

The Definition of Minorities under International Law: An Examination

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Abstract

There are minorities in every country in the world. Ensuring the protection of these minorities is acknowledged to be essential to the preservation of international peace and thus there are in existence different legal provisions and instruments to provide for the rights of minority groups. Despite the major inroads into minority protection in international law, the very definition of the term 'minorities' therein has remained controversial. There is no one agreed upon definition of the term. In fact, many doubt the usefulness or relevance of any such precise definition of the term. This paper examines the problem of the definition of minorities under international law. It further examines the question of the relevance or otherwise of a universally accepted definition of minorities. The paper concludes that although such definition would indeed be desirable, its relevance is quite doubtful given the high impossibility of such definition ever coming to fruition.

1.1 Introduction

Minorities are everywhere in the world. There is not a State without a minority group. Minority groups can be in the form of cultural, ethnic, linguistic, political, religious and sociological groups.¹ The categories of minorities however cannot be so closed as they exist in myriad forms and situations.

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The question of how to protect minorities has been in issue even before the time of the League of Nations. The central problem is that minorities are usually overwhelmed by the majority group in the State who most times exclude them politically and force them to assimilate into the rest of the population, wishing them to forego their (the minorities) own peculiar traits such as the language, culture, etc. The minorities however want to preserve their unique traits and usually try to advocate for some form of self-determination or autonomy within the State which the majority are wont to give because of the fear that it could lead to secession. States do not like to recognise this minority problem or even if they do, to a limited extent, as a result of this fear of secession.² This inevitably leads to strife.

In recognition of the fact that ignoring the rights of minorities inevitably leads to strife, there have been international efforts over time to develop minority rights protection mechanisms. This paper however does not focus on those efforts. Rather it focuses on the term ‘minorities’ as used in international law. Defining the term ‘minorities,’ has proved problematic. It is so controversial that contemporary international instruments that make provision for the rights of minorities do not provide a definition of the holders of the rights.³ This paper seeks to examine this definition problem and to also discuss the question of the relevance or otherwise of a clear definition of the term to the protection of minorities.

¹ Rehman J., *International Human Rights Law*, Second Edition, (England: Pearson, 2010), 433

² David Wippman stated thus: ‘Throughout the history of the modern nation-state, governments have had a tendency to view minorities, especially politically self-conscious minorities, as a potential threat to the political unity or territorial integrity of the states in which they reside.’ Wippman D., *The Evolution and Implementation of Minority Rights*, 66 (1997) *Fordham Law Review*, 597, 1. <http://ir.lawnet.fordham.edu/flr/vol66/iss2/10> (accessed July 2, 2015).

³ Ibid. Examples of such instruments include the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (General Assembly Resolution 47/135 of 18 December 1992), the Council of Europe’s Framework Convention for the Rights of Minorities ETS 157, 1 February 1995, etc.

To achieve its aim, this paper is divided into five parts. The first part deals with the introduction while the second discusses the problem in the definition of minorities. The third part briefly draws a distinction between minorities and indigenous people. The fourth part then discusses the relevance or otherwise of a precise definition of minorities. The fifth and final part concludes the paper.

1.2 ‘Minorities’: The Definition Problem

The Oxford Advanced Learners’ Dictionary defines the word ‘minority’ as a ‘smaller part of a group.’⁴ This would necessarily imply that a minority group or minorities constitute a smaller, distinct part of the general population.⁵ Despite this ‘simple’ meaning, the question of who minorities are under international law has been a problematic one. There is no universally agreed upon definition of the term ‘minorities’ or ‘minority groups.’⁶ It has been stated that ‘no area of minority rights is as controversial as the definition of the term minorities.’⁷ Reaching a universally accepted definition has till date, remained a problem.⁸ Francesco Capotorti puts the issue thus:

[t]he preparation of a definition capable of being universally accepted has always proved a task of such difficulty and

⁴ Oxford Advanced Learners Dictionary, 8th edition (Oxford: Oxford University Press, 2010).

⁵ With reference to a group definition, the Oxford Advanced Learners Dictionary defines minority as a ‘smaller group within a community or a country that is different because of race, religion, language, etc.’ Ibid.

⁶ United Nations, ‘Minority Rights: International Standards and Guidance for Implementation’, HR/PUB/10/3, 2, http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf (accessed July 11, 2015.)

