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Conceptualisation and operationalisation of minorities in international law: Past experiences and new avenues

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ABSTRACT

Despite decades of scholarly effort, there is still no universally accepted definition of the concept of minorities or the criteria for minority membership. Beyond its theoretical importance, the lack of a definition also has practical significance, as it may easily lead to the abuse of minority rights. In this paper, we offer a brief historical overview of the various definitional attempts in international law, including those enshrined in legal documents as well as in the practice of adjudicatory bodies. Starting from the era of the League of Nations and the case-law of the Permanent Court of International Justice, we continue by looking at major developments within the United Nations (with special attention to the practice of the Human Rights Committee) as well as the Council of Europe (and the approach of the Advisory Committee of the Framework Convention for National Minorities). Our aim is to explore the trajectory from old to recent conceptual endeavours, where the major dividing line is drawn between the relatively narrow notion of minorities (covering only autochthonous or traditional groups) as opposed to a more inclusive view (including also immigrants and, potentially, visitors under the minority protection mechanisms).

KEYWORDS

conceptualisation, operationalisation, national and ethnic minorities, international law, international jurisprudence, draft global convention on minority rights

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'[T]he scale of the minority concept is equalled only by its vagueness.'

Jules Deschênes[1]

1. INTRODUCTION: THE DEFINITIONAL PROBLEM

The lack of a definition of the term 'minority' has haunted the international community for quite a long time, and despite all the efforts made, there is still no universally accepted definition of the minority concept. In this paper, we offer a brief historical overview of the various definitional attempts in international law, including those enshrined in legal documents as well as in the practice of adjudicatory bodies. Our aim is to offer an overview of the major institutional interpretations of 'minority' at the international level and to explore the trajectory from old to recent conceptual endeavours, highlighting the differences between them. In the meantime, we also hope to convince the reader that the issue of definition is not only of theoretical importance, but also bears practical significance, since confusion about the exact scope of the right-holders may easily lead to the abuse of minority rights (i.e., 'ethnobusiness').

From a historical perspective, the question of minorities and identity were not of primary interest under international law. Since the 17th century, from which time we have a few examples of international treaties[2] that address the situation of (certain) national, linguistic or religious minorities, identity issues have emerged in post-conflict settlements, mainly in peace treaties. The minority-relevant treaty provisions named particular groups within a State that were the subject of international protection. There was no need to define these groups as usually there was a cultural, religious or national bond between the protected minority and the protecting State: the members of the minority living on a ceded territory could be former nationals of the protecting power. This logic was, by and large, also followed in the minority specific provisions of the post-WWI peace treaties under the League of Nations.[3] However, instead of referring to a protecting State as an external guarantor of the rights of a specific minority, the League of Nations was entrusted with securing guarantees for implementation. Still, these treaties did not introduce a general protection for minority rights, but granted certain rights (mainly on language use, freedom of religion, and education) to specific minority groups in each treaty. As Thornberry rightly noted, 'international law hesitated to enter the age of human rights. Instead, it entered the age of minority rights' – although without providing any general system for protection.[4]

After WWII the UN did not make any attempt to rebuild the League system or substitute it with a new system of its own. This restrained approach was not only reflected in the lack of

[1]UN Human Rights Commission, Sub-Commission on Prevention of Discrimination and Protection of Minorities (1985) Proposal concerning a definition of the term "minority" submitted by Mr. Jules Deschênes, E/CN.4/Sub.2/1985/31, 14 May 1985. para. 3.

[2]Among others the Treaty of Oliva (1660), the Treaty of Karlowitz (1699), and the Treaty of Adrianople (1829). For more on these treaties, see Thornberry (1991) 24–28.

[3]Thornberry (1991) 38–52.

[4]Thornberry (1991) 40.

minority protection provisions in the Paris Peace Treaties of 1947,[5] but also in the fact that any reference to minorities was omitted from the UN Universal Declaration of Human Rights (UDHR, 1948). In fact, both major international human rights documents adopted in these years, the UDHR and the 1950 European Convention of Human Rights (ECHR) contain a guarantee of non-discrimination (Article 2 and Article 14, respectively, the latter also prohibiting discrimination on the basis of membership of a national minority) but no provision on minority rights. Does this mean that the question of identity is irrelevant or self-evident in the context of modern international human rights? Indeed, modern international law uses identity terms loosely: the concepts of race, ethnicity, and nationality appear mostly

> when setting forth standards for the recognition of collective rights or protection from discrimination, establishing criteria for asylum, labeling actions as genocide, or requiring a 'genuine link' in citizenship law, without actually providing definitions for these groups or of membership criteria within these legal constructs.[6]

Besides 'minority', other terms such as 'people' and 'nation' are also used interchangeably in international documents, without any clear definition. Consequently, conceptual ambiguity and fluidity are present when it comes to both conceptualisation (what is a minority?) and operationalisation (who belongs to a minority?).

The lack of definition and the reference to such loose concepts in international legal instruments open the space for States to give divergent interpretations of the term 'minority' in their domestic legislation. It is possible that any definition of any term related to individual identity may be problematic inasmuch it is complex and - at least in part - is constructed through and in dialogue with 'meanings imparted by a structured society'.[7] While many segments of individual identity are irrelevant from a legal point of view (literary taste, membership of soccer fan clubs, etc.), national, ethnic and linguistic identity often represents the bond between individual citizens that constitutes the political community foundations of the State. Indeed, identity issues weigh heavily when States design education and language policies, or policies aimed at promoting social cohesion, inclusion, etc. In this sense it matters how the State identifies certain communities, and how it approaches the membership boundaries for minority protection mechanisms.[8]

Even under international law the need for definition emerges regularly in codification discussions and there have been many attempts to offer a universal definition of the term 'minority' without any ever being accepted in a legally binding instrument. The major challenge in this regard is whether it is possible to determine the scope of application of international minority rights provisions without a broadly embraced definition of 'minority'. Pentassuglia explains this problem well when he points out that many argue that a legal definition cannot be reached since it is extremely difficult

[5]With the exception of the Annex to the Treaty of Peace with Italy (10 February 1947), that contained the so-called Gruber-De Gasperi Agreement on the situation of German-speakers in South Tyrol.

[6]Pap (2021) 213. For a broader discussion of group identities, see Pentassuglia (2018a).

[7]Stets and Burke (2000) 226.

[8]Cf. Pap (2021) 213–14.

> to identify common elements which are able to grasp the plurality of existing relevant communities living within states and […] the existence of and coherence within a minority group are basically context-dependent (namely factual) matters. […] On the other hand, the prevailing view is that it is possible to find some elements of the concept of minority endorsed by international law and therefore to determine the scope of application of the respective rules *ratione personae*.[9]

We do not aim here to consider in depth the legal and theoretical problems of defining minorities in general,[10] but we need to highlight that among the many attempts to offer a definition, the most often quoted one was provided by Francesco Capotorti in 1979. As a Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his study on the rights of minorities, he used the following working definition that became widely acknowledged in academia:

> a minority is a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their cultures, traditions, religion or language.[11]

The most important elements distinguishing a minority group from the majority population are defined in terms of ethnicity, history, language, culture and religion. In addition to these features, other objective elements are also present, such as the numerical inferiority of minorities and their non-dominant position. The common will of the members of the minority group to preserve their distinctive characteristics is a subjective element that is implicitly behind all co-operative efforts to maintain the ethnic, linguistic, or religious identity of a minority. Essentially, the collective will is the reflection of the individuals' refusal to be assimilated by the majority.[12]

Even if Capotorti's definition seems to cover most, if not all, the relevant elements of a minority, it has not been officially endorsed by the United Nations.[13] One of the major questions and debates in regard to this definition is the existence of historical links between the minority and the State, and the question of citizenship: does a group need to have resided for a certain minimum period of time in the State territory in order to be recognised as a national minority? And should the members of the minority community be expected to hold the citizenship of the State in which they live and wish to be recognised as a minority?[14]

It is not by chance that neither in the UN, nor in the Council of Europe (CoE) has a broad consensus been reached among States to adopt a legally binding definition of 'minority' – States prefer to keep their discretion on how to decide which groups they recognize, and want to protect under their jurisdiction. This flexible, somewhat arbitrary approach is reflected in

[9]Pentassuglia (2002) 55.

