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David Wippman*

INTRODUCTION

FEW issues in the history of the modern state have proved more vexing than the relationship between majorities and minorities. Even the definition of minorities is contested—so much so that most contemporary international legal instruments dealing with minority rights fail to include a definition of the rights holders.¹

Some theorists emphasize objective markers of identity, such as race, language, or religion, that distinguish members of minorities from other sub-state communities. Others focus on subjective characteristics, such as belief in common descent or possession of a shared culture.² Most theorists insist that minorities can only be defined by a combination of objective and subjective elements.³

For purposes of this essay, a precise definition is unimportant. It is necessary only to recognize that the defining characteristics of minorities, whatever they may be in a particular case, are sufficient "to set the group apart" from the rest of the society in the eyes of both the groups' members and outsiders.⁴ This perception of difference lends itself to political mobilization, whether on behalf of minorities or against them, and therein lies the central difficulty of minority-majority relations.⁵

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3. A widely-cited definition combining objective and subjective characteristics defines a minority as 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.
5. Cf. Inis L. Claude, Jr., National Minorities: An International Problem 1 (1955) ("Whenever a political society comprises a group of persons who exhibit characteristics which differentiate them from the bulk of the members of that society in any respect which is felt to be politically relevant, a minority problem arises.").
Throughout the history of the modern nation-state, governments have had a tendency to view minorities, especially politically self-conscious minorities, as a potential threat to the political unity or territorial integrity of the states in which they reside. When governing elites perceive such a threat, they tend to react in one of two ways. One response is to try to contain the perceived threat by eliminating or lessening the differences between majorities and minorities. This approach may entail policies of assimilation, coercive or induced, or more drastic measures, such as population exchanges, ethnic cleansing, and even genocide.\(^6\) A second response also seeks to contain the perceived threat posed by minority groups, but attempts to do so by protecting and promoting the rights of minorities. The theory is that if this is done, it may be possible to eliminate, or at least lessen, the incentives minorities might have to mobilize politically in ways that endanger the unity of the state.\(^7\)

Within each response category the list of policy options is long. Some policy options are clearly barred by the most basic notions of human rights. Even eliminating such options, however, leaves a broad range of possibilities. Most of these have been tried at one time or another, but the conditions under which specific policy options have been attempted vary so widely that a particular policy's success or failure in one context says little about its likely utility in another. The resultant difficulty in drawing historical lessons may help explain why international lawyers and decision-makers have long been deeply ambivalent about the content of international instruments designed to protect minority rights.

For the most part, international law's normative response to questions of minority-majority relations has tended to oscillate between an individual rights focus that implicitly favors assimilation of minorities into the larger society of their states, and a quasi-collective rights focus that stresses protection and promotion of minority identities. Accompanying this normative dichotomy are a host of enduring practical issues, such as the relative roles to be played by universal, regional, and local actors, and the appropriate balance between judicial and political responses to minority rights issues.

This essay briefly canvasses the different approaches to minority rights taken since World War I, and considers the means now available to implement existing and proposed legal protections for minorities. My conclusion from this review is that minority rights questions are so inherently context-sensitive that it is impractical (and counterproductive) to pursue detailed, judicially enforceable normative codes of universal applicability. Instead, it is better to press for broad acceptance of a limited set of general principles, some of which, like the non-

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\(^7\) See id.
discrimination norm, are already well established, and to use those principles as a guide for pursuing political resolutions of minority-majority disputes in societies polarized along those lines.

I. A Brief History of Minority Rights in the Modern Era

The history of minority rights in the twentieth century does not show a linear evolution towards a consensus position. To the contrary, the contemporary approach to minority rights more closely resembles post-World War I attitudes than post-World War II views in many—though by no means all—respects.

A. The League of Nations Approach

In the aftermath of World War I, the claims of national groups both large and small dominated the international legal agenda. Those claims, which ranged from demands for equal treatment with majority populations to independent statehood, varied in accordance with the historical, territorial, political, and ideological positions of the states and minorities concerned. In addressing the demands of both majorities and minorities in the states reconfigured as a result of the war, the post-war decisionmakers, led by Woodrow Wilson, largely accepted the prevailing logic of nationalism, the notion that the boundaries of the nation and the state should coincide. To a considerable but inconsistent extent, they embedded that logic within the principle of self-determination and applied it to the task of redrawing the map of Europe.

To a surprising degree, the framers of the Peace of Versailles succeeded in rearranging state boundaries in Eastern and Central Europe so that most members of self-conscious national groups found themselves within states dominated by their co-nationals. But the vagaries of history, geography, and politics made it impossible to give every nation a state of its own. As a result, some 20-30 million people found themselves continuing in, or newly cast in, the role of national minorities.

The states heading up the 1919 Paris Peace Conference feared that in many cases their newly drawn boundaries might perpetuate—or even accentuate—tensions between majorities and minorities, particularly in those states in which members of previously separate ethnic groups were joined together in a new or reconfigured state. In the view of the Conference participants, the stability of the new states, and therefore international peace, might be jeopardized either as a

8. See Packer, supra note 1, at 35-36.
9. See Claude, supra note 5, at 12 (“The principle of 'one nation, one state' was not realized to the full extent permitted by the ethnographic configuration of Europe, but it was approximated more closely than ever before.”).
10. See id. at 13; Edmund C. Mower, International Government 455 (1931).
result of discriminatory or arbitrary treatment of national minorities by majorities, or because of unreasonable demands made by national minorities who wished to shed their minority status.\textsuperscript{12}

To preserve international peace, and, to a lesser extent, to protect the legitimate interests of members of national minorities, the Peace Conference insisted that the defeated or newly reconfigured states accept a set of treaty obligations designed to protect the interests of minority group members and thus to minimize the significance of territorial boundaries for the individuals and groups concerned.\textsuperscript{13} The minorities treaties that resulted included protections designed to insure formal equality for all individuals through provisions mandating non-discrimination and equal treatment under the law, and protections designed to ensure factual equality for members of minority groups. This was to be accomplished through provisions mandating positive steps to enable minorities to maintain the cultural, linguistic, religious, and other differences that distinguished them from the rest of the state's population.\textsuperscript{14}

With some exceptions, the minorities treaties did not formally establish collective rights; instead, they offered protections to members of minorities as individuals.\textsuperscript{15} Nonetheless, special measures designed to enhance the ability of minorities to enjoy group-specific interests, including language, religion, and culture, had the practical effect of advancing the interests of minorities as collectivities. Moreover, "associations formed by minorities were on many occasions declared capable of exercising the right of petition."\textsuperscript{16} Thus, as a practical matter, the League of Nations' protection regime superimposed some elements of collective rights on a formally individual rights approach to moderating majority-minority tensions.

This innovative system for the protection of minorities was guaranteed by the League of Nations through treaty arrangements with the affected states that combined political oversight by the League Council with rights to refer certain issues to adjudication by the Permanent Court of International Justice.\textsuperscript{17} In addition, the League Council sup-

\textsuperscript{12} See id.; see also Capotorti, supra note 3, para. 92 ("[A]rbitrary treatment of minorities on the part of the states with whose populations they had been joined would have endangered world peace.").

\textsuperscript{13} Claude, supra note 5, at 14-15.

\textsuperscript{14} See, e.g., Advisory Opinion, Minority Schools in Albania, 1935 P.C.I.J. (ser. A/B) No. 62, at 17 (April 6) (stating that one goal of the treaty at issue was to "ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions, their national characteristics," including race, language, and religion); Capotorti, supra note 3, para. 100 ("[P]rovision was made for special measures deriving from the idea of safeguarding the values peculiar to each minority group, namely, language, religion and culture.").

\textsuperscript{15} Capotorti, supra note 3, para. 101.

\textsuperscript{16} Id.

\textsuperscript{17} Id. para. 104. In addition to the international guarantees offered by the League, affected states agreed that treaty provisions pertaining to minorities "shall be
implemented the treaty mechanisms with a right of petition, which enabled minorities as well as Council members to advise the League of Nations of any “infraction or danger of infraction” of rights protected by treaty. The League also established Minorities Committees to examine petitions; in many cases these Committees negotiated with the governments concerned on behalf of the affected minorities.

