own sources, you are at the mercy of public sources. It is a real problem. Can you appoint only people from the major countries who have their own intelligence? Then, I started thinking, can a smaller country cooperate with NGOs?

Liam Mahony

I would like to draw people out on how they might apply this discussion to earlier stages of conflict, before the parties reach the point of "mutually hurting stalemate." At the early stages, we are often dealing with situations where the minority has no power at all to get the state to recognize its existence. Rather than negotiating the end of war, we may be dealing with cases of discrimination. What does the High Commissioner on National Minorities say when addressing these issues?

Catriona Drew

Referring back to the importance of building norms, I am not convinced that we should assume that norm building is always a good thing for conflict resolution. We might like to think about developing international law as one of the tools in our toolbox. But international law can become a negotiating constraint and more law might mean more constraints. In the case of the negotiations over Israel and the territories, for example, it is arguable that some Palestinians have become so entrenched in their international legal rights discourse that accepting innovative pragmatic solutions (like sharing sovereignty over Jerusalem) would be impossible.

[The second theme in these introductory presentations concerned UN experience with ethnic conflict. It was explored by three participants with extensive experience in the UN in conflict resolution and human rights: Martti Ahtisaari as Special Representative of the Secretary-General; Ian Martin as Special Representative of the Secretary-General and holder of other UN posts; and Alvaro de Soto as official of the UN and chief negotiator in El Salvador.]

Martti Ahtisaari

My principal involvement with the UN has been in Namibia and the Balkans. I have drawn several conclusions from these experiences in Namibia, where I was Special Representative of the Secretary-General (SRSG), and in the Balkans. The first concerns the particular problem of tailoring the use of SRSGs to the long term, context-specific nature of the problems they face. Typically, Special Representatives work only for a couple of years. Then, a new one is appointed. I worked in Namibia for the UN from 1977 to 1990, 13 years. Short-term appointments are not the appropriate way to handle these crises. Most of these representatives don't have a chance to get to know the full extent of the problems before their time is up.

Second, the UN is equipped only for certain types of disputes. In Namibia, the UN's involvement was part of a rights-based campaign. This helped to focus the attention of the Western governments on the problems of Namibia, but it was never enough to bring about independence. For that, attention had to be given to the interests of all of the parties. We found out that it was not actually possible to do that in the UN.

Third, during my tenure, I wanted to get the UN to behave in a more predictable fashion. I made a proposal that the Secretary-General should be given the right to ask for an advisory opinion from the International Court of Justice. It wasn't surprising that my idea was not received with particular enthusiasm in either Washington or Moscow. Boutros Ghali said to me that he asked nine times for permission to go to the Court and it was never granted.

Finally, let me say a word about the terms for discussing intervention by the international community, which have shifted dramatically during the course of my work with the UN and international NGOs. For years, the focus was on non-intervention in

the affairs of a state in light of Article 2(7) of the UN Charter.* Now, the discussion often starts with the right to intervene. The concept of humanitarian intervention is very difficult. It would perhaps be better to talk about the right to intervene for humanitarian purposes, not humanitarian intervention. In the Canadian commission examining humanitarian intervention that Gareth Evans has headed, the report talks about the responsibility to protect rather than the right to intervene.³ To me, that is an important improvement in the way of looking at intervention.

Ian Martin

Coming from Amnesty International and observing the role of intergovernmental organizations (IGOs) in situations of conflict over the past 15 years, I note that there have been tremendous developments in the place of human rights in their work. Still, there are some major weaknesses. I worked in Rwanda after the genocide of 1994. The events leading up to the genocide demonstrate a classic case of the disconnect between the human rights world and the world of conflict prevention. The earliest warnings of mass violence came from human rights NGOs. Then the UN human rights system picked up on them. The Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions raised the specter of genocide in Rwanda in 1993. That report was published in Geneva in August 1993, almost literally as the peace settlement was being negotiated at Arusha. I have never found anyone involved in the peacekeeping process who was even aware of the Special Rapporteur's report, which, by the way, had specific recommendations about protection of civilians. In the peacekeeping operation that was agreed to, there was no human rights function and very little political intelligence.

Since then, I see four developments in the relationship between human rights and IGOs. The first is the way in which human rights protection has moved from the committee rooms of Geneva to the field. Alvaro de Soto played an important role in this. El Salvador, in 1990, involved the first establishment of a human rights protection

³ *The Responsibility to Protect, Report of International Commission on Intervention and State Sovereignty* (IDRC 2002) (See <http://network.idrc.ca/ev.php>)

presence on the ground. This presence was rapidly followed in other situations like Haiti, Guatemala, Rwanda and Bosnia.

The second major development was the creation of the Office of the High Commissioner for Human Rights in 1994. The third development, for which the present Secretary-General is very much responsible, was the opening of the doors in New York to the human rights perspective of Geneva, and generally giving the human rights world an opportunity to engage in the major UN discussions on peace and security. The fourth, which is closely related, is the greater opening-up of the UN peacemaking apparatus to the expertise of NGOs and that of other parts of the UN system. These are positive developments that might have relevance to what could be done in the field of ethnic conflict and minority rights.

I also want to point out three major weaknesses of the UN system. The first is that the New York-Geneva divide remains considerable. There is a debate about the extent to which this is due to resistance from the peace and security world rather than to the failure of the human rights world to bring something to the table. This is a question that we might want to address. Second, the human rights machinery of the United Nations has developed only limited field orientation and remains focused on the committee rooms in Geneva. The extent of sharing of experience, training of cadres, and support to the people in the field is still extremely limited. With the exception of the High Commissioner on National Minorities, it can also be said of the OSCE that its general ability to support its fieldwork is weak.

The third weakness concerns the effectiveness of human rights mandates. Those of us who lobbied for attention to additional areas and topics in human rights have been more successful in proliferating mandates than in advancing thinking on how mandates can be rationalized and the human rights system more effectively focused.

Obviously there is an important function for thematic analysis of human rights issues, one of the major approaches to UN human rights reporting. But in recent years, when I have tended to view human rights from the perspective of a conflict in a particular country, I have wondered what overall impact thematic reporting has on the country situation. Very often, it doesn't add up to very much. The threshold for appointing a country specific rapporteur is

very high. Certainly the capacity of the UN human rights system not simply to report on discrete symptoms of human rights crises but to present a cogent analysis of the situation remains limited.

Alvaro de Soto

One *leitmotif* of the past decade at the UN has been the effort to grapple with a state's internal conflict (although we do not yet address ourselves explicitly to "ethnic conflict"). Along the way, we have become nearly obsessed with seeking settlements that are not merely just, but genuinely durable. We have developed an aversion to quick fixes.

When I joined the UN 20 years ago, Brian Urquhart said something that struck me as sensible and precocious—given that the UN was not actively involved in the business of conflict resolution. He said (more or less), "One should not fall into the temptation of getting involved in too many places. And one should try and ascertain whether the right conditions exist for involvement." He summarized it in one short phrase: "Don't jump into empty pools," or, to borrow a phrase from Bill Zartman, don't get involved in situations that are not ripe. But the UN doesn't always have the luxury of turning things down. We are like an emergency room of the hospital and must accept everyone who comes to the floor wounded, regardless of whether they have a credit card or valid insurance.

This leads us necessarily to a comprehensive approach. We go far beyond dealing with the combatant parties themselves and try to address the problems of a society as a whole, trying to understand the institutions, the groups and sources of grievances. In my view, conflict resolvers looking for a comprehensive solution must have resort to everyone who can provide guidance or they are not doing their job.

But the proliferation of possible conflict mediators itself complicates the situation. If there is already a tendency towards recalcitrance of the parties to the conflict, the proliferation of mediators is sure to exacerbate it. Nothing is so easy as to play one mediator against another. The UN does not aspire to be a monopoly, nor do we expect to be a leader in every negotiation. Particularly under this Secretary-General, we are happy to play a collaborative

or supportive role. But we ask for one thing: clarity as to who is in the lead. I think that is a golden rule shared by all who are involved. Once there is someone who has a serious process in hand, the UN is not going to try to hijack the process.

When we try to distinguish among the different institutions for conflict mediation, we should consider them as toolboxes. It is ultimately a political judgment as to which tools to utilize. Within the UN as well as the OSCE, we see different mandated roles. The human rights institutions have a duty to protect human rights. The Secretary-General has the paramount mandate in the area of peace making. Those roles must be kept separate and probably independent. I don't think it is useful to ask the High Commissioner for Human Rights to bend her judgment and her pronouncements. At the same time, this does not mean that the two officials cannot be very much in touch and working toward the same purpose. Each must have a general idea of what the other is doing so as to avoid working at cross-purposes.

An example comes to mind. In 1990-1991, the UN human rights apparatus in Geneva was reluctant to take on the question of operating a field operation in El Salvador. As a result, the political side of the UN took on the function. Once the peace accords were completed and were being implemented, the Commission on Human Rights appointed, as Special Rapporteur on El Salvador, the person who had been legal adviser to the Secretary-General's representative during the negotiations. In other words, they appointed someone who was fully aware of the needs that remained to be filled. Without formal institutional coordination, he was able to play a role that helped the implementation of the peace accords.

As a final thought, let me say a word about the power of the Secretary-General to draw attention to conflicts. Article 99 of the UN Charter, which gives the Secretary-General the power to bring matters to the attention of the Security Council, is viewed by many as one of the major features distinguishing the UN from the League of Nations. In four lines, this Article creates a world of possibilities. The Secretary-General may bring to the attention of the Security Council *any matter* which "*in his opinion* [italics added] may threaten the maintenance of international peace." In saying any "matter," it doesn't say any "dispute" or any "conflict." And it refers to "his opinion." The latitude for interpretation is vast and presupposes the

capacity of the Secretary-General to inform his judgment. He has to have an opinion; he has to have analyzed the situation. And for that, he must rely on other actors involved.

Martti Ahtisaari

We faced the problem of a proliferation of mediators in 1999. At that time, it was the UN that appointed two different special representatives and there was great confusion about their roles.

John Packer

I am interested in the comments made by Alvaro de Soto about the distinction between peace and human rights. Mr. Van der Stoep made an exploratory visit to New York in 1992 to speak with the Security Council members about how they would consider a discussion about human rights. Interestingly, the Council agreed to accept it if Mr. Van der Stoep appeared as a private person under a rule that allowed anyone of interest to the Council to appear. The only person who was strongly against it was the then Ambassador from Ecuador, who subsequently became the High Commissioner for Human Rights. He argued strenuously that human rights issues and peace issues should be kept separate, and that peace—not human rights—is the Security Council's business. That same argument was made by the then Secretary-General, notwithstanding Article 99 of the Charter.

In my view, if there is still a strong belief that human rights issues and peace issues should be kept separate—and the belief that human rights can compromise peace negotiations—then we have a problem. First, I don't think this is consistent with the Charter of the United Nations. The Preamble makes the link directly. It says that, in order to save succeeding generations from war, we must, among other things, respect human rights. The same is true of the Helsinki final act of the OSCE.

Not everything can be negotiable. There must be a baseline. It would be nice if there were a Moscow declaration elsewhere. But even in its absence, we still turn to the UN Charter and universal human rights. These are basic starting points that must serve as a baseline to any process. Otherwise, you have no parameters.

Alvaro de Soto

If you examine Security Council resolutions over the past ten years, you will find that the references to human rights are growing geometrically. It is actually astonishing. Ten or eleven years ago, it would have been impossible to get the two words "human rights" into a resolution. Nevertheless, there is still resistance to any institutional link, such as having the High Commissioner for Human Rights address the Security Council as the High Commissioner. This is different than asking her opinion on a specific issue.

Peter Rosenblum

It would be interesting to know the extent to which Alvaro de Soto thinks the institutions within the UN need to change to take human rights into account? Can you talk about your own efforts to draft principles on human rights for the functions of the Special Representatives of the Secretary-General?

Alvaro de Soto

In two instances in the early 1990s, we ran into situations in which mediators were somewhat complicit in trying to avoid individual punishment for the leadership of each side in an internal armed conflict. In the case of El Salvador, it was impossible to avoid such complicity. At the Secretariat, we began to wonder about the responsibility of a UN mediator or representative of the Secretary-General in such situations. We gathered a group composed largely of experienced negotiators—hard-nosed, reality based peacemakers—on the one hand, and, representatives of human rights organizations and legal experts, on the other. We discussed the issue for two and a half days for the purpose of seeing whether it was possible to reach an understanding between the two sides. Although we agreed that it wasn't possible to legislate for all situations, we also agreed that it was important for any mediator acting on behalf of the Secretary-General to make clear that the UN operated within a certain framework of law, and that the parties were expected to work within that framework as well. In other words, we need to draw bright lines and notify the parties that the UN could not be associated with a peace agreement that fell outside those lines—for example, by exonerating perpetrators

of war crimes or crimes against humanity. If the parties decided to go ahead with such an agreement, the UN would take whatever action was appropriate to disassociate itself. That is the bare minimum.

Ultimately, we did draft guidelines, but we determined not to make them public because we feared that they would serve as a disincentive to parties otherwise interested in resorting to the UN for mediation.

[The third theme in the introductory presentations addressed characteristics of international human rights that are relevant to the later discussion about relationships between conflict resolution and human rights.]

Henry Steiner

My comments sketch some characteristics of international law and minority rights that may not exactly *simplify* our discussion of human rights and conflict resolution, but that should inform it.

I start with a difficult and elusive distinction between argument and norm in international law. My purpose is to suggest that work bringing together people from different disciplines and roles—the work of this conference—runs a risk that each group will expect too much from the others in terms of a clarity and comprehensiveness and consensus in doctrine or theory or policy that would yield obvious solutions for complex issues. For non-lawyers, it may appear that the international rules and standards—largely associated with international human rights law—that are relevant to minority rights enjoy a broad consensus that includes not only the formal articulation of the norm but also an understanding of its meaning as applied to different complex contexts. On numerous rights violations like physical abuse or conventional claims of discrimination, such a view will often be broadly correct.

But on some other matters of vital concern to ethnic conflicts, that view will lead to confusion and disappointment. One international-law scholar's or activist's statement or clarification of the law may sound to another like bold advocacy about what the law ought to become rather than a description of what it is. Human rights and other contentious and highly politicized fields of international law are particularly subject to such diverse understandings. The

boundary will be thin and contested between description of today's "law" and arguments about what tomorrow's should become.

To state the same idea differently, it will be sufficient for our purposes to regard international human rights law as composed of certain core elements that are well and commonly understood and often unproblematic in their application to concrete settings, whether or not involving ethnic disputes. But international human rights law is open to contest and dispute with respect to other norms that are not simply relevant but vital to minority disputes and that different parties to those disputes may support or contest as constituting extant international law.

The UN Charter and the Universal Declaration of Human Rights state human rights that are spelled out in greater detail in the many treaties following the Declaration, as well as in the developing customary law. Among these are certain norms particularly affecting ethnic minorities that by their wording and wide understanding have become emphatic *musts* or *don'ts*—discrimination in voting rights or in holding government office, or repression of cultural life, or closure of economic opportunities, for example.

Some characteristics of international law make the field of minority rights particularly resistant to normative consensus and subject to contested argument. I shall briefly note four of them. To start, like much of international law that has important implications for politics and power, the universal human rights regime lacks serious forms of institutional settlement. There are often no courts to settle things, except in national settings where judicial opinions may have little influence on external conflicts. The prime example of an international-universal court, the International Court of Justice, rarely gets into this human rights business. We do have developed principles of institutional settlement in regional settings like Europe, that evidence considerably greater cultural and political cohesion than applies to the world at large. In such a regime, a human rights court can have real bite and settle a range of important controversies.

But bringing a controversy to the universal UN organs (such as the Commission on Human Rights) or treaty bodies (like the Human Rights Committee) may or may not lead to something useful in the way of clarification and development of a sharply contested human rights norm. Given this lack of international decision

makers whose normative pronouncements are broadly viewed as authoritatively shaping international law, important parts of that law including aspects of minority protection take the form of ongoing argument that may also be resistant to resolution through interstate agreements. States and nonstate advocates often take positions about the existence or content of such norms that reflect their own moral beliefs, cultures and values, as well as concrete military, economic and political interests.

Let me illustrate these observations with the question of autonomy regimes. By such regimes, I refer to any of three systems. (1) The first consists of personal law regimes, where particular groups are relegated to discrete laws (usually of a religious foundation) and sometimes discrete (religious) courts to settle personal law matters such as marriage, divorce, alimony and custody. India and Israel offer two very different examples today. (2) Another type of autonomy regime involves the devolution of powers, sometimes in the form of a federalism, from a central government to a territorially concentrated ethnic minority. It could also involve functional autonomies not defined in territorial terms when, for example, control over special-language education is given to a linguistic minority. (3) A third type establishes consociational arrangements giving entitlements to particular groups. Such an arrangement could include, for example, the right of a designated ethnic group to exercise a legislative veto over certain matters, to have a defined percentage participation in the civil service or among high executive officials, and so on.

Can we say that such autonomy systems have a normative character in the sense that international law gives a collective right to minorities to have them established in certain conditions? As the discussion in the Lund Recommendations* makes clear, it is impossible today to find such a normative basis enjoying a broad degree of consensus in international law.

On the other hand, it is possible to employ principles of international law to argue in favor of such autonomy regimes and thereby to give argument some normative character. The minority, for example, could argue for territorial devolution by analogy to the self-determination right for "peoples" (not "minorities") in Common Article 1 of the two International Covenants [Civil and Political Rights; and Economic, Social and Cultural Rights].* Or it could draw

on Article 27 of the Civil and Political Rights Covenant* to argue for the right of members of ethnic groups to various forms of linguistic, religious, cultural and other functional autonomies—an argument that would gain force if the minority were repressed or denied equal protection by the state in any such respects.

