

# Minority Rights Group International: Memorandum Regarding the Tabulation of Sikh Ethnicity in the United States Census

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## *Brief*

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*“To persuade the US Census Bureau to override the laws barring them from counting people on the basis of religion, and have them count Sikhs because of their belief that they are more than simply a religion.”*

## Introduction

The United States Census Bureau (Census Bureau) officially recognises and quantifies the existence of minority groups within its territory. The American Sikh population is estimated to be at 1 million, but are denied their right to identity.

Question 9 of the 2010 US Census form allows for self-identification of “race.” Many American Sikhs self-identify as an “ethnic minority” and have attempted to enter “Sikh” in the space marked “some other race”. However these entries were tabulated as “Asian Indian” and the Census Bureau refused to provide desegregated data.

Such a regime for refusing to document the existence of minority populations is in contravention of the US’s treaty obligations and general standards of international human rights law pertaining to the rights of minorities. Protection and promotion of minority rights aims to guarantee the rights to non-discrimination and equality for minorities, their participation in public life, and inclusion of their concerns in the disparities in social indicators such as employment, health and housing. However redressing these inequalities is dependent on the granting of the most fundamental of minority rights: the right to an identity.

## American Sikhs are a Minority under International Law

1. The US is a State party to the ICCPR and is thus bound by Article 27 which vests rights in minorities:

*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*<sup>1</sup>

2. The central tenant of minority rights is to respect, preserve and develop ethnic, religious or linguistic identity “thus enriching the fabric of society as a whole”.<sup>2</sup> This is reiterated in the Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN Decl. Min.)<sup>3</sup> and Framework Convention on National Minorities (FCNM),<sup>4</sup> which both seek to “preserve and develop the group identity” of persons belonging to “ethnic, religious and linguistic” minorities.<sup>5</sup>
3. The most commonly relied on definition for which groups *can* constitute minorities under international law states:

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<sup>1</sup> International Covenant on Civil and Political Rights, adopted on 16 December 1966, entered into force on 23 March 1976, 999 UNTS 171, Art. 27.

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<sup>2</sup> General Comment 23, Human Rights Committee, Article 27 (Fiftieth session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. RI/GEN/1/Rev.1 at 38 (1994), para. 9.

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<sup>3</sup> Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the UN GA on 18 December 1992, GA Res. 47/135.

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<sup>4</sup> Framework Convention for the Protection of National Minorities, adopted on 1 February 1995, entered into force on 1 February 1998, ETS No. 157, Preamble.

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<sup>5</sup> Asbjørn Eide, Commentary Of The Working Group On Minorities To The United Nations Declaration On The Rights Of Persons Belonging To National Or Ethnic, Religious And Linguistic Minorities, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-seventh session Working Group on Minorities Eleventh session 30 May-3 June 2005, para. 4.

*A group numerically inferior to the rest of the population, in a non-dominant position, consisting of nationals of the State, possessing distinct ethnic, religious or linguistic characteristics and showing a sense of solidarity aimed at preserving those characteristics.*<sup>6</sup>

4. Persons belonging to the American Sikh minority have a distinct language: Gurumukhi script and Punjabi (spoken). They have a distinct religion: followers of Guru Nanak and his successors. In addition they have separate customs including marriage, festivals and appearance not to mention different music, dance and other cultural aspects. They share a common ancestry originating from particular parts of the Punjab in India and are largely endogamous.
5. In addition to their distinct cultural identity, their numerical inferiority or non-dominant position is not disputed. The vast majority are not only citizens but the result of immigration as early as the nineteenth century.<sup>7</sup> They have since contributed extensively towards political life<sup>8</sup> and the armed forces.<sup>9</sup>
6. The final and most crucial aspect of minority rights, replicated in other instruments,<sup>10</sup> is the principle of self-identification.<sup>11</sup> The right to an identity can

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<sup>6</sup> Francesco Capotorti, Special Rapporteur of the Sub-commission on Prevention of Discriminating and Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (Centre of Human Rights, Geneva, United Nations, New York, 1991). Also see Recommendations 1144 & 1201 of the Parliamentary Assembly, Council of Europe for attempted definitions of “national minority”.

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<sup>7</sup> San Francisco Chronicle Documented Sikhs Landing San Francisco Chronicle April 6, 1899, p.10.

