UNDERAPPRECIATED RESOURCE OR INADEQUATE MEASURE?

Minority Protection under Article 27 of the
International Covenant on Civil and Political Rights

by

DIMITRIOS (JIM) MOLOS

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ABSTRACT

Article 27 of the *International Covenant on Civil and Political Rights* is a legally binding and justiciable minority protection provision. It stipulates, “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.” Perhaps due to its negative, weak and qualified terminology, too many legal scholars display a dismissive attitude toward this article suggesting that they deem it to be an inadequate measure of minority protection. This thesis seeks to address the question of whether article 27 is simply another inadequate measure or an underappreciated resource through analyses of four key questions: (i) the scope question, (ii) the definitional question, (iii) the right-bearer question, and, (iv) the obligation question. Article 27’s cautious terminology has produced much confusion and controversy, but the United Nations Human Rights Committee’s practice has helped clarify many significant points of contention. Despite contestations to the contrary by many States parties, article 27 has a universal scope and applicability with only two minor, but significant, exceptions. The right-holder is a person belonging to a non-majority ethnic, national, indigenous, racial, religious or linguistic community, and she bears and exercises the rights protected by article 27 as an individual, even though she has a right to exercise them in concert with other members of her community. States parties are obligated to ensure that persons belonging to minority communities have these rights. Hence, I suggest that article 27 should be interpreted according to the following formulation:

*States parties have negative, and possibly also positive, obligations to ensure that persons belonging to non-majority ethnic, national, indigenous, racial, religious or linguistic communities have individual rights to enjoy their own culture, to profess and practise their own religion, and to use their own language, including also the right to exercise these rights in concert with other members of their community.*
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CHAPTER ONE – INTRODUCTION

ARTICLE 27 AND THE MINORITY PROBLEM

One constant to be found throughout much of modern history, with some notable exceptions, is the general recognition that minorities should be permitted to maintain activities and characteristics peculiar to their group. The first systematic formulation dates back to the minorities treaties of the interwar period, but the basic principle survived the demise of that system through provisions such as Article 27 of the International Covenant on Civil and Political Rights. Many international instruments, as well as many states in their national legislation, recognise that members of linguistic and religious minorities are entitled to rights not necessarily explicitly guaranteed to members of the majority, namely the right to use their language and practice their religion with other members of their group. Whilst this formulation appears straightforward enough, there remains in practice many problems related to the identity of the individuals who may claim these benefits, as well as uncertainty as to its exact content.1

The enduring problem of ‘Babel’ which entails the management of differences, specifically the relationship of distinct groups within heterogeneous societies, dates back to the origins of international law, indeed, history, and continues to bear contemporary resonance. The frequency and severity of conflicts involving minorities worldwide locates this problem as one concerning peace and world public order, as well as being a human rights problem which fundamentally concerns issues of individual welfare and group dignity, identity and autonomy.2

1.1 Article 27: Underappreciated Resource or Inadequate Measure?

For centuries, the minority problem has vexed the international community. Patrick Thornberry describes it as “one of the oldest concerns of international law”,3 and James Crawford notes that “[s]ociologically, it is no doubt true that the emphasis on minorities protection has been greatest at times when empires were dissolving or new states were being created”.4 The advent of the Westphalian sovereign state system intensified the potential problems associat-

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ed with the presence of minority communities within a political jurisdiction, but only in the twentieth century did the international community embark on concerted and systematic efforts to establish international institutions to mediate the relationships between the state and the minority communities in its jurisdiction. These international efforts are premised on the relatively recent realization that the minority problem was an international rather than strictly domestic challenge.⁵ According to Thornberry, 

A cursory glance at the spectrum of internal and international disputes reveals that a minority of one kind or another is frequently the focus, which justifies the need for a continuing corpus of rules. One needs only to recall the names of such groups as the Baha’i of Iran, the Biharis of Bangladesh, the Catholics of Northern Ireland, the Hungarians of Romania, the Kurds in Iraq, Iran, Turkey and Syria, the Miskito Indians of Nicaragua, the Philippine Moslems, the Quebecois of Canada, the Tamils of Sri Lanka, and the Sikhs of India, to make the point.⁶

Thornberry does not purport to offer an exhaustive list, but these disputes coupled with revelatory lessons from the Second World War have served as the impetus for various forms of international minority protection. In particular, the international community has only recently decided that it is imperative to do more to prevent domestic, regional and international conflicts of this kind, since merely reacting to them, after they have been permitted to fester for decades, is not only precarious and imprudent, but unfair and unjust.

Breaking with the standard established in the literature on the minority problem in international law, this thesis does not examine minority protection in toto, which generally covers minority protection in nineteenth-century Europe as a matter of Great Power realpolitik through the League of Nations’ minority treaties regime and the United Nations’ human rights framework to contemporary European efforts to contend with the challenges of the post-Cold War ethnonational revival. That is, this thesis does not aim to provide an exhaus-

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tive treatment of international norms of minority protection from the nineteenth century to the present. Nor does it attempt to provide a comprehensive account of minority protection within the United Nations’ legal system. Instead, this thesis is devoted to ascertaining the nature, extent, scope and content of minority protection provided by article 27 of the International Covenant on Civil and Political Rights (hereafter ICCPR or Covenant) through four analyses of its constitutive phrases, which are described later in this introduction. Under article 27, “[i]n 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.” Perhaps due to its negative, cautious and qualified terminology, too many legal scholars display a dismissive attitude toward this article suggesting that they deem it to be an inadequate measure of minority protection. This thesis seeks to address the question of whether article 27 of the ICCPR is simply another inadequate measure or an underappreciated resource for contending with the challenges of the minority problem.

But what is the minority problem? There are not only different approaches to this problem, but various ways to understand it as well. For the purposes of this thesis, the minority problem is the challenge of contending with the presence of minority ethnic, religious and linguistic communities within the jurisdiction of a sovereign state, while respecting human rights, individual freedom, equality and the value of culture, community and diversity. These minority communities are characterized by their numerical inferiority to and by their ethnic, religious or linguistic distinctiveness from the rest of the state’s population. This formulation is informed by article 27’s opening phrase widely known as the Chilean clause –

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“In those States in which ethnic, religious or linguistic minorities exist” – with its focus on states and these three kinds of minorities. The basic idea is that state boundaries do not adhere to the nationalist ideal of ‘a state for each nation, and a nation for each state’, and the presence of distinct minority communities within states is a potential source of problems, especially when the legitimizing principle of self-determination encourages state governments to pursue a nation-building agenda.\(^8\) The minority problem may result from the presence of minority communities in a state, but contrary to what the phrase itself suggests, it is not necessarily produced by these minorities. Instead, it is often the product of government action that fails to recognize and accommodate persons belonging to minority groups.\(^9\) The purpose of minority protection is to safeguard some of the cultural and communal interests of ethnic, religious and linguistic minorities against the state’s otherwise legitimate nation-building activities. On this view, then, minority protection legislation functions to balance, legitimize and justify state action.

Unsurprisingly, there is little that is uncontroversial about the minority problem or minority protection. Even though it is trite to remark on the sociological fact and ubiquitous nature of cultural and communal diversity, the presence of minorities often becomes a matter of contentious dispute when legal rights, privileges and benefits are associated with a special legal status under domestic or international law. For instance, the presence of minorities is often denied by states of immigration, “who sometimes define them out of existence, attempting perhaps to deflect the gaze of the international community from the treatment of

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\(^9\) Thornberry explains, “The history of their protection dates back to the beginning of the modern legal system, the development of which parallels the rise, in the sixteenth and seventeenth centuries, of the nation-state system. The ideals of national unity manifested by a central concentration of power; by a common language, culture and religion; and by economic and geographical limits, all so fundamental to the self-identification of the new states, tended also to express themselves in intolerant and repressive attitudes toward those who were perceived or perceived themselves as “others”.” Thornberry 1980, *supra* note 3, at 421.
their populations”.\textsuperscript{10} In fact, in the early decades of the UN regime, almost every Latin American state’s representatives maintained that the minority problem did not arise on the American continent. Li-ann Thio holds that these states seem to believe that the minority problem is constituted by “the hostile nature of ‘majority-minority’ relations rather than the existence of minorities”.\textsuperscript{11} As a result,

no minority problem was declared to exist in countries like Switzerland where citizenship was based on shared political ideals. Neither did it exist outside Europe in countries like Canada owing to the same devotion to shared ideals, which the large number of immigrants was assumed to have embraced. Latin American countries like Argentina and Uruguay stated that although their countries had different nationalities, none were in a legally inferior position and all citizens enjoyed the same rights without distinction as to race, language or religion. This focus on the individual reflects the prevalent American assimilationist or ‘melting pot’ ethos, the idea that national characteristics are muted in the process of voluntary assimilation. Consequently, migratory minorities lose their ethnic group characteristics and any shared awareness of common history, language and culture.\textsuperscript{12}

For these assimilationist states, the source of their ‘minorities’ is relevant to determining whether these individuals should be considered minorities for the purposes of minority protection under international law. They insist that there is a significant distinction between immigrants and long-established minorities, like national minorities or indigenous peoples, and that it is a mistake to confuse the sociological and historical questions with the legal questions about the scope, definition and application of the minority concept under article 27. When states deny the presence of minorities within their jurisdiction, they are rarely concerned primarily, or even significantly, with sociological or historical questions.

The diversity of types of minority group, including distinct routes to being minorities in their state, produces also much variation in demands. A small portion of minority com-

\textsuperscript{10} Ibid at 3-4.
\textsuperscript{11} Thio, supra note 2, at 56.
\textsuperscript{12} Ibid at 56-57.
munities are nations or peoples with a right to self-determination in the form of some significant measure of internal political autonomy, even though some national minorities continue to demand secession. These large-scale, concentrated and culturally distinct communities tend to seek institutional arrangements to preserve their identities, cultures and languages. In short, they seek protection from the assimilationist pressures exerted by the state and the national majority. These communities typically seek to balance their integration into the state with adequate safeguards for their distinctiveness, and different communities will seek different types and degrees of integration and protection. Although these communities are covered by minority protection, they tend to demand protections beyond what is typically part of the minority protection package. They form one of the poles in the continuum leading to the other pole of new immigrants seeking equal rights and freedoms, toleration, non-discrimination and fair terms of integration.

This depiction suggests that the minority problem is a domestic matter relating to the type of legal and policy response that a state should adopt toward its particular circumstances, but Thio is correct to emphasize that the minority problem often involves “at least three protagonists”. The first is the potentially aggrieved minority group as the object or claimant of minority protection. The second is the host state within whose boundaries the minority community resides; these states are often called “Minority States”. Third, there is often a neighbouring ‘kin’ state with a vested interest in the treatment of its members who happen to reside abroad. This third element establishes the minority problem as an international problem and explains why these problems tend to be destabilizing sources of regional and international conflict. Thio explains, “[t]he insecurity of minority groups within multinational states and the exertion by kin states of an ethnic or spiritual protectorate over ‘kin’ minori-

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13 Ibid at 24-25.
ties beyond their frontiers fuels minority related conflicts. The transborder pull of ethnic and religious affinity remains strong.\textsuperscript{14} In recent history, memories of Nazi Germany appealing to German minority groups as a ‘fifth column’ to disrupt, sabotage and weaken the national unity of their state of residence prior to Nazi military offensives have not been forgotten, and, as a result, states remain concerned about the loyalty of their minorities. Thus, William Barth concludes,

The minority problem has a distinctly international character since the subject involves the relationship between different national groups who generally emigrate from different countries. Disputes between states and internal state conflicts about minorities have served as a justification for war as well as other forms of violence between national groups, including WWI. The minorities question is a subject that also lends itself to international law exercised through the treaty-making power of states, since treaty law is the vehicle by which different states govern their formal relationships.\textsuperscript{15}

The minority problem may be approached as a domestic matter, but this thesis is concerned with the international minority problem, and the specific contribution of article 27 as a form of minority protection under international law.

There are many possible policy responses by states to the sociological fact of minorities in their jurisdiction. Some of these policies have involved cultural assimilation, genocide, population transfer and other strategies to eliminate the presence of these minorities. These policies are not forms of minority protection, so they fall outside the scope of this thesis. They are united by a view of the presence of minorities as a problem to solve by elimination. The phrase “minority problem” encourages this view, whereas replacing the word “problem” with “challenge” may guide us more directly toward a positive solution or arrangement. In the literature, the challenge of contending with the presence of minorities within a jurisdiction is referred to as “the minority problem”, and in the interest of consisten-

\textsuperscript{14} Ibid at 255.
\textsuperscript{15} Barth, supra note 5, at 37-38.
cy, I will adhere to this convention. I want to stress, however, that my use of the word “problem” in this context should be construed to mean something much closer to “challenge” in order to remove the connotation that the presence of minorities is unwelcome, harmful, negative and lamentable. So, for the purposes of this thesis, the minority problem is the challenge of contending with the presence of minorities within a jurisdiction, where this situation is not necessarily negative or positive, but it is a challenge within a multicultural paradigm. Alexandra Xanthaki explains that “[m]ulticulturalism is primarily about respecting and celebrating the culture of the individual in the public sphere”, even though many different reasons have been offered for the value of culture and community.16 Athanasia Åkermark provides an extended commentary on the various justifications for minority protection from communitarian concerns about culture and community as sources of identity to liberal concerns about freedom, autonomy and human dignity to practical concerns about peace, order and stability.17 Although these normative justifications are important, this thesis is concerned with the content of article 27 protection rather than its justification.

Contemporary commentators on minority protection in international law tend to emphasize how the current manifestation of the minority problem is influenced by three recent developments. First, “the genocide during WWII has been followed by other genocides, thus creating a new awareness of the need for early warning and prevention”.18 In part, the uptake for many legal and political scholars has been that the UN’s human rights framework may not be sufficient for peace, order, security and stability. In the Millennium

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Report to the General Assembly, the UN Secretary-General stated,

We must do more to prevent conflicts happening at all. Most conflicts happen in poor countries, especially those which are badly governed or where power and wealth are very unfairly distributed between ethnic or religious groups. So the best way to prevent conflict is to promote political arrangements in which all groups are fairly represented, combined with human rights, minority rights, and broad-based economic development.¹⁹

Second, “the end of the Cold War has allowed the expression of cultural identities in an unprecedented manner, thus obliging states to provide some recognition of such or else face serious political and other consequences”.²⁰ For a few decades after WWII, there was a widespread belief that the age of nationalism had given way to a postnational era, but this belief was premature. It was not properly appreciated how the Cold War between the United States and the Soviet Union had served not only to overshadow national concerns with other political concerns, but also to stifle nationalist aspirations for self-determination in the interest of political unity. Third, “globalization has triggered the urge in people to confirm and express their distinct identities”.²¹ Thornberry explains how globalization serves as a double-edged sword:

On the one hand, there is a movement towards the internationalization or globalization of environmental, resource, humanitarian and rights issues … On the other hand, we are witness to the emergence or recrudescence within and between states of virulent forms of ethnocentrism, hatred of diversity, the exhumation of buried antagonisms and the obscenity of ‘ethnic cleansing’ … Positively, the increasing internationalization of rights questions implicates the rights of minorities … Negatively, the upsurge in ethno-nationalism, or nation-state ideology, targets minorities in a manner reminiscent of the darkest periods of this and earlier centuries as the new totalitarians seek out new victims.²²

The minority problem became more urgent with the ethnocultural revival in the post-Cold

²⁰ Stamatopoulou, supra note 18, at 1175.
²¹ Ibid.
International law contains a variety of techniques to protect minorities by promoting their peaceful coexistence, on a principled basis, with the rest of the state’s population. Article 27 of the ICCPR is one of these minority protection provisions, but I contend that its value as a resource for minority protection has been underappreciated. I have noted already that this thesis does not seek to provide an exhaustive account of international norms of minority protection from the nineteenth century to the present, or within the UN’s legal regime. Instead, this thesis is devoted to a single article. Yet, even an exhaustive treatment of this article would be too ambitious, so our attention is limited to four significant questions: (i) the scope question; (ii) the definitional question; (iii) the rights-holder question; and, (iv) the obligation question. Ultimately, my objective is to defend an interpretation of article 27 based on answers to these four questions:

States Parties have negative, and possibly also positive, obligations to ensure that persons belonging to non-majority ethnic, national, indigenous, racial, religious or linguistic communities have individual rights to enjoy their own culture, to profess and practise their own religion, and to use their own language, including also the right to exercise these rights in concert with other members of their community.

I contend that this universal, individual and positive interpretation provides sound grounds for regarding article 27 as a valuable resource for minority protection.

This thesis begins with an analysis of the scope question in Chapter Two. According to its opening phrase, article 27 applies to those states in which ethnic, religious or linguistic minorities exist, and this phrase raises questions about article 27’s applicability to particular states and, thus, its scope. Are there states in which minorities do not exist? Does the existence of minorities in a state depend on some form of legal recognition by this state?
What if a state refuses to bestow legal recognition on any sub-state, internal or minority groups? Also, what if a state claims that article 27 does not apply to it? These questions have been raised by States Parties to the ICCPR as they attempt to evade or deny their obligations under international law. In this chapter, I examine the Chilean clause and the French ‘declaration’ to determine whether there are states in which minorities do not exist, and whether States Parties may avoid their legal obligations by declaring that they have no minorities. My analysis reveals that article 27 has a universal scope because the existence of minorities in a jurisdiction is a matter of objective fact rather than domestic legal recognition.

Chapter Three continues where Chapter Two leaves off. Even if article 27 has a universal scope because the existence of minorities is a matter of objective fact, we are still left with the question of what it means for minorities to exist in a state. There is also the question of who determines whether minorities exist in a state and by what procedure, method, means or test. Since the legal recognition of minority status under article 27 confers legal rights onto these communities, States Parties have an interest in determining whether these communities exist as minorities within their territory. Of course, these questions depend on what the term “minority” means for the purpose of article 27, and this is the key definitional question. There are also subsequent definitional questions relating to the terms “ethnic”, “religious” and “linguistic”. Like with other definitional questions in international law, too much seems to hinge on what side of the dividing line a community finds itself. Under article 27, a minority community is numerically inferior to and culturally, religiously or linguistically distinct from the rest of the state’s population.

Chapter Four begins by investigating what it means for a person to belong to a minority community. Like the definitional question on the minority concept, belonging to a
minority community is a matter of objective fact. Yet, this question has been far less contentious than another question relating to the right-bearer of article 27; namely, are the rights contained within article 27 borne by persons belonging to the relevant minority communities as individuals or as a collective? That is, are article 27 rights individual or collective in nature? The terminology seems to suggest that this question should receive a straightforward reply, but the collective nature of culture, religion, language and community complicate efforts for a simple reply. After all, if persons belonging to such minorities shall not be denied particular rights in community with other members of their group, is it the community as a whole that exercises these rights or has decision-making authority over them? The practice of the Human Rights Committee (hereafter HRC) clarifies that article 27 rights are borne and exercised by individuals, but that individuals may opt to exercise these rights in concert with other members of their community. In this sense, these individual rights may undergird collective claims for measures to protect minority communities.

Chapter Five shifts attention from the rights-holder or beneficiary to the obligation question. Once it is determined that a person belongs to a minority community in a state in which minorities exist, what obligations does the state have to this individual? What does it mean for a state to not deny the right to enjoy one’s culture, to profess and practise one’s religion, or to use one’s language? Is it simply a matter of toleration and non-interference as the negative language of article 27 seems to suggest? That is, are the obligations on States Parties merely negative in nature? Do States Parties have any positive obligations to assist minority communities in their struggle to protect and preserve their distinctiveness, their culture, their traditions, their customs and their community? It is evident that States Parties’ obligations under article 27 are not merely negative or non-interference obligations. States
Parties may be obligated to take positive, active and concrete measures to assist persons belonging to minority communities to enjoy their culture, profess and practise their religion, and use their language. Ultimately, based on my analyses of these four questions, I conclude that article 27 is an underappreciated resource for minority protection.

1.2 The United Nations, the ICCPR and Article 27
It is customary in book-length accounts of the international law on minority protection to begin with a lengthy exposition of the treatment of the minority problem in (mostly European) international relations from the nineteenth century to the present. There are numerous excellent analyses, and this thesis does not aim to contribute to this literature. In this section, my objective is once again quite modest: to locate article 27 in international law, and to explain this thesis’ methodology.

Article 27 has a long and complex history involving an international commitment to individual human rights, an appreciation that some form of minority protection was crucial for international peace, order and security, variable levels of ambivalence and confusion on how best to formulate a minority protection article to achieve this objective, a preference to postpone decision rather than make the wrong one, and, of course, Cold War politics. As a result, there was no specific minority provision in the UN Charter (hereafter Charter) or in the Universal Declaration of Human Rights (hereafter UDHR). Thornberry speculates that “the minorities issue was subsumed under the general thrust for a new regime of human rights”, but he notes that neither minority rights nor any other human rights were spelled out in the Charter. The Charter and the UDHR do prohibit distinctions on the arbitrary
grounds of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. The omission of specific references to minorities was deliberate, according to Thornberry: “in the aftermath of the Second World War, recognition and promotion of universal individual human rights on a non-discriminatory basis was regarded as the best means of underpinning the new ‘world order’.” Thio indicates, “[w]hile a non-discrimination clause was included in the text, it was detached from the group dimension … The minorities’ regime was displaced by a novel experiment of universal human rights protection.” Fernand de Varennes believes that states preferred this approach because many were concerned with the assimilation of their new immigrant populations, and even more were reluctant to risk positive obligations to sustain minority communities through publicly funded institutions. In the early days of the UN, minority protection was not a pressing issue.

Nonetheless, there was plenty of discussion on whether to include a minority provision, and how to formulate it. According to Åkermark,

the proposals made by the Division of Human Rights of the Secretariat, by the Sub-Commission, by the Drafting Committee for the Universal Declaration, and by some states, all include more or less the same elements as the ones we find in the League of Nations instruments. In these proposals, emphasis is put on the rights of minorities to establish and maintain schools, cultural and religious institutions, to use their own language in private and in public, including before the courts and public authorities, and to have access to the press. Protection of culture is in these proposals equally important as individual human rights.

In 1947, at the first session of the Drafting Committee on an International Bill of Rights, draft article 46 was proposed for consideration:

26 UN Charter, supra note 23, art 1(4) prohibits discrimination based on “race, sex, language or religion”, whereas UDHR, supra note 24, art 2 sets out the more elaborate formulation quoted here.
27 Thornberry 1995, supra note 22, at 17.
28 Thio, supra note 2, at 109.
29 de Varennes, supra note 1, at 134; Thio, supra note 2, at 110.
30 Åkermark, supra note 17, at 123-124.
In States inhabited by a substantial number of persons of a race, language or religion other than those of the majority of the population, persons belonging to such ethnic, linguistic or religious minorities shall have the right to establish and maintain, out of an equitable proportion of any public funds available for the purpose, their schools and cultural and religious institutions, and to use their own language before the courts and other authorities and organs of the State and in the press and in public assembly.31

Later in the same year, this proposed provision was revised by the Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereafter SCPDPM) as draft article 36:

In States inhabited by well defined ethnic, linguistic or religious groups which are clearly distinguished from the rest of the population and which want to be accorded differential treatment, persons belonging to such groups shall have the right as far as is compatible with public order and security to establish and maintain their schools and cultural or religious institutions, and to use their own language and script in the press, in public assembly and before the courts and other authorities of the State, if they so choose.32

The Commission on Human Rights (hereafter CHR) voted down this draft article by a margin of 10 votes to 6, and sent the draft declaration to the General Assembly without a minority protection provision.33

When the Third Committee of the General Assembly considered the draft declaration, Denmark,34 Yugoslavia35 and the Soviet Union proposed minorities provisions.36 The Soviet proposal was the most detailed, and it attracted the most attention: “All persons, irrespective of

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34 “All persons belonging to a racial, national, religious or linguistic minority have the right to establish their own schools and receive teaching in the language of their own choice.” UNGAC3, Draft International Declaration of Human Rights, UNGAOR, UN Doc A/C.3/307/Rev.1/Add.2 (1948).
35 “A. Any persons has the right to the recognition and protection of his nationality and to the free development of the nation to which he belongs. National communities which are in a state community with other nations are equal in national, political and social rights. B. Any national minority, as an ethncial community, has the right to the full development of its ethnical culture and to the free use of its language. It is entitled to have these rights protected by the State.” UNGAC3, Draft International Declaration of Human Rights, UNGAOR, UN Doc A/C.3/307/Rev.1/Add.1 (1948).
of whether they belong to the racial, national or religious minority or majority of the population, have the right to their own ethnic or national culture, to establish their own schools and receive teaching in their native tongue, and to use that tongue in the press, at public meetings, in the courts and in other official premises.”37 When introducing this proposal, the Soviet Union’s representative declared, “[t]he use of the native language and the right of a population to develop its own culture were fundamental human rights”.38 The Soviet Union was aiming to establish an international standard for the treatment of minorities based on some significant measure of cultural and national autonomy. This model opposed the assimilationist approach embraced by the United States. According to Thornberry, “[t]he proposals were heavily criticized in a debate with a strong ‘cold war’ flavour – though this is not a complete explanation of their ultimate failure”.39 Mexico declared that it did not have a minority problem, and Brazil introduced familiar arguments about national unity and the need for assimilation.40 Similar considerations were raised by Chile, France, Haiti and Australia.41 The United States’ representative, Eleanor Roosevelt, insisted that it was inappropriate for the UDHR to contain a minorities article because the minority problem was not universal.42 Instead, she declared, “the best solution of the problem of minorities was to encourage respect for human rights.”43 The Soviet Union was supported by states from Eastern Europe, as well as Belgium, India and, with reservations, Turkey.44 Basically, the Soviet Union claimed that it had found the solution to the minority problem, and it invited other states to

37 UNCHR, Report of the Third Session of the Commission on Human Rights, UNESCOR, 3rd Sess, UN Doc E/800 (1948) at 44.
39 Thornberry 1991, supra note 6, at 135.
41 Ibid at 722-725.
42 Ibid at 726.
43 Ibid at 726.
adopt similar policies. This tactic seems to have backfired, however. Thornberry explains,

In addition to the ‘traditional’ threat of ‘Balkanization’ through allowing ethnic groups full
rein, there was added the threat of ‘Sovietization’. It is not surprising that, to a majority of
States, individualistic human rights without any special concession to particular groups in so-
ciety seemed a sensible, modern, and democratic programme, altogether worthy of support.\footnote{Thornberry 1991, supra note 6, at 136-137.}

The United Kingdom’s representative, Ernest Davies, stressed that the UDHR contained
many provisions to protect the rights of minorities, and he cited articles 2, 16, 17, 18 and
23.\footnote{UNCHR, 3rd Sess, 161st Mtg, UN Doc A/C.3/SR.162 (1948) at 731.} Hence, the UDHR would not contain a minorities article.

But since the League of Nations’ minority protection regime had not survived the
dissolution of the League, a general view which would be confirmed in Study of the Legal
Validity of the Undertakings Concerning Minorities (1950),\footnote{UNCHR, Study of the Legal Validity of the Undertaking Concerning Minorities, UNESCOR, 6th Sess, UN Doc E/CN.4/367 (1950).} the international community had to take some stance on the minority problem.\footnote{It is noteworthy that states were still obligated to honour their treaties, however.} The UDHR was adopted on 10 December 1948, and on the very next day, the General Assembly adopted Resolution 217C (III) on the “Fate of Minorities”.\footnote{Fate of Minorities, GA Res 217C(III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/RES/3/217C (1948) at 77.} In this resolution, the General Assembly affirmed that “the United Nations cannot remain indifferent to the fate of minorities”, and that “it is difficult to adopt a uniform solution of this complex and delicate question, which has special aspects in each State in which it arises”. Moreover, given “the universal character of the Declaration of
Human Rights”, it decided not to include “a specific provision with the question of minorities in the text of this Declaration”. Instead, the General Assembly referred the matter to the Economic and Social Council (hereafter ECOSOC) “to make a thorough study of the problem of minorities, in order that the United Nations may be able to take effective measures for the protection of racial, national, religious or linguistic minorities”. Resolution 217C (III)
was evidently a consolation for the supporters of minority rights, whose proposals were passed on to ECOSOC for further consideration. Thornberry states, “Resolution 217C (III) is no substitute for omitting the article from the Declaration, but it indicated that, at least, the minorities issue was not likely to be exhausted by the debates on the Declaration.”

