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Colloquy

Minority Disputes in Europe: Toward New Roles for International Law***591 DOES INTERNATIONAL LAW MATTER IN PREVENTING ETHNIC CONFLICT?**[Steven R. Ratner \[FN1\]](#)

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Skopje, Republic of Macedonia, March 1999:

Macedonian citizen of Macedonian ethnicity: We are trying to construct a multi-ethnic society and are proud that, of all the former Yugoslav republics, we have not gone to war with our neighbors or with each other. We want the Albanians here to be a part of this. They already have their own schools. Why must they have a separate university? We are a small country that can only have one university, and it must teach in our national language. Albanians have other places where they can speak their language. Our small state is all we have after most of Macedonia was given away earlier this century to Greece and Bulgaria. And why must the Albanian political parties fly the flag of another state--Albania--at their rallies?

*592 Macedonian citizen of Albanian ethnicity: We favored independence for Macedonia and want to be part of the society. This idea of a greater Albania is silly. But our schools are inferior, and the only Albanian language universities are in Kosovo and Albania, which are not in our country. Why can we not be recognized as a constituent nation, as we were in Yugoslavia, rather than some inferior minority? As for the flags at our rallies, we fly the flag of Albanians, wherever they live; it's not our fault that it's also the flag of Albania. You must also understand that it is we the Albanians who are western, not like the Macedonians, who are eastward-looking Slavs. [\[FN1\]](#)

When ethnic identity is at stake, international law should have cause to worry. Its mission to devise a set of norms and processes to promote international and domestic public order and human rights is under great stress. Since the renewed outbreak of ethnic-based violence in Europe a decade ago, international lawyers in governments, international organizations, and non-governmental organizations (NGOs) have hurried to invoke existing bodies of human rights law and develop new norms oriented toward the concerns of ethnic minorities. International organizations announce their new treaties and other documents with great fanfare. But why would or should the Macedonians in the above dialogue--one constructed for this article, as the two groups would normally not talk about such issues face-to-face--or their counterparts in Serbia (Serbs and Albanians), Latvia (Latvians and Russians), Slovakia (Slovaks and Hungarians), and a dozen other places care to comply with such norms if they are constructed by outsiders? And if those developing the norms devise them to be acceptable to the various sides in situations of ethnic stress, or involve them in the lawmaking process, what content will be left for the norms?

The issues at stake are neither hypothetical nor only academic. As the catastrophes in Yugoslavia, Rwanda, and elsewhere amply show, ethnic-based conflict threatens to slow down or unravel the modest progress made since the end of the Cold War in enhancing awareness of human rights and, ultimately, improving human dignity around the globe. Even *593 in Western Europe, discrimination against ethnic minorities continues to plague states like France, the United Kingdom, and Germany, even if those states refuse to acknowledge any tensions. It is hardly a new issue on the global agenda, but its danger to the state as the core political unit of the international system has potentially grave repercussions for

peace and human rights. Traditional mechanisms for implementing human rights law, such as regional human rights courts and U.N. bodies supervising the implementation of treaties, have proved ill-equipped for the task. If international law, in particular human rights law, cannot play some role in preventing violent conflict, one is left without much guidance as to normatively acceptable outcomes, and thus with results determined by power alone. [FN2] In that sense, ethnic conflict represents a great test for international law.

The ability of international law to make a difference in ethnic disputes also goes to the heart of contemporary debates about the pertinence of international law to state decision-making. These discussions date back many years and are the source of new theoretical and methodological insights in international law that have sought to explain, amplify, or debunk its influence. [FN3] Thirty years ago, an aptly entitled volume called *The Relevance of International Law* featured the views of eleven leading international legal scholars asking such questions about another difficult area of the law--regulation of the use of force--during an era wracked by ideological and political divisions over the Vietnam War. [FN4] Today's debates now include insights from other disciplines, such as international relations, that ask directly whether international law is an independent factor in the behavior of governments and key non-governmental actors. They go beyond measuring compliance with norms to asking why actors do or do not observe the law. The extent to which the law has shaped behavior in situations of ethnic tension, where emotions and prejudices in some sense seem at their height--conflicts plagued by what Michael Ignatieff (*594 quoting Freud) identified as "the narcissism of minor difference" [FN5]--thus offers an appreciation of how and why states and other actors might pay attention to any international norms.

Although numerous treatments of international law and ethnic identity have analyzed the norms and described the institutions implementing them, this Article attempts to get to more fundamental issues of international behavior. It views the relevant locus of inquiry as having four dimensions, each of which needs explicit treatment to determine the role for international law. First, the issue at stake--the problem of ethnic conflict in Europe--involves special challenges to international law, distinct from those in other areas examined as part of compliance scholarship, such as the environment or trade. [FN6] Second, the legal content of the norms thus far developed must be analyzed, as they vary from detailed treaties, to so-called soft instruments, to documents whose normative status is quite unclear. Third, the international mechanisms established by states and the strategies upon which they rely will prove critical to gauging the extent to which states can be encouraged to comply with the underlying norms. Finally, we must take into account theoretical insights on state and non-state actor behavior from international relations and mediation theory--the latter not previously considered relevant for an appraisal of the role of law.

This Article seeks to integrate these disparate strands of the ethnic conflict problem into a coherent thesis about the role for legal norms. My launching point for this examination is the work of a unique mechanism that European states have created for promoting norm-based solutions to ethnic trouble spots: the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe (OSCE). That case study suggests that norms indeed can play, and have played, a significant part in preventing ethnic conflict. That role hinges upon both a set of diverse, often unconventional, norms comprising both so-called hard and soft law, *595 and an innovative instrument for persuading relevant domestic decision-makers to comply through a set of distinct strategies. These aspects of the European experience represent a direct challenge to existing theories on compliance with international law. In particular, they suggest a far greater place for soft law than suggested to date; in addition, contrary to most views of norm observance, they point to a significant place for individual messengers, actors I call normative intermediaries, in fostering compliance. By scrutinizing the work of the High Commissioner against current compliance scholarship, I thus hope to offer a deeper understanding of the role for norms in ethnic conflict as well as the beginnings of a more sophisticated approach to fostering norm observance generally. This Article is thus overtly empirical as well as theoretical; it is also interdisciplinary in its reliance upon insights from international relations and mediation theory.

In light of these variables and goals, this Article proceeds as follows. Part I shows the basic constellation of issues and actors involved in contemporary minority disputes in terms of their salience for application of international norms, and then briefly reviews the responses of key international institutions to recent trends. Part II describes, based on the author's

empirical research, the work of the OSCE High Commissioner on National Minorities as a mechanism for invoking international norms to prevent ethnic conflict. It identifies five critical means by which the High Commissioner has sought to make norms matter. Turning to the implications of the case study for compliance, Part III characterizes the ongoing theoretical debates on the influences of norms on decision-making and exposes their shortcomings in accounting for the methods employed by the High Commissioner. Part IV considers the relevance of the nature of legal norms upon state behavior, rejecting traditional distinctions between hard law and soft law. In Part V, I turn to the salience of the techniques for securing compliance with international norms, introducing the construct of the normative intermediary as based on both mediation theory and the empirical research. The conclusion draws upon these analyses to offer several observations about the promises and limitations of law for resolving ethnic conflicts.

***596 I. Post-Cold War Ethnic Tensions and Responses**

A. "The Eggs of Versailles and Brest-Litowsk": The Resurgence of Ethnic Nationalism, 1989-1999

The historian E.J. Hobsbawm has cogently described the nub of the problem of Europe's contemporary ethnic tensions:

The eggs of Versailles and Brest Litowsk are still hatching. Essentially the permanent collapse of the Hapsburg and Turkish empires and the short-lived collapse of the Tsarist Russian empire produced the same set of national successor-states with the same sort of problems, insoluble in the long run, except by mass murder or forced mass migration. The explosive issues of 1988- 92 were those created in 1918-21. [\[FN7\]](#)

While Hobsbawm's view that the existing tensions are truly "insoluble" absent drastic measures might be questioned, there can be little doubt that today's disputes have critical origins in the attempt after the first World War to carve out of the defeated empires new states based on national identities. The wisdom of the victorious Allies' decision to base these new states--Poland, Czechoslovakia, the Kingdom of the South Slavs (later Yugoslavia), Estonia, Latvia, Lithuania, Austria, Hungary, and Turkey (the last three small remnants of former empires)--on Woodrow Wilson's idea of self-determination of nations has elicited endless commentary. The philosopher Elie Kedourie observed that "the nation-states who inherited the position of the empires were not an improvement . . .; in fact, the national question which their setting up, it was hoped, would solve, became, on the contrary, more bitter and envenomed." [\[FN8\]](#) Nonetheless, three-quarters of a century later, it remains difficult to imagine an alternative to the continuation of empires in Europe that would have been a vast improvement over the option chosen.

***597** Despite the desire of the Allies to draw many borders based solely on their own strategic interests, Versailles created the closest approximation in European history to states based on conscious national identity; but, of course, it could not erase the presence of numerous minorities in each of the new states. [\[FN9\]](#) The League of Nations developed a set of specialized treaties and mechanisms to address the concerns of minority groups qua groups, which helped allay some tensions but ultimately proved powerless against Hitler's attempt to bring all Germans in Europe within one Reich. [\[FN10\]](#) When the states of Europe were resurrected after World War II, the basic outlines of the Versailles map remained intact, although some states had effectively disappeared (Estonia, Latvia, and Lithuania through forced incorporation into the Soviet Union), and others had new borders thanks to Allied diktat (e.g., Poland and Czechoslovakia, which lost territory to the Soviet Union). Most of the eastern half of the continent fell under Soviet domination, with its own policies toward national minorities.

The Soviet policy, and a similar model adopted by Josip Tito in Yugoslavia, recognized different nationalities, but attempted to control the various groups to guarantee centralized governmental and party authority. As Rogers Brubaker puts it, these regimes sought "to drain nationality of its content even while legitimating it as a form, and thereby to promote the long-term withering away of nationality as a vital component of social life." [\[FN11\]](#) Beyond this trend, of course, the East European model generally eschewed public participation in governance except through entities controlled by the communist party.

***598** The result, when the communist and socialist regimes in central and eastern Europe fell from 1989-1991, was half a continent with no workable concept for integrating minorities into the state in a manner consistent with the notion of participatory government that they were claiming as the new basis for the state. The absence of democratic traditions seems to have proved a direct cause of the ensuing difficulties in addressing the concerns of ethnic minorities. [\[FN12\]](#) Making this vacuum particularly dangerous was the economic plight of many of the countries. The sense of desperation of both majorities and minorities led quite quickly to a heightened sense of identification of individuals with their respective ethnic group. [\[FN13\]](#) In Hobsbawm's words: "[I]n post-communist societies ethnic or national identity is above all a device for defining the community of the innocent and identifying the guilty who are responsible for 'our' predicament." [\[FN14\]](#) Political opportunists quickly saw a chance to profit from these insecurities. The most notable were ultra-nationalists like Franjo Tudjman of Croatia and Slobodan Milosevic of Serbia, who built their rule on the democratic and economic deficits of Yugoslavia. These political and economic factors manifested themselves in different ways across Europe, from the Baltic states, where restored independence had created a new minority--ethnic Russians--associated in the minds of the majority with the former occupation, to the former Yugoslavia, where the one state in Europe constructed at Versailles to combine several ethnic communities proved unable to keep itself together without the unifying figure of Tito.