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<sup>8</sup> U.S vs Bhagat Singh Thind 1923 (1920 Bhagat Singh Thind Veteran U.S Army fought for citizenship). Dalip Singh Saund - El Centro Imperial Valley was the first Sikh and three term Congressman, 1957-1963. In 1956, Dalip Singh Saund became the first East Indian born person to be elected to the US House of Representatives (until Governor Bobby Jindal).

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<sup>9</sup> Uday Singh, a Sikh, was the First Indian in the US Army killed in Iraq; Lt. General James Campbell attended funeral in Chandigarh, 2003.

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only emanate from the self and cannot be imposed externally.<sup>12</sup> Thus right to identity can exist without persons belonging to minorities self-identifying as such.

7. The words “[i]n those States in which [...] minorities exist” implies such a principle. The “existence” of “minorities” indicates its inherence unaffected by State recognition and is expressed in Capotorti’s definition as “solidarity aimed at preserving those characteristics.”
8. Furthermore, given that minority rights are “distinct from, and additional to, all the other rights” and require the granting of specific rights<sup>13</sup> means that persons belonging to culturally distinct groups can opt out of such recognition and must self-identify as belonging to such a minority in order to access the relevant specific rights. The most basic of these are measures of non-discrimination attempting to achieve equality for vulnerable groups and even calling for the application of temporary “special measures.”<sup>14</sup>

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<sup>12</sup> E.g. Framework Convention for the Protection of National Minorities, adopted on 1 February 1995, entered into force on 1 February 1998, ETS No. 157, Art. 3.

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<sup>13</sup> The principle was first established by the Permanent Court of Justice in 1930 in Panayote Elias Dimitras, MRG Briefing: *Recognition of Minorities in Europe: Protecting Rights and Dignity.*

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<sup>14</sup> FCNM Explanatory Report, para. 34: “Paragraph 1 firstly guarantees to every person belonging to a national minority the freedom to choose to be treated or not to be treated as such. This provision leaves it to every such person to decide whether or not he or she wishes to come under the protection flowing from the principles of the framework Convention.”

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<sup>15</sup> UN Human Rights Committee, General Comment 23, para. 9.

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<sup>16</sup> General Recommendation No. 32, *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, Committee on the Elimination of Racial Discrimination, Seventy-fifth session, August 2009

9. If a culturally distinct group fulfils all of the above objective criteria but lacks the motivation to preserve that distinct group identity; they cannot be classified as minorities under international law.<sup>15</sup>
10. Conversely it also implies that the “existence” of minorities, while dependent on self-identification, is not affected by States’ (non-)recognition of such existence and is a matter of fact. However the US is obliged under CCPR Article 27 to recognise minorities that self-identify as such as long as they fulfil the objective criteria set out above.<sup>16</sup> Without the full adherence to the principle of self-identification, minorities cannot benefit from rights of non-discrimination nor access cultural rights in relation to that identity.
11. Most American Sikhs identify as an “ethnic minority,” but the US construes the Sikh identity to be purely of a religious nature and thus denies them recognition as a “race.” The inference is that the US recognises American Sikhs as religiously distinct and excludes the Sikh ethnicity from the scope of “race.”

### “Race” must include “ethnicity”

12. The US Census Bureau has stated that the data on “race” from Question. 9 will be used for “assessing fairness of employment practices, to monitor racial disparities in health, education and to plan and obtain funds for public services.”<sup>17</sup>
13. “Race” has historically alluded to a genetic or biological notion that could be objectively assessed on the basis of visual observation.

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<sup>15</sup> Framework Convention for the Protection of National Minorities (FCNM), Art. 3 and Explanatory Report, para. 34.

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<sup>16</sup> See FCNM and Explanatory Report, para. 35: “This paragraph does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual’s subjective choice is inseparably linked to objective criteria relevant to the person’s identity.”

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<sup>17</sup> <http://2010.census.gov/2010census/how/interactive-form.php>.

