Minorities In International Law

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The ideology of ethno-nationalism creates a new world disorder.¹ States and international organizations must find a way to deal with group conflicts to prevent ethno-nationalism from transmogrifying into ethnic cleansing and genocide. Minorities need protection against harm. The problem of minorities dominates many political conflicts.

The judiciary can provide a critical means of protection. Agreement comes readily over the general role for the courts in minority protection. Disagreement abounds over their specific role.² Should courts, for instance, protect individuals but not specific groups? Should courts protect the identity of minority groups? The role of the judiciary becomes more tractable with a reorientation of our thinking by giving priority to the negative aspect of the minorities’ problem: the problem of injustice. Since group harm, and not group identity, lies at the heart of the difficulty, this is where the courts should look. Jurists become diverted in trying to define a minority in some positive terms when the harms that confront any minority are readily apparent.

The international community has picked out group harms from the many injustices found throughout the world and has loudly condemned these with a surprisingly united voice. Considerable agreement has emerged around a condemnation of forms of injustice, even as people bicker over the meaning of the word. This does not mean that everyone agreed perfectly or that the condemnations could not have been even more clear and widespread. However, this situation is in itself a major humanitarian achievement. For example, a highly diverse international community joined in a denunciation of the Holocaust and more recently representatives from a widely diverse array of nations joined in condemning the suffering inflicted upon the Kurds in Iraq. We must at least act upon our collective sense of wrong. Given a focus on the individual, judicial systems do not have good track records in honoring group-oriented demands. As a first step in devising an attack on injustice, we need to focus on harms, especially those harms unleashed against groups whose members have suffered untold inflictions.

The core thesis of this paper is that adjudicatory mechanisms can get a great deal of mileage out of a group harm principle. The principle is that courts ought to protect individuals from harms when the harm comes about because of their

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¹ Asbjørn Eide, “Ethno-Nationalism and Minority Protection: The Need for Institutional Reforms”, The Reform of International Institutions for the Protection of Human Rights (Brussels: 1993) (“one of the most serious contemporary threats both to peace and to human rights is the ideology of ethno-nationalism, and ... the best way to counter this threat is an appropriate and effective minority or group protection ...”).

² Except where otherwise noted, the terms “court” and “the judiciary” will be used interchangeably to refer to any adjudicatory mechanism.
perceived or actual group affiliation. The harms in question range from killing and torturing to less severe forms of discrimination and deprivation of conditions needed to lead fulfilling lives. This focus on group harm makes minority problems more tractable. However, jurists have created conundrums by trying to define minorities by uncovering the group’s defining features. By relying on questionable factors, both subjective and objective, the definitions yield imprecise, underinclusive and overinclusive results. Jurists do not need a more precise a priori definition. Instead, they should develop an empirical assessment of present and past cases of group harm. Group harm provides the international community with the conceptual tools needed to construct a more sensible framework to sort out rationally conflicting minority claims.

History of Minority Protection

The story most often told about minority protection has a Western bias. European narratives ignore customary humanitarian law in Africa, where some tribes “took pride in according respect and human rights to women, children, and old persons.” In Asia, foreigners often historically received protection. The slanted European story looks something like the following. In seventeenth century Europe, religious minorities achieved some degree of protection from their sovereign through treaties. The Protestant minority in Transylvania attained free exercise through the Treaty between the King of Hungary and the Prince of Transylvania in 1606. The Treaty of Westphalia in 1648 between France and the Holy Roman Empire granted similar freedoms to Protestants. The Congress of Vienna (1815) not only promoted religious freedom for Christian denominations but also had provisions aiming at the improvement of the civil status of Jews. The 1815 Polish constitution was “the first modern document giving international status to a [non religious] minority group.” States, such as the signatories to the Treaty of Berlin in 1878, made religious freedom a condition of state recognition.