The inability or unwillingness of the governments of the post-communist states (one hesitates to call them democracies) to find a way of addressing these new tensions represented, ***599** of course, a serious human rights problem. Majorities often sought to suppress various civil and political rights of the minority members of their population, such as the right to involvement in public affairs and freedom of association. [\[FN15\]](#) But the resurgence of ethnic-based claims has had an additional, more immediately destabilizing effect, due to the critical interstate aspects of the problem. Brubaker has captured the essence of the situation in describing a "triadic configuration" in Europe. The first element of this configuration consists of the newly nationalizing states, asserting an identity for the state based on the history, traditions, culture, and language of the dominant ethnic group, free from communism's insistence on socialism as a common bond across states. Second are the national minorities in the new states, who seek some form of control over their lives independent of the dominant nationality. The third party is the external homeland of these minorities, the so-called "kin state," typically a neighboring state to which the minorities belong by ethno-national affiliation and whose elites often follow the welfare of the minorities quite closely. [\[FN16\]](#) Whether Hungary's interest in the affairs of Hungarians in Slovakia or Romania, Russia's concern for Russians in the Baltic states and elsewhere, or Serbia's proclamations about the welfare of Serbs in Croatia and Bosnia, these triangles now superimpose themselves across the map of central and eastern Europe.

B. Delayed Reactions: The Responses of International Law and Institutions

International human rights law and the mechanisms developed to implement it proved generally unprepared for this new political dynamic. The League's failure to address minority issues successfully through specialized treaties and dispute resolution processes during the inter-war period had led to a complete shift in international law's treatment of that question after World War II. Instead of protections for groups, individual civil, political, economic, social, and cultural rights became the lingua franca for the protection of human rights. [\[FN17\]](#) The ***600** dominant paradigm for addressing the concerns of minorities became non-discrimination: in the words of the International Covenant on Civil and Political Rights (ICCPR), this principle required states to ensure that all persons enjoyed various enumerated human rights "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." [\[FN18\]](#) Thus, for example, the state must guarantee freedom of expression and association and due process rights during criminal trials without regard to a person's ethnic background. The Covenant limits any special rights for "persons belonging to minorities" (not the groups themselves) to the enjoyment of their culture, religion, and language, without further elaboration. [\[FN19\]](#) This model of emphasizing nondiscrimination appeared in the core regional human rights treaties in Latin America and Europe as well. [\[FN20\]](#)

International lawmakers thus favored de-emphasizing particular aspects of minority identity in favor of the equality of minorities with other persons. The wisdom of this decision should not be easily dismissed. Non-discrimination as a norm, when combined with specific human rights, offers significant protections for minorities from governments intent on dis-

criminating against them; the necessity of additional protections for minorities is hardly obvious, though beyond the scope of this Article. [\[FN21\]](#) But as a consequence of this path, the *601 detailed elucidation of the norm of non-discrimination as it affected minorities and its relationship to other rights remained until recently a fairly low priority of those prescribing or interpreting these norms. The only significant exception to this pattern of normative neglect involved the quiet work of the United Nations Human Rights Commission and its Sub-Commission on Prevention of Discrimination and Protection of Minorities, with their studies of the law concerning national minorities in the 1970s and 1980s. [\[FN22\]](#) The Sub-Commission decided as early as 1979 upon the desirability of a General Assembly resolution on the rights of minorities, and then, based on drafts submitted by Yugoslavia (ironically in retrospect), established a special working group to study the issue. [\[FN23\]](#) That process moved extremely slowly, only gaining momentum as Yugoslavia itself began to shatter in 1990. [\[FN24\]](#)

Compounding this unpreparedness was a rigid institutional structure within international organizations asserting competence over human rights issues. Their mechanisms entailed formal determinations of state compliance with human rights treaties through a review of state-submitted reports, a hearing of individual claims, or both. In the United Nations, the Human Rights Committee, established to oversee the implementation of the ICCPR, issued reports on each state party that addressed its performance of the Covenant's provisions, although the impact of these reports on minority issues remains quite unclear. Through its system of individual petitions, the Committee occasionally heard complaints from a member of a minority regarding discrimination or failure to respect the rights to culture, and issued rulings leading some states to alter their policies. [\[FN25\]](#) Similarly, the European Court *602 of Human Rights decided only a few cases that involved minority-related issues. [\[FN26\]](#) Both methods, however, were (and remain) slow, with significant procedural hurdles to adjudication on the merits that kept many issues out of those arenas. [\[FN27\]](#) And although the Human Rights Committee was authorized to issue General Comments (not specific to individual states) that offer important guidance on the interpretation of the Covenant, it did not issue one concerning the provision on minority rights until the mid-1990s. [\[FN28\]](#) International institutions and states thus stayed far from the League's policy of overtly addressing minority issues, preferring to treat them only sporadically as a distinct subject of international scrutiny.

Such a combination of norms and processes, however, proved wholly inadequate after 1989. The turn of various communities to their real or invented ethnic origins, the misuse of ethnicity by governmental and communal leaders, and the threats to international stability engendered by the involvement of kin states all argued for addressing ethnic minority issues head on: a prescription providing merely that states should not discriminate was no longer enough. The result was the construction, albeit slow and still incomplete, of a new regime regarding minority issues. This regime--a set of institutions with agreed upon principles, norms, rules, procedures, and programs--grew from the existing regime of international human rights, but reflected a very deliberate decision by states to address minority issues more explicitly as a means of conflict *603 prevention. [\[FN29\]](#) But it stemmed from a major political commitment by states. [\[FN30\]](#)

That commitment, it now appears in retrospect, emanated from positive and negative pressures, both of which originated in the fall of communism. On the one hand, Europe witnessed the emergence of many new governments either committed to principles of democracy and fair treatment of their minorities, or at least eager enough to be seen as allied with the West so as not to resist the creation of a regime embodying these principles. [\[FN31\]](#) On the other hand, many states in Eastern Europe and the former Soviet Union faced domestic instability due to the renewed emphasis on ethnic identity by both majorities and minorities. These ranged from civil wars in the former Yugoslavia, Georgia, Azerbaijan, and Moldova, to lesser, but significant, tensions in the Baltic states and central Europe.

1. Majority-Minority Relations as Conflict Prevention: The Response of the OSCE

The first and still-primary arena for the development of this new regime was the Conference (since 1995, Organization) for Security and Cooperation in Europe. Created during the Cold War as a forum for communication regarding European security, the CSCE represented the sole such entity to include all the states of the North Atlantic Treaty Organization and the Warsaw Pact, as well as the neutral states of Europe. Although it now calls itself an organization, the OSCE has never had a constitutive instrument or charter, instead altering and gradually enlarging its structures and functions as political

will has permitted, subject to the condition that all its decisions *604 be based on a consensus of its states. [FN32] In its most historically significant accomplishment, it served as the arena for the negotiation of the Helsinki Final Act of 1975, in which European states effectively recognized the inviolability of their post-World War II borders and pledged to respect basic human rights--a pledge that dissidents and NGOs used effectively against communist regimes in the 1980s. [FN33] The Helsinki Act enshrined the notion of "comprehensive security" as entailing both military and human rights dimensions. [FN34]

As the Cold War ended, the CSCE's members, which now number fifty-five (including all of the states of the former Soviet Union, some of which are not really in Europe at all) completed, in the course of just a few years, a set of more ambitious documents addressing human rights and, in particular, minority issues. First and most significant for the protection of minorities was the concluding document of the CSCE's Copenhagen Meeting of the Conference on the Human Dimension. [FN35] In addition to laying out provisions on the rule of law, elections, and basic human rights, the Copenhagen Document contains a detailed listing of protections for minorities. [FN36] For example, articles 31-38 address issues such as the individual's *605 right to choose his or her minority status; the right to express ethnic, cultural, linguistic, or religious identity; the right to use the mother tongue in public; the right to establish specialized institutions of learning or culture; and the right to maintain contacts with members of the group residing in other states. Five months later, the heads of state in the CSCE issued the Charter of Paris for a New Europe, in which they declared democracy to be "the only system of government" of their states. [FN37] With these documents, the CSCE had completed the elaboration of basic norms governing the treatment of minorities (the legal status of which we will return to later). While the provisions in the documents regarding the human dimension of security appeared quite open-ended and rarely detailed, they did represent a starting point of agreed standards that might help reduce the potential for conflict caused by government-minority tensions.

As for the implementation of these pledges, the CSCE states established three formal processes. The so-called Vienna Mechanism of 1989 set up an elaborate procedure for states to bring to the CSCE's attention instances of violations of the standards relating to human rights; the Moscow Mechanism of 1991 allowed one country to invite a mission of experts to visit it, or, with the consent of all other states, required it to accept a mission. [FN38] Although the Vienna Mechanism was used during the last years of the Cold War, states have invoked neither mechanism since then; perhaps most tellingly, neither played any significant role in preventing or controlling the bloodshed in the former Yugoslavia. [FN39] A third process, the so-called Review Meetings of the Human Dimension, allows states to confer publicly and regularly to hear criticisms regarding their human rights practices. [FN40] The formality of these mechanisms, *606 including the variety of stages involved and the necessity for formal state-to-state accusations, have, however, limited their effectiveness in improving specific situations of minority-related tensions.

Beyond these procedures, one OSCE instrument has assumed the most significance in implementing the nascent regime on minority-related disputes-- the High Commissioner on National Minorities (HCNM). The High Commissioner represents the most direct response to the triadic configuration described by Brubaker and embodies in one official the twin pillars of the regime to address that dynamic: implementation of human rights standards and conflict prevention. [FN41] Europe's governments created the position at the CSCE's 1992 Helsinki summit as a reaction to the organization's failure to prevent the war in Yugoslavia, charging the High Commissioner with serving as an "instrument of conflict prevention at the earliest possible stage." [FN42] His mandate, the product of long negotiations, permits him to collect information, assess the situation, visit countries, and "discuss the questions with the parties, and where appropriate promote dialogue, confidence and cooperation between them"; he may also, if he fears a risk of conflict, issue an "early warning" to the OSCE's standing political body (the Permanent Council) and attempt to find a solution to the problem through so-called "early action." [FN43] As discussed further below, the first High Commissioner, Max van der Stoep, a former foreign minister of the Netherlands, has interpreted his mandate to proactively devise and promote solutions to minority-related tensions without formal permission of the Permanent Council. Although the OSCE created the position of the High Commissioner as part *607 of its mission of preventing conflict rather than explicitly as a mechanism to implement OSCE

norms on minorities or human rights, his work in practice has shown the inseparability of norm implementation and conflict prevention. It is that experience to which I will return in greater detail in Part II below.