[10]For this, see Packer (1993); Pentassuglia (2000), (2002) 55–75; Jackson-Preece (2014).

[11]Capotorti (1979) para. 568.

[12]The combination of the objective and subjective elements has been referred to as the 'two poles' of minority identity. O'Nions (2007) 184.

[13]De Villiers (2021) 53.

[14]Specific issues arise in connection to the Roma, whose minority status is problematic under many (especially earlier) definitional proposals, particularly in relation to the absence of a specific territory. O'Nions (2007) 180–86.

international law, as well. It should also be underlined that minorities do not participate in international law-making procedures. As international law is by definition designed and adopted by States, minorities are rather the objects of international minority protection provisions than the subjects (even if they may potentially be seen as actors in international relations).[15]

Against this background, Section 2 gives a brief overview of how international treaties that directly address identity issues and are relevant for minorities tackle the problem of the lack of definition. In Sections 3 and 4, contributions of international jurisprudence to the conceptualisation and operationalisation of minorities are presented, from the classical approach (case-law of the Permanent Court of International Justice and the UN Human Rights Committee) to the most recent endeavours, with special emphasis on the draft global convention on minority rights, proposed by Fernand de Varennes, former UN Special Rapporteur on Minority Issues. Section 5 offers our final conclusions.

2. PROTECTION WITHOUT DEFINITION – MINORITIES IN INTERNATIONAL LAW

Even if after WWII there was a great scepticism about minority rights in the UN, the adoption of the Genocide Convention in the UN General Assembly in 1948[16] was clearly considered as a minority protection tool.[17] Under the Convention,

> genocide means any of the following acts committed with intent to destroy, *in whole or in part, a national, ethnical, racial or religious group*, as such: (a) Killing members of the group, (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group (emphasis added).

The fact that the drafters did not refer to nations but used the broader term 'national, ethnical, racial or religious group' signs that 'they understood it as a prolongation of the protection that inter-war treaties had accorded to national minorities'.[18] This definition was reproduced *verbatim* in Article 6 of the Rome Statute of the International Criminal Court (ICC), Article 2 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and Article 4 of the Statute of the International Criminal Tribunal for Rwanda (ICTR). In addition, States that have enacted crimes of genocide in their domestic criminal codes have, in most cases, satisfied themselves with repeating the text of Article 2 of the Genocide Convention.

Besides the Genocide Convention, major human rights instruments adopted within the UN also refer to different individual characteristics, and identities in provisions prohibiting discrimination. As the 1948 Universal Declaration of Human Rights formulated it, '[e]veryone

[15] Bíró (2000).

[16] Convention on the Prevention and Punishment of the Crime of Genocide approved by General Assembly resolution 260 A (III) of 9 December 1948; entry into force 12 January 1951. United Nations, Treaty Series, vol. 78, 277.

[17] Schabas (2008) 190–91.

[18] Schabas (2008) 211.

is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. This list was not intended to directly defend specific groups; it was understood as a general principle for securing access for every person to human rights on an egalitarian basis. Consequently, there was no need to offer a clear definition of the identity characteristics listed, but the terms 'language', 'religion', 'race' and 'national origin' were already seen during the *travaux préparatoires* as also protecting members of minorities from discrimination.[19]

The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) also affects minorities, though it is concerned with racial groups in general and not specifically minorities. Article 1 of the Convention states that 'the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin'. In practice many States that deny the existence of minorities on their territory in regard to Article 27 of the International Covenant on Civil and Political Rights (ICCPR, see below) also do this in reports to the monitoring body of ICERD. As a matter of fact, there are serious divisions among States regarding the aims and objectives of the ICERD with respect to minorities. Thornberry points out that while there are divergent views about how minorities could be affected by the ICERD, there is an overall attitude among States favouring 'integration' under their treaty obligations.[20]

The first major step towards recognising specific minority rights in international human rights law was the adoption of the ICCPR in 1966, which includes a separate article on the rights of persons belonging to 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.

Article 27 is deeply rooted in the individualistic and universalistic human rights language of the Covenant when it focuses on the rights of *persons* belonging to minorities. The ICCPR does not offer a definition of 'minority' or any hint on how subjective and/or objective elements should be taken into consideration for operationalising the term. In order to qualify for the protection under Article 27, an individual needs to be a member of an 'ethnic, religious or linguistic minority'.[21] During the *travaux préparatoires* there seemed to be a consensus on not hindering the process of assimilation. Obviously, only voluntary assimilation may be accepted and the Human Rights Committee's practice certainly requires States to refrain from forced assimilation. Many State delegations were also concerned about what 'existing' should mean and argued that minorities under Article 27 should have historical ties with the State where they live and the article should not be used to encourage the emergence of new minorities.[22] The final text of the article does not require citizenship as a condition for recognising a minority,

[19]Morsink (1999) 102–103.

[20]Thornberry (1991) 277–80.

[21]The terms ethnicity, religion, language and culture were also left undefined during the drafting of Article 27. For an exploration of the meaning of these terms, see Ramaga (1992) 412–15, 425–28.

[22]Taylor (2020) 795–96.

and protection is available to all 'persons' belonging to such a group who share in common a culture, religion and/or a language.

An elaborated expression of minority rights norms was reflected in the adoption of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in 1992. Even though this instrument was adopted as a legally non-binding resolution by the General Assembly, it marks a new stage within the UN as it offers a more comprehensive assessment of minority rights than Article 27 of the ICCPR. The Declaration was inspired by Article 27; nonetheless, it extends the personal scope by adding the term 'national minorities' to the list of persons belonging to 'ethnic, religious or linguistic minorities'. Asbjørn Eide, in his commentary to the Declaration, argues that this extended terminology does not change the scope of application beyond the groups mentioned in Article 27. His main argument is that '[t]here is hardly any national minority, however defined, that is not also an ethnic or linguistic minority'.[23] Indeed, the Declaration in its substantive provisions does not make any difference between the four groups. Still, Eide notes that the distinction between national and other minorities may refer to the differentiated approach in their entitlements that may help to overcome the concerns about citizenship requirements or other distinctions between 'old' and 'new' minorities.[24]

Considering the regional contexts, outside Europe there is no regional international instrument dedicated to the rights of minorities. Both the American Convention on Human Rights (1969) and the African Charter on Human and Peoples' Rights (1981) contain a non-discrimination clause that may potentially be relevant also for minorities. Article 1 of the American Convention prescribes that States Parties guarantee for all persons under their jurisdiction the exercise of their rights 'without any discrimination for reasons of *race*, color, sex, *language*, *religion*, political or other opinion, *national* or social *origin*, economic status, birth, or any other social condition' (emphasis added). The African Charter includes a similar formulation under Article 2:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as *race*, *ethnic group*, colour, sex, *language*, *religion*, political or any other opinion, *national* and social *origin*, fortune, birth or other status (emphasis added).

Neither provision mentions minority membership *per se* among the bases of discrimination.

In turn, the European Convention on Human Rights (1950) explicitly refers to minorities in its Article 14:

> '[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, *association with a national minority*, property, birth or other status' (emphasis added).

[23] Eide (2001) para. 6.

[24] 'The best approach appears to be to avoid making an absolute distinction between "new" and "old" minorities by excluding the former and including the latter, but to recognize that in the application of the Declaration the "old" minorities have stronger entitlements than the "new".' Eide (2001) para. 11.

Nevertheless, the Convention does not offer any definition and the case-law of the European Court of Human Rights does not suggest a consistent understanding of the term.[25]

When new initiatives emerged in the early 1990s within the Council of Europe to dedicate a specific instrument to the rights of minorities, the Parliamentary Assembly of the Council of Europe (PACE) intended to address this lacuna. In the recommendation on an additional protocol on the rights of minorities to the ECHR the PACE offered a definition requiring both subjective and objective elements:

> the expression "national minority" refers to a group of persons in a state who: a. reside on the territory of that state and are citizens thereof; b. maintain longstanding, firm and lasting ties with that state; c. display distinctive ethnic, cultural, religious or linguistic characteristics; d. are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state; e. are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.[26]

This recommendation has not been endorsed by States Parties and instead of an additional protocol to the ECHR, a separate treaty, the Framework Convention for the Protection of National Minorities (FCNM, 1995) was adopted on the rights of minorities.

