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# Responding to Ethnic and Religious Conflict in the New Arab Order: The Promise and Limits of Rights

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# RESPONDING TO ETHNIC AND RELIGIOUS CONFLICT IN THE EMERGING ARAB ORDER:

# THE PROMISE AND LIMITS OF RIGHTS

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## ABSTRACT

*Intercommunal conflict has marred the political transitions unfolding in a number of states in the Middle East, raising questions about the status and protection of ethnic and religious minorities in the region's evolving political order. In view of the transnational character and regional scale of the problem, this Article considers the efficacy of one potential regional response—the development of an Arab convention on minority rights. The Article begins by describing three types of "minority problems" that have been sources of conflict in the Middle East: (1) religious minorities and Islamist majoritarianism; (2) nationalist minorities and territorial disputes; and (3) politically dominant minorities and survivalist minoritarianism. The Article then sketches the international legal context, focusing in particular on the Council of Europe's Framework Convention on National Minorities. Turning back to the Middle East, the Article concludes that while a treaty exercise of that kind is probably premature, an effort to begin building consensus about regional norms would be a valuable means of promoting*

*discourse about the contours of local norms and their harmonization—both with one another and with evolving international human rights standards.*

## INTRODUCTION

In October 2011, one week after the Egyptian army killed more than two dozen unarmed Coptic protestors in front of the Maspero State Television and Radio Building in Cairo, New York Times columnist Ross Douthat reminded his readers that the Copts of Egypt are among the oldest Christian communities on earth; he then added, ominously, "[b]ut they may not survive the Arab Spring."[1] Douthat went on to suggest that the Maspero incident was "a familiar story in the Middle East, where any sort of popular sovereignty has tended to unleash the furies and drive minorities into exile."[2] Observing that minorities in the Arab world were not alone in becoming the "collateral damage" of democratization, he submitted that "the causes of democracy and international peace have often been intimately tied to ethnic cleansing: both have gained ground not in spite of mass migrations and mass

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[1] Ross Douthat, Op-Ed., *Democracy's Collateral Damage*, N.Y. TIMES (Oct. 15, 2011), http://www.nytimes.com/2011/10/16/opinion/sunday/douthat-democracys-collateral-damage.html.

[2] *Id.*

murders, but because of them."[3] And, while Douthat acknowledged that "[a] democratic Middle East would be a remarkable triumph for humanity," he asked, "is it worth decades of sectarian violence and ethnic cleansing?"[4]

Douthat's account—of ballot box as Pandora's box and popular sovereignty as mob rule—is not without historical support.[5] But it breezes over the range of factors that have been found to inflame group tensions during political transitions, including intervention by foreign powers, economic inequality, dysfunctional governmental institutions, geopolitical rivalries, and the manipulation of identity politics by opportunistic leaders.[6] Moreover, the choice that Douthat sets out for the Middle East—between authoritarianism and ethno-religious violence—offers policymakers precious few options for responding to the transformations in the region. Attempting to put the genie back into the bottle by undertaking to reverse or prevent further political transitions is likely to be as ineffective as it is unpalatable. Indeed, transitions that stall before democracy is achieved are especially likely to lead to international war.[7] The critical question, then, is not whether democratization spurs violent intercommunal conflict but, instead, what can be done to halt and prevent such conflict as transitions of varying character and uneven pace unfold across the Middle East.

It remains far from clear what kinds of systems states in transition will put in place to manage diversity within their borders—how they will distribute decision-making between central and regional governments, which communal and individual rights they will extend to ethnic and religious minorities, and what kinds of mechanisms they will establish to protect minority groups from majoritarian abuse? Questions of constitutional design are already a focus of considerable attention and debate.[8] However, in view

[3] *Id.*

[4] *Id.*

[5] As noted in a recent overview of the social science literature, "the link between democratization and civil war has been substantiated empirically." Judith Vorrath & Lutz F. Krebs, *Democratization and Conflict in Ethnically Divided Societies*, 1 LIVING REVS. IN DEMOCRACY 1, 6 (2009), *available at* http://www.livingreviews.org/lrd-2009-1.

[6] *See id.* at 1–8.

[7] *See* EDWARD D. MANSFIELD & JACK SNYDER, ELECTING TO FIGHT: WHY EMERGING DEMOCRACIES GO TO WAR 70–71 (Kindle ed. 2005).

[8] *See, e.g.,* Marc Lynch, *The Battle for Egypt's Constitution*, FOREIGN POL'Y (Jan. 11, 2013), http://lynch.foreignpolicy.com/posts/2013/01/11/the_battle_for_egypts_constitution; *Egypt and Tunisia: New Constitutions Take Shape*, THE ECONOMIST (Oct. 27, 2012), *available at* http://www.economist.com/news/middle-east-and-africa/21565268-revolutionaries-argue-over-how-they-will-rule-and-what-rights-give-citizens-new; Duncan Pickard, *Libya's Constitution Controversy*, FOREIGN POL'Y (Sept. 5, 2012),

of the regional scale of the transformations in progress and the transnational character of identity politics in the Middle East, it is also worth considering what steps can and should be taken at the *regional* level to address intercommunal conflict. Can regional mechanisms or institutions play a role in reducing conflict (or, at least, reducing the stakes of conflict) between ethnic or religious groups within states? Can an institution like the League of Arab States be transformed from the talk-shop for autocratic heads of state it was for decades into a forum through which the diverse peoples of the region can be protected and represented? On what normative foundations might an enterprise of that kind be built?

This Article focuses on the last of these questions, considering in particular whether the states of the Middle East should aim to develop a convention on the status and protection of minorities of the kind adopted more than a decade ago by the Council of Europe.[9] Part I offers some factual context, describing three types of "minority problems"[10] that have been potent sources of conflict in the region: (1) religious minorities and Islamist majoritarianism; (2) nationalist minorities and territorial disputes; and (3) politically dominant minorities and survivalist minoritarianism. These three dynamics, I submit, highlight not only the need for concerted regional action to prevent intercommunal conflict but also some of the challenges likely to attend such an effort. Part II sketches the international legal context. While states long ago recognized that intercommunal conflict within their borders had the potential to lead to transnational conflict across them, international law reflects continuing differences among states about how to prevent tensions between ethnic and religious groups from erupting into threats to international peace. In Europe, whose experience has had an outsized influence on the development of this area of international law,[11] regional institutions have undertaken to prevent conflict by erecting a normative framework for minority protection around the twin pillars of individual rights and an expansive conception of freedom of association, while reserving to states broad latitude for developing domestic strategies for

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http://mideast.foreignpolicy.com/posts/2012/09/05/libyas_constitution_controversy.

[9] *See* Framework Convention for the Protection of National Minorities pmbl., Feb. 1, 1995, E.T.S. No. 157 [hereinafter Framework Convention].

[10] For a discussion of some of the problems with the expression "minority problems," see Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1299 (1982).

[11] *See* Li-ann Thio, *Battling Balkanization: Regional Approaches Toward Minority Protection Beyond Europe*, 43 HARV. INT'L L.J. 409, 410 (2002) (describing European influence on development of international minority protection norms).

managing diversity. Part III considers whether a similar regional effort should be undertaken in the Middle East with a view toward building consensus about norms pertaining to the status and protection of minorities. I submit that such an effort would be valuable, particularly in view of the need for greater development of local norms and for their harmonization with one another and with established international human rights standards. I submit, however, that a treaty exercise is premature and is unlikely to yield results on the ground unless it is complemented by a broader effort to address the political and strategic dynamics that make states reluctant to commit to the protection of sub-national groups and that undermine the credibility of commitments that they do make.

## I.  DYNAMICS OF INTERCOMMUNAL CONFLICT IN THE MIDDLE EAST

The euphoria that accompanied the first months of the Arab Spring has been tempered by concerns about the eruption of intercommunal conflict in a number of states and, more broadly, about the status and protection of ethnic and religious minorities in the region's evolving political order.[12] The civil war in Syria has taken on increasingly sectarian dimensions,[13] stoking fears that the fall of the Asad regime will lead to reprisals against Alawis and institutionalized discrimination against Christians,[14] as well as increasing Kurdish irredentism.[15] The war has already invited the involvement of neighbors,[16] and its increasingly transnational character raises concerns that the conflict will not only escalate further but also spread to neighboring Lebanon and Iraq, unsettling power-sharing arrangements in those sharply

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[12] For an especially thoughtful, if pessimistic, assessment of recent developments, see Hussein Agha & Robert Malley, *This Is Not a Revolution*, N.Y. REV. BOOKS (Nov. 8, 2012), *available at* http://www.nybooks.com/articles/archives/2012/nov/08/not-revolution.

[13] *See* Lindsay Gifford, *Syria's Tangled Roots of Resentment*, SADA (Oct. 11, 2012), http://carnegieendowment.org/sada/2012/10/11/syria-s-tangled-roots-of-resentment/e0i1.

[14] *See id.; see also* Charles Glass, *Syria: The Citadel & the War*, N.Y. REV. BOOKS (June 7, 2012), *available at* http://www.nybooks.com/articles/archives/2012/jun/07/syria-citadel-war/ (describing fears of Syria's Christian communities).

[15] *See* Ofra Bengio, Op-Ed., *Kurdistan Reaches Toward the Sea*, HA'ARETZ (Aug. 3, 2012), http://www.haaretz.com/weekend/weekend-opinions/kurdistan-reaches-toward-the-sea-1.455675.

[16] David Hearst, Op-Ed., *Syria and the Battle for Regional Control*, THE GUARDIAN (Oct. 16, 2012), http://www.guardian.co.uk/commentisfree/2012/oct/16/syria-battle-regional-control; Tim Arango, *Syrian War's Spillover Threatens a Fragile Iraq*, N.Y. TIMES (Sept. 24, 2012), http://www.nytimes.com/2012/09/25/world/middleeast/iraq-faces-new-perils-from-syrias-civil-war.html.

divided states.[17]  Over the last two years, tensions between Sunni and Shi'i communities have also grown more acute in the states of the Gulf, bolstered by the sectarian violence elsewhere and by the brutal suppression of budding, largely Shi'i protest movements by the Sunni regimes in Bahrain and Saudi Arabia.[18]  Libya's Tawerghan population has suffered abuse and forced resettlement as collective punishment for their support for the Gaddafi regime,[19] and the country's Amazigh population continues to struggle for political and linguistic rights, notwithstanding their opposition to the Gaddafi regime.[20]  In Egypt, moreover, Copts have expressed alarm about their marginalization from a revolution that initially embraced them as equal partners but has become increasingly embedded in a broader Islamizing trend, fearing that they will become more vulnerable to attacks and discrimination by both state and non-state actors.[21]

The transnational dimensions of these problems point to the need for concerted regional action to address them.  Such action, however, must be informed by an appreciation of the varying ways in which ethnic or religious difference has become a point of tension.  With that end in mind, sketched below are three types of minority problems that have proved to be significant sources of conflict in the Middle East.

*a. Religious Minorities and Islamist Majoritarianism*

Democratization in the Middle East has become increasingly intertwined with Islamization.  The electoral success of Islamist movements in a number of states has prompted them "to embrace democratic mechanisms and politics more generally with wholehearted enthusiasm" and to show "increasingly detailed interest in and commitment to strengthening

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[17]  *See* Agha & Malley, *supra* note 12.

[18]  *See* CHATHAM HOUSE, KUWAIT STUDY GROUP: IDENTITY, CITIZENSHIP, AND SECTARIANISM IN THE GCC 2–6 (2012), http://www.chathamhouse.org/publications/papers/view/183415; Toby Matthiesen; *Saudi Arabia's Shiite Escalation*, FOREIGN POL'Y (July 10, 2012), http://mideast.foreignpolicy.com/posts/2012/07/10/sable_rattling_in_the_gulf.

[19]  *See* Doreen Khoury, *Middle East and North Africa*, *in* STATE OF THE WORLD'S MINORITIES AND INDIGENOUS PEOPLES 2012, at 193, 205 (Minority Rts. Group ed., 2012); Kim Sengupta, *The Persecution of Tawerghans: Libya's Heavy Price for Freedom*, URUKNET.INFO (July 18, 2012), http://www.uruknet.info/?p=89672.

[20]  *See* Khoury, *supra* note 19, at 206.

[21]  *See* Sarah El Deeb, *Thousands March to Mark Killing of Egypt Copts*, ASSOCIATED PRESS (Oct. 9, 2012), http://bigstory.ap.org/article/rights-group-killings-egypts-copts-unresolved.

majoritarian mechanisms."[22] Their success, however, has been greeted with apprehension by both secular elites[23] and members of religious minorities, whose concerns about the consequences of Islamist majoritarianism have yielded ambivalence in some quarters about the merits of democratization itself.[24] What is perceived to be at stake is not only the extent to which new regimes will tolerate and have the capacity to prevent violations of individual and communal rights, but also how those rights will be defined in a political order dominated by an Islamist majority.

