Minority rights in international law

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Why should international human rights law vest members of a minority community with rights that secure a measure of autonomy from the state in which they are located? Answers to this question typically rest on a commitment to the protection of certain universal attributes of human identity from the exercise of sovereign power. Minority protection thus operates on the assumption that religious, cultural, and linguistic affiliations are essential features of what it means to be human. This essay offers an alternative account of why minority rights possess international significance, one that trades less on the currency of religion, culture, and language and more on the value of international distributive justice. On this approach, international minority rights speak to wrongs that international law itself produces by organizing international political reality into a legal order. This account avoids the normative instabilities of attaching universal value to religious, cultural, and linguistic affiliation and, instead, challenges the international legal order to remedy pathologies of its own making.

1.

In a kaleidoscopic redistribution of sovereign power after the First World War, the once-great Ottoman Empire ceased to exist, its territory divided, partitioned, and reallocated to friends and enemies alike. France received mandates from the League of Nations to govern Syria and Lebanon. The United Kingdom received mandates to govern Iraq, Palestine, and what eventually became Israel and Jordan. Turkish nationals repelled Allied forces occupying their country and established the Republic of Turkey, while huge swaths of the Arabian Peninsula became parts of modern-day Saudi Arabia and Yemen.

The instruments that invested these political developments with international legal validity dramatically reshaped the structure of the international legal order. The 1923 Treaty of Lausanne, for example, delineated the territorial sovereignty of the new Republic of Turkey, replacing the 1920 Treaty of Sèvres, which had been negotiated but not ratified by the Ottoman Parliament. In doing so, the Treaty of Lausanne restored Turkey’s previous boundary with Bulgaria and Western Thrace, annulled the transfer of Smyrna to Greece, and relieved Turkey of postwar obligations to compensate Allied civilian nationals for wartime losses. The treaty also provided for extensive population exchanges between Turkey and Greece and repudiated Turkey’s

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previous commitment to recognize an independent Armenia and, ultimately, an independent Kurdistan.¹

The Treaty of Lausanne modified the distribution of sovereign power in Europe by transferring sovereignty over territory and people from some sovereign actors to others. This treaty—and others like it—illustrates how international legal arrangements operate to impose legal order on international political reality by specifying the territory over which states can legally exercise sovereign power. It also illustrates how international law participates in the creation of national, cultural, religious, and linguistic minority communities, such as Greek nationals living in Turkey, the Muslim and Turkish populations in Greece, and the Kurdish populations in southeastern Turkey and neighboring Syria, Iraq, and Iran.

Why should international human rights law vest members of a minority community—either individually or collectively—with rights securing a measure of autonomy from the state in which they live? To the extent that the field offers answers to this question, it does so from a commitment to protecting certain universal attributes of human identity from the exercise of sovereign power. It protects minority rights on the assumption that religious, cultural, and linguistic affiliations are essential features of what it means to be a human being. But acceptance of this assumption is wary and partial. Minority rights might protect key features of human identity, yet they possess the capacity to divide people into different communities, create insiders and outsiders, pit ethnicity against ethnicity, and threaten the universal aspirations that inform the dominant understanding of the mission of the field.

This essay proposes a different account of the international legal significance of minority rights, one that trades less on the currency of religion, culture and language and more on the value of international distributive justice. It suggests that international minority rights speak to wrongs that international law itself produces by organizing global political realities into a legal order. This account reveals itself most clearly in the way in which international political developments surrounding the dissolution of the Ottoman Empire at the end of the First World War were vested with international legal validity. But it also serves as the basis of a more general theory of the legal significance of international minority rights regardless of the contingent political conditions that may lead to their formal legal entrenchment. This account avoids the normative instabilities of attaching universal value to religious, cultural, and linguistic affiliation; instead, it challenges the international legal order to remedy pathologies of its own making.

This account of international minority rights engages at least some of the themes of this symposium in intriguing ways. One view of the impact of globalization on the relationship between constitutional and international law is that international and transnational forms of governance are assuming more

¹ For a contemporaneous comparison of the Treaty of Sèvres and the Treaty of Lausanne, see Philip M. Brown, From Sèvres to Lausanne, 18 Am. J. Int’l. L. 113 (1923).
of the constitutional powers and functions traditionally performed by domestic legal orders. An opposing perspective suggests that international law is an increasingly epiphenomenal system of legal ordering. This article argues that international human rights law vests minority interests with international legal significance for reasons that have very little to do with why they might merit domestic legal protection. It suggests that neither of these two perspectives adequately captures the nature of the international legal order, which has a normative architecture unto its own.

2.

The claim that a minority population possesses rights that shield it from assimilative tendencies of a majority population fits uncomfortably with a conception of international human rights law as a field devoted to protecting essential features of what it means to be human. The civil and political freedom of minority members is more likely to be interfered with than those of the majority, and, therefore, the field is attentive to the various forms of discrimination and marginalization that minorities may experience. Beyond this level of protection, however, minority rights run counter to the aspiration of international human rights law to protect universal, not contingent, features of human identity. On this universal approach, human rights protect essential characteristics or features that all of us share despite the innumerable historical, geographical, cultural, communal, and other contingencies that uniquely shape our lives and our relations with others. They give rise to duties that we owe each other in ethical recognition of what it means to be human. But belonging to a minority is not something we all share; it is a function of history and circumstance.