⁷ SAIFAC (South African Institute for Advanced Constitutional Law) Research Paper Series, ‘Chapter III- Minorities and International Law,’ 21, http://www.saifac.org.za/docs/res_papers/RPS%20No.21.pdf

⁸ De Zayas A., ‘The International Judicial Protection of the Rights of Peoples and Minorities,’ <http://alfreddezayas.com/Chapbooks/AMSTERDAM.shtml>, (accessed July 2, 2015.)

complexity that neither the experts in this field nor the organs of the international agencies have been able to accomplish it today.⁹

Reasons have been given for this definition problem. It is stated that the difficulty lies in the fact that minorities exist in different situations. Some live together in defined areas separate from the rest of the population. Others live in the midst of the majority of the population, scattered around the State. Some minority groups also have a 'strong sense of collective identity and recorded history' while others have just a weak or a fragmented understanding of their collective identity.¹⁰ There are also various types of minority groups; there are 'ethnic, linguistic, cultural, racial, religious, linguistic, sociological and political minorities.'¹¹ There are also minority groupings now by sexual orientation, (this is what is known as 'sexual minorities', i.e. the homosexuals, bisexuals and those 'questioning', i.e. not sure of their orientation yet), gender (e.g. the transgenders)¹² and handicapped or disabled persons.¹³ Indeed, an appreciation of the many forms of minority

⁹ Capotorti F., *Study on the Rights of Persons Belonging To Ethnic, Religious, and Linguistic Minorities* (1979) UN Docs. E/CN.4/Sub.2/384/Rev.1, Sales No E78XIV1 p. 5; in Dersso S.A., 'Taking Ethno-cultural Diversity Seriously in Constitutional Design: Towards an Adequate Framework for Addressing the Issue of Minorities in Africa,' Dissertation submitted in fulfilment of the requirements of the degree of Doctor of Philosophy in the School of Law at the University of the Witwatersrand. Accessed June 30, 2015,

<http://wiredspace.wits.ac.za/bitstream/handle/10539/7689/Edited%20and%20revised%20for%20final%201.pdf?sequence=1>

¹⁰ United Nations, 'Minority Rights,' 2.

¹¹ Rehman, '*International Human Rights Law*,' 433

¹² Portland State University, 'Sexual and Gender Minority Youth', last accessed May 5, 2015, <http://capstone.unst.pdx.edu/courses/sexual-and-gender-minority-youth>. See also, Portland LGTBQ Community Center, <http://www.pdxqcenter.org/programs/youth-programs/smyrc/>.

¹³ Persons with disabilities have been referred to as the world's largest minority, making up about 15 percent of the world population. Note that there is a Convention on the Rights of Persons with Disabilities (CRPD). See United

groups and the various and unique situations in which they exist, reveals the cause of this definition problem.

Despite this definition problem, a definition of ‘minorities’ which is generally regarded as authoritative is that given by Francesco Capotorti, a Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1977.¹⁴ He was given the task of preparing a study pursuant to Article 27¹⁵ of the International Covenant on Civil and Political Rights (ICCPR) 1966,¹⁶ which is the foremost international provision for the protection of minority rights.¹⁷ Capotorti’s definition has found the widest recognition of all others and has been regarded as the start-point of any discussion on the issue.¹⁸ He defined a minority group thus:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members- being nationals of the State- possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.¹⁹

Nations, International Day of Persons with Disabilities, 3 December 2012, last accessed May 9, 2015, <http://www.un.org/disabilities/default.asp?id=1597>.

¹⁴ United Nations, ‘Minority Rights,’ 2.

¹⁵ Article 27 of the ICCPR provides as follows:

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 other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

¹⁶ 999 UNTS 171

¹⁷ Kugelmann D., ‘The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity,’ (2007) 11 *Max Planck Year Book of United Nations Law*, 237, last accessed July 12, 2015, http://www.mpil.de/files/pdf1/mpunyb_06_kugelmann_11.pdf

¹⁸ Ibid.

¹⁹ E/CN.4/Sub.2/384/Rev.1, para. 568. See United Nations, ‘Minority Rights,’ 2. Note that Capotorti acknowledged that this definition was based upon a

The major feature of Capotorti's definition²⁰ is the combination of objective and subjective criteria in identifying a minority group. The objective criterion is the fact that the group possesses distinct characteristics such as language, religion, etc. from the rest of the population.²¹ The subjective criterion is the 'common will' of the members of the group towards preserving their distinct characteristics.²² Although it has been argued that identifying a minority group might be a difficult task because evaluating both

definition of 'community' given by the Permanent Court of International Justice in the *Greco-Bulgarian Case* (1930) P.C.I.J. Ser.B. No. 17 at 21 to mean:

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 own 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.

See SAIFAC, 'Minorities and International Law', 25 -26.

²⁰ A revised version of the definition is said to have been submitted by Jules Deschenes (a Canadian) to the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1985 (UNDOC E/CN.4/ Sub.2/1985/31). His version reads thus:

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

See Papoutsi E., 'Minorities under International Law: How Protected are they?' *Journal of Social Welfare and Human Rights*, Volume 2(1), March 2014, 308, last accessed July 14, 2015, http://aripd.org/journals/jswhr/Vol_2_No_1_March_2014/18.pdf

²¹ There must be present a distinct characteristic of the group that sets them apart from the rest of the population in their own eyes and in the eyes of outsiders. Inis Claude Jr. stated: 'Whenever a political society comprises a group of persons who exhibit characteristics which differentiate them from the bulk of the members of that society in any respect which is felt to be politically relevant, a minority problem arises.' Claude, I. Jr., *National Minorities: An International Problem* 1 (1955), in Wippman, 1 at footnote 5.(Emphasis mine.)