The predicament of Egypt's Copts exemplifies this dynamic. Numbering between five and eighteen million—their population itself a point of contention[25]—Copts have occupied "a paradoxical place in the Egyptian national imagination" since well before the revolution of January 25, 2011.[26] As individuals and as a community, Copts have long faced de jure and de facto discrimination in Egypt, particularly with respect to participation and employment in the public sector and the issuance of building permits for churches.[27] In addition, as intercommunal violence has surged in Upper Egypt since the 1980s, attacks on Copts have often gone unpunished.[28]

Copts have responded to this predicament in divergent ways. Even as some pressed for more pointed criticism of the Mubarak regime's human

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[22] Nathan J. Brown, *Changes in the Domestic Order, in* THE EMERGING ORDER IN THE MIDDLE EAST, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, POL'Y OUTLOOK 2, 4 (May 2012), http://carnegieendowment.org/files/middle_east_order1.pdf.

[23] *See* Marina Ottaway, *The Consequences of the Internal Power Shift, in* THE EMERGING ORDER IN THE MIDDLE EAST, *supra* note 22, at 6.

[24] *See* Charles Glass, *Syria: The Citadel & the War,* N.Y. REV. BOOKS (June 7, 2012), *available at* http://www.nybooks.com/articles/archives/2012/jun/07/syria-citadel-war/; Said Shehata, *Copts Between Shafiq & Morsi: An Easy Choice,* AHRAM ONLINE (June 12, 2012), http://english.ahram.org.eg/NewsContent/4/0/44639/Opinion/Copts-between-Shafiq-and-Morsi-an-easy-choice.aspx.

[25] Disputes regarding the size of Egypt's Coptic population are longstanding. *See* Paul Sedra, *Class Cleavages and Ethnic Conflict: Coptic Christian Communities in Modern Egyptian Politics,* 10 ISLAM & CHRISTIAN-MUSLIM REL. 219, 233 n.1 (1999). Egypt's official statistics agency's recently estimated the Coptic population to be 5.13 million, a figure disputed by the Coptic Church, which estimates the population to be 15 to 18 million. *See Egyptian Copts Reject Population Estimate,* AHRAM ONLINE (Sept. 26, 2012), http://english.ahram.org.eg/NewsContent/1/64/53839/Egypt/Politics-/Egyptian-Copts-reject-population-estimate.aspx.

[26] Avi Ascher-Shapiro, *Egypt's Copts Face an Uncertain Political Future,* MUFTAH (May 21, 2012), http://muftah.org/egypt%E2%80%99s-copts-face-uncertain-political-future/.

[27] *See Sedra, supra* note 25, at 222.

[28] *Id.* at 231.

rights record and sought recognition and protection of the community as a minority,[29] the Coptic Orthodox Church for many years staked out an accommodation with the regime. On the one hand, the Church "embrace[d] the rhetoric of national unity,"[30] rejecting the characterization of Copts as a minority and emphasizing their place as "part and parcel of the Egyptian nation."[31]  On the other hand, it maintained a clientelist relationship with the regime that has been aptly labeled a "millet partnership."[32]  Pursuant to this arrangement, the regime rewarded the Patriarch's cooperation and loyalty with resources, such as church construction permits and political appointments, and the Patriarch used these resources to consolidate his authority within the community.[33]  The regime, for its part, attempted alternately to present itself as the Copts' best protection against the dual threats of chaos and Islamism[34] and to distance itself from them in an effort to avoid appearing to be in the thrall of Christian—and, by implication, Western—interests.[35]

The Egyptian revolution has altered these dynamics in complex—and, to some extent, contradictory—ways.  Although the Coptic Orthodox Church urged its members not to get involved in the demonstrations that brought down the Mubarak regime,[36] the protests drew many Copts to Tahrir Square, uniting Muslims and Christians in a euphoric moment that seemed to herald "the end of sectarianism in Egypt."[37]  That perception of unity, however, proved short-lived.  The government's failure to protect Copts from subsequent attacks by thugs, soldiers, and Islamist hardliners, or to prosecute their perpetrators, has been a major source of Coptic disaffection with the revolution.[38]

A number of other developments have also raised concerns among Copts and others about Islamist majoritarianism in post-revolutionary Egypt:

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[29]  *Id.* at 231–32.

[30]  *Id.* at 227.

[31]  Karim El-Gawhary, *Copts in the "Egyptian Fabric,"* 200 MIDDLE E. REP. 21, 21 (1996).

[32]  *Sedra, supra* note 25, at 227.

[33]  *See id.* at 227–28.

[34]  *See* Yasmine Fathi, *Egypt's Copts: A Cry of Pain,* AHRAM ONLINE (Oct. 14, 2011), http://english.ahram.org.eg/NewsContent/1/0/24107/Egypt/0/Egypts-Copts-A-cry-of-pain.aspx.

[35]  *El-Gawhary, supra* note 31, at 22.

[36]  *Ascher-Shapiro, supra* note 26.

[37]  Mariz Tadros, *Sectarianism and its Discontents in Post-Mubarak Egypt,* 259 MIDDLE E. REP. 26, 27 (2011).

[38]  *See* El Deeb, *supra* note 21.

the Muslim Brotherhood's opposition to a 2011 draft law on the construction of religious buildings that would have applied the same rules to churches as to mosques;[39] its decision to field a candidate in the 2012 presidential elections, despite previous assurances that it would not;[40] the broad public support for the constitutionalization of a law penalizing blasphemy that has been enforced primarily against religious minorities;[41] disputes about the extent to which Islamic law permits non-Muslims to vie for leadership positions in the Egyptian state;[42] Islamist domination of the constituent assembly that drafted Egypt's new constitution;[43] and, perhaps most of all, the role assigned to *shari'a* in the constitution passed by referendum on December 26, 2012.[44] With respect to the constitutionalization of *shari'a*, what has elicited the most pointed opposition is not a clause that provides that the "[p]rinciples of Islamic Sharia are the principal source of legislation,"[45] which was borrowed from the 1971 constitution. Instead, it is two new clauses, the first stating that scholars at Al Azhar "are to be consulted regarding matters pertaining to Islamic law"[46] and the second elaborating upon the meaning of "principles of Islamic Sharia."[47] Although the substantive implications of these provisions are far from clear,[48] critics have expressed concern that they leave open the possibility that restrictive

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[39] Khoury, *supra* note 19, at 196.

[40] *Profile: Egypt's Muslim Brotherhood*, BBC (June 26, 2012), http://www.bbc.co.uk/news/world-middle-east-12313405.

[41] *See* Kristen Chick, *After Film, Push Strengthens for Blasphemy Clause in Egypt's Constitution*, CHRISTIAN SCI. MONITOR (Sept. 17, 2012), http://www.csmonitor.com/World/Middle-East/2012/0916/After-film-push-strengthens-for-blasphemy-clause-in-Egypt-s-constitution.

[42] *See Profile: Egypt's Muslim Brotherhood*, *supra* note 40 (discussing disputes with Muslim Brotherhood over whether non-Muslim can be president or prime minister).

[43] *See Egyptian Copts Abandon Constitution Talks, Say 'Pointless' to Take Part*, AL ARABIYA NEWS (Apr. 2, 2012), http://english.alarabiya.net/articles/2012/04/02/204746.html.

[44] *See* John Pontifex, *Coptic Leaders Say Egypt's Constitution 'Prepares the Way for Islamic Caliphate,'* CATHOLICHERALD.CO.UK (Jan. 7, 2013), http://www.catholicherald.co.uk/news/2013/01/07/coptic-leader-says-egypts-constitution-prepares-the-way-for-islamic-caliphate/.

[45] CONSTITUTION OF THE ARAB REPUBLIC EGYPT, art. 2, *available at* http://muftah.org/english-translation-of-egypts-new-draft-constitution/.

[46] *Id.* art. 4.

[47] *Id.* art. 219.

[48] For a nuanced analysis, see Clark Lombardi & Nathan J. Brown, *Islam in Egypt's New Constitution*, FOREIGN POL'Y (Dec. 13, 2012), *available at* http://mideast.foreignpolicy.com/posts/2012/12/13/islam_in_egypts_new_constitution.

interpretations of Islamic law will be imposed on Copts and other Egyptians. One Coptic Catholic bishop worries that the constitution "paves the way for an Islamic caliphate."[49]

Against the backdrop of continuing political change in Egypt,. it is difficult to ascertain how Copts will fare in the emerging legal order. Nathan Brown points out that as Islamists have moved into government, they "have accepted what they see as the burdens of leadership and have adopted positions dictated more by economic and international exigencies than by their interpretation of religious texts."[50] Similarly, Andrew Klager predicts that democratic competition will yield better protection for Egypt's religious minorities:

> [W]ith such a narrow margin of victory and a relatively low percentage of supporters, the Muslim Brotherhood's Freedom and Justice Party is showing signs of awareness, accompanied by the commensurate strategizing, that . . . opposition groups supported by the original student revolutionaries, youth movements, leftist, liberals, and secular Muslims will have more time and motivation . . . to coalesce as a united front against the Islamist option; this, no doubt, means that the Freedom and Justice Party, and other Islamist parties . . . will be forced to enshrine the protection of the Coptic minority in practical ways to expropriate one of the policy priorities that make secular liberals unique.[51]

But though President Morsi initially stressed "that he would never allow anyone to attack public or private property or terrorise any Egyptian citizen," and his government established local reconciliation committees to respond to intercommunal strife,[52] Copts worry that such committees will simply entrench local power dynamics that favor Muslim majorities.[53] Observing that "[n]ational unity is strongest at times when citizenship is mediated by a common Egyptian identity and weakest when citizenship is mediated by

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[49] Pontifex, *supra* note 44 (internal quotation marks omitted).

[50] Brown, *supra* note 22, at 4.

[51] Andrew Klager, *New Political Climate Could Provide Hope for Copts*, EGYPT INDEP. (July 15, 2012), http://www.egyptindependent.com/opinion/new-political-climate-could-provide-hope-copts.

[52] *See* Hatem Maher, *Morsi Wants Sectarian Clashes Culprits Punished; Church Calls for End to Violence Against Copts*, AHRAM ONLINE (Aug. 3, 2012), http://english.ahram.org.eg/NewsContent/1/64/49409/Egypt/Politics-/Morsi-wants-sectarian-clashes-culprits-punished;-C.aspx.

[53] *See* Tadros, *supra* note 37, at 31.

religion,"[54] Mariz Tadroz argues that "[w]hat is needed is the political will to administer justice in compliance with universal rights, rather than power hierarchies and normative values on the ground."[55] Moreover, after popular antagonism to the Brotherhood exploded in breadth and ferocity in the context of battles over the new constitution and presidential decrees in December 2012, political observers expressed waning confidence in Egyptian Islamists' political acumen and versatility.[56]

As Egypt's new political order takes shape, it also remains to be seen to what extent Copts will turn to the Coptic Orthodox Church either to mediate between the government and the community or to manage the community's "internal" affairs. The late Coptic Pope's refusal in 2011 to support an international investigation of the Maspero incident seems to have been driven by the fear that Copts would be seen as undermining Egyptian national unity.[57] However, many Copts believe the late patriarch's non-confrontational approach has been ineffective, and some have advocated that the Church abandon a political role altogether.[58] In addition, the Church's conservative positions regarding a number of social issues, particularly divorce, and its longstanding marginalization of middle class Copts from Church governance have estranged some members,[59] with many embracing the secular state as the best vehicle for protecting their rights. The Church itself also refuses to accept Islamic law as a framework for protecting Coptic rights. A senior bishop recently expressed concern that "Islamic Sharia law does not grant non-Muslims their rights, and someone could interpret the Sharia in such a way that it imposes special taxes or punishments."[60] At the same time, the Church has resisted efforts by Copts to circumvent its authority over matters of personal status through use of the secular court system.[61]

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[54] *Id.* at 27.

[55] *Id.*

[56] *See, e.g.*, Lynch, *supra* note 8.

[57] *Pope Shenouda Rejects International Investigation Into Maspero Violence*, EGYPT INDEP. (Oct. 21, 2011), http://www.egyptindependent.com/news/pope-shenouda-rejects-international-investigation-maspero-violence.

[58] Safaa Abdoun, *Political Role of Pope Shenouda Overshadows the Selection of His Successor*, DAILY NEWS EGYPT (Mar. 27, 2012), newsegypt.com/2012/03/27/political-role-of-pope-shenouda-overshadows-the-selection-of-his-successor/.

[59] *See Sedra*, *supra* note 25, at 228–33.

[60] *See* Michael Adel, *Living Through a Political Contradiction*, AL AHRAM WKLY ONLINE (Oct. 4-10, 2012), http://weekly.ahram.org.eg/2012/1117/eg19.htm.

[61] Emad ElSaed & Amr Bayoumi, *Court Ruling on Coptic Intermarriage Overturned*,

As this brief discussion indicates, the cause of Coptic rights is riddled with strategic dilemmas. What kinds of rights should be fought for? Is the aim autonomy in addition to equality? How can the community's rights be defined and safeguarded without sacrificing the liberties of individual members? In the face of popular support for greater Islamization of law and government,[62] is pressing for a secular public sphere the most effective means of advancing the rights of religious minorities? To what extent, and in what spheres, does Islamic law offer a viable alternative or complementary framework for minority protection? And in a political climate in which national and religious identity have grown increasingly intertwined, how can religious minorities act to preserve their own distinctiveness or to promote universal rights without inviting accusations that they are subversive agents of foreign interests?