The protection that international human rights law accords to minority populations reflects this tenuous relationship between minority membership and universal value. International human rights law comprises a variety of sources

2 See, e.g., Jack Donnelly, Universal Human Rights in Theory and Practice 10 (2d ed., Cornell Univ. Press 2003) (“[h]uman rights are, literally, the rights that one has simply because one is a human being”); A. John Simmons, Justification and Legitimacy: Essays on Rights and Obligation 185 (Cambridge Univ. Press 2001) (“Human rights are rights possessed by all human beings [at all times and in all places], simply in virtue of their humanity”) (emphasis in original).

The ambiguous relationship between minority protection and universalism was presciently grasped by Pablo de Azcárate, former deputy secretary-general of the League of Nations, in a 1946 essay:

“Protection of national minorities is a question limited in time and space, and essentially relative; its solution depends on concrete historical circumstances subject to constant shift and change. Guarantee of human rights is an absolute, general question as wide as humanity. They may or may not be set up. But if they are set up, the ideal would be to establish them in the most absolute and universal form possible. To that end, any attempt to make one institution approximate to the other will only prejudice both.”

and instruments, including the Universal Declaration of Human Rights, various international and regional treaties, principles of customary international law, and general principles of international law. These sources and instruments provide minorities with several avenues for challenging the exercise of state power, but these instruments have come to be understood in terms that display a deep ambivalence about the international legal significance of minority status.

This ambivalence reveals itself in five ways. First, minority interests deemed to merit legal protection are typically those that may be said to involve universal features of human identity, such as freedom of expression and association and, more contentiously, cultural, religious, and linguistic affiliations. Second, minority rights that protect such interests vest in individuals who claim such affiliations, as opposed to the communities to which they belong. Third, conditioned by universal and individualistic premises, minority rights nonetheless protect some activities that possess nonuniversal and collective dimensions. Fourth, civil and political rights, which fit more comfortably with a universal account of the field, occasionally protect interests characteristically associated with minority status. Fifth, the field offers little concrete guidance on what international minority rights require of states to secure their protection.

The Universal Declaration of Human Rights, for example, makes no explicit mention of minority rights. A preliminary draft of the declaration proposed enshrining rights to minority educational, religious, and cultural institutions as well as minority-language protection. Due to political opposition from many states, however, these provisions were omitted from the final version adopted by the UN General Assembly in 1948.4 Instead, the General Assembly transferred the matter of minority protection to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, instructing it to undertake “a thorough study of the problem of minorities.”5 In the words of Peter Hilpold, the General Assembly’s “reluctance to act coupled with a request for more knowledge was a characterizing trait of the entire development of minority rights within the UN system.”6

Despite its silence on minority protection, by guaranteeing freedom of expression, freedom of religion, rights of cultural and political participation, and equality rights to “everyone,” the declaration necessarily guarantees equal citizenship to members of minorities and protects them from the discriminatory exercise of state power. It protects interests that members of minority


communities share with members of the majority as opposed to interests that distinguish minorities from majority populations. Protecting interests that minorities and majorities share, such as freedom of expression and religion, fits comfortably with a conception of international human rights as devoted to shielding essential features of humanity from the exercise of sovereign power.

In contrast to the Universal Declaration, the International Covenant on Civil and Political Rights (ICCPR), which came into force in 1976, refers explicitly to minorities, but it frames minority rights in primarily individualistic terms. This is in keeping with the Covenant’s stated purpose, which is to entrench a rich panoply of civil and political rights in “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.” At the behest of the Sub-Commission, the ICCPR’s article 27 specifies that persons belonging to ethnic, religious, or linguistic minorities “shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” The text of article 27 thus suggests that minority rights are individual rights to engage in particular activities in community with others, not collective rights of a minority population to a measure of autonomy from the broader society in which it is situated.

The individualistic thrust of article 27 is underscored by the fact that it can be made the basis of a complaint before the Covenant’s monitoring body, the Human Rights Committee, which is empowered to hear only individual, not collective, claims. This is in contrast to article 1 of the Covenant, which guarantees a right of self-determination to all “peoples.” Given its collective nature, article 1 cannot form the basis of an individual complaint. On the one hand, the Covenant affords minorities a valuable avenue for international legal redress by empowering the Human Rights Committee to interpret the nature and scope of article 27 protection in the context of specific disputes. On the other hand, because the Human Rights Committee has held that it cannot hear complaints alleging violations of the right of self-determination, it has blunted the capacity of the Covenant to provide an institutional site for the elaboration of the collective rights of minority populations in international law. 9

8 Id. art. 27.
The rights enshrined in article 27 are not only framed in individualistic terms. The interests they aspire to protect can be comprehended in universal terms, as essential features of our common humanity. The capacity to participate in one’s culture, to hold and exercise spiritual beliefs, and to speak to others in a shared language may plausibly be thought to possess universal value. That is, cultural, religious, and linguistic affiliations help to shape who and what we are.\(^\text{10}\) Article 27 thus protects interests that are relevant to all in circumstances where they are likely to be threatened, namely, when a majority seeks to impose its cultural, religious, and linguistic beliefs and preferences on a minority whose members hold different beliefs. Viewed this way, international minority rights protect a minority’s cultural, religious, and linguistic practices because of the fragility of these affiliations in minority contexts.

The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, proclaimed by the General Assembly in 1992, exhibits similar tendencies. According to its preamble, the 1992 declaration was “inspired by the provisions of article 27” of the Covenant. It declares that minorities possess rights to enjoy their own culture, to practice their own religion, and to use their own language; to participate in cultural, religious, social, economic, and public life; to participate in decisions on the national and, where appropriate, regional level; and to associate with other members of their group and with persons belonging to other minorities. But, as with article 27 of the Covenant, the declaration casts these rights in individualistic terms, as vesting in “persons belonging to minorities.” And the interests that the 1992 declaration seeks to protect—cultural, religious, and linguistic affiliations, political participation, and freedom of association—are the same as those underlying article 27. Universal in significance, they are constituent features of human identity shared by members of majorities and minorities alike.\(^\text{11}\)

Within this universal and individualistic framework, the Human Rights Committee has shown a willingness to interpret article 27 as protecting some activities that possess nonuniversal and collective dimensions. Several of its decisions contemplate the idea that the right to enjoy one’s culture includes...