The FCNM contains no definition of the notion of 'national minority' and as the Explanatory Report underlines, in the absence of a broad consensus among States Parties it is not possible to offer a definition at all.[27] The FCNM builds on the individual right to free self-identification (Article 3) and identifies four essential elements of the identity of a national minority: religion, language, traditions and cultural heritage (Article 5). Since there is no legal definition of 'national minority', the individual choice to declare membership of a minority is, in principle, not limited by further, objective requirements. However, the Explanatory Report notes that not all ethnic, cultural, linguistic or religious differences lead necessarily to the creation of national minorities.[28] And while Article 3 (1) guarantees to every person belonging to a national minority the freedom to choose to be treated or not to be treated as a member of minority,[29] it is not an unlimited right to choose minority identity. 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 FCNM. However, in the Explanatory Report it is clearly stated that this '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'.[30] Regrettably, the Explanatory Report does not provide further guidance as to what these objective criteria may be.

[25]See the article of Chronowski and Nagy in this special issue.

[26]PACE (1993) Art. 1.

[27]FCNM EXREP (1995) para. 12.

[28]FCNM EXREP (1995) para. 43.

[29]Similarly, para. 32. of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE/OSCE of 1990 reads as follows: 'Persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will.'

[30]FCNM EXREP (1995) para. 35.

The only legally binding multilateral document relevant to the rights of minorities that contains a definition is the European Charter for Regional or Minority Languages (ECRML, 1992). Article 1 of this treaty prescribes that regional or minority languages are 'traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population'; and 'different from the official language(s) of that State'. Importantly, this provision *expressis verbis* excludes dialects of the official language(s) of the State and the languages of migrants. As the Explanatory Report underlines, the idea behind the adoption of the ECRML was to safeguard the cultural heritage represented by regional or minority languages,[31] and the ECRML does not address either specific minority rights claims and minorities, or 'new' minorities. As it was explained,

> [t]he Charter does not deal with the situation of new, often non-European languages which may have appeared in the signatory States as a result of recent migration flows often arising from economic motives. In the case of populations speaking such languages, specific problems of integration arise.[32]

Alas, the ECRML was not seen as an appropriate instrument to address these problems.

3. CONTRIBUTIONS OF UNIVERSAL INTERNATIONAL JURISPRUDENCE – THE CLASSICAL APPROACH

Due to the lack of definition of minorities and the identification of persons belonging to them in international documents, one must look at the existing practice in international relations for further guidance. Whereas adjudicatory bodies do not identify clear-cut boundaries of minority-related terms and especially the right-holders associated with them,[33] certain conceptual elements and operationalisation strategies can be deduced from their case-law. For instance, international criminal tribunals have been regularly confronted with the task of identifying groups protected by the Genocide Convention. The lack of definition in the Convention has given space to specific adjustments to operationalisation in practice. As part of their effort to define the four protected groups, the ICC, the ICTY and the ICTR have increasingly shifted from an objective to a subjective approach, or a combination of these approaches with an emphasis on the subjective approach. Thus, group membership has not been determined by means of uncertain objective parameters such as skin colour, but by the perpetrator's perception of the group's differentness.[34]

In this article we cannot provide an exhaustive analysis of the relevant jurisprudence of all international and regional monitoring bodies; instead we focus on two universal international fora: the Permanent Court of International Justice (PCIJ, the judicial organ of the League of

[31] ECRML EXREP (1992) paras. 10–12.

[32] ECRML EXREP (1992) para. 15.

[33] Vizi (2013) 9–10. For example, when we consider peoples' right to self-determination, it depends mostly on political circumstances whether one community can appeal to it successfully or not; in fact its application is outside the jurisdiction of international law. Musgrave (1997) 258.

[34] Lingaas (2015) 1–2.

Nations) and the UN Human Rights Committee (UNHRC, supervising the implementation of the ICCPR). From a chronological perspective, the practice of these two bodies constitutes the classical approach in the conceptualisation and operationalisation of minorities, although their views are often divergent, and in many ways the UNHRC's approach is more in conformity with the recent trends reflected in the practice of the Advisory Committee of the FCNM and the draft global minority convention (see Section 4).

3.1. The case-law of the Permanent Court of International Justice

The treaty approach of the League of Nations system was *ad hoc*, region-specific, racially oriented,[35] and crucially, unconcerned with the general notion of minorities. Nevertheless, its minority concept included elements of religion, language, nationality and ethnicity – the existence of which was not disputed because the minority treaties recognised specific and uncontended groups.[36] Importantly, one of the first attempts to define minorities under international law is attributed to the League of Nations' rapporteur on minority issues, Mr. de Mello Franco of Brazil:

> the mere co-existence of groups of persons forming collective entities, racially different, under the territory and within the jurisdiction of a State, is not sufficient to create the obligation to recognise the existence in that State, side by side with the majority population, of a minority requiring a protection entrusted to the League of Nations. In order that a minority, according to the meaning of the present treaties, should exist, it must be the product of struggles, going back for centuries, or perhaps for shorter periods, between certain nationalities, and of the transference of certain territories from one sovereignty to another through successive historic phases.[37]

Starting with a negative statement, this definition recognised minorities in the context of historical struggles between groups which also involved territorial changes.[38] In fact, the relevant judgments and advisory opinions of the PCIJ do concern groups under such circumstances, invariably existing in Europe, and therefore they operate with a relatively narrow concept of minorities.

As far as definitional issues are concerned, in the 1923 *Acquisition of Polish Nationality* case, the Court allowed that minorities need not necessarily be nationals of the given State (in this case, Poland). Based on Article 2 of the Polish Minority Treaty, which prohibited discrimination on the basis of, *inter alia*, nationality, the PCIJ concluded that 'the term 'minority' seems to include inhabitants who differ from the population in race, language or religion, that is to say, among others, inhabitants of this territory of non-Polish origin, whether they are Polish nationals or not'.[39] What was needed, though, was the existence of a link which effectively attached

[35]As Ramaga (1992: 416) explains, in the 19th and early 20th centuries, 'race' was commonly used as a synonym for nation/nationality or ethnic group/ethnicity; therefore, references to 'race' in the minority treaties and the PCIJ's advisory opinion on the Acquisition of Polish Nationality (see below) probably implied characteristics other than physical or genetic. For a good analysis of the racial criterion within the League system, see Ramaga (1992) 414–19.

[36]Ramaga (1992) 409.

[37]Quoted by Hannum (2012) 54.

[38]Hannum (2012) 54.

[39]PCIJ: Acquisition of Polish Nationality, Advisory Opinion of 15 September 1923, 14–15.

these persons to the territory of the State.[40] A decade later, interpreting the same treaty, the Court distinguished between 'minorities in the broad sense and minorities in the narrow sense'. The former – non-citizens of the State – enjoyed protection of life, liberty and freedom of religion, whereas the latter – citizens – enjoyed additional rights with respect to civil and political matters and primary education.[41] As Hannum points out, in both cases, reference was made to the terms of the treaty at issue, and the Court did not purport to address the broader question of what a minority is.[42]

In turn, in the 1930 *Greco-Bulgarian Communities* case, the Court was called upon to define 'community' – the term that was used in the 1920 treaty between Greece and Bulgaria concerning reciprocal voluntary emigration. The Court basically equated 'communities' with 'minorities',[43] and provided a nuanced definition, including both objective, external characteristics, and subjective criteria:

> 'the "community" is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other… [T]he Convention regards the conception of a "community" from the point of view of this exclusively minority character which it has had for centuries past in the East'.[44]

As can be seen, the Court based its definition on historical circumstances, specifically characteristic of (Eastern) Europe. In addition, the PCIJ asserted that whether a minority existed is a question of fact, not of law; therefore, the domestic legislation is only of secondary importance.[45] This definition was later confirmed *verbatim* in the *Minority Schools in Albania* case.[46]

Regarding operationalisation, in the *Rights of Minorities in Upper Silesia (Minority Schools)* judgment, the Court admitted that there might be some doubt as to who belonged to a minority, especially in cases of uncertain language knowledge, plurilingualism or dual identities: 'Such an uncertainty might for example exist, as regards language, where either a person does not speak literary German or literary Polish, or where he knows and makes use of several languages, and, as regards race, in the case of mixed marriages.'[47] The case originated from a disagreement between Germany and Poland as to the principle which determines the question of whether a person does or does not belong to a racial, linguistic or religious minority. Whereas Germany considered that 'this question must be left to the subjective expression of the intention of the

[40]PCIJ: Acquisition of Polish Nationality, 15.