Despite some successes, this system suffered from a number of serious flaws. Two stand out. First, the League system by design applied only a carefully circumscribed set of rights to a small number of states. The League quite deliberately did not “establish ‘a general jurisprudence applicable wherever racial, linguistic or religious minorities existed’.” Instead, it relied on country-specific treaties and declarations designed to “facilitate the solution of minority problems in countries where ‘owing to special circumstances, these problems might present particular difficulties.’” Countries singled out by the great powers for the special restrictions of the League system bitterly resented what they viewed as a violation of sovereign equality and an affront to their status as independent, sovereign states.

A second problem with the League’s system was that the terms of the minorities treaties satisfied no one. Many of the affected minorities viewed the protections as inadequate, and resented the fact that they lacked legal standing as corporate entities to challenge infractions directly before the League Council. The minority states feared

recognized as fundamental laws, and that no law, regulation or official action shall conflict or interfere with these stipulations, nor shall any law, regulation or official action prevail over them.” Id. para. 103 (quoting Protection of Linguistic, Racial or Religious Minorities by the League of Nations: Provisions Contained in the Various International Instruments at Present Force, Series of League of Nations Publications, I.B. Minorities, 1927 I.B.2 (C.L.110. 1927.1, annex) 42).


19. Id. para. 122.

20. The limited geographic scope of the minorities treaties stems directly from the fact that “it was not humanitarian principle, but political necessity in certain regions, that was the basis and the origin of the League minority protection system.” Capotorti, supra note 3, para. 131 (quoting T. H. Bagley, General Principles and Problems in the Protection of Minorities 68 (1950)).


22. Id.

23. Id. at 30-35. The affected states demanded that the minorities treaty system be made generally applicable to all states, knowing that no such demand would be accepted, and hoping it might hasten the termination of the restrictions applying to them. Id.

24. Although minorities did have a right of petition, they could only present information to the League Council. They did not have standing to appear before the Council to argue their case. Id. at 41. Moreover, any state accused of an infraction
that the protections offered to minorities would "impede[] the process of natural assimilation," sharpen internal political and social divisions, create states within the state, and foster irredentism.\textsuperscript{25} As a result, the minority states and many minorities did not seek to implement the treaties in good faith.\textsuperscript{26} To the contrary, minority states worked relentlessly to obstruct and undermine the treaties.\textsuperscript{27} Some (though not all) minorities abused the protections offered to them, and even established fifth columns within the state in the period leading up to World War II.\textsuperscript{28}

As a result of these and other problems, the minorities treaty system never functioned as its drafters hoped. While the system did shield many minority group members from some measure of oppression, it is generally deemed a failed experiment.\textsuperscript{29} Eventually, the system collapsed, along with the League of Nations itself.

B. The Post-War Approach

In the aftermath of World War II, despite the League's recent failure, there were numerous proposals for reviving some version of its minorities protection system.\textsuperscript{30} These proposals varied widely, but generally shared the pre-war focus on the need to preserve internal stability, and, therefore, international peace, by promoting equality in fact as well as equality in law between minority and majority populations.

For the most part, however, the framers of the United Nations Charter and the principal post-war international human rights instruments chose to pursue a different approach to the problem of national minorities. Accordingly, instead of adopting a set of special protections for minorities applicable only to specifically designated countries, they devised a general system of protection resting on respect for universally applicable individual rights. Supporters of this approach argued that a broad system of individual rights, including rights to freedom of association, speech, and religion, would by itself could effectively veto any substantive Council decision on a minorities question. Capotorti, supra note 3, para. 115.

\textsuperscript{25} Claude, supra note 5, at 32-33.

\textsuperscript{26} Id. at 39-40.

\textsuperscript{27} See, e.g., Richard B. Bilder, Can Minorities Treaties Work?, 20 Isr. Y.B. Hum. Rts. 71, 77-78 (1991) (stating that minority states "succeeded in evading, eroding or eventually nullifying most of their obligations").

\textsuperscript{28} Id.

\textsuperscript{29} See Claude, supra note 5, at 29-30. At the same time, the failure of the League's minority treaties system must be viewed in the larger context of the failure of the League itself, and of "the general international conditions of its time." Capotorti, supra note 5, para. 134 (quoting T. H. Bagley, General Principles and Problems in the Protection of Minorities 126 (1950)).

\textsuperscript{30} See Claude, supra note 5, at 55-69.
protect the legitimate interests of members of national minorities, if supported by a strong prohibition against discrimination based on race, ethnicity, language or religion. In addition, they hoped that an approach applicable to all individuals and all countries would avoid the internally divisive effects of conferring special rights on minority group members, and of singling out particular countries on which to impose obligations concerning the conduct of their domestic affairs not generally demanded of all states. These anticipated advantages were buttressed by a philosophical conviction that minority rights, especially collective minority rights, run counter to the tenets of liberal individualism. Further, the drafters of the post-war human rights framework were influenced by the fact that some of the national minorities protected by the League system actively sought to destabilize the states in which they resided, and in some cases provided a pretext for external aggression (most notably by German armies claiming a right to protect their co-nationals).

For all these reasons, the post-war legal framework pays relatively little attention to minority rights as such. The United Nations Charter, although it demands respect for human rights generally, and for the principle of non-discrimination specifically, makes no mention of minority rights. Similarly, minority rights are wholly absent from the Universal Declaration of Human Rights. The General Assembly (and members of the Assembly's Third Committee) did discuss the possibility of including a limited, individual-oriented minority rights article in the Universal Declaration, but the Assembly ultimately rejected the idea. As Patrick Thornberry has observed, "to a majority of States, individualistic human rights without any special concession to particular groups in society seemed a sensible, modern, and democratic programme, altogether worthy of support."

This post-war shift to an individual rights philosophy was not complete. A number of multilateral post-war instruments reflect a concern for minorities. When minorities are mentioned in such

31. See Sohn, supra note 2, at 271; see also Claude, supra note 5, at 73-74 (detailing expressions of the official leaders of the United Nations that emphasized the concept of individualism, and avoided mention of the concept of minority rights).
32. See Sohn, supra note 2, at 272.
35. See Capotorti, supra note 3, para. 138; Sohn, supra note 2, at 272.
36. According to a contemporary Assembly resolution, it was too "difficult to adopt a uniform solution of this complex and delicate question, which has special aspects in each State in which it arises." International Bill of Human Rights, G.A. Res. 217 C (III), U.N. GAOR, 3d Sess., pt. 1, 183d plen. mtg. at 141 (1948).
37. Thornberry, supra note 33, at 137.
38. See Capotorti, supra note 3, paras. 142-48.
instruments, however, the individual rights focus tends to predominate. For example, in the most important of the post-war human rights treaties, the International Covenant on Civil and Political Rights, only article 27 is devoted specifically to the protection of minorities, and the language used emphasizes that the rather tepid protections offered should be understood as predominantly individual rather than collective rights.\(^{39}\) Other important post-war treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination,\(^{40}\) although acknowledging that minorities may need "special and concrete measures" to enable them to enjoy equal rights with majorities, similarly aim at eliminating barriers to equality among individuals rather than at promoting equality among groups.\(^{41}\)

### C. The Contemporary Approach

In contrast to the post-war approach, the last few years have witnessed a partial but still dramatic shift in international attitudes towards the protection of minorities. Although the shift has some immediate antecedents in the multiculturalism debates of the 1980s, the principal driving force has been the breakup of the former Yugoslavia and the former Soviet Union coupled with a general perception that the 1990s have witnessed a resurgence of ethnic conflict in countries around the world.\(^{42}\) In particular, the prospect for replicating in states of the former Soviet Union the same kind of interethnic violence experienced in the former Yugoslavia prompted international decision-makers to reconsider the prevailing orthodoxy regarding minority rights.\(^{43}\)

In the last five or six years, this process of reconsideration has generated a surprising number of declarations, resolutions, expert reports, 39. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 179, 6 I.L.M. 368, 375-76 (1967). Article 27 provides: “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.” Id. The phrase “persons belonging to such minorities” emphasizes that article 27 confers rights on individuals. See Sohn, supra note 2, at 274. The phrase “in community with the other members of that group” acknowledges that the rights are meaningful only if exercised collectively, and indicates that the aim of article 27 is to enable individuals to preserve their communal identity. Id. at 275. In this sense, article 27 constitutes a “hybrid between individual and collective rights,” Thornberry, supra note 33, at 173, but the rights holders nonetheless remain individuals rather than groups.