\(^{10}\) See, e.g., Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Oxford Univ. Press 1995); Charles Taylor, The Politics of Recognition, in Multiculturalism: Examining the Politics of Recognition 25 (Amy Gutman ed., Princeton Univ. Press 1994). For Kymlicka, minority cultural protection is warranted because cultural affiliation is central to human identity whereas Taylor sees all individuals as beneficiaries of minority cultures and for this reason, too, cultural protection is warranted. But see Courtney Jung, The Moral Force of Indigenous Politics: Critical Liberalism and the Zapatistas, passim (Cambridge Univ. Press 2008) (arguing that cultural identity is a political accomplishment).

rights to engage in economic activities essential to cultural reproduction. In *Ivan Kitok v. Sweden*, for example, under Swedish law an ethnic Sami was denied rights to herd reindeer. Kitok was a Sami living in Sami territory and had a herd of reindeer; however, he was not a Sami village member. Under Swedish law, a Sami village member possesses rights to hunt and fish on a large part of the territory. The law also authorizes members’ reindeer herds to graze on public and private lands. The purpose of the restrictions is to ensure the future of reindeer breeding and the livelihood of those engaged in it. The village allowed, not as of right, Kitok to hunt and fish and to be present when calves are marked and herds rounded up and reassigned to owners in order to safeguard his interests.

The committee held that “reindeer husbandry is so closely connected to the Sami culture that it must be considered part of the Sami culture itself,” and, where economic activity is “an essential element in the culture of an ethnic community,” it falls under the protection of the Covenant. It saw the purpose of the law as twofold: to restrict the number of reindeer breeders for economic and ecological reasons; and to secure the preservation of the Sami minority. It held this dual purpose to be valid but expressed “grave concerns” that the means chosen was not proportionate to its objective, since it failed to deploy “objective ethnic criteria in determining membership in a minority.” Despite this disproportionality, the committee held Sweden not to be in violation of the Covenant because the law in question was enacted to protect the rights of the minority as a whole, possessed a reasonable and objective justification, and was necessary for the community’s continued viability and welfare.

Various cases suggest that other civil and political rights contained in the ICCPR protect minority interests in relation to territory. In *Hopu and Bessert v. France*, the Human Rights Committee heard a complaint by indigenous Polynesians who claimed to be the lawful owners of land in Tahiti where French Polynesian authorities were constructing a resort. The resort was being built on an indigenous historical burial ground and around a lagoon that was still used by thirty indigenous families for subsistence fishing. The Covenant does not enshrine a right to property, and article 27 was not available because France had made a reservation against its application. Instead, at issue was article 23, which establishes a right to a family life.

The state argued that the complainants could not prove that their families were buried there or, more generally, that they had ancestral links to those

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13 Id. ¶ 9.2.

14 Id. ¶ 9.7.

buried in the site. The skeletons predate the arrival of Europeans on the island. However, the committee ruled that the term family “is to be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term ‘family’ in a specific situation.” It also noted that “the relationship to their ancestors [is] an essential element of their identity” and plays “an important role in their family life.” It concluded that the state was in violation of the right to a family life, as guaranteed by the Covenant.

What international minority rights require states to do or not do is also deeply ambiguous. It is a truism of minority protection that it requires both the prohibition of discrimination against minorities and positive measures to protect minorities from assimilation. This truism predates contemporary international legal instruments providing for minority protection. In a 1935 advisory opinion, for example, the Permanent Court of International Justice held that Albania violated the minority rights of Greek nationals by abolishing Greek private schools, stating that “there would be no true equality between a majority and a minority if the latter were deprived of their own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being a minority.”

But this principle also informs contemporary understandings. The “thorough study of the problem of minorities” called for by the General Assembly in 1948 was finally commissioned in 1971. This resulted in the influential 1979 report by UN special rapporteur Francesco Capotorti on the rights of ethnic, religious and linguistic minorities, which characterizes minority protection as requiring both equal treatment and special measures. This characterization finds textual support in the presence of equality rights and minority rights in both the 1992 declaration and the ICCPR. But what the 1992 declaration requires in terms of positive measures is far from clear. It calls on states to “protect the existence and the national or ethnic, cultural, religious and linguistic identities of minorities” but requires states simply to “adopt appropriate legislative and other measures to achieve those ends.”

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16 Id. ¶ 10.3.
18 Case Concerning the Minority Schools in Albania, Advisory Opinion, 6.04.1935, P.C.I.L. REP. SER. A/B, No. 64.
21 Id. art. 4(2).
Similar ambiguities plague article 27 of the Covenant. On the one hand, its drafters, and its states parties, assumed that it obligates states to allow minority members to engage in religious, cultural, and linguistic practices but does not require states to adopt positive measures to facilitate such practices. This explains the negative phrasing of article 27, which provides that members of a minority “shall not be denied the right” to enjoy their culture, practice their religion, or use their language. On the other hand, international legal actors and institutions have begun to comprehend article 27 in a more positive light. The 1979 UN report by the special rapporteur, for example, argued that the implementation of article 27 “calls for active and sustained intervention by states.”