[41]PCIJ: Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion of 4 February 1932, 39.

[42]Hannum (2012) 55.

[43]Hannum (2012) 56.

[44]PCIJ: Interpretation of the Convention between Greece and Bulgaria Respecting Reciprocal Emigration (Greco-Bulgarian Communities), Series B, No. 17, Advisory Opinion of 31 July 1930, 21–22.

[45]PCIJ: Greco-Bulgarian Communities, 22.

[46]PCIJ: Minority Schools in Albania, Advisory Opinion of 6 April 1935, 11.

[47]PCIJ: Rights of Minorities in Upper Silesia (Minority Schools), Series A, No. 15, Judgment of 26 April 1928, 34.

persons concerned, and that his intention must be respected by the authorities even where it appears to be contrary to the actual state of facts' (subjective principle), Poland was of the opinion that minority membership was a question of fact and not one of intention (objective principle).[48] The Court adopted an intermediate position: it rejected the idea that belonging to a minority could be defined solely as a question of the intention of the individual, but it also confirmed that a declaration of minority status could not be verified or disputed by the authorities (a practice which was specifically prohibited in the German-Polish convention at issue).[49] This view was confirmed in the 1931 *Access to German Minority Schools in Upper Silesia* case, where the PCIJ repeated its principled statement: 'the question whether a person does or does not belong to a racial, linguistic or religious minority, [is] subject to no verification, dispute, pressure or hindrance whatever on the part of the authorities'.[50]

3.2. The jurisprudence of the UN Human Rights Committee

The practice of the UN Human Rights Committee offers little guidance with regard to the conceptualisation and operationalisation of traditional (national, ethnic) minorities. In turn, the Committee has spent a great deal of time and effort answering these questions concerning indigenous peoples. In both instances, the relevant cases are based on Article 27 of the ICCPR, which does not even mention the term 'indigenous'. Bearing in mind the obvious differences between the two groups and the distinct legal frameworks governing their status, we do consider that ultimately both categories are autochthonous minorities,[51] and thus (at least some of) the findings regarding indigenous peoples can also be applied analogously to national minorities.

In its often-quoted general comment on Article 27, the UNHRC had every opportunity to give a proper definition of minorities, or at least of persons belonging to them, when elaborating the personal scope of the provision. Yet, the Committee only indirectly and briefly dealt with conceptual issues. Setting out that 'the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language', it claimed that Article 27 does not require members of a minority group to be citizens of the State party.[52] For the Committee, 'it is not relevant to determine the degree of permanence that the term "exist" connotes', since under Article 2(1) States are required to ensure that the rights protected under the ICCPR are available to all individuals subject to their jurisdiction, except rights which are expressly applicable to citizens. Thus, Article 27 also entitles non-nationals, including migrant workers or even visitors.[53]

Hurst Hannum points out that when drawing up its General Comment, the UNHRC did not refer to the *travaux preparatoire* of the ICCPR; however, anyone examining the meaning of

[48]PCIJ: Rights of Minorities in Upper Silesia, 32.

[49]PCIJ: Rights of Minorities in Upper Silesia, 32–35.

[50]PCIJ: Access to German Minority Schools in Upper Silesia, Series A/B, No. 40, Advisory Opinion of 15 May 1931, 13–14, cf. 19.

[51]To be precise, not all indigenous peoples constitute a minority, but when they do, they are protected under Article 27. See, UNHRC: General Comment No. 23, UN Doc. CCPR/C/21/Rev.1/Add.5, 26 April 1994, para. 3.2.; UNHRC: *Poma Poma v. Peru*, Communication No. 1457/2006, Views of 27 March 2009, CCPR/C/95/D/1457/2006, para. 7.2.

[52]UNHRC: General Comment No. 23, para. 5.1.

[53]UNHCR: General Comment No. 23, paras. 5.1, 5.2.

minority at the time the treaty was being drafted will come to a quite different conclusion.[54] In fact, the annotations on the draft of the two Covenants, prepared by the Secretary-General in 1955, are quite clear about the agreement that the minority clause (then article 25) 'should cover only separate or distinct groups, well-defined and long-established on the territory of a State'.[55] The document adds that it was also understood that the provisions concerning the rights of minorities 'should not be applied in such a manner as to encourage the creation of new minorities or to obstruct the process of assimilation'[56] – a clear indication that immigrants are not protected. Another well-respected commentator, Gaetano Pentassuglia, also agrees that the Committee's expansive view on the notion of minorities is not entirely persuasive and not supported by the practice of States parties, including state reports submitted to the Committee.[57] Still, the Committee's support for such a broad concept of minorities is also evident from the reporting procedure, during which it regularly asks questions on immigrants under the consideration of Article 27.[58]

Importantly, the General Comment stated that the protection of minority identity is dependent on the recognition of the group.[59] In this regard, the Committee highlighted that the existence of minorities cannot be arbitrarily decided by States, but requires to be established by objective criteria.[60] While the General Comment does not provide further guidance as regards these (beyond a common culture, religion or language), it does declare that States cannot refuse to recognise their minorities by referring to the principle of non-discrimination.[61] Also during the consideration of country reports, the Committee questioned the attitude of those States (e.g. Algeria, Burundi, Egypt, Morocco, Republic of Korea) who refused to recognise the existence of minorities in their territory, or applied a narrow concept of minorities in their constitutions or other legal acts, thus confining protection only to their linguistic minorities (Italy) or limiting their definitions to national minorities (Russia, Ukraine).[62]

A year before General Comment no. 23 was adopted, the UNHRC published its views in the *Ballantyne, Davidson and McIntyre v. Canada* case. The authors of the communication challenged legislation in Quebec that prohibited the use of any other language than French in commercial signs. The submission raised the question whether English-speakers within the province of Quebec qualify as a minority for the purposes of Article 27. In a contested decision,

[54]Hannum (2012) 60.

[55]UN General Assembly: UN Doc. A/2929, 1 July 1955, p. 181, para. 184. Cited by Hannum (2012) 61.

[56]UN Doc. A/2929, p. 182, para. 186.

[57]Pentassuglia (2000) 18–36, (2002) 60–61.

[58]Spiliopoulou Åkermark (1997) 146.

[59]UNHCR: General Comment No. 23, paras. 6.2. Cf. O'Nions 195.

[60]UNHCR: General Comment No. 23, para. 5.2.

[61]'Some States parties who claim that they do not discriminate on grounds of ethnicity, language or religion, wrongly contend, on that basis alone, that they have no minorities.' UNHCR: General Comment No. 23, para. 4. On the Committee's view on the related French 'declaration' excluding the applicability of Article 27 in France, and its refusal to examine the Breton communications on the merits with regard to Article 27, see Spiliopoulou Åkermark (1997) 164–69.