2. Minority Rights as Treaty Enforcement: The Council of Europe

A slower reaction to the threats to stability and human rights from the triadic relationship came from the Council of Europe, the regional intergovernmental organization created in 1950 to promote democracy and human rights in the non-East Bloc states of Europe. At the bedrock of the Council's *raison d'être* is the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Council members must be a party. The Convention includes provisions for the binding resolution of individual complaints by the European Court of Human Rights, which has repeatedly and successfully ordered states to rectify various human rights violations. [FN44] The Council, like the United Nations, preferred an approach to human rights based on elaborating rights pertaining to all people without particular attention to minorities, with determinations through formal bodies basing their decisions on the European Convention. As a result, although the Council during the early 1990s welcomed as members most of the states of the former East bloc and thereby placed them within the ambit of the Convention's judicial system for protecting human rights, it did not move away from this formal, treaty-centered approach.

In 1991 and 1992, following issuance of the CSCE's Copenhagen Document, one of the Council's organs, the popularly elected (but for the most part powerless) Parliamentary Assembly, pressured the Council's governing body, the Committee of Ministers, to authorize the preparation of a new *608 treaty on minorities. The result was the European Framework Convention for the Protection of National Minorities. [FN45] The treaty builds upon the Copenhagen Document by containing important innovations regarding substantive protection of minorities, including the use of names, education, and public media. [FN46] As for the implementation of these commitments, the Convention somewhat vaguely leaves the matter to the Committee of Ministers, with the assistance of an advisory committee whose powers have just recently been outlined. [FN47]

3. Minority Rights as a Whimper: The United Nations

The Yugoslavia crisis brought the work of the Commission on Human Rights' working group on a draft declaration on the rights of minorities to the attention of governments, and, at the General Assembly's 47th session in 1992, the Commission's draft was adopted by consensus. [FN48] The very modest resolution, a product of the diversity of the states that approved it, contains far looser language than the European documents, although it did at least highlight the importance of minority issues as relevant to the human rights and security missions of the United Nations. [FN49]

*609 C. But is it Law?

To gauge the role of international law in preventing ethnic conflict, one must confront immediately the conscious decisions by the prescribers of these instruments to adopt a variety of postures regarding the normative nature of the documents. As an initial grasp, the more general global and regional instruments on human rights, such as the ICCPR and European Convention, as well as the Council of Europe's Framework Convention, are clearly treaties, i.e., agreements between states (or between states and international organizations) "in written form and governed by international law," [FN50] whereas the OSCE has produced a series of instruments that do not meet that definition. But the non-treaty nature of the OSCE documents only tells us what they are not, not what they are; even the treaty status of the Framework Convention does not represent the last word on the effect of its authors' decisions regarding its normative status.

1. The View from Positivist Doctrine

From the perspective of the traditional positivist view of international law prevalent in much of Europe today, if the OSCE documents regarding treatment of minorities do not constitute treaties, then they have legal relevance only if they reflect existing customary international law. If they are neither a treaty nor a reflection of custom, they are simply "political" documents. [FN51] The legal/non-legal distinction offers an easy explanation of states' willingness to conclude documents *610 such as the Helsinki Final Act or the Copenhagen Document--they could claim that the undertakings did not

legally bind them, and they thus saw no risk from concluding them. [\[FN52\]](#)

Despite the need by the states in the OSCE to cling to this distinction, the OSCE as an organization has nevertheless tried to highlight the importance of its instruments. Thus, one typical OSCE publication states: "The fact that OSCE commitments are not legally binding does not detract from their efficacy. Having been signed at the highest political level, they have an authority that is arguably as strong as any legal statute under international law." [\[FN53\]](#) This position has received scholarly support from positivists who adhere to a notion of strict distinctions between law and non-law. Among the most quoted by OSCE enthusiasts is Pieter van Dijk, who has stated: "A commitment does not have to be legally binding in order to have binding force; the distinction between legal and non-legal binding force resides in the legal consequences attached to the binding force." [\[FN54\]](#) But this position merely shifts the debate to the meaning of "binding." It implies that, other than the inability of states to seek recourse for violations through international adjudicatory bodies, the OSCE commitments are just as binding on states--just as normatively significant--as treaties. [\[FN55\]](#) It thus hopes to convince states of the seriousness of OSCE commitments without qualifying them as legal--that, albeit "political," they are nonetheless promises to be kept.

As for the Council of Europe, its Framework Convention is clearly a treaty and thus, under the binary paradigm above, legally binding upon the parties. The content of that treaty, however, suggests that the term "binding" raises as many questions as it does in the context of the OSCE documents. Many of the Framework Convention's key provisions, for instance, *611 merely require the state parties to "endeavour to ensure" certain protections for minorities or provide them only "as far as possible." [\[FN56\]](#) Is an obligation to undertake those sorts of acts binding upon a state in the same sense as one banning certain forms of discrimination? [\[FN57\]](#) The drafters of the Framework Convention recognized that many of its clauses impose weaker duties upon states, but the binding status of the Convention does not, in the Council's view, seem compromised by these provisions. [\[FN58\]](#)

Both the OSCE and the Council of Europe's official positions-- emphasizing the binding nature of their instruments--represent subterfuges. Each organization attempts to have it both ways--to claim its commitments are binding on members without acknowledging decisions by those preparing the documents that evince bindingness as a flexible and relative concept. Each, however, makes the claim of bindingness from a different direction. The OSCE suggests that the status of, for instance, the Copenhagen Document as neither a treaty nor a reflection of custom is of marginal relevance; it simply means that states cannot institute proceedings in the International Court of Justice claiming a violation of it, or, perhaps, that individuals cannot sue in domestic courts alleging a state's failure to meet its commitments. The Council of Europe, for its part, suggests that the loose language of the Framework Convention matters little, in that states that sign it have a duty to *612 implement it. Equally important, neither position offers any practical guidance on the normative nature of these documents to critical actors-- governments who must determine whether and how to comply with them (and thus what compliance even means) and claimants seeking to invoke them to promote solutions to incipient disputes over minorities. [\[FN59\]](#)

2. Evading the Binary Trap: Soft Law as a Construct

The normative ambiguities of these instruments relating to ethnic-based disputes best merit scrutiny through the lens of soft law. Debates among international lawyers over the concept of soft law have become so prevalent that even attempting a definition is hazardous. [\[FN60\]](#) Nevertheless, the idea behind identification and explanations of this genre is clear: it stems from the recognition that international lawmaking entails certain choices by prescribers as to the extent of obligation to impose upon the targets of their exercise--that the outcome of the process cannot always be seen as either law or non-law. Rather, some instruments--soft law--will exhibit some features of law and yet not enough to be fully binding under positivism's binary paradigm.

Indeed, as Michael Reisman has argued, three components inherent in all lawmaking can vary, making the binding nature of the product one of degree. [\[FN61\]](#) First, the policy content *613 in the instrument may be relatively clear in terms of the action demanded of the target [\[FN62\]](#) or open to more interpretation or a margin of discretion by the target. [\[FN63\]](#)

Second, the expectations regarding the authority of the prescriber--the extent that states regard it as reflecting their views about appropriate behavior through a legitimate process--may be high or low. A treaty drafted by states in the Council of Europe that each may choose to ratify would exhibit the former; a U.N. General Assembly Resolution adopted by split vote would entail the latter. [\[FN64\]](#) Third, the expectations regarding the ability of the norm-makers to make the prescriptions controlling--to ensure that states comply with them--may be high or low. Here, one can contrast provisions for mandatory, binding judicial review, as in the European Convention on Human Rights, with the absence of any formal mechanism for dispute resolution, as with the 1992 U.N. Declaration on Minorities. Determining the softness or hardness of an instrument with respect to these criteria demands an examination of the form, subject matter, and content of a document, as well as the intention of the parties. [\[FN65\]](#)

From this perspective, the OSCE commitments prove hard in some respects and soft in others. Certain parts of the *614 Copenhagen Document express specific expectations of governments, while others are more open-textured. [\[FN66\]](#) As for the authority of the document, the unanimity rule required for adoption of OSCE texts and the high level (head of state or foreign minister) at which they are approved imbues them with much significance as reflecting the community's expectations of right behavior (as the above-quoted excerpt from the OSCE's official handbook boasts); however, the insistence of OSCE states on denying it the formalities of a treaty suggest some reservations in this regard. As for the expectations of the prescribers regarding their ability to make the document effective, the lack of some form of mandatory or binding dispute settlement suggests somewhat low expectations, although the creation of some mechanisms to monitor state behavior means that the states did want to at least gauge compliance and put pressure on violators. Based on this combination of traits, some observers simply refer to the OSCE documents as soft law. [\[FN67\]](#)

The Framework Convention, on the other hand, would not meet some definitions of soft law simply by virtue of its conclusion as a treaty. [\[FN68\]](#) For this very reason, states, especially those in the Council of Europe, would be loathe to refer to the Framework Convention as soft law--for this would also suggest, perhaps, that treaties need not always be treated as legally binding. But such a view of soft law addresses only one aspect *615 of the Framework Convention--the expectations regarding the authority of the prescriber, in this case, the states of the Council of Europe acting by concluding a treaty. From the perspective of the level of generality of certain of the obligations and the lack of specific enforcement machinery noted earlier, the Framework Convention is, indeed, quite soft in many respects. [\[FN69\]](#)

3. Soft Law and Ethnic Disputes

European states have thus chosen to address minority issues in recent years through legal instruments soft in key aspects, rather than through harder forms akin to the European Convention on Human Rights (with its court-centered enforcement structure), or even the ICCPR (with its review of state-submitted reports and decisions on individual complaints). This decision reflects the trap in which many European states find themselves on this issue. All have adopted a mantra, now part of the core instruments of both the OSCE and the Council of Europe, that seems like the perfect "win-win" solution--one that sounds forward-looking and respectful of minority concerns, yet respects the existing states as the core units of political organization. It holds that granting minorities a degree of control and authority over certain aspects of their lives especially important to their (ethnically defined) identity will promote their voluntary integration into the state and thereby promote the strength of the state. [\[FN70\]](#) But it is equally clear that many, though certainly not all, leaders and populations do not really believe in this formula. Indeed, they fear the consequences for the state of minority rights-- in particular forms of autonomy that they see leading to a lack of control by the central government over certain groups and even territories--and would much prefer to impose a majority-*616 based ethnic identity on the population, perhaps through the guise of a "cosmopolitan diktat." [\[FN71\]](#)

To sound both unified and progressive on these issues, the governments of Europe have thus produced these new standards, but the softness reflects the hesitancy of many governments about them. Some governments simply want to test different arrangements and thus prefer to work within a corpus of soft law giving them flexibility, either because the texts themselves are open-textured or because they are not treaties, so that states can deny violating international law if they do not live up to them. [\[FN72\]](#) Others want to take advantage of generalities in the text or the non-treaty status to avoid do-

ing anything about the issue.