²² Rehman, '*International Human Rights Law*,' 434.

the objective and subjective criteria could be onerous,²³ it has been stated that it is now commonly accepted that the recognition of a minority group should take into account both the objective and subjective criteria and cannot be solely decided by the State.²⁴ This definition has been criticised and challenged on a number of grounds.²⁵ One of them is on the provision that the group be 'numerically inferior to the rest of the population in the State'.²⁶ Minority groups may almost always be numerically inferior to the rest of the population, but this is not so in all cases.²⁷ There are situations where a numerical majority group finds itself in a minority situation. An example of this is the position of the Black Africans under the apartheid regimes of South Africa and Rhodesia.²⁸ The Blacks were indeed the numerical majority of the population but they were in a non-dominant position in relation to the Whites.²⁹ They were the political minority. Reference has also been made to situations wherein a group which may be the majority in a State as a whole may be a minority within a particular region of that State.³⁰ This would be particularly relevant in federal states or states with similar structures where considerable political power is wielded at the regional or

²³ Ibid at 435.

²⁴ United Nations, 'Minority Rights,' 3.

²⁵ Rehman, '*International Human Rights Law*, '434.

²⁶ Ibid, 435.

²⁷ The term minority means a smaller part of a whole so it almost immediately conjures in the mind numerical inferiority when it is thought about. The common assumption is numerical inferiority. Oldrich Andrysek has observed that '[a]lready looking at the term minority we feel an arithmetical connotation: a minority is a smaller part of a whole'. *Report on the Definition of Minorities* SIM Special No. 8 (1989), in Dersso, 'Taking Ethno-cultural Diversity Seriously in Constitutional Design,' 7.

²⁸ Ibid.

²⁹ Another example of this would be the situation in Burundi where the Tutsi who are the numerical minority are politically and economically dominant while the Hutus, who have the upper hand numerically, are marginalized politically and economically.

³⁰ United Nations, 'Minority Rights,' 3. This scenario can be identified in Nigeria, where for example, the Hausa-Fulani who are the majority in the Northern states would definitely constitute a minority in the Southern states.

provincial units of the State. The reference in Capotorti's definition to the 'rest of the population of the State' does not make room for such considerations as it would not allow for defining minorities with particular reference to the population of a particular region or province of a State.³¹ The UN Human Rights Committee (HRC) which is the committee charged with the enforcement of the ICCPR, held in *Ballantyne, Davidson and McIntyre v Canada*³² that 'the minorities referred to in Article 27³³ are minorities within such a state, and not minorities within any province.'³⁴ This seems to follow Capotorti's definition. This view is however much criticised.³⁵

³¹ Dersso, 'Taking Ethno-cultural Diversity Seriously in Constitutional Design,' 10.

³² *John Ballantyne and Elizabeth Davidson, and Gordon McIntyre v Canada* (Communications Nos. 359/1989 and 385/1989) (1993) UN Doc. U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1. The facts of the case are as follows: Ballantyne, Davidson and McIntyre, English-speaking Canadians residing and owning businesses in Quebec, a French-speaking province of Canada challenged the Quebec Language law in place that forbade the use of English language in advertising or in the names of their firms, claiming among others, a violation of Article 27 of the ICCPR.

³³ Article 27 of the ICCPR.

³⁴ See paragraph 11.2 of the HRC views. Available at www1.umn.edu/humanrts/undocs/html/v359385.htm (accessed June 29, 2015). The HRC further held that 'English speaking citizens of Canada cannot be considered a linguistic minority. The authors therefore have no claim under article 27 of the Covenant.'

³⁵ This view was rejected by the minority of the HRC in that case. Mrs Elizabeth Evatt in an individual opinion (co-signed by Messrs. Ando, Bruni and Dimitrijevic) stated as follows:

My difficulty with the decision is that it interprets the term 'minorities' in article 27 solely on the basis of the number of members of the group in question in the State party. The reasoning is that because English speaking Canadians are not a numerical minority in Canada they cannot be a minority for the purposes of article 27. I do not agree, however, that persons are necessarily excluded from the protection of article 27 where their group is an ethnic, linguistic or cultural minority in an autonomous province of a State, but is not clearly a numerical minority in the State itself taken as a whole entity... The history of the protection of minorities in international law shows that the question of definition has been difficult and controversial and that many criteria have been proposed... To take a narrow view of the meaning of

The issue of numerical inferiority in reference to definition of minorities is particularly important in the African context. In most African States unlike their European counterparts, there is no single group that constitutes a clear numerical majority. These are multi-minority situations.³⁶ Even in those African States where a group constitutes a clear numerical majority, it has been said that unlike in European States, such numerically superior groups neither have corresponding socio-economic dominance nor were they 'central in the process of the making of the State.'³⁷ European States as they are now, resulted from a 'long historical and organic process of state building by historically dominant groups' while post-colonial African States are artificial constructs, resulting from imposed and often arbitrary boundary lines. There was no organic process of State building as in the case of Europe, rather

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 question was a minority in the State considered as a whole entity.