43. See Klebes, supra note 42, at 92.
and even treaties designed to strengthen the international legal protection of minorities.\textsuperscript{44} The Organization for Security and Cooperation in Europe (OSCE) and the Council of Europe have taken the lead in this process of reconsideration, but the same trend is evident at the global level, in particular in the United Nation's 1993 Declaration on minority rights. From a review of the various legal instruments generated in the last few years, which together dwarf the minority rights provisions generated in the preceding 45 years, some elements of consensus can be discerned.

First, assimilation as a legitimate state policy has been explicitly rejected. Coercive measures of assimilation have, of course, long been ruled out. Article 27 of the Covenant on Civil and Political Rights, for example, makes clear that minorities have the right to maintain their own language, religion and culture; indeed, article 27 can even be interpreted to place upon states a positive obligation to assist minorities in that regard.\textsuperscript{45}

Nonetheless, assimilation has long been the background norm in many countries.\textsuperscript{46} Assimilation is arguably implicit in the interna-


\textsuperscript{45} Although article 27 does not on its face require positive state action, a number of commentators argue that it would add nothing to other articles of the Covenant if it is interpreted simply as a right to be free from discrimination with reference to culture, language, and religion. See, e.g., Capotorti, supra note 3, para. 238 (stating that the protection of minorities, as opposed to the mere prevention of discrimination, requires positive action that includes concrete services rendered to minority groups); Thornberry, supra note 33, at 180-81 (agreeing with Capotorti that "from the standpoint of the principle of effectiveness, the logic of the Covenant structure, and the nature of the rights themselves," article 27 "constitutes a positive and not a negative obligation for States Parties").

\textsuperscript{46} One of the principal objections to inclusion of a minority rights provision in the Universal Declaration of Human Rights was that it might impede assimilation. See Thornberry, supra note 33, at 136; Sohn, supra note 2, at 272. Twenty years later, when article 27 was drafted, states generally acknowledged the invalidity of coercive assimilation, but induced assimilation was still the policy in many states. See Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights 14 (1995); see also id. (noting a shift in the 1970s in Canada, Australia, and the United States from an "assimilationist model" to "a more tolerant and pluralistic policy"). In keeping with this policy, the Sub-Commission on the Prevention of Discrimination and
tional legal system's post-war focus on individual rights, and its general avoidance of positive obligations to assist minorities in maintaining their cultural and political identities.  

In the absence of state support, minorities may lack the economic and political resources necessary to preserve their separate identities, particularly when full enjoyment of economic and political opportunities in the larger society may be tacitly conditioned on some measure of assimilation into the majority culture.  

The more recent minorities instruments, although recognizing the possibility that a state may pursue legitimate, voluntary measures in support of a general integration policy, explicitly ban policies or practices aimed at involuntary assimilation, and couple that ban with affirmative measures designed to enable minorities to resist more subtle assimilationist pressures. The European Framework Convention for the Protection of National Minorities, for example, provides that “the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will,” and specifies in some detail the measures parties must take “to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity.”  

The second element of consensus that has emerged is the converse of the anti-assimilation philosophy: pluralism has been affirmatively embraced. The language of recent instruments characterizes minorities as a source of enrichment rather than division for states that operate as pluralist democracies.  

More importantly, these instruments, Protection of Minorities noted in 1954 that “[i]t is most undesirable to hinder by any actions [the] spontaneous development of minority groups towards integration with the rest of the population of the country in which they live” and that “nothing should be done that is likely to stimulate their consciousness of difference from the rest of the population.” Sohn, supra note 2, at 278 (quoting report of the Sub-Commission).  

47. As Milton Esman has observed, “[t]he practical consequence of assigning legal and moral precedence to individuals is to encourage individuals of all ethnic origins to acculturate and eventually to join the dominant mainstream. Though assimilation is not imposed, it is facilitated, for the rewards in psychological security and material opportunity provide strong incentives.” Esman, supra note 6, at 251; see also id. at 253 (noting that the post-war conception of “human rights in individual terms” tends “to promote assimilation”).  

48. As Capotorti has noted, “[a]t 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.” Capotorti, supra note 3, para. 213. The same problem exists with respect to preservation of many minority languages and even religions. Id. para. 217.  

49. Framework Convention, supra note 44, art. 5.  

50. See, e.g., Framework Convention, supra note 44, preamble (noting that “cultural diversity” can be “a source and a factor, not of division, but of enrichment for each society”); European Charter, supra note 44, preamble (stating that “the protection of the historical regional or minority languages of Europe . . . contributes to the
hearkening back to the rationale for the League of Nations minorities treaties, reflect the view that the “promotion and protection” of the rights of minorities will “contribute to the political and social stability of States in which they live,” and that the failure to protect the culture and identity of minorities will contribute to inter-ethnic tensions and ultimately jeopardize international peace.51

Third, as a corollary of the two preceding propositions, the new minorities instruments all provide for positive measures to supplement the well-established norm of non-discrimination. Such measures include obligations on states not simply to protect but also to promote the ethnic, cultural, linguistic, and religious identities of national minorities.52 As with the League of Nations treaties, the language creating these positive state obligations is couched primarily in terms of individual rights.53 Nonetheless, some provisions expressly refer to the rights of minority groups as such,54 and application of many measures suggested in these various instruments can only be meaningfully fulfilled through measures that implicitly recognize the collective or group nature of minority interests.

Fourth, and perhaps most important, the new minorities instruments reflect a nascent willingness to move beyond recognition of cultural and linguistic rights, and to insist that only enhanced rights of political participation for minorities can adequately protect their interests and avoid the occasional slide from discrimination to inter-ethnic hostility to organized violence. All of the recent minority rights

51. U.N. Declaration on National Minorities, supra note 44, annex; see also Framework Convention, supra note 44, preamble (“[T]he protection of national minorities is essential to stability, democratic security and peace in this continent.”); Copenhagen Document, supra note 44, para. 30 (“[R]espect for the rights of persons belonging to national minorities ... is an essential factor for peace, justice, stability and democracy ...”).

52. See, e.g., Framework Convention, supra note 44, arts. 4(2), 5(1), 6, 10-12, 14-16 (requiring that states take measures to ensure that minorities are able to develop and preserve the unique aspects of their cultures); U.N. Declaration on National Minorities, supra note 44, arts. 4-6 (same); Copenhagen Document, supra note 44, paras. 31-36 (same).

53. In the United Nations Declaration on National Minorities, as in article 27 of the International Covenant on Civil and Political Rights, rights are attributed primarily to “persons belonging to minorities” rather than to minorities as such. See U.N. Declaration on National Minorities, supra note 44. The Framework Convention also relies heavily on the “persons belonging to minorities” formulation. See Framework Convention, supra note 44.

54. In its first article, the United Nations Declaration on National Minorities stipulates that states “shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities.” U.N. Declaration on National Minorities, supra note 44, art. 1. Although the specific measures which appear in subsequent articles rely on the language of individual rights, this first article indicates that the goal of such measures is the preservation of minorities as collective entities. See id.
declarations, treaties, and expert reports insist that persons belonging to minorities should be given the right to effective participation in public affairs.\textsuperscript{55} None of the instruments spell out what this means, but it seems clear that the drafters meant something beyond the traditional rule of "one person, one vote." Almost by definition, a one person, one vote rule is inadequate because it favors majorities, who may regularly outvote and, therefore, permanently marginalize minorities.