These dilemmas are not, of course, unique to the Copts of Egypt. Christians in other Muslim-majority countries have grappled with similar questions. In Syria, Christians have hesitated to throw in their lot with opponents of the Asad regime, fearing that the regime's fall will augur the end of Syria's secular state and further decline into chaos that will leave them vulnerable to extremist elements.[63] Christians in Iraq have already fled in large numbers from urban areas—and, when possible, the country—in response to intimidation and attacks, particularly after a 2010 massacre of churchgoers in Baghdad by an al Qaeda affiliate.[64] In addition, Palestinian Christians complain about religious intimidation and the Islamization of public spaces in Hamas-ruled Gaza,[65] even while emphasizing that Israel's continuing military occupation of the Palestinian territories is the primary

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EGYPT INDEP. (July 7, 2010), http://www.egyptindependent.com/news/court-ruling-coptic-remarriage-overturned.

[62] *See* PEW RESEARCH CENTER GLOBAL ATTITUDES PROJECT, MOST MUSLIMS WANT DEMOCRACY, PERSONAL FREEDOMS, AND ISLAM IN POLITICAL LIFE 2 (2012), *available at* http://www.pewglobal.org/2012/07/10/most-muslims-want-democracy-personal-freedoms-and-islam-in-political-life/.

[63] *See* Glass, *supra* note 24, at 6.

[64] *See* Jack Healy, *Exodus from North Signals Iraqi Christians' Slow Decline*, N.Y. TIMES (Mar. 10, 2012), http://www.nytimes.com/2012/03/11/world/middleeast/exodus-from-north-signals-iraqi-christians-decline.html?pagewanted=all; Anthony Shadid, *Church Attack Seen as Strike at Iraq's Core*, N.Y. TIMES (Nov. 1, 2010), http://www.nytimes.com/2010/11/02/world/middleeast/02iraq.html?pagewanted=all.

[65] *See* Phoebe Greenwood, *Gaza Christians Long for Days Before Hamas Cancelled Christmas*, GUARDIAN (Dec. 23, 2011), http://www.guardian.co.uk/world/2011/dec/23/gaza-christians-hamas-cancelled-christmas.

reason for Christian emigration from the area.[66]  Islamist majoritarianism, moreover, presents even more pronounced risks to religious minorities denied the status accorded to "Peoples of the Book" (*ahl al Kitab*) under prevailing interpretations of Islamic law, such as Bahá'ís, who face de jure discrimination and persecution in Egypt and Iran.[67]

The region's political transformations also present strategic dilemmas to minority Muslim sects and orders.  Although the longstanding persecution, discrimination, and economic marginalization suffered by Shi'a in Saudi Arabia[68] has prompted renewed youth protests in the country's largely Shi'i Eastern Province,[69] Shi'i leaders have tempered demands for political and institutional reform, "conclud[ing] that their community's security is intimately bound up with the survival of a regime that alone can mediate between various and often competing groups while keeping the most extreme elements at bay."[70]  Similarly, attacks on Sufi shrines and religious leaders in Tunisia, Egypt and Libya by hardline Salafists have raised questions about the capacity and inclination of new governments to protect Sufis, who have aligned themselves with liberals or with religious institutions opposed to the Islamist agenda. [71]

In all of these contexts, what is at stake is not only states' protection of the rights of religious minorities—rights to security, freedom of conscience, and unencumbered religious practice—but also how governments will engage with broader questions of national identity in an Islamizing political order.  As discussed in the next Part, questions of national identity loom similarly large over disputes pertaining to the rights of nationalist minorities in the region.

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[66]  *See* Isabel Kershner, *Palestinian Christians Look Back on a Year of Troubles*, N.Y. TIMES           (Mar.                   11,                    2007), http://www.nytimes.com/2007/03/11/world/middleeast/11christians.html?_r=0.

[67]  *See* Khoury, *supra* note 19, at 196-98.

[68]  *See* Madawi al-Rasheed & Loulouwa al-Rasheed, *The Politics of Encapsulation: Saudi Policy Toward Tribal and Religious Opposition*, 32 MIDDLE E. STUD. 96, 110 (1996).

[69]  *Saudi Arabia: Shiite Protests Kill at Least 4*, HUFFINGTON POST (Nov. 24, 2011), http://www.huffingtonpost.com/2011/11/24/saudi-arabia-shiite-protests_n_1111950.html.

[70]  INTERNATIONAL CRISIS GROUP, THE SHIITE QUESTION IN SAUDI ARABIA 5 (2005), *available       at*     http://www.crisisgroup.org/en/regions/middle-east-north-africa/iraq-iran-gulf/saudi-arabia/045-the-shiite-question-in-saudi-arabia.aspx.

[71]  *See* JONATHAN BROWN, SALAFIS AND SUFIS IN EGYPT, THE CARNEGIE PAPERS (2011), *available       at*     http://carnegieendowment.org/2011/12/20/salafis-and-sufis-in-egypt/8kfk; Frederic Wehrey, *Libya's Salafists in Search of Relevance*, DAILY STAR (Sept. 14, 2012), http://www.dailystar.com.lb/Opinion/Commentary/2012/Sep-14/187812-libyas-salafists-in-search-of-relevance.ashx#axzz2AVKZHRRw.

*b. Nationalist Minorities and Territorial Disputes*

International borders in the Middle East were not, for the most part, drawn with a view toward facilitating self-determination for the peoples of the region.[72] The lack of alignment between the territorial boundaries of states and the geographic distribution of ethnic and religious groups has posed a challenge to nation building to which regimes have responded in a range of ways. They have attempted to link national identity to more longstanding or resonant frameworks of affiliation, such as Arabism[73] or Islam,[74] in the process excluding certain groups from the definition of national community.[75] They have undertaken to repress the expression of alternative sources of identity through language[76] or religious practice.[77] They have even attempted to eliminate competing identities by using ethnic cleansing or genocide to increase homogeneity within their borders.[78] As

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[72] *See generally* DAVID FROMKIN, A PEACE TO END ALL PEACE : THE FALL OF THE OTTOMAN EMPIRE AND THE CREATION OF THE MODERN MIDDLE EAST 389-415 (1989).

[73] For an insightful discussion of efforts by Arab states to harness and contain Arab nationalism following independence see MICHAEL N. BARNETT, DIALOGUES IN ARAB POLITICS: NEGOTIATIONS IN REGIONAL ORDER 61-68 (1998).

[74] *See, e.g.*, Adeed Dawisha, *"Identity" and Political Survival in Saddam's Iraq*, 53 MIDDLE E. J. 553, 559—62 (1999) (describing previous Iraqi regime's opportunistic appropriation of Islamic identity).

[75] Groups that are Muslim but not Arab include Kurds, Berbers/Amazigh, Turkomans, and Circassians. Groups that are Arab but not Muslim include Christian communities, such as Copts, Maronites, Greek Orthodox, Latins, and Protestants, as well as Baha'is. Groups that are neither Arab nor Muslim include Armenians, Assyrians, and Southern Sudanese tribes. *See* MIDDLE EASTERN MINORITIES AND DIASPORAS 8-9 (Moshe Ma'oz & Gabriel Sheffer eds., 2009). Jews are sometimes considered part of the latter category. *See id.* However, the "ostensible binarism" between the categories of Arab and Jew is worthy of challenge. *See* YEHOUDA A. SHENHAV, THE ARAB JEWS: A POSTCOLONIAL READING OF NATIONALISM, RELIGION, AND ETHNICITY 14 (2006).

[76] *See, e.g.*, Paul Silverstein, *Berbers in France and Algeria*, 26 MIDDLE E. REP. (Fall 1996), *available at* http://www.merip.org/mer/mer200/berbers-france-algeria (describing suppression of Berber language by Boumedienne regime in Algeria).

[77] *See, e.g.*, INTERNATIONAL CRISIS GROUP, *supra* note 70 at 6 (describing constraints on Shi'i religious practice imposed by early Saudi state).

[78] *See generally* Jennifer Jackson Preece, *Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms*, 20 HUM. RTS. QUART. 817, 820 (1998) (arguing that ethnic cleansing is outgrowth of political ideal of "homogeneous nation-state"); *see also* TANER AKÇAM, THE YOUNG TURKS' CRIME AGAINST HUMANITY: THE ARMENIAN GENOCIDE AND ETHNIC CLEANSING IN THE OTTOMAN EMPIRE (2012) (describing Ottoman plan to achieve ethnoreligious homogenization of Anatolia); Ilan Pappé, *The 1948 Ethnic Cleansing of Palestine*, 36 J. PALESTINE STUD. 6, 9 (arguing that

described below, regimes in the Middle East have dealt particularly severely with groups whose identities were perceived not only to be at odds with their concept of the nation, but also to present a threat to the state's territorial integrity or the regime's survival.

The situation of Kurds in Syria is a case in point. Spread primarily across four modern states—Turkey, Iraq, Iran, and Syria—Kurds are estimated to number approximately thirty million, making them the largest ethno-linguistic group in the world without a state of their own.[79] Kurds are predominantly Sunni Muslim; and though some have embraced the national identity of the states where they reside,[80] most do not consider themselves ethnically Arab, Turk, or Persian.[81] Instead, Kurdish nationalists emphasize both their distinctiveness and their rootedness to the land they call Kurdistan:

> The Kurds constitute a single nation [that] has occupied its present habitat for at least three thousand years. They have outlived the rise and fall of many imperial races: Assyrians, Persians, Greeks, Romans, Arabs, Mongols, Turks. They have their own history, language, and culture. Their country has been unjustly partitioned. But they are the original owners, not strangers to be tolerated as minorities with limited concessions granted at the whim of the usurpers.[82]

The "usurpers"—the regimes in Ankara, Baghdad, Tehran, and Damascus—have responded both suspiciously and opportunistically to Kurdish nationalism, harshly suppressing it within their own borders even while providing assistance to Kurdish movements in rival states.[83] And the

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Zionist leaders embraced ethnic cleansing of Palestinians as means of creating geographic space for Jewish nationalism).

[79] J. Michael Kennedy, *Kurds Remain on the Sideline of Syria's Uprising*, N.Y. TIMES (Apr. 17, 2012), http://www.nytimes.com/2012/04/18/world/middleeast/kurds-remain-on-sideline-in-syrias-uprising.html?pagewanted=all.

[80] *See, e.g.,* ROBERT LOWE, THE SYRIAN KURDS: A PEOPLE DISCOVERED, CHATHAM HOUSE MIDDLE EAST PROGRAMME BRIEFING PAPER 06/01, at 2-3 (Jan. 2006), *available at* www.chathamhouse.org/publications/papers/view/108153 (noting that some Kurds in Syria have embraced Arabic language and identity and achieved "positions of power or influence" in the country).

[81] *See Kurdistan – Kurdish Conflict,* GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/world/war/kurdistan.htm (last visited Oct. 15, 2012).

[82] C.J. Edmonds, *Kurdish Nationalism*, 6 J. CONTEMP. HIST. 87, 88 (1971).

[83] For a broad survey of early state reactions to Kurdish nationalism, see generally *id.* at 91-107. For a discussion of more recent transnational dynamics, see LOWE, *supra* note 80, at 4-5; Zvi Bar'el, *Iran is Eyeing a Strategic Partnership with the Kurds,* HA'ARETZ (Aug. 1,

Kurds, themselves, have been beset by disunity,[84] undermining their efforts to secure respect for basic human rights within existing states, much less the achievement of national self-determination.

The roughly 1.75 million Kurds in Syria constitute around 10% of Syria's population[85]—the highest concentration residing in the northeast corner of the country.[86] Kurds initially adapted well to Syrian independence, but "as time went by, in an atmosphere of mounting pan-Arab exaltation, [their] presence came more and more to be regarded as an offence and a threat to be suppressed."[87] Until recently, Syria under Ba'ath rule has been particularly inhospitable to Kurdish identity, the state discriminating against Kurds "in every branch and in every activity of the administration" and banning the possession of publications in the Kurmanji language.[88] Syria has also taken a range of measures apparently calculated to stifle Kurdish irredentism. In 1962, claiming that a large number of Kurds had infiltrated Syria from Turkey, the government stripped Syrian citizenship from 120,000 Kurdish residents of the al-Hasaka province in Syrian Kurdistan, depriving them and their descendants of civil and political rights.[89] In addition, pursuant to an Arabization campaign, Syria evicted Kurds from villages along the borders with Turkey and Iraq, offered Arabs incentives to resettle there, replaced Kurdish place names with Arabic ones, and banned shop signs in Kurmanji.[90]

The Syrian uprising and civil war have transformed the Kurdish predicament in the country, at least temporarily. The uprising effectively began among Kurds. In January 2011, they held demonstrations in the eastern city of Hasaka to protest their political disenfranchisement, and, as protests spread across the country, Kurds mobilized quickly to participate.[91]

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2012), http://www.haaretz.com/news/features/iran-is-eyeing-a-strategic-partnership-with-the-kurds-1.455095; Ofra Bengio, *Kurdistan Reaches Toward the Sea*, HA'ARETZ (Aug. 3, 2012), http://www.haaretz.com/weekend/weekend-opinions/kurdistan-reaches-toward-the-sea-1.455675.