The minorities’ issue loomed large after World War I. The Congress of Oppressed Nationalities met in Rome a year before the Paris Peace Conference. The United States and Great Britain refused a Japanese proposal to extend the League’s provisions to include equal protection of all nationals. Instead, the League adopted a treaty system. Although the League of Nation’s Covenant did not contain any provisions protecting minorities, the League’s system incorporated treaties that protected designated minorities. The Minorities Treaties empowered the League

7. The following treaties were signed: the 1919 Treaty of Versailles with Poland; the 1919 Treaties of Saint-Germain-en-Laye with Austria, Czechoslovakia and the Kingdom of the Serbs, Croats, and Slovenes; the 1919 Treaty of Neuilly-sur-Seine with Bulgaria; the 1919 Treaty of Paris with Romania; the 1920 Treaty of Trianon with Hungary; the 1920 Treaty of Sèvres with Greece;
Council to receive petitions, conduct fact-finding investigations, and issue directives to those nations not in compliance. Five states—Albania (1921), Lithuania (1922), Latvia (1923), Estonia (1923), and Iraq (1932)—had to submit assurances on minority protection as a condition for admission to the League. The avowed purpose of all these minority provisions was to avoid forced assimilation. The League Council devised a mechanism for petitions from individuals or associations acting on behalf of a minority, but minorities had to rely on the unlikely willingness of the major powers to act for them. The League regarded minority questions as largely political and sought to avoid legal approaches. The League devised rules to exclude the newly formed German Republic from crucial political deliberations over minority petitions.

World War II brought an end to the League and the treaty system, although a few minority protection treaties still developed. After World War II, minority protection became an anathema despite Jewish and other groups calling for it during and after the war. Oddly enough, the victorious powers refused to accept a draft treaty for minorities’ protection submitted by Hungary to the 1946 Peace Conference in London. The creation of the United Nations ushered in a new approach, centering on individual human rights. The United Nations Charter does not contain a provision on minorities. Even amidst the rubble of the Holocaust, few made any connection between punishing genocide (group harm, on a colossal scale) and preventing (future) group harm. Many saw the word “minority” as a term of opprobrium, symbolizing a curse to be avoided rather than referring to an entity in need of protection. The establishment in 1946 of a Sub-Commission (of the United Nations Commission on Human Rights) on Prevention of Discrimination and Protection of Minorities, represented a mild but noteworthy concession to minority groups. The Sub-Commission has undertaken a quest, which continues to this day, to find an abstract definition of minorities. The high point of the definitional quest came when Special Rapporteur Francesco Capotorti issued his report on minorities on behalf of the Sub-Commission in 1977.

One final historical period deserves attention. I would agree with Rein Mullerson that, “there is no direct correlation between the social system existing in a country and the 1923 Treaty of Lausanne with Turkey. N. Lerner, “The Evolution of Minority Rights in International Law” in C. Brolmann, R. Lefeber, & M. Zieck, eds., Peoples and Minorities in International Law (Boston: M. Nijhoff, 1993) at 83. 8. See Minority Schools in Albania, Advisory Opinion [1935], P.C.I.J. Ser. A/B, No. 64 at 17. 9. Carole Fink, “The League of Nations and the Minorities Question” (1995) 157 World Affairs 197 at 199. 10. In this essay, I shall promote a judicial approach to the minority problems. While the League gave priority to the political aspects of the minorities problem, the Permanent Court of International Justice issued a number of advisory opinions on minorities: Minority Schools in Albania [1935], P.C.I.J. Ser A/B, No. 64; German Settlers in Poland [1923], P.C.I.J. Ser. B, No. 6; Acquisition of Polish Nationality [1923], P.C.I.J. Ser. B., No. 7; Access to German Minority Schools in Polish Upper Silesia [1931], P.C.I.J. Ser. A/B, No. 40; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig [1932], P.C.I.J. Ser. A/B, No. 44. 11. For example, the treaties between Austria and Italy in 1946 and 1969 concerning South Tyrol. 12. Samuel Welles, Undersecretary of State, articulated the views held by the Roosevelt administration when in 1943 he said: “...in the kind of world for which we fight there must cease to exist any need for the use of the accursed term “Racial or Religious minority.” (June 5, 1943) U. S. Department of State, Bulletin at 482. As quoted in J. Sigler, supra note 6 at 77.
and the attitude of the authorities to minorities living in the territory of the state.”\(^{13}\) As proof, he provides two examples of the positive treatment of minorities within the Soviet bloc. The former German Democratic Republic (GDR) passed a resolution protecting the linguistic rights of the 70,000 Sorbs (Wends). Similarly, the *World Directory of Minorities* in 1990 praised the efforts of the former Yugoslavia for adopting five official languages (Serbo-Croat, Hungarian, Slovak, Romanian, and Ruthenium) for the Vojvodina province.\(^{14}\) Mullerson does not deny Soviet attacks on the Chechens, the Ingushies, the Crimean Tatars, the Volga Germans, and the Meskhetian Turks under Stalin or the more recent (1984-85) attacks on Turks in Bulgaria. He only wants to demonstrate that the Soviets were not alone in their treatment of minorities. Most countries receive mixed reviews on their handling of minority issues. There may be a more sobering lesson than the ideologically balanced view that Mullerson recommends. Those calling for a system of minority protection may be advocating nothing more than the moderate minority rights granted within the former Soviet bloc. In contrast, the history, not of the successes of minority rights in international politics, but rather of the plight of minorities, provides the conceptual clue for constructing a defensible judicial framework for protecting minorities.