[62]Spiliopoulou Åkermark (1997) 142.

the Committee concluded that English-speaking people in Quebec are not entitled to minority rights, since

> the minorities referred to in article 27 are minorities within a [ratifying] State, and not minorities within any province. A group may constitute a majority in a province but still be a minority in a State and thus be entitled to the benefits of article 27. English speaking citizens of Canada cannot be considered a linguistic minority.[63]

Several committee members were unhappy with the views of the majority, including Mr. Bertil Wennergren who considered that 'the issue of what constitutes a minority in a State must be decided on a case by case basis, due regard being given to the particular circumstances of each case' – no insights were offered concerning the case at issue.[64] Another individual opinion was written by four committee members, who disagreed with the majority decision because it interpreted the concept of minorities in strictly numerical terms. However, during the controversial history of the protection of minorities in international law, many different criteria have been proposed, which the UNHRC did not take into consideration. Alternatively, as the dissenting committee members rightly pointed out, Article 50, which envisages the application of the ICCPR to 'parts of federal States' could affect the interpretation of Article 27:

> To take a narrow view of the meaning of minorities in article 27 could have the result that a State party would have no obligation under the Covenant to ensure that a minority in an autonomous province had the protection of article 27 where it was not clear that the group in question was a minority in the State considered as a whole entity.[65]

As we have already mentioned, Article 27 applies not only to persons belonging to traditional (national, ethnic) minorities but also to indigenous peoples. In fact, the majority of communications based on Article 27 and decided on the merits were submitted by members of indigenous peoples.[66] The Committee, for example, explicitly recognised as minorities the Sami in Sweden and 'Indian' bands in Canada.[67] The definitional issue is further complicated by the fact that the right to self-determination under Article 1 could affect the interpretation of Article 27 (and Articles 25 and 26), as pronounced by the UNHRC in *Diergaardt* et al. *v. Namibia*[68] and *Mahuika* et al. *v. New Zealand*.[69] In light of the established case-law of the UNHRC and its General Comment no. 23, Article 1 is not justiciable under the Optional Protocol on

[63]UNHRC: *Ballantyne, Davidson and McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989, Views of 31 March 1993, para. 11.2. The Committee confirmed that its observations apply *mutatis mutandis* to the merits of the very similar *Singer* case, without however, touching upon the issue of regional minorities or Article 27. UNHRC: *Singer v. Canada,* Communications No. 455/1991, Views of 26 July 1994, CCPR/C/51/D/455/1991, para. 12.1.

[64]UNHRC: *Ballantyne*, *Davidson and McIntyre v. Canada*, Individual opinion by Mr. Bertil Wennergren.

[65]UNHRC: *Ballantyne*, *Davidson and McIntyre v. Canada*, Individual opinion by Mrs. Elizabeth Evatt, cosigned by Messrs. Nisuke Ando, Marco Tulio Bruni Celli and Vojin Dimitrijevic.

[66]Verstichel (2005) 31. This statement is still valid today.

[67]Nowak (1993) 12.

[68]UNHRC: *Diergaardt et al. v. Namibia*, Communication No. 760/1997, CCPR/C/69/D/760/1997, Views of 25 July 2000, para. 10.3.

[69]UNHRC: *Mahuika et al. v. New Zealand*, Communication No. 547/1993, CCPR/C/70/D/547/1993, Views of 27 October 2000, para. 9.2.

individual communications, as it confers a right on 'peoples' and not on individuals.[70] Therefore, the Committee holds that it has no competence to consider a submission alleging a violation of the right to self-determination, and until 2000 it effectively refused to interpret Article 1 of the ICCPR. However, in the two above-mentioned cases, the UNHRC expressed a novel view that it can take Article 1 into account when interpreting Article 27 (and Articles 25 and 26), which it in fact did for the first time in *Gillot v. France*,[71] in the context of minority participatory rights.[72] Not even in this case, however, did the Committee give a definition of 'peoples', let alone 'minorities', or the interrelationship between the two concepts:

> Without expressing a view on the definition of the concept of "peoples" as referred to in article 1, the Committee considers that, in the present case, it would not be unreasonable to limit participation in local referendums to persons "concerned" by the future of New Caledonia who have proven, sufficiently strong ties to that territory.[73]

Exploring the possible ramifications of the interpretation of Article 1 on the conceptualisation and operationalisation of minorities would exceed the scope of this paper. Nevertheless, we may safely agree with Annelies Verstichel that this approach opened up a new avenue for minorities to make use of the concept of self-determination, at least its internal dimension.[74]

Returning to the cases connected to indigenous peoples, these generally do not deal with conceptual issues – the UNHRC simply accepts the facts as submitted by the authors that we are dealing with a certain indigenous people. For example, in the *Whispering Pines Band* case, the Committee established that

> [t]he Whispering Pines Indian Band belongs to the Shuswap Nation in south-central British Columbia. The Shuswap are the indigenous people of the region and constitute a single social, cultural, political and linguistic community distinct both from Euro-Canadians and from neighbouring indigenous peoples.[75]

In turn, indigenous cases offer useful guidelines for the operationalisation of minorities. To sum up the UNHRC's respective views, whether somebody belongs to a minority depends on objective criteria (language, religion, ethnic characteristics, cultural customs etc.) as well as the subjective feeling of the person concerned. In this context, possible (non-)recognition by the national legal system is of subsidiary significance.[76] For instance, the complainant of the 1981 *Lovelace v. Canada* case was an ethnic Maliseet Indian who were born and brought up on the

[70]This is why we do not know whether the German-speaking population of South Tyrol constitutes a 'people' within the meaning of Article 1 of the ICCPR, as the authors had no right to submit a claim under that article. UNHRC: *A.B.* et al. *v. Italy*, Communication No. 413/1990, CCPR/C/40/D/413/1990, Decision of 2 November 1990.

[71]UNHRC: *Gillot v. France*, Communication No. 92/2000, CCPR/C/75/D/932/2000, Views of 15 July 2002.

[72]Verstichel (2005) 31.

[73]UNHRC: *Gillot v. France*, para 13.16.

[74]Verstichel (2005) 36. Cf. Pentassuglia (2023) 252–55.

[75]UNHRC: *R. L.* et al. *(Whispering Pines Band) v. Canada*, Communication No. 358/1989, CCPR/C/43/D/358/1989, Decision of 5 November 1991, para. 2.1. In the context of minority membership, see UNHRC: *Poma Poma v. Peru*, para. 7.3.: '[I]t is undisputed that the author is a member of an ethnic minority […] the Aymara community'.

[76]Nowak (1993) 13–14.

Tobique Reserve, kept ties with her community and wished to maintain these ties. These factors, in the opinion of the Committee, mean that a person 'must normally be considered as belonging to that minority within the meaning of the Covenant'.[77]

In response to the recommendations of the UNHRC in the *Lovelace* case, new laws were enacted by the Government of Canada in 1985. By virtue of one of these, certain persons formerly deprived of 'Indian' status on the basis of sex were reinstated, but at the same time, other persons who formerly enjoyed Indian status were deprived of it on the basis of a racial quota.[78] The authors of the communication in the *Whispering Pines Band* case challenged the Canadian legislation as being contrary to traditional Shuswap laws, and effectively depriving them of determining membership of their community.[79] The complainants regarded themselves as a distinct people under Article 1 of the ICCPR, and emphasized that control of membership is one of the inherent and fundamental rights of indigenous communities. Although they considered themselves as an indigenous people rather than an ethnic or linguistic minority - since in their view the two categories overlap - indigenous peoples should also be entitled to exercise the rights of minorities under Article 27 of the ICCPR.[80] The Committee found the communication inadmissible for the lack of exhaustion of domestic remedies, but looking at the context of the case and other indigenous cases,[81] we may safely assume that the Committee agreed with the authors in their statements noted above.