See the Appendix to the HRC views in that decision. Dersso in this regard, quotes an author, De Varennes as stating thus: '[I]t could be validly maintained that the drafters of Article 27 simply overlooked that in a federal state, even a national majority may find itself subjected to serious mistreatment if it is a numerical minority in one of the federal units and outside the reach of federal (national) protection.' De Varennes F., *Language, Minorities and Human Rights* (1996) 143, in Dersso, 'Taking Ethno-cultural Diversity Seriously in Constitutional Design,' 10, footnote 34.

³⁶ Rehman, '*International Human Rights Law*,' 435. An example of this is Nigeria. In Nigeria, no single ethnic group makes up more than 50 % of the population to be a clear-cut majority. The three main ethnic groups (Hausa, Igbo and Yoruba) each with reference to the rest of the population of Nigeria taken together are a minority. The World Directory of Minorities and Indigenous Peoples states the Hausa/Fulani group as constituting around 29 % of Nigeria's population, the Yoruba group about 21% of the population, while the Igbo group (which is named as one of Nigeria's main minority groups) is about 18% of the population. Nigeria thus is really a multi-minority situation with regard to numerical dominance of a group of people. See World Directory of Minorities and Indigenous Peoples, 'Nigeria,' www.minorityrights.org/5757/nigeria/nigeri-overview.html, accessed July 5, 2015.

³⁷ Ibid.

boundaries were defined by the colonialists and whatever diverse and often numerous ethno-cultural groups happened to fall within those boundaries formed an ‘instant’ State. The difference in the process of state formation in the European and African contexts leads to an understanding of the difference in the experience of minorities in both continents. Whereas in European States and States with similar state-formation experience, the major concern there is how to protect numerically inferior (smaller) and ethnic/cultural distinct groups from dominance and assimilation by the historically dominant group, that is not so in Africa. In Africa, the major concern as regards minorities is not really to protect the numerically inferior groups as they are often numerous with no clear cut majority, but the ‘accommodation of population diversity.’³⁸ Solomon Dersso states thus:

The central thrust of minority issues in Africa is how to recognise and accommodate in the processes of the state the diverse identities and interests of members of the various ethno-cultural groups constituting the post-colonial African state in a way that provides sufficient structures and processes for the expression and accommodation of those identities and interests.³⁹

³⁸ Dersso, ‘Taking Ethno-cultural Diversity Seriously in Constitutional Design,’9.

³⁹Ibid. Speaking on the nature of South Africa’s minority issues, Justice Sachs in *The Gauteng Provincial Legislature in re: Dispute Concerning the Constitutionality of Certain Provisions of the School Education Bill of 1995* CCT 39/95, 4 April 1996; 1996 3 SA 165 (CC) para 81, stated: ‘There is no clear majority population in South Africa, against which a minority need to be protected. Linguistically and culturally speaking, there are only minorities in our country. The problem is to balance out their various interests rather than to protect any one group against another.’ This is in line with the nature of the minority problem in Africa as discussed above. See Dersso S.A., “The Socio-historical and Political History Leading to the Emergence and Development of Norms on Minorities,” 68, in Dersso S. (ed.), *Perspectives on the Rights of Minorities and Indigenous People in Africa*, (Pretoria: Pretoria University Law Press, 2010), available at

The above shows why numerical minority or inferiority should not be seen as essential to a definition of minorities. An insistence on numerical inferiority would be problematic in situations such as described above.

It has rightly been pointed out that the distinction between the majority in nations and minorities is not one of number, but of power, the element of power or the lack thereof being the distinguishing factor.⁴⁰ The minority truly are those without the power or who are in the non-dominant position in the State, not necessarily based upon their numerical strength in relation to the rest of the population. According to Dersso:

It is this reality of powerlessness that makes minorities vulnerable and constitutes a chief defining element of a minority. And it is from this position of general vulnerability and weakness that the need for minority protection finds one of its justifications.⁴¹

It is perhaps in recognition of the importance of the issue of access to power in defining minorities that Professor Palley defined a minority as 'any racial, tribal, linguistic, religious, caste or nationality group within a nation state and which is not in control of the political machinery of the State.'⁴²

Another ground upon which Francesco Capotorti's definition has been challenged is that it limited minorities to nationals of the State.⁴³ Non-nationals may form a sizable part of a State's

http://www.pulp.up.ac.za/pdf/2010_02/2010_02.pdf (accessed June 28, 2015.)