Powerful contrary arguments can be advanced by the state, stemming from the assertion that autonomy regimes are inimical to deeply imbedded human rights ideals. Although the human rights movement posits increasing openness in a society, strong autonomy regimes involve closure and insulation of the minority from the rest of society. They may be seriously divisive, erode the notion of a common citizenship, and lead to further social fragmentation. They fix a particular element of personal identity as the premier form of identity for individual and group. For purposes of these regimes, group ethnic identity may become total identity, whereas liberal pluralist visions deeply imbedded in the human rights movement assume and endorse individual choice and multiple identities. Such arguments again expose the deep tensions between individualistic and collective images of rights.

A second important consideration in the application of human rights to ethnic conflict concerns the nature of the human rights violations involved in the conflict. In many such conflicts, we come across obvious and basic violations like torture, rape, mock trials, denial of political participation, repression of speech, or religiously-based discrimination. Such violations may characterize many ethnic conflicts, but are they particular to such conflicts? There is nothing distinctive about torture, for example, that makes it specific to police or military abuse of ethnic minorities. It can be commonplace in general policing, or in political repression not based on ethnicity. The same observation could apply to other abominable state conduct, like the practice of disappearances.

How then does one address the problem of rights violations in the context of interventions in ethnic conflict? I believe that in many conflicts, what may well appear to be the worst violations like disappearances or torture are epiphenomenal, not at the core of the conflict or a reason or cause of the conflict but one of its consequences. The conflict itself may stem from different types of violations, such as denial of language rights or denial of equal political participation

or economic opportunity. It may stem from exacerbation by some leaders or group of long-standing hostility or even hatred toward another group. Torture is a consequence, not original cause, of the conflict, though its continuation may well exacerbate it.

This observation raises an important question for the mission of human rights groups. If many such violations are epiphenomenal, do interveners seeking to resolve the conflict continue to address only those familiar, brutal and systemic violations in a proposed settlement, or do they undertake to define and resolve the conflict's fundamental causes that may relate to other kinds of rights or historical conditions?

A third consideration involves the tension that is perceived to exist between group rights and individual rights. Much of what we think of as individual rights has a group dimension—for example, equal protection, since it is quite clearly the ascriptive or group identity of the person discriminated against that produces the discrimination. The whole group is thereby involved in a case brought by a single individual. But there are other rights that can be asserted *only* by the collectivity through its spokespeople, particularly the self-determination rights or the various autonomy rights that the Lund Recommendations discuss, all of which would have to be expressed in a state's constitution or legislation and be administered through some form of group representation and organization.

The fourth and final problem that I want to mention is that of state duties. Individual and group rights can be divided and decomposed into a variety of related state duties. Much of the argument about expanding individual rights is really about expanding the range of state duties associated with those rights. For example, a state must allow a group to use its own language and practice its own religion. There is a right, we can say, to be left alone and not discriminated against.

But should the state's "hands-off" duties of respect for individual and group rights be complemented by a duty to facilitate the group's use of its language and religion? Should international law require the state to provide financial support for special schools teaching in a minority group's language, or subsidize a minority's cultural life as through its theatre? When a group makes such a claim, can we at most say that there is no clear requirement of or prohibition

against state aid in such matters? How, if at all, does that cautious statement affect an intervener's decision whether to raise the issue of state support as part of negotiations toward a settlement?

Yash Ghai

I agree with Henry Steiner that we don't have very clear guidance from international law. How then can the framework of human rights be used to settle conflict? In part, that is the indeterminacy issue. We need to recognize the streams of rights—economic, social and cultural (ESC) rights, rights of indigenous people, self-determination—each with a different set of implications or entitlements. Sometimes a right is understood differently within the same society. The right to equality was certainly viewed differently by Blacks and Whites in South Africa. It was a “negative” right as far as the White community was concerned. But for Blacks, it was viewed as a positive right, an affirmative obligation on the part of the state.

What I have found is that there is an urge to find solutions through the discourse of rights. But you cannot achieve some of the necessary accommodations if you have the notion that only one kind of right occupies the field of *human rights*. There is an enormous flexibility in human rights that enables us to settle competing claims. And accommodations are reached partly because rights are in competition, so there is the impossibility of each being firmly held in place.

One of my difficulties with autonomy is that we tend to use it not so much as a tool of power devolution, but as an artifact of ethnic identity. Is this inevitable? Perhaps the human rights framework cannot take us far where questions of culture are concerned.

But at the same time, using the scheme of human rights can have a transformative effect within some cultures. In India, for example, religion is being defined in terms of human rights. Canada is a very interesting case study for how human rights serve as the basis for multiple accommodations with groups, including the Francophone and indigenous people. Sometimes it gets messy, but the object is human rights.

Though I am, in some sense, a coauthor of the Lund Recommendations, I was deeply upset at the progress of the Lund deliberations. I was almost put in a minority position. I was concerned

that our vision of collectivity would lead to fragmentation rather than unity. Separate ethnic nations serve to fragment the community, putting into deep jeopardy the notion of human rights, because human rights are feasible only when we respect each other as persons.

Catriona Drew

I think it may be useful for us to clarify the way that international law treats self-determination claims. International law has its own hierarchy of rights for such claims that corresponds to a particular vocabulary. The varying degrees of 'rights' depend on the definition of the group making the claim. I would lay out the categories in the following top-down order:

1. "Colonial or occupied peoples" are entitled to full self-determination—*i.e.*, a free choice over the external status of their territory—including the option of independent statehood.

2. "Indigenous Peoples" are entitled to a limited form of self-determination—land rights/autonomy/self management—all falling short of a free choice over their territorial and political destiny (*i.e.* not the right to independent statehood).

3. "Minorities" are entitled to individual minority rights—*i.e.*, to participate in minority culture (language/religion etc.)—and may arguably be entitled to a group autonomy right to be exercised within the borders of the existing states. Minority groups, as well, do not enjoy a right to choose independent statehood.

4. "Peoples who are victims of human rights abuse"—*i.e.*, peoples who are territorially based inside the borders of existing states, and who a) are subject to egregious human rights abuse or b) are denied meaningful access to government, *may* qualify for a right of secession, according to some international lawyers and sources. But the law is far from clear and the response to ethnic cleansing in Kosovo suggests that self-administration/autonomy remains the preferred solution, not secession.

Mark Lattimer

I'd like to pick up Henry Steiner's point about the field of minority rights being resistant to normative consensus. I think that is the case with regard to, for example, the autonomy questions he raised and to the range of self-determination claims that Catriona Drew has just sketched. However, there is a remarkable degree of consensus about certain fundamental human rights norms—the abomination of torture or extra-judicial execution, for example—yet what we see in many conflict situations is the violation of such norms perpetrated systematically against an entire minority ethnic group. So while it is important to advance understanding of issues such as autonomy rights, we should be careful not to underestimate the international consensus that does exist on many violations of the rights of minorities in conflict, because that consensus can be used to build protection.

Radhika Coomaraswamy

The intersection of human rights and conflict resolution struck me forcefully when I was in Sierra Leone as the Special Rapporteur. I was looking at the treatment of women in wartime. We heard the most horrendous testimonies ever heard in my experience. There was tremendous pressure from the international community to set up a special international court for human rights violations. But people were extremely nervous; they knew that trials of leaders could destroy the peace. It was a major dilemma for them: the desire for human rights accountability and their absolute fear of returning to a state of war.

I would like to focus on one issue that further complicates the question of groups in conflict, and that is the question of rights within the group—the tension between those who demand rights on a collective level and those who demand individual rights within the collective. This tension is especially pronounced as it relates to women and to democratic participation. In India, the Supreme Court intervened in one such case to disastrous effect. Essentially, *Shah Bano* involved the claim of a woman's right against the community: a Muslim woman asked for long term maintenance denied under Muslim personal law.⁴ The court held for her and the decision led to

⁴ Mohd. Ahmed Khan v. Shah Bano Begum, (Supreme Court of India 1985) 3 SCR 844; 2 S.C.C. 556.

wide scale riots; this, in turn, led the government to pass a law denying maintenance to Muslim women. Similarly, in Chiapas, Mexico, one of the big issues holding up negotiations is the treatment of women by the communities at war, including denial of the right to vote and certain inheritance rights.

How should institutions like the High Commissioner on National Minorities address these problems? Should they try to work for equality within the groups? The UN standards are extremely clear—all rights of the collective are subject to the fundamental rights guarantees of international law. But what if we know that this will lead to further conflict, or prevent the resolution of other conflict? Do we want to push for consideration of an issue that will lead to resistance by the leaders of the group? When it comes to women's rights, there is often the additional complication that colonial powers once used the suffering of women as a justification to discredit local leadership and culture.

There are some good examples from different parts of the world for dealing with the rights of women in the group. In the case of marriage rights, for example, the South African Law Commission has proposed, first, that couples be given options as to which kind of regime to choose and, second, that there be minimum core rights that are protected. Can international or regional mechanisms also deal with these issues—gently, using a South African model, for example—to get the group to meet international human rights standards?

In the case of internal democracy, the tension can be all the more pressing, leaving little room for gentle progress. In Sri Lanka, for example, a number of governments has considered handing the North East over to the Liberation Tigers of Tamil Ealam while they negotiate a settlement. Of course, the LTTE is guilty of horrific human rights violations and has driven the Muslim population from the North and East. I was with a group of women from those regions just before I came here. They are so fed up with war that they are willing, as they say, to allow the LTTE to rule. How do you respond to this reality? What is the vision that the mediator has? A vision based on collective identity will obviously push for a system that will give maximum discretion to the groups. And yet, we cannot ignore the need for peace, even on a short-term basis.

Ken Roth

I would like to talk about the role norms should play in addressing minority questions. I propose that we think about an approach that does not involve the setting of global standards. At the same time, however, I don't believe the solution lies in the case-by-case approach of conflict resolution. I'll suggest a third way.

Let me begin with what the human rights movement does. The *modus operandi* of human rights activists and organizations has been to seek ways to enforce norms where there is no functioning judicial system to do so. If you can go to court and get your rights enforced, that looks more like classic civil liberties work (on the American model). We do some of that too. However, our typical work is in countries where there is no functional court as a reasonable resort. We essentially use the process of investigation, fact-finding and exposure to reveal situations where rights are at stake. We expose and assess it against public norms, public morality. The process of public shaming and stigmatizing can be very powerful in moving governments.

But it is not as simple as this because the human rights movement also plays an active role in articulating norms and setting standards. Much of our effort is devoted to drafting treaties and developing legal language. Once the legal language is in place, we try to apply it.

The interplay between law and public morality is constant. Because the human rights movement is so dominated by lawyers, there is a tendency to think that it is the law that really matters—and I would not say that the opposite is true—but the goal is to hold governments accountable to some standard of public morality. If there is a strong public sense of right and wrong, that is when we are at our most powerful and can force the government to change its practice. Law helps shape public morality, but so does the very process of fact-finding and public disclosure in which the human rights movement engages.

The question for me is how far we can take the process of standard setting and norm creation in the field of minority rights. There is a question of timing, but also of feasibility. In the case of minority rights, I would submit that there will never be a "right time"

to draft extensive global standards on minority rights; in the long term we should pursue something other than a global legal approach.

That is not to say that legal standards have no place here. There are many provisions of existing international human rights law that can be extremely useful in dealing with minority rights problems. First and foremost, I have in mind the nondiscrimination provisions existing in virtually every human rights code. We have not yet pushed these provisions as far as they could go. The human rights movement is used to looking at specific cases—this person is tortured; a newspaper is shut down. These cases speak for themselves. But when we are dealing with discrimination, by necessity we need to look at the treatment of large numbers of people, at systemic behavior. That is much more complicated from a research perspective, but I believe there is more we can do for the problems of minorities with more sophisticated use of an anti-discrimination model.

I am skeptical of efforts to codify affirmative state duties in respect of minorities—beyond the duty not to discriminate. There are a number of difficulties in trying to set up positive duties on a global basis. There is, first, a classic difficulty of distributive justice: how do we decide on a global basis which scarce resources should go to minorities and which should go to the majority? Second, there are sets of countervailing interests at stake. How, for example, do we take into account and balance the state's legitimate interest in territorial and national integrity?

And there are some definitional problems that may be truly insurmountable. I agree with Radhika Coomaraswamy that we can make progress on some issues like the right of women within minorities. But one problem that may not be surmountable is the definitional one of determining what a minority is for purposes of special rights. This is particularly complicated in a world of migration and easy global travel. We could quickly pass into the realm of absurdity in a world of increasingly multiethnic, multinational countries.

It is these problems of competing interests and definitional problems that convince me of the limits of the traditional model of global standards for expanding the protection of minorities in conflict. But at the same time, the conflict resolution model has other

problems. It can be useful on a country-by-country basis, but it has no precedential value beyond its particular context.

I would propose a third way that involves norm-building at a local level using the methods of the human rights movement. By factual description of the plight of different minorities, we can begin to build on and articulate standards of public morality that are meaningful at a local or regional level. Public morality is the bottom line of the human rights movement; that is where we get our power.

Larry Susskind

I would like Ken Roth to clarify what he means by the non-precedential value of conflict resolution work.

Ken Roth

My sense of conflict resolution is that there is a tendency to avoid being bound by rules. The conflict resolver would rather start each case from scratch with as few binding rules as possible. I realize that this is not universal and recent years have seen some evolution, but it still distinguishes conflict resolution from human rights. Take, for example, the issue of accountability for mass violations of human rights. For us, this is an entrenched principle. If you give amnesty, you are basically encouraging these or other parties to come back and start killing again. What will the next rebel group think when it wants to start slaughtering people and it sees that its predecessors have literally gotten away with murder? The case of Haiti provides one extreme example. At the time that Jimmy Carter went in to mediate, President Aristide had been sitting in exile for three years where he insisted on respect for one principle in negotiations for his return—accountability for perpetrators of war crimes. In the course of one weekend Carter threw it away. That sums up the problem.

[The fourth and final introductory theme of Part One addresses the theory and practice of conflict resolution.]

Larry Susskind

Conflict resolution processes can indeed produce norms when that is the goal. On the other hand, there are plenty of occasions when we do not want conflict resolution efforts to set a precedent. Conflict

resolution is most useful when it is already institutionalized, when people know what to expect, when people know how to use it, and when resources are in place. The problem is that it is constantly being appropriated and redesigned on the spur of the moment, which is not necessarily very useful. I appreciate Ken Roth's example of Jimmy Carter in Haiti because it gives an idea of what we, in the conflict resolution field, are up against. Ad hoc interventions outside a clear institutional setting can get us into trouble.

Let me describe the field in terms of goals, roles, and structure. There are many different goals you can affect, but you have to define them. Once you do, you can move on to the role of the conflict resolvers. The most helpful way to think about mediation is to think about it as assisted negotiation. There isn't one way of doing mediation. The mediator can be viewed as the helper, which allows for a range of different characteristics and interventions. A helper can be external or internal to the conflict, a process manager or an active intervener. There are neutral mediators and mediators who are chosen precisely because they have leverage based on *not* being neutral.

It is also useful to think about the shifting role of the helper over time. It turns out that conflict resolvers probably can do the most when they are working with the parties before they ever get together face-to-face—in the pre-negotiation phase when you get everyone on board.

The structure of a mediation also depends on the goals. There are questions about whether you are structuring a mediation to produce an agreement, or a proposal. I have been trying to work on the status of Bedouins in Israel. I have been involved in talking with the Bedouins, the High Court, and administrative agencies with a view towards creating a forum with "external helpers" to address a certain number of issues, some of which will certainly look to you like "rights."

Let me give you a bit of background: Bedouins currently comprise 50 clans with no council. The clans are autonomous, and if Israel wants to negotiate with the Bedouins, they have problems. The government gave the military the responsibility of organizing some *official* settlements to keep the Bedouins from living in *unofficial* settlements. No one consulted the Bedouin about how or where they wanted to lead their lives. Now, the *official* settlements

are inhospitable places with high rates of crime, delinquency, and prostitution; the electricity doesn't always work, and the sanitation system was not finished. In sum, they are definitely not places where you would want to go.

The courts have encouraged additional dialogue, although the recent Interior Ministry has not been open to that. So, we have come in to help invent a Forum. There are several questions that have to be addressed. For example, who will represent the different parties at the Forum? Who can legitimately act as a mediator? Another question concerns support for the Forum and finally the impact that the Forum could have on Israeli policy. How such questions are worked out in each case is a big part of the problem of introducing mediation.

Eileen Babbitt

I would like to pick up on the categories that Larry Susskind outlined and add some detail. To be frank, we do not have an agreed-upon set of norms. There is an implicit set of norms in conflict resolution, but they are focused more on process than substance. The first norm is that of participation—that the most effective negotiation and decision-making processes are those in which the parties have direct stakes in the outcome and are part of the process. Identifying the parties, bringing them into some kind of process, and giving them a voice is the most basic goal of conflict resolution.

The second norm is that of inclusion, which is different from participation. Inclusion answers the question: who participates? In the conflict resolution field, the preferred approach to bringing people to the table is to err on the side of including as many parties as possible, rather than excluding stakeholders, even those who can be disruptive.

The third norm is that of empowerment. The effectiveness of the discussion can be compromised either by lack of experience or lack of resources or both. In addition to third party mediation, the practice of conflict resolution often incorporates learning, teaching and coaching the parties in conflict in order to maximize the effectiveness of the discussion and provide a stronger basis on which negotiations might proceed.

The fourth norm is cultural sensitivity. Most cultures have existing methods for handling conflict. If something is culturally

familiar and appropriate, it is something that will be sustainable long after you, as the outsider, have departed. So, it is very important to know what those practices are and, as much as possible, to build upon and enhance those indigenous methods.