The issue of membership was directly addressed by the Committee in the *Kitok v. Sweden* case. Ivan Kitok, a Swedish citizen of Sami ethnicity, asserted that due to his formal exclusion from the Sami community, he had been denied his ancestral right to reindeer husbandry and thereby his right under Article 27 to enjoy his culture in community with other Samis had been violated. Both parties agreed that effective measures are needed to ensure the future of reindeer breeding and the livelihood of those for whom this activity is the primary source of income. Sweden chose to secure these objectives by way of limiting the right to engage in reindeer breeding to members of the Sami villages (*Sameby*).[82] Membership of a *Sameby*, in turn, was granted by the Sami village itself. The UNHRC expressed serious doubts as to the statutory restrictions affecting the membership of ethnic Samis, especially that these included factors other than objective ethnic criteria:

> the Act provides certain criteria for participation in the life of an ethnic minority whereby a person who is ethnically a Sami can be held not to be a Sami for the purposes of the Act… [T]he ignoring of objective ethnic criteria in determining membership of a minority, and the application to Mr. Kitok of the designated rules, may have been disproportionate to the legitimate ends sought by the legislation.[83]

[77]UNHRC: *Sandra Lovelace v. Canada*, Communication No. 24/1977, Views of 30 July 1981, para. 14.

[78]UNHRC: *Whispering Pines Band v. Canada,* para. 2.2.

[79]UNHRC: *Whispering Pines Band v. Canada,* paras. 3.3–3.6.

[80]UNHRC: *Whispering Pines Band v. Canada,* paras. 3.7–3.8.

[81]Cf. for example UNHRC: *B. Ominayak and Lubicon Lake Band v. Canada*, Communication No. 167/1984, Views of 26 March 1990.

[82]UNHRC: *Kitok v. Sweden*, Communication No. 197/1987, Views of 27 July 1988, paras. 9.3–9.5.

[83]UNHRC: *Kitok v. Sweden*, paras. 9.6–9.7.

However, weighing up all the circumstances of the case, the Committee decided that the restriction upon the right of an individual member of a minority was shown to have a reasonable and objective justification and was necessary for the continued viability and welfare of the minority as a whole, and thus found no violation of Article 27.

More recent jurisprudence of the UNHRC seems to uphold the *ratio decidendi* of the previous cases on the importance of both objective and subjective criteria for the purposes of establishing minority membership. In November 2018, the Human Rights Committee adopted its views in two cases against Finland. At issue was the right of the Sami people to determine their own identity or membership in accordance with their customs and traditions, as well as their right to determine the structures and to select the membership of their institutions in accordance with their own procedures. In respect of both *Sanila-Aikio* and *Klemetti Käkkäläjärvi* et al., the Committee held that the interpretation of the Finland Supreme Administrative Court concerning who was eligible to be a member of the Sami Parliament's electoral roll violated Article 25 of the ICCPR, read alone and in conjunction with Article 27, and in light of Article 1.[84] In both instances, the Committee was guided by its previous jurisprudence. For instance, it recalled *Lovelace v. Canada* when asserting that 'the category of persons belonging to an indigenous people may in some instances need to be defined to protect the viability and welfare of a minority as a whole', and *Kitok v. Sweden* in that 'a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole'.[85] Furthermore, the UNHCR made explicit references to self-identification as a criterion for the determination of a person as indigenous (in compliance with recommendations of the Committee on the Elimination of Racial Discrimination),[86] as well as to several articles of the UN Declaration on the Rights of Indigenous Peoples, which essentially provide self-determination for indigenous communities on membership issues.[87] As Pentassuglia aptly put it, these cases 'have highlighted the connection between the subjective self-determination standard of group decision-making and the need for some objective criteria to underpin that process'.[88]

Enlightened as the Committee's views may be, the observations on internal self-determination of indigenous peoples most certainly cannot be transferred to other (traditional) minorities – not in full, anyway. What certainly applies to the operationalisation of minorities in general

[84]UNHRC: *Sanila-Aikio v. Finland*, Communication No. 2668/2015, CCPR/C/124/D/2668/2015, Views of 1 November 2018; UNHRC: *Käkkäläjärvi et al. v. Finland*, Communication No. 2950/2017, CCPR/C/124/D/2950/2017, Views of 2 November 2018.

[85]UNHRC: *Sanila-Aikio v. Finland*, para. 6.5.; *Käkkäläjärvi* et al. *v. Finland*, para. 9.5.

[86]UNHRC: *Sanila-Aikio v. Finland*, para. 6.3.; *Käkkäläjärvi* et al. *v. Finland*, para. 9.3.

[87]Under Article 33 of the Declaration, indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions, and the right to determine the structures and to select the membership of their institutions in accordance with their own procedures. Article 9 provides that indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned, and that no discrimination of any kind may arise from the exercise of such a right. Finally, in accordance with Article 8 (1), indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. UNHRC: *Sanila-Aikio v. Finland*, para. 6.6.; *Käkkäläjärvi* et al. *v. Finland*, para. 9.6.

[88]Pentassuglia (2023) 254.

from the UNHRC's practice is, firstly, the recognition that minority membership must in fact be defined in order to protect the well-being of a minority group as a whole, and so that only those could avail of minority rights who in fact belong to that minority.[89] In this way, the Committee reconciles two different interpretative approaches: one that gives priority to individual human rights, and another that favours the interests of the minority group.[90] Secondly, and more to the point, the Committee seems to have endorsed a mixed or hybrid operationalisation strategy where subjective elements (self-identification, solidarity) and objective criteria (language, religion, ethnicity, culture, traditional livelihood, etc.) are equally important, and none of them alone are conclusive in establishing minority membership.[91]

4. NEW AVENUES IN THE CONCEPTUALISATION OF MINORITIES

In Pentassuglia's assessment, there seems to be a recent trend in international jurisprudence to reconceptualise certain ethno-cultural groups, including indigenous peoples and national or ethnic minorities.[92] As for the concept of minorities in general, notwithstanding the Human Rights Committee's expansive approach elaborated in its General Comment 23, the inclusion of so-called 'new minorities' is still controversial in international law. In this section, we look at two recent developments which advocate for broadening the traditional minority concept: the practice of the Advisory Committee of the Framework Convention for the Protection of National Minorities (ACFC), and the proposal for a draft global convention on minority rights.

4.1. The inclusive approach of the Advisory Committee of the Framework Convention

A broadly inclusive approach appears in the work of the ACFC. In Europe, the Framework Convention has been often referred to as a key normative document regarding the protection of minority rights in different situations.[93] (That is true even if there are still a few Council of

[89]This latter point refers to the phenomenon of ethnobusiness, that is, the abuse of minority rights, which is not explicitly mentioned by the UNHRC, but indirectly follows from its views, especially those adopted in 2018.

[90]Magallanes (2020) 304.

[91]In the context of the two recent Sami cases, Magallanes (2020: 304) articulates this as follows: the Committee 'rejects the sole use of self-identification when deciding what is a reasonable test for the identification of Sami voters […]. It thereby maintains the previous use of a consensual interpretation between Sami peoples exercising their internal right to self-determination and the Court's exercise of its appeal function to give effect to the reasonable and objective criteria'.

[92]Pentassuglia draws most of his examples to confirm the expansive concept of indigeneity in the practice of the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights. In this context, 'in addition to criteria of self-identification, territorial connection, and cultural distinctiveness, notions of social marginalisation, discrimination and non-dominance have informed such a re-thinking'. Pentassuglia (2018b) 18. Cf. Pentassuglia (2023) 255–58.

[93]In the process of EU enlargement, the European Commission regularly referred to it as a benchmark for evaluating the situation of minorities in candidate states and since 1998 the ratification of the Framework Convention is seen as a precondition of accession. Furthermore, the UN Mission in Kosovo signed a special agreement with the Council of Europe for its application in Kosovo.

Europe member states that have not ratified or even signed it.[94]) Since the document lacks any definition of 'national minority', States Parties apply different approaches and definitions in their domestic legislations.

The monitoring body of the FCNM, the Advisory Committee, has also developed a specific interpretation. Based on its monitoring practice, the Advisory Committee issued a Thematic Commentary on the scope of application of the treaty that includes an innovative approach in this regard.[95] The Advisory Committee did not venture to offer a proper definition, but it put forward a rather nuanced method for identifying the addressees of certain rights enshrined in the Framework Convention. The Thematic Commentary distinguishes three different categories in this regard: (i) rights applying to all persons; (ii) rights with a broad scope of application (i.e., including persons belonging to national minorities who are not recognised as such by the respective State party); and (iii) rights with a specific scope of application (i.e., limited to certain areas where persons belonging to national minorities reside traditionally and/or in substantial numbers). This differentiated approach to the scope of application inevitably led to a re-thinking of who could/should be considered as a 'person belonging to national minority' in different situations.