The Human Rights Committee has followed suit, stating that minority rights in article 27 should not be equated with equality rights, and that “positive measures by States may … be necessary to protect the identity of a minority and the rights or its members to enjoy and develop their culture and language and to practice their religion.” But the committee has also held that an official language in the public sphere does not violate the Covenant. It also has also held that, although equality requires a state to not discriminate among religions, the right of minority members to profess and practice their religion does not impose an obligation on the state to fund private religious schools. The committee occasionally requests states to adopt positive measures to protect minority communities but such requests are typically phrased in general terms, providing little insight into the precise positive obligations article 27 imposes on states.

The Sub-Commission requested another study, in 1990, on “peaceful and constructive solutions to situations involving minorities,” which resulted in a call to states to adopt comprehensive strategies that address minority concerns.

22 See Capotorti, supra note 19, ¶¶ 211–212.
24 Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, supra note 19, ¶ 217. See generally Cholewinski, supra note 23.
28 See, e.g., Concluding Observations of the Human Rights Committee, Guatemala, ¶ 29 U.N. Doc. CCPR/CO/72/GTM (Aug. 27, 2001) (asking Guatemala to adopt “comprehensive legislation” that “guarantees the enjoyment of all the rights guaranteed by Article 27” and to ensure that “implementation of this legislation improves the situation of members of indigenous communities in practice and not on paper”).
by guaranteeing equal treatment, and by promoting linguistic, educational, and cultural pluralism, as well as territorial decentralization and effective political participation. It also recommended the establishment of a Working Group on Minorities, which has since met annually. In 2005, the High Commissioner for Human Rights appointed an independent expert on minority issues, who has identified four broad areas of concern in relation to minority protection. These are: protecting the existence of a minority; protecting the right of minorities to enjoy their cultural identities and to reject forced assimilation; ensuring effective nondiscrimination and equality; and ensuring effective participation of members of minorities in public life. She also has called for increased attention to minority communities in the context of poverty reduction strategies and to the promotion of political and social stability.

While these initiatives suggest that issues surrounding minority protection possess greater visibility in the United Nations than previously, the field continues to display a deep ambivalence about what is required of states to secure the protection of minority rights. This ambivalence is a function of a broader international legal project that comprehends human rights as instruments that protect individual interests of universal value. For minority rights to fit into this project, the interests they protect must be construed as fundamental features of what it means to be a human being. Religious, cultural, and linguistic affiliations plausibly possess such universal value, and so it is no surprise that these interests are those that dominate international minority protection. These interests receive protection as of right from the assimilative tendencies of the broader political community in which a minority finds itself. At a minimum, this protection requires a state not to discriminate against members of minorities. More substantive protection requires positive measures that treat members of minorities differently from members of the majority in relation to religious, cultural, and linguistic matters. But greater protection attenuates the normative basis of universalism on which this conception of minority rights rests, which explains, at least in part, the institutional reluctance to specify the positive obligations that they impose on states.

3.

The tenuous normative relationship between minority membership and universal value is not the only reason why international law displays ambivalence


about the legal significance of minority status. Robust minority protection was left off the international legal register after the Second World War less for pristine theoretical reasons of universalism than for pragmatic considerations of international peace and security. Minority protection can induce political discord by hardening differences into rights, and by enabling political actors to capitalize on national, ethnic, religious, and linguistic differences to gain political power. Those responsible for the postwar international legal architecture eschewed minority protection because of fears that it produces ethnic politics, and threatens the political stability and territorial integrity of states.

The postwar concern that minority rights might endanger international peace and security has been replaced, gradually, by an equally pragmatic but more nuanced view, one that accepts that failure to protect minority rights might also exacerbate ethnic and cultural tensions between majorities and minorities and lead to the splintering of political communities. More visibly in some contexts than in others, minority protection in international law displays what Jacob Levy has theorized as a “multiculturalism of fear.” International law values minority protection not only for reasons of universal value but also because it mitigates “dangers of violence, cruelty, and political humiliation [that] so often accompany ethnic pluralism and ethnic politics.”

Concerns that minority rights possess the potential both to aggravate and to alleviate ethnic conflict are especially prevalent in European human rights law. Legal instruments and institutions in Europe engage questions of minority protection from several different regulatory vantage points. Some of these instruments and institutions, like their United Nations counterparts, comprehend minority rights in primarily universal and individualistic terms. Others provide more targeted protection to national minorities, that is, communities bound by ethnicity and culture that are historically and territorially concentrated both within and across adjacent state boundaries. Minority interests also receive occasional protection in the form of civil and political rights. Again, as with international initiatives, what European minority protection requires of states in terms of positive measures is ambiguous at best. What distinguishes European from international initiatives is the relative visibility of the stance that the legitimacy of minority rights rests on their capacity to promote political stability in the region.

The European Convention on Human Rights, perhaps the most significant regional human rights instrument in Europe, does not expressly enshrine minority rights. Its text is thoroughly individualistic in nature and devoted overwhelmingly to the protection of civil and political rights. At the time it came into force, minority rights were not part of the postwar vision of a future Europe. The convention was drafted in light of wartime atrocities primarily if not exclusively as an instrument that would safeguard interests associated with civil and political rights from the raw exercise of collective political power.

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The one express exception to its focus on civil and political rights lies in its equality guarantee, which refers to minority membership, but the convention enshrines only the right of an individual not to be discriminated against as a member of a minority defined by language, religion, or national origin.  

The fact that the European Convention on Human Rights does not expressly enshrine minority rights does not mean that it offers no minority protection whatsoever. Several if not all civil and political rights, such as freedom of religion, expression, association, as well as the right to a family life, the equality guarantee, and the right to free elections, are all textually capable of protecting various interests of a minority community. 