This somewhat skeptical look at the motivations of governments in promulgating the existing norms does not, however, imply a setback for the development of international law. For, given their concerns about protection of minorities noted above, the alternatives would seem far worse. 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. [FN73] The soft law solution has thus proved critical in this area as well as others where expectations of appropriate *617 behavior and the consequences for failure to act in accordance with them are not crystallized, such as certain aspects of the environment. [FN74] For a normative framework responding to the resurgence of ethnic identity, to ask more at this early stage of state reactions to this phenomenon would be utopian.

Understanding the key instruments concerning minorities as reflecting varying degrees of firmness justifies expanding the locus of inquiry regarding the relevance of international law beyond treaties; it also helps explain that not all treaties are, in a sense, created equal. With this groundwork laid, I turn to appraising how these various instruments have been employed to address ethnic-based tensions through an examination of the experience of the OSCE's High Commissioner on National Minorities.

II. Making the Law Matter: The Work of the High Commissioner on National Minorities

The first seven years of the OSCE's High Commissioner on National Minorities offer a critical mine for empirical research on appraising the role of international law in preventing ethnic conflict. The High Commissioner has assumed the role of focal point in Europe for this purpose, and his reliance upon international norms--whether they are called legal or non-legal, or simply standards--clearly forms part of his modus operandi. For purposes of my analysis here, it is neither necessary nor possible to conduct an entire review of the experience of the first High Commissioner, which has involved *618 hundreds of visits throughout Eastern Europe and the former Soviet Union and thousands of pages of written communications with governments, non-state actors, and international organizations--with successes and failures sometimes very hard to measure. [FN75] Instead, the experiences will be examined thematically and functionally, with particular attention to a small number of countries that demonstrate the range of processes involving, and outcomes resulting from, the High Commissioner's use of norms. Later, in parts IV and V, I will consider the consequences of these activities for norm compliance.

A. An Overview of the High Commissioner's Modus Operandi

The High Commissioner's overall function, as summarized by Diana Chigas, is

not to "resolve" complex ethno-national disputes. Instead, he has seen his main task to be in the realm of short-term conflict prevention, to prevent acute escalation of tensions, and, looking to the longer term, to help set in motion a process of dialogue between the government and minority that will address the long-term relationship between them and deal with the root causes of the tensions. [FN76]

To accomplish this, the High Commissioner keeps a general watch on those states within Europe where the problem of minorities could interact with the triadic relationship described by Brubaker and lead to interstate tensions. [FN77] The areas of nascent tensions can range from citizenship, to use of *619 language, to education. The High Commissioner first assesses whether he can play some sort of useful role. Some situations, for instance, prove ill-suited for his intervention because other actors are concurrently investing efforts in the conflict, even if to no avail; in Cyprus, for instance, the United Nations has assumed the leading role in (as yet unsuccessful) peacemaking in that ethnically divided island. Others may prove inappropriate for involvement because the dispute may have reached a point where his sorts of tools are not likely to make a difference, as occurred with the conflicts in Bosnia-Herzegovina and Kosovo or the attempted seces-

sion of Chechnya and ensuing fighting with Russia. His mandate also prohibits him from intervening in "situations involving organized acts of terrorism," language added at the behest of the United Kingdom and Turkey to keep the office out of the affairs of Northern Ireland and Kurdistan, respectively. [\[FN78\]](#)

In each situation, the High Commissioner then gradually seeks to increase his involvement, initially through visits to the country to meet the relevant players. He sees governmental leaders in the executive and legislative branches, representatives of minorities, and others intimately involved in the issues (e.g., educational leaders on an issue concerning minority education) to gauge their concerns and their amenability to his involvement. He also consults with other organizations or states that may be following the situation, including the kin state of the relevant minority, thereby addressing all three points of Brubaker's triad. At this point, the High Commissioner may assume a more active role, proposing concrete steps that might move the government and the minority group (or in some cases, two governments) together on an issue. [\[FN79\]](#) This entails working with legislators on drafting statutes and with administrators on preparing implementing regulations, in coordination with the minority group whose concerns are at stake. Simultaneously, he will talk with outside actors who might be able to urge acceptance of his proposals. The ability of these actors to contribute to the High Commissioner's efforts can turn on such factors as historical or ethnic ties with *620 one side or the other, their ability to offer incentives to comply, or even their ability to mete out adverse consequences if the parties do not agree. [\[FN80\]](#)

Lastly, the High Commissioner engages in this conflict prevention role within an institutional framework. He serves as a permanent mechanism of an international organization, the OSCE, with a staff of some ten international civil servants. He carries with him the mantle of the OSCE: his ability to work with governments and minorities may be influenced by their views of the OSCE, and he often needs the OSCE to support his actions. The OSCE as an organization may support him through diplomacy by its Chairman-in-Office, statements of support by the Permanent Council or members of it, information-gathering and follow-up work by OSCE missions in various states, and projects by other OSCE institutions. Nonetheless, the High Commissioner remains in many ways a free agent in terms of the issues he wishes to pursue. He need only report his activities to the Chairman-in-Office of the OSCE (the foreign minister of the state serving as the chair of the organization for that year), rather than to the entire Permanent Council, and in practice has engaged in such consultation rather infrequently. [\[FN81\]](#)

B. A Place for Norms

Where do norms fit into this process? As a matter of the intent of the governments creating the office and the High Commissioner's formal mandate, they do not seem to play much role at all. The OSCE states did not create his position for implementing international norms concerning minorities. Their approach at the 1992 Helsinki meeting where the mandate was crafted made clear that the High Commissioner served, first and foremost, as a mechanism for conflict prevention, rather than formally as part of the OSCE's "human dimension." [\[FN82\]](#) As a result, the mandate mentions the OSCE *621 norms somewhat in passing, without explicitly requiring him to base his work upon them. [\[FN83\]](#)

Yet as the official mechanisms for implementing the human dimension commitments on minorities have fallen into disuse (principally because only states can invoke them and their formality dissuades them from doing so), the High Commissioner, who can act on his own, has become the centerpiece of OSCE concern for national minorities. [\[FN84\]](#) From the beginning of his term of office, the first High Commissioner has made the international norms a core part of his strategy to resolve incipient conflicts. [\[FN85\]](#) The norms of the OSCE, the Council of Europe, and the United Nations have provided both a starting point for many of his interventions and a continued reference point during the discussions. He has invoked and interpreted them constantly, especially if one party is seeking to ignore or mischaracterize them. He has proposed solutions in which states specifically acknowledge duties to undertake *622 behavior required or at least encouraged by the norms. And he has used a variety of strategies to support outcomes consistent with norms and to oppose policies inconsistent with them. In short, he uses norms to achieve solutions, and seeks solutions consistent with norms.

Of course, securing compliance with international law forms only part of the task of the High Commissioner. And norm compliance hardly suffices to prevent conflict. One side in a conflict may ask for more than the norms require, even if the norms do not prohibit what they are seeking, or a tense situation may not really concern norms at all, but dialogue or political cooperation between different groups. [\[FN86\]](#) In those cases, any mechanism for preventing conflict will find arguments based on international norms of limited utility and instead must rely upon other strategies to defuse tensions.

Nevertheless, the High Commissioner has made norm compliance a necessary (though not sufficient) element of his problem-solving approach. (It is, of course, possible to imagine a High Commissioner who could accept any outcome that the major political factions agreed upon even if it violated international norms, although the ethical ramifications of an OSCE official's endorsement of an outcome at odds with OSCE standards would be quite significant. [\[FN87\]](#)) The process by which he has employed norms to get parties to reach agreements respecting those norms reveals potential causal paths by which norms can affect the behavior of relevant actors. In this context, the OSCE High Commissioner has employed five ***623** principal methods for integrating norms into conflict resolution--(1) translation of norms; (2) elevation of norms; (3) mobilization of support for outcomes consistent with norms; (4) development of norms; and (5) dissemination of norms.

C. Translation of Norms

Whatever the treaty or non-treaty status of the norms that European states have developed to address ethnic concerns, the text of these documents (the first factor of softness discussed earlier) leaves them open to much interpretation. [\[FN88\]](#) In the case of the two main relevant instruments, the Copenhagen Document and the Framework Convention, neither the OSCE nor the Council of Europe has created bodies authoritatively charged with their interpretation. As noted, the IC-CPR and the European Convention on Human Rights have received some elaboration. The Human Rights Committee, principally in cases involving indigenous peoples, has offered guidance on the need to balance individual and group rights, the connection between minority rights and territories important to a group, and the link between a minority group's culture and its special economic activities. [\[FN89\]](#) The European Court of Human Rights has examined a few minority-related concerns insofar as they reflect upon various rights in the Convention (which lacks a minority rights article per se.) [\[FN90\]](#) Nevertheless, many other aspects of minority rights, such as the use of language, educational rights, or minority roles in the governance of the state, remain unaddressed by either the Committee or the European Court of Human Rights.

***624** The result for decision-makers is a lack of normative guidance for many situations. What, for instance, is a government facing a demand by an ethnic minority for its own university, with courses in its own language, funded by the public, to make of the following requirements in the Copenhagen Document?:

[Persons belonging to minorities] have the right . . . to establish and maintain their own educational, cultural and religious institutions, organizations or associations, which can seek voluntary financial and other contributions as well as public assistance, in conformity with national legislation

The participating States will endeavor to ensure that persons belonging to national minorities, notwithstanding the need to learn the official language or languages of the State concerned, have adequate opportunities for instruction of their mother tongue or in their mother tongue, as well as, wherever possible and necessary, for its use before public authorities, in conformity with applicable national legislation. In the context of the teaching of history and culture in educational establishments, they will also take account of the history and culture of national minorities. [\[FN91\]](#)

Here the High Commissioner plays his first and perhaps most critical norm-related role: the translation of norms into practical guidance and concrete proposals for consideration by minorities and governments. [\[FN92\]](#) Translation as a metaphor for aspects of the legal process has previously been highlighted in both jurisprudential literature and constitutional law. [\[FN93\]](#) In ***625** the case of the High Commissioner, it entails taking each of the various norms, whether from

an OSCE document, a U.N. declaration, or a treaty, and offering detailed guidance to governments and minorities on the sorts of actions that these instruments contemplate, regardless of whether they create traditional, legal obligations upon states. Two examples from the High Commissioner's experiences give a sense of this process.