[84] *See* LOWE, *supra* note 80, at 4.

[85] As is the case with the Copts of Egypt, *see* note 25, *supra*, and accompanying text, statistics pertaining to the size of the Kurdish population in Syria are imprecise and politically contested. *See id.* at 2.

[86] *Id.* at 3.

[87] *See* Edmonds, *supra* note 82, at 103.

[88] *Id.* at 104.

[89] LOWE, *supra* note 80, at 3.

[90] *Id.*

[91] *See* Michael Weiss, *Why Syria's Kurds will Determine the Fate of the Revolution*, THE

However, they have since moved to the margins of the conflict, apparently encouraged by the Asad' regime's promises of fuller enfranchisement; put off by the Arabist and Islamist orientation of the Syrian National Council (as well as its close relationship with Turkey); and perhaps also hedging their bets as the civil war rages on.[92] At the same time, and with little resistance from a regime distracted by troubles elsewhere, they have established de facto self-rule over a "250 mile wide swath of northern Syria . . . that is the heartland of the country's oil industry."[93] One journalist describes the transformation as follows:

> Now, red, green and yellow-banded Kurdish flags can be seen above municipal buildings. Kurds are policing their own towns and cities. Kurdish political parties control the distribution of food, water and fuel, and have set up their own makeshift courts. Kurdish paramilitary forces are training in camps in northeastern Syria and across the border in northern Iraq.[94]

Kurdish leaders have made clear, moreover, that they regard these steps toward autonomy as irreversible, and they have fortified ties with and obtained assistance from the Kurdistan Regional Government in Iraq and the Kurdistan Workers's Party (PKK), whose separatist struggle against Turkey has escalated over the last year.[95]

It is far from clear where these transformations will lead. The manifold uncertainties created by the stalemate in the Syrian civil war have allowed Kurds in Syria and elsewhere to exploit rivalries among governments in the region in the pursuit of Kurdish interests, securing support from Tehran and acquiescence from Damascus,[96] as well as a measure of restraint from Ankara.[97] At the same time, however, central governments are not indifferent to the possibility that growing transnational cooperation among Kurdish parties in the region and the increasing autonomy of Kurdish areas

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NEW REPUBLIC (Nov. 16, 2011), http://www.tnr.com/article/politics/97493/syria-kurds-national-council.

[92] *See* Kennedy, *supra* note 79.

[93] Joe Parkinson, *Syria's Kurds Build Enclaves as the War Rages*, WALL ST. J. (Oct. 3, 2012),
http://online.wsj.com/article/SB10000872396390443862604578032381512705730.html.

[94] *Id.*

[95] *Id.*

[96] *See* Bar'el, *supra* note 83.

[97] *See* Pelin Turgut, *How the Kurds Have Changed Turkey's Calculations on Syria,* TIME (Aug. 6, 2012), http://world.time.com/2012/08/06/how-the-kurds-have-changed-turkeys-calculations-on-syria/.

in Syria and Iraq will bolster—rather than quiet—Kurds' national ambitions.[98] What remains to be seen is whether these dynamics will yield enhanced protection of Kurds' individual and communal rights within these states—perhaps coupled with greater freedom of movement between them— or, instead, inspire a more decisive push for Kurdish independence.

Like the cause of Coptic rights in Egypt, the character of the Kurdish struggle therefore remains something of an open question. A key factor distinguishing the two causes, however, is the territorial dimension of Kurdish claims. Kurds seek more than equality as citizens of the modern states where they reside. This desire for self-determination both informs and complicates their pursuit of other rights. Some of these rights—to teach Kurmanji and Kurdish history in schools, to use Kurdish place-names, to maintain transnational relations with Kurds in other states, and to establish autonomous local political institutions—may be pursued within the framework of the existing territorial order. Such efforts, however, may also be seen (by Kurds and others) as a prelude to independence, prompting governments to resist even modest steps for fear that they will create a slippery slope to secession, at the expense of the territorial integrity and strategic security of existing states. These concerns are especially acute in cases in which access to valuable resources is implicated. Conversely, governmental repression of Kurdish nationalism may simply serve to sharpen the Kurds' resolve to secede.

Similar dynamics complicate the status and protection of ethnic and religious minorities elsewhere in the region. Iranian authorities have cracked down harshly on separatists in the country's oil-rich Khuzestan province, whose Arab majority has long faced discrimination and economic marginalization.[99] The secession of South Sudan and the 2011 partial peace agreement between the regime in Khartoum and Darfuri rebel groups failed to bring an end to intercommunal conflict in the Sudan. According to International Crisis Group, the governing National Congress Party "remains committed to an Arab-Islamic identity for all Sudanese . . . set[ting] the stage for continued violence that may not be containable and could lead to further

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[98] *See* Roy Gutman, *Turkey Warns Asad That He Must Keep Kurds in Check, or Risk Intervention* (July 27, 2012), http://www.csmonitor.com/World/Latest-News-Wires/2012/0727/Turkey-warns-Assad-that-he-must-keep-Kurds-in-check-or-risk-intervention; Shwan Zulal, *Splitting Iraq: How Likely is an Independent Kurdistan?*, NIQASH (July 12, 2012), http://www.niqash.org/articles/?id=3087.

[99] Palash R. Ghosh, *Ahwazis: Iran's Persecution of its Arab Minority*, INT'L BUS. TIMES (July 24, 2012), http://www.ibtimes.com/ahwazis-iran%E2%80%99s-persecution-its-arab-minority-729874.

fragmentation of the country."[100]   In Saudi Arabia, efforts by the Shi'i minority to end their political and economic marginalization are undermined by Sunni fears that they seek, in collusion with Iran, to establish their own independent state in the country's oil rich Eastern Province.[101]   In Israel, moreover, the Palestinian minority has faced a resurgence of Jewish nationalism following the Al-Aqsa Intifada and the effective demise of the Oslo peace process, resulting in broad support for repressive and discriminatory legislation targeting Palestinian citizens,[102] as well as for their "transfer" from the state.[103]

In all of these contexts, demands for minority rights have become entangled with regime concerns about territorial integrity and political subversion in ways that not only undermine the protection of rights, but also, in the process, bolster minority opposition to the regime and the legitimacy of revolutionary or secessionist movements.  As described in the next Part, similar cycles of conflict make political transitions especially difficult in states where members of an ethnic or religious minority control the regime.

*c. Politically Dominant Minorities & Survivalist Minoritarianism*

Minoritarian regimes were once a common feature of the Middle East's political landscape.  As Joshua Landis points out, "[f]ollowing World War II, minorities took control in every Levant state, thanks to colonial divide-and-rule tactics and the fragmented national community that bedeviled the states of the region."[104]  Although most such regimes have since fallen, those

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[100] INTERNATIONAL CRISIS GROUP, AFRICA REPORT NO. 174: DIVISIONS IN SUDAN'S RULING PARTY AND THE THREAT TO THE COUNTRY'S STABILITY at i (2011), *available at* http://www.crisisgroup.org/en/regions/africa/horn-of-africa/sudan/174-divisions-in-sudans-ruling-party-and-the-threat-to-the-countrys-future-stability.aspx.

[101] INTERNATIONAL CRISIS GROUP, *supra* note 70, at 5.

[102] For a review of such legislation, see *Update: Anti-Democratic Legislation Initiatives*, THE     ASS'N     FOR     CIV.     RTS.     IN     ISRAEL     (Feb.     5.     2012), http://www.acri.org.il/en/2012/02/05/update-anti-democratic-legislation-initiatives/.

[103] *See* Gideon Levy, *Survey: Most Israeli Jews Wouldn't Give Palestinians Vote if West Bank was Annexed*, HA'ARETZ (Oct. 23, 2012), http://www.haaretz.com/news/national/survey-most-israeli-jews-wouldn-t-give-palestinians-vote-if-west-bank-was-annexed.premium-1.471644. In the Israeli political lexicon, "transfer" has assumed a broad range of meanings, including forcible ethnic cleansing, the offering of incentives to encourage emigration, and the further curtailment of Palestinian citizenship rights. *See* Robert Blecher, *Citizens Without Sovereignty: Transfer and Ethnic Cleansing in Israel*, 47 COMP. STUDS SOC'Y & HIST. 725, 728–29 (2005).

[104] Joshua Landis, *The Syrian Uprising of 2011: Why Asad is Likely to Survive to 2013*, 19 MIDDLE   E.   POL'Y   72,   72   (2012),   http://www.mepc.org/journal/middle-east-policy-

remaining present distinct challenges to the establishment of a legal order that reconciles democracy with minority protection. As described below, fears that political change will deprive members of a politically dominant minority of power and entitlements—or, worse, will lead to violent reprisals or even genocide—create a potent incentive (and useful pretext) for resisting even modest reforms. Assurances that constitutional safeguards will protect the minority are viewed skeptically, particularly in circumstances where the regime can point to the minority's past persecution or the abuse of kin groups in neighboring states. The regime's mobilization of fear in defense of repressive policies creates, in turn, a self-fulfilling prophecy, superimposing a narrative of ethnic or religious conflict upon the struggle for political change and transforming a minority problem into a majority problem.

This dynamic is vividly illustrated by the continuing crisis in Syria. The Asad family, which has held the reins of power in Damascus since 1970, comes from Syria's Alawi community.[105] During Ottoman rule, the country's Alawis lived in relative poverty, isolated in the mountains above the port of Latakia and marginalized by Sunni elites, who considered them nonbelievers or "exaggerators."[106] Though Arabic-speaking, the Alawis initially distanced themselves from the cause of Arab nationalism, which in the 1920s had taken on "a Sunni tincture" and assimilationist bent that Alawis "construed as an attempt to subordinate the non-Sunni communities."[107] Aligning themselves instead with France, which governed Syria as mandatory power during the interwar years, the Alawis managed to achieve a degree of autonomy from Damascus that many were loath to surrender when the country was formally unified in 1936.[108] Indeed, a delegation of Alawi notables (including the grandfather of President Bashar al-Asad) sent a memorandum to France's Prime Minister, Leon Blum, affirming their loyalty to France and their refusal to be "annexed to Muslim Syria," adding, "as to the presence of a parliament and a constitutional

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archives/syrian-uprising-2011-why-asad-regime-likely-survive-2013.

[105] The Alawi'a are adherents of an offshoot of Shi'ism that has been described as "a folk religion that absorbed many of the spiritual and intellectual currents of late antiquity and early Islam, packaged into a body of teachings that placed its followers beyond the boundaries of orthodoxy." Malise Ruthven, *Storm Over Syria*, N.Y. REV. BOOKS (June 9, 2011), *available at* http://www.nybooks.com/articles/archives/2011/jun/09/storm-over-syria/?page=1.

[106] *Id.*

[107] Itamar Rabinovich, *The Compact Minorities and the Syrian State, 1918-45*, 14 J. CONTEMP. HIST. 693, 699 (1979).

[108] *Id.* at 703–04; Ruthven, *supra* note 105.

government, that does not represent individual freedom. This parliamentary rule is no more than false appearances without any value. In truth, it covers up a regime dominated by religious fanaticism against the minorities."[109]

Following Syria's independence, many Alawis gravitated toward the Ba'ath Party's anti-sectarian vision of Arab nationalism and to the opportunities for social advancement offered by enlistment in the military, eventually dominating both institutions.[110] The Asad family consolidated its hold on power over time, "marshal[ing] in-laws, cousins and coreligionists into the upper ranks of the security forces," as well as the higher ranks of important ministries.[111] Even now, most Alawi families can point to at least one member in the security forces and several others employed by civilian ministries.[112] As Joshua Landis observes, "[d]espite the rhetoric of Arab nationalism, the Asads were keenly aware that only the traditional loyalties of family, clan and sect could cement their rule. In essence, they upheld the notion that it takes a village to rule Syria, a formula that successfully brought an end to political instability."[113] The regime applied a similar formula to its relations with other groups, encouraging clan, tribal, and religious leaders across the country to "build constituencies and to mediate these constituencies' relations with the state apparatus," developing a web of relationships that has enabled the regime to respond to crises, but also "undermined the development of associational life on a national basis."[114]

The minoritarian character of the regime in Damascus has had a profound effect on efforts to reform or replace it. "Khudr," the pseudonym for a reformist Alawi engineer, neatly captured the nature of the challenge in a 2005 blogpost.[115] "Khudr" pointed out that support for the Asad regime

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[109] Ruthven, *supra* note 105. In the same year, it should be added, a separate group of Alawi religious and political leaders who supported the Alawi areas's union with the rest of Syria published two manifestos arguing that the Alawis were genuine Muslims and Arabs. *See* Rabinovich, *supra* note 107, at 705.