Recognition of this problem prompted many political scientists, such as Arend Lijphart, to conclude some years ago that in deeply divided societies, the only way to combine inter-ethnic harmony with democratic rule is to guarantee minorities a share of political power through such devices as guaranteed seats and offices at the national level, and to offer territorial autonomy to geographically concentrated minorities.\textsuperscript{56} This approach to majority-minority relations, in a substantially diluted form, seems to underlie the concept of effective political participation as it appears in some, though not all, of the new minority instruments. Thus, for example, the report of the 1991 Conference on Security and Cooperation in Europe Meeting of Experts on National Minorities observes that some participating states have obtained "positive results . . . in an appropriate democratic manner by, \textit{inter alia}: . . . elected bodies and assemblies of national minority affairs; local and autonomous administration, as well as autonomy on a territorial basis" and by "self-administration by a national minority of aspects concerning its identity in situations where autonomy on a territorial basis does not apply."\textsuperscript{57} Similarly, the Council of Europe's Recommendation 1201 on an Additional Protocol on the Rights of Minorities to the European Convention on Human Rights proposes that "[i]n the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status

\textsuperscript{55} See, e.g., \textit{Framework Convention}, supra note 44, art. 15 ("The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them."); \textit{U.N. Declaration on National Minorities}, supra note 44, art. 2(2) (declaring that minorities shall "have the right to participate effectively in cultural, religious, social, economic and public life"); \textit{CSCE Meeting of Experts}, supra note 44, at 1696 (recognizing "the right of persons belonging to national minorities to effective participation in public affairs"); \textit{Copenhagen Document}, supra note 44, para. 35 ("The participating States will respect the right of persons belonging to national minorities to effective participation in public affairs . . . ."); \textit{European Commission for Democracy through Law: Proposal for a European Convention for the Protection of Minorities}, reprinted in 12 \textit{Hum. Rts L.J.} 270, art. 14 (1991) ("States shall favour the effective participation of minorities in public affairs . . . .").


\textsuperscript{57} \textit{CSCE Meeting of Experts}, supra note 44, at 1698.
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. . . . Other instruments, however, including the recent European Framework Convention on the Protection of National Minorities, contain no reference to territorial autonomy, leaving it largely to the individual states parties to determine the means by which they will give effect to the right of effective political participation.

In many respects, the common elements of the minority rights instruments of the last few years, as described above, recall aspects of the League of Nations’ approach to minority rights, updated uncomfortably and inadequately to fit into the post-war focus on universal, individual rights. As with the earlier minorities treaties, the impetus behind recent instruments has been a desire to preserve international peace by moderating internal tensions and by limiting the political significance of state boundaries for minorities, especially national minorities. As before, the new minority rights instruments are intended to insure factual as well as legal equality. Non-discrimination and individual rights are again deemed inadequate to protect legitimate minority interests, and therefore inadequate to avert majority-minority disputes and separatist sentiments. Once again, the rights at issue are framed as individual rights, but have clear collective rights overtones.

Unlike the minorities treaties, however, many of the new minority rights instruments are intended for general application, either globally (as is the case with the United Nations Declaration) or regionally (as

58. Recommendation 1201, supra note 44, art. 11. The legal status of Recommendation 1201 is murky. Although the draft Additional Protocol contained in the recommendation stands no chance of adoption, Klebes, supra note 42, at 97, states requesting accession to the Council of Europe are still supposed to respect the rights contained in the Additional Protocol, id. & n.25. Moreover, the Parliamentary Assembly re-affirmed the validity of Recommendation 1201 in Order 508 adopted on April 26, 1995. Id. at n.25.

59. See Klebes, supra note 41, at 96 (“[T]he Framework Convention has not incorporated the idea of Article 11 of the Assembly's draft to grant persons belonging to a national minority, in the regions where they are in a majority, ‘the right to have at their disposal appropriate local or autonomous authorities or to have a special status . . . .’” (emphasis in original) (quoting Framework Convention, supra note 44, art. 11)).

60. See Manas, supra note 42, at 133 (noting that the Council of Europe's work on minority rights reflects a search for the model of majority-minority relations that “is most likely to be peaceful”); supra notes 11-16 and accompanying text.

61. See, e.g., Framework Convention, supra note 44, art. 4(2) (requiring “adequate measures in order to promote . . . full and effective equality between persons belonging to a national minority and those belonging to the majority”); Copenhagen Document, supra note 44, para. 31 (providing for “special measures” beyond simple non-discrimination); Giorgio Malinverni, The Draft Convention for the Protection of Minorities: The Proposal of the European Commission for Democracy Through Law, 12 Hum. Rts. L.J. 265, 267 (1991) (noting that the basis for inclusion of “special measures” in favor of minorities in the draft European Convention prepared by the European Commission for Democracy Through Law was the conclusion that “the principle of non-discrimination does not . . . always suffice to protect those groups which find themselves in a specific situation against a policy based on the principle of uniformity”).

62. See Klebes, supra note 42, at 94-95.
is the case with most CSCE and Council of Europe instruments). This intended general application is consistent with the post-war philosophy of universal human rights, and seemingly avoids one of the principal objections to the League of Nations system.

In practice, however, the intended general application of the new minority rights instruments has had the effect of sharply limiting their reach, both substantively and geographically. Minority rights remain deeply controversial, despite the apparent consensus on certain basic issues described above. Many states, though generally supportive of the concept of minority rights, disagree strongly on the form they should take, and believe that the situation of minorities in their own territories deserves an individualized treatment that cannot be adequately captured in a universally applicable instrument, except in terms of vague and malleable general principles. Others accept the new minority rights, but define minorities in a way that drastically limits the applicability of those rights. Still other states believe that minority rights may be useful “to stabilise the situation in the eastern part of Europe,” but that such rights should be avoided “in Europe’s western part, where States remain essentially stable” and where minority rights might promote rather than avert disintegration.

63. Controversy over the new minority rights came to a head at the 1992 Vienna Summit of Heads of State and Government, in which many argued that minority rights institutionalized ethnic and similar differences, and thus impeded efforts to strengthen national unity along other lines. See Manas, supra note 42, at 129-30. As a result, the Vienna Summit instructed the Committee of Ministers to proceed with a draft protocol to the European Convention limited to “the cultural field” rather than to proceed with a broad-ranging protocol of the sort envisioned by the European Parliamentary Assembly. Id. at 130-31. Nonetheless, the Council of Europe and the European Parliamentary Assembly continue to work on expanding the range of minority rights.

64. The view of these states is explicitly reflected in cautionary language contained in the CSCE Meeting of Experts, supra note 44, at 1694 (stating that the participating states are “[a]ware of the diversity of situations and constitutional systems in their countries, and therefore recogniz[e] that various approaches to the implementation of CSCE commitments regarding national minorities are appropriate”).

65. Germany, for example, has ratified the Framework Convention, but with a declaration that limits its application to five small, regionally concentrated minority groups, consisting of German citizens who are Danes, Sorbs, Frisians, Sinti, or Roma. In general, Germany does not consider non-citizen immigrant groups, such as the Turkish population in Germany, to constitute minorities. See Fourteenth Periodic Report of Germany to the Committee on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/299/Add.5, paras. 8-10 (1996).

66. Klebes, supra note 42, at 92 (describing attitudes of European states towards minority rights). The view that minority rights are appropriate for the violent and chaotic east but unsuitable for the civilized and stable west was commonly expressed in connection with the League of Nation’s minority treaties. See generally Nathaniel Berman, The International Law of Nationalism: Group Identity and Legal History, in International Law and Ethnic Conflict (D. Wippman ed., forthcoming 1998) (manuscript on file with author) (emphasizing the cultural dimension in discussing formalist and pragmatist theories as applied to international minority rights).
The result is that the more generally applicable a minority rights instrument is intended to be, and the stronger the wording of its protections for minorities, the less it is likely to contain by way of specifically enforceable obligations. The universally applicable United Nations Declaration is legally non-binding, as is the OSCE's path-breaking Copenhagen Document. The European Framework Convention and the European Charter on Regional and Minority Languages are both legally binding, but contain only watered-down versions of the new minority rights, and give broad discretion to the states parties over the means by which those rights are given effect. Ironically, the most specific and obligatory minority rights protections do not appear in minority rights instruments of general application; instead, they are included in bilateral treaties or in internationally brokered peace agreements such as the Dayton Accord, which—like the League minorities treaties—were effectively imposed on states deemed to have minority problems serious enough to jeopardize international peace, and to require international intervention and supervision. In essence, agreement on general minority rights instruments could be achieved only by papering over key issues of scope, universality, and enforcement—the same issues underlying debates on minority rights for much of the past 100 years.

The problem can be seen most clearly in the drafting history of the European Framework Convention. The Convention was designed in substantial part to transform the broad political commitments adopted by the CSCE into legal obligations. In the process of preparing the Convention's text, the drafters considered a variety of proposals, including proposals prepared by the European Commission for Democracy Through Law (the Venice Commission) and the European Parliamentary Assembly. But the Convention as adopted is noticeably tamer in its formulation of minority rights than the proposals upon which it was substantially based. Noting the diversity of "situations and problems to be resolved" when facing minorities questions, the Convention's drafters deliberately opted "for a framework Convention which contains mostly programme-type provisions setting out objectives which the Parties undertake to pursue," rather than specifically defined rights directly applicable within states' national legal systems.