⁴⁰ Cullen, 'Nations and Its Shadow: Quebec's Non-French Speakers and the Courts' 3 *Law and Critique* (1992) 219 at 219, quoted in Rehman, '*International Human Rights Law*,' 435.

⁴¹ Dersso, 'Taking Ethno-cultural Diversity Seriously in Constitutional Design,' 12.

⁴² Palley. *Constitutional Law and Minorities* (Minority Rights Groups, 1978), 3 cited in Rehman, '*International Human Rights Law*,' 435.

⁴³ United Nations, 'Minority Rights,' 2; Rehman, '*International Human Rights Law*,' 435.

population and amount to a minority in such State. Non-nationals that may live in States include migrant workers, refugees and stateless persons.⁴⁴ Capotorti was of the opinion that since non-nationals were already protected under international law,⁴⁵ Article 27 of the ICCPR should exclude them. This view has been criticised. An author, Tomuschat puts it thus, 'One can not fail to observe that the word employed [in Article 27] is 'persons' not 'nationals' '.⁴⁶ Article 27 of the ICCPR which provides for the protection of minorities indeed uses the word 'persons' unlike Article 25 which uses the word 'citizens' providing for the right to participate in public affairs. This would imply that the term 'minorities' is wide enough to encompass non-nationals.

The Human Rights Committee (HRC) in its General Comment on Article 27 has also put forth the view that the rights provided for in that Article are not restricted to citizens of a State alone but to all individuals present in the State's territory.⁴⁷ The HRC noted as follows:

[t]he terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in a common culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from article 2.1 are also relevant, since a State party is required under that article to ensure that

⁴⁴ Rehman, *ibid*, 436. See also United Nations, 'Minority Rights,' 5.

⁴⁵ *Ibid*.

⁴⁶ Tomuschat C., 'Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights', (1983) *Volkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte, Festschrift für Herman Mosler*, 945 at 960, quoted in Rehman, '*International Human Rights Law*', 436, footnote 22.

⁴⁷ Human Rights Committee, General Comment No. 23 (Fiftieth Session 1994) Report of the Human Rights Committee 1 GAOR 49th Session, Supp. No. (A/49/40) pp. 107-110, paragraph 5.1, in Rehman, '*International Human Rights Law*', 436 – 437.

the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone.⁴⁸

The HRC was also of the view that the minorities need not be permanent residents of the State in question as Article 27 confers rights to minorities which 'exist' within the State. Thus the question of the 'degree of permanence' of residence of such groups does not arise. In the Committee's view, even visitors in a State party constituting minorities should not be denied the rights under Article 27.⁴⁹ Indeed, Capotorti later had a change of heart and abandoned this 'nationality requirement' in a 1985 article on minorities, due to the problems such a requirement would cause in the application of minority rights.⁵⁰

Yet another ground on which Capotorti's definition has been challenged is that it concentrates on what has been termed 'minorities by will' as against 'minorities by force'. Both terms

⁴⁸ Ibid.

⁴⁹ The HRC in this regard states as follows:

[a]rticle 27 confers rights on persons belonging to minorities which 'exist' in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term 'exist' connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with other members of their group, to enjoy their own culture, to practise their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights.

See Ibid, paragraph 5. 2.

⁵⁰ Capotorti F., 'Minorities', in 8 Encyclopedia of Public International Law 385 (R. Bernhardt ed., 1985), in Jabareen Y., 'Redefining Minority Rights: Successes and Shortcomings of the UN Declaration on the Rights of Indigenous Peoples', last accessed July 10, 2015, http://jilp.law.ucdavis.edu/issues/Volume%2018.1/Jabareen_PDF.pdf, 123

‘minorities by will’ and ‘minorities by force’ were formulated by Laponce.⁵¹ In explaining the difference between both types of minority groups, he stated thus:

... two fundamentally different attitudes are possible for a minority in its relationship with the majority: it may wish to be assimilated or it may refuse to be assimilated. The minority that desires assimilation but is barred is a minority by force. The minority that refuses assimilation is a minority by will.⁵²

By this, Laponce expresses the view that indeed a minority group might not want to preserve its differences as is the focus in Capotorti’s definition, but might have a common want to be assimilated into the rest of the population. When they are refused this, then they are not a minority by will as they do not wish to be so, but a minority by force. An example of a minority by force has been stated to be the Ahmadiyahs of Pakistan who claim to be Muslims, but the existing law in Pakistan forbids them from being so identified as Muslims.⁵³ This it is submitted, is yet another unique situation wherein minorities could arise from, which gives an inkling as to the difficulty that goes into formulating a definition for minorities.