In certain respects the Advisory Committee is rather critical on existing State practices, and this is especially the case regarding the citizenship requirement that many States Parties apply in their domestic legislation on minority rights. The Thematic Commentary underlines that 'the inclusion of the citizenship requirement may have a restrictive and discriminatory effect'[96] and stresses that persons belonging to national minorities who are *de jure* or *de facto* stateless, face specific challenges that should be taken into consideration.[97] Addressing the problem of statelessness in this context echoed the concerns formulated within the UN by the Independent Expert on Minority Issues in 2008[98] who noted in her report that 'stripping [persons belonging to minorities] of citizenship can be an effective method of compounding their vulnerability' and 'once denied or deprived of citizenship, minorities are inevitably denied protection of their basic rights and freedoms, including minority rights by the problem of arbitrary denial of citizenship'.[99] The question of statelessness and deprivation of citizenship is particularly relevant for minorities as States may use it as a tool to delegitimize minority rights claims. Yet, the Advisory Committee went even further when it noted as a general rule that 'it should be considered for

[94]Belgium, Greece, Iceland and Luxemburg signed it, but have not ratified it, while Andorra, France, Monaco and Turkey have not even signed it. The Russian Federation decided to withdraw in January 2024 – the withdrawal will take effect on 1 August 2024. Link1.

[95]ACFC Thematic Commentary No. 4 (2016) The Framework Convention: a key tool to managing diversity through minority rights – The Scope of Application of the Framework Convention for the Protection of National Minorities. FCNM EXREP (1995) Explanatory Report to the Framework Convention for the Protection of National Minorities, Strasbourg, 1.II.1995.

[96]ACFC (2016) para. 29.

[97]ACFC (2016) para. 30.

[98]A/HRC/7/23, 28 February 2008.

[99]A/HRC/7/23, para. 13. The report mentioned many examples from Europe (from Slovenia to Latvia, etc.); see paras. 65–68. In 2018 the Special Rapporteur on Minority Issues dedicated his annual report to the question of statelessness, highlighting that depriving members of minorities of their citizenship is often used by States as a tool to deny their human and minority rights. A/73/205, 20 July 2018.

each right separately whether there are legitimate grounds to differentiate its application based on citizenship'.[100]

Regarding the protection against discrimination (Art. 6), the Thematic Commentary stresses that it applies to 'all persons' and that 'the lack of respect for or ill-treatment of migrants, asylum seekers, refugees and/or other individuals who are, for whatever reason, considered to be different from the majority population, may prompt a general environment of fear'.[101] Against this background, social integration is interpreted by the Advisory Committee in a broad sense and regarding education and media as tools for integration (Arts. 6(1) and 12) it underlined that 'inclusive language policies should cater for the needs of everybody based on their different characteristics and needs, including persons belonging to national minorities living outside their traditional areas of settlement, immigrants and "non-citizens".'[102]

The Advisory Committee clearly opened the interpretative framework of the Framework Convention and argues that the States Parties should review at regular intervals their approach to the scope of application to ensure that it reflects 'the present-day societal context'.[103] This means that the declarations and reservations made by States Parties that restrict the application of the Framework Convention to specific groups or require specific conditions, such as citizenship, should be reviewed, for which the Thematic Commentary offers useful guidelines. This 'dynamic interpretation',[104] however, may be legitimately criticized not only because the Advisory Committee's position to give an authoritative interpretation can be questioned under international law,[105] but also because the interpretation offered by the Thematic Commentary is not based on a textual, but on a teleological approach that does not seem to be in line with the original intentions of States Parties. As Pentassuglia rightly noted,

> although the Advisory Committee has consistently supported the idea of a broader application of this treaty, a large number of the current states parties that have taken a stance on this matter (at least more than half of the current treaty membership) has equally consistently held on to a more restrictive understanding of the concept of "national minority".[106]

Undoubtedly, the extension of the concept of 'national minority' under the Framework Convention by including immigrants or under certain provisions everyone residing on the territory of the State, would be difficult to digest for many States Parties.

[100]ACFC (2016) para. 30.

[101]ACFC (2016) para. 52.

[102]ACFC (2016) para. 62.

[103]ACFC (2016) para. 24.

[104]"The purpose of this Commentary is to make it clear that the absence of a definition in the Framework Convention is indeed not only intentional but also necessary to ensure that the specific societal, including economic and demographic, circumstances of states parties are duly taken into account when establishing the applicability of minority rights. The Framework Convention was deliberately conceived as a living instrument whose interpretation must evolve and be adjusted regularly to new societal challenges. Multiple identities and increasing mobility, for instance, have become regular features of European societies. However, such features must not limit access to minority rights. This approach is fully in line with the principle of dynamic interpretation developed by the European Court of Human Rights with respect to the European Convention on Human Rights.' ACFC (2016) para. 5.

[105]See Tóth (2017) 79–80.

[106]Pentassuglia (2018b) 17.

4.2. The draft global convention on minority rights – the beginning of a new ethos?

On 6 March 2023, (then) UN Special Rapporteur on Minority Issues Fernand de Varennes published a Proposal for a Draft Global Convention on the Rights of Minorities, attached to his annual thematic report, submitted to the UN Human Rights Council.[107] The document calls on the United Nations to take stricter and more effective measures to protect and recognise the human rights of minorities, as there has been little development institutionally at the UN level to that effect, and the human rights situation of many minorities in the world is increasingly deteriorating. As a solution, de Varennes proposes to adopt a legally binding universal treaty, the draft of which he prepared with the contribution of several scholars, civil actors and international organizations, drawing heavily from the recommendations of the regional and UN forums held since 2019, as well as from a large number of global and regional instruments.

The proposal is composed of three parts: (i) the main text of the draft convention; (ii) an implementation protocol on communications and reporting; (iii) and an optional protocol which provides a more detailed elaboration of the rights of minorities, specifically the right to take part in cultural life, freedom of thought, conscience and religion or belief, and the right to use one's own language. The third part also includes definitions of the concept of minorities, namely definitions of 'national minority', 'ethnic minority', 'religious or belief minority', and 'linguistic minority', emphasizing that the existence of these groups in a State is not dependent on official status or legal recognition.

Already in his 2019 report, de Varennes submitted to the Human Rights Council a study on the minority concept in the UN, arguing that 'the absence of consistency in understanding who is a minority is a recurring stumbling block to the full and effective realization of the rights of minorities'.[108] He also criticised UN Member States when he pointed out that many States feel free to determine who is or is not a minority in absence of a definition under international law.

In most of these situations, the uncertainty leads to restrictive approaches: in many situations, persons are deemed to be "undeserving" because they are not "traditional" minorities, not citizens or not sufficiently "dominated". The end result is that some minorities are excluded because they are not the "right kind" of minority according to different parties.[109]

Following a detailed overview of the relevant international jurisprudence and the work of various international organizations and monitoring bodies, the Special Rapporteur concluded his own working definition as follows:

> An ethnic, religious or linguistic minority is any group of persons which constitutes less than half of the population in the entire territory of a State whose members share common characteristics of culture, religion or language, or a combination of any of these. A person can freely belong to an ethnic, religious or linguistic minority without any requirement of citizenship, residence, official recognition or any other status.[110]

[107] We are fully aware that the Special Rapporteur's proposal is not a draft convention in a strict legal sense, but for the sake of simplicity hereinafter we refer to it as such.

[108] A/74/160, 15 July 2019.

[109] A/74/160, para. 21.

[110] A/74/160, para. 53.