Thio takes a less optimistic stance: “In typical ‘UN buck-passing’ fashion, the issue was referred to ECOSOC and in turn, the CHR and SCPDPM were asked to undertake studies. While demonstrating formal UN concern for minorities, the matter was consigned to endless committee discussions.” Nonetheless, these discussions would eventually culminate in article 27 of the ICCPR.

Human rights are central to the UN’s legal system, but issues relating to human rights fall within the competence of various international organs, like the General Assembly and ECOSOC. Under the Charter, the General Assembly was tasked with “assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”, and ECOSOC with making “recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.”

Thio explains that, “[i]mplicitly, minority rights fell within the province of ECOSOC”. Under article 68 of the Charter, ECOSOC was empowered to create commissions to promote human rights. At its first session, it created the CHR, which was staffed by government representatives and charged with formulating an international bill of rights. Both the prevention of discrimination and the protection of minorities expressly fell within

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51 Thio, *supra* note 2, at 138-139.
52 *UN Charter, supra* note 23, art 13(1)(b).
54 Thio, *supra* note 2, at 113.
the CHR’s purview. At the initiative of the Soviet Union, ECOSOC established the SCPDPM as the institutional home of minority issues. Like the CHR, the SCPDPM dealt with the prevention of discrimination and the protection of minorities. Thio suggests that only a single commission was established to deal with these two related tasks because there was a general reluctance to highlight minority issues as a focal point of attention and action. John Humphrey held that the fused mandate allowed the UN to dodge minority protection issues, and that the higher UN bodies never intended to take seriously minority protection, preferring to bury it in a sub-commission with a dual mandate. Interestingly, unlike the ECOSOC and CHR, the SCPDPM was composed of independent experts rather than instructed government representatives because “it was designed to operate as an advisory organ rather than a political organ, empowered to take independent action.” Thio believes that these considerations support Humphrey’s hypothesis: “Relegating the issue of minorities to a subordinate, non-political body indicates that minority protection was a relatively minor institutional goal. It was primarily within this context that efforts to define ‘minorities’ and set minorities standards would take place. However, minorities’ issues had to jostle for attention as the SCPDPM progressively addressed a widening range of human rights concerns and accumulated new functions.”

From its inception, the SCPDPM was eager to discharge its mandate to thoroughly study the minority problem and aid in the production of effective protective measures. In 1950, it identified two necessary steps toward this goal: to define and classify minorities

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55 Ibid.
56 Ibid.
57 Ibid.
58 Ibid at 114. The appointment of these independent experts is a serious matter. Thornberry explains that the independent experts are chosen by the CHR in consultation with the Secretary-General and in agreement with the governments of their respective countries. See Thornberry 1980, supra note 3, at 442.
59 Thio, supra note 2, at 114.
according to the type of protection required, and to collect information about minority situations. According to Thio,

   According to Thio, this led to a flurry of proposals relating to definitions, substantive provisions and implement-
   tation measures, but the CHR was un receptive and often subjected proposals to an endless carousel by requesting that the SCPDPM place these under further consideration. ECOSOC acquiesced in the evasive attitude of the CHR towards minorities’ questions, indicating the negative attitude of states towards minority protection.

Thornberry confirms, “its proposals were unpopular with states and were constantly referred back to it for further study.” Thio speculates, “[t]he tension between the CHR and the SCPDPM stemmed from conflicting perceptions about the role of the SCPDPM.” She explains,

   The CHR viewed it as a subordinate, advisory body in the service of the human rights programme it was constructing. It preferred a gradualist, three-step approach: first, to issue a non-binding declaration establishing basic human rights standards, followed by a convention translating these standards into legal obligations and finally, to construct machinery to implement the conventional rights. Legal enactment was to precede devising implementation processes. The SCPDPM’s primary role was to engage in background studies.

   Conversely, the SCPDPM preferred an activist posture. Staffed by independent experts to some extent insulated from the binds of realpolitik, it displayed a degree of idealism in seeking to make general principles, once established, operational and effective. Considering studies in vacuo pointless, it stressed the imperative of ensuring immediate and effective implementation of rights relating to non-discrimination and minorities.

In 1950, the CHR admonished the SCPDPM for its activism on minority protection and instructed it to forego aggressive quasi-litigious and enforcement proposals. In 1951, ECOSOC moved to dissolve the SCPDPM and to transfer its mandate elsewhere. ECOSOC shared the SCPDPM’s conviction that academic studies per se lacked value, and the

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61 Thio, supra note 2, at 121.
62 Thornberry 1980: 442.
63 Thio, supra note 2, at 121.
64 Ibid.
SCPDPM’s penchant for impractical and premature proposals was causing increased irritation. In 1952, however, the General Assembly requested that ECOSOC reconsider its decision because preventing discrimination and protecting minorities were two of the most important projects undertaken by the UN. The SCPDPM was saved, but it retreated from its mandate regarding the protection of minorities. According to Thio,

Chastened by its near-death experience, SCPDPM drafted an acceptable programme of activities concentrating on prevention of discrimination studies and on drafting a related declaration and convention. SCPDPM initiatives in 1953 drew the CHR’s pallid response which merely noted with appreciation the SCPDPM’s work in the field of minorities, without expressing any opinion on the proposed definition of minorities. Subsequent SCPDPM initiatives were banished to the realm of ‘further study’. In a capitulation of sorts, the SCPDPM in 1955 adopted a resolution declaring its intention to concentrate on discrimination problems.65 This resolution effectively placed minority protection on the backburner, and the SCPDPM was virtually dormant on matters of minority protection until the 1970s. Thornberry notes that, after the events of the mid-1950s, “[a] lapse of some thirteen years followed before the Sub-Commission resolved to undertake a study of the principles set out in article 27.”66 In retrospect, the SCPDPM’s successful inclusion of a minority provision in the ICCPR seems not only surprising, but rather remarkable.

The framers of the Charter and the UDHR opted to omit a minority protection article from these international documents, and although the minority problem was sidelined, it was never fully absent. In 1947, at its second session, the CHR decided to prepare an International Bill of Rights consisting of a general Declaration, a separate Covenant, and measures of implementation.67 With the UDHR’s proclamation in 1948, attention shifted to the Covenant on Human Rights. “The drafting took the best part of six sessions of the Human

65 Ibid at 124-125.
66 Thornberry 1980, supra note 3, at 442.
Rights Commission, beginning with consideration of a preliminary draft which included
detailed formulation of most of the civil and political rights set out in the Declaration."
During the 1950s, debates over the inclusion of minority rights in this covenant were heavily
influenced by the Cold War. The Soviet Union positioned itself as the international spokes-
person for minority rights, whereas the United States held fast to its endorsement of individ-
ual human rights, non-discrimination, and toleration as fair terms of assimilation. These
superpowers clashed over many issues. The United States insisted on divorcing the principle
of self-determination from minority protection, and even though it managed to exact this
separation, it failed to eliminate the right of all peoples to self-determination.69

The United States and Soviet Union also butted heads on the inclusion of economic,
social and cultural rights in the human rights covenant. In 1951, after what Dominic McGol-
drick described as a “bitter” debate during the General Assembly’s sixth session, the General
Assembly instructed the CHR to split the Covenant on Human Rights into two separate
treaties, “one to contain civil and political rights and the other to contain economic, social
and cultural rights”.70 The Soviet Union and other Eastern Bloc states objected that this
division would establish a hierarchy between them, and these concerns came to fruition.
Until very recently, the International Covenant on Economic, Social and Cultural Rights
(hereafter ICESCR) was widely considered to be the weaker treaty because it required only
progressive implementation and because it was not internationally justiciable.71 Only in the

68 Thornberry 1991, supra note 6, at 142. See UNCHR, Report of the Fifth Session of the Commission on
Human Rights to the Economic and Social Council, UNESCOR, 5th Sess, UN Doc E/1371; E/CN.4/350 (1949),
Annexes I and II.
at 175. The right of all peoples to self-determination is contained within the twin first articles of both interna-
tional covenants.
70 McGoldrick, supra note 67, at 7; Preparation of Two Draft International Covenants on Human Rights, GA
Res 543(VI), UNGAOR, 6th Session, Supp No 20, UN Doc A/2119 (1950) at 36.
71 Barth, supra note 5, at 89.
last few years was this imbalance addressed as the General Assembly adopted the *Optional Protocol* to the *ICESCR* on 10 December 2008, which was signed by forty parties and ratified by ten as of February 2013, and then entered into force on 5 May 2013. States Parties to the *Optional Protocol* to the *ICESCR* recognize the competence of the Committee on Economic, Social and Cultural Rights to consider complaints from individuals. This is a major breakthrough in the area of economic, social and cultural rights.

Nonetheless, with the decision to split the Covenant on Human Rights into two separate treaties, there remained the question of whether and how to include a minority protection provision. In 1950, the SCPDPM claimed,

the most effective means of securing such protection [for minorities] would be the inclusion in the International Covenant on Human Rights of the following article: Persons belonging to ethnic, religious, or linguistic 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.72

The core of article 27 had been prepared by 1950, and it required only the addition of the Chilean clause to be complete: “In those States in which ethnic, religious or linguistic minorities exist”. In 1953, the CHR approved a version of the draft article in what would be its final formulation.73 By 1954, the CHR had produced a draft covenant elaborating on the civil and political rights set out in the *UDHR*,74 but including also a right to self-

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74 The civil and political rights contained in the draft covenant include “the right to life; freedom from inhumane treatment; prohibition of slavery and related practices; liberty and security of the person, humane treatment of those deprived of liberty; prohibition of imprisonment on grounds of inability to fulfil a contractual obligation; freedom of movement; freedom of aliens from arbitrary expulsion; the right to a fair trial; prohibition of retroactive application of criminal law; the right to privacy, honour, and reputation; freedom of thought, conscience, and religion; freedom of opinion and expression; prohibition of advocacy of national, racial, or religious hatred; the right of peaceful assembly; freedom of association; the right to marry and found a family; the right to take part in public affairs; equality before the law; the rights of members of ethnic, religious, and linguistic minorities.” Thornberry 1991, *supra* note 6, at 143.
determination and a minority protection article. This draft was subjected to intense scrutiny and assessment, and many substantive revisions were made.\footnote{Thornberry 1991, \textit{supra} note 6, at 144.} The draft article of the minority provision was not debated by the Third Committee of the General Assembly until 1961, when it was adopted by 80 votes to none, with one abstention.\footnote{UNGAC3, \textit{Draft International Covenant on Human Rights}, UNGAOR, UN Doc A/5000 (1961), paras 116-126.} On 16 December 1966, in Resolution 2200A (XXI), the General Assembly adopted unanimously the draft Covenant, and the minority protection provision survived to become article 27. In 1980, Thornberry remarked, “[t]he significance must not be underestimated because it is, historically, the first international norm dealing specifically with rights for ethnic, religious and linguistic groups that is capable of, and intended for, universal application.”\footnote{Thornberry 1980, \textit{supra} note 3, at 443-444.} In 2008, almost three decades later, Martin Scheinin explained, the \textit{ICCPR} “is the only human rights treaty that has universal coverage both geographically and in respect of its personal scope, and that includes a specific provision on the rights of minorities.”\footnote{Martin Scheinin, “The United Nations International Covenant on Civil and Political Rights: Article 27 and Other Provisions” in Kristin Henrard & Robert Dunbar, eds, \textit{Synergies in Minority Protection: European and International Law Perspectives} (Cambridge: Cambridge University Press, 2008) at 23.}

The \textit{ICCPR} entered into force on 23 March 1976. As of 22 August 2013, it has 74 signatories and 167 parties. Seven states have signed it, but not ratified it,\footnote{People’s Republic of China (1998), Comoros (2008), Cuba (2008), Nauru (2001), Palau (2011), Sao Tome and Principe (1995), and Saint Lucia (2011).} and eighteen have neither signed nor ratified it.\footnote{Antigua and Barbuda, Bhutan, Brunei, Burma (Myanmar), Fiji, Kiribati, Malaysia, Marshall Islands, Federated States of Micronesia, Oman, Qatar, Saint Kitts and Nevis, Saudi Arabia, Singapore, Solomon Islands, Tonga, Tuvalu, United Arab Emirates.} The \textit{First Optional Protocol} (hereafter the \textit{Optional Protocol}), which establishes the individual complaints mechanism for individuals alleging violations of their Covenant rights, has 35 signatories and 114 parties. Six states have signed...
Articles 28 through 45 of the ICCPR spell out its implementation procedure. Article 28 establishes the HRC as an eighteen member body comprised of “persons of high moral character and recognized competence in the field of human rights”, and article 29 declares that these independent experts shall be elected by secret ballot. Under article 40(1), States parties “undertake to submit reports on the measures they have adopted which give rise to the rights recognized herein and on the progress made in the enjoyment of those rights”, and article 40(4) charges the HRC with the task of studying these reports and reporting its views back to the States parties. Article 41 permits States parties to communicate a complaint to the HRC alleging a failure of another State party to fulfil its Covenant obligations. Also, under article 45, the HRC is responsible for submitting to the General Assembly through ECOSOC “an annual report on its activities”. So, the ICCPR establishes the HRC to monitor States parties’ implementation of their Covenant duties, a state-reporting obligation about domestic implementation within one year of the Covenant’s entry into force and then in periodic reports at regular intervals thereafter, and an obligation for the HRC to submit annual reports to the General Assembly. Strictly speaking, the HRC is not a judicial body, but it is the pre-eminent interpreter of the ICCPR as a legally binding treaty. Although HRC views are not legally binding per se, there is no higher international body supervising the implementation of its views. In Barth’s words, “HRC decisions are thus a strong indicator of the state’s legal obligation.”

The Optional Protocol establishes the individual complaint procedure. According to article 1, “[a] State Party to the Covenant that becomes a Party to the present Protocol

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82 Even though there is a mechanism for States parties to complain about alleged violations or breaches of Covenant obligations by other States parties, this mechanism is not yet in force.
83 Barth, supra note 5, at 93.
recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.” Article 2 stipulates that “individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration,” but article 5(2)(b) explains that, where domestic remedies are “unreasonably prolonged”, they should be considered to have been exhausted. Article 6 requires the HRC to include within its annual reports “a summary of its activities under the present Protocol”. Thus, any State party to the ICCPR may become a party to the Optional Protocol. Individuals who claim to be victims of alleged violations or breaches of the ICCPR may communicate their complaints to the HRC, after they have exhausted domestic remedies. In this sense, individuals have standing to bring communications to an international body charged with monitoring the implementation of human rights. It is noteworthy that the HRC firmly rejected the possibility of communities, groups or corporate entities lodging complaints under the Optional Protocol.84 Barth notes,

the Optional Protocol is the first international instrument, beginning with the establishment of the League of Nations’ minority protection treaty system, to permit an individual member of a minority group authority to bring a communication before an international tribunal. It is the first legal procedure that authorises individual minority claims against states for adjudication by an international forum in the form of the HRC.85

In section 1.1, I introduced the four questions guiding our examination of article 27, but I did not explain how I would approach these questions. Since the ICCPR is a treaty, it is tempting to resort to the travaux préparatoires to seek answers to these questions, but Åkermark argues that this approach is mistaken.

85 Barth, supra note 5, at 93-94.
It is now evident that the *travaux préparatoires* of Article 27 do not offer great details regarding the substantive content of the provision, either as it stands today or on its justifications. The preparatory works concentrate mainly on issues *ratione personae* rather than *ratione materiae*. In addition, Articles 31-32 of the Vienna Convention on the Law of Treaties (*VCLT*) give the preparatory works a secondary place in the interpretation of treaties.  

The *Vienna Convention of the Law of Treaties* (hereafter *VCLT*) established the guidelines for the interpretation of treaties. According to article 31(1), “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 32 stipulates:

> Recourse may be had to supplementary means of interpretation including the preparation work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or, (b) leads to a result which is manifestly absurd or unreasonable.

So, the *travaux préparatoires* are merely supplementary or secondary sources of interpretation to which interpreters may resort if the interpretation referring to the ordinary meaning and the object and purpose of the provision are ambiguous, obscure, manifestly absurd or unreasonable. In 1983, Christian Tomuschat foresaw the increasing importance of HRC practice, “though at the time of writing he found himself obliged to examine the drafting history of Article 27 whenever the literal interpretation failed”.  

Manfred Nowak is explicit about his method of interpretation:

> In accordance with the opinion on protection of minorities prevailing at the time, the wording of Art. 27 is formulated in an extremely cautious, vague manner. It leaves many questions open, for which an answer must be found by way of interpretation. As required by Arts. 31 and 32 of the *VCLT*, the following will attempt to ascertain the meaning of this provision primarily by resorting to a grammatical and a logical-systematic interpretation. Where these do not permit any conclusions, use will be made of the *travaux préparatoires*. The case law of

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86 Åkermark, *supra* note 17, at 126.
the Committee in individual communications is only of limited assistance in interpretation.\textsuperscript{88} Åkermark maintains that “the examination of the case law and of the annual reports of the Human Rights Committee concerning state reports, in combination with the General Comment on Article 27, give considerable guidance regarding the content and application of the \textit{ICCPR}.”\textsuperscript{89} I submit that Åkermark is correct. Under article 31 of the \textit{VCLT}, the HRC’s views on individual complaints, state reports and general comments are primary means of interpretation of the \textit{ICCPR}, and the \textit{travaux préparatoires} are merely supplementary or secondary sources of interpretation. The HRC’s competence to review state reports is affirmed in the \textit{ICCPR} itself and, thus, also by States parties to the Covenant. Moreover, States parties to the \textit{Optional Protocol} have explicitly recognized the HRC’s competence to receive and examine individual complaints. There is considerable evidence that States parties recognize the competence of the HRC as a primary means of interpreting their obligations under the Covenant. I conclude with Åkermark that “it is correct and important to regard the work of the HRC as a primary means of interpretation, giving this priority over supplementary means of interpretation such as the \textit{travaux préparatoires} and the writings of international law experts.”\textsuperscript{90} I contend that the HRC’s position on the four questions guiding our inquiry will demonstrate that article 27 is an underappreciated measure for minority protection.

\textsuperscript{89} Åkermark, \textit{supra} note 17, at 126-127.
\textsuperscript{90} \textit{Ibid} at 127.
CHAPTER TWO – THE SCOPE QUESTION

“IN THOSE STATES IN WHICH ETHNIC, RELIGIOUS OR LINGUISTIC MINORITIES EXIST … ”

Article 27 represents an important marker in a continuum throughout much of history: it is appropriate and even mandatory to recognise the fundamental nature of language, religion and culture for minorities. It also signals a significant, yet almost unnoticed shift from previous practices: instead of applying mainly to well-established groups composed of citizens of a state, Article 27 is truly universal as it applies to everyone in a state belonging to an ethnic, religious or linguistic minority.91

Article 27 of the ICCPR does not protect a universal right to culture, religion or language, but rather the rights of some minorities. To qualify for protection under article 27, it would seem that an individual would have to be both (i) a member of an ethnic, religious or linguistic minority group, and (ii) in a state in which ethnic, religious or linguistic minorities exist. These two conditions may appear to amount to the same thing, since it is difficult to comprehend how an individual could satisfy the first without simultaneously, and on the same ground, meeting the second. Nonetheless, the Chilean clause and the French ‘declaration’ attempt to establish some degree of separation between these two conditions. On the one hand, the Chilean clause implies that the minority problem does not have a universal scope, so article 27 is not universally applicable. Instead, it is applicable to “those States in which ethnic, religious or linguistic minorities exist”. As we shall see, this clause is premised on a distinction between ‘old’ national minorities and ‘new’ immigrant populations, and it attempts to limit the scope and applicability of article 27 protection to states with substantial national minority communities. On the other hand, the French ‘declaration’ challenges the universality and applicability of article 27 through a State party’s unilateral declaration that article 27 does not apply to it because it does not legally differentiate between its citizens,

91 de Varennes, supra note 1, at 170.
and thus, does not have any minorities within its jurisdiction. The Chilean clause and the French ‘declaration’ are two significant attempts by States Parties to limit the scope and applicability of article 27. In this chapter, I examine the scope question to determine how the international community has drawn the parameters of the ICCPR’s minority protection provision. First, I will examine the Chilean clause to demonstrate the impetus for this attempted reduction in scope, and then the French ‘declaration’ to clarify questions about the applicability of article 27. In the end, the HRC has resisted these efforts by States Parties to evade their obligations under international law to minorities in their jurisdiction, and the scope of article 27 should be considered to be universal.

2.1 The Chilean Clause
Even before we begin to contend with the interpretative challenges attending article 27, it is worth noting that there is a peculiar paradox in the inclusion of a minority protection article within a universal human rights instrument. Unlike the other articles in the ICCPR, which are expressed in universal, general and inclusive language, article 27 has a restricted scope. The international community could have remained consistent by including a universal right to culture and language. After all, the cultural, religious and linguistic interests of members of minority groups could have been covered by universal human rights protecting these interests, and any concern over these interests being overlooked or denied could have been removed by an article affirming that the rights protected in the ICCPR are the rights of each and every person, whether a member of a majority or minority group. Since these rights “derive from the inherent dignity of the human person”, the universal approach would appear to be the most straightforward and consistent approach to the minority problem. Yet, contrary to de Varennes’ suggestion in the opening quote to this chapter, there is a seemingly non-
universal article contained within a universal human rights instrument.

This paradox is further heightened by the international community’s insistence that article 27 is non-universally applicable: the rights protected by article 27 should not be denied to persons belonging to ethnic, religious or linguistic minority groups in those states in which these minority groups exist. That is, not only is the scope of article 27 restricted to only some persons in a domestic jurisdiction, but it is also not applicable to each and every domestic jurisdiction. Thio believes that article 27’s inclusion in the ICCPR signals that the international community recognized and appreciated “the need for special measures protecting a well-defined, limited category of minorities”, and also that the minority problem itself was understood to be a universal problem.  

Her interpretation may appear implausible, and we will return to it in the conclusion, but I suggest at this early stage that there is much truth in it. Thio also speculates that many of article 27’s interpretative challenges result from ambiguities contained within the international community’s fragile consensus on this article. Whatever the reasons for these challenges, on first blush at least, article 27 appears to be a non-universal and non-universally applicable article directed at a universal problem through inclusion in a legally binding universal human rights instrument. I contend that it is crucial for interpreters of article 27 to remain mindful of this paradox because it is integral to understanding the HRC’s practice and to contending with this article’s significant interpretative challenges.

Let’s begin our investigation of the scope question with the least controversial aspect of the Chilean clause: the legal concept of ‘state’. Rhetoric aside, the United Nations was

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92 Thio, supra note 2, at 143-144.  
93 Ibid.
never a union of nations.\textsuperscript{94} Instead, the UN formed after the Second World War as a union (mostly) of sovereign states with the ultimate objective of maintaining international peace, stability and security “to save succeeding generations from the scourge of war.”\textsuperscript{95} The legal definition of ‘state’ is specified in article 1 of the \textit{Montevideo Convention on the Rights and Duties of States} (1933), and it stipulates that the state as a legal person under international law should possess four qualifications: (i) a permanent population, (ii) a defined territory, (iii) a government, and, (iv) a capacity to enter into relations with other states.

For the purposes of political and legal scholarship, it is important for us to maintain the distinction between states and nations. According to Hugh Seton-Watson, a state is “a legal and political organization with the power to require obedience and loyalty from its citizens”, and a nation is “a community of people, whose members are bound together by a sense of solidarity, a common culture, a national consciousness”.\textsuperscript{96} In a similar vein, Thio stipulates, a state is “a political-legal concept, the source of citizenship”, whereas a nation is “a psycho-cultural entity from which one’s nationality is derived”.\textsuperscript{97} Yael Tamir clarifies the nature of statehood: “The state is distinguished from other associations by its goals, by the methods it employs in accomplishing these goals, by the marking of territorial limits, and by its sovereignty. Sovereignty distinguishes the state from other kinds of human associations: It entails the monopoly of power as well as the creation and control of law”.\textsuperscript{98} There is near universal agreement that sovereignty is the defining attribute of statehood, and that only

\textsuperscript{94} It is important to distinguish between two senses of the term ‘nation’. If we construe ‘nation’ on a nationalist understanding as communities distinguished on the basis of common culture, identity, language, history, etc., then the United Nations was never a union of nations. But if we understand ‘nation’ on a political or democratic understanding as synonymous with ‘state’, then the United Nations was always a union of states. Note that the name ‘United Nations’ already demonstrates a tendency for the international community to deploy seemingly nationalist terminology in line with their democratic meanings.

\textsuperscript{95} UN Charter, \textit{supra} note 23, at Preamble & Article 1(1).

\textsuperscript{96} Hugh Seton-Watson, \textit{Nations and States} (London: Methuen, 1977) at 1.

\textsuperscript{97} Thio, \textit{supra} note 2, at 13.

states can be sovereign.

Many commentators have emphasized the central role of sovereignty for the UN and its regime of international law. Ian Brownlie has referred to sovereignty and the accompanying corollary of the equality of states as “the basic constitutional doctrine of the law of nations”.99 FH Hinsley explains, in line with the Hobbesian or modernist tradition, sovereignty is the idea that there must be a supreme authority within each political community; that is, the sovereign state is the final and absolute authority within its jurisdiction.100 Stephen Krasner elaborates, “[t]he fundamental norm of Westphalian sovereignty is that states exist in specific territories, within which domestic political authorities are the sole arbiters of legitimate behaviour”.101 Westphalian sovereignty is an institutional arrangement based on territoriality and the exclusion of external actors from domestic authority structures. At the domestic level, sovereign states are free from external interference in the pursuit of their interests; and, at the international level, sovereign states must recognise the sovereignty of other states, at least in theory.

All sovereign states have an interest in maintaining and bolstering the principle of sovereign equality of states, since this principle protects against interference in their domestic affairs. This interest explains the multiple provisions in article 2 of the Charter, which serve to affirm and/or protect state sovereignty.

1. The Organization is based on the principle of the sovereign equality of all its Members ...
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations ...
7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the

100 See FH Hinsley, Sovereignty (Cambridge: Cambridge University Press, 1986).
Members to submit such matters to settlement under the present Charter.

Clearly, the principle of state sovereignty is enshrined in the Charter as a fundamental principle of the UN regime, and it serves to govern the pursuit of its purposes, as outlined in the preamble and article 1. Moreover, any minority protection article will have to be consistent with and applicable within this legal framework. In short, the UN regime aims to maintain international peace and security by sustaining state sovereignty and limiting the encroachment of foreign actors in domestic affairs.

Yet, there are two distinct interpretations of the principle of self-determination, and, paradoxically, they function to simultaneously legitimate and undermine state authority: self-determination is a principle of political legitimacy for sovereign states, while simultaneously undermining their legitimacy and exerting secessionist pressure on them. The interplay of these two views of self-determination is a constant feature of the politics around self-determination in international law, and it plays a significant role in state-minority relations as well. Since all states engage in some form of nation-building, and since political policies establishing official symbols, religions, languages and so on serve to create majorities and minorities, we should expect to find various forms of minority community in all states. Yet, many states have officially denied the existence of minorities in their jurisdictions; the usual suspects include France, Greece and Turkey. These states have aimed to institutionalize a central state united by ‘national’ symbols, but they “have not denied the existence of basic freedoms or rights for linguistic and religious minorities”.102 Instead, they have adopted “the position that some of these minorities do not exist on their territory”.103 Although France, Greece and Turkey are often singled out, they are not alone in denying the existence of at least some minorities within their jurisdiction. It is not uncommon for a State party to deny

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102 de Varennes, supra note 1, at 129, n 1.
103 Ibid.
the presence of minorities within its territory, or to deny that the minority problem applies to it.