[110] *See* Ruthven, *supra* note 105; Philip S. Khoury, *Continuity and Change in Syrian Political Life: The Nineteenth and Twentieth Centuries*, 96 AM. HIST. REV. 1374, 1394 (1991).

[111] Landis, *supra* note 104.

[112] *Id.*

[113] *Id.*

[114] Salwa Ismail, *The Syrian Uprising: Imagining and Performing the Nation*, 11 STUD. IN ETHNICITY & NATIONALISM 538, 545 (2011).

[115] "Khudr" (anonymous commentator), *What do Sunnis Intend for Alawis Following Regime Change?*, SYRIA COMMENT (Aug. 30, 2006), http://www.joshualandis.com/blog/?p=14.

had diminished among many Alawis as a result of the country's economic decline, the regime's corruption, and the increasing economic and political marginalization of poor segments of the community.[116]    He observed, however, that members of the sect remained reluctant to support regime change, complaining that "[n]ot a single Syrian intellectual, political leader, or plain good-will writer, has ever dealt with the following fundamental question: [w]hat exactly are your plans for the Alawis after we give up power?"[117]    In particular, "Khudr" inquired about the fate of tens of thousands of Alawis employed by the government and military and security services, of land reforms that had benefited Alawi peasants, and of development   projects   in   coastal   areas   where   the   community   is concentrated.[118]

The Syrian civil war has raised the stakes of regime change even further, both for Alawis and for the regime's opponents. At the beginning of the uprising, the protest movement was quick to emphasize its rejection of sectarianism, articulating its objectives in terms of universal political rights and civil liberties, rather than ethnic or religious identity.[119] The regime, on the other hand, alleged that the protests were the product of "sectarian manipulation by foreign actors[,] casting the protestors as infiltrators, saboteurs, or armed gangs, and associating them with plots and conspiracies by a host of named and unnamed enemies."[120]  The regime's deployment of Alawi officers and militias in its brutal response to the uprising further entrenched this narrative of sectarian conflict:

> Playing upon terrors that Alawites may again be persecuted as heretics as they often were in the past, the Asad regime has encouraged a sort of Masada complex, goading loyalists toward extreme violence as if the sole alternative were annihilation.  The effect of this, perhaps intended, has been to implicate Alawites as a whole in the regime's crimes.[121]

As a result, "a majority of Alawi officials, security officers and ordinary citizens . . . have become convinced that their fate is either to kill or be

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[116]  *Id.*

[117]  *Id.*

[118]  *Id.*

[119]  *See* Ismail, *supra* note 114, at 542.

[120]  *Id.*

[121]  Max Rodenbeck, *The Agony of Syria*, N.Y. REV. BOOKS 2 (Sept. 27, 2012), *available at* http://www.nybooks.com/articles/archives/2012/sep/27/agony-syria/?page=2.

killed."[122] Although International Crisis Group points out that "the regime has been infinitely more sectarian than the protest movement," it warns that "reality gradually has been catching up with fiction,"[123] an assessment shared by the United Nations' special adviser on the prevention of genocide.[124] For many Alawis, democratization consequently has come to mean not only a return to the political, social and economic subordination they previously suffered under Sunni-led governments in Damascus and Istanbul, but a threat to their very survival.

What makes the situation in Syria even more explosive is that it encapsulates all three kinds of "minority problems" described above. The Asad regime has played on fears of Islamist majoritarianism as a means of marshaling support from Alawis, Christians, and secularists in Syria,[125] and it has portrayed opponents to its rule as subversives beholden to foreign interests, including Western powers, Sunni regimes, transnational jihadi movements, and even Israel.[126] Conversely, members of the Syrian opposition claim that the regime's supporters have begun laying the groundwork for the establishment of an independent Alawi state in the event that the regime falls,[127] compounding resentment about Alawi support for the regime with concerns that they are prepared to undermine the country's territorial integrity. They also point to the regime's alliance with Iran and Hizbollah as evidence of a transnational Shi'i axis to deprive Syria's Sunnis of their rights.

Similar dynamics complicate efforts to achieve democratic change in

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[122] INTERNATIONAL CRISIS GROUP, MIDDLE EAST BRIEFING NO. 31, UNCHARTED WATERS: THINKING THROUGH SYRIA'S DYNAMICS 3 (Nov. 24, 2011), *available at* http://www.crisisgroup.org/~/media/Files/Middle%20East%20North%20Africa/Iraq%20Syria%20Lebanon/Syria/B031%20Uncharted%20Waters%20-%20Thinking%20Through%20Syrias%20Dynamics.pdf.

[123] *Id.*

[124] *UN Anti-Genocide Envoy: Syrian Alawites, Other Minorities Face Reprisal Risk*, HA'ARETZ (Dec. 21, 2012), http://www.haaretz.com/news/middle-east/un-anti-genocide-envoy-syrian-alawites-other-minorities-face-reprisal-risk-1.486222.

[125] *See* Anthony Shadid, *Syrian Unrest Stirring New Fear of a Deeper Sectarian Division*, N.Y. TIMES (June 13, 2001), http://www.nytimes.com/2011/06/14/world/middleeast/14syria.html?pagewanted=all&_r=0.

[126] *'U.S., Israel Supporting Syrian Rebels from Turkey,'* JERUSALEM POST (Oct. 11, 2012), http://www.jpost.com/MiddleEast/Article.aspx?id=280826.

[127] Zeina Karam, *Syria Conflict: Breakaway Alawite State may be President Bashar Assad's Last Resort*, HUFFINGTON POST (July 25, 2012), http://www.huffingtonpost.com/2012/07/25/syria-conflict-breakaway-alawite-state_n_1703624.html.

other states in the region. In Bahrain, where the Sunni Khalifa monarchy governs a majority-Shi'a population, the regime has long exploited sectarian divisions as a means of stymieing challenges to its authority.[128] Although the country's protest movement has undertaken to emphasize the non-sectarian character of its demands for political reform and counts both Shi'a and Sunnis among its supporters,[129] the government has worked to recast "a popular pro-democracy movement against an authoritarian regime [as] one of a sectarian struggle between Sunni and Shia," and to depict protestors as agents of Iran.[130] As a result, many Bahraini Sunnis have become convinced that republican government "can only mean an Iranian-style theocratic system."[131]

The specter of majoritarianism is invoked in similar ways in Israeli political discourse. Israel established a Jewish majority within the Green Line by blocking the return of Palestinian refugees who fled or were expelled from their homes in 1948 and encouraging the immigration of Jews.[132] However, Israel's occupation of the West Bank and Gaza Strip since 1967 and the failure of the Oslo process to produce a negotiated two-state solution have transformed "the Jewish state"[133] into a de facto minoritarian regime, Jews having ceased recently to be a majority in the territory controlled by the Israeli government.[134] Perceptions of Palestinians as a threat—not only to Israel's "right to exist as a sovereign Jewish

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[128] INTERNATIONAL CRISIS GROUP, BAHRAIN'S SECTARIAN CHALLENGE 7 (May 6, 2005), *available*                                                                                      *at* http://www.crisisgroup.org/~/media/Files/Middle%20East%20North%20Africa/Iran%20Gulf/Bahrain/Bahrains%20Sectarian%20Challenge.pdf.

[129] *See* Sarah Kanbar, *Sectarianism & Revolution in Bahrain & Syria*, MUFTAH (Jan. 18, 2013), http://muftah.org/bahrain-and-syria-sectarianism-revolution/.

[130] Joost Hiltermann, *Bahrain: A New Sectarian Conflict?*, N.Y. REV. BOOKS BLOG (May 8, 2012, 10:45 AM), http://www.nybooks.com/blogs/nyrblog/2012/may/08/bahrain-new-sectarian-conflict/.

[131] Marina Ottoway, *Bahrain: Between the United States and Saudi Arabia*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Apr. 4, 2011), http://carnegieendowment.org/2011/04/04/bahrain-between-united-states-and-saudi-arabia/t8.

[132] Sammy Smooha, *The Model of Ethnic Democracy: Israel as a Jewish and Democratic State*, 8 NATIONS & NATIONALISM 475, 484-85 (2002).

[133] The legitimacy of characterizing Israel as a (or the) "Jewish state" is hotly contested. For competing perspectives, see Steven Menashi, *Ethnonationalism and Liberal Democracy*, 32 U. PA. J. INT'L L. 57 (2010), and Nadim N. Rouhana & Nimer Sultany, *Redrawing the Boundaries of Citizenship: Israel's New Hegemony*, 33 J. PALESTINE STUD. 5, 7-9 (2003).

[134] *See* Akiva Eldar, *The Jewish Majority is History*, HA'ARETZ (Oct. 16, 2012), http://www.haaretz.com/news/features/the-jewish-majority-is-history.premium-1.470233.

state,"[135] but also to the security (and even survival) of its Jewish citizens[136]—are offered as justifications for opposition to the enfranchisement of Palestinian residents of the West Bank and Gaza Strip pursuant to a one-state solution. They are also cited in support of proposals to disenfranchise Palestinian citizens of Israel[137] and for the Israeli government's continuing refusal even to contemplate Palestinian refugee return.[138]

To be sure, Syria, Bahrain, and Israel differ from one another in significant ways. However, apprehensions in all three states about the security consequences of majority rule have provided the communities in power with rationales—or pretexts—for refusing to relinquish or share control over the machinery of state.

<div align="center">* * *</div>

The three minority problems described above clearly overlap in some respects: in some contexts, religious minorities are considered (and treated like) nationalist minorities, and politically dominant minorities have tended themselves to be religious minorities, nationalist minorities, or both. This typology, moreover, is neither intended to capture the breadth of sources of intercommunal conflict in the Middle East nor to suggest that heterogeneity within states is necessarily a source of disharmony. It is meant, however, to illuminate the need for—and the challenges facing—the clarification and protection of minority rights in states of the Middle East. The next Part considers the international legal context for such an effort.

## II.    THE STATUS AND PROTECTION OF MINORITIES UNDER INTERNATIONAL LAW

States have attempted to craft multilateral solutions to the problem of intercommunal conflict since the dawn of the Westphalian order. Indeed, the Peace of Westphalia was itself a response to the internecine religious wars

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[135] Shimon Peres, *Israelis, Palestinians Need Two States*, WASH. POST (Feb. 10, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/02/09/AR2009020902098.html.

[136] *See* Dahlia Scheindlin, *Anticipating September*, JERUSALEM REP. (July 3, 2011), http://www.jpost.com/JerusalemReport/Israel/Article.aspx?id=227553 (reporting that 40% of Israelis believe Palestinians seek to "destroy much of the Jewish population").

[137] *See* Blecher, *supra* note 103, at 744; Rouhana & Sultany, *supra* note 133, at 7–13.

[138] Ehud Barak & Benny Morris, *Camp David and After – Continued*, N. Y. REV. BOOKS (June 27, 2002), *available at* http://www.nybooks.com/articles/archives/2002/jun/27/camp-david-and-aftercontinued/?pagination=false; *see also Sharon: Palestinian 'Right of Return off the Table*, JERUSALEM POST (May 7, 2003) (quoting Ariel Sharon as saying "The right of return is a recipe for the destruction of Israel").

that rent Europe in the fifteenth and sixteenth centuries.[139] The treaties that comprised it not only affirmed and broadened the right of princes to determine the religion of inhabitants of the territories they ruled, extinguishing the Holy Roman Emperor's authority over the matter,[140] they also established the right of Christian minorities in those realms to religious toleration, subject to some limitations and exceptions.[141]  Although the treaties are often credited with inaugurating the modern system of territorial nation-states in Europe,[142] their terms were not animated by a desire to establish a general norm of non-interference in the domestic affairs of sovereign states, which would emerge only later.[143]  Nor were they conceived to sanctify religious liberty as an individual right.[144] The parties' paramount concern was, instead, the need to build a stable international order in the wake of the most devastating wars Europe had known.[145]  By extending to one another a degree of religious autonomy and exchanging guarantees that at least Christian minorities within them would not face persecution, Europe's powers undertook to eliminate the cause of—or pretext for—destabilizing interventions.

Neither the map drawn in Westphalia nor the system of political relations that has come to bear its name succeeded in preventing a resurgence of intercommunal and international conflict in Europe.  Indeed, the three multilateral efforts that have done most to define the rights of minorities in modern, heterogeneous states all followed cataclysmic wars. The League of Nations' minorities protection system was established after

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[139]  *See* MALCOLM D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 49–50 (James Crawford & David Johnston eds., 1997).

[140]  The principle of *cuius region, eius* religio ("Whose the region is, his religion.") was first established in the Treaty of Augsburg in 1555, *id.* at 46–47, but was reaffirmed and extended to Calvinist rulers in the Treaty of Münster, *id.* at 51–52.

[141]  *Id.* at 52–54.

[142]  *See* Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 251, 261 (2001).