14. However such a formulation of “race” would be counterproductive to ensuring equality for minority groups on the basis of non-discrimination. The raising of grievances implies that the individual has self-identified as a particular “race” and seeks protection from discrimination. As such, minorities must be able to self-identify as to which “race” they belong to, in order for effective measures of non-discrimination to be implemented.
15. A note by the United States Equal Employment Opportunity Commission<sup>18</sup> strongly endorsed self-identification advising against visual identification<sup>19</sup> and is in line with a general trend away from “race” as visually observed to “race” as self-identified in the context of non-discrimination.
16. The ICERD, which binds the US, defines “racial discrimination” as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.”<sup>20</sup>
17. Sikh ethnicity is recognised in the UK. Under English law, “racial groups” for the purposes of non-discrimination are understood to be any groups defined by “colour, race, nationality or national or ethnic origins.” The English Courts have interpreted “ethnic origin” to include the Sikh identity.<sup>21</sup>

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<sup>18</sup> Equal Employment Opportunity Commission Notice of Submission for OMB Review; Final Comment Request, Federal Register (EEOC Note), Vol. 70, No. 227, Monday, November 28, 2005.

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<sup>19</sup> Id. p. 2.

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<sup>20</sup> International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), concluded on 7 March 1966, entered into force on 4 January 1969, 660 UNTS 195, Art. 1.

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<sup>21</sup> *Mandla v Dowell-Lee* [1983] 2 AC 548 (House of Lords). Lord Fraser of Tullybelton’s leading opinion interpreted the Sikh minority as a “racial group”: “For a group to constitute an ethnic group in the sense of the Act of 1976, it must in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these:

18. Thus “race” for the purposes of determining the existence of “racial disparity”<sup>22</sup> must involve the self-identification of persons belonging to “ethnic minorities”.

19. The United States Census Bureau itself stated in 2000 that: *“The concept of race as used by the Census Bureau reflects self-identification by people according to the race or races with which they most closely identify. These categories are sociopolitical constructs and should not be interpreted as being scientific or anthropological in nature.”*<sup>23</sup>

20. Therefore the Census Bureau has adhered to such developing standards, domestically and internationally, by allowing for self-identification to *any* “race”. It has desisted from providing individuals with a finite list of permissible “race” categories by allowing for the entry of “some other race”. Without this option, implementation of the principle of self-identification would be incomplete.<sup>24</sup>

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1. a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive.
  2. a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.

In addition to those two essential characteristics the following characteristics are in my opinion, relevant;

3. either a common geographical origin, or descent from a small number of common ancestors
4. a common language, not necessarily peculiar to the group
5. a common literature peculiar to the group
6. a common religion different from that of neighbouring groups or from the general community surrounding it
7. being a minority or being oppressed or a dominant group within a larger community, for example a conquered people.”

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<sup>22</sup> <http://2010.census.gov/2010census/how/interactive-form.php>.

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<sup>23</sup> [http://quickfacts.census.gov/qfd/meta/long\\_68178.htm](http://quickfacts.census.gov/qfd/meta/long_68178.htm).

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<sup>24</sup> UN Human Rights Committee, General Comment 32, para. 6.2.

21. Allowing for a “some other race” category allows those whose “ethnicity” is not included in the list provided under Question 9 or those who belong to a subgroup which they have a closer affiliation to freely self-identify as they please.
22. Many members of the Sikh community self-identify as a distinct “ethnicity” due to their characteristics, which set them apart from other groups. The identity of a Sikh person is actually a combination of culture, ethnicity, race and religion. It does not fit neatly into religion.
23. Thus many American Sikhs self-identified in line with their “Sikh ethnicity” under “race” in the Census. The US Census Bureau however chose to disregard these expressions of identity, instead identifying them as ethnically “Asian Indian” even though they laid claim to no such identity.
24. As we have already established, “race” must be self-identified. However it seems that the US Census does not consider the Sikh ethnic identity to be within the scope of “race” or “ethnicity”. Such practice is in direct contravention of the principle of self-identification, and American Sikhs cannot be labelled as “Asian Indian” when they have ascribed to no such identity. If the US Census Bureau does not accept “Sikh” as an acceptable “race”, then it cannot impose an ethnic identity on individuals by reference to their presumed national origin.
25. Nonetheless, the refusal to recognise the Sikh identity in the Census is not compatible with the principle of self-identification and the definition of “ethnic” under international law.