The fifth norm is equity, which is different from equality. Equity is the notion that even though there are differences in power, the mediator treats all parties at the table with equal respect, giving them equitable time and attention. The respect and acknowledgment function to make the forum work.

There are two major ways in which conflict resolution people think about goals. First, there is the situation where the goal is settlement and the process focuses on changing the parties' behavior. This is the deal making approach. Then there is the goal of transformation; in addition to parties changing their behavior, parties are actually changing their attitudes towards each other.

Shifting to the question of structures, I wanted to explain what is meant by the different "tracks." We often speak of "track 1 diplomacy," "track 2," etc. For the purposes of discussion, track 1 is where official interveners are working with official parties. Track 2 is non-official interveners, *i.e.*, academics, religious leaders and eminent persons who are no longer representatives of states, convening non-official or influential members of the disputing communities. Track "1 1/2" is in between—where non-official interveners convene official parties. There are strengths and weaknesses of each "track," which we can discuss later.

William Zartman

I would like to raise the question of whether human rights is necessary to successful mediation. If human rights is not included in mediation, is it because of neglect or is it because human rights poses obstacles? Similarly, what is the relationship of mediation to human rights?

I was struck when John Packer said that everything is *not* negotiable. I would answer that if it is not enforceable, then it must be negotiable. If you can't impose it, then you have to negotiate your way through it. The relationship between our community and the human rights people is the relationship between the standard setters and implementers. And that is a relationship of tension; we need each other.

The goal is indeed to end conflict. The question is how to do it: do you end it all at once or do you end it in pieces? The important thing is to keep on working on it, even after the agreement, instead of going home and popping a bottle of champagne. Conflict resolution is achieved in incremental stages, not all at once. If we recognize the limitations, I think we are on the right track.

At times peace and justice are in conflict with each other. In that case, human rights is an obstacle to peace. On this ground, I am troubled by criticism of Jimmy Carter in Haiti. The alternative to impunity was sending in the troops and accepting the bloodshed that would follow. What you can't take, you have to buy. And that is negotiation. The freedom of Cedras was the price paid to save lives.

I think we are negligent by not paying enough attention to the structure of conflict. In my view, it is essential to take account of the "ripeness" of a conflict. People don't initiate conflict resolution efforts until they have a sense that they are in a mutually hurting stalemate. That isn't a sufficient condition, but it is necessary. Ripeness is a perceptual matter, so it can be cultivated by a mediator; but you can't get around it. People look hard for enticements—the pull factor that will bring each side into negotiations—but they are hard to find. This is a disheartening conclusion and I would be gladly proven wrong.

PART TWO:
Roundtable Sessions

Session 1:
Human Rights Perspectives on
Ethnic Conflicts and Conflict Resolution

Henry Steiner (chair)

Today we enter Part Two of the conference consisting of three sessions. Three themes in this first session strike me as relevant to our discussion about human rights and conflict—the character and significance of human rights violations in ethnic conflict, the nature of the rights norms that apply to ethnic conflict, and the methods and practical implications of bringing rights into conflict resolution and settlement.

The first theme focuses on the gross violations of physical security rights that are a part of conflict around the world. These notorious events—terrorism, torture, disappearances—capture public attention about the conflict. But are they the cause of conflict or rather the consequence of deeper causes such as suppression of use of a given language or unequal benefits of development for different ethnic groups? Should the mediator give primary attention to such notorious rights violations or rather to such underlying causes (that might or might not fall within the domain of rights violations)? Should we assign different responsibilities to different kinds of interveners?

Second, what are the relevant human rights norms and what weight do they have? When we refer distinctively to minority protection—that is, rights that have a distinctive relevance to ethnic conflict—the agreed rights are relatively few. They concern matters like language rights, which by definition affect only minorities because the language that the majority speaks will hardly be repressed. Other rights mentioned in the treaties, like practicing one's religion, implicate minorities, whether or not they are mentioned. Broadly speaking, there is a right to maintain your culture—fundamentally a notion of cultural survival.

But consider the duty of governments to go beyond non-interference and thereby to facilitate or even to promote rights. At its extreme, this might require financial aid. The Framework Convention*, for example, talks explicitly of a duty of the State to

promote and in certain circumstances to provide primary instruction in the language of the minority. These are matters in serious political dispute that are not easily resolved by reference to rights alone.

A further complication lies in the deep contradictions inherent in some of the human rights norms that are discussed with respect to minorities. Ken Roth and others stressed the salience of the equal protection norm for protection of minorities. Nonetheless, consider the paradox of creating an autonomous regime for given minorities—for example, consociational agreements, devolution, or personal law regimes, all of which constitute special regimes for defined groups that depart from the notion of equal treatment for all citizens. Some citizens are subject to and may benefit from one legal and institutional regime, others to another. Nonetheless, such carving out of different *regimes of separateness* is surely preferable to continuing systemic violence.

Our third theme raises one final set of questions about the view that conflict resolution should be infused with human rights norms. What task does such a view put on the conflict resolver? Does the conflict resolver have to distance himself from any negotiated term of a settlement that violates basic human rights? Or to look at it from another perspective, does the mediator raise the issue whether those human rights norms that have been systematically violated in the conflict should be restated in the final accord as an obligation of both parties? Should these rights be subject to defined means of implementation through the accord, such as special monitoring systems, an ongoing system of investigation of alleged violations, or special punitive or sanction systems?

Asbjørn Eide

In contrast to Henry Steiner, I think we have a lucid set of standards for minority rights based on human rights documents starting with the Universal Declaration of Human Rights, the most important document ever made by the United Nations. It provides the only transculturally valid ethical basis for legal and social order within states.

There are three basic issues that have to be examined in claims of rights: standards, institutions, and procedures. The universal standards, based on the principle that everyone is equal and

has dignity and rights, have to ensure not only civil rights, but also political, economic, social and cultural rights. Non-discrimination in the enjoyment of human rights is also very essential; therefore specific instruments have been developed for that purpose, such as to eliminate race discrimination and discrimination against women.

The overall vision of the Universal Declaration, as I see it, is to ensure individual equality and equality within a framework of pluralism and togetherness. This accommodates the possibilities of different groups entering into a compact together in particular regions of the country. I prefer to talk about peaceful group accommodation within a state, within an expanding but not hegemonic common domain of equality. The wall is met when you start to talk about self-determination, particularly when it is defined in ethnic terms. It challenges the fundamental area of non-discrimination, equality and pluralism.

Obviously, the most important thing is to have proper institutions at the national level—a democratic system that includes electoral systems, special rules of representation and various other constitutional mechanisms. You can have ombudspersons in ethnic discrimination on human rights commissions and minority councils. There are also the regional institutions: the OSCE, the Council of Europe, Organization of American States (OAS) and the Organization of African Unity (OAU). For international institutions, the most important thing after World War I was to get away from the problem of bilateral solutions. Thus, the League of Nations tried to develop a minority regime system, providing for a collective mechanism rather than leaving it to the kin-state to react against alleged or real violations. At the global level we now have several treaty bodies, such as the Human Rights Committee which deals with minority issues under Article 27 of the Covenant on Civil and Political Rights, and the Committee on the Elimination of all Forms of Racial Discrimination. Important also is the Committee on Economic, Social and Cultural Rights, which can help to ensure that members of minorities can enjoy their culture and participate in the cultural life of the country as a whole.

One important weakness is that there is no institution that can deal with claims of self-determination. When there is a threat to international peace, then the Security Council may have a role.

But the Security Council does not address it as a question of self-determination. There is no mechanism to address issues of self-determination within the Working Group on Minorities. If a group says that it is a people and wants to address the Working Group as a people, as Chairman, I have to point out that we can deal with the rights of persons belonging to minorities but that we do not have any forum for settling controversies over issues of self-determination.

Let me also say a few words about the UN Working Group on Minorities, since it is now the primary human rights institution engaged on the question of minority rights at the global level. The Working Group was established in 1995. It was influenced by two things: the 1992 UN Declaration on the Rights of Persons Belonging to National, Ethnic, Religious, or Linguistic Minorities, and the desire to search for peaceful and constructive ways of dealing with situations of minorities. The name of the Working Group, like that of the High Commissioner on National Minorities, is not *for* minorities but *on* minority rights issues. The Declaration itself addresses rights in purely human rights terms. The main thrust of the Declaration goes beyond simply discrimination; it builds on Article 27 of the Covenant of Civil and Political Rights. It not only expresses the rights of persons belonging to minorities, but it also imposes obligations on states to take certain measures.

In other words, though the rights are individual, the duty of the state is collective. That is a very interesting distinction. You have the choice of whether or not to belong to the minority. The Declaration focuses on effective participation, language rights and education rights, and the right to a certain degree of control over development activities within the area where the minority lives.

The Working Group has modest power. It operates as a forum. It makes it possible for minorities to attend and to discuss concerns. It makes it possible for them to express views on problems in particular countries. Beyond that, we are talking about themes that appear to be important and trying to develop them to a greater extent.

Ken Roth

We all agree that we want to go beyond protection to promotion of minority rights. The issue, in my view, is whether promotion will be based on ad hoc notions of best practices at a regional or local level,

or whether we will be moving towards truly global standards. I am skeptical about whether you would be able to define global standards because of the difficulty, in part, of adequately defining minorities.

The most advanced effort to advance promotion of minority rights is in the Framework Convention. Is there a way to codify a definition of minorities in order to limit the huge range of possible minorities that might qualify?

Though the term "minority" isn't defined in the Convention, there are three places in which it prescribes positive rights.⁵ And in each case, there are caveats that make it clear that it is only certain kinds of minorities that are intended. I agree that there are reasonable distinctions, such as one based on how long a minority has been present. Take language rights, for example. If you move into a country with a dominant language, you may have less of a claim to continue in your language than if you were there all along. That is intuitively true but that basic distinction, as far as I can see, is not spelled out in the Framework Convention.

Asbjørn Eide

I think it is very important not to define minorities. What is important is to define when a group claiming a minority right, should have that right. That has to be defined contextually. A number of criteria could be used, such as number or length of stay. The answers will emerge over time as we are learning. My basic understanding of the whole human rights system is that through the historical process, you start generally, and move on step-by-step. The Framework Convention moved several steps forward by articulating some standards for minorities.

Ken Roth

I agree. I don't think we can define minorities. As a result, I think the best we can do is to work for progressive realization using a best practices approach. This would probably be very specific to regions and use mechanisms such as the OSCE High Commissioner or NGOs, all without trying to define a global treaty.

⁵ See Articles 10(2), 11(3) and 14(2) of the Framework Convention for the Protection of National Minorities, adopted 10 Nov. 1994, entered into force 1 Feb. 1998, ETS 157. [Reprinted in Annex I].

Asbjørn Eide

It is important to develop minimum rights that have to be respected, even if it is not recognized by the state. It is a question of normative development.

John Packer

I share Asbjørn Eide's position in that I, too, would be against an initiative to develop a concrete definition of minorities at a regional or universal level. I just do not think there is a sufficient degree of shared understanding, even in Europe. However, I would encourage efforts to come up with a definition.

The problem is one of authority and power. The basic idea of the minority comes out of recognizing groups that are numerically inferior to the group represented by the decision-making authorities in the country. What we are trying to do is find ways to rectify the disadvantage. From the human rights perspective, the motivation proceeds from a concept of dignity and equality. And the dignity link is identity. That is where we make the link to the content of minority rights. Language is important because of its importance in the maintenance of cultural identity; education links into this because education is the mode of transmission of identity and language between generations.

In the international standards, where the Framework Convention is relevant, rights are cast in terms of individuals. You could be part of a long standing community or a recent immigrant. This is qualified specifically in Articles 3 and 4 of the Framework Convention. The right of self-identification in Article 3 states that no one may externally identify you if you choose not to be identified. It is also predicated on Article 4, freedom from discrimination. There are other articles—only three—which add the elements of tradition or substantial numbers. These are Articles 10, 11 and 14. The point is that there are rights which are not the rights of any person belonging to any minority, but only to those traditional minorities or those of substantial numbers. And we're only talking about ethnic, national, linguistic or religious minorities. So there is already such a constrained and qualified content and subject that, in my view, the field of application is relatively clear. But it is still an evolutionary process.

Ram Manikkalingam

I am still struggling with the difference between Ken Roth's position and that articulated by Asbjørn Eide and John Packer. I am not sure if we can solve this problem of group definition and I don't think it is because we are at an early stage. I resist the notion of linking dignity to identity—at the very least linking dignity to ethnic identity. My dignity could be related to a range of identities. And by saying that "minority" is somehow connected to ethnic identity, you are then pushing for the ethnic identity form of dignity. If we remove that step of linking dignity to identity, we really have no difference between Ken's position and that held by Asbjørn and John.

John Packer

Neither Asbjørn Eide nor I argue that ethnicity is the only (or even most important) form of human identity, but it is one part, and for many it is the most important or key part of their identity. So, it is relevant and valid, but certainly not defining of "dignity" which is a different and more inclusive concept.

Asbjørn Eide

On the identity question, I share to some extent John Packer's position but I think that identity is linked with ethnicity. To use two examples, when the Turks call the Kurds mountain Turks, that is deeply humiliating to the Kurds. That is a humiliation born of refusal to acknowledge their identity. When, in Latin America, the Indians are called campesinos, that is deeply humiliating to those who believe that they are from a very old culture. So these are humiliations which raise the question of identity in a relevant way.

William Zartman

What confuses me or troubles me is this mixture of claims and rights. It seems clear to me that the day the Turks in Germany want a Turkish language, they will make enough of a nuisance of themselves to get it. It's the squeaky wheel principle: if you make enough noise, and the claim is real and political, the right comes afterwards.

Henry Steiner

That is a very important statement. So often the conception of rights is understood as something developed through elites, through discourse, debates and normative drafting by legal and political elites. But there is an alternative political process of generating practices which become widely accepted and relied on, such that firm expectations of continuity and a wide belief that the beneficiaries of the practice are entitled to it may assume the same characteristics and rhetoric that we associate with broadly accepted rights. One can readily imagine such a development with some aspects of language rights that are now in contention.

Asbjørn Eide

A small group has no political chance of succeeding, so international human rights become very important. The Greeks don't want to accept a Macedonian minority in Greece. A group of persons decided to start a Macedonian culture club in Greece, and it was not recognized. It was brought before the Council of Europe and the Council found that failure to register it would be a violation. Fortunately the Greeks accepted the outcome and were willing to register a Macedonian culture club. This would never have happened politically in Greece without the international norms.

Yash Ghai

I would like to reinforce one element of what Asbjørn Eide referred to when he spoke of the domestic structure for the protection of rights. One should not consider minority rights purely from an international perspective. Because of the enforcement mechanisms at the national level, some of these rights are regularly protected. Once they're codified in the national constitutions, they take a specific finite form, their claims are based on that, and there is not that much indeterminacy. There are courts, government agencies, and commissions that explain them and implement them.

Radhika Coomaraswamy

I sense in many of the previous statements—those of Ken Roth, Ram Mannikkalingam, John Packer and Bill Zartman—a desire for clarity and manageability. This suggests that we should stick to rights that

can be clearly defined and enforced, that these complex areas of identity, religion, or language are more dangerous; we have to be wary. I am sympathetic with that position, but I think that one also has to articulate the other point of view. This is the world of identity, the world of imagination and the world of communication. Rights language for a long time has been very material, related to structures of state and the economy. But emerging in minority rights is the sphere of rights that relate to the symbolic universe of human beings, such as the way people imagine themselves. Do we want to go there and try to identify it, codify it? I think we should try.

When I delve into women's rights, I find that many women resist their own rights because of perceived conflicts with this symbolic universe. Their strong identity with their culture leads them to resist practices that would support them, but are not consistent with cultural identity. Maybe we need to go into the symbolic universe and regulate it.

Eileen Babbitt

I am still trying to understand how this all works in practice. A part of what it means for people to invoke a right, is that they are making a claim for something that is immutable. But what I am hearing is that there is actually very little that is non-negotiable. It sounds as if there are only a few agreed upon rights that apply to the minority, as a group, except as regards the right of self-determination as exercised in the context of colonialism.

We seem to be in Henry Steiner's world of argument—that outside of some givens, a claim of right depends on what is persuasive, using a myriad of documents, practices, moral claims and interpretations. If you present a very strong case, then maybe you get indigenous rights versus minority rights. In that case, the notion of invoking clear and immutable rights is a fiction. Maybe I am misunderstanding the procedure: if you are a member of a minority group and you feel your rights are being violated, what do you do? It sounds as if there is no standard procedure and also that there is no set of standard norms.

Henry Steiner

There is an understanding of rights that traces their validity, whatever their earlier origin, primarily to formal instruments like constitutions and treaties. Such rights are concrete, fixed, not transient and open to negotiation. They are fundamental, basic to human dignity and social order. We are not talking of a mere "legal" right such as a right to enforcement of a contract or to monetary damages for a given injury. But this rhetoric of eternal, fixed rights, of a corpus that will be stable over time, *is* a rhetoric—a language about rights that expresses only a partial truth but that serves important purposes in placing rights at the top of the hierarchy of norms.

Canonical texts like the Universal Declaration or the Covenants are vital points of departure and provide the legitimation for the entire enterprise of the contemporary human rights movement. They will often serve as springboards for arguments limiting rights, as broadly provided for in clauses in these authoritative texts, or for expanding rights well beyond any common understanding at the time these instruments were drafted. Rights change in this manner over time. They always have, they always will. Some rights that are revered today in the United States and treated as fundamental and eternal were unheard-of, or at least perceived as shocking and absurd, as little as a century ago—or indeed for certain rights a mere half century ago when the human rights movement started. Equal protection rights with respect to gender and sexual orientation, and broad realizations of the right to privacy, offer prominent illustrations.