1. Higher Education in Macedonia

The Republic of Macedonia [\[FN94\]](#) was the only former Yugoslav republic to secede without bloodshed. The poorest of the successor states, Macedonia is composed of approximately 65 percent ethnic Macedonians, 22 percent ethnic Albanians, 4 percent ethnic Turks, and 2 percent ethnic Serbs. [\[FN95\]](#) Its principal ethnic tensions arise from dissatisfaction of the Albanian community regarding educational opportunities, participation in public administration (including representation in the police forces), and other elements they regard as discrimination. Ethnic Albanians and Macedonians remain suspicious of the other; many of the former accuse the majority of treating them as second-class citizens, while the Macedonians continue to harbor fears of an Albanian secession or quest for unity with Albania and Kosovo. Nonetheless, to their significant credit, they have managed not only to avoid major outbreaks of violence, but also to form coalition governments with representation of both Macedonian and Albanian parties. [\[FN96\]](#)

***626** A poignant example of the tensions, one that has become a sort of rallying point for much of the ethnic Albanian community, is education in the Albanian language. Macedonia, like the former Yugoslavia, guarantees in its constitution primary and secondary education for minorities in their own language. [\[FN97\]](#) However, education in Albanian is generally inferior, contributing to a far smaller percentage of Albanians advancing to Albanian-language secondary schools than ethnic Macedonians. At the level of university education, results have proved even worse, in part because the Albanians do not have the Macedonian language skills necessary to enter university. In the former Yugoslavia, an Albanian language university operated for many years in Pristina (Kosovo), which Albanians throughout the country could attend. But the ultranationalist authorities in Belgrade terminated the courses in Albanian in 1991, and then, of course, that university became part of another state with the independence of Macedonia in 1992.

Matters reached a head in 1994, when a group of Albanian academics in Tetovo (the largest Albanian-majority city in Macedonia), composed primarily of former professors from the Albanian language faculty at Pristina, declared a "University of Tetovo" and began organizing classes in makeshift classrooms. The Albanian community claimed that the separate university was necessary because admission of Albanians to the University of Skopje did not reflect their percentage in the population due to inadequate secondary education and overt discrimination against Albanian candidates. Moreover, they regarded an Albanian language university as a matter of right in order to provide a proper education to the Albanian community. [\[FN98\]](#) The central government, for its part, refused to fund the university or recognize its diplomas. It claimed that a small country like Macedonia could only finance one state university with a full set of faculties (the University of Skopje), and that such a university could only afford to have its classes and ***627** research conducted in one language, the national language--Macedonian. The government asserted that the separate university was substandard and would furthermore fractionate the country by encouraging separate development of the ethnic communities. They denied any right for the Albanians to set up such an institution. [\[FN99\]](#)

In this situation and others, the High Commissioner's translation function involved two processes. First, he needed to make the sides aware of the requirements--and the limitations of the requirements--of the international norms. In the case of Tetovo University, one key question turned on the extent to which international norms required the government to recognize the school, as demanded by the ethnic Albanian community. The HCNM conveyed to both sides publicly and privately that the ICCPR, the ICESCR, [\[FN100\]](#) and the Framework Convention ensure for minorities the right to establish educational institutions in their own language, but made clear they do not have a right to either public funding or automatic recognition of diplomas. [\[FN101\]](#) At the same time, he told the government that these norms do not allow a government to deny recognition to an institution based solely on the language used; rather, its decision to recognize or not recognize must turn on objective educational criteria. [\[FN102\]](#) This clarification to both sides became a set of bookends in which a constructive solution to the problem might lie. Once the two sides accepted ***628** this starting point, as they appeared to by 1999, the arguments between them could shift from clashes regarding rights to consideration of

practical possibilities. [\[FN103\]](#)

A second translation function proved more complex and politically laden. It entailed offering a concrete proposal to accommodate the concerns of both sides in a manner consistent with the standards. In November 1993, early in his mandate, the HCNM had recommended an increase in the teacher training faculty at the University of Skopje to improve the quality of instruction in Albanian. The government accepted this proposal and began introducing courses in Albanian at that university in February 1995, though these were limited to training for kindergarten through grade four. [\[FN104\]](#)

The following years, and especially the declaration of Tetovo University, had made clear that the government needed to do more to address secondary and tertiary education. After numerous meetings with political parties and education experts, the High Commissioner offered a public proposal in November 1998, shortly after the election of a government headed by the hard-line Macedonian nationalist party. In it, he suggested the creation of an "Albanian Language State University College" for teaching training, presumably located in Tetovo, that would be funded by the state with foreign assistance. This would allow ethnic Albanians to have something ***629** called a "university" in Tetovo, although one limited to their main needs, i.e., teacher training. In addition, the HCNM proposed a new "Private Higher Education Centre for Public Administration and Business," funded by a consortium of outside states. It would offer courses in English, Macedonian, and Albanian, with a goal of training primarily ethnic Albanians for positions of public administration and business, another pressing concern of the Albanian community. Although private, the quality of the instruction would, under his proposal, merit recognition of its diplomas. [\[FN105\]](#) In proposing this option, the High Commissioner again reminded the Macedonian authorities of their obligation to allow for private institutions and not to base any decisions to recognize these institutions on the language of instruction. [\[FN106\]](#) Nonetheless, the mistrust between the two sides prevented either from endorsing this proposal, and the issue remained unresolved into the year 2000.

The recommendations thus served to show the two sides that the norms do not merely limit options, but represent balanced principles that create room for practical, creative solutions to satisfy varying needs and thereby reduce tensions. Without the specific recommendations, the High Commissioner would be acting merely as a legal adviser to the parties, explaining the contours of the law, not as an intermediary for solving conflict. But without the clarification of the norms, too many options would remain on the table--options that Macedonian or Albanian hard-line nationalists might claim represent the best solution, e.g., forcibly closing Tetovo University on the one hand, or violent action against the government, on the other. [\[FN107\]](#) The two aspects of the High Commissioner's translation function--norm clarification and policy recommendation--help make the move from the abstract to the concrete possible. [\[FN108\]](#)

***630** 2. Citizenship and Language in Latvia

In 1991, the Republic of Latvia regained the political independence it had enjoyed from 1918 to 1940 but lost following its annexation by the Soviet Union under the 1939 Molotov-Ribbentrop Pact. [\[FN109\]](#) Fifty-one years of Soviet occupation had created a demographic and cultural sea change in the country. By the time of independence, the ethnic Latvian population had shrunk to some fifty-three percent, with ethnic Russians approximately one-third of the population and a majority in seven of the country's eight largest cities. [\[FN110\]](#) More important, the legacy of Soviet rule meant that most Latvians regarded the Russian residents as remnants of a former occupier whose power had to be diminished to rebuild the Latvian state, rather than as an ethnic minority that might deserve protections from majority rule. Once Latvia and Russia agreed, with international assistance, on the modalities for the removal of Russian forces from Latvia, [\[FN111\]](#) citizenship and language became the critical issues regarding the treatment of Russians in Latvia and, consequently, targets of attention of the High Commissioner.

a. Citizenship

After independence in 1991, the Latvian government had refused to grant automatic citizenship to all residents of the country, limiting citizenship principally to descendants of citizens as of 1940. The result was that 700,000 of Latvia's 900,000 ethnic Russians did not have Latvian citizenship in the mid-1990s. [\[FN112\]](#) The vast majority of this population wanted to stay in Latvia and become citizens; indeed, many had supported independence ***631** during the 1991 referen-

dum. [\[FN113\]](#) When Latvia did pass a new citizenship law in 1994, it generally made the attainment of citizenship onerous. It required applicants to pass a difficult language test and a history and constitutional law examination, with a particularly burdensome effect on the old and the young. Furthermore, by adopting a system of age brackets (the so-called "windows system") that gave priority to those born in Latvia and to younger people, it postponed the eligibility of most adults. [\[FN114\]](#) The OSCE and the High Commissioner saw that these policies, which left much of the population non-citizens unable to participate fully in public life, created tremendous internal stresses in Latvia (and Estonia, which faced the same issue), as well as tensions with Russia.

The High Commissioner engaged in both aspects of the translation of norms from the beginning of his involvement. With regard to elaborating the requirements of the norms, in his first letter to the Latvian government in 1993, he acknowledged the state's right to eject non-citizens "whose continued presence could be damaging to vital interests of the state," although he added that "expulsions on a massive scale would be contrary to generally accepted international humanitarian principles." [\[FN115\]](#) The explanation of international norms proved most significant concerning the citizenship of young children born in post-1991, independent Latvia to non-Latvian (principally Russian) parents. Under both Latvian and Russian law, these children were stateless, i.e., without a nationality. The High Commissioner made repeated reference in written and oral communications with Latvian government officials to the ICCPR, [\[FN116\]](#) the 1961 Convention on the Reduction of Statelessness, [\[FN117\]](#) the European Convention on Nationality, [\[FN118\]](#) and, most ***632** significantly, the 1989 Convention on the Rights of the Child. [\[FN119\]](#) These treaties do not, however, explicitly require nationalization of stateless children; yet van der Stoel wished to deflect arguments from ultra-nationalist politicians that the children were not entitled to Latvian nationality because their parents could possibly apply for Russian citizenship. The High Commissioner responded by consulting human rights scholars and then argued to the government, based on their unanimous views, that the conventions implicitly required the granting of citizenship to the children. At the same time, he recognized that the government could both require the parents to file a formal application and insist on some reasonable period of prior residence. [\[FN120\]](#)

As with Macedonia, the High Commissioner engaged in the second translation function as well. Indeed, he offered his legal views primarily in order to bolster support for his detailed policy recommendations. The challenge involved offering proposals that respected Latvia's interest in recreating its identity, but that required Latvia to observe international norms, promoted domestic tranquility, and soothed relations with its large, suspicious neighbor to the east. Here, he recommended that Latvia afford the stateless children citizenship, although he expressed his support for requirements that the parents apply for the child and that the government have a five-year residence requirement. The recommendations demonstrated that Latvia could indeed comply with international ***633** norms--as interpreted by the High Commissioner himself--without drastic changes in the social order, and that it could build its new national identity in a way that respected the Russian minority. Most of his recommendations were eventually incorporated into legislation or regulations, with the new legislation granting citizenship to stateless children and even surviving a public referendum called by ultra-nationalists. [\[FN121\]](#)

b. Language

Elie Kedourie has written that "the test . . . by which a nation is known to exist is that of language." [\[FN122\]](#) Indeed, the Latvian government insisted from the earliest days since independence on rebuilding the Latvian language. Because of the sizeable Russian population, many private enterprises conducted business principally or even exclusively in Russian. Latvia had numerous Russian newspapers as well as TV and radio stations, and advertisements appeared in Russian for many events of interest to that community. Latvian nationalists, however, found the use of Russian a vivid reminder of their occupied past and sought to restrict its use. They cited examples of stores or taxi companies whose employees could not speak Latvian. [\[FN123\]](#) In 1997, the parliament began considering a draft language law that included requirements that Latvian be used in all companies and all public announcements. [\[FN124\]](#) Russians in Latvia, as well as the Russian government, saw the move as another attempt to infringe on the civil rights of ethnic Russians.

