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GAETANO PENTASSUGLIA
MINORITIES IN INTERNATIONAL LAW: AN INTRODUCTORY STUDY
(STRASBOURG: COUNCIL OF EUROPE PUBLISHING, 2002)

*By Aristides Díaz-Pedrosa**

Minorities in International Law is the latest publication by Gaetano Pentassuglia, a professor of international law at the University of Munich Law School and former EU Research Fellow. The book is part of Pentassuglia's previous work with the European Centre for Minority Issues [ECMI] in Germany and is the first volume of ECMI's series on Minority Issues, a series dedicated to providing a practical guide to the instruments and legal mechanisms that exist at the national, regional and international levels for the protection of minorities.

Pentassuglia's book offers a comprehensive overview of the treatment of minorities within international law, with three main objectives. First, it outlines the substantive entitlements available to minorities by contrasting them to the wider background of international human rights. Second, it describes and underscores the role of international institutions in the development of protective regimes. Finally, it addresses special problems and questions that arise in the context of minority rights, such as the difficulty of arriving at a universal definition of the term "minority".

Minorities in International Law is a book that remains introductory in nature, even when considering the scope of the endeavor, the complexity of issues addressed and Pentassuglia's critical assessments. As such, the book appeals to a wide audience, such as practitioners, minority rights advocates, legal experts, journalists and students of international law or related disciplines. In keeping with its broad appeal, the book contains detailed references to relevant literature at the end of each chapter, as well as an appendix that sets out some of the documents discussed in the text.

Pentassuglia's central premise is that minority rights form an integral part of the international protection of human rights. For instance, Article 27 of the *International Covenant on Civil and Political Rights*¹ [ICCPR] places minority rights within the wider context of human rights entitlements. However, the author explains that minority rights and human rights are not identical notions. Whereas human rights are recognized as the legal right of all human beings to protect their dignity, minority rights are recognized as the exclusive benefit of minority groups. Despite this difference, Pentassuglia uses human rights norms as a framework within which to evaluate the definition, scope and protection of minority rights in international law.

The first component of this framework is the subject entitled to the right recognized in a legal rule and, within the limits of his procedural capacity, who is entitled to take permissible action to secure any given right. The second component focuses on the duty-holder, usually a state, obliged to fulfill the subject's demands or

* Cornell Law School.

¹ 19 December 1966, 999 U.N.T.S. 171.

create the conditions necessary for their realization. The third component, the object, refers to the content of any given right and corresponding duties. Finally, the fourth component is implementation - the range of measures taken to guarantee the right in question domestically and to supervise the concomitant process through available domestic or international procedures and institutions.

This framework also provides a useful breakdown of the book's structure, which consists of three parts. Part A, "The minority question in context: background and concepts," focuses on the first component of the human rights norm. It presents the question of who minorities are and what their rights are within the corpus of international human rights law. After all, according to Article 27 of the ICCPR, "the definition of minority [...] remains a tool for determining the concrete bearing of [duties] undertaken by states and achieving clarity and certainty in the regime of minority rights."

Pentassuglia commences Part A of the book with a historical perspective of minority rights, focusing in particular on three major stages: the League of Nations, the period between 1945 and 1989 (the Cold War era) and the post-Cold War era. According to Pentassuglia, the League of Nations marked the first genuine "system" of minority rights protection, due in part to the disintegration of the Austria-Hungary, Prussia and Ottoman Empires. In stark contrast with this first period, the Cold War era paid little attention to minority issues. Notwithstanding the adoption of Article 27 of the ICCPR in 1966, Pentassuglia notes that records of major international organizations (including the UN and the Council of Europe) did not reveal any marked change in the treatment of minority rights. Finally, the post-Cold war era reveals a trend towards developing international minority rights regimes. In the context of the United Nations, the *UN Declaration of Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*² adopted by the UN General Assembly in 1992 and inspired by Article 27 of the ICCPR, is the most important contemporary non-treaty text devoted to minority rights.