Minority rights are a classic case. They pose some of the basic conundrums and raise some of the basic differences of opinion in the entire rights corpus—individual vs. collective or communitarian rights, for example. Their evolution since the Universal Declaration is striking. This very roundtable is part of the complex processes by which new understandings are argued toward and sometimes achieved. Surely one of the reasons that many people are understandably suspect about the value of attempting to draft now a convention on minority rights stems from such considerations, from an awareness of how deeply imbedded these issues are in questions of sovereignty and notions of the nation or people. The human rights movement has raised and will continue to raise such basic questions.

Radhika Coomaraswamy referred to how people within a different culture from the West—women were her example—may refuse to treat as rights what many other cultures view as self-evident and essential. Rights is not a language that some or many groups within a different culture from the West may always accept as meaningful or legitimate when assessed against the claims of tradition, practice and religion. They might be saying: “At least in this instance, don’t impose your conception of rights on us. We think differently.”

So I think there’s a lot of truth in what Eileen Babbitt has said, though she may well have said it out of confusion and disappointment about what rights offer to conflict resolution theory. In this field like many others, we will not readily reach a world consensus on the content of group or collective rights and expanded state duties including argument about a state’s duty to “recognize,” or perhaps “facilitate”, an autonomy regime. Argument, debate and practice on particular issues may enable us to enlarge the corpus of rights. But many passionate advocates of human rights are much more comfortable remaining with the classical and well understood individual rights, particularly those protecting physical security of the person against aggression.

Ken Roth

Eileen Babbitt’s comment makes me realize that we may be doing a disservice to the conflict resolvers among us. The debate we are having concerns a tiny sliver of rights. Let me put that in a broader context. Though I agree with Henry Steiner’s description of the historical evolution of rights, I also think it leaves a false impression. Today, if you look at treaties that are ratified by some 140 governments, there is broad agreement about a core set of rights of tremendous import for national minorities and everybody else. It is not only the personal integrity issues such as physical violence, but also the right to speak, the right to organize, the right to pray, the right to practice your culture, the right to speak your language. These rights, 95% of the rights that matter, are broadly agreed upon and not subject to negotiation.

I think the place where I diverge from John Packer and Asbjørn Eide is when we get beyond the “non-interference” rights in Henry’s framework. In other words, I think we all agree about the right

to speak your language, practice your culture, and pray to your God, but we might differ on the government's duty to facilitate or promote such practices. There, I think, we differ more in degrees of optimism as to whether it will ever be possible to come up with definitions that are sufficiently precise to define universal duties in a binding way. There are simply too many variants. When the Framework Convention describes the positive duty to promote education in a minority language, I read five caveats in the definition. This is a very watered-down right, and this is the best there is. That illustrates the kind of problems we encounter in defining positive rights.

But these are the cutting edge issues. On the core issues, there is broad international agreement. These are the bulk of the issues that our mediators can fairly rely upon.

Henry Steiner

I agree with Ken Roth in so far as these core issues on which he finds broad consensus are the focus of investigative human rights work, but I think that his observations underestimate the importance of those rights that are least well defined—or better said, of those claims of minorities that are now in the world of contentious argument. NGOs and, to a large extent, IGOs address a very slender percentage of rights that are broadly recognized. A vast percentage of their investigative work, lobbying and reporting, address violations of physical security and liberty—killings, torture, rape, jailing, corrupt criminal procedure. I agree that many of the rights of conscience and advocacy and association enjoy a very broad, though not quite universal, consensus. And I agree that violations of these categories of rights figure importantly in ethnic conflict. They also figure in many other contexts, such as sheer repression by authoritarian and theocratic regimes, corrupt administration of police and prisons, and so on. So as I indicated, I'm trying to concentrate on recognized or argued-toward rights that are distinctive to ethnic conflict. There I find in abundance the difficulties that I stressed.

Although it may be truly difficult, as Ken says, to set standards for the affirmative obligations of states in this field, other conventions have moved a considerable distance towards imposing similar kinds of affirmative, proactive duties on states. The Race Convention and Convention on the Elimination of all Forms of

Discrimination Against Women (CEDAW) are prominent examples. They move way beyond claims like "don't interfere" or "protect me against interference by nonstate actors,"—that is, way beyond the state duties that were present from the start of the human rights movement. We can appreciate the significance of this move when we think of the many developing duties now imposed on a state to work towards cultural change that facilitates the realization of rights. I would not then characterize the developing field of affirmative and proactive duties of states as occupying only a remote and slender area. I would say it is now fundamental to a developing understanding of what rights mean in terms of related state duties. Such duties of states where minorities and ethnic conflict are involved do pose a particularly complex and anguished illustration of efforts to develop a new understanding.

Catriona Drew

Again, I am in slight disagreement with Ken Roth, and I am hoping to clarify something. To me, the issue here is not whether we should have human rights for minorities. Individual rights for members of minorities are clearly recognized in the human rights Covenants. The issue is whether we have *group* rights for minorities. I would like to put that in historical perspective. After World War I, the international community took up the issue of minorities as groups. Because of the experience of the inter-war period, after World War II, we abandoned the group approach and, instead, focused on individual rights for minorities. The ethnic conflict that occurred in the 1990s, however, has led to two realizations. The first is that individual human rights are necessary, but not sufficient. We want more—we want group consciousness, group identity and land. Secondly, on a more practical level, we have realized that one of the reasons for ethnic conflict is that the focus on individuals has excluded the recognition of group minority rights.

[Defining and locating ethnic conflict]

Andrea Bartoli

I am very uncomfortable with the focus on *ethnic* conflict. It presumes that the essence of the conflict is disrespect of ethnic groups. There

are many different ways of characterizing conflict—internal conflict, deadly conflict or violent conflict. And there is conflict within ethnic groups. More often than not, ethnic groups are living peacefully with one another all the time. We need to dispel the presumption that the ethnic dimension changes the nature of the conflict.

Henry Steiner

We should certainly affirm that not all ethnic groups are in conflict. This roundtable means to discuss a quite formal subset of conflicts in which the parties can be seen as composing distinct groups that fall within the rubric, ethnic. That rubric is not defined with certainty. It tends to involve lineage, religion, language and cultural traditions. By defining the topic in these terms, we meant to distinguish conflicts such as the Cambodian conflict, whose ethnic aspects were clearly minor. The notion was to work out what was distinctive to ethnic conflicts and hence we got to minority rights.

William Zartman

To protest the discussion of ethnic conflict as roundly deficient is to say that marriage counseling implies that all marriages are conflicts. I want to keep in the ethnic notion of conflicts over identity as what we are talking about.

Peter Rosenblum

I think there is something more significant about Andrea Bartoli's point when viewed as a reaction to Catriona Drew's historical claim. Minority rights have reemerged as an issue, says Catriona, because ethnic difference is perceived as a source of conflict. What is more, the failure to recognize group rights is itself viewed as a cause of conflict. Is this true? I think it is important to recognize how much we have come to associate *ethnic* with *conflict*. At other times, groups in conflict were dominantly identified with other features—religion or ideology, for example. One commonly claimed feature of current conflict is that it is no longer ideological. Does the concept of ethnicity capture a more essential element in the genealogy (or the resolution) of current conflict? If not, perhaps we have to examine the assumptions in international law that have brought us to this point in the conversation.

Ram Manikkalingam

It's not clear that ethnic conflicts tend to be more violent than other conflicts. People think that, but how often do they have the numbers and measurements? There is no clear data. In Sri Lanka, for example, there was a conflict in the south, in the 1980s, that involved the killings of thousands of Sinhalese; it actually led to more deaths than the conflict between the Tamils and the Sinhalese.

The point is not that ethnic conflicts are more violent, or that ethnic groups tend to live in conflict. The point is to say that there are conflicts that are ethnic conflicts. And we believe that there is some way that assigning group rights can sometimes reduce the conflict. Sometimes it can aggravate them; we don't know. There is a debate on this. And so we are asking how and what kinds of rights can be provided that help reduce this conflict and how can international law and human rights norms and other practices help us.

[Infusing conflict resolution with human rights]

Henry Steiner

I would like to move on to consider how the techniques of conflict resolution might be informed by human rights considerations. We know, for example, that some mediators and dispute settlement bodies have restated human rights norms as ingredients of settlements. I wonder what, if anything, this adds, particularly where the relevant human rights norms are well established by treaty or custom.

I would also like to raise a question that follows on the point that Eileen Babbitt noted: What does it mean to say that rights are involved, rather than interests or claims of a party that are subject to bargain? How are fundamental entitlements treated in the negotiation process? Until they are recognized by both parties, is nothing else debated? Should the conflict resolver raise the relevant human rights issues even if neither party does? Should issues of punishment of the violators become part of the negotiations? What distinctive element does rights rhetoric, or rights assertions, introduce to the conflict resolver's work? At what point do they become obstacles?

I would like to turn first to Larry Susskind, who has laid out a few starting points for discussion.

Larry Susskind

I have written this as a series of five inter-linked propositions that suggest ways in which human rights can—and should—be brought into the conflict resolution process. As a starting point, I suggest that mediation should take place on the basis of a contract between the mediator and the parties, even if only one agency is paying for the mediator's services. That contract is where the mediator's values should be stated with regard to vital issues like human rights.

In dealing with issues of human rights law, I propose the creation of a legal advisory panel to serve all parties. The panel would serve as a joint resource for interpretation of international law.

I also suggest, in response to Ken Roth's comment about precedent, that you can design a mediation process to set a precedent or, quite explicitly, to avoid setting a precedent. This is my own formulation and nobody else should be blamed for it, but perhaps it can serve as a template for an eventual set of principles.

Larry Susskind's proposed principles:

The Appropriate Use of Mediation and Other Forms of Conflict Resolution in Ethnic Conflicts Involving Disputes over Human Rights

(1) It is both feasible and appropriate to use a range of conflict resolution techniques to address a variety of human rights disputes in ethnic conflicts.

(2) When conflict resolution techniques are used in human rights disputes in ethnic conflicts, it is crucial that prevailing human rights norms and applicable international law be taken into account explicitly.

(3) There are a variety of ways that relevant international law and prevailing norms can be brought into play when conflict resolution is used in an effort to resolve human rights disputes in ethnic conflicts. Five nonexclusive ways of doing this are:

(a) Convening international agencies can introduce explicit guidelines as a prerequisite for their participation and efforts to mediate human rights disputes in ethnic conflicts.

(b) Best Practices of mediation (including accountability for potential conflicts of interest or other biases) should be spelled out in the contract between the dispute resolution professional (i.e., the mediator) and the parties. (NB, It might be desirable for IGOs and the dispute resolution professional to draft a "model contract" that can become a template for all such mediation efforts.)

(c) A panel of "neutral" lawyer advisers—acceptable to all the parties—can serve as joint advisers to a mediation process or to the mediator to ensure equal access to relevant legal advice on prevailing international law.

(d) In the first steps in any mediation process (i.e., preparation of a conflict assessment) the mediator can learn about the relevant human rights norms and incorporate these into the preparation of ad hoc ground rules that all parties must adopt before the process can proceed.

(e) It would be possible to promulgate a global declaration regarding the appropriate use of conflict resolution techniques in human rights disputes in ethnic conflicts to ensure that the parties to a dispute have a "starting point" for their discussion of ground rules.

(4) Concerns about the precedential value of mediated resolutions are not a serious obstacle to effective and appropriate use of mediation in human rights disputes in ethnic conflicts.

(5) When precedent is a desired outcome, it can be an explicit product of the design of the mediation process. When it is not desired, it can be avoided by incorporating a long list of contingent prerequisites that make it clear that the agreement only applies in one particular case.

A sixth principle was added at the suggestion of Mark Lattimer (see below):

[(6) The mediator (i.e., mediating agency) should oppose or abstain from participating in any agreement that facilitates the commission of or validates impunity for war crimes or crimes against humanity.]

Henry Steiner

Are these process rules or substantive rules?

Larry Susskind

These are process rules and substantive norms. You can say, for example, that in a mediation, a process step is that all meetings shall be open to the public. It is a process step, but it is also a norm with regard to transparency.

Mark Lattimer

I don't think it is enough simply to take norms into account. I propose adding a proposition that the mediating agency should abstain from any agreement that facilitates the commission of, or validates impunity for, war crimes and crimes against humanity.

This would be one way of acknowledging the responsibility of the mediating agency, independent of any contractual arrangement that may be reached by the parties. There are some things that the

mediator should do on its own account. I can think of several kinds of cases where the mediator may be complicit in an agreement that violates human rights. There is the case of amnesty, as in Haiti. There is a case like that of the Dayton Accords, where at a late stage in the discussion, the borders of a national entity were changed in a way that arguably facilitated ethnic cleansing. A third kind of example arises frequently where endangered minorities are not represented around the table.

In these three situations, it seems to me that the mediating agency, particularly if it has an official status as a UN body, has the responsibility to defend a baseline of basic rights, and must not partake in anything that is going to lead to the facilitation of a war crime or impunity for a war crime.

Ken Roth

I don't think that it is possible to prevent an agreement from serving as a precedent in the political sphere. It may work in the judicial context, but people take a much broader view of precedent in the political realm. If you were to allow amnesty for a mass killing, even with all the caveats that you mentioned, that would become a precedent, regardless of how you downplay it.

Andrea Bartoli

I agree with Ken Roth. Our collective understanding will be that an agreement has been reached. That is the only thing that will matter.

Alvaro de Soto

I would like to address a few of Larry Susskind's propositions, but let me start with a point about terminology. To me the very term, mediator, confers certain rights that distinguish that person from others such as "good offices." The mediator can make proposals. In Cyprus, where I am currently involved, the parties are quick to point out that the Secretary-General's responsibility is to conduct good offices, not to mediate. Good offices are not, strictly speaking, allowed to present proposals. The same thing happened in El Salvador. We have to be careful about the term that is used. That is a terminological point.

In an ideal world, sometime far in the future, a template like Larry's might be useful, but in the interim, it might actually

deter parties in conflict from seeking mediation from international organizations, particularly the United Nations.

In terms of the actual propositions, I have no problem with paragraph 1 ("feasible and appropriate" to address human rights issues in conflict resolution), paragraph 3 (ways of bringing international law and human rights norms into process), and paragraph 6 (refusal of mediator to participate in an agreement that sanctions grave violations). In paragraph 2, I am not sure what it would mean to take prevailing norms "*explicitly*" into account. I might use broader terminology, making mediators responsible for bringing to the attention of the parties the need to resolve the conflict in conformity with prevailing human rights norms.

I have a problem with explicit guidelines and with the idea of spelling out the rules in a contract. You need to lure people to a negotiated resolution. Let me mention a couple of examples. You may find yourself in the presence of a conflict between a government—legitimate or not—and a rebel group. The government will hold out against mediation for as long as possible out of fear that the process would give legitimacy to the rebel party. The Salvadoran government only came to the United Nations after thinking about it long and hard, and introducing lots of caveats. The Colombian government has always refused the involvement of the UN as mediator or good offices for the same reason. Publicly stated rules are certainly not going to lure them into a negotiated resolution.

This is why we, at the United Nations, have approached the needs that are addressed in Larry's template somewhat differently. We have issued guidelines to the Special Representatives, as I previously described, but they are kept out of the public eye. There are lines the mediator must not cross—war crimes, crimes against humanity, genocide. We don't condone blanket amnesty. But we don't actually state that publicly, since we are in this luring process.

Eventually, the parties must understand that we represent an institution founded on basic principles. If it is not clear at the time of entering the negotiations, it is made clear after they agree to be involved. But I believe that it would be a deterrent to the process to draw up a contract and to make these principles explicit.

I am also troubled by the idea of a panel of neutral lawyers. You would probably have as many opinions on how to interpret these

norms as lawyers are present on the panel. And also, there is another consideration. Mediators or good offices should be "control freaks." They should ensure control over the process. Any legal advice should be at their disposal. I had a legal adviser. But he was *my* legal adviser, he was not at the disposal of the parties.

Larry Susskind

First, let me say that I readily defer to Alvaro de Soto's experience as to what works from the UN perspective. But I am also convinced that mediation at various stages can, indeed, be conducted through other mediation auspices. The use of other kinds of independent mediation and institutions might be considered separately. Perhaps, we should distinguish between what would work from the UN perspective and what would work from the perspective of non-governmental mediation.

Nadim Rouhana

I would propose to raise the level of the core agreement beyond simple guidelines to prerequisites. Agreements reached between the parties should not be incompatible with these prerequisites. Some work should be done on defining what these prerequisites are. Now the paradox of course is that which was pointed out by Alvaro de Soto. That is, the lower power party—the party with the grievance—would probably come to the table, but the high-power party might refuse. If there were international acceptance for something like this core agreement, however, it could serve as a moral standard for third party intervention. In that case, it might encourage the high-power parties to come to the table.

Henry Steiner

I am confused about what the third party does to implement human rights in the negotiation process without transforming the role of mediator. I have a sense, and I may be wrong, that Larry Susskind is talking more about arbitration and adjudication than about mediation. Are we asking the third party to apply the principles of human rights law or international law as a fundamental point of departure, or simply to request the parties to consider them?

Larry Susskind

One possible response—that takes into account Alvaro de Soto's concerns—would be to avoid putting anything out at the beginning, but to insist that we do not leave unless this set of norms is taken into account.

Henry Steiner

But, as I understand it, Alvaro de Soto's guidelines are far more condensed and dramatic. They have to do with crimes against humanity, war crimes, and genocide. Nadim Rouhana seems to be suggesting something far more expansive, including compliance with international norms, authoritative declarations of international institutions and other binding acts or decisions.

William Zartman

Like Alvaro de Soto, I would drop the idea of contracts. In fact, I think they can be largely irrelevant. I was working with an NGO that had a contract with the government of Congo Brazzaville to mediate. The contract maker broke the contract by making another one with somebody else. To say, "Mr. President, you have to live up to this contract," is nonsense. That is the whole weakness of NGO mediation.