During the drafting of the ICCPR, perhaps due to the enduring impact of the minority problem as a contributing cause of the Second World War, opposition from states to a special minority provision was more pronounced. At the first session of the Drafting Committee in 1947, the minority provision had a different form:

*In States inhabited by a substantial number of persons of a race, language or religion other than those of the majority of the population,* persons belonging to such ethnic, linguistic or religious minorities shall have the right to establish and maintain, out of an equitable proportion of any public funds available for the purpose, their schools and cultural and religious institutions, and to use their own language before the courts and other authorities and organs of the State and in the press and in public assembly."¹⁰⁴

By 1950, at the third session of the SCPDPM, the minority provision had been altered significantly, and the qualification limiting the scope of applicability was removed: “Persons belonging to ethnic, religious, or linguistic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”¹⁰⁵ In 1953, however, at the ninth session of the CHR, Chile and Uruguay proposed amendments to the SCPDPM’s draft article “reflecting very clearly the preoccupations of the ‘States of immigration’.”¹⁰⁶ Chile proposed inserting what I have been calling the Chilean clause before the SCPDPM’s draft article¹⁰⁷ whereas Uruguay suggested the addition of a second paragraph: “Such rights may not be

interpreted as entitling any group settled in the territory of a State, particularly under the
terms of its immigration laws, to form within that State separate communities which might
impair its national unity or its security”.\textsuperscript{108} The Chilean clause was adopted by a vote of five
votes to one, with ten abstentions, whereas the Uruguayan proposal was rejected by seven
votes to five, with four abstentions.\textsuperscript{109} The revised draft article was adopted as a whole by
twelve votes to one, with three abstentions.\textsuperscript{110} Thus, the minority provision would be
amended once again and for the last time: “\textit{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.”\textsuperscript{111} At its 1104\textsuperscript{th} meeting, the
CHR voted 80 votes to none, with one abstention, to adopt this formulation of article 27.\textsuperscript{112}
The addition of the Chilean clause was seemingly “to restrict the rights to those minorities
long established in the territory of the state and to prevent the encouragement of new minori-
ties or the reawakening of minority consciousness in previously assimilated groups”; howev-
er, the Chilean clause suggests also the possibility of states being legally authorized to deny
the existence of groups in their jurisdiction.\textsuperscript{113} As a result, the Chilean clause limits the
application of article 27 “to states where minorities exist, thereby creating a potential subter-
fuge for states to deny the existence of minority groups”.\textsuperscript{114}

But why was the Chilean clause proposed? Is it not a superfluous qualification to the
minority provision? Let’s answer these questions in reverse order. The Chilean clause has

\begin{enumerate}
\item[Ibid, para 18. See also UN Doc E/CN.4/L.260.]
\item[Ibid, Annex III, para 21.]
\item[Ibid, Annex III, para 22.]
\item[Ibid, Annex I, B, art 25 [27].]
\item[UNGAC3, \textit{Draft International Covenant on Human Rights}, UNGAOR, UN Doc A/5000 (1961), para 125.]
\item[Thornberry 1980, \textit{supra} note 3, at 448-449.]
\item[Barth, \textit{supra} note 5, at 90.]
\end{enumerate}
the distinct appearance of a superfluous addition. After all, if there were no ethnic, religious or linguistic minorities in a state, then article 27 would be nothing more than an inapplicable irrelevance for that state. Yet, it is a well-established sociological and anthropological fact that all states have either ethnic, religious or linguistic minorities, so it appears that the Chilean clause was proposed to perform a specific function. Additionally, for scholars subscribing to the view that article 27 imposes only negative obligations of non-interference on States Parties, the Chilean clause is superfluous. Since States Parties must refrain from interfering with the cultural, religious and linguistic interests of individuals, it is not relevant whether these individuals are members of minority groups, whether these minority groups are of a particular sort, or whether they are citizens, immigrants or aliens.115 Yet, as we will see in Chapter Five, the preponderance of scholarly opinion and legal argument supports the view that article 27 generates also some positive obligations on States Parties to actively protect and promote members of the relevant types of minority group. As a result, the Chilean clause is not superfluous, but rather a tactic to reduce the scope and applicability of article 27 as a minority protection provision.

So, why was the Chilean clause proposed? What is its intended function? According to Thio, “[t]he adoption of the Chilean amendment marked the triumph of the assimilationist camp”, by which she means the victory of the “states of immigration”.116 Opposition to a universally applicable minority provision came mainly from Latin American and African states, “who were concerned that minority protections would threaten national unity and promote separate communities, and also threaten the public health, safety and human rights

115 See de Varennes, supra note 1, at 144, n 46.
116 Thio, supra note 2, at 141-142.
of minority group members”.\footnote{Barth, supra note 5, at 90.} In particular, the states of immigration were concerned that an improperly phrased minority provision might interfere with the voluntary assimilation of individuals into mainstream society. This concern is manifested in the Uruguyan proposal to prevent the formation of separate minority enclaves, “which might impair [the State party’s] national unity or its security”.\footnote{UNCHR, \textit{Report of the Ninth Session of the Commission on Human Rights}, UNESCOR, 16\textsuperscript{th} Sess, Supp No 8, UN Doc E/2447; E/CN.4/689 (1953), para 18. See also UN Doc E/CN.4/L.260.} De Varennes explains, “the Chilean proposal must be read in light of the fact that some states feared that the provision might encourage segments of their inhabitants to isolate themselves from the rest of the population”.\footnote{de Varennes, supra note 1, at 135.} In a similar vein, “Afro-Asian nations with heterogeneous populations who were then engaged in the onerous post-colonial task of nation-building supported this assimilationist trend” because “[i]gnoring ethnic and other divisions would hasten the development of a national identity”.\footnote{Thio, supra note 2, at 141.} Thus, the primary motivation behind the Chilean clause appears to be the nation-building plans of states of immigration and recently decolonized territories – plans facilitated by a distinction between ‘new’ and ‘old’ minorities, which was intended to preclude the formation of what are often referred to as ‘artificial minorities’.

The \textit{travaux préparatoires} confirm Thio’s assessment that the Chilean amendment was a victory for the assimilationist camp. Two key passages recounting the drafting committee’s proceedings are especially telling:

(i) “Many delegations representing countries of immigration stressed, however, that persons of similar background who entered their territories voluntarily, through a gradual process of immigration, could not be regarded as minorities, as this would endanger the national integrity of the receiving States; while the newcomers were free to use their own language and follow their own religion, they were expected to become part of the national fabric”;\footnote{UNGAC3, \textit{Draft International Covenant on Human Rights}, UNGAOR, UN Doc A/5000 (1961), para 120.} and,
(ii) “any assimilation which might take place must be clearly voluntary; and that members of minority groups should not be deprived of the rights enjoyed by other citizens of the same State, so as to enable them to integrate should they so desire. Several delegations stated that existing minorities were groups which had succeeded in maintaining their separate identities and that article [27] should not be used to encourage the emergence of new minorities”.122

Also, this view was affirmed by the Secretary-General, when he was requested by the General Assembly “to prepare a concise annotation of the text of the draft international covenants on human rights”:

The provisions concerning the rights of minorities, it was understood, should not be applied in such a manner as to encourage the creation of new minorities or to obstruct the process of assimilation. It was felt that such tendencies could be dangerous for the unity of the State. In view of the clarification given on those points, it was thought unnecessary to specify in the article that “such rights may not be interpreted as entitling any group settled in the territory of a State, particularly under the terms of its immigration laws, to form within that State separate communities which might impair its national unity or security.”123

The drafting committee was persuaded to adopt the distinction between ‘new’ and ‘old’ immigrants, and an approach to minorities where new immigrants were expected to integrate into the national society, while being permitted to continue using their language and practice their religion, and long-established minorities were the proper target of minority protection.

This approach is premised on an understanding of the minority problem as applicable mainly in Europe, where minority nationalisms have persisted for centuries. Thornberry explains, “representatives of Latin American states have often maintained that the problem of minorities does not arise on the American continent”.124 During debates on the minority protection article in the Third Committee of the General Assembly, the representative from Brazil stressed the importance of a carefully formulated definition of ‘minority’ because “mere coexistence of different groups in a territory under the jurisdiction of a single State did

122 Ibid, para 122.
123 UN Secretary-General, Draft International Covenants on Human Rights, UNGAOR, 10th Sess, UN Doc A/2929 (1955), para 186.
124 Thornberry 1980, supra note 3, at 422, n 3.
not make them minorities in the legal sense”. He added, “[a] minority resulted from conflicts of some length between nations, or from the transfer of a territory from the jurisdiction of one State to that of another” because, for a minority to exist,

a group of people must have been transferred ‘en bloc’, without a chance to express their will freely, to a State with a population most of whom differed from them in race, language or religion. Thus, groups which had been gradually and deliberately formed by immigrants within a country could not be considered minorities, or claim the international protection accorded to minorities.

As such, Brazil and other American states “did not recognize the existence of minorities on the American continent”. Brazil’s claim was supported by Chile, Venezuela, Panama, Ecuador, Peru and Nicaragua. Chile “declared that there were no minorities in Chile”, Venezuela proclaimed that “the minority problem did not arise there”, Panama explained that “[t]he problem dealt with in that article did not, strictly speaking, concern Panama which was a melting-pot of numerous races”, and Ecuador stated that it “could rightly and objectively claim that there were no minorities on its territory”. According to Chile, the minority protection article was “neither general in scope nor universal in application … and pertained only to certain regions of the world”. These Latin American delegations voted for the article due in large measure to their belief that there were no minorities in their jurisdictions, as did Australia, Spain, Liberia, Guinea, Mali, Ghana and Upper Volta.

Consider how the Chilean delegation must have reacted to the HRC’s review of their initial report from 1979. The HRC indicated that “[s]ome members asked why the Govern-

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126 Ibid.
127 Ibid.
128 Thornberry 1991, supra note 6, at 155.
130 Ibid., paras 27-28.
131 Ibid., para 42.
132 Ibid., paras 43-45
133 Ibid., para 23.
134 Thornberry 1991, supra note 6, at 155.
ment of Chile, according to its report, did not seem to think that there were any ethnic or linguistic minorities in the country”.135 Unsurprisingly, the Chilean delegation reaffirmed that “there were no such minorities within the meaning of article 27”, and that this statement “reflected the desire to integrate all ethnic groups into the national community since, in the opinion of the Government, the existence of different standards of treatment would be tantamount to discrimination”.136 The issue of non-indigenous ethnic or linguistic minorities was not raised in Chile’s subsequent state reports in 1984, 1989, 1999 and 2007. Given the travaux préparatoires and the HRC’s position vis-à-vis Chile’s denial of minorities in its territory, it may appear as though the Chilean clause achieved its objective of restricting the scope and applicability of article 27. This appearance is mistaken, however. In the next section, we shall see that the Chilean clause does not simply permit States Parties to declare whether minorities exist in their jurisdiction, even though it appears to extend an invitation to do so and some states have accepted this invitation.

2.2 The French ‘Declaration’

Yet, “only France has gone so far as to record an ‘official’ statement to such negative effect”: this is the French ‘declaration’.137 Like many States Parties, when ratifying the Covenant, France expressed ‘declarations’ and ‘reservations’ about various articles of the ICCPR, including the following declaration about article 27: “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.” According to article 2 of the French Constitution, “France is a Republic, indivisible, secular, democratic and social. It shall ensure the equality

136 Ibid, para 106.
137 Thornberry 1995, supra note 22, at 21.
of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.”  

France has explained its declaration in its initial, second and third periodic reports to the HRC: “Since the basic principles of public law prohibit distinctions between citizens on grounds of origin, race or religion, France is a country in which there are no minorities, and as stated in the declaration made by France, article 27 is not applicable as far as the Republic is concerned”.

The French ‘declaration’ is significant not only as an attempt to evade international human rights obligations, but also as a way of clarifying the nature of article 27 of the ICCPR.

The French ‘declaration’ raises the question of whether States Parties have the power to determine unilaterally whether a minority exists in their territories. This question will be examined directly in section 2.2, but before we do so, we should examine the content of the French ‘declaration’ in greater detail. The first thing to note is that France does not deny that its citizens have different ethnic, cultural, religious and linguistic traits, but it does refuse to grant legal recognition or ‘special’ minority rights to any individual or community. France denies that it is appropriate, legitimate or acceptable for these traits to be manifested in the politico-legal domain. For France, these traits are matters of personal choice and control, and it is illegitimate for the state to interfere with them. Instead, in the interest of recognizing and respecting the equality of its citizens, a state should endeavor to ensure the equal treatment of all its citizens without invidious discrimination, just like article 2 of the French Constitution does. Yet, most legal and political scholars interested in minority protection are

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138 It should be noted that art 2 of the French Constitution is not coextensive with art 27 because the former applies to citizens, whereas the latter applies beyond the category of citizen as well. Moreover, France’s interpretation of art 27 fails to appreciate what this article adds to the ICCPR, especially over and above the anti-discrimination protection in art 26. This issue is central to the examination of State parties’ duties in Chapter Five.

139 UN Doc CCPR/C/22/Add.2 (1982) (France); UN Doc CCPR/C/46/Add.2 (1987) (France); UN Doc CCPR/C/76/Add.7 (1992) (France), para 394.
not persuaded by France’s logic on minority protection or its interpretation of article 27. De Varennes proclaims that “France’s position is indefensible … since “minority” under Article 27 does not imply any political or legal categorization”,140 and Thio claims, “[s]ince French constitutional provisions on equal treatment of citizens are hardly unique, one might speculate that the French motive was to avoid assuming positive obligations under art 27”.141 There are reasons to be sceptical about Thio’s speculation, like the positive measures undertaken by France to protect members of minority communities to ensure their equal rights and freedoms under the French Constitution and the ICCPR. Nonetheless, it is doubtful that there is much truth in the West German government’s communication to the Secretary-General, which was received on 23 April 1982: “The Federal Government … interprets the French declaration as meaning that the Constitution of the French Republic already fully guarantees the individual rights protected by article 27”.142 At its core, the French ‘declaration’ is an affirmation of a traditional form of liberalism, which the French government has interpreted as inconsistent with any form of liberal nationalism extending beyond a ‘thin civic nationalism’ by conferring differentiated rights and freedoms.

Whatever its motivation, France’s ‘declaration’ is a significant obstacle to article 27 as a minority provision, and it is unfortunate that the HRC has adopted an ambivalent posture by recognizing it as both a binding reservation and inconsistent with its jurisprudence on article 27. The interaction between France and the HRC over its ‘declaration’ begins with its first state reports, where France emphasized that it is constitutionally prohibited from drawing distinctions between groups of citizens, and, consequently, it is a state without minorities,

140 de Varennes, supra note 1, at 129, n 1.
141 Thio, supra note 2, at 241, n 276.
142 As quoted in Åkermark, supra note 17, at 165, n 221. See also Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1994. UN Doc ST/LEG/Ser.E/13 (1994).
and article 27 is not applicable to it. In its annual report from 1983, the HRC raised three significant issues. First, it referred to France’s ‘declaration’ as a reservation rather than as a declaration, thereby foreshadowing a future legal dispute. Second, the HRC “wondered how [France’s] position could be justified in view of the existence in France of several French and foreign communities of various ethnic, religious and linguistic origins, which were entitled to have their right to enjoy their own culture and to use their own language respected and ensured by law and practice”. Third, it pointed out that article 2 of the French Constitution refers to the “Republic”, but it is not clear whether France’s reservation applies “only to Metropolitan France”, so the HRC “asked whether France did not recognize the existence of minorities in its overseas territories as well” and “whether all residents of those territories enjoyed equal rights as the residents of the metropole and whether that included their right to be ensured enjoyment of their own cultures and use of their own languages”.

Let’s dispel quickly with the third issue, where there is the least to consider. The HRC’s annual report from 1988 recounts the French representative’s reply to the possible differentiation in the application of the French ‘declaration’ to Metropolitan France and its overseas territories:

Under the Constitution, in New Caledonia, Wallis and Futuna and Mayotte, civil status, marriage, adoption, affiliation, inheritance and ownership were governed by the customary law of the territories concerned … In general, the overseas community itself laid down the policies for developing their cultural traditions and the State provided financial support for activities carried out within that framework.

This passage demonstrates Thio’s assertion that, “[n]otably, French state reports have recog-
nized the existence of minorities in its overseas territories”.147 This recognition is consistent with article 74 of the French Constitution, which “includes a special clause for overseas territories, under which they shall have a special organization which takes into account their own interests within the general interests of the Republic”.148 Moreover, it accords with France’s position in Hopu and Bessert v France149, a complaint submitted by ethnic Polynesians living in Tahiti (French Polynesia). France explained that “pursuant to article 74 of the French Constitution and implementing legislation, legislative texts adopted for metropolitan France is [sic] not automatically and fully applicable to overseas territories, given the geographic, social and economic particularities of these territories”, but “the existence of different legislative texts in metropolitan France and overseas territories does not necessarily imply a violation of the non-discrimination principle enshrined in article 26”.150 The difference in treatment is not discriminative because the HRC’s jurisprudence permits differential treatment “based on reasonable and objective criteria”, and “the legislative and regulatory differences between metropolitan France and overseas territories is based on such objective and reasonable criteria” stemming from different “geographic, social and economic particularities”.151 Even though the evidence is not overwhelming, it appears that France is prepared to recognize the existence of minorities in its overseas colonies. Nonetheless, the majority in Hopu viewed the complaint as inadmissible due to the French ‘declaration’.

Given the possibility that France itself distinguishes between the metropole and its overseas territories vis-à-vis article 27, France’s response to the second issue about ethnic,

147 Thio, supra note 2, at 242-243, n 280.
149 Ibid.
150 Ibid, para 9.4.
151 Ibid, para 9.5.
religious and linguistic diversity in its territories should be treated as applying primarily, if not exclusively, to the metropole. The French representative replied by acknowledging that different French citizens had different religious convictions, ethnic origins and cultural traits, by affirming that there were distinct ethnic, religious and linguistic communities, and by confirming that some of these communities were concentrated in different regions of the country.\textsuperscript{152} This acknowledgement was seemingly overlooked by the HRC, since it provided the following reaction to France’s third periodic report in 1997:

The Committee is, however, unable to agree that France is a country in which there are no ethnic, religious or linguistic minorities. The Committee wishes to recall in this respect that the mere fact that equal rights are granted to all individuals and all individuals are equal before the law does not exclude the existence in fact of minorities in a country and their entitlement to the enjoyment of their culture, the practice of their religion or the use of their language in community with other members of their group.\textsuperscript{153}

The HRC appears to have missed the point here. According to the French position, these empirical facts about cultural, religious and linguistic differences are indisputable, but more importantly, irrelevant:

All French citizens had the right to have their individual characteristics respected. Regional languages such as Basque, Breton, Catalan, Corsican and Provencal were taught at the secondary level, and Arabic and Hebrew were also widely studied. In Alsace-Lorraine, German occupied a privileged place in the curriculum. However, Frenchmen enjoyed all those rights in their capacity as citizens and not as members of a legally protected minority. The concept of a “minority” had come from central Europe, where the interplay of languages, racial groups and cultures had caused it to be developed in certain well-defined geographical and historical conditions. However, the concept had always seemed dangerous, since the legal organization of a minority could lead to isolation, to the establishment of ghettos, and to persecution. There was no Jewish minority in France, although there were French citizens who belonged to a given cultural community and faith, which they were free to practise and develop in their capacity as French citizens. The Republic guaranteed to all French citizens all the rights and

freedoms necessary for the flowering of their personality.154

The chief impediment to France’s endorsement of article 27 is that it “runs counter to the provisions of article 26” insofar as the legal recognition of ‘minority’ or ‘minority status’ are forms of discrimination. This is a familiar criticism of nationalist and multiculturalist policies, and it is not a baseless concern, even though liberal legal and political theorists have argued that it is exaggerated because these policies can and should be restricted by liberal principles of justice. As such, according to these scholars, a properly formulated ‘liberal’ recognition of minorities may contribute to equality among citizens, and even function as a necessary condition of equal citizenship.155 Interestingly, if accurate, the French delegate’s reply to the HRC’s questions provides evidence against Thio’s speculation that the French government is simply seeking to avoid positive obligations under article 27. After all, it appears that the French government has already engaged in positive practices to not only protect, but also to promote, minority languages and cultures, and in its second periodic report in 1988, France stressed that it “encouraged the development of [private] regional cultural associations and activity centres”, while reaffirming that “regional languages were taught in secondary education on an optional basis”.156 France’s commitment to state neutrality applies to culture, “where State intervention was generally considered unlawful and even dangerous”.157 Thus, France has continued to maintain its position that the legal recognition of minorities results (necessarily?) in a form of discrimination that violates its constitutional guarantees and its legal obligations under article 26 of the ICCPR.

157 Ibid, para 409
The HRC has received a total of fourteen complaints of article 27 violations by France, and it received thirteen of those complaints from the Breton minority in the four-year span between 1986 and 1990.158 These complaints raise issues regarding bilingual road signs, the language on postal cheques, the right to an interpreter in court proceedings, the right to communicate with the government using the Breton language, and other similar issues. The HRC’s views on these communications are not finalized in the order they are received because the individual complaint procedure depends on various factors, like the pace and volume of the communications between the HRC, the complainant(s) and the State party, and whether the communication is admissible to be considered on its merits. The first four views of the HRC on France’s alleged violation of article 27 were deemed inadmissible under article 5(2)(b) of the Optional Protocol due to non-exhaustion of domestic remedies.159

In his individual opinion in C.L.D. v France160, Bacre Ndiaye expressed his frustration with the HRC’s decision:

The Committee’s decision … has in no way settled the question of whether or not France is a party to article 27. The separability of consent to be bound by an international convention is the rule in international law … For France, the Covenant has 26 articles and no State party has challenged that by objecting to the reservation. Accordingly, it is incomprehensible that the Committee, which of course has no power to object to the reservations of States parties, should have acted as though France was a party to article 27. For me, the communication of C. L. D. is inadmissible in the first instance because France is not a party to article 27 and subsequently because the content of the article is not what the author claims.161

Åkermark notes, “[t]his was the first time a member of the Committee expressed clearly and

161 Ibid, paras 3-4.
firmly such a position”. In Ndiaye’s opinion, the French ‘declaration’ is a reservation under international treaty law, and, consequently, the HRC is not competent to examine on their merits alleged article 27 violations by France.

On 8 November 1989, the HRC published its views on two complaints, where it could not avoid deciding on the nature of the French ‘declaration’. In *T.K. v France* and *H.K. (or M.K.) v France*, the HRC endorsed Ndiaye’s individual opinion from *C.L.D*. After noting that, in accordance with article 2(1)(d) of the *VCLT*, a reservation is “a unilateral statement, however phrased or named, made by a State, when … acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”, the HRC settled the question of France’s declaration:

> The Convention does not make a distinction between reservations and declarations. The Covenant itself does not provide any guidance in determining whether a unilateral statement made by a State party upon accession to it should have preclusionary effect regardless of whether it is termed a reservation or declaration. The Committee observes in this respect that it is not the formal designation but the effect the statement purports to have that determines its nature. If the statement displays a clear intent on the part of the State party to exclude or modify the legal effect of a specific provision of a treaty, it must be regarded as a binding reservation, even if the statement is phrased as a declaration. In the present case, the statement entered by the French Government upon accession to the Covenant is clear: it seeks to exclude the application of article 27 to France and emphasizes this exclusion semantically with the words “is not applicable”. The statement’s intent is unequivocal and thus must be given preclusionary effect in spite of the terminology used … Accordingly, the Committee considers that it is not competent to consider complaints directed against France concerning alleged violations of article 27 of the Covenant.

This decision to recognize the French ‘declaration’ as a reservation was applied consistently

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162 Åkermark, *supra* note 17, at 166.
165 *T.K.*, *supra* note 163, para 8.6.
in the remaining cases where the Breton minority alleged violations of article 27,\textsuperscript{166} except in three cases where the Committee noted the French ‘declaration’, but decided that “the facts of the communications did not raise issues under this provision”.\textsuperscript{167} In these exceptional cases, the HRC has opted to note the French ‘declaration’, but not to affirm it. Although the jurisprudence around the French ‘declaration’ appears to be settled, the HRC’s reluctance to adhere to Ndiaye’s suggestion to deem article 27 inapplicable to France is evident in its consistent policy of finding cases unsubstantiated by the facts, whenever it may do so, rather than declare the complaints inadmissible due to France’s reservation. Even the relatively consistent case law reveals the ambivalence of the HRC to France’s ‘declaration’.

Despite this jurisprudence, the legal questions around the French ‘declaration’ have not been settled yet. In \textit{T.K.} and \textit{H.K. (or M.K.)}, Rosalyn Higgins argued that the Committee’s position was incorrect.\textsuperscript{168} First, she argued that there is a real distinction between declarations and reservations, even if the Covenant fails to draw it. She points to the terminology used by France as it “engaged in two tasks: listing certain reservations and entering certain interpretative declarations”. France entered reservations in relation to articles 4(1), 9, 14 and 19, whereas it offered an interpretive declaration of article 27. Second, since it is not a reservation, the French ‘declaration’ introduces a series of interpretative questions for the HRC to consider, most of which it has addressed already.

The Committee has, in relation to several States parties, rejected the notion that the existence of minorities is in some way predicated on an admission of discrimination. Rather, it has in-

\begin{itemize}
  \item \textsuperscript{168} \textit{T.K.}, \textit{supra} note 163, Appendix II; \textit{H.K. or (M.K.) v France}, \textit{supra} note 164, Appendix II.
\end{itemize}
sisted that the existence of minorities within the sense of article 27 is a factual matter; and that such minorities may indeed exist in States parties committed, in law and in fact, to the full equality of all persons within its jurisdiction. And many States parties whose constitutions, like that of the French Republic, prohibit discrimination, readily accept that they have minorities on whom they report under article 27. I therefore conclude that the declaration of the French Government, while commanding the respectful attention of the Committee, does not accord with its own interpretation of the meaning and scope of article 27; and does not operate as a reservation.169

I submit at this point that, as we shall see in Chapter Three, Higgins is correct to emphasize that the existence of minorities under article 27 is a factual matter.

Also, there are good reasons to suspect that Higgins’ analysis may be superior to the HRC’s. While Åkermark provides a convincing case, based on Frank Horn’s Reservations and Interpretative Declarations to Multilateral Treaties, to conclude that the French ‘declaration’ is a reservation, she points to the HRC’s General Comment 24(52) on issues raised by reservations made upon ratification or accession to the Covenant. The HRC emphasized that, as of 1 November 1994, 46 of the 127 States parties to the ICCPR had combined to enter 150 reservations.170 The HRC thus felt compelled to review “its views on the distinction between declarations and reservations, on incompatible reservations and on its own role in the determination of the compatibility of reservations with the object and purpose of the Covenant”.171

Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive

169 T.K., supra note 163, Appendix II.
170 UNCHR, General Comment No 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocol thereto, or in relation to declaration under article 41 of the Covenant, 52nd Sess, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) [General Comment 24(52)], para 1.
171 Åkermark, supra note 17, at 167.
persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language.\textsuperscript{172}

The HRC emphasizes that article 27 is a “right of profound importance”, and that it is an essential task of the HRC to interpret the provisions of the Covenant, to develop a jurisprudence, and to determine whether a State party’s reservation is compatible with the object and purpose of the Covenant taken as a whole.\textsuperscript{173} Ultimately, the HRC concludes, “a reservation that rejects the Committee’s competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.”\textsuperscript{174} So, the HRC is correct to view the French ‘declaration’ as a reservation in accordance with international treaty law, but it failed to “question whether this reservation is compatible with the object and purpose of the ICCPR”.\textsuperscript{175} Åkermark concludes, and I think correctly, that “[t]he wording of the General Comment on reservations seems to indicate that the Committee would find the French reservation to be incompatible”, at least partly due to the fact that “the existence of minorities is a factual matter”.\textsuperscript{176} It remains to be seen whether the HRC will reassess its view of the French ‘declaration’.