**Knowing Minorities**

To determine whether a group legally qualifies as a protected minority we need to know what groups have been and are being harmed. Even on a world scale, the task is not as formidable as it might sound. Ted Robert Gurr has provided a global view of disadvantaged minorities. Gurr uncovers the historical causes of disadvantaged status.

The inequalities that divide disadvantaged minorities from advantaged or dominate groups are the enduring heritage of four major historical processes: conquest, state building, migration, and economic development. Every people who established an empire or settled frontiers, who conquered nonbelievers or civilized natives, who built a modern state, did so at the expense of weaker and less fortunate peoples. Ethnic immigrants have provided functionaries for colonial bureaucracies, labor for plantation economies, workers for industrial revolutions, and menials for the service economies of postindustrial societies. All the common types of minorities at risk had their origins in one or more of these historical processes.\(^{15}\)

Ironically, history provides the first place to begin looking for minorities. International jurists have so much difficulty devising an abstract definition of minorities precisely because they do not look at history, where minorities are so visible. To a large extent, sovereign states created minorities throughout history. Yet, as noted in Capotorti’s report, many countries, citing the non-recognition of

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minorities within their internal laws, denied the existence of minorities.16 Most Latin American countries found the term inapplicable since, for example, “[i]migrants are treated the same as Brazilians.”17 The French Government could not recognize “the existence of ethnic groups, whether minorities or not.”18 “Thailand found that the translation of “minority” has “no social and cultural connotation whatsoever.”19

States’ refusals to recognize minorities help maintain their power and privilege.20 Politically, it should not surprise us that the concept of minorities has become a problem. States have a stake in keeping the issue muddled. Intellectually, we should express dismay at how the political has duped our intellectual ability to see the contours of minority groups, which become evident once we look at history. Gurr’s analysis, which codes groups according to the types and degrees of disadvantage they experience, tells us what we already knew. Take the following sampling of his classifications: “discrimination weighs most heavily on indigenous peoples and ethnoclasses.”21 Ethnoclasses are “ethnically or culturally distinct peoples, usually descended from slaves and immigrants, with special economic roles, usually of low status.”22 “The five million Roma of Eastern and Western Europe have the highest demographic stress ratings of any communal groups in the region.”23

In short, defining minorities poses no real problem. The historical record of oppression unleashed by dominant groups locates minorities. The definitional game inevitably leaves out some minorities whose grievances deserve a hearing and detracts from the crucial issue of stemming the tide of group harm. If group harm represents the primary concern, then jurists need to turn to it directly. The project of determining group harm does not confront the same problems encountered by defining minorities. The phrase ‘positively identified minority’ will remain amorphous since it stems from an admixture of characteristics “proposed” through dominant group forces and by the bearers of the traits themselves. The process leaves great leeway for political manipulation and social construction as the recent invocation of the idea of Greater Serbia amply demonstrates.

Group harm has stark manifestations, although the wounds of group harm can be invisible to the naked eye.24 Psychological scars, self-hatred, and other more subtle effects of group harm may take training to uncover, but these will soon become apparent. Many indigenous peoples throughout the world are not faring well.

20. “‘No Turks live in Greece,’” Greece’s former Deputy Foreign Minister, Ioannis Kapis, once told me: “There are some Greeks who happen to be Muslim and happen to speak Turkish to each other. Nor are there any Macedonians...”’ Robert D. Kaplan, *Balkan Ghosts* (New York: Vintage, 1993) at 240.
Internecine disputes erupt over who represents the Romani people, and the United Nations struggles to determine the positive identifying traits of the Romani. In the meantime, the harms, past and present, inflicted upon the Romani stand out for all to see. Group harm best handles the constantly changing reality. True, as with any concept, jurists need to indicate what activities fit and what do not. However, these jurists can set a pragmatic threshold for when harm becomes judicially cognizable; they can also determine upper ranges where judicial intervention becomes imperative and a lower range where it becomes counter-productive to intervene. Schematically, group harm involves the showing of a harm inflicted upon members of a relatively powerless group because of their negative group identity. Suffice it to say that, in the United States, African Americans easily meet the threshold, whereas Dutch Americans do not.