In regard to Nadim Rouhana's proposal, I feel that he is talking about arbitration. And my answer is a phrase I hate: "That has never been done before." As Alvaro has suggested, it may be impossible to get the government party to the table with a set of prerequisites in place. Then one has to move on to another political situation, either to seize a ripe moment or use pressure to "ripen" another.

Ken Roth

It is useful to introduce a distinction between private and public mediators. Private mediators lack the leverage of public mediators to ensure that a human rights framework is adopted. I would actually go so far as to suggest that private mediators withdraw from situations where they lack the clout to force parties towards such a framework. A public mediator representing an institution with the promise of aid, or other benefits, is in a better position to use incentives. But private

mediators could cause considerable damage if they jump in and deal on whatever terms are available.

William Zartman

That is a nice idea, but the public mediator must be available and willing to jump in, when necessary, and make use of those tools. I come back to my experiences in Congo, where we would have very much liked to have support by public mediators. But France was on one side, the United States was uninterested, and Angola was engaged, so it was a question of us or no one at all. It is nice to say that the powerful should command, but they have to want to.

Andrea Bartoli

I want to disagree with Ken Roth on his basis for distinguishing public and private mediation. The distinction should be viewed across a continuum and not as a simple dichotomy. The public mediator may be powerful, but biased. We have to be very careful about using public people for more strict enforcement of human rights; they tend to be more concerned with *realpolitik* and less with respect for human rights. On the other hand, you can be very well served by weak mediation or weak intervention by mediators who rely on established human rights norms. Sometimes private or weak mediation, as in the case of Sant E'gidio, can be more effective because it is less threatening. And in other cases, it is the powerful mediator itself—as in Bill Zartman's example—which has reasons to abstain. The UN will not intervene in Algeria, for example, but a private institution may.

As for the ethical standard to apply, both private and public mediators should be bound by human rights. The only difference that I would stress is to focus less on violations and more on long term realization of human rights. Anything that stops that violent conflict by default will have a huge impact on ameliorating human rights conditions.

Radhika Coomaraswamy

I think that Larry Susskind's proposal is a very valid framework for power-based negotiations where the third party is someone who has enormous leverage in the negotiations, and where it is institutionally

backed, as in the case of the High Commissioner on National Minorities.

On the other hand, there are many circumstances in which it would be hard to imagine applying such a template. I have followed the Sri Lankan negotiations closely and had experiences in East Timor and Sierra Leone where I had an opportunity to speak with various parties. It would be very difficult to impose a human rights framework on the process. Maybe we have to think about those realities in a different way.

We seem to be assuming that people come into negotiations with a common discourse. But, in fact, they remain extremely suspicious, even of the mediator that they have chosen. They are constantly looking for hidden agendas and conspiracies. If anyone attempts to impose prerequisites, they will just find another mediator. In many cases, the last thing the parties want is a strong and independent negotiator. They want something done quietly and informally—without contracts or panels of lawyers. I think we need to come up with subtle ways in which to enable the mediator to recognize, articulate, and identify human rights issues.

What I would suggest is that we have a training of negotiators through actual case studies. Given a certain fact situation, we might explore the best way to articulate human rights concerns.

Asbjørn Eide

I would give one argument why it is important to use human rights in resolving disputes: without human rights the agreement is not sustainable over time.

Whether it is practical and possible to apply a human rights framework depends largely on the international environment. Max Van der Stoep can be successful in many situations because he knows that he has the backing of the European Union and the Council of Europe. Is he engaged in mediation, arbitration or some other act? Does it matter what word we use for it? Even if some of his parties do not like his approach, they have no other option. Now, with Latin America at the time of the Cold War, it was very difficult to use human rights because a very powerful state to the North defined everything in Cold War terms. There wasn't much space for human rights concerns. Now the Cold War is over, and that was a very important

factor in changing the approach of the United States to Guatemala, El Salvador and many other places.

William Zartman

What Max Van der Stoep does is certainly not arbitration. And I don't see how you can argue arbitration from an international law point of view if you think there is any respect for what states can do to themselves.

Ashjörn Eide

These days, states simply have to recognize that they are not sovereign, in the old sense of the word. They are living in an international community that puts constraints on how they operate, even in a democracy.

Ian Martin

Something has gone a bit wrong with this discussion. We are focused too much on how human rights ought to constrain conflict resolution, rather than how human rights can actually assist conflict resolution. Human rights people have the greatest possible interest in the success of conflict resolution. Human rights people sometimes make the statement, which I think is never true, that human rights violations are the causes of conflict. They are not. They are the symptoms of conflict. Human rights violations almost never exist as exogenous determinants of conflict. What we ought to be doing is looking at the positive ways in which attempts to resolve conflict in the ethnic context can be assisted by bringing human rights principles and the human rights framework to the table.

The conflict in El Salvador was the classic case where the use of the human rights framework turned out to be critical for successful efforts to resolve conflict. There is, of course, the accountability argument. But that is not the most important element of the discussion that we should be having.

Henry Steiner

Can we suggest how one might start thinking about human rights considerations assisting the resolution of a conflict? How would they enter into the scheme?

Andrea Bartoli

The real processes that resolve deadly conflict have little to do with international mediators. They have much to do with political participation of actual people—constitutional assemblies, national assemblies. Take South Africa. The country was imaginative enough to acknowledge the political constraints and tailor an amnesty process to the truth and reconciliation commission. The “new” comes about when we allow ourselves to have inclusive participatory processes that give the power to the people to imagine the future differently. It doesn’t come about when we have a professional mediator coming from the international community to tell the people how they should elaborate a contract to resolve their conflict.

People have been solving their problems for centuries, and unless we start thinking about normalcy—how people do this all the time—we are off track. Human rights gives millions of people who never articulated their dreams a way to do that. It gives them a very powerful way to say, “I don’t want simply to be alive, tomorrow, I want to have my right of life respected.”

Peter Rosenblum

My comment goes both to thinking about human rights as a tool as well as human rights as a possible constraint. There are those who are using human rights in a way that raises empirical questions, and there are those who are using human rights in a pure, normative sense as basic principles that must be respected whether empirically useful or not. I think we have the burden to explore whether human rights is actually useful in a conflict resolution process, and to account honestly for those circumstances in which it was not.

For example, we frequently assume that human rights is helpful or even necessary for either the process of negotiating, as Andrea Bartoli suggests, or the stability of the final agreement, as Asbjørn Eide said. When Andrea talks about human rights in terms of effective participation for envisioning the future, I say that this is perhaps useful 99 percent of the time, but what about the other one percent? What if effective participation leads to Hindu fundamentalism or Islamic extremism, to winner-take-all intolerance rather than conciliatory power sharing?

As for long term stability, we tend to draw lessons from Sierra Leone about the dangers of impunity, but we can all name cases where a stable transition occurred without attention to human rights accountability. There are "old" cases, like Spain or Greece, and "new" ones like Mozambique. In his time, the leader of Renamo, Dlakhamu, was viewed very much like Foday Sankoh of Sierra Leone today. But peace in Mozambique has apparently been quite stable. In honesty, don't we have to take this into account when we argue for human rights in conflict resolution?

Ken Roth

I'd like to talk about the way in which human rights facilitates conflict resolution in the case of Aceh. It provides a good contemporary example of how a prerequisite to conflict resolution is going to be greater respect for human rights. Aceh started off as a classic separatist situation—a distinct community of Indonesia with a plausible tradition as an independently recognized entity. But what began as a separatist dispute emerged as a war. There has been a radical polarization with each side killing the other, with the rebels using violence to silence people who favor autonomy rather than independence, and the government using indiscriminate killing and torture to go after people who were seen as the rebels' supporters. The most recent targets have been very prominent members of civil society institutions who are seen as neutral or speaking about prohibited political options. The obvious long-term solution to this conflict is some kind of autonomy for Aceh. But the people who were voicing the autonomy alternative are getting killed. And if there is going to be any opportunity to make progress toward peace, there must be a way to enable the emergence of civil society. This means ending the killing, establishing some degree of accountability so people have the confidence to come forward, and allowing the emergence of free expression and association.

Yash Ghai

I'd like to supplement Ken Roth's comments on how the framework of human rights can facilitate the process of resolution with examples from constitution-making. Constitution-making, of course, is a

device for conflict resolution, and often part of a wider package. In the South African situation, one of the turning points in the whole settlement process was when the ANC issued a paper on human rights. It committed the ANC to a regime of human rights; I think that was quite important to getting other parties to the table. Once the talks started, it was clear that they had different conceptions of human rights. The Afrikaaners saw human rights as a protection against infringements on their privileges, their property rights and other vested interests; whereas the ANC saw human rights very much as the broader rights that we have discussed here.

Once they had the mediated negotiations, the two conceptions came out. One of the interesting things is that South Africa rejected the Indian device of directive principles—general principles guiding the government—and put a lot of those principles in the binding human rights section of the Constitution. That was clearly important in getting a lot of ANC support. A number of problems were resolved by using the framework of human rights: land transfers and accommodation of ethnic diversity, in particular.

It is my own impression that, by accepting the framework of human rights, the ANC helped to establish an essential framework for negotiation that not only brought everyone to the table but also changed the parameters of decisions that were made.

Peter Rosenblum

I agree entirely with Yash Ghai's characterization of how the ANC brought human rights to the table, but I would add a couple of twists that I think are relevant for understanding both the power and the limits of the example. The ANC made a political decision to endorse human rights and constitutionalism; it served a purpose that proved rhetorically useful to the movement. Once the ANC adopted the position, the government was put on the defensive. The Apartheid regime tried to adopt the rhetoric of rights, but with their own spin, one that supported group rights. The South African Law Commission was charged with supporting their position and in a rare and courageous act, the Commission refused and, instead, insisted on an individual rights approach. Individual rights survived as the basis of negotiation and decision making, as Yash said.

But even in the case of South Africa, one might conjecture that this position only survived because of the need to negotiate the end of Apartheid. After 1994, many activists mourned the compromises that were necessary because they had not "won the war;" those compromises included a binding bill of rights, the Truth and Reconciliation Commission and the protection of property gained through Apartheid.

In Ethiopia, the rebels won. There, the dominant rights theory of the constitution is one of group rights founded on ethnically defined communities.

Asbjørn Eide

It is very important not to assume that by group rights we are necessarily talking about self-determination rights. In fact, I think that is suicidal. I am very worried. The South African constitution demonstrates the balance that we are thinking about. It focuses on issues like language and local government. It does not lead towards the kind of exclusionary self-determination rights that encourage ethnic-cleansing and other violations that we want to avoid. That point I want to make clear: don't associate minority rights with the extreme case of self-determination.

Andrea Bartoli

I will make six points to clarify what happened in Mozambique and dispel one of the claims that Peter Rosenblum raised about the absence of human rights. It is frequently said that Mozambique is the case in which human rights were not respected. But I would like to state emphatically that the human rights framework was always an indispensable point of reference that was embedded, expressed, and included in discussion during the nearly infinite series of negotiations that lasted more than two years. It is a mistake to identify the lack of a specific provision referring to human rights documents as proving that human rights was not taken into account.

Second, the level of awareness of human rights varied greatly on the basis of the political history of the participants. That is to say, St. E'gidio was very much aware; Frelimo was somewhat aware; and Renamo was completely unaware. In this regard, coaching is as important as enforcing.

Third, parties tended to use everything they can to their advantage during negotiations, including human rights rhetoric, language, documents and solutions. Everything. This is neither good nor bad, this is just a fact. Human rights becomes part of political discussions.

Fourth, St. E'gidio was chosen to mediate—together with the Bishop [of Moputo] and an Italian parliamentarian—because it served the particular legitimacy needs of the parties. The government didn't want to recognize Renamo and Renamo didn't want to speak with the government unless there was some form of international recognition. St. E'gidio provided the right amount of recognition. Significantly, the same elements came into play in Kosovo when we were able to negotiate with Milosevic and Rugova. This has little to do with Sant E'gidio *per se*; it has an awful lot to do with legitimacy constraints that often prevent official actors like the UN from intervening.

Fifth, mediation is a crucial but, finally, marginal element of a peace process. It must include and represent people's interests. People's power was well served in Mozambique because the leadership was held to represent that interest. Millions of refugees went back to their homes, even before UNHCR came and sent them home. People were fed up completely with the war. They wanted peace badly.

Sixth, human rights violations are reduced by a stable political system. My point is that human rights is not served only by punishment and prosecution. There are other important and meaningful ways of responding to victims' claims.

Session 2:

Case Studies of Conflict Resolution and Human Rights

Radhika Coomaraswamy and Ram Manikkalingam (chairs)

[The following discussion is built on three case studies, personal accounts of institutional mechanisms and interventions that brought human rights into conflict resolution: John Packer on the High Commissioner on National Minorities (HCNM), Alvaro de Soto on the peace process in El Salvador, and Ian Martin on East Timor.]

John Packer

There are many preconditions for intervention by the High Commissioner, but even if objective criteria are met, we still try to determine the wisdom of intervening. We try to determine, both in historical terms and in regard to the specific situation, whether we are going to help the situation. Is this going to work? The High Commissioner has, in several cases, determined not to engage, even though his mandate would say he may and he should. He has determined at times that engagement would exacerbate the situation. As an instrument of international security whose *raison d'être* is conflict prevention, the HCNM cannot be seen to facilitate the eruption of violent conflict.

The HCNM draws heavily on two OSCE concepts. One is the notion of "comprehensive security;" that is an idea that integrates economic, environmental, social, cultural, and human rights concerns as well as security. It asserts there is no meaningful security in the long run without security in all of these areas. That means we are permitted to raise almost anything if we can reasonably establish a link to inter-ethnic or majority/minority relations and the potential for conflict affecting relations between States. The second idea is "cooperative security." This is the idea that OSCE participating States constitute a community and there is a host of interests that are at play in each situation. This implies a duty on the state to cooperate, but also a duty on other states to cooperate. This translates specifically into rights to act, rights to enter. The Secretary-General of the United Nations does not have the right to enter any United Nations state. But the High Commissioner on National Minorities has effectively a right to

enter which is very remarkable—his mandate gives him unrestricted access to virtually all persons of his choosing in all places.

Human rights standards inform us in two ways. First of all, they are a standing code of behavior that analytically helps us to understand the situation. Second, the application of the standards in specific situations in many cases leads us to a practical solution. So there are two functional benefits of the human rights-informed approach. In many cases, what we also found is that it is far from enough.

The human rights standards are minimum standards. They don't answer a wealth of aspirations which are legitimate. For example, we don't have a hook for the demand for higher education in one's own language provided by a separate set of integrated institutions, whether privately or publicly funded. There is no human right, no international right of any kind to any kind of higher education. But it would not be sufficient for us analytically, in terms of looking for sources, to say, "Oh there is no right, therefore, end of story." The higher education conflict in Kosovo, or in Macedonia, is directly related to loss of life and conflict. This is a major item of dispute. So we look for other sources. Good governance is one. Then we often look at comparative law and practice in terms of specific problem-solving. Constitutional law, statutory law, jurisprudence, and so forth are all relevant. We look for good and bad references.

We have provided assistance through some expertise, the value of a third party, a friend seeking solutions, a referee at times, and we sought to solve problems even by finding resources, creating new opportunities and possibilities. We have finally extended our work by sharing expertise on request—we helped Latvia, we also helped Sweden, Finland, Northern Ireland, the Czech Republic and the European Commission. This is not reported anywhere. In Finland, for example, we helped in the process of devising a new language law to make sure it was in conformity with not only best practices, but also international standards.

Human rights is a source—it informs, it has proven useful in many cases, but it is only one source. I don't see how it can be absent, how you can have a durable peace if you are going to accept an end which would include sustained violations of human rights. So, it is a bedrock which is accepted by all (or, at least, hardly disputed

by any). Moreover, it establishes boundaries and even partly directs us towards specific solutions. Not unimportantly, it offers a common language for a mutually understandable and acceptable dialogue. So it is also instrumental.

Alvaro de Soto

It is worth mentioning the El Salvador negotiations in 1990—1991, which took place as the Cold War was winding up. The insurgency in 1981 of the Farabundo Martí National Liberation (FMLN) against the government of El Salvador was essentially against oppression by the armed forces with the blessing of the elected government. It was a period in El Salvador during which you could be killed simply for expressing unhappiness over the state of affairs. As simple as that. It was also a period when anyone who advocated negotiation with the guerrillas could also disappear or be killed.

When the time came, a pragmatic government of the right wing Arena party was elected and the president, in his inauguration speech, said he wanted to initiate a dialogue. He did not dare to use the word “negotiations;” he just said a dialogue. When a dialogue actually began under the auspices of the church, in 1989, it was rapidly frustrated by murders of human rights leaders by death squads—doubtless assisted by the armed forces. And there was an atmosphere of instability.

Then the FMLN launched an offensive in which they penetrated the main cities of El Salvador, including the capital. This was the moment of truth. On the one hand, it made clear that the armed forces were unable to quash the guerrillas. On the other hand, it became clear that the guerrillas were incapable of starting a generalized, popular insurrection. It was a watershed, the moment of ripeness, as Bill Zartman would say; it led to “a mutually hurting stalemate.” That is when they came to us.

There was a pre-negotiation phase. It was necessary to establish terms under which the parties would agree to come to the negotiating table. During seven weeks following the request from both sides for the UN to get involved, we drew up a series of procedural rules. A four-fold goal to the negotiation was established and agreed to by the parties, including: an end to the armed conflict, promoting democratization, promoting human rights, and also bringing about

the reconciliation of the El Salvadorans. The final point was spelled out in a somewhat more detailed agenda, where the first item was the armed forces, and the second item was human rights. Then there were a lot of other questions, such as the judicial system, constitutional reform, and finally, only at the end of that, agreeing to a cease-fire.