In the meantime, however, France has submitted its fourth periodic report, where it spelled out in detail its reservation to article 27. In this report, France claimed that “[t]he purpose of France’s declaration concerning article 27 of the Covenant is to underscore this French concept, \textit{which is consistent with article 27} and allows persons from minorities to have their own cultural life, to profess and practise their own religion outside the institutions

\begin{footnotesize}
\begin{enumerate}
\item General Comment 24(52), supra note 170, para 8, my emphasis.
\item \textit{Ibid}, supra note 170, para 8, my emphasis.
\item \textit{Ibid}, supra note 170, para 9, my emphasis.
\item \textit{Ibid}, supra note 170, para 10.
\item Åkermark, \textit{supra} note 17, at 168.
\item Åkermark, \textit{supra} note 17, at 168.
\end{enumerate}
\end{footnotesize}
France reiterated that its approach to the minority problem “is based on two fundamental concepts: (a) Equality of citizens’ rights, which implies non-discrimination; (b) The unity and indivisibility of the nation, encompassing both the territory and the population.” France is an indivisible Republic comprised of a singular and indivisible French people, and the concept of internal peoples is incompatible with this idea; therefore, France cannot legally recognize minorities within its territory or population, and it cannot recognize any collective rights, apart from the rights of the French people as a singular whole. Its guarantee of equality without discrimination is consistent with article 27 insofar as it recognizes the four obligations comprising article 27: (i) The individual right to freedom of association and expression; (ii) “The right of individuals belonging to a linguistic minority to use their own language among themselves, in private or in public”; (iii) “Positive measures taken by the State, whether through its legislative, judicial or administrative authorities, to ensure protection not only from the acts of the State itself but also from the acts of other persons within the State party”; and, (iv) “Positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group”. France claims to recognize these rights for all individuals, including individuals belonging to minority groups. In this sense, its approach to the minority problem is consistent with article 27 and establishes the conditions for diversity to flourish, subject to individual choice and without discriminating between individuals through the legal recognition of minorities and the conferring of ‘spe-

177 UN Doc CCPR/C/FRA/4 (2007) (France), para 8, my emphasis.
178 Ibid, para 362.
179 Ibid, paras 365 & 367.
cial minority rights.

The HRC was not impressed with France’s reasoning. The Committee acknowledged that it was pleased that “the lack of official recognition of minorities within the territory of the State party does not prevent the adoption of appropriate policies aimed at preserving and promoting cultural diversity”, but refused to accept France’s view that “the abstract principle of equality before the law and the prohibition of discrimination represent sufficient guarantees for the equal and effective enjoyment by persons belonging to ethnic, religious or linguistic minorities of the rights set out in the Covenant.”. It concludes in terse terms and bold faced font: “The State party should review its position concerning the formal recognition of ethnic, religious or linguistic minorities, in accordance with the provisions of article 27 of the Covenant.”

In the advanced version of its fifth periodic report, France insisted that it has not wavered from its position that the legal recognition of minorities is incompatible with its Constitution, its national culture, and its commitment to article 26 of the ICCPR. The HRC has yet to examine France’s fifth periodic report, but I submit that the Committee should examine the content of the French ‘declaration’ to ascertain whether it is consistent with the jurisprudence on article 27, specifically, and the ICCPR, generally. Furthermore, I contend that, notwithstanding the dominant view that it is a legally binding reservation, the French ‘declaration’ is inconsistent with the jurisprudence on what a minority group is, how the existence of a minority group is established, and what legal protections are owed to members of minority groups under article 27. These matters will be clarified in the subsequent chapters. At this point in our analysis, it is not yet possible to settle the scope

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182 Ibid.
183 UN Doc CCPR/C/FRA/5 (2013) (France), paras 23-33.
question because much depends on how the HRC interprets the minority concept and establishes that minorities exist in a state. Hence, we turn now to the definitional question.
CHAPTER THREE – THE DEFINITIONAL QUESTION

WHAT IS A MINORITY?

The human world is marked by diversities – of language, custom, and religion or, more generally, of culture … how are we to respond to this fact of diversity? What bearing does it have on questions of how (and under what institutions) we should live? Yet before these questions can properly be broached, it is necessary to ask: how should this diversity be understood?184

The Chilean clause and the French ‘declaration’ represent two tactics deployed by states intent on redefining, minimizing or altogether skirting their responsibilities under international human rights law to persons within their territory belonging to minority groups. The HRC has slowly, but surely, been developing the jurisprudence on article 27 to prevent these tactics, but significant questions remain, especially about the minority concept. What does the term ‘minority’ mean? When does a minority group exist? Who determines whether a minority group exists? Are there criteria for a group to be a minority group? In this chapter, I examine these questions to shed light on the minority concept in article 27, and to further refine our understanding of the scope question.

3.1 The ‘Minority’ Concept

Our task would be simplified greatly, if we could simply point to a definition of ‘minority’. Unfortunately, there is no such definition in article 27 or elsewhere in the ICCPR. Moreover, there is no standard definition of ‘minority’ for the purposes of international human rights law. As Thornberry points out, “there seems only to be general agreement that there is no generally agreed definition”.185 This lack of a key definition may surprise newcomers to legal studies, but veteran scholars seem to have grown accustomed to the perplexing difficul-

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ties of definitional questions coupled with the practical necessity of contending with often pressing real-world cases. After all, many key legal concepts have eluded scholars trying to pin-down descriptively accurate definitions. In the area of minority protection alone, the familiar list includes “nations”, “peoples”, “indigenous peoples”, “self-determination”, “community”, “culture”, and, of course, “minority”.\textsuperscript{186} Despite voluminous literatures on these concepts, definitional questions continue to vex scholars and practitioners of law.

Legal definitions often perform a crucial function, especially when the concept involves a collective beneficiary of a significant right. Thio explains, “[t]he function of a legal definition is to establish the range of potential candidates who may claim an entitlement. It determines the possible legal options open to members of a legal category, which bears legal consequences for both right-holders and duty-bearers.”\textsuperscript{187} In other words, a legal definition of ‘minority’ is tasked with identifying a specific category of social group, distinguishing it from other similar social groups, and providing criteria by which to individuate minority groups. The search for descriptively adequate legal definitions may seem like a trivial empirical, conceptual or academic exercise, but given the stakes involved for many groups and states, definitional questions often become manifestly important. According Hurst Hannum,

In the end, definitional questions become truly important only if inclusion in or exclusion from a particular definition has legal implications ... No state objects to complete self-definition by indigenous peoples [or other cultural communities] for social or cultural purposes; many \textit{would} object to such a practice if it necessarily implied state obligations towards the persons or groups so designated.\textsuperscript{188}

Issues relating to the definition of “nations”, “peoples”, “indigenous peoples”, “self-


\textsuperscript{187} Thio, \textit{supra} note 2, at 1.

\textsuperscript{188} Hannum, \textit{supra} note 186, at 90-91.
“determination”, “community”, “culture” and “minority” in international law are politically contentious due to the types of high stakes claims often advanced by these groups. At the present time, Will Kymlicka argues, “too much depends on which side of the line groups fall, and as a result, there is intense political pressure to change where the line is drawn”.189 Too often, the politics of difference involves groups struggling for inclusion into their preferred category, and states resisting these efforts either by attempting to exclude groups from categories with what they consider to be onerous and unwarranted legal entitlements, or by pushing them into a different category with fewer legal entitlements. The Chilean clause and the French ‘declaration’ are simply two such efforts by states to limit their legal obligations under international law.

The pursuit of a legal definition of ‘minority’ may be supported by two further arguments. The first argument is advanced by Åkermark. She believes that “a definition is necessary” because “international lawyers and the international community have to communicate over natural and cultural borders, using common terms which facilitate meaningful communication”.190 There is a paradox here: the more contentious or serious a case is, the more controversial minority protection is, and the more needed a definition of ‘minority’ is. Åkermark’s argument about a discourse for international cooperation is buttressed by a second argument from Felix Ermacora191 and John Packer.192 They draw attention to the role of a definition in establishing foreseeable rights, obligations and claims vis-à-vis cases involving minorities. This argument emphasizes the importance of certainty, clarity, foresee-

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190 Åkermark, supra note 17, at 86.
ability and predictability in a legal system respecting the rule of law. Each of these arguments associates a definition of ‘minority’ with a common discourse, predictable expectations and some of the social functions of law. It is remains an open question how robust a definition must be to meet the requirements of these three arguments.

The persuasiveness of arguments for a definition does not entail that such a definition is readily available or even possible, however. Thio believes that the search for a definition of ‘minority’ is a misguided “formalist aspiration toward doctrinal generalisation”, and she highlights three serious impediments to such an endeavour. The first hurdle is the challenge of accounting for a wide range of circumstances within a single concept without compromising its practical application. She argues, “one must struggle with the fact that in practice, the term ‘minority’ encompasses groups across a wide range of factual situations” from “discrete, insular groups concentrated within a territorial region to scattered groups dispersed within and beyond state borders”. As a result of their distinct characteristics and circumstances, minority groups exhibit a wide range of needs, spanning the spectrum from the freedom to express and commemorate their culture in public spaces to territorial autonomy. Thio alleges that it is misconceived to attempt to formulate definitions in the abstract without adequately contextualizing them, and once we contextualize the conditions of minority groups, “[t]here are difficulties in crafting a definition general enough to encompass this range of factual situations, yet capable of practical application in specific cases.” So, any definition capable of capturing the diversity of the minority condition risks being too thin to have any practical value in a legal regime of minority protection.

Moreover, Thio’s argument may be stretched further. If the broad category of

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193 Thio, supra note 2, at 2.
194 Ibid.
195 Ibid.
‘minority’ requires us to differentiate between types of minorities (like nations, peoples, indigenous peoples, immigrants, forest dwellers, hill tribes, the Roma and so on), and if each of these subcategories contains the type of internal differentiation she discusses, then it may be impossible to draw the distinctions required to instantiate a multi-targeted approach to the minority problem. It may be possible to identify a minority group as such, but it may not always be possible to differentiate between peoples with a right to self-determination, indigenous peoples with a right to internal political autonomy, and immigrants with a right to the public expression of their culture. This problem results from the second impediment emphasized by Thio. She claims that minorities are not “pre-existing entities which can be identified by determinate criteria”.196 Minorities are not a natural kind. In fact, they are not even a social kind because they have no pre-institutional existence. This point is crucial to appreciating the minority problem. Human communities are necessarily social and cultural entities, but they are not necessarily minorities or majorities. Through the process of establishing political institutions, jurisdictions and boundaries, humanity was divided into sovereign states, and minorities appear to be an inevitable by-product of these divisions. In this sense, minorities are a political construct without any real essence. And herein lies the third impediment discussed by Thio: the problem of essentialism or reductionism. This problem involves a series of much rehearsed and familiar considerations about cultural communities and their members being contingent social constructs characterized by a fluid and dynamic nature. In W.H. Sewell’s words, these groups should be conceived “as normally being contradictory, loosely integrated, contested, mutable, and highly permeable”.197 There appears to be a consensus on these impediments to defining the minority concept and indi-

196 Ibid at 4.
viduating minority groups and their members, even though there remains considerable
disagreement on the extent and surmountability of these impediments.

There have been numerous efforts to arrive at an acceptable and descriptively accu-
rate minority concept, but there is still no authoritative legal definition of ‘minorities’ as the
beneficiaries under article 27 of the ICCPR. For many commentators, according to Åker-
mark, this failure demonstrates “a failure of the will of states, and that, in most cases, states
show little real desire to find a definition since they intend to delay the adoption of interna-
tional documents, or they wish to narrow the scope of any definition and so exclude groups
“making trouble” in their own territory.”198 It is difficult to deny that this failure of will may
contribute to the impediments in the search for a legal definition of ‘minority’, but it is more
difficult to deny the role of the factors emphasized by Thio, especially when we consider
Jules Deschênes description of the symphony of negative reactions by members of the
SCPDPM who attempted to draft such a definition. In his words,

Widely differing views had been expressed as to the advisability, usefulness and need for a
definition … Mr Khalifa … had expressed reservations … in his view, it was an almost im-
possible task. Mr Mazilu saw no need to have a definition … Mr Yimer, to paraphrase his
words, thought that the game was not worth the candle … Mr Joinet … had endorsed Mr
Yimer’s view … Mr Bossuyt had made a statement which … questioned whether it was pos-
sible to arrive at a definition. Mr Bhandare did not think it was possible to find a complete
definition. Mrs Gu Yigie … considered that a definition was unnecessary and Mr Dahak felt
that it was preferable not to have one. Mr Al Khasawneh was sceptical … Mr George took
the view that it was an academic exercise … Mr Martinez Baez considered that, in law, all
definitions were dangerous.199

This cacophony of opinions offers an excellent sample of the reactions of international
lawyers and scholars tackling the definitional question. It is beyond the scope of this thesis
to delve deeper into these positions to explain, assess and evaluate them. What is clear is

198 Åkermark, supra note 17, at 86.
that, for the purposes of deploying article 27 as a minority provision and contending with the challenges of the Chilean clause and the French ‘declaration’, international law requires (i) at least a thin definition or conception of ‘minority’, (ii) which is applicable at least to article 27, and perhaps only to this provision, and (iii) which is, hopefully, also globally applicable, and if not, then at least containing enough regional variations for global coverage.

For the purposes of article 27, it is evident that the minority concept is not identical to the literal, ordinary or common-sense meaning of ‘minority’ because the latter notion has a much broader scope. The term ‘minority’ is essentially relational; minorities are counterposed with majorities. A literal approach would encompass a wide array of social groups. Barth points out that “[a]ny group or association of individuals that is linked by a common interest and does not comprise a majority of the population can potentially be defined as a minority group. Social classes, families, speakers of dialects might claim benefits and protections of international law under an expansive definition of the minority group.”200 If minorities are distinguished solely by their numerical relation to and distinctness from a majority, then women, children, the elderly, persons with physical and/or mental disabilities, homosexuals and other potentially disadvantaged groups could count as minorities under article 27. Of course, since relative disadvantage is not part of the literal conception of minority, advantaged and affluent groups could qualify for minority protection as well; thus, the literal approach results in what Thio has described as “a definition without distinction or practical utility”.201 Barth’s criticism is more scathing: “Giving all such groups recognition and protection in law, however, would create an absurdity that demeans larger historical

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200 Barth, supra note 5, at 38.
201 Thio, supra note 2, at 9.
questions.\textsuperscript{202} These other groups warrant protection via standard human rights (including anti-discrimination legislation) to contend with their non-dominant status and relative disadvantage, but their struggle is typically conceived as a struggle for inclusion or integration. The minority problem, on the other hand, is a problem resulting from the creation of sovereign states; therefore, international law restricts the scope of minority protection under article 27 to ethnic, religious and linguistic minorities – groups that typically seek to preserve their distinct cultures, religions and languages, even as most seek fair terms of integration.

So, the minority concept under article 27 should be informed by the historical and political processes by which minorities came to be, but the starting-point of the analysis should be the concept of ‘community’. After all, a ‘minority’ is a particular type of community. The oft-quoted definition of ‘community’ from the Permanent Court of International Justice’s (PCIJ) \textit{Greco-Bulgarian Community} advisory opinion has provided the conceptual springboard for many definitions of ‘minority’:

\begin{quote}
By tradition … 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.\textsuperscript{203}
\end{quote}

Thornberry thinks that the PCIJ may have described “an idealized rather than a real community”, but this basic definition reflects the need for both objective and subjective criteria. Objectively, members of a community have a shared identity and they exhibit common cultural characteristics, and subjectively, these individuals have a “sentiment of solidarity” and an aspiration to propagate the group into the future. For a group of persons to be a

\begin{footnotes}
\item[202] Barth, \textit{supra} note 5, at 38.
\item[203] \textit{Interpretation of the Convention between Greece and Bulgaria respecting reciprocal emigration} (1930), Advisory Opinion, PCIJ (Ser A/B), No 17, para 30 [\textit{Greco-Bulgarian Communities}].
\end{footnotes}
community, these objective and subjective criteria must be objectively discernable or identifiable.204 Notably, and perhaps in anticipation of states denying the existence of minorities in their territories, the PCIJ proclaimed that “[t]he existence of communities is a question of fact; it is not a question of law”.205 Thio points out that two of the most influential definitions of ‘minority’ under the UN regime – the definitions of Capotorti and Deschênes – “essentially continued the PCIJ’s approach in the 1930 *Greco-Bulgarian Communities* case”.206 In this sense, the basic elements of the international community’s concept of community was laid out, and it required only a minor supplement to its territoriality requirement to become a working definition of ‘minority’.

Even though the UN regime could avail itself of something like the *Greco-Bulgarian Communities* definition, it proceeded without a definition of ‘minority’. ECOSOC placed the minority problem within the purview of the CHR and the SCPDPM. The SCPDPM was tasked with undertaking studies and making recommendations to the CHR concerning “the protection of racial, national, religious and linguistic minorities” – arduous tasks, given the lack of an institutionalized definition of ‘minority’. To assist the SCPDPM to implement its mandate, the Secretary-General prepared a memorandum entitled *Definition and Classific-

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204 Thornberry entertains the possibility of a group of persons exhibiting the objective characteristics of community, but without any subjective self-consciousness, solidarity or aspiration to perpetuate the community into the future. He asks whether a group lacking these subjective characteristics can be said to exist at all, despite its objective characteristics, and concludes that, because it cannot, “the ‘subjective’ aspect of group identity is fundamental to the existence of groups”. See Thornberry 1991, *supra* note 6, at 165. On the face of it, this analysis is unobjectionable, but only because it conceals a deeper problem. Human communities often contain significant internal diversity and contestation. There are serious disputes over the nature of the community, its membership and other central questions to the community’s identity. While I agree that the subjective criteria are essential to an acceptable definition of ‘community’ and ‘minority’, there are complex issues raised by these criteria that are not addressed by some members of the group making a claim on their behalf.

205 *Greco-Bulgarian Communities*, *supra* note 203, para 35.

206 Thio, *supra* note 2, at 155.
tion of Minorities (1949). On Thio’s assessment, “[t]he Study, academic and tentative in tone, did not offer a formal definition. It adopted a theoretical, political science approach towards compiling and analysing raw data. From this, it proposed the principal elements forming the concept of ‘minorities’ and sought to explain the basis for classifying this group.”

The Secretary-General’s classification system grouped minorities by such factors as their size, contiguity, citizenship, the state’s national characteristics, the group’s origin, whether incorporation into the state was voluntary, whether the whole group or part of it fell within the state’s boundaries. Yet, because minorities were recognized as fluid and dynamic social groups, “the definitional task was complex.” Most likely influenced by the Greco-Bulgarian Communities definition, the memorandum regarded minorities as typically dominated and distinct communities in multinational settings, whose members exhibited a subjective aspiration to safeguard their collective existence, culture and distinct lifestyle. “The pressing problem,” as emphasized by Thio, “was to protect those minorities desiring equality with the dominant group in the sense of non-discrimination plus the recognition of certain special rights and grant of positive services.”

To begin tackling this problem and fulfilling its mandate, at its first session, the SCPDPM adopted a working definition of ‘protection of minorities’:

Protection of minorities is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population. The protection applies equally to individuals belonging

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207 UN Secretary-General, Memorandum: Definition and Classification on Minorities. UNHCR, UN Doc E/CN.4/Sub.2/85 (1950).
208 Thio, supra note 2, at 147.
209 UN Secretary-General, Memorandum: Definition and Classification on Minorities. UNHCR, UN Doc E/CN.4/Sub.2/85 (1950), at 16-22.
210 Thio, supra note 2, at 147.
211 Ibid at 148.
to such groups and wishing the same protection.\textsuperscript{212} At its third, fourth and fifth sessions, the SCPDPM submitted to the CHR draft resolutions containing definitions of ‘minorities’, but “[t]he CHR adopted the familiar delaying tactic of referring these proposals back for further study.”\textsuperscript{213} At its sixth session, the SCPDPM issued Resolution F, where it noted its mandate to protect minorities and its instructions from ECOSOC to prepare “a more thorough study of the whole question, including definition of the term “minority” for the purpose of such recommendations”.\textsuperscript{214} Furthermore, it noted that the CHR has referred their proposals from the three previous sessions back for further study, and resolved

\begin{quote}
... to initiate a study of the present position as regards minorities throughout the world … for the purposes of such a study, and with no intention of determining which groups should receive special protection, the term minority shall include only those non-dominant groups in a population which possess and wish to preserve ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population; and that no further work on the problem of definition can serve any useful purpose at present.\textsuperscript{215}
\end{quote}

The CHR noted Resolution F and requested that the SCPDPM “give further study to the whole question including the definition of the term “minority” and to report thereon”.\textsuperscript{216} “With the SCPDPM’s shift in focus to discrimination issues, the question of definition was

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\begin{itemize}
  \item 212 UNSCPDPM, \textit{Report Submitted to the Commission on Human Rights}, UNESCO, 1\textsuperscript{st} Sess, UN Doc E/CN.4/52 (1947), at Section V, para 2.
  \item 215 \textit{Ibid}, my emphasis.
\end{itemize}
\end{footnotesize}
suspended until the 1970s when it was considered in a special rapporteur’s report.”

At its twentieth session, the SCPDPM adopted Resolution 9 (XX) to “initiate as soon as possible a study of the implementation of the principles set out in Article 27 … with special reference to analysing the concept of minority taking into account ethnic, religious and linguistic factors and considering the position of ethnic, religious and linguistic groups in the multinational state”. The ECOSOC approved the resolution on the recommendation of the CHR, and in 1971, the SCPDPM appointed Francois Capotorti as the Special Rapporteur to conduct the study. After a series of interim reports, Capotorti submitted his final report at the SCPDPM’s thirtieth session in 1977: Rights of Persons Belonging to Ethnic Religious and Linguistic Minorities. According to Thornberry, “[t]he study is an extremely valuable contribution to the debate on minorities and opened up discussion on this issue after years of neglect.” Åkermark adds that it remains “the most thorough study on minorities”. Among its many valuable contributions was the following oft-quoted definition of ‘minority’:

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.

Given the mandate set out by the SCPDPM, the Capotorti definition is limited to Article 27 of the ICCPR, and thus, not an all-purpose conception of ‘minority’. Nonetheless, it seems to have been accepted by the SCPDPM and the CHR, since “it expressed the common denomi-

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217 Thio, supra note 2, at 149.
220 Thornberry 1991, supra note 6, at 152.
221 Åkermark, supra note 17, at 89.
222 Capotorti Study, supra note 218, para 568.
nator; the definition took into account the comments of several governments and UN-organs and institutions."\(^{223}\) Also, using his suggested definition, Capotorti concluded, “[e]xamination of the available documentation reveals the existence of different ethnic, religious or linguistics groups in almost all countries studied”.\(^{224}\) This conclusion was predicated on an approach to the existence of minorities as a matter of objective fact – an approach resembling closely in its broad strokes the position in *Greco-Bulgarian Communities*.

Capotorti distinguishes between the objective and subjective elements of his proposed definition.\(^{225}\) Objectively, a minority is (i) “numerically inferior”, (ii) “in a non-dominant position”, (iii) its members are “nationals [in the sense of citizens] of the State”, and (iv) they “possess [distinct] ethnic, religious or linguistic characteristics”. Subjectively, members of a minority have “a sense of solidarity”, meaning a subjective aspiration to preserve the group’s culture, religion and/or language. The existence of a minority in a state, therefore, is a matter of objectively discernible facts about the possession of these objective and subjective characteristics. Once the existence of a minority group is objectively ascertained, legal non-recognition of the minority by a state does not relieve that state of its duties under article 27 of the *ICCPR*. In other words, the Capotorti study undermines the Chilean clause and the French ‘declaration’ as obligation-evading strategies; the former by recognizing as a matter of objective fact the existence of minorities in almost all states, and the latter by denying that the relevant objective facts involve legal recognition by states or the possession of a special legal status under domestic law.

Even though there is considerable agreement on the central features of the Capotorti

\(^{223}\) Åkermark, *supra* note 17, at 89.

\(^{224}\) Capotorti Study, *supra* note 218, para 53.

definition, it has been found lacking in many ways. In 1980, Thornberry contended that the Capotorti definition was not exhaustive because it refers to what J.A. Laponce termed “minorities of will” (i.e., groups wishing to retain their cultural distinctiveness and identity), but neglects “minorities by force” (i.e., groups whose ambition to integrate into mainstream society is frustrated by a resistant majority).\footnote{Thornberry 1980, supra note 3, at 423. See also J.A. Laponce, The Protection of Minorities (Berkeley: University of California Press, 1960), at 16-22.} Capotorti seems to assume that “minorities by force” do not require any protection beyond their human rights (including the right to non-discrimination), but it may be prudent to avoid a strict dichotomy here. It is not inconceivable for some minority communities, or alternatively, some persons belonging to minority communities, to seek some measure of integration into the mainstream of society, while also retaining some of their distinct cultural traits, customs, religious practices, etc. In fact, I speculate that most groups and individuals would manifest some mixture of these distinct aspirations. Additionally, Thornberry indicates, “the definition does not apply to dominant groups like the white minority in South Africa; nor does it include the black majority or functional minority in that state because of the numerical requirement”.\footnote{Ibid.} So, because it treats the numerical inferiority and non-dominance criteria as co-extensive, the Capotorti definition overlooks both dominant numerical minorities and non-dominant numerical majorities.\footnote{de Varennes, supra note 1, at 137, n 22; Thornberry 1991, supra note 6, at 169, 8-9; Thio, supra note 2, at 151.} Furthermore, it fails to recognize the possibility that there may be no dominant group or numerical majority in a society, like in many African states,\footnote{Thornberry 1991, supra note 6, at 168-169; Thio, supra note 2, at 11.} and that there may be a group that is a numerical minority within a state, but a dominant numerical majority within a sub-state jurisdiction, like Québec in Canada.\footnote{de Varennes, supra note 1, at 137, n 22.} Also, it fails to note a distinction empha-
sized at great length by many ‘states of immigration’ during the drafting of article 27: the distinction between ‘old’ and ‘new’ minorities. It is a common assumption in the international law on minority protection that voluntary immigrants are a form of ‘new’ minority that should assimilate into the host state rather than form an ‘artificial’ minority. Finally, the Capotorti report has been criticized for its citizenship or nationality requirement – a requirement which effectively excludes non-citizens, like temporary visitors, migrant workers and refugees. These are some of the most common criticisms of the Capotorti definition, but they did not stop Thornberry from declaring in 1991 that the Capotorti definition was the most widely cited and accepted definition. Whatever its shortcomings, the Capotorti definition was a significant contribution to the literature on minority protection.