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69. Id. at 101.
70. Id. para. 11, at 102; see also Geoff Gilbert, The Council of Europe and Minority Rights, 18 Hum. Rts. Q. 160, 174 (1996) ("[E]verything is at the discretion of the state with regard to its own particular circumstances and nothing is directly applicable.").
consciously eschewed the language of collective rights,\textsuperscript{71} and deliberately excluded any provision dealing explicitly with territorial autonomy for minorities.\textsuperscript{72} Further, the drafters added a series of restrictive clauses to articles drawn from other texts, limiting the scope of many rights through language such as "as far as possible" or "within the framework of their legal systems."\textsuperscript{73} The resulting Convention is, in the words of the Parliamentary Assembly's rapporteur, "weakly worded," with "vaguely defined objectives and principles, the observation of which will be an obligation of Contracting States but not a right which individuals may invoke."\textsuperscript{74} As discussed below, these problems with the formulation of minority rights are compounded by difficulties associated with the available enforcement mechanisms.

\section*{II. MEANS FOR AND OBSTACLES TO THE IMPLEMENTATION OF MINORITY RIGHTS}

Given the scattershot nature of the minority rights system currently in place, efforts at implementation take many different forms and encounter many different obstacles. This section looks at some of the approaches currently in use or under contemplation.

\subsection*{A. Multilateral Treaty Procedures}

For reasons noted above, the recent flurry of activity in the area of norm elaboration has not resulted in many legally binding international treaties. In fact, the only general multilateral treaty focused on minority rights that has yet emerged is the European Framework Convention on the Protection of National Minorities.\textsuperscript{75}

Unfortunately the Framework Convention's implementation mechanisms are weak even by the standards of international human rights

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\textsuperscript{71} Article 1 of the Convention distinguishes between the protection of national minorities and individuals belonging to such minorities. "This distinction and the difference in wording make it clear that no collective rights of national minorities are envisaged . . ." \textit{Explanatory Memorandum, supra} note 68, para. 31, at 103; \textit{see also} Gilbert, \textit{supra} note 70, at 175 ("[T]he drafters went out of their way to make it clear that they had no intention of creating collective rights.").

\textsuperscript{72} \textit{See} Gilbert, \textit{supra} note 70, at 186 (contrasting the Framework Convention's "somewhat timid" approach to autonomy with the express reference to it in the Copenhagen Document); Klebes, \textit{supra} note 42, at 96 (noting that "[t]he sensitivity with regard to autonomy in whatever form is still very strong in quite a number of Member States of the Council of Europe").

\textsuperscript{73} Klebes, \textit{supra} note 42, at 94 (noting that such clauses "weaken[ ] the text considerably," and providing examples).


}
HUMAN RIGHTS IMPLEMENTATION

The Framework Convention provides only that parties to the Convention shall submit periodic reports, to be monitored by the Committee of Ministers of the Council of Europe with the assistance of a committee of experts. The Convention contains no interstate complaint procedure, and no right of petition for individuals or minorities as groups. Instead, the Convention appears to assume, as indicated in the preamble, that implementation shall occur primarily "through national legislation and appropriate governmental policies." Indeed, the drafters of the Convention, concerned with the multiplicity of situations giving rise to minority rights problems, intentionally left states with a broad margin of discretion in determining the means to be used to fulfill their obligations under the Convention. In keeping with this approach, the Convention's provisions are not directly applicable in state parties' national law. Similarly, the rights in the Framework Convention are separate from the European Convention system, and therefore cannot be directly the subject of adjudication by the European Commission or the European Court of Human Rights.

By contrast, the Parliamentary Assembly of the Council of Europe, in Recommendation 1201, proposed a comprehensive draft protocol on minority rights to be added to the European Convention on Human Rights. The draft protocol, if adopted, would have included affirmative minority rights protections among the rights subject to adjudication by the European Commission and European Court of Human Rights. The Parliamentary Assembly recognized that an effective and mandatory system of judicial enforcement might render

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76. In the words of the European Parliamentary Assembly's rapporteur, the Convention's "implementation machinery is feeble and there is a danger that, in fact, the monitoring procedures may be left entirely to the governments." Recommendation 1235, supra note 74, para. 7; see also Gilbert, supra note 70, at 189 (describing the Framework Convention's approach to enforcement as "the worst of all worlds"); Kiebes, supra note 42, at 94 (suggesting that the Parliamentary Assembly's criticism of the Convention's enforcement machinery as "feeble" is an "understatement").

77. Framework Convention, supra note 44, arts. 24-26.

78. Gilbert, supra note 70, at 174.


80. Id. para. 11 (noting that the parties are left with "a measure of discretion in the implementation of the objectives which they have undertaken to achieve, thus enabling them to take particular circumstances into account").

81. Id. para. 29; see also Gilbert, supra note 70, at 179. Instead, the operative provisions use language such as "the Parties undertake to adopt" or "the Parties undertake to promote" certain rights, indicating that judicial enforcement can only follow adoption of appropriate national legislation. See, e.g., Framework Convention, supra note 44, arts. 4(2), 12(3).

82. Gilbert, supra note 70, at 175.


84. See Kiebes, supra note 83, at 143.
the protocol unacceptable to some states, but hoped that "the topical nature and the urgency of minority problems, and pressure of public opinion, would convince all in due course of the need for a truly binding legal instrument." 85

Many participants in the Vienna Summit of the Heads of State and Government, however, were not prepared to accept either the far-reaching terms of the protocol or judicial enforcement of minority rights beyond the limited protections already available under the European Convention. 86 Accordingly, the Vienna Declaration produced at the summit did not pursue the Parliamentary Assembly's proposal for an additional protocol to the European Convention on Human Rights designed to protect minority rights generally. In contrast, the Declaration calls for a "framework convention specifying the principles which contracting States commit themselves to respect," and a "protocol complementing the European Convention on Human Rights in the cultural field . . . ." 87 The proposed cultural protocol has not been completed because of "insufficient political will," 88 and, as noted above, the Framework Convention lacks any judicial enforcement machinery.

The European Charter for Regional and Minority Languages has experienced many of the same difficulties as the Framework Convention. Despite its narrower focus and earlier date of drafting, the Charter has attracted even fewer ratifications than the Framework Convention. 89 Moreover, the Charter has not yet come into force. 90

The Charter attempts to specify measures signatory states should consider to protect the "historical regional or minority languages of Europe." 91 Like the Framework Convention, the Charter gives States broad discretion over the steps they actually take to carry out the treaty's goals. Unlike the Framework Convention, however, the Charter adopts an innovative and somewhat bizarre menu-of-options approach to implementation. With respect to each of the minority languages covered—itself a matter of apparently considerable state discretion—signatories are required to apply a minimum number of paragraphs or subparagraphs chosen from among the operative arti-

85. Id. at 141.
86. See Manas, supra note 42, at 129-31.
90. Five states must ratify the Charter for it to come into force. European Charter, supra note 44, art. 19.
91. Id. preamble.
In turn, each operative article contains a spectrum of protections pertaining to a particular area of language use, ranging from education to public services to economic and social life. The spectrum runs from strong language rights in a particular area, such as a right to education in the relevant minority language, to weak protections in the same area, such as a provision for teaching the relevant language as part of the school curriculum “at least to those pupils whose families so request and whose number is considered sufficient.”

States are free to skip some proposed Charter protections altogether. Thus, each State party ends up with its own customized set of language rights.

Despite this flexibility, as well as the relatively mild formulation of language rights as they appear in the weaker options, the Charter’s implementation mechanisms are comparable to those of the Framework Convention. Parties are required to submit periodic reports for review by an Expert Committee. The Committee may consider information submitted by minority associations legally established in the territory of the party under consideration. The Committee then prepares a report with proposals for action, which it gives to the Committee of Ministers, who in turn may make “such recommendations . . . to one or more of the Parties as may be required.” Nevertheless, despite the Charter’s sliding-scale approach to language rights, and its modest implementation procedures, only four states have ratified it to date.