Generally, jurists using a group harm analysis do not need to fear what statisticians call false positives and false negatives. If they overlook the “Afro-Cubans who in 1912 were the victims of a virtually forgotten pogrom,” the fault lies not with the conceptual tools but rather with how far they take the analysis. The under-inclusive and overinclusive problems that they will find in trying to identify minorities positively tie directly to the conceptual tools of sufficient and necessary conditions employed therein. Typically, definitions demand finding a few traits that always establish minority status (sufficient conditions) and a few others that minorities cannot do without (necessary conditions). Alternatively, minorities consist of a cluster of features or they possess, what Wittgenstein called, a “family resemblance.” Yet, the definitional strategy will not tolerate “fuzzy sets” since this demands a way of making clear-cut determinations. The legal definitional demand for precision cannot match the reality of murky situations.

Defining Minorities

Everyone agrees that everyone cannot agree on a definition of minorities. Nevertheless, international jurists continue the definitional search. Although the United Nations has not adopted any single definition, the most widely accepted definition of a minority is Capotorti’s proposal. Capotorti’s study explores the implications of Article 27 of the Covenant on Civil and Political Rights. He defines a minority as a

25. This analysis is extensively developed in my Democracy and Social Injustice (Lanham, MD: Rowman & Littlefield, 1995).
26. Supra note 15 at 37.
27. Special Rapporteur F. Capotorti, supra note 17 at 96.
Thirty years after the Capotorti report, the Commission on Human Rights, commissioned a follow-up study in which Jules Deschênes offered an alternative to Capotorti’s definition:

A group of citizens of a state, constituting a numerical minority and in a nondominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by collective will to survive and whose aim is to achieve equality with the majority in fact and in law.28

Patrick Thornberry, a leading commentator on the status of minorities in international law, sees little difference between the two, although he opts for the first. He predicts that “it is doubtful if any international instrument of the future will depart greatly from this [Capotorti’s] line of approach.”29 On the basis of that prediction, I will confine myself to an examination of Capotorti’s definition. However, note that both definitions presume a positive identity of minority groups. One obvious difficulty with Capotorti’s definition, readily acknowledged by him, is it refers to a numerical minority. The majority status of blacks under apartheid in South Africa serves as a counterexample. Actually, the “number’s game” does not pose a problem since we only need to agree on a numerical range. Normally, a group of two would not count as a minority, whereas those groups numbering in the thousands generally would cross the numerical threshold.

Some commentators try to excuse the unfortunate choice of the term “minority” by cautioning that the term covers minorities at risk, and this more accurately captures almost all groups that should be the focus of international concern. The suggestion seems reasonable, but it then becomes incumbent for the analyst to specify what “at risk” means. As discussed in the previous section, not every risk should trigger judicial intervention. Capotorti’s definition, however, presents more telling problems than the numerical difficulties. It supposedly captures those groups in need of protection by identifying their characteristics. Accordingly, those groups possess ethnic, religious, and linguistic properties that differentiate them from the dominant group or groups. A number of problems doom this strategy; the reason is that these definitions attempt to characterize minority groups positively. A negative identity strategy does not confront the following problems of the positive method.

1. Lack of precision. What are ethnic, religious, and linguistic characteristics? Ethnic characteristics, with specific histories and conditions of existence, defy precise differentiation.30 What characteristics differentiate ethnic groups from other groups and from other ethnic groups? Some have used tradition as the glue that holds together a minority. In the Greco-Bulgarian Communities case, the Permanent Court of International Justice declared:

29. Patrick Thornberry, supra note 16 at 7.
30. “Sociologist estimate that today there are around 5,000 discrete ethnic or national groupings in the world.” S. James Anaya, “The Capacity of International Law to Advance Ethnic or Nationality Rights Claims” (1990) 75 Iowa L. Rev. 837 at 840.
By tradition ... the “community” is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with spirit and traditions of their race and rendering mutual assistance to each other.\(^{31}\)