Nonetheless, in 1984, despite its original acceptance of the Capotorti definition, the CHR requested the SCPDPM to continue work on a definition of ‘minority’ and to give this task the “highest priority” because a draft declaration on the rights of persons belonging to minorities was being prepared. In 1985, Deschênes submitted his study: Proposal concerning a Definition of the Term Minority. On the Deschênes definition, a minority is

A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law. Like Capotorti, Deschênes’ proposed definition is specific to article 27 and clearly derived from the PCIJ’s approach in the 1930 Greco-Bulgarian Communities case. Yet, there are
five minor differences between their definitions. First, Deschênes replaces the phrase “numerically inferior to the rest of the population of a State” with “constituting a numerical minority”. Thornberry claims, “[t]his is more than elegantia juris: the term ‘inferior’ is avoided, even though in Capotorti it clearly refers to a number and is not a cultural value-judgement”. Second, Deschênes avoids the ambiguity of the term “nationals” by using “citizens”. Third, Deschênes is explicit about minorities aiming to achieve “equality with the majority in fact and in law”, whereas this idea is only implicit in Capotorti, according to Thornberry. Unlike Thornberry, many commentators regard Deschênes’ addition as an unwarranted limitation on the minority concept. Fourth, Deschênes contrasts the minority with “the majority of the population”, and Capotorti with “the rest of the population”. Of course, these phrases involve the problematic empirical assumptions discussed above. Fifth, Deschênes uses the phrase “collective will to survive”, and Thio points out that the lack of clarity troubled members of SCPDPM. Ultimately, these differences are quite minor. Thornberry claims, “[t]here is not much to choose between the definitions and the present work adopts Capotorti as the longer established of the two. It is doubtful if any international instrument of the future attempting a definition will depart greatly from this line of approach.” At its thirty-eighth session, however, the SCPDPM considered the Deschênes definition, but it “was unable to achieve a consensus”. At its next session, the SCPDPM decided to postpone the question of a definition and to continue with the draft, since settling the definitional question was not a prerequisite for drafting standards.

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236 Thornberry 1991, supra note 6, at 7.
237 Thornberry 1991, supra note 6, at 7.
238 Packer, supra note 192, at 55; Åkermark, supra note 17, at 91.
239 Thornberry 1991, supra note 6, at 7.
241 Ibid.
According to Thio, “the absence of an authoritative ‘scientific’ definition has neither impeded minority standard-setting processes nor hamstrung the work of international bodies with minority-related mandates.” 242 There is much truth in this claim because it is possible to make significant progress using a commonsense understanding of the minority concept within the general framework of minority protection or the specific provision of article 27. Nonetheless, this practical or pragmatic approach has its limitations. For instance, the HRC may have to deal with a highly contested and serious complaint, where the central issue is whether a group is a minority under article 27. In such a scenario, the absence of a definition of ‘minority’ is likely to handcuff the international body with a mandate to protect minorities. We have already discussed some of the reasons why a definition is desirable.

Even though there remains no authoritative definition, de Varennes points out, “many commentators have simply adopted this definition [proposed by Capotorti] without considering whether or not it conforms with the intent and wording of Article 27”. 243 De Varennes is concerned, first, with what he considers an insufficiently critical acceptance of a key legal concept, and second, with the possibility that “the definition adopts certain concepts which were categorically rejected when the provision was adopted”. 244 Moreover, he alleges that the Capotorti definition “has accentuated confusion amongst commentators”, who seem divided into two theoretical camps: scholars who interpret ‘minority’ as a politico-legal concept, and those who view it in strictly numerical terms. 245 According to de Varennes, “the definitions proposed by Capotorti and Deschênes attempted to combine elements of both, but in so doing may have inadvertently led to a definition which is too restrictive, too

242 Thio, supra note 2, at 6.
243 de Varennes, supra note 1, at 137.
244 Ibid.
245 Ibid.
difficult to apply, and essentially inconsistent with the plain wording of Article 27”.

The basic point of de Varennes’ scathing critique is that Capotorti, Deschênes and other scholars subscribing to a politico-legal conception of ‘minority’ have mistakenly supplemented a numerical or statistical conception with additional content. These additional contents include the citizenship and the non-dominance requirements, as well as the subjective sense of solidarity and aspiration to perpetuate the community and its culture for future generations. The problem is that “the travaux préparatoires unambiguously show that there was no prevailing consensus with respect to adding any sociological or political aspects to the concept of minority”.

A peculiar feature of the literature is the number of scholars who simultaneously accept Capotorti’s definition, albeit with some reservation, but who also recognize that it has many serious shortcomings. What many scholars have failed to appreciate is that, for the purposes of article 27, the term ‘minority’ denotes a far simpler and broader concept: a minority is a group of persons sharing common ethnic, religious or linguistic characteristics, and whose numbers are numerically inferior to the rest of the population of the state. In essence, under article 27, a minority is a non-majority ethnic, religious or linguistic community.

The HRC case law contains only a single instance where it viewed the complaint inadmissible under article 27 due to the complainants not being persons belonging to a minority group: Ballantyne and Davidson v Canada and McIntyre v Canada. Originally, there were two separate communications issued; one issued by John Ballantyne and

\[ \text{Ibid.} \]
\[ \text{Ibid at 139-141.} \]
\[ \text{Thornberry may be the most notable of them.} \]
Elizabeth Davidson, and the other by Gordon McIntyre. Since they involved the same alleged violations by the same State party against the same identifiable group, the HRC combined them into a single complaint. Ballantyne, Davidson and McIntyre were Canadian citizens residing in Québec. Each complainant was an Anglophone who operated a business serving the Anglophone community in Québec. They alleged being victims of an article 27 violation “because they are forbidden [by Bill 178] to use English for purposes of advertising, e.g., on commercial signs outside the business premises, or in the name of the firm”. Yet, in a submission by the Québec government made through the Federal Government of Canada, Québec asserted that history amply demonstrated the need for protection of its French language and culture. The HRC agreed that the Québécois are a minority under article 27:

As to article 27, the Committee observes that this provision refers to minorities in States; this refers, as do all references to the “State” or to “States” in the provisions of the Covenant, to ratifying States. Further, article 50 of the Covenant provides that its provisions extend to all parts of Federal States without any limitations or exceptions. Accordingly, the minorities referred to in article 27 are minorities within such a 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. The authors therefore have no claim under article 27 of the Covenant.252

The HRC’s view demonstrates that, for the purposes of article 27, ‘minority’ designates ethnic, religious and linguistic communities, whose numerical inferiority is determined relative to the population of the State, not its internal political jurisdictions. Thio asserts, “[t]he implication is that the definition of ‘minorities’ must be the same with respect to unitary and federal states.”253 This opinion was not unanimous, and eight members appended

251 Ballantyne, supra note 249, para 1.
252 Ibid, para 11.2.
253 Thio, supra note 2, at 246.
individual opinions. In an individual opinion by Evatt, co-signed by Ando, Celli and Dimitrijevic, she states,

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 criteria for determining what is a minority in a State (in the sense of article 27) has not yet been considered by the Committee, and does not need to be foreclosed by a decision in the present matter, which can in any event be determined on other grounds.254

So, in Ballantyne, the complainants who are denied the right to advertise on private property in their native tongue belong to a majority, whereas the government prohibiting them from doing so represents a minority community requiring protection under article 27. In the end, the HRC found a violation of the complainants’ rights to freedom of expression under article 19(2) and, thus, decided that it did not have to settle the question of whether article 50, which applies the Covenant to parts of federal states, could affect the interpretation of article 27. This controversial decision raises serious conceptual, moral and legal questions about the status and mistreatment of individuals who are part of a majority relative to the State party and a minority relative to a sub-state jurisdiction.255 Without delving into the complexities of the issue, I submit that whether an ethnic, religious or linguistic group counts as a minority should not be determined necessarily relative to the population of the State party, but rather relative to the population of the level of government whose legislation, policy, practices or conduct led to the complaint. In my opinion, then, the Québécois warrant article 27 protection by virtue of being a minority relative to the rest of Canada, and the Anglophone commu-

254 Ballantyne, supra note 249, Appendix E.
255 See Thio, supra note 2, at 246-247; Thornberry 2002: 145-153; Scheinin, supra note 78, at 26-27.
nity of Québec warrants protection because it is a minority relative to the rest of the population of Québec.

Additionally, the HRC has issued two General Comments which contribute to our understanding of the minority concept under article 27. In General Comment 15(27) on The position of aliens under the Covenant, the HRC stressed that “[r]eports from States parties have often failed to take into account that each State party must ensure the rights in the Covenant to “all individuals within its territory and subject to its jurisdiction” (article 2, para 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.”256 So, the general rule is that both citizens and aliens are the beneficiaries of the human rights enumerated in the Covenant.257

Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life … Aliens have the full right to liberty and security of the person … They have the right to liberty of movement and free choice of residence; they shall be free to leave the country … They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association … In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.258

General Comment 15(27) dispelled any potential lingering doubt about a citizenship requirement for a person to belong to a minority and be protected under article 27. The HRC’s comments are consistent with the singular reference to ‘citizen’ in article 25 and the drafting

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257 Ibid, para 2.
258 Ibid, para 7, my emphasis.
committee’s decision, at its sixteenth session, to refuse India’s proposal to replace the term ‘persons’ with ‘citizens’.  

In 1994, the HRC adopted *General Comment 23(50)* on article 27 and settled the definitional question.  

The terms used in article 27 indicate 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. 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 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.

Moreover, Article 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 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. As any other individual in the territory of the State party, they would, also for this purpose, have the general rights, for example, to freedom of association, of assembly, and of expression. The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.

Based on these clarifications, ‘minority’ designates the objective, numerical status of some ethnic, religious or linguistic communities. This status is unencumbered by potentially limiting considerations related to dominance, solidarity, citizenship, permanence, collective aspirations and so on. In essence, under article 27, a minority is a non-majority ethnic,

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260 de Varennes, *supra* note 1, at 144
262 *Ibid*, para 5.2.
religion or linguistic community, though there remain questions about whether the non-majority condition may be satisfied relative to a sub-state political jurisdiction.

3.2 Different Types of Minorities: “Ethnic, Religious or Linguistic”

Even if this resolution to the definitional question is accurate, there is a distinct risk that it produces more questions than it settles, literally. We have an answer to the definitional question on the term ‘minority’, but we may have simply shifted the burden onto three additional concepts: ‘ethnic’, ‘religious’ and ‘linguistic’. Thankfully, these further definitional questions are less challenging for at least two reasons. First, these questions are embedded within a framework already comprised of a legal definition of ‘minority’ for the purposes of article 27. It would be as much a mistake to attempt to answer these definitional questions in the abstract as it would have been to try to answer our initial definitional question independent of its legal bedrock. In fact, I contend that that was one of the reasons for the inadequate and unsuccessful definitions suggested by Capotorti and Deschênes, and supported by their adherents. Second, the HRC’s jurisprudence on the question of whether a complainant of an article 27 violation belongs to a minority group may be characterized as generous, charitable and inclusive. We have already examined the one combined view where the HRC decided that Anglophones in Québec, Canada did not constitute a minority under article 27, and this community was excluded not because it was the wrong type of minority, but rather because it was not a numerical minority within the State party. The remaining communications reveal much about what types of group have already and unproblematically been accepted as either ethnic, religious or linguistic.

In her general treatment of ‘minority’, Thio insists that minorities are “non-dominant”
and “distinct”. She indicates that “[t]his nature of distinction may be ascertained from the qualifying adjectives attached to minorities’ provision in international treaties and declarations. Thornberry points out, however,

In the fields of anti-discrimination, genocide, and minorities there is a profusion of terms, listed differently in different instruments. The Universal Declaration of Human Rights lists, inter alia, as impermissible grounds of distinction in the entitlement to human rights ‘race, colour . . . language, religion, . . . national or social origin’, all of which terms share a certain kinship with those employed in Article 27. The Genocide Convention prefers ‘national, ethnical, racial or religious’ groups. In the International Convention on the Elimination of All Forms of Racial Discrimination, discrimination on the grounds of ‘race, colour, descent, or national or ethnic origin’ in the recognition, enjoyment, or exercise of human rights is forbidden. Elsewhere in the Covenant on Civil and Political Rights, the grounds of discrimination are listed in a fashion similar to the Universal Declaration of Human Rights.

Article 27’s terminology uses the qualifying adjectives ‘ethnic’, ‘religious’ and ‘linguistic’, and these terms are vague in relation to other potential categories, like ‘racial’, ‘national’, ‘indigenous’, ‘political’, ‘immigrant’, ‘alien’, and so on, but also due to the unclear distinctions between (i) ‘religion’ and ‘cult’, and (ii) ‘language’ and ‘dialect’.265

Many questions may be answered quickly with a brief survey of the HRC’s case law on article 27. Even though there was once a question whether indigenous peoples are minorities under article 27, that question was effectively answered by General Comment 23(50) and the HRC’s case law in its first decision. In Lovelace v Canada, de Varennes claims, the HRC adopted “a logical no-nonsense approach”, which he paraphrases thusly: “Mrs. Lovelace was an indigenous person, a member of an ethnic and linguistic community called Maliseets which are numerically a minority in Canada, ergo, Mrs. Lovelace was a member of

263 Thio, supra note 2, at 12.
264 Thornberry 1991, supra note 6, at 151.
265 Ibid at 163.
a minority.”267 This basic fact was not contested by the State party. In subsequent decisions, the HRC has recognized various indigenous groups: (i) the Maliseet268, Mikmaq269, Cree270, Shuswap271 and Hiawatha272 in Canada; (ii) the Sami in Sweden273, Finland274 and Norway275; (iii) the Wiradjuri276 in Australia, (iv) the Khoi277 in Namibia, (v) the Maori278 in New Zealand, (vi) the Aymara279 in Peru, and (vii) the Arhuaco280 in Colombia. The majority of article 27 complaints to the HRC involve indigenous peoples, and the category of indigenous peoples is not restricted to the so-called ‘settler states’. An examination of the travaux préparatoires, the Capotorti Study and the Deschênes Report provides overwhelming evidence for the view that indigenous peoples are not minorities.281 In particular, in a summary of the 1070th to 1104th meetings of the ICCPR’s drafting committee, J.D. Pelt clarified, “[i]t was further stressed that the autochthonous [or indigenous] population in Latin American countries could not be regarded as a minority. It should be treated as a vital part of the nation and should be assisted in attaining the same levels of development as the remain-

267 de Varennes, supra note 1, at 141.
270 Lubicon Lake, supra note 84.
der of the population.”\textsuperscript{282} The \textit{travaux préparatoires} reveal an assimilationist approach to indigenous peoples, whereas Deschênes excluded indigenous peoples from the minority category because he considered them to be a unique category of peoples with special claims, especially historical claims to land.\textsuperscript{283} Also relevant is the fact that many indigenous communities refuse or are reluctant to be viewed as minorities, often because they believe that minority status would undermine their claims to self-determination as peoples. For instance, in \textit{A.D. v Canada}, the complainant was adamant that he represented a people within the meaning of article 1, not a minority under article 27.\textsuperscript{284} Nonetheless, HRC jurisprudence and examination of state reports reveal that, for the purposes of article 27, indigenous peoples are ethnic minorities.

It appears as though the term ‘ethnic’ was chosen deliberately as the broadest concept related to indigenous peoples, national minorities, and racial groups.\textsuperscript{285} The most active national minority communicating complaints of alleged article 27 violations is France’s Breton population, although these communications have not been admissible due to France’s ‘declaration’. In \textit{T.K.}, the HRC recognized the complainant as “a French citizen of Breton ethnic origin”.\textsuperscript{286} Again, it is evident that the HRC’s jurisprudence on questions of distinct minority status is inclusive. Nowak explains,

In light of this case-law there are no doubts that many traditional \textit{minorities in Central and Eastern Europe} including the Slovaks in Czechoslovakia, the Hungarians in Czechoslovakia and Romania, the Macedonians in Bulgaria and Yugoslavia, the Turks in Bulgaria, the Muslims of Bosnia-Hercegovina as well as the Roma in different countries and various groups in

\textsuperscript{283} Thio, \textit{supra} note 2, at 153-154.
\textsuperscript{284} \textit{A.D.}, \textit{supra} note 269, paras 3 & 7.3.
\textsuperscript{285} The term ‘racial’ has fallen out of favour. The idea of a racial group under art 27 is best understood as a group exhibiting physical, biological or genetic similarities \textit{over and above} their cultural similarities. The cultural similarities are key due the cultural, religious and linguistic rights protected by art 27.
\textsuperscript{286} \textit{T.K.}, \textit{supra} note 163, para 1.
I believe that Nowak’s assessment is correct. In 2010, his prediction about the Roma counting as minorities under article 27 was confirmed in Georgopoulos v Greece. In Thornberry’s words, “[t]he net effect, therefore, of preferring the formula in the final text is that many groups are to be protected before they become ‘national groups’, irrespective of whether they could ever ‘develop’ in this fashion.” It seems clear enough that the HRC is authentically concerned with the protection of distinct minority groups, and, as such, has adopted an inclusive stance on the definitional questions related to ethnic, religious or linguistic communities, preferring to assess the complaints on their merits rather than disqualify complaints based on the type of group to which the complainant belongs. Given the HRC’s inclusive stance, there is no reason to suspect that it would deem a complaint inadmissible because the person belongs to the wrong type of ethnic, religious or linguistic group. As such, I submit that, for the purposes of article 27, a minority is a non-majority ethnic, indigenous, national, racial, religious or linguistic community.

3.3 Conclusion
Our analysis in Chapters Two and Three reveals that article 27’s scope and applicability are universal, except for the isolated case of France. The definitional question establishes a minority as a non-majority ethnic, indigenous, national, racial, religious or linguistic group, where its non-majority status is determined relative to the State party. The question of whether a group is a minority under article 27 is a matter of objective fact, and it does not depend on domestic legal recognition or some other determination by a State party. In

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287 Nowak, supra note 88, at 14-15
289 Thornberry 1991, supra note 6, at 160, my emphasis. The idea of community inherent in the concepts of ‘ethnic’, ‘religious’ and ‘linguistic’ groups is crucial. It explains why it is overwhelmingly likely that the HRC would reject claims by a political party. After all, a political party is not the type of social group that could develop into a nation.
practice, the HRC has adopted an inclusive interpretation of the persons and groups covered by article 27 protection, preferring to examine potential violations or breaches of this provision rather than disqualify this protection out of hand based on definitional or membership considerations. The jurisprudence on the scope and definitional questions provide early reasons for optimism about the value of article 27 as a resource for minority protection. After all, the HRC’s standards are far less restrictive than those advocated by Capotorti, Deschênes and many other legal scholars. Yet, article 27’s individualist terminology raises significant questions about the relevant right-holder, and many commentators have been perturbed by it, especially by the apparent lack of protection for the community itself. These questions are the subject matter of the next chapter.
CHAPTER FOUR – THE RIGHT-HOLDER QUESTION

“PERSONS BELONGING TO SUCH MINORITIES … IN COMMUNITY WITH THE OTHER MEMBERS OF THEIR GROUP”

[T]he liberal view is sensitive to the way our individual lives and our moral deliberations are related to, and situated in, a shared social context. The individualism that underlies liberalism isn’t valued at the expense of our social nature or our shared community. It is an individualism that accords with, rather than opposes, the undeniable importance to us of our social world.290

Thus far, we have examined the scope and definitional questions. Article 27’s scope covers “those states in which ethnic, religious or linguistic minorities exist”, and the HRC has adopted a minimalist, expansive and inclusive interpretation of the minorities protected by this article. These questions have helped us refine our understanding of article 27’s right-holder, but there is still the question of whether these rights are borne by individuals or communities. The dissatisfaction with article 27 expressed by many commentators is often directed at its individualistic formulation, especially by those who are enamoured with the League of Nations’ minority treaty regime. In this chapter, I examine the question of whether – and, more importantly, in what ways – article 27 is an individual or collective right, and also, the consequences of these features on the type of minority protection offered by it. Ultimately, this chapter defends an individualist interpretation of article 27 as descriptively accurate of international law, but also as a better resource for persons belonging to minority communities and those minority communities than a collectivist interpretation of it.

4.1 The Membership Question: “Persons Belonging to Such Minorities”

Article 27 protection applies to persons belonging to ethnic, religious or linguistic minorities.

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290 Kymlicka, supra note 155, at 2-3. It is troubling to note how often in the discussions of the individual and collective aspects of article 27, legal scholars who advance what I will argue is a mistaken and weakened version of this article simply dismiss or condemn liberalism.
On first blush, then, article 27 protects individual rather than collective rights, even though these rights are rights held by individuals by virtue of their minority group memberships. So, at this point, the pressing question is how membership is interpreted, but article 27 does not appear to offer any guidance. According to Thornberry, “[t]here is no indication as to how ‘membership’ of a group is to be defined.”291 Additionally, as Thio points out, “[t]he question whether an individual belongs to a group also raises the problem of the identifier, whether this is the individual, the group in question or the state”.292 Since persons often simultaneously maintain memberships in various different communities with different cultural norms, their various memberships will likely produce some tensions, inconsistencies and conflicts. The complexity of social reality and the multiplicity of group memberships function to complicate the membership question. The membership question cannot be settled solely by the individual’s aspiration to belong to the group because the community may refuse to accept her as a member, or the state may refuse to regard her as a member under the law. Even if the minority group recognizes an individual as a member, she may not want to be one, or the state may not recognize her as a legal member of the community. Also, there is the possibility of a state recognizing a person as belonging to a minority group, where either the individual herself or the community refuse to adhere to its judgement. Additionally, the policies determining minority group membership – either the state’s or the minority community’s – may violate international law. It should be recognized that, even though most complaints are likely to involve an individual being denied recognition of her membership against her wishes, there is also the possibility of a state or minority community imposing membership onto the individual. Group membership may often appear to be a simple matter,

291 Thornberry 1995, supra note 22, at 23.
292 Thio, supra note 2, at 8.
but there are many real possibilities for complications, especially vis-à-vis the legal protection of persons belonging to minority groups.

In *Lovelace*, the HRC had to decide whether the membership question was determined by the state or an individual. Sandra Lovelace was born and registered as a Maliseet Indian, but due to section 12(1)(b) of the *Indian Act*, she lost her status and rights as an Indian when she married a non-Indian. In its submission, the Canadian government stressed the crucial importance of the *Indian Act* “as an instrument designed to protect the Indian minority in accordance with article 27 of the Covenant” and of a legal definition of Indian to determine who was a legitimate beneficiary of the special rights and privileges conferred on individuals with that status; however, it submitted further that it had already recognized the inadequacy of various elements of the *Indian Act*, including section 12(1)(b), and that it planned to introduce a reform bill before the Canadian Parliament. The HRC noted that, since “no quick and immediate legislative action could be expected”, it had to decide whether Lovelace as an ethnic Maliseet Indian who was denied the legal right to reside on the Tobique Reserve was thereby denied a right guaranteed by article 27. The central question was whether Lovelace as a person belonging to an ethnic minority, and, as we saw in the previous chapter, indigenous communities are ethnic minorities under article 27. By focusing on the membership question, the HRC signaled that, consistent with its approach to the Chilean clause and the French ‘reservation’, a State party’s legislative characterization of a person belonging to a minority group is not determinative. There are two distinct questions of status here: (i) should Lovelace be considered an Indian under

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293 *Indian Act*, RSC 1970, c 1-6 [*Indian Act*].
294 *Lovelace*, supra note 266, para 1.
Canada’s *Indian Act*?, and (ii) should Lovelace be considered a person belonging to an ethnic minority under article 27? The issue in *Lovelace* was not the correct application of a domestic law, but rather Lovelace’s human rights under the Covenant. So, *Lovelace* establishes that the membership question is not settled definitively by a State party’s domestic law, policies or decisions.

Moreover, the HRC decided that Lovelace was a person belonging to an ethnic minority under article 27. In a frequently quoted passage, the Committee explained,

> Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant. Since Sandra Lovelace is ethnically a Maliseet Indian and has only been absent from her home reserve for a few years during the existence of her marriage, she is, in the opinion of the Committee, entitled to be regarded as “belonging” to this minority and to claim the benefits of article 27 of the Covenant.297

Many commentators have interpreted this passage as indicating that membership involves both objective and subjective criteria. “In its conclusions,” Scheinin argues, “the HRC emphasised that Sandra Lovelace not only identified herself (subjectively) as a Maliseet Indian but also was ethnically (objectively) a Maliseet Indian.”298 Similarly, Thio claims, “[i]n keeping with convention, both the objective fact of ‘community’ and the subjective desire of a person to identify with a group informed the identification process as the ‘normal’ basis for ascertaining group membership.”299 Nowak asserts, “[w]hether somebody belongs to a minority depends on objective criteria (language, religion, ethnic characteristics, cultural customs etc.) and the subjective feeling of the person concerned. Possible recognition by the national legal system is of only subsidiary significance.”300 These comments by Scheinin, Thio and Nowak raise questions about the objective and subjective criteria of membership in

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297 *Ibid*, para 14, my emphasis.
298 Scheinin, *supra* note 78, at 29.
299 Thio, *supra* note 2, at 248.
a minority community, and Thornberry’s draws attention to three possible models.

States adopt a variety of methods to make such determinations. Some prefer a purely subjective criterion. The Government of Romania’s reply to Special Rapporteur Capotorti stated that: ‘Each citizen establishes by his free consent his membership of a nationality, his mother tongue and his religion. This decision is not subject to any administrative control.’ The courts in Austria use both ‘objective’ and ‘subjective’ criteria but give preference to ‘subjective’ factors in case of doubt. On the other hand, many countries prefer ‘objective’ criteria. Thus, for example, in Venezuela, the national census classifies a person as indigenous if he habitually speaks a native language of his own or if his way of life is so obviously aboriginal that he could not be classified with the peasant population. It seems logical to premise membership of a minority on the definition of minority, incorporating subjective and objective criteria. While some States take a generous view of membership, allowing it to be determined by subjective preference uncontrolled by objective criteria, this cannot be said to be demanded by Article 27.  

Thus, Thornberry, like Scheinin, Thio and Nowak, believes that article 27’s stance on the membership question involves both subjective and objective criteria. It is noteworthy that Thornberry is explicit that his interpretation of the membership question is premised upon his view on the definitional question. Basically, Thornberry, Scheinin, Thio, Nowak and many other scholars believe that just as minorities must exhibit both objective and subjective criteria, so too must persons belonging to such minorities. We have seen that these scholars are mistaken about the HRC’s position on the definitional question, and I submit that they are mistaken about its stance on the membership question as well.

In the previous chapter, I argued that the minority concept for article 27 was determined objectively by two components; so, a minority group is (i) a distinct ethnic, indigenous, national, racial, religious or linguistic community, (ii) whose total membership is less than the rest of the population of the state. The existence of a minority was an objectively discernible fact based on its objective distinctiveness in the state and its numerical non-

301 Thornberry 1991, supra note 6, at 175-176.
majority status in the state. Subjective requirements may assist us to identify these groups, but they are not strictly speaking requirements or conditions of being a minority group. Similarly, it is evident that any individual (or collection of individuals) who has devoted the time, energy and resources required to first exhaust domestic remedies and then communicate a complaint to the HRC about an alleged violation of article 27 is a person who has expressed a subjective desire to maintain some ties with the community either through membership or the exercise of her culture, religion or language, broadly construed. Yet, the HRC has not disqualified any individual complaints for failing to meet some subjective criterion of membership, and I do not suspect that it will ever do so. Like with the subjective criteria in the definitional question, subjective criteria are relevant to our thinking about the membership question, but strictly speaking, under article 27, these criteria are not legal requirements or conditions of membership in a minority community.