Much more time was spent on discussing the armed forces than on any other item. The starting position of the FMLN was that the armed forces should be abolished. Of course, they knew that this was unlikely, but it was a negotiating position. So the negotiation turned on how to reform and restructure the armed forces. At one point after two or three sessions devoted to the armed forces, it became clear that nothing was going to come out of the negotiations and things were slowing down.

Before the slow down, we gathered a group of human rights specialists and what I would call "Salvadorologists," including two or three Salvadorans. We had gathered them for brainstorming purposes for two days in order to ask them their advice on what could be done to address human rights, the next item on the agenda. As it turned out, we were able to come up with an agreed human rights agenda in a matter of days.

Radhika Coomaraswamy

Who asked for human rights to be on the agenda?

Alvaro de Soto

Both sides asked for it. In our draft framework for the talks, we had only three items. The government added human rights, which was a surprise for us. It was not surprising that the FMLN readily agreed. The FMLN had very intelligently used human rights as a tool; for years, they were very active along the sidelines of the UN Human Rights Commission. They succeeded in painting a picture of a very repressive government, and having a Special Rapporteur appointed. So the government was trying to seize the human rights initiative by proposing it for negotiation. The government accused the FMLN of doing all sorts of things—and indeed, it is true that the FMLN laid mines that were sometimes stepped on by peasants, and things like that. That was the coded meaning of human rights from the

perspective of the government. The FMLN would attack businesses; they would knock over electric pylons, disrupting power.

The best-known component of the draft on human rights was the monitoring system that had never been tried before. In the draft, it was spelled out that the United Nations would verify compliance with human rights agreements. In order to do that, we said we would have to cover the country with human rights observers. And they agreed. We had 200 people monitoring all over the country.

The actual agreement repeats the language of human rights treaties and instruments of law to which the government of El Salvador was in any event bound. But it served the purpose of both sides by actually reassuring them of the commitments and spelling them out in detail. It didn't stop there, however, because negotiation turned towards armed forces and other issues. We actually started to negotiate constitutional reforms and the elaboration of other legal instruments that would provide for an institutional underpinning for the respect and protection of human rights. It was clear that the future of human rights could not be assured dealing with the institutions that had ensured a permanent state of terror, especially the armed forces. There were provisions of the Constitution that referred to the armed forces as ultimate arbiters of law and the Constitution. The police force was under the armed forces. All of that had to be dealt with, and it was through constitutional reforms.

The parties agreed to change the Constitution to remove the army from any political role in the state; they agreed to create a new civilian police. And of course the armed forces were reduced. A mechanism was created to purge the armed forces: an independent commission would make recommendations which the parties agreed would be binding on them in order to dismiss officers of the armed forces who were either guilty of violations of human rights, which was very difficult to prove, or simply considered not apt for service in the new reformed armed forces which would come out of the peace agreement. Over 100 officers, including almost the entire high command, were removed. Ad hoc battalions that had been created during the war years were disbanded and disarmed. And the judiciary was reformed in order to make the Supreme Court more plural and open.

One part of the peace accords created a truth commission whose recommendations the parties also agreed would be binding upon them. The truth commission was composed of three foreigners—you couldn't find three Salvadorans to do this job. They recommended that a lot of people be banned from public life for a long time. They named a lot of names, which was, perhaps, the most sensational aspect of what they did. The more important part, however, was probably the institutional recommendations addressed to judicial reform. The two parties during the negotiations had not been able to go as far as they wanted because there was the danger that the Supreme Court would actually declare the accords to be null and void. For that reason, I don't think it is an exaggeration to say that the essence of the negotiation was about democratization and establishing an institutional underpinning for human rights.

Nadim Rouhana

How do you get the parties in 22 months to agree not to abuse human rights? What are the tools that you used to bring the parties together, to bring about this transformation?

Alvaro de Soto

There was a lot of bitterness when the parties came together in 1989. FMLN had just emerged from a long introspection. They were highly intelligent and sophisticated and they could already see the cracks in the Soviet system that had supported them. They had sufficient arms to continue the war for five or six years, but they had reached a strategic decision at the time. They had come to negotiate because this government wanted to negotiate. It had lost faith in the capacity of the armed forces to sustain and support them, so there was a need.

Eileen Babbitt

If the government had not put human rights on the agenda, would you have?

Alvaro de Soto

The FMLN would have included it and, in fact, did so.

Eileen Babbitt

One of the things we are discussing is whether it is the role of the third party to put something explicitly on the agenda if the parties are not able or willing to do it themselves. If they hadn't, how would you have commented on the agenda?

Alvaro de Soto

Ultimately, we couldn't impose anything. What we would do is to collect things for proposals that the two sides were making and try to draw a common list in language that they could both settle on.

Ian Martin

It seems to me that there are two distinct ways in which human rights contributes to a successful settlement. One is a contribution to the durability of the settlement. We have already discussed that to some degree. The other is before the settlement, to alleviate the violations which are occurring, helping to improve the context in which the ultimate settlement will be negotiated. In the case of El Salvador, my understanding is that the human rights framework contributed to the durability of the settlement. The human rights monitoring on the ground was originally intended to happen only when the parties agreed to the cease-fire to be negotiated by the UN, but the parties requested its deployment ahead of the cease-fire. And the improvement of the human rights situation was a positive factor in the subsequent course of negotiations.

Alvaro de Soto

My short answer; yes.

Henry Steiner

You mentioned that the human rights norms were incorporated in the agreement, although the state was already subject to them through treaty or custom. Then you mentioned that the provisions were voluntary. So I am wondering what effect these provisions of the agreement have. Is there some sense of prioritization, or hierarchy, or progressivity, such that things that seem realizable within a shorter distance of time or seem more essential are in the accords, but the entire corpus of relevant human rights was not included?

Alvaro de Soto

The human rights accords were agreed to in July 1990 with the stipulation that they would not be implemented until there was a cease fire—on the principle that nothing was agreed until everything was agreed. The negotiations continued until December 1991. But there was a clamor from inside the country, coming primarily from FMLN and its supporters who asked, “Why wait? Start monitoring them now.” The government and FMLN agreed and we were faced with a demand to go to the Security Council and persuade them to deploy a mission solely for the monitoring of human rights.

We had to argue that this was the first installment in what was to be an integrated peace monitoring mechanism. Somewhat to our surprise, they bought it. Around 160 or 180 international human rights observers were deployed throughout the country. They established offices, put up flags and allowed people to come in and make complaints. This survived the cease-fire for a long time. As I mentioned yesterday, my legal adviser in the negotiations was appointed Special Rapporteur for El Salvador. Among other things, he struck a deal with the government under which the monitoring mission would gradually be reduced and disappear as the new national ombudsman for human rights—established under the peace accords—began to deploy.

Andrea Bartoli

This model of intervention is extraordinary. It should be replicated as a participatory model in which the parties themselves accept non-violent intervention of any form of monitoring. We know very little about the value of monitoring. Imagine for a moment that you have a violent conflict and that the participants of the conflict allowed a few thousand monitors—not necessarily human rights monitors, just monitors—to go around and speak with people, collect information and gather complaints. The level of violence may very well fall, simply because of their presence.

Here the parties themselves are so committed to the process that they use this occasion to demand human rights monitors. They invented this new thing. During a peace process, these things happen all the time. This is another example of progress being made by letting

the people speak. What violence does is that it doesn't allow the people to experiment, to think, to participate or to think creatively.

William Zartman

In the context of El Salvador, was immunity part of the deal?

Alvaro de Soto

No. The FMLN's starting point was exemplary trials and exemplary punishment for the military commanders responsible for human rights violations. When they came to a point where they had to produce evidence that would stand up in those courts, they realized that they couldn't do it. You couldn't bring military commanders to trial successfully. Until the Jesuit cases, no military officer had ever been held responsible in an El Salvador court for human rights violations. So they struck a deal composed of the two elements that I mentioned: an ad hoc commission to review the records and performance of the officer corps, to determine whether they had violated human rights, and whether they were qualified to serve in a reformed Armed Forces, and a truth commission.

Ken Roth

I want to stress both how innovative and how important the experience of El Salvador has been. The legal options were extremely limited in El Salvador. Because this was the early '90s, it was three to four years before we had an international tribunal for anything, so that wasn't an option. As for domestic prosecutions, Alvaro de Soto was being generous with respect to the Salvadoran judiciary, which was completely dysfunctional—utterly incapable of trying anyone. What Alvaro was able to accomplish was the most he could have in those circumstances. The end result was far more than a truth commission. One hundred two of the senior-most members of the Army were removed from office. Nothing like this had happened before. It was done against tremendous odds, since it was essentially against the interest of both parties. It required allowing civil society and rights groups and others who had an interest in accountability to be heard and to have their point of view encouraged. This was a huge advance, in the sense that it laid the groundwork for the possibility of a more judicial kind of accountability down the line.

Liam Mahony

In many ways, the El Salvador model was replicated and expanded upon in Guatemala. The use of monitoring, as Andrea suggests, can have a powerful impact. The monitoring presence isn't limited to reporting violations. It actually affects cultural thinking. I was very involved with the Guatemala process. In that case, it wasn't clear that there was a mutually hurting stalemate at the point that the monitors arrived. But the presence of the monitors had an amazingly hopeful impact on the society. It gave people the sense that the international community would not forget them altogether, which the Mayan community, in particular, had every reason to believe. If you reduce violations during the negotiation process, you can actually help the negotiation process.

Eileen Babbitt

Has the OSCE process ever used monitors?

John Packer

The High Commissioner on National Minorities actually proposed the use of monitors in the context of the Croatia UN mission. But as Ian mentioned, there are problems with the OSCE when it comes to long term missions. In Macedonia now, there are supposed to be 230 monitors. I believe it will have a preventive function and help to build confidence on the ground.

Catriona Drew

In the context of the Occupied Territories, Israel has always resisted the idea of international monitors. But during the first Intifada, there were—unofficially—international monitors operating in the refugee camps. UNRWA [the United Nations Relief and Works Agency] established 'Refugee Affairs Officers' (RAO) who drove around in radio cars, monitoring the situation in the camps (and often elsewhere) and collecting information. If, for example, there was a demonstration at a specific refugee camp, a RAO would drive there and simply park the car and observe. It was an ad hoc UNRWA initiative but it definitely succeeded in reducing tension in conflict zones.

Alvaro de Soto

I would add a cautionary word about the examples that we are using: The places where we have sent monitors—El Salvador, Guatemala, Haiti, East Timor, Kosovo and now Macedonia Sierra Leone and Rwanda—all have in common the fact that they are very small countries.

Ian Martin

I would like to say a word about East Timor and then talk more generally about the use of civilian monitors. East Timor was highly exceptional in both the negotiation and implementation phase. As for the negotiation phase, the Indonesians refused to speak directly to the East Timorese, so the negotiations were conducted between Indonesia and Portugal with the UN as mediator. The implementation project was extremely narrow and specific: In a very short time, we were to run a ballot. We had no other aspects to our mandate other than the rather weak mandate to advise the Indonesian police on their responsibility for security during the ballot.

I have now had experience with civilian monitors in Haiti, Rwanda and East Timor, and I remain quite enthusiastic about the advantages of such a presence. Civilian monitors provide a strong dissuasive pressure. And it is very different and better to be able to intervene on the ground than to engage any of the more remote human rights mechanisms that are available to us through the UN and NGOs.

In order for monitoring to be effective, it must figure as part of a strategy with realistic prospects of success. To my mind, this is one of the major differences between El Salvador and Guatemala, on the one hand, and Haiti and Rwanda, on the other. In the latter cases, the human rights monitoring presence was not a part of a successful overall strategy of the United Nations.

In the case of Haiti, I think it was a good try. The civilian presence had an important short term effect which, in the end, made a contribution to the outcome in Haiti. By kicking the international monitors around once too often, the Haitian authorities contributed to the Security Council's willingness to mandate military intervention. In the case of Rwanda, the human rights presence—at least during the time I was there—was again able to achieve some improvement

in conditions. But this ended when the insurgency from the camps in Zaire came into Rwandan territory. At that point, the government put human rights aside to deal with the perceived threat. It ultimately decided to rid itself of the human rights monitoring presence as well.

My bottom line is that monitors remain an important tool in the human rights toolbox, but it is essential to be very clear as to what is the goal of the negotiating strategy of which they are part.

Mark Lattimer

I am very conscious of the fact that we have focused time and again on conflict resolution and post-conflict reconstruction, and that we have tended to forget the prevention elements. Andrea Bartoli's comment about getting peace when the parties are ready to make peace is all very well, but it omits many situations when minority rights and minorities themselves are in the greatest danger. Many of the grossest abuses of minority rights happened precisely when the situation wasn't ripe for peace. If we wait until the fruit is ripe to start acting, it might be pretty rotten by the time that we are able to get control. What we need to do is to think carefully about the contribution of human rights, including minority rights, at a much earlier stage in the procedure. If we look at the situation in Kosovo, I think that is very clear. The conflict had a very long fuse, something like ten years.

I would like to return to a theme that Henry Steiner has raised, the question of whether human rights violations *cause* rather than express or reflect conflict. I think there are many cases in which they do. Kosovo provides a good example. The government of Serbia kept the pressure on Kosovo for years, beginning in 1989. The Albanian leadership was practically Gandhian in its response. It was only after all strategies at accommodation had failed that the KLA was able to gain enough popular support to create an armed insurgency. But that process happened at the end of ten years of escalating human rights violations. Part of our job here must be to think creatively about international intervention using human rights in a different way in order to prevent those conflicts at a much earlier stage.

Ian Martin

Intervention must be political. We had an exceptionally good researcher on Kosovo at Amnesty International. She was one of the first to expose human rights violations and identify the political crisis that they heralded. There was no shortage of information and yet there was no political willingness to respond.

Mark Lattimer

Partly what I am saying is that we need to devise strategies that go beyond publishing reports. Human rights intervention must involve an intergovernmental response.

William Zartman

I think there is some reporting that still hasn't been done. Is there any group that could publish a regular account of power distribution and allocation along ethnic lines? It is a perfect role for an NGO. It needn't reach conclusions—simply bring to light information in a standardized way that might otherwise be lost in individual people's research.

Peter Rosenblum

Reporting on ethnicity is still off-limits in many places, for fear of getting on the wrong side of the party in power. Rwanda is one very good example. The perception of ethnic difference is the greatest source of division—there was a genocide because Hutus killed Tutsis, whatever the subtleties of distinction. Nevertheless, the public discussion of who belongs to which group is entirely taboo. When aid programs came in after the genocide to train lawyers, judges and prosecutors, for example, no one analyzed the ethnic make-up of beneficiaries. No one openly discusses the composition of the student body at the national university. My sense is that international groups have been cowed in observing the taboo with total fealty.

Asbjørn Eide

One of my first years on the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities was in 1983, when the Sri Lankan tragedy and massacres took place. I brought it up in the Sub-Commission and wanted a resolution on it, at least

calling on the government to investigate who was behind the killings and to ensure that the rule of law applied to the Tamils, too. But the government of Sri Lanka at the time lobbied intensely to prevent this resolution from being adopted, and of course, they succeeded. In later years, representatives of the Sri Lanka government have said many times that if they had accepted those recommendations, things would have been quite different. But they were completely alien to the idea which seems so obvious to me, that if a minority doesn't feel that it has the same security as others, then they will take up arms, and that is what happened.

[Amnesties]

Radhika Coomaraswamy

In the current negotiations in Sri Lanka, the tensions between conflict resolution and human rights are strongly in evidence. When the parties agreed to Norwegian mediation, one of the first things the civil society did was to pull out the El Salvador human rights agreement and propose a similar model. The Norwegians were very reluctant because both the government of Sri Lanka and the LTTE [Liberation Tigers of Tamil Eelam] were very clear that they were not to make any proposals. We tried to get the parties to raise issues, but also to no avail. We have some interest from the government, but there are too many other issues in the way. We are faced with the choice between letting war take its course and compromising on human rights standards.

Ram Manikkalingam

The major tension between conflict resolution and human rights seems to come up on the question of amnesty. If you want a solution, if you want to end the war, then giving amnesty doesn't appear to be such a bad thing. If there is peace in Sri Lanka with full amnesty, there is no question in my mind that it will be worth the price.

Radhika Coomaraswamy

How do you stop them from doing it again?

Ken Roth

That is my point. In the case of Sri Lanka, the government and LTTE both engage in abuses. Some suggest that we should do whatever it takes to stop the violence. Give them amnesty; give them positions in government; whatever it takes. We all know how counterproductive that is.

Mark Lattimer

Does anyone know of an agreement for which a refusal to give amnesty was the deal breaker? It didn't stop Dayton. We keep coming back to this idea of amnesty, but I don't know of any particular agreement where failure to offer amnesty really stopped a deal.

Ken Roth

The former Yugoslavia offers a double precedent. At Dayton, Milosovic hadn't been indicted and nonetheless agreed to peace. In Kosovo, he had been indicted and still agreed to peace.

Theoretically, it will make it less likely for a dictator to step down if he is not offered an amnesty. But I don't think the world works that way. Dictators cling to power for as long as they can. I can't think of a case in which a dictator was ready to step down but for provision for an amnesty. In any event, with the International Criminal Court starting, there will be no prospect of giving an amnesty that has international validity. In a sense, the court will bind everyone's hands for prospective crimes.

Yash Ghai

Sometimes it is necessary to offer an amnesty to get the parties to the table. We had this problem in Bougainville. On both sides, people had killed. I spent four months going over the amnesty documents. There is absolutely no way we could've gotten them to the table without it.

William Zartman

The question of amnesty was the deal maker in the Haitian case.