Numerous decisions of the European Court of Human Rights—the primary judicial body responsible for interpreting the convention—open this jurisprudential door, suggesting that certain civil and political rights also protect interests associated with minority status. Such interests merit protection because of their universal value but only in circumstances where they will not lead to political instability and conflict in the region. 

For example, in Serif v. Greece, at issue was the conviction of a Muslim religious leader for officially representing a Muslim community in Greece without being designated as such by the Greek state. The European Court held the conviction to be an interference with the applicant’s freedom of religion. It noted that division within religious communities creates “tensions” but held that “[t]he role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.” It noted further that Greece had not adduced any evidence to suggest that such tension had led to “disturbances” within the Muslim population, and that the risk of such tension beyond the Muslim population to affect relations between the Muslim and Greek populations, or between Greece and Turkey, was nothing more than “a remote possibility.”

15 Id. (arts. 10, 11, 9, 8, 14, 3, and Protocol 1, respectively).
17 Serif v. Greece, supra note 36, ¶ 53.
18 Id.
Similarly, at issue in Socialist Party v. Turkey was the nature and scope of the convention’s guarantee of freedom of association in the wake of a decision by the Turkish Constitutional Court to ban a political party. The party’s political platform claimed that the Kurdish minority constitutes a nation, that its members possess a right of national self-determination, and that this right entitles them to an independent state if they so choose. Instead of secession, however, the party advocated a peaceful, constitutional transformation of Turkey into a bilingual, binational federal republic in which the Kurdish population would possess territorial and jurisdictional autonomy. Its platform promised that “the freedom and right of each nation and each national or religious minority to develop its language and culture and to pursue political and associative activities will be guaranteed.”

The European Court held that the ban violated the convention guarantee of freedom of association, stating that “it is the essence of democracy to allow diverse political programs to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.”

The Court’s case law on the equality guarantee in article 14 enables it to determine whether minority protection is necessary in a manner sensitive to the particular circumstances of minority communities. In Thlimmenos v. Greece, the Court, for the first time, expressly held that nondiscrimination in certain circumstances requires the differential treatment of “persons who are significantly different.” Greece was held to have discriminated against Thlimmenos—a Jehovah’s Witness convicted of insubordination for refusing to enlist in the military for religious reasons—by failing to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants. Thlimmenos effectively introduces the concept of indirect discrimination into the convention’s equality jurisprudence by treating a rule that is neutral on its face but which has a disparate impact on a religious minority as a violation of equality. It suggests that the equality guarantee in article 14 of the convention, in certain circumstances, imposes positive obligations on states to treat some members of society, in this case, members of a religious minority, differently than others.

Other regional institutions address minority concerns more directly, most notably the Organization on Security and Cooperation in Europe. As its name suggests, the OSCE is an organization concerned with regional security, specifically, conflict prevention, crisis management, and postconflict rehabilitation.

39 Case of Socialist Party and others v. Turkey, supra note 36.

40 Id. ¶ 13. It also promised that “no Turk will be entitled to enter paradise if a single Kurd remains in hell.” Id.


42 Thlimmenos v. Greece, supra note 36, ¶ 44.
That the OSCE monitors the treatment of minorities in the region is an indication of how European law and policy comprehends minority rights as both potentially stabilizing and destabilizing. The OSCE has assumed this role under the auspices of the Office of the High Commissioner on National Minorities, established in 1992 to identify and seek early resolution of ethnic tensions that might endanger peace, stability, or friendly relations between states. The OSCE also has in place what is known as the “human dimension mechanism,” which involves an intergovernmental complaint procedure that can be activated in crisis situations to bring regional scrutiny to bear on ethnic conflict.43

There are additional European institutions that oversee minority protection. These include the Council of Europe, which adopted the 1992 Framework Convention on the Protection of National Minorities and monitors the extent to which states parties to this convention comply with its terms.44 The Framework Convention provides a rich description of its ideological origins, noting that “the upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace,” and that toleration and dialogue are necessary to enable “cultural diversity” to be a source of “enrichment” instead of “division.”45 Like the ICCPR and the Universal Declaration, the Framework Convention refers to the rights of persons belonging to national minorities, suggesting an emphasis on individual as opposed to collective interests. This represents a significant departure from the recommendations of the Council of Europe’s Parliamentary Assembly of four years earlier, which had proposed the entrenchment of rights of national minorities to be recognized as such by the states in which they are located; to maintain their own cultural, educational, and religious institutions; and to participate in decisions about matters that affected their identities.46

The Framework Convention also narrows the scope of protection to national minorities compared with the 1992 declaration, which also provides protection to ethnic, religious, and linguistic minorities.47 It emphatically asserts that members of national minorities possess equality rights and freedom of assembly,


45 European Charter, supra note 44, preamble.


association, expression, thought, conscience, and religion. It also specifies that members of minorities have the right to learn their minority language, operate their own private school systems, and to use minority languages in public and private, in surnames and first names, in local names, signs and inscriptions, and in contacts with administrative bodies and courts whenever possible. As a framework agreement, the instrument is not directly applicable in the domestic legal orders of the member states but requires implementation by legislation and appropriate governmental policies.