In Lovelace, the HRC viewed the complainant as an ethnic Maliseet, even though she chose to marry a non-Indian at the cost of her Indian status under domestic Canadian law, as well as the rights and privileges derived from this legal status. The HRC’s decision suggests that it was relevant that Lovelace had returned to her native community after the dissolution of her marriage,\(^{302}\) but I do not think that this suggestion was intended to satisfy a subjective criterion of membership. Kitok v Sweden\(^{303}\) may clarify the point here. The complainant was “a Swedish citizen of Sami ethnic origin”, who lost his right to breed reindeer because, under Sweden’s Reindeer Husbandry Act,\(^{304}\) any individuals who engaged in any other form of livelihood for over three years would lose their membership in the Sami community and the associated rights to engage in reindeer husbandry. The Sami community at Sörkaitum was

\[^{302}\] Lovelace, supra note 266, para 14.
\[^{303}\] Kitok, supra note 273.
\[^{304}\] Rennäringslag, SFS 1971:437 [Reindeer Husbandry Act].
empowered under the Act to reinstate Kitok’s membership, but it refused to do so. Notably, it permitted him to continue practicing reindeer husbandry, albeit as a non-member without a right to do so. The HRC decided that there was no violation of article 27 because Kitok had been permitted to continue the cultural practice in question, so there was no interference with his right under article 27 to enjoy his culture. The Committee’s comment on the membership question are instructive:

It can thus be seen that the [Reindeer Husbandry] 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. The Committee has been concerned that the 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. It has further noted that Mr. Kitok has always retained some links with the Sami community, always living on Sami lands and seeking to return to full-time reindeer farming as soon as it became financially possible, in his particular circumstances, for him to do so.305

In Kitok, the HRC expressed concern with the Act’s lack of ‘objective ethnic criteria’ in determining questions of membership, in particular through the distinction between being ethnically Sami under article 27 and not being Sami under Swedish domestic law. This distinction between membership criteria under article 27 and under domestic law was highlighted in Lovelace as well. It is evident that the HRC views membership as an objective status determined without reference to domestic law and institutions.

There is no substantive debate over the existence of objective criteria of membership or their precise content. Objective criteria are required to establish a discernible connection between the complainant and an ethnic, religious or linguistic community covered by article 27, to connect the membership question with the UN’s minority protection framework, and to respect States Parties by treating them fairly. Thornberry explains, “[i]n so far as the rights

305 Kitok, supra note 273, para 9.7.
set out in Article 27 are rights for only some of a State’s nationals in many cases, it can hardly, in logic and in fairness to the State, be regarded as a right of individuals to be included in a special category with which they have no obvious connection.”  The objective criteria of membership establish “a tangible link between the individual and a group who shared in common a culture, religion and/or language”, and it appears that this tangible, objective link may be manifested in various ways. The individual may have a significant early childhood association with the culture, religion or language; e.g., it may be her mother tongue. Also, the culture, religion or language may be a major component of her personal, family or community life. In his discussion of minority language rights, de Varennes stresses,

Thus, determining that an individual belongs to a linguistic minority is not an issue of establishing some type of legal or political category, excluding for example people who are of different ethnic background or who are not native-born speakers of a minority language: it is purely a factual, objective determination based upon some concrete tie between an individual and a linguistic community. Knowledge of the official or majority language in a state, a common occurrence in respect to many members of linguistic minorities, should not in itself affect the legitimacy of a claim of belonging to a minority as the phrasing of Article 27 does not restrict its application to individuals with exclusive ties to a minority community. In the end at essence is whether an individual maintains some objective connection with a minority community through the use of its language.

I believe that these points are as true for culture as they are for language, although they may be somewhat strained in cases involving religion. Ultimately, the HRC holds that, for a person to belong to an ethnic, religious or linguistic minority, she must have an objectively discernible objective relationship, association or connection with the minority group. The relevant type of relationship will depend on many different factors, like the sort of group and

306 Thornberry 1991, supra note 6, at 176.
307 Thio, supra note 2, at 248.
308 de Varennes, supra note 1, at 149.
the rights in question.

This account does not have, need or benefit from a subjective criterion. A subjective aspiration to belong to the community does not add anything to our analysis once a complaint is communicated to the HRC and an objective connection to the relevant community is established. In this sense, a subjective criterion is already implicit and redundant. If the idea motivating the scholars supporting the inclusion of a subjective criterion is that individuals should not be compelled to be members of a minority community, then they should not worry. A right furnishes individuals with choices, and they may choose for themselves whether to exercise them. Given that domestic remedies must be exhausted before an individual may communicate a complaint to the HRC, the risk of an individual being compelled to pursue this course is extremely low. Moreover, even if an individual were so compelled, the HRC may view the State party as violating her rights under article 27 and order some sort of reform or restitution. Again, there is no real danger of individuals being trapped in a minority community. Most importantly, however, the rights protected by article 27 include a right to renounce membership in minority communities, including one’s native community. As a result, a subjective criterion is not necessary for determining whether a person belongs to a community.

Yet, there is a risk that the inclusion of a subjective criterion could have a negative effect. Including such a criterion would provide States Parties with another legal procedure by which to attempt to evade or delay their legal obligations under article 27, even if they are unsuccessful in most cases. After all, if it is established that a person has sufficient objective ties to a minority community, as this concept is understood under article 27, then the inclusion of a subjective criterion simply establishes an unnecessary hurdle over which the
complainant could trip. As such, I submit that it is a mistake to consider the membership question to involve a subjective criterion, and additionally, it would limit the value of article 27 as a minority protection provision. Once again, many commentators have placed extraneous requirements on an aspect of this minority protection provision, even though HRC practice reveals a less restrictive approach.

4.2 Individual or Collective?

Our discussion seems to have taken a turn. In chapters two and three, we had been discussing states and minority communities, but in this chapter, our attention has shifted to persons belonging to such communities. This shift foreshadows the question under examination in this section: Are the rights protected by article 27 individual or collective rights? On first blush, there is no real question here because the article’s terminology protects the rights of persons belonging to minority groups. Yet, once we account for the relational nature of minority status, group membership, culture, religion and language, we are confronted with the complex interplay between the individual and collective dimensions of minority protection. It is my contention that many legal scholars concerned with minority protection are mistaken about what they see as the ‘hybrid’ nature of article 27 because they misconstrue its collective dimension. Instead, I argue that an accurate view of the controversial collective dimension leads to a potentially more potent legal resource for minority protection, albeit as a fundamentally individual right that may be exercised in concert by persons belonging to minority groups.

Article 27’s terminology from the first session of the Drafting Committee in 1947 has identified “persons belonging to such ethnic, linguistic or religious minorities” as the benefi-
ciaries of the rights it protected. In the opinion of the SCPDPM, according to Thornberry, “minorities as such were not subjects of the law, whereas persons belonging to minorities could be defined in legal terms.” He adds, “[t]o maintain the idea of a group, the words ‘in community with the other members of their group’ were inserted after ‘shall not be denied the right’.” Yet, in the years immediately after the Second World War, the international community was exceedingly cautious about the dangers of recognizing minorities as such. With this motivation, there was widespread agreement that the UN should continue the League of Nations’ policy of denying legal recognition to minority groups as such. So, in Barth’s words, “the issue of minority standing under the UN’s ICCPR Article 27 reflects the dilemma over how to protect minority identity without recognising the legal standing of a minority group”. The international community provided plenty of evidence that article 27 protects individual rights, and Åkermark summarizes them concisely:

Article 27 of the ICCPR refers to “persons belonging to ...minorities”. The fact that Article 27 is placed in the context of a document on individual civil and political rights (with the exception of Article 1 on self-determination of peoples), that the travaux préparatoires to the Covenant emphasise that minorities do not have a legal personality in international law, and the fact that the Optional Protocol to the Covenant recognises locus standi only to individuals, are all arguments supporting the position that Article 27 guarantees only individual rights.

So, the article’s terminology, the travaux préparatoires, the document in which it is located, the nature of the protection provided by almost every other article in that document, and the individual complaint procedure established by the Optional Protocol are overwhelming...
evidence that article 27 protects individual rights.\textsuperscript{314} Also, since the international community has continued to develop instruments of international law using the phrase “persons belonging to”, the inclusion of this terminology in article 27 has not been viewed in retrospect as an error to avoid replicating or an unwelcome continuation of a League of Nations relic.

It is indisputable that article 27 protects the individual rights of persons belonging to ethnic, religious and linguistic minorities, and I do not believe that there is anyone audacious enough to deny it. Yet, there is a question about whether article 27 protects also some collective rights, and many prominent legal scholars believe that it does. In fact, the preponderance of opinion supports the view that article 27 is a ‘hybrid’ right rather than an individual right. In the first paragraph of \textit{General Comment 23(50)}, the HRC clarified, “this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is \textit{distinct from, and additional to}, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.”\textsuperscript{315} The emphasized phrases highlight that, whatever article 27 is intended to do, it performs a function over and above the other articles in the Covenant. So, article 27 is distinct from, and additional to, the right to self-determination (article 1) and freedom from discrimination (article 26). We shall discuss article 27 in relation to these other articles below, but article 27 does offer some sort of distinct protection for persons belonging to ethnic, religious or linguistic minority communities, specifically their rights to enjoy their culture, profess and practice their religion, and use their language. Yet, these rights have an ineliminable social or collective dimension. Individuals are born into existing communities, they learn, internal-

\textsuperscript{314} These points may be buttressed further with considerations based on the ‘inheritance’ of various aspects of the League of Nations’ minority treaty regime, where the terminology designated “persons belong to”, the complaint procedure were initiated by states, and minority communities had no \textit{locus standi}.

\textsuperscript{315} \textit{General Comment 23(50)}, supra note 261, para 1, my emphasis.
ize and attempt to adhere to communal norms relating to culture, religion and language, and these norms are integral to fashioning their worldviews. Individuals depend on these norms and the community’s supporting them for numerous human goods involving such important things as freedom, well-being, self-respect, identity, meaning, value and so on. The arguments for the indispensable role of community, culture and language in the lives of individuals are well-rehearsed in political theory and practice, and they have a prominent influence in the legal literature on cultural and minority rights as well.316

Article 27 is intended to safeguard at least a few of these ineliminable and indispensable social, associative and collective dimensions of human life, but it attempts to do so through individual rights to culture, religion and language. Scholars of international law, however, emphasize article 27’s collective dimensions. First, as Thornberry indicates, the rights protected by article 27 are “ premised on the existence of a community”.317 Individuals bear these rights as persons belonging to minority ethnic, religious or linguistic communities. Second, article 27 rights may be “collectively exercised”, since “persons belonging to such minorities shall not be denied the right, in community with the other members of their group”. Third, according to Ermacora, article 27 is a “group protection provision” – its intent and purpose is to protect minority ethnic, religious and linguistic communities.318 These claims are unobjectionable. What is interesting are the additional claims made by many prominent scholars.

Every commentator on article 27 notes, often with considerable lament, how in the

317 Thornberry 1995, supra note 22, at 23.
318 Ermacora, supra note 191, at 308.
early years of the UN, the international community was committed to addressing the minority problem, but this endeavour required contending with the challenges of the individual and collective dimensions of the problem within a universalistic and individualistic human rights framework. Thornberry captures the dilemma:

Human rights instruments generally follow language which is universalist and individualist and does not accept a group dimension of rights without some strain. The reality elided by this concentration on the individual as legal subject is that of the group. Individuals do not exist shorn of cultural, linguistic or religious peculiarities; they do not exist in abstracto. States are much more complex than philosophies of the State. Thus, an interesting aspect of the contemporary law of minorities is the attempt to grapple with the group dimension within the individualist framework of human rights law. One may, therefore, expect to find individual human rights and collective rights in any living scheme for the protection of rights: this may be doctrinally impure but it respects practicality and complexity. It seems insufficient to the present writer to concentrate on either group rights or individual rights.\(^{319}\)

So, Thornberry notes the challenge, as well as his personal assessment that the task of minority protection requires a combination of individual and group rights. Nonetheless, he acknowledges that the international community has pursued a different course:

The balance between ‘minority rights’ and ‘individual rights’ is an aspect of a larger question, but it is resolved in the Covenant in favour of individual rights. The minority’s ‘claim’ on individuals, even in the case of a minority in difficulties of self-preservation, has only a secondary or subordinate importance. The minority does not mediate between the individual and the State; it has no rights as such to preserve its identity.\(^{320}\)

What Thornberry is emphasizing is that the relevant minority communities have no \textit{locus standi}, legal corporate status or corporate rights.\(^{321}\)

Yet, Thornberry does not view article 27 as strictly an individual right. In an important and intriguing passage, he argues,

The rights in Article 27, however, are a hybrid between individual and collective rights be-

\(^{319}\) Thornberry 1991, \textit{supra} note 6, at 11-12.

\(^{320}\) \textit{Ibid} at 176-177.

\(^{321}\) There is an all-important distinction between collective and corporate rights as two types of group rights. This distinction will be explained shortly.
cause of the ‘community’ requirement: the right of a member of a minority is not exercised alone; enjoyment of culture, practice of religion, and use of language presupposes a community of individuals endowed with similar rights. The rights may, therefore, be described as benefiting individuals but requiring collective exercise.322

This idea of a ‘community requirement’ is another puzzling contribution from the Capotorti Study. Capotorti believes that the right-bearer of article 27 is “persons belonging to minorities, in community with the other members of their group”, and he provides three reasons for this interpretation.323 First, he points to a historical reason: “In the system of protection of minorities established in 1919-1920, rights were accorded to individuals only.”324 He claims that “[t]he theory of an international personality of minorities developed later, mainly owing to the fact that the right of petition was granted not only to members of minority groups but also to the groups themselves”, but Thornberry points out that this latter point is mistaken. According to Thornberry, “the language of the treaties of 1919 to 1920 was consistent with the desire to regard the individual members of minorities, not the groups themselves, as the focus of protection.”325 Second, article 27 resembles almost every other provision in the two international Covenants as an individual right, with the notable exception of the right of peoples to self-determination, but this is the exception that proves the rule of individual human rights protection in the Covenants.326 Third, there is a political reason:

The fact of granting rights to minorities and thus endowing them with legal status might increase the danger of friction between them and the State, in so far as the minority group, as an entity, would seem to be invested with authority to represent the interests of a particular community vis-à-vis the State representing the interests of the entire population. Moreover, the freedom of each individual member of a minority to choose between voluntary assimilation with the majority and the preservation of his own distinctive characteristics might be disregarded by the organs of the entity formed by the minority group, in its concern to preserve

323 Capotorti Study, supra note 218, para 206.
324 Ibid, para 207.
325 Thornberry 1991, supra note 6, at 174.
326 Capotorti Study, supra note 218, para 208.
the unity and strength of the group.\textsuperscript{327} The problem with these reasons is that they point to an interpretation of article 27 as a strictly individual right, and Capotorti not only recognizes it, but believes that it is based on sound reasons.\textsuperscript{328} But then he takes a drastic turn in the final two sentences of the section:

At the same time, it must be borne in mind that the rights in question will be exercised by their holders “in community with the other members of their group”, as stated in article 27. That is easily understandable when it is considered that the rights provided are based on the interests of a collectivity, and consequently it is the individual as a member of a minority group, and not just any individual, who is destined to benefit from the protection granted by article 27.\textsuperscript{329}

A disproportionate amount of attention has been directed at two ideas in these final sentences: (i) “the rights in question will be exercised by their holders “in community with the other members of their group” ”; and, (ii) “the rights provided are based on the interest of a collectivity”. The first idea is true if ‘will’ means ‘may’, but appears false as ‘must’. It is evident that article 27 rights are intended to be used by individuals with other individuals in their minority ethnic, religious or linguistic community, but there is no indication anywhere else that these rights must be exercised collectively. This idea of a collective exercise requirement does not accord with a straightforward reading of the article, and it does not appear anywhere in the HRC case law or documents relating to the periodic reports of States Parties. Also, there is no indication in the Covenant or the travaux préparatoires that article 27 protection for persons belonging to minority communities is based on the interest of these minority communities. Individuals as members of a community have interests relating to the survival, health and functioning of their community, but the terminology of article 27 seems to place value on the collective only because it values its individual members. I submit that

\textsuperscript{327} Ibid, para 209.
\textsuperscript{328} Ibid, para 210.
\textsuperscript{329} Ibid, para 210, my emphasis.
Capotorti’s claims about a collective exercise requirement for article 27 rights grounded in the idea that these rights are based on the interest of a collectivity are unsubstantiated, false and harmful.

Of course, there is much more to say on this issue, but it may be helpful to interrupt our inquiry to make a few conceptual distinctions. The literature on article 27 and minority rights in international law seems to conflate, more often than not, two distinctions: (i) the distinction between individualism and atomism; and, (ii) collectivism and corporatism. It is beyond the scope of this thesis to enter into the complex conceptual analysis required to fully extrapolate these distinctions and explain their relevance, but a few simple points may allow us to make significant progress on the right-bearer question. First, atomism involves viewing individuals as concrete, indivisible, self-sufficient and independent wholes, like impermeable billiard balls bouncing off each other without really impacting on their constitution. In his influential essay entitled “Atomism”, Charles Taylor explains, “[t]he term ‘atomism’ is used loosely to characterize the doctrines of social contract theory which arose in the seventeenth century and also successor doctrines which may not have made use of the notion of social contract but which inherited a vision of society as in some sense constituted by individuals for the fulfilment of ends which were primarily individual.”

It is often assumed that Robert Nozick’s libertarianism is the primary target of Taylor’s criticism, although this criticism has been applied to the work of John Rawls as well. As pointed out by Taylor, atomism is challenged and undermined successfully by demonstrations of the manifest ways that individual human beings depend necessarily in constitutive ways on other human beings and human communities. For instance, language as an intersubjective phenomenon demonstrates that atomism about language is false. Importantly, language as an intersubjective

phenomenon is consistent with individualism. It is possible for the ultimate locus of language to be in the mind of the individual, while establishing crucial and necessary dependencies on the minds of others, as it is usually expressed. In the literature, when the human rights framework is criticized as individualist for failing to appreciate the interconnections and interdependencies in human life, the target is actually atomism.\footnote{For a noteworthy example, see Alison Jaggar (1983) *Feminist Politics and Human Nature*, at 40.} For the purposes of our question here, atomism and individualism involve the individual being the appropriate right-bearer of article 27 rights, but individualism is capable of recognizing that these rights are meaningful, significant and necessary only because individuals form social communities.

The second distinction between collectivism and corporatism is often conflated in ways that halts progress on important questions, like the right-bearer question. Corporatism views the minority community as an organic entity with independent moral, political or legal status. In its modern form, collectivism is endorsed by German thinkers like Johann Gottfried Herder, Johann Gottlieb Fichte and Georg Wilhelm Friedrich Hegel. A right as a corporate right is held by the corporate entity as a complex whole, justified by its singular corporate interests, and exercised by it. On this view, individuals are simply parts of the organic whole, and a corporatist minority protection strategy aims primarily to ensure the survival of the community as a corporate entity, and only secondarily to protect its individual parts. Very often, fears about group rights are fears about corporatist interpretations of these rights. I submit that corporate interpretations are more frequent than atomist ones, but thankfully, these views are explicitly endorsed by a very small minority. Collectivism differs from corporatism because it denies the independent moral, political or legal status of the community as a complex whole, and it denies the legitimacy of group rights serving the interests of the
community for its own sake. On a collectivist view, individual rights are aggregated and exercised in concert based on the interests of individual members in their community. For instance, an indigenous community may request a group right to send a representative to a constitutional congress, and if that right is justified by the interests of the community’s members and exercised by some collective procedure, then it is a collective right. Collective rights are aggregated individual rights.

Interestingly, individualism and collectivism are compatible, and atomism and corporatism are compatible, whereas atomism and individualism are incompatible, and so too are collectivism and corporatism. Once we dispel of atomistic and corporatist interpretations of article 27 on the grounds that they are overwhelmingly implausible interpretations, we are left with the question of whether they are individualist or collectivist. On the one hand, the right-bearer question is almost always answered in individualist terms: Individuals are the bearers of article 27. On the other hand, there is a second question raised by Capotorti’s comments about whether the individual bearers of article 27 rights may only exercise her rights collectively with other members of the community. The distinction between right-bearing and right-exercising allows Capotorti, Thornberry and other commentators to proclaim that article 27 is a hybrid right. After all, it is individualist in terms of right-bearing, but collectivist in terms of right-exercising. Since individualism and collectivism are not only compatible, but unavoidably and inextricably linked, it may appear that there is no issue here, but this appearance is misleading. There is a deep and profound question here because, if article 27 rights are individualist, then persons belonging to the relevant minority groups cannot exercise their rights as individuals or with only some members of their community.

Their individual right is transferred without their consent to the community as a whole to make a singular determination based on the community’s interest, and this idea is not collectivist, but corporatist in nature. I submit that the accurate interpretation of article 27 rights is that they are held by individuals, and that they may be exercised alone or in community with other members of the group, but that they are not corporate – they are not transferred to the group under some nebulous collective exercise condition.

A quick survey of HRC case law on article 27 reveals a few patterns. There are the inadmissible complaints of France’s Breton minority, which we examined in chapter two, and there are cases where persons belonging to a minority community have complained about their treatment as individuals by legislation aiming to protect the community as a whole. The two clearest examples arise in Lovelace and Kitok: Lovelace involves a challenge to the membership criteria of the Indian Act, and Kitok deals with another membership question in relation to reindeer husbandry. As we would expect, many of the remaining complaints involve government policies negatively impacting a community, its cultural and religious practices, and other similar effects. This latter group of complaints involves matters that could have been brought by each and every member of the community, at least in theory, but it is very rarely the case that a complaint of an alleged article 27 violation has been brought to the HRC by a group as a whole. Ominayak v Lubicon Lake Band333 is the exception. In this complaint, Chief Bernard Ominayak alleged a violation of the Lubicon Lake Band’s right of self-determination under article 1 of the ICCPR, including the right to determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources.334 The Chief as the

333 Lubicon Lake, supra note 84.
334 Ibid, para 2.1.
leader and representative of the Band outlined the long history of land and resource expropriation by the Albertan government with the consent of the Canadian government. The complaint of an alleged article 1 violation is inadmissible under the *Optional Protocol* because only individuals may communicate complaints about alleged violations of their individual rights as set out in Part III of the Covenant in articles 6 to 27, inclusive. A violation of article 1 involves the violation of a group right and the group as victim. Nonetheless, the HRC decided to permit the complaint under 27. It explained,

> There is, however, no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights … Although initially couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under article 27. The Committee recognizes that the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the cultural of the community to which they belong.335

Ultimately, the HRC found that the persons of the Lubicon Lake Band were victims of serious article 27 violations – violations threatening their community, way of life and culture. This decision is hardly surprising, nor is the HRC’s decision to permit numerous individuals to complain in concert about the violation of their rights.

What is most striking, however, is that there is a condition placed on joint complaints: the individuals must be *similarly affected*. Perhaps with this condition in mind, Barth claims, “[t]hough limiting the grant of jurisdiction to individual members of minority groups, the nature of minority claims inevitably compels HRC hearing of Article 27 communications on the basis of collective harm”.336 This claim about collective harm is deceptive. In *Lovelace* and *Kitok*, for instance, the HRC’s concern was solely with how the domestic legislation of Canada and Sweden, respectively, impacted on the ability of Sandra Lovelace and Ivan Kitok

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335 *Ibid*, paras 32.1-32.2, my emphasis.
336 Barth, *supra* note 5, at 93-94.
to enjoy their culture. In fact, in both cases, the domestic legislation in question was intended to protect an indigenous community in accordance with article 27, and Lovelace and Kitok were victims of these policies. The kernel of truth in Barth’s assertion is that these policies would negatively impact also others in relevantly similar circumstances, but the harm in these complaints was the harm of being denied communal membership or being denied the right to engage in cultural practices. While Lubicon Lake demonstrates that joint complaints are possible, there is no suggestion that the complaints must involve violations of the collective exercise of article 27 rights. Lovelace wanted to return to her native community, whereas Kitok wanted to engage in reindeer husbandry. These claims were individual claims for the individual exercise of article 27 rights. Undoubtedly, there are collective factors in these complaints, like Kitok’s long family history of engaging in reindeer husbandry or the simple fact that Lovelace’s band is a human community, but these rights are held and exercised by individuals. Individuals may communicate joint complaints – or they may have the HRC join their complaints, like it did with Ballantyne and Davidson and McIntyre, as well as JB v France\(^\text{337}\) and HK v France\(^\text{338}\) – but this is not a condition for complaints or the violation of their rights under Part III of the Covenant. The HRC’s comments on these cases demonstrates that there is no collective exercise requirement or collective harm requirement.

Additionally, in Länsman III\(^\text{339}\), a complaint was communicated by Jouni Länsman, Eino Länsman and the Muotkatunturi Herdsmen’s Committee, and this complaint raised the question of whether a collective or corporate entity could allege violations of the individual rights of its members. The HRC was crystal clear: “On the contention that the Muotkatunturi
Herdsmen’s Committee did not have standing to bring a claim under the *Optional Protocol,* the Committee referred to its constant jurisprudence that legal persons are not “individuals” able to bring such a claim”. The HRC pointed out that there was no indication that individual members of the Muotkatunturi Herdsmen’s Committee had authorized a claim on their behalf, or that the other complainants were authorized to act on their behalf. The HRC’s jurisprudence makes it clear that joint or collective claims are permitted, but they require the persons belonging to the minority group to join the complaint and/or authorize someone to represent them. Thus, the Committee found, “while it was uncontested that Jouni and Eino Länsman had standing to bring the communication on their own behalf, the Committee considered the communication inadmissible under article 1 of the *Optional Protocol* insofar as it related to the Muotkatunturi Herdsmen’s Committee and/or its constituent members, other than Jouni and Eino Länsman.” Corporate entities are not permitted to allege violations because they have no legal standing under the *Optional Protocol,* they have no justiciable rights in Part III of the Covenant, and they do not speak for their members, unless explicitly authorized to do so.

So, how should these findings inform our understanding of article 27? First, there is the undisputed point that the rights under article 27 are borne by persons belonging to a minority ethnic, religious or linguistic group as individuals. Second, only individuals may communicate a complaint of an alleged article 27 violation to the HRC. Third, an individual may communicate a complaint with another individual provided that they are similarly

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affected; that is, individuals may join or combine relevantly similar complaints. In other words, collective complaints are possible, and probably desirable too. Fourth, individuals may complain individually or jointly of a violation of their right to engage in collective conduct. For instance, in *Mavlonov and Sa’di v Uzbekistan*\(^{342}\), Mavlonov complained of a violation of his freedom of expression because the State party refused to renew the legal registration of his newspaper. Since the newspaper served the Tajik minority, he alleged a violation of article 27 as well. Sa’di was a regular reader of the newspaper, and the HRC decided that there is a collective aspect to freedom of cultural expression and that this collective aspect is captured by article 27. So, there was a violation of Sa’di’s right to enjoy his culture by being denied a newspaper in his native culture.\(^{343}\) A minority language press is an important means of communicating issues of significance to the Tajik minority in Uzbekistan, and it is important to editors, contributors and readers. Article 27 involves a right to transmit your culture, religion or language, but also a right to receive such transmissions from other members of one’s group. Fifth, there is no requirement for everyone affected by an alleged article 27 violation to join the complaint. What these five points indicate is that article 27 is fundamentally an individual right and it is exercised by individuals as individuals. An individual may choose to exercise her right to engage in conduct with another member of her community, or she may refuse to do so. She may complain of a violation of her right alone or with other similarly affected members of her community, and she may authorize someone to represent her in her communications with the HRC, including representatives of her minority community. It is evident that the right is borne by the person belonging to the relevant minority community individually, even though she may exercise it

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\(^{343}\) *Ibid*, para 8.7.
collectively as well. Unlike with the corporate view, however, the collective dimension does not have to exhaust the minority community. It is possible for only two individuals to exercise their rights collectively. I believe that the failure to appreciate that ‘collective’ means ‘jointly’ or ‘in combination’ without implying a scope covering the entire community is responsible for the persistent misinterpretation of article 27 when it comes to its individual and collective dimensions. Again, this interpretation of article 27 as an individual right, which may be exercised jointly or in combination with other members of the group, is less restrictive than on the hybrid view.