Ken Roth

In Haiti, I have never gotten a Clinton administration official to say that Jimmy Carter was under instruction to give an amnesty. This was

his doing. It happened when the Marines were about to arrive, when he had maximum U.S. leverage. To say that there was no alternative but to give a formal amnesty, is a lack of imagination. In fact, what happened is that Jimmy Carter promised an amnesty, and even the Haitian parliament was so appalled that they didn't confirm it. So in fact, it was never formalized.

Henry Steiner

Amnesty has a binary character in that potential defendants either have it or they don't. But historically, it is a much more complex issue. First, we are talking about a relatively select group of top leaders, which is to be sure a vital group in terms of their punishment acting as an example and perhaps deterring other countries' leaders from similar conduct. In fact, there is invariably a *de facto* amnesty for the enormous majority of people who committed war crimes, crimes against humanity or participated in genocide. As a practical matter, the vast majority of soldiers or civilians committing the grass-level atrocities are not going to be prosecuted.

Secondly, there are different processes by which amnesties come into effect. At one extreme we see the self-amnesty granted by the Pinochet regime before he left office. Other amnesties go through some kind of public electoral process as in Uruguay. The South African amnesty was much discussed and decided on by a democratically elected body—and it had a practical and useful *quid pro quo*. So it does seem to me that the question of amnesty and its effects before international or state tribunals is more complex and contextual than a bold choice valid everywhere about whether we will or won't grant one.

Ken Roth

I'd like to elaborate on Henry Steiner's point. There is a distinction between a formal granting of amnesty, which I don't think should ever happen, and a decision not to prosecute. It may turn into a *de facto* amnesty, but it leaves open the possibility of accountability down the road. That was what was particularly objectionable about Jimmy Carter. The Haitian judiciary wasn't in a position to prosecute Cedras the next day. If he had just gone off to Panama, they could have hoped to extradite him at another time. It would have been much

less objectionable than a formal amnesty which purported to preclude future prosecution.

Mark Lattimer

For an international organization like the United Nations, or indeed an international power like the United States, to agree to an amnesty is something quite different. It is something much more offensive. A crime against humanity is not a crime against individuals, it is a crime against the whole of humanity. And therefore the consequences of impunity for those crimes don't just apply to the individual state. They apply potentially to a much wider range of situations. Therefore, to have an amnesty for crimes against humanity conferred or condoned by the United Nations or by another power in the international community is particularly serious.

Alvaro de Soto

I agree that there is a natural tension here. Echoing a bit of what Andrea Bartoli said, it is not in the UN's power to issue an amnesty, nor is it in the UN's power or that of any other good officer, to prevent an amnesty if the parties to a conflict want a deal. Our instruction to Special Representatives of the Secretary-General is to dissociate themselves from an agreement that grants amnesties for certain kinds of human rights violations.

Session 3:

Possible Mechanisms and Collaborative Roles

Liam Mahony (chair)

In our discussions over the past two days, we brainstormed various mechanisms for pre-conflict intervention when minority rights are at stake. Our suggestions covered five themes in an attempt to equalize the situation for the minority in an extremely asymmetric situation. We have covered some in more detail than others, but I thought it would be useful to put them out in some order for consideration.

- First, we examined reporting, from having a report on minorities, to a commission that would produce ongoing reports on the situation of minorities around the world.
- Second, we thought to look for high and middle level mechanisms to get the attention of the international community.
- Third, we suggested infiltrating existing institutions that deal with issues of good governance such as the United Nations Development Programme (UNDP) or the World Bank and helping them integrate minority rights into their processes.
- Fourth, we discussed the High Commissioner on National Minorities of the OSCE and looked at ways of expanding that model beyond the OSCE context.
- And fifth, we discussed ideas of a presence in the field or monitoring, either on official or unofficial levels, or at the NGO level.

Larry Susskind

There are another half dozen things that we can add to the list, drawing on the experience of conflict resolvers in the early stages of conflict. Conflict-resolution practitioners bring together non-formal representatives from groups to explore the bases for their different views of a problem. The neutral can also move back and forth between the minority and majority groups. An independent group can prepare written analyses of the conflict; studying the conflict itself rather than forming a preliminary advocacy piece on behalf of either side. Unofficial representatives of the contending groups can join and try to formulate proposals that they take back separately and try to sell as a way of moving towards a process of joint problem solving. All

of these are strategies or devices that come very early in the story and that can best be done by non-officials. There is even the possibility of training, so that people on both sides have a fuller sense of some of the process options available down the road.

Eileen Babbitt

Are we talking about discrimination issues, but no mobilization in terms of a nationalist movement? Are we talking about national minority issues, where there is a kin state that may experience escalation in tension, or are we talking about a situation in which ethno-nationalism has already coalesced? It's important to be more precise, because otherwise we're talking at cross purposes.

It seems to me that the real issue is: what is the earliest point at which we can reasonably assess that there is a likely possibility of escalation to violence? How might we determine that point, a point at which it makes sense to talk about the mechanisms for intervention.

Asbjørn Eide

As Eileen Babbitt said, a big problem that contributes to the difficulty of defining possible mechanisms is that there are many different kinds of minorities, with different needs, and which point to the use of different mechanisms. We have the traditional prevention of discrimination issue. We have the rights of indigenous peoples, which is now following its own, separate track within the United Nations. There are the national minorities with a neighboring kin state, where their conflict can be a threat to international peace. And there are the ethno-nationalist movements, like the Kurds and the Tamils, seeking self-determination, and the ethno-class groups, like the Roma. The Roma are not looking for a state and they live in many places, and they're being discriminated against everywhere.

Mark Lattimer

I might re-categorize some of this discussion on possible mechanisms in a slightly different way to bring in the temporal dimension. It struck me that once again, as soon as we start talking about conflict resolution and negotiation, we are addressing ourselves to a relatively late stage, when the conflict has already begun. Rather, what we are interested in as a human rights NGO is what you do before you get there. No one

is going to make peace unless they feel that their security is somehow guaranteed. And they are not going to feel their security is guaranteed unless they feel their fundamental human rights are protected.

Before armed conflict has broken out, we have to be much more creative as human rights advocates about talking sensibly about minority rights; about group rights. We should build on the existing classic corpus of individual human rights, and partly fashion group remedies for those individual violations. For example, we can focus more on discrimination. At the moment, very sophisticated human rights courts like the European Court of Human Rights effectively don't look at discrimination at all. Whenever there is a complaint under the discrimination article, it has to be read in conjunction with a substantive violation of another right. We've got to raise the stakes on discrimination. We've got to say, if your right is violated as a result of discrimination, that's an aggravated wrong.

Another option might be to enforce the rights of the group by enabling group claims or class actions on the basis of individual violations of rights. If a court ruled that a violation had occurred, that would send a very clear message that a state hadn't just locked someone up, hadn't just stopped someone from speaking out; it had actually stopped the whole group from doing that.

Peter Rosenblum

There is a way to view what Larry Susskind said in a different context, regardless of the time of conflict. If we think about the recommendations that Liam Mahony noted, they fit within traditional human rights thinking. If at the same time that we are collecting information and making tables of ethnic groups, we are seeking to bring groups together in some pre-negotiation process—so that we are already inviting dialogue and thinking in terms not just of discrimination but also of relationships among different groups—then we are beginning to think about marrying the human rights approach and the conflict resolution approach.

Larry Susskind

The difference has to do with a difference in perspective, not just in technique. If you can get in early and help deal with internal disagreements within each group about, for example, what their

priorities are, that may be one of the most useful things a mediator can do.

Asbjørn Eide

As Larry Susskind said, it's very important to recognize the internal conflict dynamic within a given group. The tension between those who actually see violence as very instrumental, on the one hand, and those who are looking for some kind of solution to the underlying problems, on the other hand, raises the question of how early and when you can get into the dialogue.

Eileen Babbitt

One other interesting collaborative or complementary role of these two different perspectives is that in order to bring parties into a discussion, there also needs to be a sense from the lower power group that there's some forum that they have and some power that they have. And part of what the human rights community does is to work on that power issue. The things that the human rights people have been describing, such as getting information about what the situation of this discriminated-against group is, and increasing access, would be a complementary process to discussion or dialogue mechanisms that a conflict resolution process would provide. I agree with Larry Susskind that it's not a question of timing, it's a question of perspective.

Mark Lattimer

I appreciate Eileen Babbitt's concern, but how do you get the state around the table? If the state has the monopoly on the means of violence, it is in a position of unassailable power. Often, the message is that the only way for minorities to get around the table is to start picking up arms. In many ways, some elements of the Macedonian Albanian community believed that. Their way to internationalize what they saw as a ten-year struggle was to do what they thought their brothers in Kosovo had done. I think there are many problems with that, but for a community that is heavily disadvantaged, to take up arms is a decision to consider. For that to have a sufficient basis of support to seem a threat, a certain desperation among the population may be necessary. If you know you are in a position of great weakness, taking up arms against a repressor invites a very frightening escalation

of repression. We need to focus on the early stages of human rights violations, on the stuff before the shooting starts.

Liam Mahony

Even when you are at the table, there is one analysis that suggests that the negotiated outcome is going to divide the pie more or less according to the power of the parties at the table. That fear is what then discourages people in the weaker position from going into the conflict resolution process.

Andrea Bartoli

If what Liam Mahony has said indicates his understanding of conflict resolution, I would say that he's completely reductionist. Conflict resolution demonstrates very clearly that any kind of serious procedure is much more than dividing the pie. It actually creates value, it actually has an enormously important empowering process that simply happens because I accept to speak with you. Just on that basis, there is an empowering process that we need to recognize. We should not speak about dividing the pie, or characterize conflict resolution as dividing pies. In this sense, I am completely with Larry Susskind. I refuse to be characterized that way.

[Suggestion to gather better information]

Henry Steiner

It strikes me that a major threshold issue concerns getting things about the conflict known. The lack of information about the tradition of non-violent resolution, or institutions such as a free press, is dramatic. Do the interventions of the Minority Rights Group International or of other NGOs really serve the purpose of providing such information? Moreover, statistical information can be really dull. We're so bombarded day by day by massive violations that are statistically described, to the point where we no longer react as we should.

We can't ignore the media as a way of disseminating information, provoking interest and provoking international and national reaction. That seems so fundamental to me as a mechanism for mobilizing information and which groups have access to it.

Peter Rosenblum

I am still very taken with the question of how and what information is collected such that it leads to a process that could be a human rights process and a conflict resolution process. When I first researched human rights, I would go somewhere and find grievances and bring them back to report. It's an oppositional stance. We have to recognize that there are ways of collecting information that aren't oppositional, and that lead to a different conclusion. But what if we were collecting information focusing not on oppositions per se, but on understanding the local mechanisms? We start by finding out what is already there, who are the peacemakers and/or the violent entrepreneurs. We look and analyze the situation, not in terms of grievances, but in terms of relationships. There is very little effort that I am aware of to record this information in a pre-conflict context, rather than to view it through the lens of conflict that has already emerged.

Mark Lattimer

Better information on minorities is very important. Minority Rights Group International (MRGI) publishes fifty to seventy monographs on individual minority situations around the world; a world directory on minorities; and we're currently planning an online resource on world minorities. The more we know about situations, the better. However, I think it's difficult. I love William Zartman's idea of a table of participation by ethnic groups around the world in public administration, police, and so on, but comparable figures around the world are not always possible. Even in Macedonia, a country in Europe, no one agrees whether ethnic Albanians make up a quarter or a third of the population. If we don't even agree about that, we are unlikely to agree on most of the other statistics.

[Internationalizing the conflict]

Radhika Coomaraswamy

What do we do with Liam Mahony's list? How do we trigger each stage? And is it always appropriate to engage the international machinery?

An international problem-oriented process may be healthy when the conflict is pathological. But the local judiciaries must

learn to deal with issues like discrimination. I think that the good governance model is really important for this first process, which is to build into the existing institutions some capacity to deal with such issues. It's very important that we also deal with the local reality; the local institutional processes have to be strengthened by this conflict-resolution process as well. At a given point, we can decide to trigger the other international mechanisms.

Mark Lattimer

One of the things that MRGI tries to do is to internationalize by encouraging minorities to participate at early stages in human rights institutions like the Sub-Commission, the Working Group on Minorities, and the World Conference against Racism. That is a way of internationalizing human rights issues before the situation reaches a level where the international community is interested for the wrong reasons.

Alvaro de Soto

Like Radhika Coomaraswamy, I am a fraction troubled about the idea that it is necessary to have some outlying intervention in all cases. Larry Susskind is assuming that the goal is to provoke negotiation—that if you catch a problem brewing early enough, maybe you can address the power and authorities to solve the problem before it is necessary. Clearly there are situations where there is a manifest case of discrimination or repression that's not being addressed by whoever is in power, and that requires a ratcheting of international attention because all of the efforts have failed. There are, however, any number of cases where what you have is indications of unrest, indications of the situation brewing where attention of the authorities has not yet been awakened, and where a somewhat quieter approach might be the recipe. Indeed, raising of attention might have the opposite effect by exacerbating the problem and opening up the potential for its misuse, or even mischief.

Everybody knows, for instance, that the United Nations was criticized pretty badly in 1994 when information was received that in Rwanda, there were preparations for mass killing of Tutsis. The instructions given to the SRSG was to bring it to the attention of the authorities who were presumably the culprits. But there was

a method to what seemed like this mad act. If you make it public and raise a scandal about it, then you make it very difficult for those who are responsible to do something about it. On the other hand, you can bring it to their attention, confronting them with the fact that you are aware of what is happening and threaten to denounce them unless they harness the situation. It is that distinction that I think is important. I am the last person to say that NGOs, who by definition are free agents, should be restrained in what they do. But I would feel considerably more confident if there were some sort of a consensus, a filtering mechanism or consultation among NGOs as to their assessment of a situation before anything is done that might potentially exacerbate the situation and trigger things.

Catriona Drew

But international law also puts a premium on violence. This is a lesson that the Kosovar Albanians learned well. If you can show that you are a "people subjected to gross human rights abuses," that may trigger an international legal mechanism. If you can escalate the conflict beyond the political, international legal rights may come into play—humanitarian intervention or internationalization of the territory or a claim to secede. Below that level, you don't have very much besides human rights mechanisms.

Andrea Bartoli

There's a difference between the violence you perpetrate when you escalate and the violence to which you are submitted when you get gross violations of human rights.

Catriona Drew

That can be circular. The escalation may lead to a response that increases human rights abuse—which, in turn, strengthens any legal argument for secession.

[Institutional mechanisms]

Simon Chesterman

I'd like to shift the focus from processes to institutions. In particular, I want to ask whether it is possible to move from a posture of reacting

to problems as they arise, to institutionalizing methods that might prevent these conflicts from arising in the first place.

I'd like to organize my thoughts around four basic questions. First, institutional gaps: Are there gaps in the existing UN mechanisms that deal with minority protection and conflict prevention issues? Second, are there necessary reforms of existing institutions and UN structures? Third, what are the external political problems that we might confront? Would regional solutions be more promising? Fourth, we need to be realistic about the institutional problems of operating through the UN. How can the UN's capacity for advocacy and action in this area be strengthened without giving rise to internal competition, blurring of mandates, and competition of resources?

There are a number of existing institutions in the UN that have a role in conflict prevention and minority protection. The High Commissioner for Human Rights, for example, was entrusted, among other things, with preventing the continuation of human rights violations throughout the world. Building on institutions like this, we have seen some relatively modest moves in the direction of strengthening the UN's capacity to engage practically in conflict prevention, but there has long been great reluctance on the part of member states to formalize this process. The most prominent body in conflict prevention is probably the Secretary-General himself. The Department of Political Affairs was created precisely to provide advice to the Secretary-General on, among other things, conflict prevention.

Are there gaps in the structure? That might be the wrong word, because it's clear that member states have intentionally limited the capacity of the UN to involve itself in certain issues. Another way of thinking about what institutional changes might be useful is to ask if there are particular minority groups and situations that are not being addressed where some change in the UN might lead to their being addressed. Two cases come to mind: the Kurds and the Roma/Sinti. We would all agree the High Commissioner on National Minorities has a far broader mandate than anything that the UN has. Still, it has been deeply problematic and very difficult for the High Commissioner to get involved with these groups.

What institutional and political alternatives might be possible? There are three general caveats in relation to any reform within the

UN. First, the mandate must be clear. It is not enough to create a body whose mandate is described in terms of the problem to be addressed. Will the body be a lead agency or act in an advisory capacity? Would it have field presence and engage in hands-on diplomacy? Or would it advise the Secretary-General? What particular deficiencies in the mandate of the existing bodies would the new institution seek to address? Second, funding must be addressed from the outset. What staff and budget would the new body need in order to be effective? Where would it come from? If the body is to be funded by voluntary contributions, this may lead to practical and political difficulties, where UN staff, for example, might be reluctant to move from a specialized agency to such a body. Further, the new body's institutional position must be clear. What would its relationship be to the Executive Office of the Secretary-General, the High Commissioner for Human Rights, the High Commissioner for Refugees, and so on? Even with a limited mandate, other agencies might fear mandate creep, leading to possible competition over resources, personnel and "business."

With these caveats in mind, I have a list of seven possible things we might consider. First, and this is something I understand that Neelan Tiruchelvam had suggested, a convention on the rights of minorities. Perhaps a treaty body could be dedicated to bringing attention to minority rights issues and to providing a possible medium in which to process disputes. It would also serve the purpose of advancing normative responses to state treatment of minority issues. The disadvantages are that it is extremely unlikely that any convention would have real impact in a form that's likely to pass muster. Even the complaint mechanism would almost certainly have to be included in an optional protocol.

Second, a new Special Representative of the Secretary-General for Minorities. This really goes to the question of good offices that we've been talking about in previous sessions. A special representative mandated specifically to raise the profile of minority issues and, when necessary, to act as a mediator in a dispute between minorities and the state might be modeled on the High Commissioner on National Minorities. Could the UN replicate the High Commissioner's successful approach in developing a thematic approach to minority issues? There are limits to that analogy. Most obviously, the OSCE is an unusual institution in an unusual region.