It can also be seen that Capotorti’s definition makes no mention of sexual or gender minorities, minority by disability or even political minorities. It makes reference only to ethnic, religious and linguistic minorities. The reason for this can be traced to the fact that Capotorti was tasked to prepare a study pursuant to article 27 of the ICCPR which itself refers only to

⁵¹Laponce, *The Protection of Minorities*, (University of California Press, 1960), 12-13, quoted in Rehman, ‘*International Human Rights Law*,’ 437- 438.

⁵² Ibid.

⁵³ Rehman J., ‘The Weakness in the International Protection of Minority Rights’, *The Hague, Kluwer Law Journal*, 19, in Khan B. and Rahman M., *Protection of Minorities: Regimes, Norms and Issues in South Asia*, (United Kingdom: Cambridge Scholars Publishing, 2012), 10, available at <http://www.c-s-p.org/Flyers/978-1-4438-3992-1-sample.pdf>.

‘ethnic, religious and linguistic minorities.’ This is another gap in Capotorti’s definition.

These criticisms of Capotorti’s definition even when it is presently the most recognised and authoritative one, only reveal how multi-faceted the minority problem is. Indeed minorities exist in many different situations around the whole. This bedevils the formulation of a universal definition that can encompass and adequately describe the many situations they exist in.

1.3 Minorities and Indigenous Peoples.

There is need here to draw a distinction between minorities and indigenous people, because though indigenous people are often part of the minorities in their States, international law provides for them a separate system of protection, different from the minority rights regime.

Just like minorities, there is also no universally accepted definition of indigenous people.⁵⁴ However, the most widely accepted definition⁵⁵ is that formulated by Special Rapporteur Jose Martinez Cobo.⁵⁶ He has defined them thus:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their

⁵⁴ A reason given for this is that it would be impossible to formulate a definition that would ‘include all of indigenous peoples’ varied characteristics’, Jabareen, 128.

⁵⁵ Jabareen, 126.

⁵⁶ He was authorized in 1971, by the UN Sub-commission on Prevention of Discrimination and Protection of Minorities to prepare a study on ‘the Problem of Discrimination Against Indigenous Populations.’ See SAIFAC, ‘Minorities and International Law,’ 45.

ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural practices, social institutions and legal systems⁵⁷.

The rights of indigenous people were initially subsumed under the rights of minorities. However, both groups are now recognised as distinct and separate.⁵⁸ It was in the ILO Convention No. 107 on Indigenous and Tribal Populations of 1957 that Indigenous people for the first time were recognized as a distinct category.⁵⁹ It has been stated that the need for a separate system of protection for indigenous peoples as against other minorities is borne out of the fact that they (indigenous peoples) are among the poorest, persecuted and marginalised peoples of the world and that they, unlike many other minorities have historical and ancestral claims to the land on which they live on.⁶⁰

Most indigenous groups have similarities with other types of minorities. For one, both groups are in the non-dominant position in the society they live in. Also, their linguistic, cultural or religious identity which they seek to retain may be different from that of the dominant (majority) groups. However, there are also strong differences. The most important difference between indigenous groups and other minorities is aboriginality which means being the first/original inhabitant of a territory⁶¹. That is the essence of the term 'indigenous'. Therefore, indigenous groups

⁵⁷Special Rapporteur on the Study of the Problem of Discrimination Against Indigenous Populations, Final Report, U.N. ESCOR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1986/7 Add.1-4 (1986) (by Jose Martinez-Cobo), in Jabareen, 126.

⁵⁸Smith R., *Texts and Materials on International Human Rights*, Second Edition, (Oxon; Routledge, 2010), 545. There are now United Nations mandates and protection mechanism specifically for indigenous people e.g. the United Nations Declaration on the Rights of Indigenous People. See United Nations, 'Minority Rights,' 3.

⁵⁹SAIFAC, 'Minorities and International Law', 44.

⁶⁰Jabareen, 125.

⁶¹SAIFAC, 'Minorities and International Law,' 45.

are necessarily nationals of the State⁶² and they also have a strong, spiritual and historical attachment to their lands borne out of their aboriginality, which need not be the case for other minority groups. Minorities need not be nationals and the degree of permanence of their existence in the State in question is not a factor that should be considered when determining whether or not a group qualifies as a minority group.

Indigenous people also, along with seeking to preserve their existence and identity, and also canvass for effective participation in their society just as minority groups do, often also seek for self-determination and recognition of their rights over their ancestral lands and the resources contained therein.⁶³ This is a fall-out of wanting to assert control over land which they feel is theirs by right. This is another major difference between indigenous peoples and other types of minorities.

Having understood these major differences, one would understand why there was need for a separate protection mechanism to adequately cater for the special needs of indigenous peoples even as minority groups. Indigenous groups who are minorities can of course claim protection under the regime of minority rights protection but the protection mechanisms specific to indigenous people would be better suited to govern any claim brought by them.