4.3 Conflicts between Individual and Collective Rights under Article 27
So far, I have been stressing the individual dimension of article 27 minority protection because too many commentators have made what I consider to be significant errors in their interpretations. Even though article 27 rights are borne and exercised by persons belonging to minority groups, there is an apparent sense in which article 27 has a purpose and objective geared toward the preservation of ethnic, religious and linguistic communities, and the HRC has explicitly recognized the validity of various minority protection measures under the domestic law of many States Parties. De Varennes identifies this problem as the “unspoken difficulty facing the UNHRC”. In Lovelace, the complainant was denied membership in the Maliseet Indian Band under Canadian law. In Kitok, the complainant was denied membership in the Sijrkaitum Sami community and the associated right to engage in reindeer husbandry. In Ballantyne, Davidson and McIntyre, the complainants were prohibited from advertising or naming their businesses in their native tongue. In Howard, the complainant was denied what he saw as an ancestral right to fish when, where, how and to the extent that

344 de Varennes, supra note 1, at 147, n 55.
345 Howard, supra note 274.
he wished. In each of these complaints, the complainants alleged violations of their rights under article 27, and the domestic laws under review were intended (at least substantially) to protect a minority community. The HRC recognized the vital importance of the domestic legislation under examination, and in some cases, it found violations of the complainants’ rights, even though it accepted the legitimacy of the domestic legislation in principle. Whenever domestic legislation aiming to protect a minority community conflicts with article 27 rights or other related rights, the HRC has been careful to affirm how this legislation satisfies an obligation under international human rights law, while indicating that some revision is warranted. So, in *Lovelace*, for instance, the HRC found that the general aim of the *Indian Act* was consistent with article 27, but that section 12(1)(b) was not. The HRC did not want to invalidate the *Indian Act*, only a provision in it. These complaints demonstrate what many legal theorists and practitioners already know: there is an enormous potential for measures intended to protect a minority community to conflict with the cultural, religious or linguistic rights of some of its members.

The potential conflict between individual and collective rights is well-known, much discussed and often exaggerated. I suggest further that it is often misunderstood too. In particular, the portrayal of a conflict between an individual and her community often conceals an important feature, which the HRC appears to appreciate well: measures aimed at the protection of a minority community are designed to serve the interests of the community’s members, not some enigmatic corporate entity. As such, these conflicts of interest are often a conflict between the interests of some members of the community and the interests of other members of the community. De Varennes notes the factual background in *Lovelace* and *Kitok*, where the legislation was not an unwanted interference by the States Parties, but where
“the legislation constituted in reality measures to ensure the protection of culture and way of life under attack by the overwhelming attraction or presence of the majority society”, where “the measures were adopted with the approval of the leaders of the minorities involved”, and where “an important segment of the respective minority communities were either severely divided or strongly opposed to modifying the legislation”.\footnote{de Varennes, supra note 1, at 168-169.} On many occasions, like in Lovelace, Kitok and Howard, the complainant’s interests are reflected on both sides of the conflict. Sandra Lovelace has an interest in the special status of aboriginals under Canadian domestic law, but only if she is legally recognized as an Indian. Ivan Kitok benefits from the legislation regulating and protecting reindeer husbandry as an industry, but only if he is permitted to engage in the practice. George Howard’s interests as a fisher are served by legislation regulating the practice to ensure that he, other members of his community, and other members of the state are able to fish without excessively depleting the stock. The central points of contention rarely require us to choose to protect either the interests of the individual or the community in the exclusive sense of the term ‘or’. Instead, and I believe that the HRC has demonstrated that this is often a reasonable and available course of action, the question must be reformulated not as an exclusive choice, but as a matter of the best way to accommodate, reconcile or satisfy seemingly competing interests. Often, as demonstrated thoroughly by the HRC’s case law, it is possible to amend the relevant domestic legislation to serve multiple ends, such as the protection of the community and the protection of individual members whose interests are jeopardized by the domestic legislation in its current form. I believe that the HRC has displayed a cautious practical wisdom in its views on complex legal dilemmas.

To step away from this optimistic account for a bit, it is important to remain cogni-
zant of the constant empirical possibility of a community requiring a form of protection that violates the rights of some of its individual members, but is supported by a majority of members. There are various layers to the HRC’s position. First, as Barth argues, “a minority group’s abuse or violation of any individual human right is clearly proscribed, as are states, under the UN’s minority regime” because article 27 is “required to be consistent and compliant with the UN human rights treaty system”. This response is accurate, but not adequate. In practice, it would demonstrate a crass disregard of the relevant cultural, religious or linguistic interests involved, and given Barth’s work and his sensibilities, it is unlikely that he would be satisfied by it. Also, we should remember Xanthaki’s warning:

a pre-determined hierarchy of individual rights above cultural rights is a simplistic solution that creates even more problems … In fact, such an approach rings of cultural imperialism. It should not be forgotten that liberalism is the expression of a distinct moral faith and way of life; it is in itself a culture. Insisting on the liberal model without adequate regard for other values justifies the complaints of vulnerable societies that international law has done nothing to salvage them and much to damage them; it is law that promises liberation, but oppresses.

Xanthaki’s warning to avoid a pre-determined hierarchy of individual over group rights is prudent, but her criticism of liberalism misses the mark, especially liberal forms of multiculturalism. Liberalism as a political theory of justice does not impose a liberal way of life onto dissenting individuals, but rather aims to establish the conditions for the coexistence of many distinct and inconsistent cultures, communities and ways of life. In particular, liberalism is able to tolerate a host of non-liberal and even illiberal practices, as long as participants engage in them with free and informed consent. As a result, for instance, liberalism is capable of tolerating non-democratic, hierarchical and discriminatory religious practices as an expression of individual freedom. Of course, there are limits to liberal toleration, but the

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347 Barth, supra note 5, at 9-10.
348 Xanthaki, supra note 16, at 44.
ability of liberalism to tolerate distinct ethnic, religious and linguistic communities should not be underestimated.

So, how should the HRC contend with situations where restrictions on individual rights are required to ensure the survival and well-being of the minority group to which these individuals belong? Like many domestic jurisdictions, the HRC recognizes that there may be occasions where it must countenance a principled restriction on an individual right. A restriction must meet four important conditions: (i) it requires “a reasonable and objective justification”; (ii) it must be consistent with human rights instruments; (iii) it must be “necessary for the continued viability and welfare of the minority as a whole”; and, (iv) the restriction must be proportionate to its justification, objective or end. In Lovelace, the HRC stated, “statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole.”\(^\text{349}\) This passage contains conditions (i) and (ii). In Kitok, the HRC affirmed the ratio decidendi in Lovelace: “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”.\(^\text{350}\) This passage endorses conditions (i) and (iii). Lansman I\(^\text{351}\), Mahuika et al\(^\text{352}\) and Prince\(^\text{353}\) also affirm the principled approach to restrictions of individual rights established in Lovelace. The proportionality condition tends to be discussed in cases where no violation is found, like Kitok and Prince.\(^\text{354}\) In Prince, for

\(^{349}\) Lovelace, supra note 266, para 16

\(^{350}\) Kitok, supra note 273, para 9.8.

\(^{351}\) Länsman I, supra note 274, para 7.9.

\(^{352}\) Mahuika, supra note 278, para 9.6.


\(^{354}\) Ibid, para 7.3; Kitok, supra note 273, para 9.7.
instance, even though the HRC recognized that the complainant was “a member of a religious minority and that the use of cannabis is an essential part of the practice of his [Rastafarian] religion”, the Committee noted that “not every interference can be regarded as a denial of rights within the meaning of article 27” and, thus, it could not conclude that “a general prohibition of possession and use of cannabis constitutes an unreasonable justification for the interference with the author’s rights” or that “the prohibition of the possession and use of drugs, without any exemption for specific religious groups, is not proportionate and necessary to achieve this purpose”. Also, the HRC has stressed that the regulation of a right is not equivalent to a breach or violation. Overall, there is much to be said for Xanthaki’s assessment:

cultural practices that restrict human rights without going so far as to violate the core of these rights can be tolerated in the name of cultural diversity. Whether these gray cultural practices should be accepted by the state even when the concerned individual agrees to be bound by these practices, should be a matter of judgment that will be reached after intercultural dialog … In making these decisions, several principles must apply. International adjudication has elaborated such principles. In Lovelace, Kitok, and Länsman, the HRC asked for the existence of a reasonable and objective justification for the prevalence of one right over the other, consistency with human rights instruments, the necessity of the restriction, and proportionality. Further, it is argued that the complete neglect of one right—be it collective or individual—for the safe realization of the conflicting right would in most cases violate the principle of necessity.

The endeavour to respect individual rights, including rights derived from membership in minority ethnic, religious or linguistic communities, will almost necessarily produce challenging cases. The HRC has established a principled approach to such conflicts, and their decisions often involve a complex compromise between the various interests of the relevant stakeholders. It is my contention that the HRC’s sensitivities are informed and aided by its

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355 Prince, supra note 353, paras 7.3 & 7.4.
356 Xanthaki, supra note 16, at 46.
individualist approach to culture, religion, language and community.
CHAPTER FIVE – THE OBLIGATION QUESTION

“SHALL NOT BE DENIED THE RIGHT …”

To give every Canadian equal citizenship rights without regard to race or ethnicity, given the vulnerability of aboriginal communities to the decisions of the non-aboriginal majority, does not seem to treat Indians and Inuit with equal respect. For it ignores a potentially devastating problem faced by aboriginal people, but not by English-Canadians – the loss of cultural membership. To insist that this problem be recognized and fairly dealt with hardly sounds like an insistence on racial or ethnic privilege.\(^{357}\)

In this chapter, we shift our inquiry from questions about the right-holder or beneficiary to the type of protection offered by article 27 as a minority protection provision. Specifically, we are concerned with whether article 27 imposes negative or positive obligations on States Parties. For many commentators who have noted the relationship between the scope and obligation questions, as we have already, we should expect to find that the larger the class of individuals covered by article 27, the less extensive the obligations of States Parties to them. Conversely, the more extensive the obligations of States Parties, the more restricted the scope of article 27 protection. This intuitive idea should not be mistaken for a theorem or general law; it is simply a prediction, and in this case, it does not accurately represent article 27. Even though it is not surprising to find States Parties aiming to limit the scope and their obligations under article 27, these factors do not stand in any necessary relationship to each other. In the previous chapters, we have seen that article 27 applies universally to persons belonging to ethnic, religious or linguistic minority communities, where these qualifying adjectives have been interpreted broadly. On the predictions of de Varennes and Thio, our analysis should anticipate limited obligations on States Parties in accordance with the ordinary meaning of “shall not be denied”. De Varennes believes that this is the correct interpre-

\(^{357}\) Kymlicka, \textit{supra} note 155, at 151.
tation, and Thio vehemently disagrees on legal and political grounds.\textsuperscript{358} This question is the most controversial and heated issue involved in the legal interpretation of article 27, and de Varennes rightly contends that it is “also probably the most important”.\textsuperscript{359} Ultimately, in addition to an obvious and uncontroversial form of non-interference, article 27 rights impose at least some positive obligations on States Parties.

5.1 The Case for the Negative Non-Interference Position

Article 27 affirms that persons belonging to the relevant minority communities “\textit{shall not be denied the right} … to enjoy their own culture, to profess and practise their own religion, or to use their own language”. The quoted phrases outline States Parties’ obligations, but the emphasized phrase is distinct from other expressions of rights in the Covenant and in other human rights instruments. According to Thornberry, the terminology “shall not be denied” contrasts with “shall have the right”, “has the right”, and “no one shall be subjected to”.\textsuperscript{360} Article 27’s weak terminology suggests a weak obligation on States Parties, “implying only a duty not to interfere with the minority in its enjoyment of rights – a minimal duty of tolerance of differences”, even though “many minorities would be grateful for it in an intolerant world”.\textsuperscript{361} Thornberry expands on these comments: “The duty of the state appears to be only one of non-interference in the enjoyment of minority rights – which ‘shall not be denied’ – and not one of supportive action. The state is, as it were, \textit{a mere spectator in the minority’s attempts to resist assimilation}.”\textsuperscript{362} Although Thornberry does not subscribe to this view, article 27’s terminology does suggest a negative interpretation on the obligation question.

With Capotorti, Sohn, Ermacora, Cholewinski, Åkermark, Thio, Barth and many others,

\begin{footnotes}
\item[358] de Varennes, \textit{supra} note 1, at 172-173; Thio, \textit{supra} note 2, at 246.
\item[359] de Varennes, \textit{supra} note 1, at 150.
\item[360] Thornberry 1991, \textit{supra} note 6, at 178.
\item[361] Thornberry 1980, \textit{supra} note 3, at 449.
\end{footnotes}
Thornberry argues that a proper understanding of article 27 requires imposing positive obligations on States Parties. This interpretive camp has been variously described as the ‘positive action’, radical and activist camp, and it is opposed to the view expounded by the non-interference, minimalist or passive camp. Whatever we chose to call them, one position denies what the other affirms; namely, that article 27 imposes positive obligations on States Parties. For the sake of simplicity, I will refer to the view denying this thesis as ‘negative’, and the other as ‘positive’.

Early interpretations of article 27 tended to endorse the negative view. Jacob Robinson notes the negative phrasing and comments that article 27 represents “a classic example of restrictive toleration of minorities”.

Tore Modeen agrees with this view that article 27 does not advance minority protection because States Parties “are not required to enter into any commitment to protect their minorities, beyond avoiding hindrances on the minority group employing their own language and developing their own culture.” He explains,

With this unclear formulation it is difficult to discover any express right for a national minority to establish its own schools, even at its own expense, and even less are they entitled to receive instruction in their own tongue in schools maintained or supported by the state. Nor is there any sign that the minority possesses the right to use its own language in relationships with the public authorities.

Modeen contends that, since the UDHR guarantees freedom of thought, conscience and religion (article 18), freedom of opinion and expression (article 19) and freedom of association (article 22), international law already established the conditions for the private exercise of culture, religion and language, and article 27 of the Covenant does not contribute anything. In a similar vein, J.W. Bruegel remarks, “the article ... does not do more than express

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363 Jacob Robinson, “International Protection of Minorities: A Global View” (1971) 1 Israel Yb HR 61 at 89.
365 Modeen, supra note 364, at 108.
the truism that national minorities must not be prevented from enjoying their own culture and using their own language”, 366 and Yoram Dinstein proclaims that article 27 is “a minimum – rather than a maximum – of rights”. 367 This negative interpretation reflects the priorities of the assimilationist states of immigration, according to Albert Verdoodt:

> the assimilationist countries of America are still on their guard, and they have been reinforced by the massive influx of African and Asian delegates representing countries largely poly-ethnic and ... multi-lingual, who are far more concerned with mobilising their energies around a common pole than with giving positive help to the development of each linguistic group. 368

Tomuschat recognizes that the negative terminology was chosen deliberately, and thus, concludes that “it is difficult to see a convincing justification for giving a broader construction to Art. 27 by requiring States to give positive assistance”. 369 According to Åkermark’s analysis, “[o]ver a period of more than twenty years these writers have adhered to a careful and restrictive interpretation of Article 27.” 370 What is interesting about the quoted scholars from the negative camp is that they believe that genuine equality cannot be achieved with traditional individual rights and non-discrimination alone, and their analyses suggest that they would welcome a minority protection provision that imposed positive obligations on States Parties. Nonetheless, they do not believe that article 27 is subject to such an interpretation. So, under article 27, States Parties are obligated to avoid interfering with the cultural, religious and linguistic activities of minority groups in their territories, but these minority communities are not protected from the actions of other communities in the private sphere, not even the dominant, majority or mainstream community. Therefore, scholars in the

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370 Åkermark, supra note 17, at 128.
negative camp tend to be dissatisfied with the limited protection offered by article 27.

The evidence for the negative interpretation was not derived from the negative formulation of article 27 alone. The *travaux préparatoires* provide considerable evidence for the negative interpretation of the obligations generated by article 27 rights. According to Ryszard Cholewinski, “[t]he drafting history of Article 27 in the Human Rights Commission exposes a deliberate move to couch the state obligation under the provision in negative terms.” Three proposals for alternative formulations have garnered much attention. First, there is a proposal from the USSR: “The State shall ensure to national minorities the right to use their native tongue and to possess their national schools, libraries, museums and other cultural and educational institutions.” Second, there is a draft article by Yugoslavia:

Every person shall have the right to show freely his membership of an ethnic or linguistic group, to use without hindrance the name of his group, to learn the language of this group and to use it in public or private life, to be taught in this language, as well as the right to cultural development with other members of this group, without being subjected on that account to any discrimination whatsoever, and particularly such discrimination as might deprive him of the rights enjoyed by other citizens of the same State.

Third, the Mexican delegate suggested that the draft should be formulated in a positive rather than negative way because it was not sufficient for minority protection that minorities shall not be denied certain rights. The Mexican suggestion in particular emphasized that “the negative interpretation was the prevailing one”, and that “the draft Article provided … a minimum rather than a maximum of rights for minorities”. The Soviet and Yugoslavian proposals were rejected, the Mexican proposal for a positive formulation was not accepted

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either, and, thus, “calls for a negative formulation of the article ultimately won the day”. Cholewinski explains, “[t]he aim of their approach was to lessen the burden upon states in the belief that the provision would be more acceptable universally”. The main idea – an idea championed by the British representative – was that article 27 supplemented non-discrimination with a new duty of toleration. Thornberry concludes, “[i]t was widely accepted in the Human Rights Commission and in the Sub-Commission that the text did not place governments under any positive duties to promote minority culture, religion or language and that its limited mandate adequately reflected a prevailing international consensus.” De Varennes summarizes the prevailing opinion during the drafting of the minority provision:

Having rejected a Soviet proposal to include what would be considered as positive obligations to provide resources in order for minority communities to conduct their own cultural, religious or linguistic activities they deemed important, the goal and intent in adopting Article 27 was much more modest: to ensure a minimum level of rights, not necessarily available to other individuals, which would not restrict the ability of minorities to freely use their own language, practice their religion, or enjoy their own culture, whilst not imposing any obligations upon the states to intervene actively in assisting the minorities in their private affairs.

Thus, Thio concludes, “[a]rticle 27 does not appear to mandate positive measures, being cautiously and modestly formulated … Its negative phrasing … betrays a weak approach towards minority rights, seeming only to impose negative duties on states to allow minorities the free exercise of their rights and to tolerate the manifestation of their cultural lifestyles.”

These considerations from the travaux préparatoires for a negative view on the obligation question are often supplemented with a consequentialist argument for the superior-

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376 Cholewinski, supra note 281, at 369.
377 Ibid.
379 Thornberry 1980, supra note 3, at 449.
380 de Varennes, supra note 1, at 150.
381 Thio, supra note 2, at 144.
ity of this view. Tomuschat contends that the positive view is “a maxim of legal policy which does not rest on fully reflected foundations”. The problem is that a positive interpretation would risk undermining the universal application of article 27:

Art.27 is designed to find world-wide application. Thus, account has to be taken of the specific problems of Third World countries. As far as Africa is concerned, it has been reported for instance that in Nigeria not less than 250 native languages exist, it is simply unrealistic to assume that the competent public authorities could take affirmative action for the benefit of all those linguistic communities. On the other hand, there is no obstacle of any kind which would prevent authorities from tolerating the use of those languages and their manifold dialects. The same is true of the cultural life of the different communities. Stretching the scope of Art.27 to encompass positive obligations could lead in the last analysis to an outright breakdown of its guiding value and hence to a total loss of credibility. Art.27 will be more effective if it is restricted to a hard core of obligations easily to be complied with.

The key premise to this argument is that non-discrimination requires that members of different minority communities receive equal treatment, but it appears that Tomuschat believes that equal treatment is identical treatment. Especially when dealing with diverse minority communities, there are likely to be principled reasons for differential treatment. The equal consideration of their rights under article 27, positively construed, may justify public subsidies for a private educational system for one minority, but not for another, based solely on considerations of their size and distribution. A large and concentrated minority community has a better claim than a small and dispersed one. The main shortcoming with Tomuschat’s argument is not the emphasis on non-discrimination, but rather the idea that a positive interpretation of article 27 rights would require identical treatment of minority communities. Without supplementation with empirical evidence demonstrating the causal connection in this slippery slope argument, even though he raises an important consideration, Tomuschat simply does not provide enough support for his claim.

382 Tomuschat, supra note 358, at 969.
383 Ibid, at 969-970.
De Varennes offers another intriguing argument for the negative view. He claims that the early decisions of the HRC “in respect to Article 27 all confirm indirectly the non-interference nature of the provision as a minimal measure of protection of minorities, and all essentially contradict Capotorti’s position.” De Varennes has in mind Lovelace, Kitok and Lubicon Lake, where he believes that the HRC concluded that the governments of Canada and Sweden were interfering with the cultural life of indigenous peoples as ethnic minorities. In his own words,

All three matters confirm the “negative” nature of Article 27, namely that the state ought not to interfere with the enjoyment by members of a minority of certain private community activities. In Kitok v. Sweden, reindeer herding and the decision regarding who could reside within a minority community both came within the purview of Article 27 not as rights granted by the Swedish state but because they were examples of state intervention in a minority member’s cultural life. In Lovelace v. Canada, the Canadian government was similarly involved in restricting a person from contacts and ties with her community. And in Ominayak v. Canada, government legislation and policies interfered with traditional community economic and social activities so intimately tied to culture that they amounted to a denial of the right to enjoy one’s culture.

De Varennes argues that the HRC regarded Canada’s Indian Act and Sweden’s Reindeer Husbandry Act as illegitimate forms of interference with persons belonging to ethnic minority communities. He believes that his analysis is confirmed by the HRC’s position in Lovelace that there is a distinction between the privileges under Canada’s domestic law and the rights of article 27. He contends that this distinction confirms that “the provision is basically one of non-interference by the state and not one requiring its active support for minorities”.

De Varennes’ argument contradicts my analysis from the previous chapter. Specifi-

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384 de Varennes, supra note 1, at 154.
385 Ibid at 154-155.
386 Ibid at 155.
ally, in relation to Lovelace and Kitok, I claimed that the HRC approved of the Indian Act and the Reindeer Husbandry Act as forms of minority protection. I suggested that the HRC did not want to undermine such positive and concrete assistance of minority communities, so it did not want to invalidate the legislation in question. In Lovelace, the HRC decided that the Canadian government was wrong to deny the complainant her legal right to reside on the Tobique Reserve. Its decision sought to extend Canada’s ‘interference’ with aboriginal communities by reforming its membership criteria to include Lovelace. It is noteworthy that neither the Canadian government nor the Band Council made any attempt to expel Lovelace from her parents’ residence on the Tobique Reserve when she returned to live there after her marriage dissolved. If article 27 simply protected Lovelace from interference, then there would be no violation because nobody tried to prevent her from living on the reserve. She was free to live there and to participate in the social life of the community, but she was denied a legal right to do so under domestic law. What Lovelace sought was legal recognition of her membership and the legal rights and privileges associated with that status. In other words, Lovelace sought inclusion in the Canadian government’s indigenous protection system by virtue of her status as a person belonging to a minority ethnic group.

In Kitok, the HRC expressed its endorsement of Sweden’s legislation as a form of protection for its Sami minority. It voiced concerns that the application of the designated membership rules to Kitok “may have been disproportionate to the legitimate ends sought by the legislation”.

Also, the HRC was troubled with the “apparent conflict between the legislation, which seems to protect the rights of the minority as a whole, and its application to a single member of that minority”, but it applied its test from Lovelace to determine that the restriction with Kitok’s article 27 rights have a “reasonable and objective justification” and

387 Kitok, supra note 273, para 9.7, my emphasis.
are “necessary for the continued viability and welfare of the minority as a whole”. To make sense of the “legitimate ends”, “apparent conflict” and application of the test from Lovelace, the Reindeer Husbandry Act must be interpreted as positive legislation promoting article 27 rights. The HRC found that there was no violation, but it noted that Kitok would be permitted to continue engaging in Sami socio-economic activities, like reindeer husbandry, hunting and fishing, albeit not as a right. In Lovelace, the complainant’s desire to reside on the Tobique Reserve was compatible with a desirable revision of the Indian Act, but in Kitok, the HRC found that it was preferable to sustain the domestic legislation in its current form because it was necessary for the survival and viability of the community as whole, and to allow the complainant to continue his activities, albeit not as a right. In these cases, the HRC supports domestic legislation intended to protect minority communities and discharge the State party’s obligations under article 27. Therefore, I conclude that, contrary to de Varennes’ assertions, the early HRC case law demonstrates that States Parties have positive obligations to protect persons belonging to minority communities, particularly when they are concentrated into local communities.

Even though the negative view does not benefit much from the subsequent arguments of Tomuschat and de Varennes, the travaux préparatoires seemingly contain sufficient evidence in themselves. Given the evidence from the drafting history for the negative view, it is somewhat surprising that there is a debate at all. As de Varennes indicates, “[t]he contemporary debate over the scope of rights guaranteed under Article 27 emanates principally from Capotorti’s influential study.” In this study, Capotorti recounts the main features of the travaux préparatoires and notes the agreement reached:

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389 de Varennes, supra note 1, at 151.
some representatives expressed the opinion that the article to be included should contain a more precise description of the State’s obligations. In their view, the words “persons ... shall not be denied” were devoid of meaning and would probably have no effect. It was therefore necessary to specify in the article that the State should adopt special legislative measures to guarantee to minorities the enjoyment of certain rights. On the other hand, some speakers pointed out that a proposal of that nature would place undue emphasis on the rights of minority groups instead of stressing the importance of tolerance—the only new duty which should be imposed on States which had accepted the obligation of non-discrimination. It was generally agreed that the text submitted by the Sub-Commission would not, for example, place States and Governments under the obligation of providing special schools for persons belonging to linguistic minorities. Persons who comprised ethnic, religious or linguistic minorities could, as such, request that they should not be deprived of the rights recognized in the draft articles. The sole obligation imposed upon States was not to deny that right.\footnote{Capotorti Study, supra note 218, para 211. See E/CN.4/SR.368-371.}

Capotorti acknowledges that the prevailing opinion at the twentieth session of the SCPDPM was that article 27 “did not imply that members of minorities had the right to demand that the State should adopt positive measures.”\footnote{Ibid, para 212. See E/CN.4/Sub.2/286, paras 155-157.} So, whatever the main point of contention is, the debate over the negative or positive views on the obligation question does not centre on the proper interpretation of the travaux préparatoires.

### 5.2 The Case for the Positive Assistance Position

Yet, Capotorti believes that it is a mistake to conceive of article 27 as not imposing positive obligations on States Parties. Due to the influence of his reasoning, I will quote the key paragraph in its entirety:

> Nevertheless, there is reason to question whether the implementation of article 27 of the Covenant does not, in fact, call for active intervention by the State. At the cultural level, in particular, it is generally agreed that, because of the enormous human and financial resources which would be needed for a full cultural development, the right granted to members of minority groups to enjoy their own culture would lose much of its meaning if no assistance from the Governments concerned was forthcoming. Neither the non-prohibition of the exercise of such a right by persons belonging to minority groups nor the constitutional guarantees of freedom of expression and association are sufficient for the effective implementation of the...
right of members of minority groups to preserve and develop their own culture. These comments echo the Mexican position during the drafting process: non-discrimination, non-interference and traditional individual rights and freedoms are not necessarily sufficient for the protection of ethnic, religious and linguistic minorities. Capotorti’s argument does not dispute the content of article 27, but rather its implementation. His reasoning precedes and anticipates the HRC’s explanation in General Comment 3(13) on Article 2: Implementation at the National Level:

the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights … in principle this undertaking relates to all rights set forth in the Covenant.

To achieve the object and purpose of article 27, States Parties may be obligated to resort to positive measures.

De Varennes is not impressed with Capotorti’s implementation argument. He contends that the above passage demonstrates that “Capotorti candidly admits he is setting aside what the drafters obviously meant, to adopt what he believed should preferably be in place.” De Varennes explains,

In other words, Capotorti was ready to cast aside the clearly expressed intention of the drafters of an international treaty, not because of any dispute as to its wording or meaning, but because he believed more is required for the effective protection and development of minorities. Whereas the purpose of Article 27 as expressed by the drafters had been to protect minorities by prohibiting states from interfering in the affairs of minority communities in respect to their language, religion or culture, Capotorti substituted his own: the objective of Article 27 should be to guarantee the preservation and development of the language, religion and culture of minorities, including if necessary the active and sustained intervention of the state.