The 1992 European Charter for Regional or Minority Languages, also a product of the Council of Europe, reaches further into the public sphere than the Framework Convention. However, despite the provocative claim in its preamble that the use of a regional or minority language is an “inalienable right,” this 1992 charter seeks to protect regional and minority languages, not linguistic minorities. It does not enshrine any individual or collective rights for the speakers of these languages. It lists several principles and objectives applicable to all regional or minority languages, such as the promotion of mutual respect and understanding among linguistic groups; the establishment of bodies to represent the interests of regional or minority languages; and the need for positive action for the benefit of regional or minority languages. It also contains a series of more specific provisions concerning the place of regional or minority languages in the context of education, the legal sphere, public administration, the media, cultural activities and facilities, the market, and international exchanges. Individual states are free, within certain limits, to determine which of these provisions will apply to each of the languages spoken within their jurisdiction.

A concern that lack of minority protection threatens international and regional stability also informs the criteria for membership in the European Union (EU) and NATO. Candidate countries must comply with the Copenhagen criteria for admission to the EU set out by the European Council in 1993. These criteria include requirements that candidate countries demonstrate “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.”

Recent reforms in Turkey provide a vivid illustration of compliance with the Copenhagen criteria. In 1999, Turkey was declared a candidate state destined

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50 Scholars debate the salience of domestic political factors as intervening variables when assessing the impact of the Copenhagen criteria on domestic reforms. See NORMS AND NANNIES: THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON THE CENTRAL AND EAST EUROPEAN STATES (Ronald H. Linden ed., Rowman & Littlefield 2002).
to join the European Union following fulfillment of the Copenhagen criteria.\textsuperscript{51} Turkey responded with extensive reforms designed to harmonize its domestic legal order with European standards. These reforms included enhanced protection of certain human rights, including freedom of expression, association and assembly, abolition of the death penalty, and the criminalization of genocide and crimes against humanity. The reforms also included media and educational rights designed to benefit the Turkey’s Kurdish population.

Conditioning membership in the EU and NATO on adequate protection of minorities in candidate states does not entail a review of how existing member states treat their minority populations. This has led some to claim that a double standard exists between existing and new members, or between old and new Europe.\textsuperscript{52} But whether requiring candidate countries to provide adequate minority protection constitutes a double standard depends on the reason for the requirement. If the sole reason for the requirement is because there are aspects of minority membership that merit protection because they are intimately connected to human identity, then it is difficult to see why minority protection matters in Ankara but not in Amsterdam. The requirement of minority protection, however, can be understood as reflecting the fear that economic and political integration without minority protection is likely to foster ethnic unrest in candidate countries but not in member countries. On this view, minority rights are to be promoted where they will minimize ethnic conflict and to be avoided where they will exacerbate ethnic conflict.

Pragmatic considerations about how to minimize the potential of ethnic conflict are not the entire story of minority protection, even if they form more of the story at the European than at the international level.\textsuperscript{53} But do these pragmatic considerations exhaust the normative significance of minority rights? Are international minority rights simply a necessary evil, or do they possess positive normative value such that they can be comprehended as legitimate entitlements in our international legal order? The dominant account of their normative value remains steeped in universalism but, as we have seen, the relationship between minority membership and universal value is, at best, tenuous. A normative account of law should not conflate fact and norm by relying on the existence of a law to vest it with normative significance, but neither should it lose sight of the object in which it seeks to vest normative meaning. If the various instruments and institutions devoted to the protection of minority


\textsuperscript{52} MILADA ANNA VACHUDOVA, EUROPE UNDIVIDED: DEMOCRACY, LEVERAGE, AND INTEGRATION AFTER COMMUNISM 121 (Oxford Univ. Press 2005).

\textsuperscript{53} Cf. WILL KYMALAKA, MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY 9 (Oxford Univ. Press 2007) (“international organizations alternate between these approaches [of a fear of ethnic violence and a hope of liberal multiculturalism], as indeed is appropriate, since both perspectives identify aspects of the complex reality of contemporary ethnic politics”).
rights in international human rights law fit awkwardly within a universal account, this raises an obvious question. Is there another account that makes better normative sense of international minority rights than one that grounds their legitimacy in universalism?

4.

Shortly after the dramatic redistribution of sovereign power at the end of the First World War, the major states in the postwar period attempted to address some of the consequences of this reorganization. They did so by generating an additional web of multilateral and bilateral treaties, monitored by the League of Nations, which provided protection to populations displaced or adversely affected by the war and its distributional consequences. Although protection was tailored to particular circumstances, there were common features. The relevant instruments contained stipulations regarding the acquisition of the nationality of the newly created or enlarged state; the right to equal treatment; rights against nondiscrimination; and protection of ethnic, religious, or linguistic minorities, including the right to use their mother tongue officially, to have their own schools, and to practice their religion. The League of Nations assumed the authority to agree to changes to these provisions and the power to intervene in the event of an infraction, taking action appropriate to each case. In addition, the Permanent Court of International Justice, the League’s judicial body, was vested with compulsory jurisdiction to resolve certain cases involving disputes between minorities and the states in which they resided.