## Defining Ethnicity

26. Denying American Sikhs the right to identify as “Sikh” in the US Census suggests that their identity is objectively considered not to be one which is an accepted “ethnicity” or “race”. However we can observe that under international law, “ethnic” identity is determined by two factors: self-identification and the presence of a “culture”:

*Persons who belong to groups defined as ethnic would have more extensive rights relating to the preservation and development of other aspects of*

*their culture also, since ethnicity is generally defined by a broad conception of culture, including a way of life.*<sup>25</sup>

27. It is on this basis that minority rights are granted. CCPR Article 27 states that “ethnic minorities” shall not be denied the right to enjoy their culture. Given that linguistic and religious identity also have “cultures”; they constitute specific and explicit examples of “culture” while the term “ethnic minority” covers all *other* forms of culture.

28. Therefore for a group to be defined under international law as an “ethnic minority” they need only show the existence of a group culture that is separate from or in addition to their religious and linguistic identity.

29. Ethnicity has been defined as “the heritage, nationality group, lineage, or country of birth of the person or the person's parents or ancestors before their arrival in the United States”.<sup>26</sup>

30. In the case of the American Sikh minority, they have many dimensions to their identity of which religion is clearly an important aspect. As has already been established, the Sikh identity has many dimensions, which collectively are perceived of by members as an “ethnicity”.

31. A reason advanced for refusal of the Sikh identity has hinged on the presumption that they constitute a religious minority and cannot be documented due to a policy barring documentation of religious affiliation.

32. There is nothing to suggest under international minority rights law that religious and ethnic identities are mutually exclusive and that one group cannot have access to both elements of identity. To deny recognition to the Sikh minority of their “ethnicity” or to define them by solely by their religion at the expense of their “ethnicity” constitutes discrimination.

33. Therefore, even if a group is recognised as a minority in line with its express desire to that effect, the recognition of minority status will be rendered illusory and an unacceptable observance of the principle of self-identification, if the group is not

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<sup>25</sup> UN Commission on Human Rights, Commentary on UN Declaration on Minorities, E/CN.4/Sub.2/AC.5/2005/2, 4 April 2005, paragraph 6.

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<sup>26</sup> American Anthropological Association’s Response to OMB Directive 15: Race and Ethnic Standards for Federal Statistics and Administrative Reporting (Sept 1997).

recognised as the particular type of minority that it claims to constitute. Just as a State may not deny a culturally distinct group within its territory recognition as a minority; it may also not deny the group to choose which type of minority it self-identifies as.

34. In the case of American Sikhs, they are automatically classified with their assumed national origin but not their primary identity that of being Sikh.
35. Nonetheless the principle of self-identification while fundamental is not absolute. There are objective criteria which set the boundaries of the space available for the principle of self-identification to be observed.<sup>27</sup> The objective criteria determine the scope of minority rights. Thus if the resultant identity resulting from the exercise of self-identification is within this scope, complete deference must be given to that choice.
36. Just as there is a finite scope in which “minorities” may lay claim to such a status, there is similarly a finite scope for each of the separate categories of minorities listed in Article 27: ethnic, linguistic and religious.
37. In addition, it has been argued that the use of subjective criteria, such as a will on the part of the members of the groups in question to preserve their own characteristics and to be accepted as part of that group by the other members, combined with certain specific objective requirements, such as those listed in the Capotorti definition, should be taken into account. It is now commonly accepted that recognition of minority status is not solely for the State to decide, but should be based on both objective and subjective criteria.
38. If ethnicity denotes the wider concept of culture and the term religious minority refers to religious identity, it does not then mean that the two are mutually exclusive. It would also mean that any group which is recognised to have a culture which does not neatly fit the categories of religion or language can rely on “ethnic” head to access minority rights in relation to their culture and identity.

### Non-discrimination

39. The most immediate and essential adverse effect of non-recognition is that the American Sikh minority is unable to refer to any official population figures of their ethnic minority. They are denied the right to be counted. This affects their sense of

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<sup>27</sup> Explanatory Report to the Framework Convention for the Protection of National Minorities, adopted on 1 February 1995, entered into force on 1 February 1998, ETS No. 157, para. 34.

identity. They cannot politically participate in the decisions which affect them. They will not be able to access group rights specific to their unique culture which extend beyond religious beliefs, such as educational institutions and other cultural considerations unconnected with their religious beliefs.