[143]  The principle of non-interference would not be articulated explicitly for another hundred years, in the late 18th century writings of Wolff and Vattel. *See* Stephen D. Krasner, *Pervasive, Not Perverse: Semi-Sovereigns as the Global Norm*, 30 CORNELL INT'L L. J. 651, 656–57 (1997).

[144]  *See* Peter G. Danchin, *The Emergence and Structure of Religious Freedom in International Law Reconsidered*, 23 J. L. & RELIGION 455, 501–02 (2007). The treaties, moreover, upheld the right to religious practice of only specified religious communities. *See* EVANS, *supra* note 139, at 50–51.

[145]  Danchin, *supra* note 144, at 504 (noting that "treaty practice following Westphalia was motivated . . . by the desire to eliminate possible causes of conflict").

World War I. The United Nations human rights system was built in the wake of World War II. And the Balkan conflicts that erupted after the dissolution of Yugoslavia were the impetus for minority rights initiatives in Europe and at the global level. Like Westphalia, each of these lawmaking episodes reflected recognition of the threat posed by intercommunal conflict within states to the stability of the international order. But while all three embraced the protection of human rights as a vehicle for preventing such conflict, they differed with respect to the relative emphasis they placed on individual versus group rights and the sanctity they attached to the sovereignty of states.

### a. The League of Nations Minority Protection System

Communal identity—national, religious, and ethnic (or "racial")—was a leitmotif of the international conferences that brought an end to the First World War and established the League of Nations.[146] The principle of self-determination, championed by President Wilson as the normative foundation for a new international order, ultimately played a relatively small role in the delimitation of borders in central and eastern Europe.[147] It did, however, find expression in an enhanced system of minority protection in newly created states.[148] That system was enacted through the inclusion of minority protection clauses in peace treaties between the Allied Powers and some of the defeated states and through the requirement that newly created states enter into treaties with the Allied Powers, or make declarations before the League of Nations, committing to minority protections.[149]

Notably, the system's normative framework included commitments to safeguard not only the individual rights of members of minorities, but also certain communal rights:

> The obligations assumed by these states fell roughly into four categories. The first, embracing citizenship rights, defined the conditions under which citizenship could be acquired. In the second and third categories were included rights of life, liberty, and religious freedom of general applicability to all inhabitants; and civil and

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[146] *See* EVANS, *supra* note 139, at 75.

[147] *Id.* at 81 (observing that boundaries of new states "were largely determined by events").

[148] *See* Asbjørn Eide, *The Framework Convention in Historical and Global Perspective, in* THE RIGHTS OF MINORITIES IN EUROPE: A COMMENTARY ON THE EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES 25, 35 (Marc Weller ed., 2005).

[149] Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102, 113–14 (1976).

political rights for all nationals, including equality before the law and
equal access to civil service, business, and profession as well as the
use of their own language in religion, press, and assembly. Finally,
certain special rights, designed to protect their cultural identity, were
guaranteed to all nationals belonging to racial, religious, or linguistic
minorities.  These rights included the free enjoyment of equal
treatment and security in law and in fact with other nationals; the
receipt of primary school education in their own language; the right
to establish under their own control charitable, educational, social,
and religious institutions; and the right to share equitably in the
enjoyment and application of public funds allocated for educational,
religious, or charitable purposes.  In addition, certain of the treaties
contained special provisions for the protection of particular minority
groups, such as the Jews in Poland, the Mussulmans [sic] in
Yugoslavia, the Saxons and Czecklers in Rumania, the Ruthenians in
Czechoslovakia, and certain others.[150]

As Yoram Dinstein points out, this system was premised on the idea that
"each minority has concurrently the right to full equality with the majority
and to preservation of its separate identity"—a right, in other words, "not to
assimilate itself to the majority, unless it wishes to do so."[151]  The limits of
the latter right, however, were hotly contested from the outset as some states
regarded the recognition of robust communal rights as both a challenge to
their sovereignty and a source of intercommunal tension.[152]

### b. The United Nations Human Rights System

Hostility to the idea of communal rights for minorities prevailed over
the international lawmaking enterprise that followed World War II.
Although the idea continued to be championed in some quarters,[153] the
parties that forged the United Nations system regarded communal rights as
divisive—"a method within states of preserving a 'fifth column' that would
subvert internal stability."[154]  They were also considered an idiosyncratically
European approach to managing pluralism that was inappropriate for

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[150] Mary Gardiner Jones, *National Minorities: A Case Study in International Protection*, 14
LAW & CONTEMP. PROBS. 599, 606–07 (1949).

[151] Dinstein, *supra* note 149, at 116.

[152] *See* Danchin, *supra* note 144, at 523.

[153] David Wippman, *The Evolution and Implementation of Minority Rights*, 66 FORDHAM
L. REV. 597, 604 (1997).

[154] Thio, *supra* note 11, at 423.

extension to Africa[155] or the Americas.[156] The concept of communal rights was not abandoned entirely: the UN Charter pays lips service to the "principle of self-determination of peoples",[157] and the Genocide Convention is premised at least implicitly on the right of groups to physical survival.[158] However, the system inaugurated in San Francisco privileged the sovereignty and territorial integrity of states over the self-determination of peoples as a normative framework for the maintenance of international peace.

To be sure, the United Nations' human rights system has come to represent a challenge to absolutist conceptions of state sovereignty. However, its foundational legal instruments address the rights of ethnic and religious minorities almost exclusively through equality and anti-discrimination norms vested in individuals rather than groups.[159] The omission of communal rights from the Universal Declaration of Human Rights (UDHR) was not accidental: after considerable debate, the Human Rights Commission concluded that the Declaration's individual rights protections made specific protections for minorities superfluous.[160] The

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[155] *Id.* at 451.

[156] *Id.* at 423.

[157] U.N. CHARTER art. 1, para. 2.

[158] *See* Convention on the Prevention and Punishment of the Crime of Genocide art. 2, *adopted* Dec. 9, 1948, 78 U.N.T.S. 278 (criminalizing acts intended to destroy a "national, ethnical, racial, or religious group, as such").

[159] *See* Universal Declaration of Human Rights art. 1, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("All human beings are born free and equal in dignity and rights."); *id.* art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other option, national or social origin, property, birth or other status."); *id.* art. 7 ("All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."); *see also* International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); *id.* art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

[160] Eide, *supra* note 148, at 37–39.

International Covenant on Civil and Political Rights (ICCPR), which was adopted in 1966, goes further toward recognizing minority rights, reaffirming in Article 1 the right of all peoples to self-determination[161] and providing in Article 27 that "[p]ersons 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."[162]  However, the Human Rights Committee has been reluctant to elaborate on the implications of the principle of self-determination outside of the colonial context, citing concerns about the territorial integrity of states,[163] and the extent to which Article 27 protects group rights has been a point of some contention.[164] Moreover, while states concluded a human rights treaty focused on the elimination of discrimination in 1965,[165] efforts within the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities to develop a comparable treaty codifying the rights of minorities foundered.[166] According to one influential study, governments were skeptical about the utility of articulating uniform norms for application to the widely varying contexts in which minority rights were an issue and feared that such an enterprise would both provide a pretext for external intervention and threaten states' internal unity and stability.[167]

Until recently, regional human rights systems largely hewed to this approach.  The European Convention for the Protection of Human Rights and Fundamental Freedoms accords protection primarily to individual rights, omitting even the limited references to group rights contained in the ICCPR and offering standing only to individuals.[168]  Similarly, the Inter-American

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[161]   ICCPR, *supra* note 159, at art. 1.

[162]   *Id.* art. 27.

[163]   *See* Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 27–28 (1993).

[164]   *See* KRISTIN HENRARD, DEVISING AN ADEQUATE SYSTEM OF MINORITY PROTECTION: INDIVIDUAL HUMAN RIGHTS, MINORITY RIGHTS, AND THE RIGHT TO SELF-DETERMINATION 172–74 (2000).

[165]   International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

[166]   Eide, *supra* note 148, at 39–41.

[167]   U.N. Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, *Study of the Rights of Persons Belonging to Ethnic, Religious, and Linguistic Minorities*, UN Doc. E/CN/4/Sub.2/384 and Add. 1–6 (May 20, 1977) (by Frank Capotorti).

[168]   *See* Charles F. Furtado, Jr., *Guess Who's Coming to Dinner? Protection for National Minorities in Eastern and Central Europe under the Council of Europe*, 34 COLUM. HUM. RTS. L. REV. 333, 340–41 (2003).

human rights system was crafted with an explicit—and deliberate—focus on individual rights, evincing "a preference for individual rights protection based on egalitarian norms," concern about "the potential destabilizing effects of minority protection regimes," and the conviction, particularly among Latin American states, that "the major distinct groups in the Americas were immigrants who were expected to assimilate into national society."[169] Indeed, while the American Convention draws heavily upon the ICCPR, a provision comparable to Article 27 of the International Covenant is "conspicuously absent."[170] The African human rights system is less individualistic in orientation than the European and American systems: the Banjul Charter proclaims the rights of "all peoples," inter alia, to existence,[171] equality,[172] self-determination,[173] and "economic, social and cultural development with due regard to their freedom and identity."[174] Like their American counterparts, however, African governments have both challenged the relevance of minority protection to circumstances in African states and expressed concern that regimes focused on the group rights of minorities would foster factionalism that undermined the nation-building enterprise.[175]

### c. Recent Developments in International Minority Protection Law

The internecine ethnic conflict that attended the dissolution of Yugoslavia prompted some reconsideration of the adequacy of an individual rights approach to protecting minorities.[176] At the global level, the UN General Assembly adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Linguistic, and Religious Minorities in 1992.[177] In addition to reaffirming a range of individual rights possessed by members of minority groups, the Declaration recognizes the obligation of

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[169] Thio, *supra* note 11, at 423.

[170] *Id.* at 422–23.

[171] Organization of African Unity, African [Banjul] Charter on Human and Peoples' Rights, art. 20, para. 1, *adopted* June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter Banjul Charter].

[172] *Id.* at art. 19.

[173] *Id.* at art. 20, ¶ 1.

[174] *Id.* at art. 22.

[175] Thio, *supra* note 11, at 449–51.

[176] Wippman, *supra* note 153, at 604.

[177] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, Annex, U.N. Doc. A/Res/47/135/Annex (Dec. 18, 1992) [hereinafter U.N. Minorities Declaration].

states to "protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities"[178] and encourages states, "where appropriate," to "take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory."[179]  Though non-binding and relatively limited in scope, the Declaration's provisions depart from the approach taken in the UDHR and ICCPR in two respects.  First, they reflect an explicit (if contingent) embrace of pluralism within states, encouraging them not only to tolerate but also to cultivate sub-national communal identity.[180]  Second, they articulate a duty to protect the existence and identity "of minorities", rather than "of persons belonging to minorities," implying that these rights are vested in groups as well as individuals.[181]

Over the last two decades, European regional institutions have further elaborated these norms.  Members of the Conference (now Organization) for Security and Cooperation in Europe defined standards pertaining to minority issues in the 1990 Copenhagen Document,[182] even before Yugoslavia disintegrated into war.[183]  Then, in 1994, the Council of Europe adopted the Framework Convention on National Minorities, which was subsequently ratified by most of the Council's members.[184]  The Convention sets out an array of principles for ensuring "the effective protection of national minorities and of the rights and freedoms of persons belonging to those minorities" that is substantially coextensive with the Copenhagen

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[178]  *Id.* at art. 1.

[179]  *Id.* at art. 4.

[180]  Wippman, *supra* note 153, at 606–07.

[181]  Jane Wright, *The OSCE and the Protection of Minority Rights*, 18 HUM. RTS. Q. 190, 197 (1996).

[182]  Conference for Sec. & Cooperation in Eur., *Document of the Copenhagen Meeting of the Conference on Human Dimension*, June 29, 1990, 29 I.L.M. 1305 [hereinafter Copenhagen Document].  Although the Copenhagen Document is not a treaty, describing it as soft law may understate its influence. *See* Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict*, 32 N.Y.U. J. INT'L L. & POL'Y 591, 608–15 (2000).

[183]  The Balkan wars did, however, impel them to establish the Office of the High Commissioner for National Minorities, which promotes adherence to minority protection standards with a view toward preventing future conflict. *See* Wright, *supra* note 181 at 200–01.

[184]  The Convention has been ratified all of the Council's members except Andorra, France, Monaco, and Turkey (who have neither signed nor ratified it) and Belgium, Greece, Iceland, and Luxembourg (who have signed but not ratified it).  A map reflecting the states-parties to the Convention may be found at http://www.coe.int/t/dghl/monitoring/minorities/default_en.asp.

Document's standards. Although its mechanisms for implementing these principles "are weak even by the standards of international human rights treaties,"[185] the Framework Convention offers the most thorough articulation of norms pertaining to minority protection in international law today.