All attempts to construct a definition, whether through tradition or otherwise, have been unduly saddled with the burden of positively identifying a minority group worthy of judicial protection. Tradition is just as susceptible to social construction and political manipulation as any other so-called unifying idea. Cultural identity does not always naturally evolve within traditions. Examples from Thailand, which (except for a slight interlude)\(^{32}\) changed its name from Siam in 1939, vividly illustrate the nebulous state of ethnicity and its handmaidens, culture and tradition. The political construction of Thai identity became blatant in the 1940’s. Royal edicts helped to forge Thai identity, prescribing Thai characteristics. The Cultural Mandates went so far as to require authentic Thai husbands to kiss their wives before going to work. Politics forged Thai identity. Language faced a similar fate. The notion of a Thai language actually promotes a particular dialect among competing dialects in Central Thailand. Should everyone whose language fits within the Thai language family be classified as Thai? The 15 million speakers of the Zhuange and Bui languages of Guangxi and Guizhou provinces do not refer to their language as Thai.\(^{33}\) Do they qualify as Thai in spite of their self-definition to the contrary? Depending how one classifies dialects, Lao, not Thai, ranks as the largest first language in Thailand.\(^{34}\) In this case, it is difficult to find ways of positively identifying dominant groups, to say nothing of non-dominant ones. Other ethnic groups, such as the Chinese, become defined relative to this politically constructed Thai identity. To illustrate the ephemeral nature of ethnic identity consider that Chinese immigrants retain their ethnic identity if they remain in business but loose it if they join the civil service.\(^{35}\) So, minority groups as well as the dominant group are politically and socially constructed.

Negative definitions, on the other hand, do not fall victim to problems of precision. Ways of negatively isolating a minority group may fail to meet every standard of precision except one: the perpetrators of the harms know clearly how to identify group members. Perpetrators often make mistakes by attacking the wrong victim. The Chin case provides a dramatic example of mistaken identity on a small scale. In 1973, enraged by Japanese automotive manufacturing competition, two American males brutally beat Chin, who they thought was Japanese. Chin’s self...

\(^{32}\) In 1945, Thailand briefly became Siam following World War II before changing back to Thailand in 1948.
\(^{34}\) Ibid., p. 98.
identity as a Chinese American proves irrelevant to the case. The Chin case sym­
bolizes the brutal definitiveness of prejudice.

2. Underinclusive. The grouping “ethnicity, religion, and language” leave many plausible candidates for judicial protection out of the picture. International instru­ments use many group identifiers: alienage, gender, sexual orientation, physical or mental disability, class, economic status, social origin, and descent. Article 27 of the Covenant on Civil and Political Rights does not allow for any of these to serve as a basis for group identity. While many of these types of groups receive protection from non discrimination in Article 26, there is no prima facie reason for denying members of these groups the rights of self identity accorded in Article 27. The preferential treatment given to a few groups or categories identified in Article 27 seems unjustified. It is unclear why anyone who speaks a minority lan­guage should receive preferential treatment over those whose group affilia­tions revolve around sexual orientation. Moreover, drawing lines around some groups privileges those groups. Group protection becomes easier to justify when it comes on the heels of group harm. In effect, group harm picks out those characteristics worthy of protection. Race becomes a feature used by individuals to demand pro­tection because race closely tracks discriminatory harm.

3. Overinclusive. The Capotorti definition yields a proliferation of minority groups. Aruba, for example, with a population of 60,000 has 40 “minorities” with no majority if we use his criteria. Presumably, all forty groups would qualify for judicial protection as well as for entitlements, such as state subsidies for language instruction, under Capotorti’s scheme. Letting the number of minority groups pro­liferate creates not only definitional but also legal and political nightmares. A low threshold for qualifying as a minority would result in flooding the courts with claims from all kinds of groups, ranging from optometrists to skin-heads. Further, a low threshold sends the wrong signal to those who might not have otherwise thought of themselves as an ethnic group. Differentiating groups in terms of group harm need not result in a proliferation of groups. It all depends on how demanding we make the demonstration of harm. If the idea of harm includes almost anything someone says is a group harm, then group formation becomes an easy task. However, we cannot and would not want to protect individuals and their groups against every conceivable harm. We would want to make at least some headway in addressing the worst forms of group harm. A more serious worry than the pro­liferation of groups and their claims is that we fail to address even the most outrageous forms of group harm.