***634** Indeed, numerous provisions in the draft legislation conflicted with treaties to which Latvia is a party. Most not-

ably, both the ICCPR and the European Convention on Human Rights guarantee freedom of expression and freedom of association, from which restrictions are permitted by the state only under very limited circumstances. [\[FN125\]](#) Because, however, the treaties themselves do not expressly address the use of language in the context of these freedoms, [\[FN126\]](#) the High Commissioner needed to engage in the first translation function. He did so through visits, letters, and deployment of independent experts to meet with parliamentarians, cabinet ministers, and their legal staffs. His legal arguments involved an acceptance of the right of Latvia to draft a language law, [\[FN127\]](#) coupled with explanations of the permissible limits of derogation to the freedoms of expression and association. [\[FN128\]](#)

As with the naturalization issue, the High Commissioner accompanied his explanatory translation with a recommendatory one as well. He sought to provide solutions that addressed *635 Latvia's concerns within the parameters of the law as he had set it out for them. His proposals, offered in a series of letters and legislative drafts, were essentially three-fold: alternative provisions to the draft legislation that would limit the required use of Latvian to the so-called public sphere (areas of legitimate governmental interest) as permitted in the human rights treaties; a transitional period during which violation of the new law would not lead to penalties; and alternative methods of encouraging the use of Latvian, such as language training, grants to Latvian cultural events, and other forms of promotion of the language. [\[FN129\]](#) He also relied upon an economic argument that, as use of Latvian increased, businesses would employ people who could transact businesses with customers in Latvian. This position, however, often met with a response that, in some areas of the country, Russian speakers so outnumbered Latvian speakers as to prevent such a change, thus necessitating legislation to force its use. [\[FN130\]](#) The High Commissioner's work seemed for naught after the parliament passed a bill in July 1999 that ignored his points, but the president was persuaded by van der Stoep and others to veto it. [\[FN131\]](#) The parliament passed a revised law incorporating the OSCE's key suggestions on December 9, 1999. [\[FN132\]](#)

Two further points deserve mention with regard to language in Latvia. First, the High Commissioner carried out both translation functions in the context of legislative drafting. This proved necessary because the parliament played a central *636 role in this issue, thus making a dialogue with the prime minister, foreign minister, or president insufficient. This context undoubtedly had an effect on the utility of legal arguments, a point that I return to in Part IV below.

Second, during discussions with Latvian officials, the High Commissioner focused upon the incompatibilities between the draft language law and the ICCPR and ECHR provisions on freedom of expression and association. Yet the Latvian draft also contravened provisions in the ICCPR giving minorities the right to use their own language. [\[FN133\]](#) The High Commissioner refrained, however, from arguments about the rights of Russians as a minority because many Latvians simply reject such a characterization of Russians based on their percentage of the population and status as a former occupier. By tailoring his argument to the issue of individual freedoms, the High Commissioner sought to avoid the perception that his objections to the draft language law stemmed from a desire to protect Russians--even though they did. Moreover, this strategy also played upon Latvia's interest in foreign investment, as the High Commissioner pointed out how foreign companies might well not wish to conduct their business in Latvian. One ethnic Russian member of parliament wryly noted that the High Commissioner seemed publicly concerned only with one minority--"the English-speaking business minority." [\[FN134\]](#)

D. Elevation of Norms

Although the translation function provides guidance to states on implementing norms, it does not focus on whether these norms bind states legally in the sense of positivism's binary paradigm. Yet, at times, the varying legal status of norms has proved a key element of the High Commissioner's work. In a second process aimed at making norms matter, the High Commissioner has sought to take norms that do not meet the traditional definition of legally binding--principally those promulgated by organizations that lack lawmaking power--and imbue them with a more binding status. This I term the elevation of norms. Here, he tries to convince states to transform their international soft law commitments into provisions *637 in hard, domestic law. Such a transformation serves all the purposes of incorporation of other human rights into domestic law--such as providing for the possibility of a judicial remedy, removing discretion from the executive arm of

government, and making them generally part of the architecture of domestic law. [\[FN135\]](#) The attempt to elevate standards through domestic law has arisen in many situations. For example, he has tried to convince states to pass statutes ensuring minorities the right to use their language in various settings along the lines of the Copenhagen Document. [\[FN136\]](#)

The High Commissioner has proved somewhat less enthusiastic about attempts to elevate norms through a second method, their inclusion in a bilateral treaty between two states that are kin states of the other's minority. Although he values these treaties' symbolic importance as basic commitments to friendly relations, he has regarded them as merely additional promises to implement standards and, thus, less important than internal legislation that would actually do so. Indeed, he has even viewed them as potentially exacerbating the triadic relationship among governments, minorities, and kin states by providing kin states with a legal justification to defend their kin folk abroad. [\[FN137\]](#)

*638 E. Mobilization of Support for Outcomes Consistent with Norms

In a third process for making norms matter, the High Commissioner has signaled to the parties the possible consequences of their acceptance or rejection of his norm-based recommendations. Here, he engages in what I term the mobilization of support, using his position to convince influential actors outside the state to back up his proposals. The High Commissioner's involvement of these actors has assumed two distinct and complementary forms. First, he may use their influence to push the parties toward acceptance of his proposals. Second, he may solicit financial support from them to make implementation of his recommendations feasible.

In Latvia, the involvement of outside actors took the first form. As an initial matter, the High Commissioner ensured that the OSCE's Chairman-in-Office and key member states supported his work. Their support would demonstrate to the government that many states in fact cared about this issue. [\[FN138\]](#) *639 Most significantly, however, he contacted officials of the European Union (EU) and ensured that they would link Latvia's admission to the EU, a primary goal of that state's foreign and economic policy, to implementation of his recommendations on citizenship and language. The EU, for its part, made the linkage clear during the adoption of the citizenship law in 1998 and the language law in 1999. [\[FN139\]](#) During the referendum on Latvia's citizenship law in 1998, its president made the EU membership issue a cornerstone of the arguments in favor of not overturning the passage of the new law. [\[FN140\]](#) Furthermore, the prospect of a decision of the EU at its December 1999 summit to invite Latvia to start talks on accession contributed to the parliament's willingness to amend the draft language law prior to its passage. [\[FN141\]](#)

*640 In Macedonia, the High Commissioner attempted to use carrots. He had recommended that the state find ways to address the quality of secondary education of Albanians and the consequent inequities in admission of ethnic Albanians to tertiary education. [\[FN142\]](#) Although teacher training was at the core of his proposal for improvement, van der Stoel also arranged for the establishment of a foreign-funded program to help Albanian high school students prepare for the college entrance examination. [\[FN143\]](#) Moreover, as part of his proposal to establish a new private business and public administration school to address the dearth of Albanians in these professions, van der Stoel began to explore the funding possibilities with states in 1998 and 1999, though without much success.

F. Development of Norms

The legal landscape regarding minorities and ethnic-based tensions is not only characterized by norms of varying degrees of hardness; it also contains what might be called legal black holes, where states in concert or international organizations have not yet promulgated any norms. Here, where positivist legal doctrine would afford the state full discretion to act as it chooses (as long as it did not impinge on other norms), [\[FN144\]](#) the High Commissioner has performed a fourth function to make norms matter--in essence, by deriving norms himself.

1. Inventing Norms to Overcome Blockages

Two examples demonstrate the High Commissioner's willingness to develop norms during his involvement with a partic-

ular *641 state and its minority. First, with respect to the major hurdles to naturalization in Latvia, such as language and residency requirements, the High Commissioner could not invoke any standards found in OSCE, Council of Europe, or U.N. instruments, as these organizations had not promulgated any. Instead, he devised a new norm by urging Latvia to "restrict itself to requirements for citizenship which, broadly speaking, would not go beyond those used by most CSCE states." [FN145] Such an elaboration of acceptable conduct through reference to practices in other states bears a remarkable resemblance, at the level of soft law, to the idea of general principles of law--legal concepts common to different legal systems in the world--as a source of international law. [FN146] By invoking the policies of other states in the OSCE area regarding naturalization, the High Commissioner laid the groundwork for his detailed proposals on citizenship, such as simplification of the language test (including exemption of the elderly), funding of Latvian language training, paring back the detail in the history test, and elimination of the "windows system." [FN147]

A second, more significant area lacking much normative guidance concerns the extent to which governments have a duty to provide forms of self-governance or autonomy to minority groups. A state might grant autonomy to a certain territory because it is populated predominantly by minorities, or to the minority group itself regardless of its geographic concentration. [FN148] European history provides numerous examples of *642 autonomy regimes, some of which are quite successful in addressing minority concerns. [FN149] Yet international law does not provide that states must, or even should, grant certain forms of autonomy to minorities beyond the limited right to practice their religion, culture, and language. [FN150]

This absence stems in part from the self-interest of many central governments--the prescribers of most international law--who are unwilling to endorse regimes that might dilute their authority. In democracies that guarantee individuals human rights and effective participation in governance, the absence equally results from a genuine lack of consensus among those in and out of government on the necessity or desirability of such regimes, especially territorial regimes. [FN151] The diversity of states in terms of the size, concentrations, and wishes of their minority populations and their existing territorial devolution of power (e.g., federal vs. unitary states) has made prescriptions extremely difficult. For instance, the most *643 the OSCE has offered as a norm regarding autonomy is the statement in the Copenhagen Document:

The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned. [FN152]

Yet many minorities do seek forms of autonomy and, as Kosovo has shown, such demands and the responses or non-responses to them have proved the source of tension and bloodshed in Europe.