A number of the Convention's substantive features are of particular relevance to the development of norms that could guide the resolution and prevention of intercommunal conflict in the Middle East. First, the Convention makes clear that the principles for minority protection it articulates are embedded within a broader political and institutional commitment to democracy and the rule of law.[186] Unlike the Copenhagen Document, which provides that "the questions relating to national minorities can only be satisfactorily resolved in a democratic political framework based on the rule of law,"[187] the Framework Convention does not state that effective minority protection is dependent upon the establishment of democratic institutions. That presumption, however, is reflected in the kinds of civil and political rights the Convention affirms.[188]

Second, the Convention nowhere defines its object, "national minorities." Its Explanatory Report states obliquely: "[i]t was decided to adopt a pragmatic approach, based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States."[189] According to Hans-Joachim Heintze, the key points of dispute that prevented agreement on a definition were "the minimum size of the minority group and the need for a subjective feeling of solidarity," as well as the reluctance of some states (France and Turkey in particular) to recognize the concept of minorities at all, on the grounds that the concept is at odds with the state's national ethos or could pose a threat to its territorial integrity.[190] The Convention's omission of a

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[185] Wippman, *supra* note 153, at 612–13.

[186] *See* Framework Convention, *supra* note 9, pmbl. (referring to minority protection as "essential to . . . democratic security," noting that a "genuinely democratic society" should facilitate expression, preservation and development of minority identity, and undertaking to ensure minority protection "within the rule of law").

[187] Copenhagen Document, *supra* note 182, ¶ 30.

[188] For example, the Convention commits Parties to ensure respect for "freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought," Framework Convention, *supra* note 9, at art. 7; and to create conditions for effective minority participation in public affairs, *id.* at art. 15.

[189] Framework Convention, *supra* note 9, Explanatory Report, ¶ 12.

[190] Hans-Joachim Heintze, *Article 1*, in THE RIGHTS OF MINORITIES IN EUROPE: A COMMENTARY ON THE EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF

definition of the term national minority has allowed states to determine, through declarations and practice, to which kinds of groups the label applies, leading to some controversy about states' decisions to include or exclude particular groups.[191]

Third, the Convention not only rejects forcible assimilation as a strategy for responding to diversity,[192] but also encourages affirmative measures to promote the development of sub-national communal identity.[193] In this respect, it resurrects the spirit of the League of Nations' minority protection system,[194] treating pluralism as a source of strength rather than instability.[195] In the same vein, the Convention goes beyond prohibiting discrimination to advocating the achievement of equality through affirmative measures that accommodate the "specific conditions" of minority group members.[196] It stops short, however, of recognizing that national minorities possess communal rights as such. As Heintze observes, the Convention "follows the universally recognized individualistic human rights approach typical of all instruments dealing with minority issues" insofar as it "signals that the individual *per se*, and not the minority group, is considered to be the rights holder."[197] Instead, the Convention adopts an expansive conception of freedom of association that includes commitments both to individual agency and to the development of communal institutions. On the one hand, a

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NATIONAL MINORITIES, *supra* note 148, at 82–83.

[191] *Id.* at 111–18.

[192] *See* Framework Convention, *supra* note 9, at art. 5, ¶ 2 ("Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.").

[193] *See id.* pmbl ("[c]onsidering that a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity"); *id.* art. 11 (obliging Parties "to endeavor . . . where appropriate" to display place names in minority languages in areas inhabited by them in large numbers); *id.* art. 12 (obliging parties "where appropriate" to "foster knowledge of the culture, history, language and religion of their national minorities and of the majority"); *id.* art. 14 (obliging Parties "to endeavor to ensure" that minority groups have opportunity to receive instruction in their language).

[194] Wippman, *supra* note 153, at 606–07.

[195] Framework Convention, *supra* note 9, pmbl ("Considering that the creation of a climate of tolerance and dialogue is necessary to enable cultural diversity to be a source and a factor, not of division, but of enrichment for each society.").

[196] *Id.* at art. 4(2).

[197] Heintze, *supra* note 190, at 86.

person's embrace of minority identity is treated as a matter of free choice, rather than one to be dictated by the state or the community.[198] On the other hand, the members of minority groups are to be given latitude to develop their own religious,[199] educational,[200] and media[201] institutions and contacts, both within states and transnationally.[202] In these respects, as Heintze points out, the Convention "recognizes that persons belonging to national minorities cannot avail themselves of the rights" it sets out "without the participation of others belonging to the same group," clearly implying that the rights have "a collective dimension."[203]

Finally, and no less importantly, the Framework Convention addresses minority protection as part of a package of reciprocal obligations. It not only imposes duties on states, but also binds minorities to respect "national legislation and the rights of others"[204] and to refrain from challenging the "sovereign equality, territorial integrity, and political independence of States."[205] Thus, the Convention makes clear that it is intended to operate squarely within the framework of state sovereignty, not to present a challenge to it. That disposition is also reflected in the Convention's approach to enforcement: the Convention is explicitly non-self-executing, its principles to be implemented "through national legislation and appropriate governmental policies."[206]

The Framework Convention therefore represents an effort to strike a balance between the two approaches to minority protection embraced by the international community over the course of last century. Although it offers a more thorough elaboration of the rights of minority group members than other global and regional human rights instruments, it stops short of explicitly recognizing the concept of communal rights, and it goes a considerable distance toward preserving states' sovereign prerogatives to craft their own strategies for managing diversity within their borders. The next Part considers whether the states of the Middle East should follow Europe's example by undertaking to define regional norms pertaining to the

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[198] Framework Convention, *supra* note 9, at art. 3, ¶ 1.

[199] *Id.* at art. 8.

[200] *Id.* at art. 13, ¶ 1.

[201] *Id.* at art. 9, ¶ 2.

[202] *Id.* at art. 17, ¶ 1.

[203] Heintze, *supra* note 190, at 86.

[204] Framework Convention, *supra* note 9, at art. 20.

[205] *Id. at* art. 21.

[206] *Id.* pmbl.

status and protection of minorities.

## III.    DEFINING REGIONAL STANDARDS FOR MINORITY PROTECTION IN THE MIDDLE EAST

Intercommunal conflict in the Middle East is a transnational and region-wide phenomenon.  As described in Part I, ethnic and religious communities are spread across national boundaries, their activities and treatment in one state often eliciting the concern and sometimes the intervention of kin groups or adversaries in other states.  Transnational social movements, such as Arab nationalism, revolutionary and political Islam, and democratization, have influenced identity formation and geopolitical relations across the region, producing both transformative alliances and violent rivalries.  Moreover, some of the consequences of intercommunal conflict within states, like refugee flows and economic disruptions, are felt well outside their borders.

In view of these transnational dimensions, intrastate processes, such as constitutional reform and institutional development, can offer only partial solutions to intercommunal conflict in the region.  Because such conflict tends to arise from—and manifest itself in—the deprivation of rights, discourse about how those rights should be defined and safeguarded is a natural starting point for regional action.  But is a new human rights treaty really the solution to intercommunal conflict in the Middle East?  To what extent is there consensus about the content of norms pertaining to the status and treatment of minorities?  Which normative gaps need filling?  Which normative conflicts need resolution?  And to what extent could an agreement, or an effort to reach one, help change the situation on the ground in the states of the region?  As a step toward answering these questions, this Part offers a few observations regarding the promise and limits of rights as a framework for preventing and responding to intercommunal conflict in the Middle East.

### a. Normative Consensus and Conflict

An effort to develop regional norms addressing the status and protection of minorities would not write on a blank slate.  Most of the states in the Middle East are already parties to a number of international human rights instruments: all of them have acceded to the Genocide Convention; all except Saudi Arabia, Qatar, Oman, and the United Arab Emirates are parties to the ICCPR (though only Algeria has acceded to the ICCPR Special Protocol); and all are parties to the International Convention on the Elimination of All Forms of Racial Discrimination (though, notably, Saudi Arabia has entered a reservation that it will implement only the provisions

that "do not conflict with the precepts of the Islamic Shariah").[207] Thus, the governments of the region have already committed to certain basic propositions: minority groups have a right to physical existence; their members should both be protected from discrimination; and they should be allowed to use their languages, practice their religions, and "enjoy" their cultures.[208]

In addition, Islamic and Arab multilateral institutions have developed human rights instruments of their own that offer an additional reference point for discourse about the rights of ethnic and religious minorities. The Organization of the Islamic Conference (now the Organization of Islamic Cooperation) adopted the Cairo Declaration on Human Rights in Islam in 1990 for presentation to the Preparatory Committee of the UN World Conference on Human Rights.[209] In its first article, the Cairo Declaration affirms that "[a]ll men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations," though it adds that "[t]he true religion is the guarantee for enhancing such dignity along the path to human integrity."[210] Similarly, while the Declaration also provides that "[e]veryone shall have the right to live in security for himself, his religion,"[211] it states that "Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism."[212] It makes clear, moreover, that "[a]ll the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah."[213]

The Arab League adopted the Arab Charter on Human Rights in 1994, though the initial version of the Charter was not ratified by any member state. As part of an effort to harmonize the Charter with international human rights standards, a revised version was adopted at the League's Summit of

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[207] Listings of the parties to international human rights treaties, and reservations to them, may be found here: http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en.

[208] *See* notes 158–162, *supra*, and accompanying text.

[209] *See* Contribution of the Organization of the Islamic Conference, World Conference on Human Rights, Preparatory Committee, 4th Sess., U.N. Doc. A/CONF.157/PC/62/Add. 18 (Aug. 5, 1990) (hereinafter Cairo Declaration), *available at* http://www1.umn.edu/humanrts/instree/cairodeclaration.html.

[210] *Id.* at art 1.

[211] *Id.* at art. 18.

[212] *Id.* at art. 10.

[213] *Id.* at art. 24.

Heads of State in 2004,[214] and it entered into force in 2008.[215] The revised version of the Charter includes relatively broad anti-discrimination provisions, guaranteeing the protection of individual rights "without distinction on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability," and obliging parties to "take the requisite measures to guarantee effective equality in the enjoyment of all the rights and freedoms enshrined in the . . . Charter in order to ensure protection against all forms of discrimination."[216]  Echoing Article 27 of the ICCPR, the Charter also prohibits parties from denying "[p]ersons belonging to minorities . . . the right to enjoy their own culture, to use their own language and to practice their own religion."[217]  In addition, like the African Banjul Charter, the Arab Charter recognizes a number of "people's" rights, including the "right of self-determination and to control over their natural wealth and resources, and the right to freely choose their political system and to freely pursue their economic, social and cultural development."[218]  However, in view of the Charter's declaration in the same article that "[a]ll peoples have the right to national sovereignty and territorial integrity,"[219] it seems unlikely that these provisions were intended to apply to sub-national groups.

When read in light of the dynamics described in Part I of this Article, these instruments reflect the need both for further development of norms pertaining to the status and protection of minorities in the region and for a

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[214] Mervat Rishmawi, *The Revised Arab Charter on Human Rights: Step Forward?*, 5 HUM. RTS. L. REV. 361, 361–62 (2005).

[215] Mervat Rishmawi, *The Arab Charter on Human Rights and the League of Arab States: An Update*, 10 HUM. RTS. L. REV. 169, 169 (2010). By October 2009, ten states had ratified the Charter: Algeria, Bahrain, Jordan, Libya, Palestine, Qatar, Saudi Arabia, Syria, the United Arab Emirates and Yemen. *Id.* at 172.

[216] League of Arab States, Arab Charter on Human Rights, May 22, 2004, art. 3, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005), *entered into force* March 15, 2008 (hereinafter Arab Charter). *See also id.* at art. 4 (prohibiting derogations from the Charter that discriminate "solely on the grounds of race, colour, sex, language, religion or social origin"); *id.* at art. 11 ("All persons are equal before the law and have the right to enjoy its protection without discrimination.").

[217] Arab Charter, *supra* note 216, at art. 25. This provision differs from Article 27 of the ICCPR in two ways: first, it excludes the right of minority group members "to profess" their religion, potentially limiting the right of religious minorities to proselytize; and, second, it includes a caveat that "[t]he exercise of these rights shall be governed by law," potentially offering states a basis for circumscribing the free exercise of these minority rights.

[218] *Id.* at art. 2, ¶ 1.

[219] *Id.* at art. 2, ¶ 2.

concerted attempt to harmonize existing local norms with one another and with established international human rights standards. The need for harmonization is perhaps greatest with respect to the rights of religious minorities. The Cairo Declaration's characterization of all of the rights it affirms as "subject to the Islamic Shariah," an idea echoed in many of the region's constitutions,[220] obviously raises the question of what constraints Islamic law places on the exercise of minority rights. Indeed, some of the issues that have been sources of concern among religious minorities—such as the freedom to build churches and shrines, the ability of non-Muslims to assume leadership positions within an "Islamic" state, the right of non-Muslims to proselytize, and the right of Muslims to convert from Islam to another religion—are points about which there are differences not just between Islamic law and international human rights instruments, but also within the Islamic legal tradition.[221] The diversity of approaches encompassed by the *shari'a* creates opportunities for advocacy, negotiation, and progressive development of rights.[222] However, not all questions may be considered negotiable: Islamic law has been hostile, for example, to protecting the religious rights of adherents of monotheist faiths that developed after Islam.[223] Flexibility, moreover, may undermine predictability, offering religious minorities little assurance that an Islamist government will expand rather than contract their legal rights. While the region's history offers no shortage of models for self-governance by minority communities, it is also rich in examples of intolerance for heterodoxy and individual agency.