36. See, Evely Kallen, “Ethnicity and Human Rights in Canada: Constitu­tionalizing a Hierarchy of Minority Rights” in Peter S. Li, ed., Race and Ethnic Relations in Canada. (Toronto, ON: Oxford University Press, 1990) 77. Kallen argues that in Canada the English and the French founding majorities in Quebec constitutes a distinct society. Kallen bemoans the fact that section 15(1) and (2) of the Charter gives greater protection against discrimination to ethnic (aboriginal and multicultural) minorities and women (since they have separate constitutional protection) than to other enumerated minorities (race, age, physical or mental disability). The least protected groups are non-enumerated minorities (sexual orientation, political belief, criminal record) at 89.
4. *Subjective Factors.* Intuitively, it seems that a definition of minorities should allow for self-definition, that is, employ a subjective factor. Individuals should be able to identify themselves with a group. Nevertheless, the demand that subjective factors be included in the definition of minority would exclude two types of cases. First, it fails to capture those who do not subjectively identify with a group because they are afraid to exhibit a sense of solidarity with the group. This problem arose in response to Capotorti’s draft proposal, when a number of Governments urged him not to ignore the desire expressed by the minority group to preserve its traditions and characteristics as an essential part of the definition of minority.\(^38\) The Yugoslav Government expressed an insightful reservation about the need to include a subjective factor in the definition of minority. They noted that the subjective factor did not capture those fearful of exhibiting a sense of solidarity.

Historical experiences have shown that the “indifference” of the members of minorities towards their national origin, position, and rights are, as a rule, the consequence of the social and other circumstances in which they live.\(^39\)

Those who fail to exhibit a sense of solidarity may be just the ones who need protection. The degree to which individuals try to hide their group identity may provide a measure of how much protection they need. The burakumin in Japan provide a good example of a group whose members have tried to hide their identity, which becomes manifest only when their genealogies are known.

Second, the subjectivity requirement excludes those who do not identify with a group, not out of fear, but because of some sort of choice or inattentiveness. A person may not know her or his so-called ethnicity or have any familiarity with the traditions and customs of the ethnic group and still be negatively treated as a member of an ethnic group.

[U]ntil precisely those months [during which the Italian Fascists began promoting the idea of racial purity] it had not meant much to me that I was a Jew: Within myself, and in my contacts with my Christian friends, I had always considered my origin as an almost negligible but curious fact, a small amusing anomaly, like having a crooked nose or freckles; a Jew is somebody who at Christmas does not have a tree, who should not eat salami but eats it all the same, who has learned a bit of Hebrew at thirteen and then has forgotten it.\(^40\)

The critical factor is not what minority groups say about themselves. Rather, it is how others treat minorities. Alternatively, if courts give subjective factors too much weight, then members of almost any collectivity have an opportunity to construct a group identity and demand protection and entitlements from the state. Self-definition should not qualify as a condition for minority status. Certainly, there must be more to being Jewish than saying so. The negative identification strategy, by

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38. Special Rapporteur F. Capotorti, *supra* note 17 at 8.
39. *ibid.*
focusing on the perpetrators, largely ignores subjective factors of effected group members. However, even those who do not self-identify with a group, whether out of fear or choice, would qualify as members of a minority in need of protection so long as they were negatively treated by others as if they belonged to the group. A group harm approach shifts the focus away from the victim's mental state to the actions of the perpetrators of the harm.

5. Objective Factors. “Objective factors” refer to agreed upon external characteristics of the groups. However, there are no successful, objective renderings of the groups in question. Candidates for objective characteristics include genetic traits and physiognomic attributes. None of these work for the concept of race. Race is a social construct and not a biological characteristic. Even if we could define race using “objective” biological analyses, we could not define ethnic group or any of the other categories that fit under the heading of “minorities” in biological terms alone. Searching for Bosnian Muslim genes constitutes an effort in futility. Strategically, any attempt at a definition based on objective group characteristics is wrongheaded because it misfocuses the legal spotlight. The main problem is not how to construct predetermined definitions of protected groups but rather how to protect members of groups from harm. For legal purposes, these groups, in a sense, become defined by the harm. The dynamics of the positive group identification process do not always draw distinct boundaries around membership. The forces of negative group identity clearly separate Them from the Other.