One claim that has prompted the involvement of the OSCE's High Commissioner concerns Crimea, the majority-Russian-speaking southern region of the Republic of Ukraine. Since Ukraine's independence in 1991, Crimea has sought a high degree of autonomy from Kiev, even threatening secession at times. Crimea's discontent with its status as part of Ukraine stems in large part from its historic identification with Russia (and the Soviet Union when it existed), rather than with Ukraine. Crimea had long hosted the Russian, then Soviet (then Russian) Black Sea fleet; it had also formed part of the Russian Soviet Federated Socialist Republic in the USSR until 1954 (when Nikita Khrushchev gave it as a so-called gift to the Ukrainian Soviet Socialist Republic), and even after that remained loyal to Moscow as Crimea still remained part of the Soviet Union. [FN153] In 1994, Crimea's parliament had drafted its own constitution for the so-called "Autonomous Republic of Crimea" (ARC), which the Ukrainian parliament had abolished in 1995. Moreover, in March 1995, the Ukrainian Parliament enacted its own law defining its relationship with Crimea, and Ukraine's president then issued a decree placing Crimea directly under Kiev's authority. [FN154]

*644 The High Commissioner's involvement began in 1994 with a series of visits to the region; in May 1995, he convened a roundtable discussion among governmental and parliamentary representatives of Ukraine and Crimea and organ-

ized another meeting of the sides in March 1996, in which he played a direct mediation role. [FN155] Despite the absence of any real norms regarding autonomy, van der Stoel tried to convince the parties that certain types of relationships between central and regional authorities were generally accepted features of autonomy regimes--analogous to the general principles of citizenship that he offered the government in Latvia. Thus, after the 1995 roundtable, he noted that a 1992 draft Ukrainian law on the status of Crimea, which never entered into force, "lays down some basic principles which usually govern the relationship between an autonomous republic and the central state organs." He further offered, somewhat indirectly, a definition of autonomy by noting that the division of competencies in that law between the state and regional governments "makes it clear that the Autonomous Republic of Crimea would have substantial autonomy." [FN156]

In November 1995, Crimea adopted a new constitution that took many of van der Stoel's views into account and significantly narrowed the gap between the sides. At the March 1996 roundtable, the sides agreed on a basic framework for Crimea's status within Ukraine. The High Commissioner subsequently explained the contours of the autonomy relationship as it concerned defense and foreign affairs, noting that the sole competence of the central government should not prevent it from consulting the ARC on issues of relevance or allowing the ARC to sign limited international commitments. *645 [FN157] The general sense of autonomy from other cases thus provided a backdrop to the High Commissioner's ideas of an acceptable division of powers between the central and regional authorities. In April 1996, based in part on these understandings, the Ukrainian parliament endorsed the ARC constitution, though it left some provisions subject to further negotiation. [FN158]

2. Inventing Norms of General Application

The High Commissioner has also relied upon an additional strategy for development of norms, one that straddles the line between translation of existing norms and elaboration of new ones--devising sets of guidelines on issues that recur in many states which build upon existing norms, but offer greater detail and seek to fill in gaps. The High Commissioner has focused on the need for normative guidance in three fields where hard and soft law remain undeveloped: education, use of language, and participation of minorities in governance. In each case, he convened a group of independent experts of various nationalities to prepare recommendations. [FN159] Their results-- the Hague Recommendations Regarding the Education Rights of National Minorities, [FN160] the Oslo Recommendations Regarding the Linguistic Rights of National Minorities, [FN161] and the Lund Recommendations on the Effective Participation of *646 National Minorities in Public Life [FN162]--have no official status as OSCE documents. Nevertheless, the High Commissioner has arranged to have them translated into numerous languages and has introduced them at seminars in states in which he operates. He has also invoked them in discussions with his interlocutors to further support his specific recommendations. [FN163]

G. Dissemination of Norms

The need to imbue decision-makers with the importance of respect for international norms lies at the core of any strategy for protection of minority rights and prevention of conflict. Thus, the OSCE's High Commissioner has engaged in a fifth function--disseminating and educating others about relevant norms. To be successful, such education must avoid appearing insensitive to a state's history or dictatorial of a state's policies. [FN164] The High Commissioner has attempted to maintain this balance by convening seminars in central and eastern Europe. Here, independent experts explain to governments, minority representatives, and other NGOs, in a non-confrontational setting, the content of norms, whether they emanate from the OSCE, the Council of Europe, the United Nations, or the recommendations offered by academic experts noted above. Educating these constituencies about the norms can at least increase the likelihood that the government and minority groups will limit their proposed policies to those consistent with them, thus narrowing the gaps between the two sides. Such seminars provide governments and minorities with a set of common values, as well as a common language or form of reference-- although the results of such educational processes elude quantification.

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*647 The first OSCE High Commissioner on National Minorities has thus exercised five discrete functions aimed at making international law effective in preventing ethnic conflict. These processes offer salient strategies for others seek-

ing to use norms for this cause. Equally important, and of relevance beyond ethnic conflict, the work of the High Commissioner offers a critical case study for understanding the role of norms in inducing particular behavior from governments and other actors generally. That is, the data his work offers on how states can be induced to comply inevitably says something about the adequacy of theories about why they would listen to normative arguments and choose to comply with norms at all. His data provides a test for existing theories in international law and international relations about why states respond (or do not respond) to international norms. Before beginning such an analysis, however, we need first to provide a basic understanding of current approaches to this question.

III. Assessing the Impact of International Law: Prologue to Analysis

A. Dividing the Field

International law and international relations scholarship has, particularly in the last decade, offered a variety of often competing explanations of the extent to which international norms matter in international affairs. All move beyond the seemingly law-affirming observation made by Louis Henkin a generation ago that most states observe international law most of the time [\[FN165\]](#) by asking why this is the case and whether the law is in fact causing the behavior in conformity with it. Organizing and categorizing theories of compliance itself produces various possible outcomes. [\[FN166\]](#) At the most basic level, however, I prefer to identify those theories positing that norms matter because they are norms and those that do not. Robert Keohane has usefully invented the terms "instrumentalist optic" and "normative optic" to describe these approaches. The *648 instrumentalist optic describes theories that "focus[] on interests and argue[] that rules and norms will matter only if they affect the calculations of interests by agents"; the normative optic describes theories that assert that "norms have causal impact They exert a profound impact on how people think about state roles and obligations, and therefore on state behavior." [\[FN167\]](#) These optics do not correspond to a simple division between political scientists and lawyers, but may originate in international relations or international legal scholarship. [\[FN168\]](#)

At the risk of somewhat simplifying the varied outlooks, [\[FN169\]](#) we might consider five basic theories as falling within these two general optics. First, within the instrumentalist optic, realists believe that state behavior and rules are determined by structural factors in the international system alone. The extent to which a state's behavior in fact conforms to international norms concerning a certain issue depends upon these factors--in particular a state's power, political, economic, and military, vis-à-vis its neighbors--and not the norms at all. [\[FN170\]](#) Some critics of realism have gone so far as to say that realists view rules as epiphenomenal. [\[FN171\]](#) In any case, most realists see rules per se as not affecting state behavior, but as reflections of the interests of states exogenously determined.

The second group of instrumentalists is a broad group of international relations scholars under the label institutionalist. Most institutionalists share realists' focus on state interests, but they believe that states can combine to create institutions that can make rules affecting state behavior. These norms influence states not, however, because they are norms, but because they form part of an entire regime, including the institutions creating and implementing them that, in Keohane's words, *649 can "alter incentives" of states to comply or not comply. [\[FN172\]](#) They do this through their ability to condition the benefits of the regime on compliance (reciprocity), to link compliance to cooperation on other issues, and to put pressure on domestic actors to comply with norms. [\[FN173\]](#) Some international lawyers have adopted this construct from international relations theory as well. [\[FN174\]](#)

Scholarly orientations in the normative optic have argued directly that norms qua norms influence state behavior. First and most prominently are views of legal scholars arguing that norms affect the behavior of states due principally to their internal normative nature. That is, the norm itself has certain qualities based on its origin, content, and operation in practice that are likely to lead states to treat it seriously. This idea has long been inherent in the New Haven School's approach to international law [\[FN175\]](#) and has been developed most recently by Thomas Franck. [\[FN176\]](#) Drawing upon the work of Ronald Dworkin, Franck argues that the lodestar for law observance is the norm's "compliance-pull," which results from its legitimacy, as measured by four factors: the norm's historical pedigree, or its age and the respect accorded its originating authority; its determinacy, namely its ability to communicate content; its coherence, or consonance with

related norms; and its adherence, that is, its consistency with higher, constitutive *650 norms of the international system. [FN177] Abram and Antonia Chayes have posited a variant of Franck's approach to legitimacy. They also regard legal norms as having some special traits that cause states to take them more seriously, but then, unlike Franck, they borrow some ideas from institutionalist theory and explain compliance as due to the interactions of states within institutions. [FN178] Harold Koh is developing yet another variant, which focuses on the state's participation in the "transnational legal process" and, in particular, the "internalization" of the norm through domestic institutions. [FN179]

A second, more recent and far-reaching theory within the normative optic is constructivism. The constructivist ontology starts from a completely different point compared to the other three; in the words of John Ruggie, it holds that "the building blocs of international reality are ideational as well as material"; it thus seeks "to problematize the identities and interests of states and to show how they have been socially constructed." [FN180] As part of their focus on ideas as constituting the makeup and interests of actors in the international system, constructivists embrace norms. Legal rules and other norms do not respond to or influence the already determined interests of actors or the structure of the international system; they define identity, interests, and structure. [FN181] Martha Finnemore, Kathryn Sikkink, *651 and others have gone furthest in seeking to understand the ways norms contribute to the identity of states. [FN182]

Somewhat straddling the instrumentalist and normative optics is the renewed interest in domestic structures for explaining state reaction to international norms. Such scholars, often grouped under the label liberal, build upon a strand of international relations linking state behavior to domestic regime type and state-society relations generally. [FN183] They shift the focus of inquiry from the instrumentalists' attention to the international system and the normativists' attention to the characteristics of norms to the traits of a particular state that make it more or less willing and able to accept international obligations. [FN184] They adopt an instrumentalist outlook in looking beyond the law itself to the makeup of governments and other domestic actors as critical to inducing compliance, but they also see the law qua law as affecting the behavior of those particular actors (and even may cross the line to the constructivist approach in this regard).

B. Missing Norms, Missing Links

Despite the utility of these approaches for understanding the reasons norms can matter, ethnic tensions in Europe and the attempt by the OSCE's High Commissioner on National Minorities to address them through norms offer profound challenges to such views. In particular, the High Commissioner's efforts to use and secure compliance with norms through the five methods discussed above reveal two critical gaps in existing theories.

*652 1. Missing Norms

First, existing theories do not sufficiently address the differences among norms concerning their legal nature, whether as formally defined by positivism (i.e., law vs. non-law) or in terms of their hardness or softness. Instead, legal scholars simply focus on the impact of "hard" rules, usually treaties or firmly established custom. [FN185] Setting aside whether international law itself is best viewed as a set of rules or as an entire process, [FN186] even if one simply focuses on the norms as rules--the outcomes of certain prescriptive processes--these norms surely vary in quality. Thus, conclusions about the impact of norms based on trade law or arms control, many of whose rules exhibit most or all the characteristics of hardness as defined in the three dimensions (content, origin, and control mechanism), [FN187] offer at best an incomplete picture of the effect of norms. International relations scholars, especially in regime theory, acknowledge that norms extend beyond treaties, but then simply group all norms together without appreciating, or differentiating with respect to, hardness. [FN188]

The focus on treaties by scholars of compliance may have some merit, because if political scientists and international lawyers want to understand how legal norms matter--a complex enough task--their scholarly project becomes more manageable by focussing on norms that all accept are legally binding (thus the attention to treaties, even at the expense of custom). To complicate the picture by including soft law--even *653 though, as I note, some treaties are indeed quite soft--risks making hypotheses about causation more cumbersome by adding a new, independent variable--softness or

hardness. Moreover, this variable does not attach itself in a binary way to the norms so that one could simply compare the effect of hard law with that of soft law. Rather, softness and hardness come in degrees.