The under-development of norms also requires attention. The Cairo

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[220] *See, e.g.*, Article 2, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq], 2005 ("Islam is the official religion of the state and is a foundation source of legislation. . . . No law may be enacted which violates the established provisions of Islam."); CONSTITUTION OF THE SYRIAN ARAB REPUBLIC, 26 Feb. 2012, art. 3, *available at* www.voltairenet.org/article173033.html ("Islamic jurisprudence is a main source of legislation."); CONSTITUTION ARAB REPUBLIC EGYPT, art. 4 ("Principles of Islamic Sharia are the principal source of legislation."), *available at* http://muftah.org/english-translation-of-egypts-new-draft-constitution/.

[221] *See* Gudrun Krämer et al., *Minorities in Muslim Societies*, OXFORD ISLAMIC STUD. ONLINE, http://www.oxfordislamicstudies.com/article/opr/t236/e0536 (last visited Feb. 13, 2013).

[222] *See* Nazila Ghanea, *Human Rights of Religious Minorities and of Women in the Middle East*, 26 HUM. RTS. Q. 705, 724 (2004) (noting that feminists have effectively employed strategy of highlighting variations in cultural practices among Muslims as means of distinguishing between cultural and religious practice).

[223] *See* Krämer et al., *supra* note 221.

Declaration and the Arab Charter both articulate broad guarantees against discrimination,[224] but they stop short of offering a vision regarding either the value or the management of diversity within states. In contrast to the Council of Europe's Framework Convention, they neither take a position against assimilation nor commit to proactive measures for safeguarding minority identity. Instead, like most other human rights instruments of a general character, they are silent with respect to issues like education in minority history, religion, language, and other aspects of culture, the use of place-names and signage in minority languages, and the licensing of media institutions to minority groups and in their languages. In addition, although the Arab Charter commits parties to take "the requisite measures to guarantee effective equality,"[225] the extent to which such equality is envisaged only for individuals or also for groups is left unaddressed. As described in Part I, these kinds of issues are likely to be of particular importance to religious and nationalist minorities, many of whom seek to preserve their identity and a measure of autonomy in the states where they reside, and to politically dominant minorities, who justify their unwillingness to relinquish power by invoking fears of majoritarian tyranny.

*b. The Promise and Limits of Rights*

Building consensus in a region of such diversity regarding issues of such complexity will take time and leadership. Notwithstanding the imperatives presented by the burgeoning intercommunal tensions in the region, an attempt to develop a detailed minority rights treaty for the Middle East seems neither feasible nor advisable at this juncture. Even in Europe, a region that is presently more politically homogeneous than the modern Middle East, states were unable to commit to more than a very general "framework" convention that gives them considerable latitude to determine by which means to effect minority protections, even after almost two decades of efforts to develop consensus about norms within regional organizations.[226] In view of the substantial variances in regime type and in the character and pace of the transitions unfolding among Middle East states, a treaty exercise risks producing norms that constitute the lowest common

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[224]  *See* notes 210, 216, *supra*, and accompanying text.

[225]  *See* note 216, *supra*, and accompanying text.

[226]  For a discussion of efforts to build consensus about a minority protection framework within the OSCE, *see generally* Wright, *supra* note 181. For a discussion of complementary efforts within the Council of Europe, *see generally* Heintze, *supra* note 190, at 79–82.

denominator[227] or that are so aspirational that they are unlikely to elicit broad acceptance.[228]

Nevertheless, a regional effort, informed by both local and global law and practice, to define even "soft law" standards pertaining to the rights of minorities in the region could serve a number of useful functions. At a basic level, the discourse such an exercise could generate would be valuable in itself, bringing to light problems that too often are allowed to fester in the dark, testing new governments' commitment to treaty obligations entered into by their predecessors, and providing a framework for transnational engagement among different kinds of stakeholders—governments, non-governmental organizations, political parties, and religious institutions—in a context that involves lower stakes than intrastate political processes.

To the extent, moreover, that standards are defined in abstract terms, discourse about them may also yield more moderate positions by stakeholders than would discussion of particular problems within particular states. Indeed, because groups that comprise the majority in some states find themselves in the minority in others, the arbitrariness of the region's borders may thereby be transformed from a source of conflict to a source of empathy. The embrace of a multilateral instrument (even one lacking the status of a treaty) could also give governing parties a more credible vehicle for signaling their intentions than promises offered in the context of domestic political contests. And it could provide political cover to efforts to implement minority protections that are likely to elicit domestic opposition, particularly if the instrument is grounded in local norms and the process through which it is developed is perceived to have been inclusive. In addition, the articulation of regional standards for minority protection would offer a normative framework for mediation, conciliation, and technical assistance efforts by international actors.[229]

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[227] *See* Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113, 148-49 (2008) (arguing that attempting to define legal rights in the absence of broad consensus regarding their specific contours "leads to a bias towards the status quo, as well as to deliberately vague, uncontroversial, and unimaginative expressions").

[228] *See Ratner, supra* note 182, at 616–17 ("If drafting groups in international organizations instead prepared harder documents in the area of minority rights, would they ever complete them, and, if they did, what difference would they make? Most states would not become parties to them, and many of those that did would not instantly change their attitude and start complying.").

[229] *See* Wippman, *supra* note 153, at 625-26 (noting that even soft law provides "the starting point for the mediation and conciliation activities of international actors").

To a substantial extent, however, the problems described in Part I arise from disputes not about the content of norms, but about the credibility of commitments. Arguably, many of the abuses and privations that are sources of conflict between ethnic and religious groups in the Middle East could be obviated through faithful adherence to human rights treaties to which most states in the region are already adhering. The factors influencing states' compliance with human rights obligations have been a focus of considerable attention—and some dispute—among international law and international relations scholars.[230] Some point to the perceived substantive fairness of the norms, or to the perceived legitimacy of the processes through which they are defined and promoted.[231] Some focus on the character and strength of domestic institutions—courts, legislatures, law enforcement organizations— through which norms are internalized, interpreted and enforced by states.[232] Some examine the extent to which developing a reputation for compliance with certain obligations enables states to advance other interests through international cooperation.[233] And some are skeptical about whether international norms have any independent influence on state behavior at all, arguing that compliance with them occurs only when it coincides with states' pursuit of other military, economic, or political interests.[234] Taken together, these diverse approaches point to three challenges that constrain the effectiveness of human rights as a framework for preventing and responding to intercommunal conflict in the Middle East.

The first challenge is weak states. The poorly developed legal and political institutions in most of the countries of the region provide little assurance that commitments made at the international level will be adhered to at the national or local level. Commitments made by regimes lacking democratic legitimacy may be seen as the product of influence by foreign or parochial interests, undermining buy-in at home. Moreover, regimes concerned with their own survival may have little incentive to implement minority protections that are opposed by a majority of the public or by political or security elites in their countries. Indeed, such regimes may be tempted instead to stoke intercommunal tensions as a means of bolstering their nationalist credentials or of stymieing challenges to their authority. In

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[230] For a review of the literature, see Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1935, 1942–62 (2002).

[231] *Id.* at 1958–60.

[232] *Id.* at 1952–55.

[233] *Id.* at 1947–52.

[234] *Id.* at 1944–47.

addition, to the extent that governments do possess the will to implement such protections, weak judicial and law enforcement institutions may limit their capacity to do so, particularly at the local level. To be sure, successful democratic transitions are likely to yield stronger institutions and, perhaps also, more reliable adherence to human rights standards.[235] However, the outcome of the transitions in progress in the Middle East is difficult to predict; and, in the short run, unsettling states' established modes of operation (even dysfunctional ones) can produce competition and chaos that bolster the threat perceptions of both governments and sub-national groups, diminishing confidence in their commitments to one another.

The second challenge is weak nations. In states across the region, disputes about how national identity should be defined have persisted and perhaps even grown sharper since the Arab Spring. The capacity of human rights standards to serve as a framework for containing and resolving such disputes is constrained in several ways. How a nation is defined may influence which sources of authority its members regard as legitimate, leading to conflicts about which bodies of law should inform the definition of rights and about who is entitled to speak on behalf of the members of communities within a state. In addition, the definition of the nation in ways that exclude certain groups may impel them to embrace secessionist or irredentist ambitions, pitting their right to self-determination against the state's right to territorial integrity. It may alternatively motivate minority groups to secure protection of their rights through counter-majoritarian means such as the establishment of a minoritarian regime or support for an authoritarian regime that is friendly to their interests, in either case pitting the rights of the minority against the rights of the majority. What makes these kinds of disputes especially difficult to resolve is not only that they are seen to involve a zero-sum competition for rights—the question becoming not whether rights should be protected but whose rights should be protected—but also that they make it difficult to distinguish legitimate fears and grievances from pretexts for oppression or subversion.

The third challenge is weak regional institutions. No regional organization counts all of the states in the Middle East as members, and the League of Arab States' longstanding association with Arab nationalism makes it less than ideally situated to win the confidence of non-Arab communities like the Kurds (particularly in light of its reflexive past support for repressive policies in Darfur and Western Sahara) or to elicit the

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[235] *See id.* at 1940 (discussing evidence that "ratification of human rights treaties by fully democratic nations is associated with better human rights practices").

participation of non-Arab states such as Israel, Iran, and Turkey. In addition, as Michael Barnett observes, "[t]he Arab League was designed to fail as a supranational entity, and in that sense it reflects the triumph of domestic regimes with little interest in developing robust regional institutions."[236] Although the League contributed to the consolidation of a supranational Arab identity,[237] its decision-making procedures were conceived with a view toward safeguarding national sovereignty,[238] and the decisions it has made have often reflected greater concern for regime survival than regional cooperation.[239] Accordingly, it lacks a robust framework for promoting collective security within the region or adherence to human rights standards among its members. Indeed, until recently, "[a]bstaining from intervention on account of human rights violations was among the few truly consensual principles guiding Arab League members, reflecting the common rejection of democratic institutions by most of its leaders."[240] To be sure, the League has recently shown new vitality, undertaking significant internal reforms, establishing mechanisms for monitoring compliance with the Arab Charter on Human Rights, legitimating UN Security Council action in Libya, dispatching an observer mission to Syria, and suspending Libyan and Syrian membership on account of human rights violations.[241] And as Marc Lynch points out, it remains "the only regional organization which brings together all of the self-identified Arab states" and, "[a]s such, it will likely remain the privileged regional interlocutor for the United Nations and the focus of any kind of pan-Arab diplomacy."[242] But transforming the League into a forum in which the rights of minorities within the states of the region can be debated, negotiated, and promoted will take considerable time and, perhaps also, a re-imagination of its mission.

That said, none of these challenges is unique to the Middle East, and none is an argument for indefinitely deferring an effort to build regional consensus about norms pertaining to the status and treatment of minorities in

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[236] Michael N. Barnett & Etel Solingen, *Designed to fail or failure of design? The Origins and Legacy of the Arab League, in* CRAFTING COOPERATION: REGIONAL INTERNATIONAL INSTITUTIONS IN COMPARATIVE PERSPECTIVE 180, 182 (Amitav Acharya & Alastair Iain Johnston eds., 2008).

[237] *See* BARNETT, *supra* note 73, at 82.

[238] Barnett & Solingen, *supra* note 236, at 192.

[239] *Id.* at 206–07.

[240] *Id.* at 207.

[241] *See* Marc Lynch, *Making the Arab League Matter,* FOREIGN POL'Y (Apr. 8, 2012), http://lynch.foreignpolicy.com/posts/2012/04/08/making_the_arab_league_matter.

[242] *Id.*

the region. These challenges do point, however, to the need for careful attention to the design of such a process, particularly with respect to the participation not only of governments, but also of non-state actors. They also point to the need for simultaneous efforts to strengthen domestic legal and political institutions and to develop an inclusive framework for regional collective security that offers states incentives for containing intercommunal conflict, rather than contributing to its escalation.

## CONCLUSION

As Peter Bartu observes, "[p]olitical transitions are a daily referendum on identity."[243] They are, accordingly, processes during which the rights and roles of ethnic and religious minorities in states often become a point of contestation and conflict. As described above, the "minority problems" facing the Middle East present an array of dilemmas that will not easily be resolved through rote application of international human rights norms or an attempt to codify regional norms. Nevertheless, a regional effort to build consensus about norms pertaining to the status and protection of minorities could facilitate much needed discourse about how to reconcile the interests of diverse sub-national groups in the context of political change, potentially transforming the region's minorities from democracy's collateral damage to its collateral.

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[243] Peter Bartu, *Against the Odds: Mustafa Abdel Jalil and the National Transitional Council, in* THE LIBYAN REVOLUTION AND ITS AFTERMATH (Peter Cole & Brian McQuinn eds., forthcoming Aug. 2013) (manuscript on file with author).

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