The more we demand objective criteria for group identity and the more solidity we require for groups, the less the laws reflecting these demands will protect loosely knit groups, such as migrant workers, which do not have either clear objectively defining characteristics or a strong senses of solidarity. Migrant workers in the United States, who have a legitimate claim to protection as migrants, have various cultures, religions, and languages. Migrants have little sense of solidarity as migrants. Yet, they constitute a group, at least as characterized by the dominant culture, which has a sad history. Migrant workers should have a right to an identity even if their identity is pluralistic. The Spanish speaking migrants from Guatemala and the French speaking ones from Haiti should be able to enjoy their cultures, religions, and languages, as migrant workers for migrancy (and not national origin) serves as a (negative) group determinant. This is not to say that positive ethnic, religious, and linguistic identities do not have an important role to play in society and politics. However, we need to distinguish the issue of where the law should intervene. The law should play a prominent role in protecting vulnerable groups from harm.

Moreover, legally valorizing a group has serious drawbacks. Thornberry and other commentators see Article 27 as demanding positive action on part of states for minorities. The law needs to differentiate groups. Does each minority group, then, have an equal claim on state resources? Is the state required to give all vying

minority groups an equal share of the resources. Is the state required to assist the identity formation and maintenance of all minority groups, including hate groups, which many find reprehensible? Is the state thereby obligated to provide resources for those group practices it finds objectionable, such as female circumcision? These questions pose problems for a positive group identity framework, which places a premium value on groups as such and which does not condition entitlements on negative treatment. The most plausible basis for making distinctions among groups is the differences in harms experienced by each group and not the strength of competing positive group identities.

Canada provides an excellent example of what happens when a state grants entitlements to certain groups. Although Canada has made a constitutional commitment to multiculturalism in Section 27 of the Charter, it has constitutionalized bilingualism by making English and French the official languages. Linguistic ethnic minorities have complained that Canada's bilingualism harms them.42 Granting linguistic rights to the English and the French has not reaped the anticipated unifying benefits. While some French Canadians would say that they have a unique historical claim, the rights to linguistic identity for Poles and Ukraines in Canada should count for something. Imagine that French-speaking Canadians can also speak and understand English but do not want to do so and that Polish-speaking Canadian residents do not have any fluency in French or English. In a court, a Polish person, but not a French person, could demonstrate a harm from not having a right to use Polish in the proceedings. Group harm provides a framework for developing a solution without requiring the constitutionalization of language rights for ethnic minorities. One can give a group harm interpretation to the equality provisions of Section 15 of the Canadian Charter. Section 15(1) prohibits discrimination on a number of non-exhaustive grounds, which could include the prohibition of discriminatory treatment based on language. If Section 15 is read in tandem with Section 27, then members of an ethnic minority could not only challenge discrimination based on language, they could also argue for accommodation and affirmative measures (such as the “right to receive an education with public funds in their language where sufficient numbers of individuals within a minority exist”) to help them overcome the disadvantage. Granting an entitlement would then depend upon demonstrating a harm.

We need to heed the counsel of those proposing that we abandon the quest for a definition. Alfredsson and de Zayas do not think that a precise definition of minorities is necessary because “the answer is known in 90% or more of the possible cases.”43 They correctly highlight the futility of seeking a definition of minorities. The definitional strategy demands precision in an area fraught with fuzziness. We are already able to recognize minorities without any definitions.

Minorities have never fared well in international law and the plight of minorities has never been so urgent. Adjudicatory mechanisms could help alleviate the harm experienced by innocent minorities. The quests for positive identities, however noble in certain contexts, has impeded judicial resolution of minority problems.

A definition demands precision. The political reality of minorities yields not only imprecision but a phenomenon that defies clarity. The reality of how individuals form into minorities dooms any conceptual attempt to impose \textit{a priori} limits on what counts as a minority and what does not. Minorities, by their very nature, create issues of exclusion and inclusion. The amorphous nature of minorities stems, in part, from the fact that unpredictable political forces, unleashed primarily by dominant power factions, play a significant role in determining the ever-changing confines of the minority category. The history of Nazi Germany can better inform a court on the question “what is a Jew?” than any commission of jurists.

The intellectual frustration experienced by those involved in delineating the necessary and sufficient conditions for minority status may find comfort in how minority problems unfold historically. It takes incredible naiveté and blindness not to see the pain and suffering inflicted upon individuals because of how others perceive their minority status. True, judges will need to ask the questions about what kind of pain and harm, how much, etc. We can take some solace in knowing that, at least, they will be asking the right questions. Individuals throughout the world suffer egregiously because of their group affiliation. Adjudicatory mechanisms and institutional structures must address group harm. Group harms demand our focused attention and concerted action—now.

Conclusion