1.4 A Single Definition for Minorities: Relevant?

This definition problem has not been resolved and there seems not to be a point of agreement in sight. This definition controversy has led to scholars to question the relevance of having one universal definition. Thornberry has stated that ‘the lack of a universal definition does not however, prevent a description of what is and

⁶² This is borne out of the fact that they are descendants of inhabitants of the land prior to either colonization or the creation of state borders. Examples are the Native Americans in the United States of America.

⁶³ United Nations, ‘Minority Rights,’ 4.

has been understood by the terms.’⁶⁴ Alfredson and Zayas on their part, stated that such precise definition is unnecessary as the ‘answer is known in 90% of the cases.’⁶⁵ Capotorti himself maintains that the application of the principles in Article 27 of the ICCPR cannot be tied to a universal definition of ‘minority’ and that a claim to the contrary would be ‘clouding the issue.’⁶⁶

The view that a precise definition of the term minority is unnecessary is the official position of the UN and other international organisations. For example, in the process of drafting the UN Declaration on the Rights of persons belonging to National, Ethnic, Religious, and Linguistic Minorities (Hereafter, the UN Declaration on Minorities), the Human Rights Commission was of the view that ‘the question of definition was not a necessary prerequisite for drafting the declaration and that this question should not hinder the continuation of drafting work.’⁶⁷ A statement by the then OSCE⁶⁸ High Commissioner of National Minorities, Max van der Stoep is also relevant here. He is often quoted as having said thus:

What is a minority? I do not pretend to improve on the work of many experts who over the years have not been able to agree on a definition, so I won’t offer you one of my own. I would note, however, that the existence of a minority is a question of fact and not of definition...Even though, I may not have a definition of what constitutes a minority, I

⁶⁴ Thornberry P., *International Law and the Rights of Minorities*, 164. He however admitted the importance of such definition for purposes of clarity.

⁶⁵ Alfredson G. and de Zayas A., ‘Minority rights: Protection by the United Nations 14 (1993) (1-2) Human Rights L.J. 3 in SAIFAC, ‘Minorities and International Law’, 22

⁶⁶ Capotorti F., *Study on the Rights of Persons Belonging to Ethnic, Religious, and Linguistic Minorities* (New York: United Nations, 1991) para. 564, in SAIFAC, ‘Minorities and International Law’, 22.

⁶⁷ UN Doc. E/CN.4/1986/43 3, in SAIFAC, ‘Minorities and International Law,’ 23.

⁶⁸ Organization for the Security and Cooperation in Europe.

would dare say that I know a minority when I see one.⁶⁹

Some legal scholars however, hold an opposite view on the issue. They insist that a precise definition and a 'clear conceptualization' of the term 'minority' is essential for a proper application of the principles under minority rights.⁷⁰ Packer holds the view that the absence of such definition,

...opens the door to possibly unfounded, unwarranted or unjust invocations of the rights and raises the prospect of social tension and conflict concerning the legitimacy of claims and the full content of their rights. It also poses a difficulty in assessing compliance by states.⁷¹

Nowak, another scholar also made a case for a clear definition stating that such definition would prevent states from being able, by their own subjective definitions of the term, to deny the existence of minorities within their borders as some states have tried to do.⁷²

⁶⁹Van der Stoel M., 'Keynote address to the Human Dimension Seminar, Case Studies on National Minorities issues', Warsaw 24-28, May 1993, reprinted in 1(1) CSCE ODHR Bulletin 22.

⁷⁰SAIFAC, 'Minorities and International Law,' 23

⁷¹Packer J, 'On the Content of Minority Rights', in Raikka J (ed), *Do we need Minority Rights?* (1996) 21, in SAIFAC, 'Minorities and International Law,' 23.

⁷²Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary, in SAIFAC, 'Minorities and International Law,' 24. For example, the non-recognition of the Romas by Germany, based on the German interpretation of 'minorities' to be ethnic groups whose members are German nationals living in well-defined areas of settlement for a long period of time'. The Roma by nature are nomadic people and thus do not live in a discrete area in Germany but are spread all around the country. See Tsekos M.E., 'Minority Rights: the Failure of International Law to Protect the Roma', Human Rights Brief, Volume 9, last accessed June 12, 2015, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1461&context=hrbrief>, 2.

It has been pointed out that ‘the controversy with respect to minority rights is partly explained by the absence of a common understanding of the concept.’⁷³ Packer in line with this, has observed that the apprehension of States about the concept of minority rights i.e. that the rights are a threat to their territorial integrity, especially the agitations for self-determination, is rooted in the shroud of ambiguity that surrounds them.⁷⁴ Thus the question of a precise definition of minorities is very important.⁷⁵

Both sides to the argument as to the relevance of a precise definition of minorities raise very valid points. On one hand, it is true that a clear and precise definition is desirable as it would make for the creation of a standard to judge the actions of States by in terms of minority protection and not allow them evade responsibility through the use of their own arbitrary definitions. Also, it is true that such definition would demystify the concept of minorities that seems kind of nebulous at present and remove tensions that could occur from questions as to whether or not a group can truly qualify as a minority or not. This would even ensure smoother application of the principles under the extant minority protection rights regime and a consistent application of legal standards worldwide.