This system of minority protection was not universal; it governed only certain states and not others within Europe and surrounding areas. States defeated in the war, with the exception of Germany, had been compelled to agree to special provisions regarding minorities. New states, as well as those reconstituted by the inclusion of additional territory and a minority population—with the exceptions of Belgium, Denmark, France, and Italy—were required to sign separate treaties providing for minority protection. It also governed some minorities and not others within particular states. The Treaty of Lausanne, for example, required Turkey to respect certain minority rights of non-Muslim minority communities within its territory, which Turkey took as not requiring it to recognize any minority rights for its Kurdish population.\(^{54}\) It also required Greece to respect the rights of its Muslim population, which Greece, like Turkey,\(^{54}\)

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\(^{54}\) Turkey continues to claim that the Kurdish population does not possess international minority rights, because Turkey has reserved the right to interpret and apply the provisions of Article 27 of the International Covenant on Civil and Political Rights in accordance with its Constitution and the Treaty of Lausanne. Some have argued that the possibility of EU accession is softening Turkey’s resistance to recognizing the minority status of its Kurdish population. See Ayşe Betül Çelik, *Transnationalization of Human Rights Norms and Its Impact on Internally Displaced Kurds*, 27 Hum. RTS. Q. 969 (2005).
took as not requiring it to recognize any minority rights that protect Turkish national interests, as opposed to Muslim religious interests. Although the Assembly of the League of Nations adopted a resolution calling on all member states to observe the standards embodied in the minority treaties, it fell on deaf ears. Majority resentment led states subject to minority treaties to ignore their provisions. The system’s shortcomings were but one of the many complex variables that led to the demise of the League of Nations and the onset of the Second World War.

But to portray the interwar system of minority protection as an institutional failure obscures how the reasons for its establishment point the way to an alternative conception of international minority rights, one that locates their international legal significance less in universal elements of human identity and more in the structure and operation of the international legal order itself. The interwar system of minority protection was established in direct response to the large-scale redistribution of sovereign power that occurred immediately after the First World War, and it sought to mitigate some of its adverse consequences. Regardless of its institutional shortcomings, it suggests a different normative logic to the legitimacy of minority rights in international human rights law. On this account, minority rights are part of a larger arsenal of international entitlements that monitor the justice of the distribution of sovereign power in the world.

To see why this is so, it is necessary to stand back from legal detail and grasp the nature of sovereign power in international law. International law provides that a state whose government represents the whole of its population within its territory in a manner consistent with principles of equality, nondiscrimination, and self-determination, is entitled to maintain its territorial integrity under international law and to have its territorial integrity respected by other states. The European Court of Human Rights recently rebuffed Greece’s claim that by virtue of the Treaty of Lausanne only a Muslim minority and not a Turkish minority exists in the region of Western Thrace. See Emin and Others v. Greece App. No. 34144/05 Eur. Ct. H.R. ¶ 30 (2008) (available at http://www.echr.coe.int/echr) “freedom of association involved the right of everyone to express, in a lawful context, their beliefs about their ethnic identity” and added that “however shocking and unacceptable certain views or words used might appear to the authorities, their dissemination should not automatically be regarded as a threat to public policy or to the territorial integrity of a country.”

For a contemporaneous introduction to what was termed the “generalization” debate, see Howard B. Calderwood, The Proposed Generalization of the Minorities Regime, 26 AM. POL. SCI. REV. 1088 (1934).

See, e.g., UN General Assembly, Declaration on the Occasion of the Fiftieth Anniversary of the United Nations (1995), G.A. Res. 50/6, at 13, 49 U.N. GAOR Supp. No. 49 U.N. Doc. A/RES/50/49 (1995) (the right of self determination “shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind”).
law only under certain conditions and in certain circumstances. International law does not validate a claim of sovereign power by a collectivity unless (a) the collectivity in question constitutes a “people” in international law and is entitled to exercise an right of self-determination in ways that entitle it to sovereign power, 58 or (b) the collectivity possesses the attributes that international law declares to be the necessary criteria of statehood. 59

These avenues to obtaining and maintaining sovereign statehood are the means by which the international legal order distinguishes between legal and illegal claims of sovereign power. By legally validating some claims of sovereign power and refusing to validate others, international law organizes international political reality into a legal order in which certain collectivities possess legal authority to rule people and territory. Sovereignty, in international law, is a legal entitlement to rule people and territory that the field confers on the multitude of legal actors it recognizes as states. 60 International legal rules determine which collectivities are entitled to exercise sovereign authority and over which territory and people such authority operates. In so doing, international law effectively performs an ongoing distribution of sovereignty among certain collectivities throughout the world.

Treaties, like the Treaty of Lausanne, possess the capacity to modify the distribution of sovereign power by transferring sovereignty over territory and people from one sovereign actor to another. In the process, they create majorities and minorities, such as those created and validated by the Treaty of Lausanne in Greece and Turkey. Minorities exist in relation to majorities, and majorities exist because international law distributes sovereign power over territory and people to certain collectivities and not to others. 61 Understanding minority rights claims

58 For the view that the right of self-determination validates a claim of sovereign power where a people has experienced severe and ongoing injustices such as colonial rule or alien subjugation, domination, or exploitation, or where it is denied any meaningful exercise of its right to self-determination within the state of which it forms a part, see Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

59 See, e.g., The Montevideo Convention on Rights and Duties of States, art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 (which lists the following criteria of statehood: a permanent population, a defined territory, a system of government, and capacity to enter into relations with other states. Although recognition by other states is not a legal precondition of acquiring statehood, it does affect the capacity of the collectivity to possess the attributes of statehood required by international law).


61 Compare Hans Kelsen:

[T]he concept of a majority assumes by definition the existence of a minority, and thus the right of the majority presupposes the right of the minority to exist. From this arises perhaps not the necessity, but certainly the possibility, of protecting the minority from the majority. This protection of minorities is the essential function of the so-called basic rights and rights of freedom, or human and civil rights guaranteed by all modern constitutions of parliamentary democracies.

in distributive terms reveals that their normative status rests not on whether they protect universal human values but whether they promote a just distribution of sovereign power in international law. Seen in this light, minority rights serve as instruments that can mitigate injustices associated with the kinds of recalibrations of sovereign power embodied in the Treaty of Lausanne that international law treats as possessing international legal force.