Formal implementation mechanisms within the OSCE are also rudimentary. In general, OSCE commitments—such as the extensive provisions governing treatment of minorities found in the 1990 Copenhagen Document and various other OSCE instruments—are politically, but not legally, binding. Accordingly, judicial enforcement mechanisms are almost by definition unavailable. The OSCE

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92. Id. art. 2(2) (“[E]ach Party undertakes to apply a minimum of thirty-five paragraphs or sub-paragraphs chosen from among the provisions of Part III of the Charter, including at least three chosen from each of the Articles 8 and 12 and one from each of the Articles 9, 10, 11 and 13.”).
93. Id. art. 8(1)(b)(iv).
94. Id. arts. 15-17.
95. Id. art. 16(2).
96. Id. art. 16(4).
97. See supra notes 89-90.
98. See Jane Wright, The OSCE and the Protection of Minority Rights, 18 Hum. Rts. Q. 190, 192 (1996) (“[T]he accepted view is that [OSCE documents] are not treaties and, therefore, are not legally binding on the OSCE participating states.” (footnote omitted)). Too much should not be made of this point, however, since OSCE commitments are politically binding. See Janusz Symonides, The Legal Nature of Commitments Related to the Question of Minorities, 3 Int’l J. on Group Rts. 301, 312 (1996) (OSCE—which is referred to in this article by its former name, “CSCE”—standard-setting instruments are “political decisions adopted by consensus,” but are nonetheless “recognized by all participants as binding and as having legal consequences”).
has no individual complaint procedure, and no reporting requirements. Similarly, OSCE commitments do not apply directly in the national laws of participating States.\textsuperscript{99}

The OSCE does, however, have various means to generate public scrutiny of states that fail to respect their OSCE commitments. In 1989, the OSCE adopted a Human Dimension Mechanism, popularly known as the Vienna Mechanism, to monitor implementation of human rights principles.\textsuperscript{100} In brief, the Vienna Mechanism establishes a four-stage process that begins with an exchange of information between concerned governments over human rights issues in a particular State and may eventually entail examination by all of the participating States.\textsuperscript{101} The Vienna Mechanism was supplemented several years later by the Moscow Mechanism, which permits participating States to trigger the dispatch of expert missions to examine human rights problems in a particular country, to determine the relevant facts, and to propose solutions.\textsuperscript{102} Such missions can even be sent without the consent of the territorial state, provided at least five participating States support the request of a state that has participated in the earlier stages of the process.\textsuperscript{103}

The OSCE procedures effectively create an interstate monitoring process of the sort that has been "notoriously underused" in other settings.\textsuperscript{104} States may, for political reasons, refuse to initiate the available procedures, or accept explanations or outcomes unacceptable to the minorities involved or incompatible with OSCE standards.\textsuperscript{105} For the first few years of its existence, the Vienna Mechanism was used quite frequently, often by kin-states that wished to challenge particular practices in other countries. With the increasing integration of eastern and central European states into the larger European community, however, the use of these mechanisms has declined substantially.\textsuperscript{106}

In-country missions serve as another recently developed OSCE mechanism that operates in part to ensure respect for minority rights. These missions, known as "missions of long duration," are established for six-month renewable periods and operate with individual, situation-specific mandates.\textsuperscript{107} The missions are generally small, but active


\textsuperscript{100} Symonides, \textit{supra} note 98, at 313; Wright, \textit{supra} note 98, at 198-99.

\textsuperscript{101} Symonides, \textit{supra} note 98, at 313; Wright, \textit{supra} note 98, at 199.

\textsuperscript{102} Brett, \textit{supra} note 99, at 681.

\textsuperscript{103} Id.; Wright, \textit{supra} note 98, at 200.

\textsuperscript{104} Brett, \textit{supra} note 99, at 678.

\textsuperscript{105} Id. at 679.

\textsuperscript{106} Id. at 680.

\textsuperscript{107} Id. at 687-88.
and visible. Unfortunately, the missions "have no independent authority." Created by the OSCE's Permanent Council, they are "instruments of the political process" and "dependent upon the continuing consent of the government concerned." As a result, "the missions are forced to work cooperatively with the government and refrain from too much criticism of it, so as not to jeopardize their continued existence." Nonetheless, the missions generally appear to play a constructive, if limited, role in reducing tensions.

Perhaps the most promising feature of the OSCE implementation system is the five-year-old office of the High Commissioner on National Minorities. The High Commissioner is expressly the Commissioner on and not for national minorities; indeed, his mandate is the promotion of conflict prevention, technically a security rather than a human dimension function. Despite this apparent limitation, the High Commissioner has conducted numerous missions to many OSCE countries, collected information from all available sources, produced reports, and directly engaged governments on minority rights issues, often making specific recommendations on highly sensitive government policies and programs.

Although the High Commissioner on National Minorities is guided by the relevant instruments of the OSCE, and other pertinent minority rights instruments at the global and regional level, he has the freedom to foster dialogue between governments and national minorities, and to work with both to develop mutually acceptable solutions to pressing problems. While other OSCE initiatives can be "delayed or prevented" by the normal OSCE consensus decision-making processes, the High Commissioner fills the "perceived need for an independent, impartial actor with a power of initiative who could work quietly, behind the scenes, to address some of the underlying problems before they erupted into open conflict." By all accounts,

109. Id. at 57.
110. Id.
111. Id.
112. See Brett, supra note 99, at 689.
113. Chigas, supra note 108, at 52.
115. See Brett, supra note 99, at 692; Chigas, supra note 108, at 52-56.
116. See The Hague Recommendations Regarding the Education Rights of National Minorities and Explanatory Note (1966), reprinted in 4 Int'l J. on Minority & Group Rights 199, 199 (1996-97) [hereinafter Hague Recommendations] (stating that the High Commissioner "employs the international standards to which each State has agreed as his principal framework of analysis and the foundation of his specific recommendations").
the High Commissioner has had considerable success in this regard. Nevertheless, formal constraints on the High Commissioner's mandate, and more importantly, practical constraints involving the limited resources available to the High Commissioner (who works alone, assisted by a small staff), limit his effectiveness. Moreover, there is already some resistance to his work by governments that feel themselves unfairly singled out for attention.\textsuperscript{118}

B. Ad Hoc Implementation Mechanisms

In addition to the modest institutionalized implementation procedures just described, there are many other ad hoc means of implementation recently tried or currently in use. Such ad hoc means tend to be case specific, and their generalized value is therefore usually limited.

1. Bilateral Agreements

In a number of cases, kin-states sharing reciprocal minority problems and interests have entered into bilateral agreements pursuant to which each state agrees to protect its national minorities in return for the same protection being offered to ethnic kin in the other state.\textsuperscript{119} An interesting and innovative example is the 1995 treaty between Hungary and Slovakia.\textsuperscript{120} The treaty stipulates that various minority rights instruments, including the European Framework Convention, the Copenhagen Document, and the United Nations Declaration on the Rights of National Minorities, shall be applied as legally binding by both states. The treaty also sets out a number of other important principles pertaining to the two states' treatment of the national minorities within their territories. Equally remarkable, the two states entered into a special arrangement to provide for "biennial visits of experts to study the situation of the Slovak minority in Hungary and the Hungarian minority in Slovakia."\textsuperscript{121}

Partly on the basis of these special arrangements, the OSCE High Commissioner on National Minorities made a series of specific recommendations to the governments of the two states, and in particular to the Slovakian government, on issues such as decentralization in edu-


\textsuperscript{119} See Symonides, supra note 98, at 314-15.


\textsuperscript{121} Letter from Max van der Stoel, OSCE High Commissioner on National Minorities, to Juraj Schenk, Minister for Foreign Affairs of the Slovak Republic, REF/910/96/L (Aug. 13, 1996) (copy on file with author) [hereinafter van der Stoel Letter, August 1996].
cation, the language of instruction in schools, and the financing of cultural activities.\textsuperscript{122} The government of Slovakia has balked at fully implementing some of its treaty commitments, evidently fearing that minority demands will escalate, and that the grant of even limited autonomy “could be a direct instrument of the dissolution of” Slovakia.\textsuperscript{123} Nonetheless, these bilateral arrangements, coupled with the active involvement of the High Commissioner on National Minorities, have created an on-going dialogue among the interested parties that appears to hold considerable promise for furthering minority interests and simultaneously reducing the likelihood of conflict between Slovakia and Hungary.