However, it is also true as stated by Alfredson and Zayas that the ‘answer is known in 90% of the cases,’ to the question of whether or not a group is a minority. There is to a very large

⁷³ SAIFAC, ‘Minorities and International Law,’ 24.

⁷⁴ Packer J., ‘On the Content of Minority Rights’, in SAIFAC, ‘Minorities and International Law’, 24.

⁷⁵ Patrick Thornberry acknowledged the necessity of a definition for purposes of clarity. (See footnote 64.) Hannum has also stated to the effect that the absence of a consensus definition of ‘minority’ does not prevent the use of a ‘common-sense conception of the term.’ See Dersso, ‘Taking Ethno-cultural Diversity Seriously in Constitutional Design,’ 6, referring to Hannum H. ‘Contemporary Developments in the International Protection of the Rights of Minorities’ 66 (1991) *Notre Dame LR* 1431. This, according to Dersso signifies that there is the implicit recognition that at least some foundational understanding of the concept of minorities is necessary for determining minority rights and their application under international law. See Dersso, *ibid.*

extent, a great understanding of the concept of minorities at present. The discourse surrounding Capotorti's definition and its criticisms have helped to broaden understanding on the myriad and unique situations wherein minorities exist around the world. Thus it is very likely, to borrow the words of Max van der Stoel, to know a minority when you see one despite the fact that there is no precise definition at present.⁷⁶ Thus to a great extent, the minority rights protection regime can be run effectively despite the lack of a universal definition if States are committed to making it work.

While recognising the validity of points raised on both sides of the debate, the present writers acknowledge that the ideal would be that there be a precise definition of the concept of minorities that is all-encompassing and provide adequately for the different forms and situations that minorities exist in. However, here, reality sets in. Ramaga has rightly observed that 'because of diverse experiences of different states, solutions can hardly be formulated in universal principles but depend on the particular circumstances of particular contexts.'⁷⁷ This is very true. The many varied and unique situations of minorities around the world often require that particular attention be placed on different issues. Thus even if it is possible for a universal definition to be formulated given that it would be an extremely difficult and rather enormous task to accomplish, the resultant definition would likely be quite unwieldy.

Therefore, while the idea of a precise definition of minorities is quite important considering the impact such definition would have, the present writers believe that the nigh impossibility of the idea ever coming to fruition makes its relevance in the scheme of things quite doubtful.⁷⁸ Thus, rather than spending time chasing

⁷⁶ It is perhaps this confidence that led the Working Group that was established to draft the UN Declaration on Minorities to state that 'the declaration could function perfectly well without precisely defining the term as it was clear... to which groups the term referred to in concrete cases'. UN Doc. E/CN.4/1991/53 para.9 in SAIFAC, 'Minorities and International Law', 23.

⁷⁷ Ramaga P.V., 'Relativity of the Minority Concept' 14 (1992) *Human Rights Quarterly* 104, 112, in Dersso, *ibid.*

⁷⁸ Max van der Stoel has also stated thus:

shadows so to speak, attention could instead be paid to seeing how minority rights could be better protected despite the lack of a precise definition of the holders of the rights. In this case, imprecision can be worked with.

1.5 Conclusion

This paper has examined the definition of minorities under international law. It was revealed that there is a definition problem stemming from the myriad situations in which minorities exist around the world. Thus, penning a definition that is agreed to be all-encompassing has proved difficult. The paper also drew a distinction between minorities as a category for protection under international law, and indigenous peoples. The relevance of a singular and precise definition of minorities was also discussed herein and it was concluded that the necessity and relevance of such definition is quite doubtful given that reaching such a definition would be virtually impossibility. A lack of a precise definition of minorities notwithstanding, it behoves on States to ensure that no minority group within their territory is alienated. Serious efforts should be made to extend needed protection to such groups. The protection of minority rights is essential to the preservation of peace in the world.⁷⁹ The experience in Rwanda of the 1994 Genocide is but a manifestation of what can go wrong when minorities are neglected. Therefore, States should take the issue of minority protection very seriously.

Given the dynamism and diversity in the nature and manifestation of the minority phenomenon, the possibility and necessity of a universally agreed upon definition of the term minorities may indeed be doubted.

Van der Stoep M., 'Keynote address to the Human Dimension Seminar, Case Studies on National Minorities issues', Warsaw 24-28, May 1993, reprinted in 1(1) CSCE ODHR Bulletin 22.

⁷⁹ Note Woodrow Wilson's reflection where he said 'Nothing is more likely to disturb the peace of the world that the treatment which might in certain circumstances be meted out to minorities', in Thornberry P., 'Is there a Phoenix in the Ashes', 440 quoted in SAIFAC, 'Minorities and International Law', 58.