Nevertheless, de Varennes did not consider his working definition suitable for the draft convention and in the optional protocol thereof he offers four definitions for the different categories of national, ethnic, religious and linguistic minorities. It should be noted that unlike in his 2019 definition, here national minorities are mentioned separately. There are many new elements in the concept of minority in the draft convention that only partly build on previous international documents. Unlike Capotorti's definition or the 1993 PACE recommendation, the draft convention's definition follows the road paved by the UNHRC General Comment 23 in not requiring citizenship to qualify as a member of a minority. Article 19(6) of the draft convention also declares that 'citizenship shall not be regarded as an element of the definition of "minority" in a State.' Article 1 of the draft convention's optional protocol on strengthening the recognition and protection of the rights of minorities offers the following definitions (in each case emphasizing that the existence of the given type of minority in a State is not dependent on official status or legal recognition):[111]

1. The expression "national minority" refers to a group of persons in a state who:
   (a) reside on the territory of that state;
   (b) maintain longstanding, firm and lasting ties with that state;
   (c) share distinct cultural, religious or linguistic characteristics;
   (d) are less than half of the total population of that state;
   (e) share a concern to preserve together that which constitutes their common identity. […]

2. The expression "ethnic minority" refers to a group of persons in a state who:
   (a) are present on the territory of that state;
   (b) share distinct cultural characteristics;
   (c) are less than half of the total population of that state.
   An ethnic minority includes persons linked by descent, caste or origin, seafaring, nomadic or semi-nomadic groups, and can include persons who share personal characteristics with other members of a community, such as a common language or culture who are not in a majority in a State. […]

3. The expression "religious or belief minority" refers to a group of persons in a state who:
   (a) are present on the territory of that state;
   (b) share distinct religious or belief characteristics;
   (c) are less than half of the total population of that state.
   A religious or belief minority includes persons who belong to non-hierarchical or non-formalized as well as non-religious or non-theistic beliefs, sects, offshoots of a mainstream religion or new religions or beliefs who are not in a majority in a state. […]

4. The expression "linguistic minority" refers to a group of persons in a state who:
   (a) are present on the territory of that state;
   (b) display shared linguistic characteristics;
   (d) are less than half of the total population of that state.
   A linguistic minority includes persons who share any natural language, including sign languages, who are not a majority in a state, including languages categorized domestically

[111]This has already been put forward in Article 3(1) of the main text: 'The existence of a minority is a factual determination based on objective criteria such as ethnicity, religion or belief, culture or language, or a combination thereof. It is not dependent on official status, recognition or acknowledgment.'

> as dialects, patois or creoles, or who share a common writing system but are mutually unintelligible. […]

The question arises why there was a need to provide four definitions when most rights in the draft convention are formulated as rights of persons belonging to minorities (unqualified). Even under the optional protocol, specific rights are assigned only to linguistic and religious minorities, whereas national or ethnic minorities are not mentioned separately. The term 'national minority' in academia and in the European context is often associated with territorial changes and the historical links between a traditional minority and its kin-state. The significant role of kin-state/home-state relations in the protection of minorities appears implicitly also in Article 18 of the Framework Convention which stresses the importance of transfrontier contacts, and confidence-building in bilateral cooperation for the protection of national minorities. The draft convention does not mention bilateral cooperation and in contrast with ethnic, religious or linguistic minorities, the major *differentia specifica* of a 'national minority' is that its members are expected to '*maintain longstanding, firm and lasting ties*' with the State where they live. But neither the draft convention, nor its optional protocol refers to specific rights or conditions that would be relevant only for national minorities. The distinction between national and ethnic minorities is based on special characteristics (persons belonging to ethnic minorities may be linked by descent, cast or belong to nomadic, seminomadic, seafaring groups) and the length of residence on the territory of the State. Interestingly, while both the Capotorti definition and the 1993 PACE recommendation include solidarity among members as a precondition for qualifying as a minority, here solidarity is mentioned only for national minorities. This distinction may suggest a difference between 'minorities by will' and 'minorities by force', implying that a national minority exists only if its members 'share a concern to preserve together that which constitutes their common identity'. In turn, the existence of ethnic, religious and linguistic minorities may be justified by the presence of certain objective criteria alone.

The draft optional protocol confers specific language and cultural rights to linguistic minorities (Part IV) and offers a detailed set of rights on different aspects of religious life to religious minorities (Part III). Specifying the potential addressees of certain language and religious rights may be important, but in many cases the different minority identities overlap and a national minority may easily be a linguistic and/or a religious minority as well. The overall conceptual ambition of this definition presumably was that it would limit States from denying recognition from specific minorities.

The first part of the draft convention requires States to protect minorities in their integrity as distinct communities reflecting all aspects (cultural, religious/belief, or linguistic) of their identity.[112] This may be the reason why only the draft optional protocol and not the draft convention's main text contains a definition. What is a consistent element of the definition, reflected also in the pragmatic approach of the draft convention, is its openness in principle to anyone who lives either temporarily or permanently on the territory of the State. As was asserted above, in the cases of statelessness and arbitrary deprivation of citizenship it is a legitimate concern that citizenship requirements may exclude a minority. And from a doctrinal viewpoint, extending minority rights as human rights to all (based only on identity and numerical criteria) may be a logical step. But it is quite unlikely that States would ever accept that as it could raise

[112]Art. 4(a).

problems in implementation (how to distribute resources for different minorities; is any distinction between minorities such as applying thresholds acceptable?). In addition to that, very likely this definition could hardly be endorsed by States that have a more restrictive constitutional or legal definition of 'minority' in their domestic legislation.

5. CONCLUSIONS

Based on the overview of the relevant international jurisprudence and the activities of monitoring bodies, including important contributions from the ACFC and the UN Special Rapporteur on Minority Issues, we may conclude that there is a clear tendency among international experts to extend the concept of 'minority' beyond its original meaning. There seems to be a general concern about excluding groups from the concept who may need access to minority rights: immigrants, non-citizen residents, 'new minorities', etc. There are many options for categorizing these groups; however, against this new approach in international law, States usually maintain a restrictive interpretation of the existence of a 'minority' on their territory[113] or of the notion of 'minority' in their international minority rights commitments. The apparent contradiction between experts' views and the reservations, declarations and domestic legislation of many States is only part of the dilemma. Another problematic aspect is that opening the concept of 'minority' in this way may lead to watering down the level of protection of traditional minorities. As a matter of fact, it can hardly be denied that different categories (such as 'old' and 'new' minorities, etc.) reflect diverse situations and varied social contexts. It should be admitted that a differentiated approach may respond well to the needs of different groups, but may easily challenge the universalistic human rights interpretation of minority rights. The demographic, political, and social situation of minorities may change over time and may need a continuous adaptation of State policies and legal provisions aimed at the protection of minority rights and identity.

But it is not only 'new' minorities that pose a challenge of interpretation: looking at the case-law of the UNHRC, many times the monitoring body of the ICCPR considered claims submitted by persons belonging to indigenous peoples without reflecting on the differentiation between indigenous and minority situations, rights and claims. Moreover, the UNHRC did not develop a consistent approach towards the right to determine membership of a minority group and the balancing of the interests of the individual against the interests of the minority group. For instance, whereas in *Lovelace* v. *Canada* the UNHRC favoured the individual, in *Kitok v. Sweden*, it preferred to protect the collective interests of the Sami.[114] Furthermore, in *Ballantyne* the UNHRC failed to give a reassuring answer to the situation of regional minorities, i.e., where the main group of the population of a State is in a minority position in some sub-units of the same country.[115]

In any case, it would be misleading to single out the Human Rights Committee, since fallacies in the conceptualisation and operationalisation of minorities appear in the practice

[113]See, for example, France's reservation to Art. 27 of ICCPR: 'In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned.'

[114]Spiliopoulou Åkermark (1997) 173–74.

[115]Spiliopoulou Åkermark (1997) 171–72.

of all adjudicatory bodies examined in this paper; hence the most recent endeavour to get a universal minority rights treaty adopted. Yet, it is not by chance that States prefer to reserve a control in this field. It is not theoretical or legal considerations which impede the emergence of a universal agreement on the definition of 'minority', but rather political considerations: the lack of a legal definition offers a relatively large margin of discretion to governments in selecting those minorities for which they want to provide legal protection.[116] We have yet to wait for a change in this attitude, and thus in the fortune of minorities.

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