The Hungarian-Slovak treaty and others like it fulfill the recommendation in article 18 of the European Framework Convention for the conclusion of bilateral treaties by neighboring states for the protection of persons belonging to national minorities. While such treaties may prove beneficial in particular cases, they also run the risk of encouraging kin-state involvement in the internal affairs of neighboring states. The minorities treaties following World War I were designed in part to avoid just such a bilateralization of minority protection issues because of fears based on past experience that kin-state involvement might easily escalate into intervention and international conflict.\textsuperscript{124} The subsequent entrenchment of norms against intervention, particularly in Europe, clearly lessens this risk, but does not eliminate it altogether. On the other hand, bilateral treaties permit states to extend and tailor international obligations relating to minorities beyond what can be achieved on a multi-lateral basis. On balance, such treaties seem worthwhile, although they are unlikely to be adopted with any frequency.

2. Internationally Brokered Peace Accords

With increasing frequency, international organizations and ad hoc coalitions of states attempt to broker comprehensive peace accords to resolve large-scale ethnic conflicts. The Dayton Accord represents the most dramatic recent example of this approach to ethnic strife,\textsuperscript{125} but similar efforts are underway in Cyprus, Nagorno-Karabakh, and elsewhere. The protection of minority interests is central to these efforts to achieve a negotiated resolution to internal conflicts, precisely because the conflicts are viewed as power struggles among competing ethnic groups.

\textsuperscript{122} See, e.g., id. (offering recommendations to the Slovakian government regarding educational and cultural activities); Letter from Max van der Stoel, OSCE High Commissioner on National Minorities, to Juraj Schenk, Minister for Foreign Affairs of the Slovak Republic, REF.414/961L (Apr. 23, 1996) (copy on file with author) (same).
\textsuperscript{123} van der Stoel Letter, August 1996, supra note 121 (citing an Aide Memoire by Juraj Schenk).
\textsuperscript{124} See Claude, supra note 5, at 30.
\textsuperscript{125} Dayton Accord, supra note 67.
On its face, the Dayton Accord protects minorities in two ways. First, it obligates the various parties to respect a long list of international human rights instruments, including traditional individual rights instruments, such as the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, and some of the more recent minority rights agreements, in particular, the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities. Second, and more importantly, the Dayton Accord attempts to balance power among the competing ethnic groups in Bosnia in a fashion very much in keeping with Arend Lijphart's theory of consociationalism mentioned above. Specifically, the Bosnian Constitution contained in an annex to the Dayton Accord mandates ethnic powersharing in the presidency and national assembly, grants Serbs, Croats and Muslims substantial territorial autonomy, gives each group the power to veto legislation inimical to its perceived interests, and makes ethnic balance the basic standard for voting and political participation. In this respect, the Dayton Accord goes well beyond anything required in any general minority rights instrument. As a result, Bosnian Serbs, though they represent only 33% of the state's population, are effectively self-governing at the local level and can block almost any action of the central government, even if it is favored by the other two-thirds of the state's population.

The advantage of the Dayton approach is that it addresses the problem of majoritarianism: minorities in Bosnia cannot simply be outvoted. The disadvantages, however, are substantial. Even if we assume that the Dayton Accord represents a good faith effort to establish a workable internal balance of power, rather than a disguised but peaceful transition to the partition of Bosnia, the essential precondition for a viable powersharing arrangement is lacking. Political elites on all sides lack sufficient incentives to cooperate, which makes political deadlock the likely outcome. Moreover, the distribution of state resources and political power on the basis of membership in a

126. See id. annexes 1-4 (reprinting the Constitution of Bosnia and Herzegovina).
127. See note 56 and accompanying text.
128. See Dayton Accord, supra note 67, annex 4 (reprinting the Constitution of Bosnia and Herzegovina arts. IV-V).
130. Dayton Accord, supra note 67, arts. IV-V; Yee, supra note 129, at 187-89.
132. See id.
133. Id. at 191 (stating that the Bosnian Constitution "affords each group the chance to bring down the whole nation, and if history is any guide, it is possible that one of them will").
particular ethnic group is inherently problematic from a human rights standpoint, even though it may be necessary in some countries.\textsuperscript{134}

In any event, the Dayton model is of inherently limited applicability. It was imposed through a combination of military force, political and economic sanctions, and inducements. Such measures will only be used, and can only be tolerated, in rare cases where a combination of humanitarian and geostrategic interests suffice to induce the extraordinary international intervention that produced the Dayton Accord. Less intrusive measures are not likely to yield similar results, as the United Nations has found in its long-running effort to establish a similar powersharing settlement in Cyprus.\textsuperscript{135}

3. International Criminal Tribunals

In exceptional cases, the prospect of criminal prosecution may serve as a modest deterrent to inter-ethnic violence. International war crimes tribunals have been established to prosecute genocide, war crimes, and crimes against humanity arising out of the conflicts in the former Yugoslavia and Rwanda. Although the tribunals are not per se designed to protect minority rights, their work may indirectly help foster a climate of tolerance for minorities by reaffirming the international community's revulsion at activities such as ethnic cleansing.\textsuperscript{136}

Unfortunately, the effectiveness of the Yugoslavia tribunal in this regard has been undercut by the tepid political and financial support provided by the United Nations, and by the reluctance of the international force sent to the former Yugoslavia as part of the Dayton Accord to pursue and arrest individuals indicted for war crimes.\textsuperscript{137} The reasons for the reluctance are obvious and understandable, but the message sent is that only in rare cases will individuals responsible for inter-ethnic violence be subject to international prosecution.

C. Institutional Incentives as Implementation Mechanisms

Potentially the most effective means for securing the protection of minorities is conditioning access to international organizations and institutions on effective domestic implementation of minority rights principles. Respect for human rights generally has long been a condi-

\textsuperscript{134} See generally David Wippman, Practical and Legal Constraints on Internal Powersharing, in International Law and Ethnic Conflict, supra note 66, manuscript at 442 (discussing circumstances in which "consociational solutions to ethnic conflict may conflict with human rights principles mandating equal rights of political participation for all and barring discrimination on the basis of race, religion, or ethnicity").


\textsuperscript{136} Cf. Theodor Meron, Answering for War Crimes, 76 For. Aff. 2, 3 (1997) (stating that establishing the Hague tribunal before the end of the war could have had a deterrent effect for the remainder of the conflict).

\textsuperscript{137} Id. at 3-5.
tion for admission to the Council of Europe, and now compliance with the minority rights provisions of the Parliamentary Assembly's Recommendation 1201 is also required.\textsuperscript{138} States that can reasonably hope to gain admission thus have strong incentives to ameliorate any minorities problems that might hinder acceptance by the European club, even though the Council sometimes bends its admission standards and accepts promises of compliance in lieu of actual compliance.\textsuperscript{139} In any event, once states do gain entrance, they become subject to the generally effective but individual-rights focused system of the European Convention on Human Rights.

Of course, only a handful of states have reasonable prospects of gaining admission to the Council of Europe. Conditioning participation in other state groupings, or in international financial institutions, on respect for minority rights may be useful, but is unlikely to achieve the same results as the entry ticket to the Council of Europe. No other state grouping has the same commitment to minority rights, and few, if any, confer positive benefits on their members equivalent to the benefits that come with the Council's stamp of approval. International financial institutions have benefits to confer, of course, and they increasingly take into account political and social considerations in addition to purely economic ones, but the former considerations are by no means central to their missions.\textsuperscript{140}

Perhaps the most dramatic recent instance of an effort to condition institutional acceptance on respect for minority rights was the recognition policy adopted by the European Community ("EC") during the dissolution of the former Yugoslavia. The EC proclaimed, among other criteria, that its members would not recognize newly emerging states that did not modify their national legislation to ensure respect for the rights of minorities.\textsuperscript{141} The EC went so far as to insist that candidates for recognition submit applications for consideration by an Arbitration Commission.\textsuperscript{142} In the end, the EC failed to follow its own guidelines, choosing to recognize Croatia despite the Arbitration Commission's determination that Croatia had not taken adequate steps to protect minorities, and failing to recognize Macedonia after it had taken the necessary steps.\textsuperscript{143} Thus, as often happens with recognition decisions, politics overwhelmed policy. Moreover, it is doubtful

\textsuperscript{138} Order No. 484 instructs the Committee on Legal Affairs and Human Rights "to make scrupulously sure when examining requests for accession to the Council of Europe that rights included in this Protocol are respected by the applicant countries." Klebes, supra note 83, at 142 (quoting Order No. 484).