After a historical perspective, Pentassuglia moves to more contentious ground in his attempt to clarify the legal concept of "minority". In this regard, Pentassuglia essentially contrasts two approaches, the minimalist approach and a broader approach. The minimalist approach attempts to solidify a widely accepted and sufficiently precise core meaning of minorities. According to this approach, "minority" as stated by Articles 58 and 59 of the ICCPR means "a group historically rooted in the territory of a state and whose specific ethno-cultural features (with respective claims of protection) markedly distinguish it from the rest of the population of the state." The author accepts this approach because it sets a minimum standard that allows for substantive protection of minorities, while still addressing a concern for stability.

In accepting the minimalist approach, Pentassuglia rejects a broader approach aimed at protecting a variety of disadvantaged groups in modern societies that have equally varied attachments to the state. This broader view fundamentally

² GA Res. 47/135, UN GAOR, 47th Sess., Supp. No. 49, UN Doc. A/47/49 (1992) 210.

differs from the minimalist approach in that it abandons the requirement of citizenship and is more flexible on the necessity of a citizen's long stay in the state. As such, this view would include foreigners, migrant workers and refugees within the scope of "minorities".

Ultimately, Pentassuglia endorses the definition of "minority" provided by Francesco Capotorti in 1978 with regard to Article 27 of the ICCPR and elaborated by Article 57 of the same treaty. According to this definition, "minority" refers to

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

According to Pentassuglia, this definition reflects the core principles of the term minority and specifies that, although belonging to this group is a matter of an individual's choice to preserve her heritage, a subjective element must be substantiated by objective criteria relevant to a person's identity.

Part B of the book is entitled "Substantive entitlements available to minorities: general standards and special regimes." Specifically, this part deals with the second and third components of human rights norms, the duty-holder and the object. As such, the second part of the book commences with a discussion of standards in international law that are of relevance to minorities.

The first of these general standards is the international prohibition against genocide, as expounded by the *Convention on the Prevention and Punishment of the Crime of Genocide*.³ Although minorities are not the only beneficiaries of the Convention, the prohibition is an explicit reaffirmation of the protection of minority groups against extermination. Furthermore, although the Convention does not embrace the concept of cultural genocide, Pentassuglia notes that it shares many underlying elements with current international human rights instruments, such as the 1992 *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*.

The second standard in international human rights law affecting minorities is the principle of equality and non-discrimination promoted, *inter alia*, by instruments such as the *UN Charter*⁴, the *Universal Declaration of Human Rights*⁵, and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*⁶ [ECHR]. Although the author stresses that minorities are not the primary beneficiaries of equality and non-discrimination norms, the wording of the prohibited grounds of distinction, in spite of small variations from one instrument to another, repeatedly include references to race, national or ethnic origin, language, religion,

³ 31 December 1949, 78 U.N.T.S. 277.

⁴ June 26, 1945, 59 Stat. 1031, T.S. 993.

⁵ GA Res. 217 (III), UN GAOR, 3rd Sess., Supp. No. 13, Doc A/810 (1948) 71.

⁶ 4 November 1950, 213 U.N.T.S. 221 at 223.

social origin and other status. Essentially, according to Pentassuglia, they cover most areas of minority identity.

In addition, the second part of the book deals with the set of universal entitlements that aim to protect culturally distinctive identities. The first of these entitlements is Article 27 of the ICCPR. Most importantly in this regard is Article 27's breadth, limitations and the obligations that it demands from a State. Referring to the historical background of this issue, a fear that the recognition of a collective right could trigger autonomist or secessionist claims, Pentassuglia asserts that rights expounded by Article 27 are for "persons belonging to" minorities, not minorities *qua* groups. That is, they are not group rights. In addition, although Article 27 does not contain a specific limitation clause, the author notes that limitations on minority rights may result from conflicts with other rights recognized in the ICCPR. For example, jurisprudence the Human Rights Committee has developed includes a "reasonable and objective" test that sets a limit on the permissibility of positive measures for the protection of minority identity.

Pentassuglia also asserts that, while it is clear under Article 27 that a State must abstain from interfering with minority rights, when read in the context of the non-discrimination (Article 2), equality (Article 26), freedom of thought, conscience and religion (Article 18) and freedom of opinion and expression (Article 19) provisions, Article 27 can be interpreted as requiring positive protective action by States.