Europe is more enthusiastic than any other region to integrate and enter into intrusive regional agreements. Other regional agreements have been less successful, such as the former OAU's mechanism for conflict intervention. One reason may be institutional problems, but it can't be separated entirely from the lack of political commitment.

A third possibility might be a Special Representative for Conflict Prevention, not tied explicitly to national minorities. A more persuasive way of getting that on board would be to connect it in an institutional way to the Department of Political Affairs. This might also be difficult, as the reaction to the Brahimi Report proposals on an Information and Strategic Analysis Secretariat (EISAS) show. In relation to the specific question of minority rights and conflict prevention, we must address the question of whether the problem that we are identifying is a lack of capacity, analysis, political will or action—and at what level we think that UN action is needed.

Fourth, a new Special Rapporteur for Minorities and Conflict Prevention. There are presently special rapporteurs on racism and racial discrimination, and so on. It is possible that such a position would have more investigative powers than the Working Group currently enjoys. A downside of such an approach is that the Commission lacks the capacity to act in some way. The Secretary-General would probably use his good offices and it's unlikely the special rapporteur would be asked personally to mediate in a developing dispute.

Fifth, encouragement of regional mechanisms. As I said before and as has been mentioned earlier, there's an argument for approaching the question of minority protection and conflict prevention at the regional, as opposed to universal, level. The advantages of such an approach lie in the tailoring of each mechanism to suit the needs, capacities and political constraints of each region or sub-region. Governments would presumably consent only to measures to which they were prepared to submit themselves. These are also the disadvantages. Conflict prevention initiatives are far more effective in the OSCE than the OAU. Accepting this geographical divide arguably trades effectiveness for principle. Minority protection issues in Africa are certainly threats to regional security. If a regional approach is adopted, strengthening regional and sub-regional mechanisms in Africa would have to be a priority.

Sixth, encouragement of nongovernmental organizations. This is another option outside of the UN, to encourage the way that NGOs monitor human rights, including minority rights, and seek to provide early warning. Some form of commission might make it possible to bring together interested and competent NGOs and UN decision-makers to discuss potential conflict areas. Actual mediation would presumably still fall to existing political mechanisms in the UN and regional bodies as well as interested states. If gaps exist at the translation of information to action, it might be argued that reform at the level of information gathering is best.

The final suggestion is improvement of the existing system. Ultimately, any effective reform within the UN must address the relationship between the Secretary and the Security Council, as well as the functions of the specialized agencies. The question of minority protection and conflict prevention is among one of the most controversial individual questions confronting states.

The ultimate solution, of course, rests with the states. So all this must be regarded as political institution-building that is aimed at facilitating internal solutions for these problems.

Alvaro de Soto

The idea of a convention on the rights of minorities is an inspired goal, but I wouldn't argue its early success. It would probably take a long time and there would be quite a bit of resistance at this juncture. You have to be very careful about a potential backlash.

Asbjørn Eide

We, at the Working Group, have contacted countries to have an idea about whether they are interested in drafting a convention. I am reluctant to go that route, too. What we would get at the present stage would be weaker than what we have in the declaration. It is too early now. Let's not forget that when the UN started, there was a clear majority against dealing with minorities altogether. But there has been a developing process and now there is the Declaration and the Working Group.

Alvaro de Soto

Regarding a special representative for minorities, you would find a lot of resistance for institutional, bureaucratic and budgetary reasons. It would create an intermediary who would rival or substitute or cut across the responsibilities that now rest where they rest, unless it were not an advocate, but rather someone like Francis Deng commissioned to look into the problem and provide a diagnosis. A special representative would be interpreted by a number of multiethnic states as provocative and possibly even in violation of Article 2 (7) of the UN Charter.

Asbjørn Eide

I am also skeptical about whether a special representative on minorities would be possible at the present stage. But it comes back to my feeling that the word minorities is too general. Within the United Nations, you are already seeing different tracks. Different components of the problem are being divided up by these different mechanisms. I think that is a positive development. We have in our Working Group also recommended the appointment of a special rapporteur on minorities. But I have my doubts as to how that mandate should be developed.

Alvaro de Soto

If you use the title of special rapporteur, you usually mean the realm of the Human Rights Commission. I am not sure how the human rights community would feel about that. I am not sure that there would be a consensus judging by one or two things Radhika Coomaraswamy has said.

Radhika Coomaraswamy

I don't think that a special rapporteur of the Human Rights Commission would be that helpful. Basically a special rapporteur travels with international standards, says that the performance of the country is against those standards, and is engaged in a different kind of relationship with the parties than a person who is involved in a conflict resolution relationship. There's a little bit of a shaming, judgmental role in the way we operate because we are rapporteurs. We are not engaged in trying to find solutions, although some of us do that. We really need a mechanism that allows for conflict resolution

skills. Francis Deng plays that role with the internally displaced. Hina Jilani plays that role with human rights defenders. If we can, that should be something we should try and see.

Alvaro de Soto

Regional mechanisms seem to be the way to go—either that or perhaps a combination of such a mechanism plus a special representative, a panel or a commission. But then you get the difficult decision of whether the Secretary-General can take a decision like that upon himself. There is no clear mandate. He can and does appoint special representatives for issues. Encouraging the work of NGOs and a commission outside the United Nations may be a positive mechanism as well. But if you are going to get any success, we first have to have a clear diagnosis of the problem. That is something that we could work on in a multidisciplinary group like this.

I am inspired by a term that described the High Commissioner on National Minorities as a “normative intermediary.” It’s a very useful description because it presupposes the existence of a normative framework. What we are lacking now in most regions other than Europe is a normative framework. That is what you have to start with before you talk about intermediaries. Perhaps a preliminary goal, of not just this gathering but successive gatherings, would be to agree on a diagnosis of what a normative framework or regional normative frameworks would look like before we discuss what the best intermediary is to promote those norms.

Ashbjørn Eide

I certainly think that we should encourage regional and subregional mechanisms. In Latin America, in 1948, the position was that there were no minorities. Now all Latin American countries are recognizing that they have indigenous people. Most of them are addressing these issues. It has been a tremendous development. In Asia, there is a growing awareness of minority issues. The Working Group is well supported by India, for instance. Sri Lanka has basically also supported the Working Group. In Africa, the issue is very early in the debate. Our seminars have been tolerated, but governments are

very apprehensive. The fact that the Working Group exists, and is allowed to take on more and more issues, is a learning process for governments. Encouraging the effectiveness of the existing system is something that should certainly be done.

Radhika Coomaraswamy

One thing I don't want is Asian standards on how to deal with minorities. Nothing would be worse than India and Indonesia getting together and devising Bumiputra⁶ standards for Asia. This is not the time for Asian standards on minorities.

Andrea Bartoli

The OSCE is not necessarily in the business of changing standards, but actually making the link between human rights standards and security. Twenty years from now, you'll see that people will start to realize that unless you have certain standards, you have security problems. So you better take care of them. That need is extraordinary now.

Radhika Coomaraswamy

But at this historical time, in Asia you could never get something like the Framework Convention for the Protection of National Minorities. Neelan Tiruchelvam, in his usual manner, tried to start work toward an Asian convention on human rights. And it was a nightmare. The ideas they were introducing to allow for regional scrutiny were horrible.

Ian Martin

There are certainly useful incremental things that can be done within the human rights machinery of the United Nations, perhaps within regional organizations, and certainly outside intergovernmental organizations. But I think this meeting has been right to focus on the OSCE High Commissioner on National Minorities as the most interesting and positive example of the prevention of minority situations developing into a conflict. And as Max Van der Stoep made clear, it is essentially a security and conflict prevention mechanism. I don't see any realistic possibility of its replication in other regions.

⁶ [ed.] Indigenous protections in Malaysia.

Africa and Asia are light-years from the point at which there could be an effective mechanism of that kind through regional institutions. So the question of how to carry out that kind of function within the UN system is an important question to focus on. I think it would not be in the human rights machinery, but in the Department of Political Affairs. There is a case for somebody who stands between the comprehensive responsibilities of the full-time staff and the country specific focus of those who are special representatives of the Secretary-General, who are not going to carry the experience that someone like the HCNM carries from one situation into another.

Mark Lattimer

If the HCNM is to work, then surely the prime candidate is the Americas. Two reasons: First, the normative bases are there. Secondly, there probably is a greater homogeneity of problems and possible solutions. The Americas must be the first candidate.

Simon Chesterman

Two reasons why the HCNM has been relatively successful, quite apart from regional questions is because, first, it is not a human rights mechanism. It is a security mechanism. Second, in contrast to what Alvaro de Soto said earlier, I don't think it is necessary to tie ourselves down to establishing a normative framework before you act. One of the things that the HCNM has shown is that to some extent you can make up the normative framework as you go along. The presence of the institution itself has played a major role in establishing very gentle soft norms. The policy recommendations don't read like human rights treaties. They read like gentle policy recommendations for governments. That has played a significant role in ameliorating tensions.

Ram Manikkalingam

Part of the problem that we have is the international community telling these Asians or Africans what to do. People react nationally. Start a conversation at the regional level that inquires into the practices in the Western African region, or in the eastern African region, that are successfully dealing with local minority issues. Then, we can have a parallel conversation at the national level without connecting them

directly. To reduce the resistance, maybe we shouldn't start at the top and go down but rather start at the regional level.

Radhika Coomaraswamy

The issue of starting locally based on the strengths of the societies is very important. I am not denying that. But it would be better if the UN began its conversations because at least you are then working to some extent within an international norm framework. It is good to have these local conversations, but also to link them to some extent to an international body.

Annex I:

*Documents Referred to in Text**

United Nations Documents

Charter of the United Nations, adopted 26 June 1945, entered into force 24 Oct. 1945, as amended by G.A. Res. 1991 (XVIII) 17 Dec. 1963, entered into force 31 Aug. 1965 (557 UNTS 143); 2101 of 20 Dec. 1965, entered into force 12 June 1968 (638 UNTS 308); and 2847 (XXVI) of 20 Dec. 1971, entered into force 24 Sept. 1973 (892 UNTS 119). (See <http://www.unhchr.ch/html/menu3/b/ch-cont.htm>)

Convention on the Elimination of All Forms of Discrimination against Women, adopted 18 Dec. 1979, entered into force 3 Sept. 1981, G.A. Res. 34/180, 34 U.N. GAOR, Supp. (No. 46), U.N. Doc. A/34/46, at 193 (1979), reprinted in 19 ILM 33 (1980). (See <http://www.unhchr.ch/html/menu3/b/elcedaw.htm>)

International Convention for the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, entered into force 4 Jan. 1969, 660 UNTS 195, reprinted in 5 ILM 352 (1966). (See <http://www.unhchr.ch/html/menu3/b/9>)

International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, entered into force 23 March 1976, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 999 UNTS 171, reprinted in 6 ILM 368 (1967). (See http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, adopted 15 Dec. 1992, G.A. Res. 47/135, reprinted in 32 ILM 911 (1993), 14 HRLJ 54 (1993). (See http://www.unhchr.ch/html/menu3/b/d_minori.htm)

Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A (III), UN Doc. A/180, at 71 (1948). (See <http://www.unhchr.ch/udhr/lang/eng.pdf>)

Security Council Resolution 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999). (See www.un.org/Docs/scres/1999/sc99.htm)

OSCE Documents

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference of Security and Co-operation in Europe, adopted 29 June 1990, reprinted in 29 ILM 1305 (1990); 11 HRLJ 232 (1990). (See www.osce.org/docs/english/1990-1999/hd/cope90e.htm)

Document of the Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe, adopted 3 Oct. 1991, reprinted in 30 ILM 1670 (1991). (See www.osce.org/docs/english/1990-1999/hd/mosc91e.htm)

Final Act of the Conference on Security and Co-operation in Europe, adopted 1 Aug. 1975, reprinted in 14 ILM 1292 (1975). (See www.osce.org/docs/english/1990-1999/summits/helfa75e.htm)

The Hague Recommendations regarding the Education Rights of National Minorities, adopted in 1996. (See www.osce.org/hcnm/documents/recommendations/hague/index.php3)

The Oslo Recommendations regarding the Linguistic Rights of National Minorities, adopted in 1998. (See www.osce.org/hcnm/documents/recommendations/oslo/index.php3)

The Lund Recommendations on the Effective Participation of National Minorities in Public Life, adopted Sept. 1999 (Foundation on Inter-Ethnic Relations, September 1999). (See www.osce.org/hcnm/documents/Recommendations/lund/index.php3)

Council of Europe Document

Framework Convention for the Protection of National Minorities, adopted 10 Nov. 1994, entered into force 1 Feb. 1998, ETS 157. (See conventions.coe.int/Treaty/EN/Treaties/Html/157.htm)

Annex II: ***Participants***

All biographical information is as of the time of the conference unless noted otherwise.

Martti Ahtisaari is the former President of the Republic of Finland and founder of the Crisis Management Initiative. He is also Co-Chair of the New York-based East West Institute, and the Chair of the Brussels-based International Crisis Group.

Eileen F. Babbitt is an Assistant Professor of International Politics and Director of the International Negotiation and Conflict Resolution Program at the Fletcher School of Law and Diplomacy at Tufts University.

Andrea Bartoli is a Senior Research Scholar and the Director of the Center for International Conflict Resolution at Columbia University's School of International and Public Affairs. Trained as an anthropologist, Dr. Bartoli has been actively involved in conflict resolution in Mozambique, the Sudan, Burundi, and Angola.

Simon Chesterman is a Senior Associate at the International Peace Academy (IPA) where he directs IPA's program on Transitional Administrations, which examines the role of the United Nations in state-building activities in, among other places, Kosovo, East Timor and Afghanistan. Prior to joining IPA, he worked at the International Criminal Tribunal for Rwanda.

Radhika Coomaraswamy is the United Nations Special Rapporteur on Violence against Women, and Director of the International Centre for Ethnic Studies in Colombo, Sri Lanka. She is a member of the Global Faculty of New York University School of Law.

Catriona Drew was at the time of the conference a lecturer in public international law at Glasgow University in Scotland. She is now a Lecturer in International Law in the Department of Law at the University of London's School of Oriental and African Studies.

Asbjørn Eide is former Director and present Senior Fellow of the Norwegian Institute of Human Rights. He is the former Secretary-General of the International Peace Research Institute in Oslo, and has been a member since 1981 of the United Nations Sub-Commission on Human Rights. He is presently (2004) a Professor at the Norwegian Centre for Human Rights, University of Oslo.

Yash Ghai is Sir YK Pao Professor of Public Law at the University of Hong Kong. He has taught, researched and published on constitutional law, law and development, ethnicity, human rights, and sociology of law and has been a constitutional adviser to states including Papua New Guinea, Fiji, Tanzania, Cambodia, and Kenya.

Mark Lattimer is Director of Minority Rights Group International, a British NGO that works to protect minority and indigenous rights across the world and to promote cooperation between communities.

Liam Mahony is a consultant to the Global Inclusion Program at the Rockefeller Foundation and the Center for Victims of Torture and the Collaborative for Development Action. Mr. Mahony also lectures on human rights at Princeton University.

Ram Manikkalingam is the Assistant Director of the Global Inclusion Program at the Rockefeller Foundation. He is organizing the Foundation's work in the area of peace and security, focusing on minority and human rights in armed conflict.

Ian Martin is currently Vice President of the International Center for Transitional Justice (ICTJ). Prior to joining the ICTJ, Martin served as a Special Representative of the Secretary-General in various United Nations missions.

John Packer was at the time of the conference the first Director of the High Commission on National Minorities of the Organization for Security and Co-operation in Europe (OSCE), where he previously served as Senior Legal Advisor.

Peter Rosenblum was at the time of the conference Associate Director of the Harvard Human Rights Program and a Lecturer on Law at Harvard Law School. He was formerly Program Director for the International Human Rights Law Group and Human Rights

Officer for the United Nations Centre for Human Rights. As of 2003, Rosenblum was the Lieff, Cabraser, Heimann & Bernstein Associate Clinical Professor in Human Rights at Columbia Law School.

Ken Roth is Executive Director of Human Rights Watch, a post he has held since 1993.

Nadim Rouhana served since its establishment in 2000 as Director of 'MADA: Center for Applied Social Research,' a leading research center for Israeli Palestinians, and was Lecturer in the Sociology Department of Tel Aviv University.

Alvaro de Soto has been the United Nations Secretary-General's Special Adviser on Cyprus, with the rank of Under-Secretary-General, since 1999. Before his Cyprus assignment, Mr. de Soto was Assistant Secretary-General for Political Affairs, responsible for the Americas, Europe, Asia and the Pacific (1995-1999).

Henry Steiner is Jeremiah Smith, Jr. Professor of Law at Harvard Law School. He is the founder and director of the Human Rights Program, has written on a range of human rights issues, and taught and lectured on human rights issues in over 20 countries.

Larry Susskind is Ford Professor of Urban and Environmental Planning at the Massachusetts Institute of Technology (MIT), and Head of the Environmental Policy Group at MIT. Professor Susskind is also Director of the Public Disputes Program; Visiting Professor, Program on Negotiation, Harvard Law School; and President of the Consensus Building Institute.

Max Van der Stoel was the first High Commissioner on National Minorities for the Organization for Security and Cooperation in Europe (OSCE). Prior to becoming High Commissioner, van der Stoel enjoyed a long career as a member of the Dutch Parliament and the Consultative Assembly of the Council of Europe.

Dr. I. William Zartman is the Jacob Blaustein Professor of International Organizations and Conflict Resolution, and Director of African Studies and Conflict Management Programs at the Paul H. Nitze School of Advanced International Studies of the Johns Hopkins University.