392 Capotorti Study, supra note 218, para 213.
394 de Varennes, supra note 1, at 151.
395 Ibid.
In short, de Varennes charges Capotorti with substituting article 27’s original *laissez vivre* objective with a mandate to guarantee that minority communities are able to preserve and develop their culture, religion or language. He vehemently opposes Capotorti’s stance: “Starkly put, neither the expressed *raison d’être* … nor the phrasing of Article 27 support Capotorti’s conclusion.”396 What is most upsetting for de Varennes is that “many commentators have simply taken for granted that Capotorti’s position either represented the actual meaning and scope of Article 27, or that it was essential to so interpret it, as they assumed that no other rights offered sufficient guarantees to ensure adequate protection of minorities.”397 Whatever their reasons for endorsing the positive interpretation on the obligation question, de Varennes could sense the tide rising.

Yet, I fear that de Varennes may have misconstrued Capotorti’s point. De Varennes interprets the “Nevertheless”, which conjoins Capotorti’s summary of the evidence for the negative view contained in the *travaux préparatoires* with his positive interpretation, as a dismissal of this information. He claims, “Capotorti candidly admits he is setting aside what the drafters obviously meant, to adopt what he believed should preferably be in place.”398 There is another interpretation available, however. According to Cholewinski, “[t]he negative wording and the drafting history of Article 27 are by no means conclusive in interpreting the provision.”399 Articles 31(1) and 32 of the *VCLT* set out that the *travaux préparatoires* are merely supplementary or secondary sources of interpretation to which interpreters may resort if the interpretation referring to the ordinary meaning and the object and purpose of the provision are ambiguous, obscure, manifestly absurd or unreasonable. As a result, interna-

396 *Ibid* at 152.
397 *Ibid* at 151.
398 *Ibid*.
399 Cholewinski, *supra* note 281, at 369.
tional law requires interpreters to resort first to the meaning, object and purpose of the article, and that appears to be what Capotorti has done. On this analysis, the “Nevertheless” should not be conceived as simply setting aside the prevailing opinion of the international community, but rather a correction of it. The object and purpose of article 27 rights is to ensure that persons belonging to minority groups are able “to enjoy their own culture, to profess and practise their own religion, or to use their own language”, and Capotorti’s remarks are intended to demonstrate that the negative interpretation on the obligation question will often be insufficient to meet this object and purpose. Hence, States Parties may be obligated to take positive action to ensure the object and purpose of article 27 rights. Even proponents of the negative view concede that article 27’s object and purpose is to protect minorities from forced assimilation and to assist them to retain their cultural, religious and linguistic particularities.

I believe that there is also an ordinary meaning argument available, even though most interpreters seem content to proceed on the assumption that article 27’s ordinary meaning is imprecise and vague. Article 27 recognizes that “persons belonging to such minorities shall not be denied the right … to enjoy their own culture, to profess and practise their own religion, or to use their own language”. I contend that the ordinary meaning of article 27 is that the identified beneficiaries have the specified rights, and States Parties will not deny them these rights. In other words, States Parties will not refuse or withhold these rights, and persons belonging to such minorities shall have the right to enjoy their own culture, to profess and practise their own religion, or to use their own language. In short, I contend that “shall not be denied” is equivalent to “shall have”. The reasoning for this view proceeds in four steps.
First, the term ‘shall’ has no relation to the permissive sense of ‘should’, where one should eat healthier, but may chose not to do so. Instead, ‘shall’ means ‘definitely will’, and the ICCPR is replete with references to ‘shall’; e.g., “Everyone shall have the right to …”; “Every citizen shall have the right …”; “All persons shall be …”; “No one shall be …”; and, “ … shall be recognized.” The Covenant is an agreement or pledge between States Parties on how they shall or will conduct themselves. This account of the term “shall” should not be controversial.

Second, there are also many references to “shall not” in the Covenant. In general, the phrase “shall not” is used to impose limits on States Parties’ actions or interpretations of its provisions. For instance, article 6(5) stipulates “Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women”, and article 22(2) posits “[t]his article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.” The ordinary meaning of “shall not” is “definitely will not”.

Third, there is an implicit “by the State party” missing from the text. The specified right shall not be denied by the State party, but we should adjust the passive to the active voice. So, it is the State party that shall not deny the specified rights of the identified beneficiary. There may also be an implicit “through inaction” as well.

Fourth, the combination of “shall not” with “denied” may be causing some confusion. There are numerous references to “shall not” in the Covenant, but only once is it coupled with the word “denied”. This combination of negatives may be complex in instances where there is an intermediary category. For example, to say that it is not hot outside is not equivalent to saying that it is cold outside because it may be neither hot nor cold. The matter is
much simpler if there is no intermediary position. For example, to say that a student has not passed the course is to say that she has failed it, or to say that a woman is not pregnant is to say that she is nongravid. So, the ordinary meaning of “shall not be denied” depends on whether there is an intermediary state between “will have” and “will not have”. Treating the specified rights as a singular whole, either the identified beneficiary will have these rights or they will not. It does not make sense for them to neither have them nor not have them because they are in some intermediary state comparable to being neither hot nor cold. This is the key step in my ordinary meaning argument. Let me recount the steps with B representing the identified beneficiary, R the specified rights, and S the State party:

(i) B shall not be denied R by S;
(ii) B will not be denied R by S;
(iii) S will not deny B of R, or S will not withhold B from R;
(iv) S will recognize or provide B of R.

In ordinary language, article 27 recognizes that persons belonging to minority communities will have the right to enjoy their own culture, to profess and practise their own religion, or to use their own language. If article 27 recognizes rights for persons belonging to minority communities, then under article 2(2), States Parties have positive obligations insofar as they are obligated “to take the necessary steps … to adopt such laws or other measures as may be necessary to give effect to the rights recognized in present Covenant.” Just like article 18(1) establishes a positive obligation on States Parties vis-à-vis each person’s right to freedom of thought, conscience and religion, so too article 27 establishes positive obligations vis-à-vis minority rights.

I believe that Vojin Dimitryevic, a Yugoslavian member of the HRC, attempted to express this view when he said “[t]he statement that they [persons belonging to the relevant
minority groups] should ‘not be denied the right’ could mean that they already possessed a right which could not be denied”.\footnote{Ibid at 347. See also UN Doc CCPR/C/SR.618, para 33.} This is a rather confused and confusing proposition, but Cholewinski believes that Dimitryevic was saying “the rights of minorities are inherent in that they are not granted by the Covenant itself but only strengthened by Article 27.”\footnote{Ibid.} This is consistent with the preambular acknowledgement that the Covenant recognizes rights derived from the inherent dignity of the human person. Higgins thought that he meant “that states parties were not under an obligation to provide additional instruction or facilities for minority groups. They should not, however, interfere with rights already held”.\footnote{Ibid.} Unfortunately, Dimitryevic did not clarify his statement, and Cholewinski recommends that this discussion “not be treated too seriously because it was a short affair consisting largely of ambiguous statements”.\footnote{Ibid.} I submit that Dimitryevic should be interpreted as advocating for the type of ordinary meaning argument described above.

Interpreters of article 27 have been dismissive of the possibility of an ordinary meaning argument, so they have proceeded with other arguments. To support his positive view further, Capotorti compares article 27 to articles 13 through 15 of the ICESCR. These rights from the ICESCR are universal cultural rights, but they “have the character of positive obligations in that they can only be fully realized by appropriate state measures”.\footnote{Ibid at 364-365. See Capotorti Study, supra note 218, paras 215-216.} These universal rights impose positive obligations on States Parties, and Capotorti adds that “[i]t would be inconceivable that the State should have fewer cultural obligations vis-à-vis minorities than towards its people in general”.\footnote{Capotorti Study, supra note 218, para 214.} So, article 27 as a minority protection provision

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\begin{itemize}
\item \textbf{Ibid} at 347. See also UN Doc CCPR/C/SR.618, para 33.
\item \textbf{Ibid.}
\item \textbf{Ibid.} See also UN Doc CCPR/C/SR.618, para 40.
\item \textbf{Ibid.}
\item \textbf{Ibid at 364-365. See Capotorti Study, supra note 218, paras 215-216.}
\item \textbf{Capotorti Study, supra note 218, para 214.}
\end{itemize}
would impose positive obligations as well. This argument may be supported further by the decision to adopt two Covenants based on the distinction between two models of rights: (i) ‘civil and political rights’, and (ii) ‘economic, social and cultural rights’. The former rights are to be ‘secured’, whereas the second are ‘achieved’ or ‘promoted’. There is an aspirational character to ‘economic, social and cultural rights’ that is not possessed by the hard-core ‘civil and political rights’, and this difference is reflected in the fact that the rights contained in Part III of the *ICCPR* are justiciable. According to Thio, “[w]hile article 15 of the *ICESCR* protects cultural rights, the obligations in it are promotional in nature, whereas *ICCPR* rights are by nature more immediate obligations which can be vindicated by an associated individual complaints procedure.”

If minority protection were simply an aspirational goal to be promoted, then article 27 would be located in the *ICESCR*. It is significant that article 27 is a special social and cultural right placed in the *ICCPR*. Its resemblance to articles 13 through 15 of the *ICESCR* suggest that article 27 imposes positive obligations, but its placement in the *ICCPR* means that article 27 rights have a special priority over other social and cultural rights. Thus, according to Thornberry, “from the standpoints of the principle of effectiveness, the logic of the Covenant structure, and the nature of the rights themselves, the Special Rapporteur concludes that Article 27 constitutes a positive and not a negative obligation for States Parties.” Even though this supplementary argument is not decisive, at least some weight should be given to these considerations about the logic of the Covenant structure and the nature of article 27 rights.

Thornberry provides another argument for a positive view on the obligation question. He argues, “[t]he relationship between the rights in the Covenant also suggests the positive

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406 Thio, *supra* note 2, at 145.
view. The point here is that, unless Article 27 is given a more forceful content, it adds nothing to the Covenant.” In *General Comment 23(50)*, the HRC endorsed Thornberry’s argument by confirming that article 27 “is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.” These remarks contradict Modeen’s earlier assessment that article 27 does not represent a real advance in minority protection because the *UDHR* guarantees freedom of expression, religion and association. Since the *ICCPR* contains provisions for freedom of thought, conscience and religion (article 18), freedom of opinion and expression (article 19), freedom of association (article 22), and two non-discrimination clauses (articles 2 and 26), and since article 27 is “distinct from, and additional to” these other rights, article 27 imposes positive obligations on States Parties to facilitate the ability of persons belonging to minority groups to enjoy their own culture, to profess and practice their own religion, or to use their own language. Many jurists and scholars consider this argument on its own to be a sufficient basis for abandoning the negative view.410

Of course, this argument invites another question about the unique contribution of article 27 to the *ICCPR*. I believe that this question, and its answer, informed Capotorti’s positive stance on the obligation question. According to Thio, “[a]rticle 27 addresses the specific harm of threats to the survival of minority cultures, being susceptible to the assimilative pull of the majority culture shaping state-organised activity.”411 She adds, “[c]ultural development requires considerable human and financial resources, and minorities need special measures to achieve substantive equality with the majority group. Obliging states not

408 *Ibid* at 180.
409 *General Comment 23(50), supra* note 261, para 1, my emphasis.
410 Thio, *supra* note 2, at 144-145.
411 *Ibid* at 145.
to deny minorities the common enjoyment of their cultural life alludes to the achievement of factual equality, which goes beyond article 26’s prohibition against discrimination.\footnote{Ibid.} In other words, the point of article 27 as a minority protection provision is to provide positive state action beyond mere non-discrimination in order to achieve the larger goal of equality, both in fact and in law. These two ingredients were famously laid out in the PCIJ’s Advisory Opinion in \textit{Minority Schools in Albania}:

The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and cooperating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs. In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties. The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State. The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics. These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.\footnote{Minority Schools in Albania (1935), Advisory Opinion, PCIJ (Ser A/B), No 64, at 11.}

These two ingredients are contained within the Covenant in articles 26 and 27: non-discrimination and positive minority protection. Although the placement of these two ingredients in succession at the end of the justiciable portion of the Covenant may be a coincidence, it would not be too much of a stretch to regard it as yet more evidence for the positive interpretation on the obligation question.

I believe that these arguments about the implementation of article 27, the logical structure of the Covenants, the nature of the rights protected by it, the inclusion of article 27
as a distinct and additional form of protection, and the historical precedent of non-discrimination and positive minority protection as two complementary, but necessary, ingredients to effective minority protection provide sufficient evidence for the positive interpretation. Nonetheless, there is yet more evidence for it. Cholewinski is concerned with the obligation question, but he approaches it from a different perspective. Cholewinski conducts a thorough and detailed analysis of state reports to and summary meeting records of the HRC. He concludes that, even though “quite a number of states still adopt a negative approach”, “the practice of states and of the Human Rights Committee points to the latter interpretation [of a duty of positive action] as the correct one”.414 As such, there is widespread and increasing acceptance of the idea that “the right of minorities under Article 27 … cannot be fully satisfied without state assistance, either in the provision of financial aid or in the adoption of special legislative or administrative measures.”415

Cholewinski’s contribution to the debate on the obligation question should not be underestimated. According to Åkermark, for instance, “Cholewinski’s examination is a turning point in the history of the interpretation of Article 27, in that it recognises the importance of the work of the Human Rights Committee”.416 Despite the importance of his contribution to the literature, Åkermark believes that there is a serious shortcoming in Cholewinski’s analysis. Cholewinski bases his study on the summary records, but “[t]he drawback of this method is that it gives the impression of basing the conclusions on the questions and comments of the individual members of the Human Rights Committee.”417 This approach risks conflating the subjective opinions of individual members with the views

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414 Cholewinski, supra note 281, at 370-371.
415 Ibid at 371.
416 Åkermark, supra note 17, at 131.
417 Ibid.
of the entire committee. Nonetheless, Åkermark believes that Cholewinski has opened a fruitful avenue of inquiry, so she seeks to correct and continue his work by examining the annual reports of the HRC to the General Assembly. Like Cholewinski, Åkermark found countless instances of positive language. Moreover,

The practice of the Human Rights Committee in the consideration of country reports clarifies the standard demanded by the Committee in the implementation of Article 27 … The Committee has approached several aspects of the rights to culture, religion and language and has underlined the necessity of active support and not simply of non-interference. The HRC has insisted that the status of minorities should be regulated by foreseeable and accessible legal acts which introduce positive measures for the protection of the minority cultures. The Committee has put great emphasis on issues of language, and also on aspects such as access to media and representation in decision-making. The repeated questions on matters such as the right to establish religious institutions and the representation of minorities in parliament indicate that the Committee is well aware of the collective aspects of the rights involved, and that the protection of minority cultures as such is a necessary element in the realisation of the rights enshrined in Article 27.\textsuperscript{418}

The HRC has clarified that individual human rights, non-discrimination and toleration are not sufficient for the realization of minority protection under article 27. With every passing year, the evidence for the positive interpretation on the obligation question continues to mount higher and higher. At this point, the pendulum of scholarly opinion has swung decisively from the negative to the positive interpretation.

In 1980, Thornberry suggested that Capotorti was correct to draw attention to article 27's programmatic element.\textsuperscript{419} Cautiously, he stated, “[i]t remains to be seen whether this positive interpretation will gain general acceptance. The expressed attitudes of many states canvassed in the Capotorti Report do not give great cause for optimism.”\textsuperscript{420} In 2002, Thornberry revised his earlier assessment: “The HRC has gradually but forcefully hardened up

\textsuperscript{418} Ibid at 153.
\textsuperscript{419} Thornberry 1980, supra note 3, at 450.
\textsuperscript{420} Ibid at 450.
Article 27 to mandate action by States for the benefit of minority communities. The term ‘ensure’ features regularly in the Committee’s dialogue with States, as do the phrases ‘positive action’ and ‘concrete measures’.\footnote{Thornberry 2002: 160-161.} What a difference two decades makes. At this point in time, it is quite evident that Capotorti’s conclusion has been vindicated.

Article 27 of the Covenant must therefore be placed in its proper context. To enable the objectives of this article to be achieved, it is essential that States should adopt legislative and administrative measures. It is hard to imagine how the culture and language of a group can be conserved without, for example, a special adaptation of the educational system of the country. The right accorded to members of minorities would quite obviously be purely theoretical unless adequate cultural institutions were established. This applies equally in the linguistic field, and even where the religion of a minority is concerned a purely passive attitude on the part of the State would not answer the purposes of article 27. However, whatever the country, groups with sufficient resources to carry out tasks of this magnitude are rare, if not non-existent. Only the effective exercise of the rights set forth in article 27 can guarantee observance of the principle of the real, and not only formal, equality of persons belonging to minority groups. The implementation of these rights calls for active and sustained intervention by States. A passive attitude on the part of the latter would render such rights inoperative.\footnote{Capotorti Study, supra note 218, para 217.}

*General Comment 23(50)* settles the obligation question definitively in paras 6.1 and 6.2, respectively:

6.1 Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a ‘right’ and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

6.2 Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.

On the positive interpretation on the obligation question, therefore, (i) in accordance with the...
negative view, so far as is legitimate, States Parties should refrain from interfering with the
efforts of minority communities to preserve and promote their culture, religion and language,
and (ii) States Parties should take active steps to protect and promote the culture, religion and
language of minority communities for the sake of equality in law and in fact. On this fourth
question of our analysis, the HRC has once again eschewed a restrictive position for a more
robust one. The fact that States Parties may have positive obligations to assist persons in
their territory belonging to minority communities is an all-important reason to view article 27
as a significant minority protection provision. After all, that is its object and purpose.
CHAPTER SIX – CONCLUSION

UNDERAPPRECIATED RESOURCE

Today, it would be no exaggeration to say that if so-called classical lawyers think human rights is a weak part of law, then human rights lawyers think cultural rights are the soft part of human rights. They could not be more mistaken. The neglect of cultural rights has hidden one of the most disgraceful and violent parts of human history: that of states knowingly and deliberately oppressing and even annihilating communities.\footnote{Stamatopoulou, supra note 18, at 1171.}

The cyclical character of international involvement with minorities protection is well enough known … But it bears emphasis at this time of inter-ethnic and cultural conflict, in the aftermath of the Great World Peace of 1989 and the Great European Peace of 1991. It is hard to recall now the brief euphoria of those years – the “New World Order”, the “End of History”. Those who think that history has ended are perhaps compelled to relive it, and it has certainly seemed that we have been reliving our collective experience with minority protection – whether deriving from Central Europe, the Balkans and the Middle East in the later 19th century or the same places in the inter-war period – through our involvement in the same places in our time.\footnote{Crawford, supra note 4, ix.}

Throughout this thesis, I have been praising the HRC for its position on the various questions guiding our inquiry. HRC practice has established a wide scope of coverage and application, based on an objective definition of ‘minority’ as a non-majority ethnic, religious or linguistic community. There are two significant exceptions to this trend: (i) the French ‘declaration’, which the HRC has deemed a reservation, but which it has yet to assess for its compatibility with the object and purpose of the Covenant; and, (ii) the decision in Ballantyne to view the relativity of the minority concept in relation to the State party rather than the government whose laws, policies or actions led to the alleged human rights violation. I have provided reasons why the HRC should change its views to eliminate these restrictions, and we will have to wait for HRC practice to develop further before we can determine how it treats these
exceptions. With these minor exceptions in mind, HRC practice has established a near universal scope of coverage and applications for article 27, and its objective stance on the definitional question is accompanied by a similar objective position on the membership question. As a result, persons with an objective tie to a non-majority ethnic, religious or linguistic community are protected under article 27. That is, these persons bear the rights declared under article 27, and as individuals, they exercise these rights, even if they choose to exercise them in concert with other members of their group or to designate representatives of the community or some other party to exercise them on their behalf. Contrary to the opinions of some legal scholars, the HRC has not adopted a collective exercise condition, a collective harm condition or a collective interest condition for these rights. Quite simply, article 27 protects individual rights, including the individual right to exercise these rights with other individuals. Again and again, HRC practice reveals a no-nonsense approach to minority protection – an approach that is unencumbered by the sorts of restrictive conditions purported by legal scholars.

Since article 27 rights are capable of imposing negative and positive obligations on States Parties, this provision should be regarded as a valuable resource for minority protection. Our analysis of the scope, definitional, right-bearer and obligation questions suggests an expansive and robust view of article 27, in line with the following formulation:

*States Parties have negative, and possibly also positive, obligations to ensure that persons belonging to non-majority ethnic, national, indigenous, racial, religious or linguistic communities have individual rights to enjoy their own culture, to profess and practise their own religion, and to use their own language, including also the right to exercise these rights in concert with other members of their community.*

This formulation clarifies many of the questions analyzed in this thesis, but other significant
questions remain. In particular, and perhaps most importantly, the content of the individual rights to culture, religion and language needs to be spelled out with greater precision. It is one thing to recognize a generic legal right to culture, religion and language, and another matter entirely to detail to what these rights entitle the right-holder. My analysis places increased salience on this question because it views article 27 as applying universally to many different types of minority community, and not only to individuals recognized through some legal process as members, but also to individuals who have a relevant objective tie to the community. Additionally, my analysis recognizes that States Parties may have positive obligations to protect and promote the cultural, religious or linguistic interests of these persons, and the question about the specific content of the rights protected under article 27 must examine measures beyond mere non-interference. In other words, since we have recognized that article 27 has an expanded scope and imposes positive obligations on States Parties, there is a complex question about the specific content of these rights. HRC case law reveals a few specific rights under the generic rights to culture, religion and language, but these specific rights have not been outlined with enough precision yet. HRC practice in relation to its review of state reports may be more revealing, but this project would take us too far afield. In my opinion, the evaluation of article 27 as a minority protection provision depends significantly on the content of the rights protected within this provision.

Although I have been emphasizing how HRC practice reveals a desirable interpretation of the minority provision, it is important to note that article 27 is not the panacea of minority protection in international law. Moreover, it is not intended to serve as a magic bullet, and it does not need to be one. In 1980, Thornberry stated, “international law is less prepared now than it ought to be to deal with a question which so vitally affects international
peace. Indeed it is doubtful that international law can be said to recognise a specific minorities problem at all. This relatively recent blind spot has arisen since the fall of the League of Nations. In 2008, however, Gudmundur Alfredsson recounted how several instruments and institutions had been established as part of the UN’s international minority protection regime. He claims,

It now amounts to more than fifty instruments and some dozen monitoring and dialogue institutions with minority-specific provisions. In addition, members of minorities are entitled to the equal enjoyment of all human rights and equal access to all implementation and monitoring procedures designed for human rights in general. Indeed, there has been a steady increase in the application of general human rights instruments for the protection of members of minority groups, and an increasing sensitivity to the needs of such persons. Hence, the reference to a minority protection regime rather than merely minority rights is most appropriate.426

The relatively quick expansion of minority protection may have been uneven and unorganized, plagued by uncertainties and double standards, and pursued with questionable motives, as Alfredsson claims, but international minority protection continues to improve, with article 27 serving as just one of many tiles of the overall mosaic.

Given that article 27 is simply one of many resources available for minority protection, it is surprising how much negativity has been directed at it. We have noted already much of the early reaction to this minority provision. Robinson claimed that it represented “a classic example of restrictive toleration of minorities”, 427 Modeen agreed that it did not advance minority protection,428 Bruegel remarked that it expressed only the truism that minorities should not be prevented from enjoying their culture and using their language,429

425 Thornberry 1980, supra note 3, at 425.
427 Robinson, supra note 363, at 89.
428 Modeen, supra note 364, at 108.
429 Bruegel, supra note 366, at 432-433.
Dinstein saw it as a minimum rather than maximum of rights, and Verdoodt declared that it reflects the priorities of assimilationist states of immigration. To these comments, we can add a smattering of more recent descriptions, although it is important to note that the scholar’s quoted do not necessarily hold these opinions themselves. Henrard and Dunbar claim, “[w]hile Article 27 of the ICCPR is widely understood to enshrine a prohibition on forced assimilation and the right to an identity, a regime of minority protection does not guarantee that members of minorities will not choose the path of assimilation.” McGoldrick adds, “[a]rticle 27 is clearly limited in its scope. It accords rights to individuals rather than to a group or a minority. It applies only to certain kinds of existing minorities, concerns limited rights, and is expressed in negative (“shall not be denied”) rather than positive terms.” Nowak is concerned that, in terms of its contents article 27 is, however, formulated in a quite restrictive manner. In particular, it does not contain any explicit obligation of States parties to take positive measures of, e.g., providing financial support for minority schools, providing for the use of minority languages before courts or administrative authorities, or ensuring representation in legislative bodies.

“Textually,” Scheinin claims, “[a]rticle 27 is a rather modest provision in that it primarily addresses the negative obligation of states not to deny members of minorities the right to enjoy their culture, to profess and practice their religion or to use their own language.” Thio states, “[a]rticle 27 does not appear to mandate positive measures, being cautiously and modestly formulated … Its negative phrasing, ‘shall not be denied’ betrays a weak approach towards minority rights, seeming only to impose negative duties on states to allow minorities

430 Dinstein, supra note 367, at 118.
431 Verdoodt, supra note 368, at 70-71.
433 McGoldrick, supra note 67, at 659.
434 Nowak, supra note 88, at 15.
435 Scheinin, supra note 78, at 23-24.
the free exercise of their rights and to tolerate the manifestation of their cultural lifestyles.\footnote{436} Similar statements may be reproduced \textit{ad nauseam}, but I have argued throughout this thesis that these commentators have misinterpreted article 27 and, thus also, underappreciated its value.

Nonetheless, within the ambit of international legal minority protection, article 27 is a special provision, and its uniqueness is often noted. Thornberry may capture it best when he states, “[i]ts significance must not be underestimated because it is, historically, the first international norm dealing specifically with rights for ethnic, religious and linguistic groups that is capable of, and intended for, universal application.”\footnote{437} Nowak explains, “[a]rticle 27 … still remains the only binding provision in a multilateral international treaty which guarantees certain minimum rights to persons belonging to minorities.”\footnote{438} Åkermark notes, “[a]rticle 27 of the \textit{ICCPR} is still the main universal provision with a legally binding effect offering an all-round protection of minorities,”\footnote{439} and she reaffirms, “[a]rticle 27 … is still today the only global provision of a legally binding nature guaranteeing all the main aspects of minority protection, namely language, religion and culture.”\footnote{440} Scheinin remarks, “[a]mong legally binding international treaties, Article 27 … provides a promising example of the emergence and evolution of patterns of interpretation in respect of the scope and content of minority rights.”\footnote{441} Stamatopoulou adds, the \textit{ICCPR} “is the most broadly ratified international instrument with binding nature to recognize, in its Article 27, that persons belonging to ethnic, religious, or linguistic minorities “shall not be denied the right, in

\footnotesize{\begin{itemize}
\item[\footnote{436}] Thio, \textit{supra} note 2, at 144.
\item[\footnote{437}] Thornberry 1980, \textit{supra} note 3, at 443-444.
\item[\footnote{438}] Nowak, \textit{supra} note 88, at 8.
\item[\footnote{439}] Åkermark, \textit{supra} note 17, at 131-132.
\item[\footnote{440}] Ibid at 296-297.
\item[\footnote{441}] Scheinin, \textit{supra} note 78, at 45.
\end{itemize}}
community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”.\footnote{Stamatopoulou, supra note 18, at 1174-1175.} Given that article 27 remains the only universal minority rights provision within a legally binding and justiciable international treaty, our interpretation of it should be welcomed by many legal scholars who wrongly lamented article 27’s perceived shortcomings. A crucial step in recognizing the value of article 27 as a resource for minority protection is to appreciate its status in international law and to rescue it from international law scholars who have embraced inaccurate interpretations, often because they are enamoured with the League of Nations’ minority protection regime. This thesis contributes to the effort to do so, but significant questions remain.
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