This account focuses the normative spotlight not on the legitimacy of minority rights but on the legitimacy of the boundaries of the broader political community in which—and against which—such rights are asserted. At issue is the legitimacy of the assertion of state sovereignty over people who possess little affiliation with the broader political community in which they find themselves. Whether minority rights merit international legal protection turns on the legitimacy of the boundaries of the political community of which the state is a formal manifestation. To what extent did the minority community in question participate in the establishment of the majority political community in which it finds itself? What modes of acquisition of territorial authority—discovery, conquest, settlement, adverse possession—are consistent with ideals associated with a just international legal order? Did the minority community accede to the norms by which sovereignty vested in its parent state? Were the preexisting entitlements of the minority community respected in the process by which the state assumed sovereign authority over its members?

Viewing international minority rights this way does not end normative inquiry into their legitimacy. Whether the Treaty of Lausanne was a just or unjust recalibration of sovereign power is obviously critical to determining the justice of requiring Turkey, say, to respect certain differentiated rights of the Greek minority under the sway of the sovereign power of the Turkish state. Nor does this view necessarily determine the content of the rights due to any given minority. But it does direct judgment on these questions to identifiable moments in the legal organization and reorganization of international political reality, and it asks whether the legitimacy of an assertion of sovereign power rests on the extent to which the state in question respects the rights of national minorities in its midst.

Focusing on injustices produced by the structure and operation of the international legal order—as opposed to abstract conceptions of universal right—also yields a more refined approach to minority protection. The standard universal account of international human rights law fails to address the deep diversity of claims by minority communities that assert a certain measure of autonomy or protection from the assimilative tendencies of the broader political community in which they find themselves. Some of these communities share an ethnic

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62 Cf. Kymlicka, supra note 53, at 202 (arguing that article 27 embodies a generic approach to minority protection, articulating “a universal and portable cultural right that applies to all individuals”). For Kymlicka, European minority protection is abandoning a “targeted” approach to national minorities and shifting to a more generic strategy. Id. at 205–231. See also Will Kymlicka, The Internationalization of Minority Rights, 6 INT’L J. CONST. L. (I•CON) 1 (2008).
kinship with a state other than the one in which they are located. Some define themselves in terms of religious identities not shared by the majority of members of the larger political community. Some share common cultural traditions that they regard as defining features of their collective identities. Some, like indigenous peoples in the Americas and elsewhere, claim ancestral relations to territories that long predate the establishment of states in which they are embedded. The standard account forces us to inquire into what all of these diverse claims might share and then to determine whether this feature or set of features possesses universal value and, therefore, merits international protection.  

A distributive account of international minority rights, in contrast, facilitates differentiation among minority claims by locating their international legal significance in relation to the legitimacy of the sovereign power they challenge, which, in turn, rests on the way international law brings legal order to global politics. International law does so by treating sovereignty as a legal entitlement that it distributes among the legal actors it recognizes as states. National minority rights speak to the adverse effects of recalibrating the distribution of sovereignty as exemplified by the Treaty of Lausanne. Claims based on religious and cultural difference challenge the limits of sovereign power more than its sources. International indigenous rights speak to the distributional consequences of an international legal validation of morally suspect colonization projects. Instead of seeking commonalities among minorities from the vast diversity of their religious, cultural, linguistic, and national identities, this account distinguishes among the myriad claims for minority protection vying for international legal recognition, by specifying their legal relevance in terms that relate to the structure and operation of international law. Differentiation along such lines does not resolve the contentious ethical, political, and legal issues associated with international minority rights. But it clarifies why some minority claims and not others might merit international legal protection.

5.

How might this account of international minority rights participate in current debates on the relationship between constitutional and international law? One perspective in these debates is that international and transnational forms of governance are assuming more and more of the constitutional powers and functions traditionally performed by domestic legal orders. From this perspective,

63 Contemporary legal and political theory typically identifies cultural difference to be the unifying feature of these kinds of diverse political claims and then either defends or critiques its protection. See Courtney Jung, Why Liberals Should Value ‘Identity Politics,’ ¶ 135 DAEDALUS 32 (2006).

64 See, e.g., Louis Henkin, Human Rights and State “Sovereignty,” 25 GA. J. INT’L & COMP. L. 31 (1995–1996) (“a half century of human rights has been the cause, or the result, or both, of radical change in the international state system, in the character of international law, and its relation to national constitutions and to the spread of constitutionalism”).
globalization could be said to have had a healthy effect on the international protection of human rights, perhaps at the expense of domestic legal regimes.64 An opposing perspective, however, suggests that globalization is transforming international law into an epiphenomenal system of legal ordering.65 From this perspective, to the extent that we can speak of international law, we can only speak of it as delegated domestic legal authority, legally binding on states only to the extent that they consent to be bound by its terms.

This article has argued that international human rights law vests minority interests with international legal significance for reasons that have very little to do with why they might merit domestic legal protection. If this is the case, then neither of the above perspectives adequately captures the normative dimensions of international law. The first fails to grasp that the reasons why minority rights matter in international law have to do with the structure and operation of the international legal order itself, not because the demands of liberal constitutionalism are better met at the international level. The second would construe international minority rights as it construes all international legal entitlements, as the outcome of delegated domestic authority.66 But this construction is not how international law comprehends the legality of minority rights. Treating international minority rights in epiphenomenal terms assumes away the very legal autonomy they represent.

65 There are those, of course, who believe that international law has always been an epiphenomenal legal system. See, e.g., John J. Mearsheimer, The False Promise of International Institutions, 19 INT’L SECURITY 5(1994/95).