40. The CERD has stated that:

*States parties fail to collect data on the ethnic or national origin of their citizens or of other persons living on their territory, but decide at their own discretion which groups constitute ethnic groups...that are to be recognized and treated as such...the Committee draws to the attention of States parties that the application of different criteria in order to determine ethnic groups or indigenous peoples, leading to the recognition of some and refusal to recognize others, may give rise to differing treatment for various groups within a country's population.*<sup>28</sup>

41. The Census Bureau desegregates groups with significantly small populations. The American Sikh population is thought to be over 1 million. As a large group that has grown since settlement over 200 years ago, it has constantly voiced its desire to self-identify for many years.

42. Completely missing the autonomous existence of 1 million people in the USA means that their protection will critically be overlooked. This is a huge flaw in both the census and compliance of US with CERD. Trends of one of the most discriminated against Asian group cannot be obtained from this data without being flawed.

## Hate Crimes

43. Sikhs have been the victims of hate crimes, racial profiling and discrimination, especially since the horrific terrorist attacks on 9/11. Hate crimes cannot be properly reported and categorized unless Sikhs are recognized as a separate ethnic group and counted by the Census. Counting Sikhs separately will help government to document, prosecute, and prevent hate crimes. Below are only a few illustrative examples:

- i. Balbir S Sodhi was the first hate crime victim post 9/11. He was shot and killed in Arizona outside his gas station.

<sup>28</sup> General Recommendation No. 24: Reporting of persons belonging to different races, national/ethnic groups, or indigenous peoples (Art. 1) : 27/08/99. Gen. Rec. No. 24. (General Comments).

- ii. Baljeet Chadha was punched and his nose and eye socket broken outside a gurdwara (Sikh place of worship after being called a f\*\*\*\* arab in late 2008.
- iii. In the state of NY, a Sikh boy was assaulted and his hair was cut in school forcibly, a guilty verdict was given in the case for a hate crime.
- iv. Nirvair Singh was visiting Orlando, Florida from India and didn't speak English very well. He became very ill while staying in a hotel, and after being deserted by the Uncle he was visiting, decided to leave and go back to India. While trying to get a taxi, he walked into a bank to get help getting a taxi and passed out from a high fever while waiting. The bank employees assumed he was a threat, possibly with a bomb, because he had luggage with him and had a beard and turban, and called the police. The police came in with a SWAT team and attacked him with police dogs, cut off his clothes, and blew up his suitcases without giving him a chance to explain anything.
- v. In New Jersey, a Sikh Boy's *patka* (head covering) and *kesh* (hair) were set on fire during a fire drill in school by a fellow student.
- vi. Sikhs are regularly subjected to special screening by the Transportation Security Administration (TSA), by virtue of wearing the turban.

These examples demonstrate the dire need for measures needed to protect American Sikhs from persecution and violence on the basis of their distinct ethnicity. International law explicitly anticipates and prompts such treatment of minorities.<sup>29</sup> An accurate count of the population will better ensure protection and better inform authorities of the needs of a community that is being targeted.

## Conclusion

It has been shown in respecting, persevering and developing the identity of minority groups, it is essential to give prominence and defer to the principle of self-identification. However such a subjective principle must be bound by objective limits.

The principle thus implemented will compel the recognition of groups as minorities if they satisfy these objective criteria. However it will also allow for those groups that fulfil such objective criteria but lack the desire to preserve their culture to choose not to be identified and treated as minorities.

<sup>29</sup> UN Declaration on Minorities, Commentary, para. 32, FCNM Exp. Note, Art 6 para. 2, para. 50.

Consequently the same principle must be applied to preserving and developing a particular type of minority identity through its recognition. Therefore we have established that under international law, the availability of an “ethnic” identity for a group need only be conditioned on evidence of a “culture” which is not solely<sup>30</sup> religious or linguistic and covers all cultural identities including race.

This analysis has shown that American Sikhs have a right under international law to self-identify as “ethnic minorities” based on their cultural traits which cannot be isolated to those of a religious nature and reinforced by a strong sense of solidarity aimed at preserving their culture. The United States Census Bureau has a duty to correctly tabulate minorities, including Sikhs, and should provide desegregated data for Sikhs who write in “Sikh” under the “Some Other Race” category.