\textsuperscript{139} See Chayes & Chayes, supra note 118, manuscript at 381-83.

\textsuperscript{140} Id. at 383-88.


\textsuperscript{142} Id. at 1486.

that events would have followed a materially different course even if the EC had stuck to its recognition guns. In any event, recognition is clearly not a tool that can be used with any frequency, unless—as some have proposed—powerful states are prepared to take the radical step of withdrawing recognition from states that fail to protect the fundamental rights of a substantial segment of their citizenry.

III. Where Do We Go From Here?

The existing patchwork quilt system of minority protection is clearly inadequate. The principles enunciated in various recent instruments are, for the most part, very general, and subject to multiple interpretations, and they impose little in the way of specific obligations on particular states. Implementation mechanisms, as described above, are either weak, inherently episodic, or both.

It is tempting, looking at this diffuse and disorganized state of affairs, to conclude that we should draft sharper, more detailed minority rights treaties, with individual complaint procedures and a court to adjudicate disputes, similar to—or for members of the Council of Europe, part of—the European Convention system. There are, however, several reasons why such an approach is likely to yield only modest benefits, at best.

As an initial matter, who would ratify such a treaty? Relatively few states have ratified the European Framework Convention, even though it carefully avoids the language of collective rights, says nothing about territorial autonomy, does not apply directly, contains largely program-type objectives rather than specific obligations, and establishes nothing by way of enforcement mechanisms other than the submission of periodic reports.

In part, the reluctance to ratify reflects the natural hesitation of most governments to accept international constraints on the conduct of their domestic politics, especially in an area as politically charged as minority rights. In part, the reluctance reflects genuine philosophical doubts as to the wisdom of the contemporary approach to minority rights. This approach, though couched in the language of individual rights, seeks equality among groups as well as equality among individuals. But the two are inherently in tension. To achieve the former, it may be necessary to depart significantly from the liberal individualist paradigm that has long underpinned the post-war politics of the West. This is most evident in proposals to grant minorities autonomy at the local level, and effective participation at the national level. Although such measures may be necessary to ensure that minorities can maintain and develop their identity and protect their interests from the effects of majoritarian decision making, such measures may also entail the distribution of political power and state resources along racial, ethnic, or linguistic lines, in ways that benefit minorities out of propor-
tion to their representation in the population at large.\textsuperscript{144} Such measures may be justifiable as necessary and proportionate steps toward protecting the rights of minorities, but their fit with individual rights oriented legal systems is awkward at best.\textsuperscript{145} More telling, for many states, is the fear, not without some historical basis, that special rights for minorities, and in particular, autonomy, will lead to escalating demands and jeopardize the political unity and territorial integrity of the state.\textsuperscript{146} In this view, even cultural autonomy may start a spiral leading to territorial autonomy and eventually secession.\textsuperscript{147}

Moreover, it is no easy task to define with the precision necessary for binding adjudication the means by which minority rights should be given effect in states with vastly different historical, demographic, and political characteristics.\textsuperscript{148} The OSCE's Copenhagen Document and the report of the 1991 CSCE Meeting of Experts list many different ways in which states have achieved "positive results" in addressing issues of minority-majority relations.\textsuperscript{149} But the territorial autonomy that may work for the Aaland Islands or the Trentino-Alto Adige region in Italy may be totally impractical or unnecessary for minorities in other states.\textsuperscript{150} On such questions, suitable policies are inherently and inescapably context-sensitive. Whether a proposal for autonomy will be productive or counterproductive will depend on the goals of the relevant actors, the size and political strength of the minority population vis-a-vis the majority and vis-a-vis other minority groups in the society, the territorial concentration of the relevant groups, the timing of the proposal, the history of majority-minority relations in that society, the goals and involvement of kin-states and other interested outside actors, and a host of other variables.

Clearly, instruments could be drafted at a somewhat higher level of specificity than documents such as the Framework Convention. On the two most intractable minority rights issues—autonomy and language rights—some guidance can be found in the European Charter of Local Self-Government and the European Charter for Regional or Minority Languages.\textsuperscript{151} Additional guidance can be derived from state practice, and from the interaction between states and interna-
tional actors such as the High Commissioner on National Minorities. Courts may also assist by giving specific content to general principles in defined situations.

Even then, specific treaty obligations and judicial enforcement work best when a culture of compliance already exists, and that culture cannot be easily imposed from outside. One of the lessons learned from the League of Nations system of minorities treaties is that governments who feel that obligations to national minorities have been unfairly or unreasonably imposed from outside will find ways to nullify those obligations. The states of the former Yugoslavia are a case in point. Although they were compelled to sign numerous human rights agreements as the price of doing business with the international community, their treatment of minorities in the area could scarcely be worse. In short, the states most in need of strengthening majority-minority relations are also the states least likely to accept or comply with general minority rights treaties.

It does not follow that efforts to strengthen and clarify international protections for minorities should be abandoned, or that existing norms cannot play a useful role in averting ethnic conflict. To the contrary, such norms can and do play a useful role in moderating tensions in a number of countries. They form the starting point for the mediation and conciliation activities of international actors such as the High Commissioner on National Minorities, who "employs the international standards to which each State has agreed as his principal framework of analysis and the foundation of his specific recommendations."

In general, when a State accepts Council of Europe or other international norms it:

accepts an obligation to justify its conduct in the light of them, both within the bodies of the organization and in the larger community, and to submit to scrutiny when challenged. Grievances of minority groups are couched in terms of the norms, and negotiations and mediation are framed by them. The seemingly endless discussions of the meaning and application of the legal norms and standards in these forums not only strengthens their authority, but often elicits

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152. The High Commissioner routinely discusses the application of pertinent CSCE and Council of Europe instruments with numerous governments and other international actors, in the process helping to give greater definition to ambiguous norms. The exchange between the High Commissioner and the Minister of Foreign Affairs of Slovakia provides one example. See supra notes 121-23. In addition, the High Commissioner periodically convenes meetings of experts to help flesh out the skeletal principles contained in many minority rights instruments. The Hague Recommendations Regarding the Education Rights of National Minorities, supra note 116, is the product of one such set of meetings.

153. See Claude, supra note 5, at 44-47.

154. For an argument along those lines, see Donald L. Horowitz, Self-Determination: Politics, Philosophy, and Law, in Ethnicity and Group Rights 421, 445-53 (Ian Shapiro & Will Kymlicka eds., 1997).

more detailed understanding of their content and commitments as to performance. For example, what starts out as the affirmation of a broad and generally accepted standard on the rights of minorities to use their own language may wind up in a detailed negotiation over street signs or the language in which official proceedings are to be conducted in a particular region. Agreements that emerge are very likely to be complied with, because they are tailored to the particular case and because the state has participated in the process and explicitly committed to the outcome.\textsuperscript{156}

This sort of flexible, managerial approach to conflict management is unsatisfying to many lawyers, who prefer the sort of judicial model represented by the Parliamentary Assembly’s proposed Additional Protocol to the European Convention on Human Rights.\textsuperscript{157} For the reasons noted above, however, a judicial model is at present impractical, even within Europe. Moreover, for many deeply divided states, it may be more productive to pursue negotiated internal political arrangements facilitated by international mediation and persuasion, along the lines of the work currently performed by the OSCE’s High Commissioner on National Minorities. Such arrangements can and should be guided by the general principles already enunciated in recent minority rights instruments, but the specific details will necessarily depend on the circumstances of each case.

**Conclusion**

While the approach outlined here may not seem very satisfactory, it is responsive to the dilemma at the heart of efforts to produce an adequate international legal response to minority-majority tensions. Conventional individual rights, although they can be made universally applicable, will not satisfy minorities intent on preserving their identities and avoiding assimilation. But positive minority rights, of the sort contained in recent minority rights instruments, cannot practically be made universally, or even generally, applicable, except at the level of general principles subject to interpretation (and manipulation) by all the actors involved.

\textsuperscript{156} Chayes & Chayes, supra note 118, manuscript at 382.
\textsuperscript{157} See Recommendation 1201, supra note 44, at 145-46.