With regards to regional frameworks and their protection of minorities, Pentassuglia first focuses on the Council of Europe. The author analyzes the case law and notes that, although some decisions of the European Commission of Human Rights and the European Court of Human Rights have protected minority rights under a broad interpretation of Article 8 and 14 of the ICCPR, the general trend has been to deny protection to minorities under the ECHR. Nevertheless, the author also describes recent efforts to elaborate on minority rights standards within the Council of Europe. This includes initiatives such as the proposal for a European Convention for the Protection of Minorities, adopted by the Venice Commission in 1991; the European Charter of Regional Minority Languages produced in 1992; and the Framework Convention for the Protection of National Minorities.

In contrast with the Council of Europe's framework, Pentassuglia explains how the Organization for Security and Co-operation in Europe has contributed to making the protection of minorities a part of multilateral dialogue and inter-state cooperation in Europe. As such, the author critically assesses the accomplishments of instruments such as the Helsinki Act (1975), the Madrid (1983) and Vienna (1986) Concluding Documents and the Copenhagen Concluding Document on the Human Dimension (1990).

Part B also places the issue of minorities within the larger issue of self-determination and evolving visions of sovereignty. The tension between these two concepts is rooted in the language of "equal rights and self-determinations of peoples" found in Articles 1 and 55 of the *UN Charter*. The author addresses the complex

question of whether minorities constitute “peoples” for self-determination purposes, and his response is two-fold. On the one hand, Pentassuglia notes the definition of “people” is traditionally designated to inhabitants of a particular territory, irrespective of their ethno-cultural traits. According to Pentassuglia, this theory has been recently affirmed by the Supreme Court of Canada in *Reference re Secession of Quebec*.⁷ On the other hand, Pentassuglia argues that the right to internal self-determination, concerning the relationship between a people and its State or government, has gained palpable ground in international law. This latter position finds strong support in the Vienna Declaration and Program of Action, adopted by consensus on 25 June 1993 by the UN member states within the World Conference on Human Rights. Consequently, the author critically assesses the contribution of this Declaration to the evolving dialogue between minorities and States.

Part B ends with an analysis of the role of special treaties in modern practice. The most important part of the analysis describes the approach taken during the Cold War and the post-Cold War era to multilateral and bilateral treaties. This discussion also raises the question of whether minority treaties actually are effective and what the advantages and disadvantages of bilateral agreements are. Like many of the other issues raised, answers to these questions are open to debate. With regards to the first question, the author states that “[a] study of each particular treaty would be necessary to determine whether it advanced the situation of the minority which enjoyed protection.”⁸ The author does, however, present arguments in favor of and against specialized treaties. Regarding the second question, the author contends that bilateral treaties “should not be considered definite and self-contained regimes, namely agreements meant to substitute for the protection of minorities within the wider international law framework.”⁹

Part C, the last part of the book, is entitled “Realizing protection: international supervision and domestic dimensions.” Composed of two chapters, Part C addresses the fourth and final component of human rights norms: implementation. The first chapter discusses the variety of relevant procedures and institutions available for the implementation of minority rights. In doing so, the author notes three elements of general supervisory techniques aimed at securing the implementation of standards contained in international legal instruments. These elements include the scarcity of judicial review, the importance of the availability of pertinent information and the importance of adoptable measures that are legally binding. The author ends with a discussion of possible ways to enhance compliance for members of bilateral and multilateral treaties.

The other chapter in Part C provides a connection between the objectives set out by international instruments and efforts to enhance the protection of minorities at the domestic level. This chapter briefly explores patterns of protection for minorities in the context of European countries. Pentassuglia discusses existing cases such as a

⁷ [1998] 2 S.C.R. 217.

⁸ Gaetano Pentassuglia, *Minorities in International Law: An Introductory Study* (Strasbourg: Council of Europe Publishing, 2002) at 184.

⁹ *Ibid.* at 193.

Swedish-speaking group in the Åland Islands in Finland, a German-speaking minority in Italy and systems of minority and group protection in Spain and Belgium. The chapter also addresses the unique multilateral arrangements that result from serious ethnic conflict, such as current arrangements in the former Yugoslavia and Northern Ireland.

Ultimately, Pentassuglia admits that “the specific architecture of international minority rights is still in the making.” However, *Minorities in International Law* provides a solid foundation upon which to build a stronger understanding of the rights of minorities at the international, regional and national levels.