Beyond, or perhaps related to, this reluctance to incorporate the element of softness into explanations of compliance lies an implicit assumption that hard law will affect behavior more than will soft law. Scholars typically justify the special place of hard law by asserting that states wish to avoid the special stigmatization in international society that comes from violating the law. [\[FN189\]](#) Chayes and Chayes, for instance, in their theory of compliance with treaties, argue that diplomatic discourse forces states to justify their actions in terms of legal norms, which carry more weight than other justifications for policy. [\[FN190\]](#) This view suggests that states will treat anything less than a hard treaty less seriously. Others, including liberal theorists, have made conclusions about the power of hard legal rules in the international arena by examining primarily court systems, domestic and international (such as the EU's European Court of Justice), where governments have clearly accepted a legal duty to accept outcomes mandating a particular interpretation of a treaty. [\[FN191\]](#) Yet the propensity of states in Europe to formulate their norms regarding minority issues in soft terms and the work of the High Commissioner suggest that such a view about hard law and soft law is simplistic, even deceptive.

*654 2. Missing Links

The reluctance of scholars of compliance to address soft law represents only one shortcoming of current theories that might explain the relevance of international law to ethnic conflict. The other dimension concerns the need to construct a more complete set of causal bridges between the normative arguments, whether of a hard or soft nature, and the behavior of states. [\[FN192\]](#)

Most of the extant theories focus upon various structures of the international system. Institutionalists examine structural elements of a particular regime, such as its ability to induce compliance with its rules through incentives, reciprocity, linkages to other issues, monitoring, or, if necessary, sanctions. [\[FN193\]](#) Andre Nollkaemper has pointed out that institutionalism does not explain why sometimes, in seemingly similar cases regarding the factors that are likely to make regimes effective in terms of their ability to alter state incentives, states choose to ignore the norms in the regime. [\[FN194\]](#) The same criticism might also be made of liberal theory, the one theory to focus on domestic structures.

As for normativists, with their claims about the special power of legal rules, structure lies again at the center of their attention, in their case structures involved in norm creation or enforcement, rather than structures of political power. Indeed, the normativist paradigm has several strands regarding mechanisms of compliance. First, legal scholars have traditionally emphasized enforcement, i.e., the threat and use of sanctions for non-compliance to restore observance of the norm. States can enforce norms in a variety of ways, such as refusal to implement a treaty in response to a material breach, [\[FN195\]](#) nonforcible measures such as diplomatic and economic *655 sanctions, [\[FN196\]](#) or even forcible measures, although international law generally limits these to responses to aggression. [\[FN197\]](#) States may enforce norms unilaterally, multilaterally, or in a centralized manner through an international organization acting under its organic instrument. An international tribunal can also order a state to comply with a norm, a scenario that consumes the attention of many international lawyers, even though only a relatively small number of issues are currently subject to regular, effective enforcement by international courts. [\[FN198\]](#) In any case, those emphasizing enforcement assume that without effective sanctions for non-compliance, the risk of violation of the rule is high, indeed high enough to make the rule ineffective. [\[FN199\]](#) Myres McDougal and Michael Reisman capture the importance of enforcement when they state that the measure of a purported norm's claim to be the law is in part due to whether "its audience concludes that the prescriber . . . intends to and, indeed, can make it controlling." [\[FN200\]](#)

Chayes and Chayes, who also emphasize the centrality of norms qua norms to compliance, offer a second perspective on mechanisms and causation-- what they call a "managerial approach" to treaty (but, as noted above, not soft law) compliance. They reject enforcement regimes as "largely a waste of *656 time" [\[FN201\]](#) because aggrieved states fail to invoke them often and violating states do not respond to them particularly well. Instead, they concentrate on a process of give and take among members of a treaty regime that brings about an understanding among the parties of the details of their

commitments and eventually leads them to comply. International organizations are at the core of the process, and, drawing on the institutionalists, Chayes and Chayes posit that institutions, through their structures and procedures, can bring about compliance. [\[FN202\]](#)

A third normative approach essentially finds both enforcement and management beside the point--essentially for the same reason that the management approach finds enforcement of marginal relevance, namely that other factors account more for compliance. That view, typified by Franck, views the norm's legitimacy as causing states to treat it seriously. States will thus comply voluntarily with norms they view as legitimate, without the need for sanctions (the enforcement approach) or intervening institutions (the managerial approach). His theory essentially posits that states comply voluntarily with many norms because those norms have certain characteristics and that responses to non-compliance miss the point. [\[FN203\]](#) Robert Keohane has criticized this position as failing to explain whether a norm's legitimacy in fact leads states to treat it more seriously. [\[FN204\]](#)

These institutionalist and normative views are thus built around grand structures of the international system, organizational dynamics, or normative pulls. They adopt an explicitly impersonal, procedurally oriented emphasis to the issue of causation. But the accounts of actors involved in the process of prevention of minority conflict in Europe highlight a core shortcoming of those theories--their failure to sufficiently view law as ultimately a process of communication among relevant decision-makers, a transmission of norms from prescriber to target. [\[FN205\]](#) As a result, they generally neglect to take account *657 of the direct synapses between those invoking the norm and those who must decide whether to comply with it. Instead, the European experience underlines the need for explicit treatment of a new element, one not usually considered in contemporary theories of either international law or international relations--the individual or individuals who act as messengers or transmitters of norms.

The importance of individual messengers is not completely lost on existing theories. Ethan Nadelmann has written of so-called "transnational moral entrepreneurs" who help develop a consciousness among governmental and non-governmental actors in favor of a new norm. [\[FN206\]](#) Constructivists, who emphasize how norms can change the identities of states, also take account of the role of individuals. Martha Finnemore, in a seminal study on UNESCO's role in promoting norms, notes that "a focus on the origins and dynamics of norms inevitably [leads] into the world of agents," adding that "conventional international relations theories cannot talk about persuasion." [\[FN207\]](#) Peter Haas has examined the role of individuals through the concept of the epistemic community, "a network of professionals with recognized expertise and competence in a particular domain" that act as "channels through which new ideas circulate from societies to governments as well as from country to country." [\[FN208\]](#) With respect to legal norms, these communities seek to inculcate the bureaucracies in which they work with the significance of the norms and thereby induce *658 compliance. [\[FN209\]](#) Koh has relied upon these ideas to speak of "agents of internalization" as critical to a state's decision to comply, to include both non-governmental "norm entrepreneurs," individuals who can mobilize popular support for norms, and governmental "norm sponsors" who work in governmental channels. [\[FN210\]](#) All these ideas echo somewhat liberal theory's concern with transnational linkages among various governmental and non-governmental sectors, [\[FN211\]](#) but their concretization of these linkages in particular individuals is a critical advance in thinking.

Thus, current approaches offer four different answers to why norms (however defined) matter: [\[FN212\]](#) (a) that they form part of a regime that can affect incentives (institutionalism); (b) that they have certain internal traits that directly or indirectly cause states to obey them (legitimacy perspectives); (c) that they change the identity of states (constructivism); and (d) that certain domestic structures will affect that state's propensity to comply (liberal theory). But as I have suggested, the methods of the High Commissioner reveal basic shortcomings in the ability of most of these theories to answer two questions: (1) does a state's propensity to comply depend upon the kind of norms with which it is being asked to comply, and (2) does a state's propensity to comply depend upon the messenger--individual or institution--that is asking them to comply? I now return to the work of the High Commissioner to help answer these questions. In so doing, I hope to offer several new keys to the causation puzzle.

***659** IV. Hard Law, Soft Law: Does it Matter?

A. Invoking Hard and Soft Law

Because ethnic tensions form the subject of norms of differing degrees of hardness, the High Commissioner has routinely cited a spectrum of norms in his communications with governments and minorities. These range from the harder ICCPR and the European Convention on Human Rights to the softer OSCE documents and the U.N. Declaration on Minorities. Indeed, as part of the translation function described above, the High Commissioner has avoided giving any particular attention in his letters and discussions to positivism's legal/non-legal distinction. Instead, he has relied upon the notion of "international standards" as a sort of umbrella to describe the *acquis* (the accumulated body of law and policy) of the OSCE, Council of Europe, and United Nations in the area of majority-minority relations, regardless of the authority of the body promulgating the standard to make law. [FN213] Thus, while he might note, in the context of citing a convention, that a state is party to it, [FN214] he often and without qualification makes arguments based on treaties to which a state is not party [FN215] or treaties that have not yet entered into force. [FN216] Furthermore, as a mechanism of the OSCE, the High Commissioner, of *660 course, routinely invokes OSCE norms, in particular the Copenhagen Document. [FN217]

But the reliance upon soft law goes beyond the OSCE documents--which, after all, have some hardness due to their adoption by all OSCE governments at a high level by consensus. The High Commissioner has cited recommendations of the Parliamentary Assembly of the Council of Europe, [FN218] recommendations of the Council of Europe's Higher Education and Research Committee, [FN219] and the recommendations of academic experts in the form of the Hague and Oslo Recommendations. [FN220] With respect to the three dimensions of softness, each of these documents is quite soft in terms of the authority of the prescribers--none is empowered by constitutive instruments to make law--and in terms of the ability of the prescribers to make its prescriptions effective and create costs for non-compliance. (Indeed, the scholars devising the Hague, Oslo, and Lund Recommendations have no authority akin to that of an international organization whatsoever.)

It would be an overstatement to say that the High Commissioner uses these instruments completely interchangeably. If a treaty to which a state is party directly addresses the issue at hand, his practice suggests he will make his argument in terms of the treaty. However, in the cases above in which the very soft instruments were cited, they proved useful because they provided specific language in a way that neither treaties nor OSCE documents did. But in the course of his dialogues, all become rather indiscriminately referred to as the international standards. All this may come as no surprise, of course, to those in the trenches in international relations--officials of *661 foreign ministries, international organizations, NGOs, and other advocates who seek to make their points based on whatever arguments they can muster. In van der Stoel's case, it has meant using those international standards he can find to back up his position, even if, in effect, in some cases they may only be standards because he says they are. [FN221]

Moreover, in many situations, such as those in Macedonia and Latvia, the norms themselves leave open as many policy options as they close off. Once he has convinced the sides of the need to comply with the norms, his great challenge lies in devising a politically acceptable solution to the sides and convincing them to accept it. Compliance, in a word, can only take the High Commissioner so far.

B. Elite Response to Hard and Soft Law

The relevance of the hardness of norms to state behavior turns not simply on the High Commissioner's invocation of norms of varying legal character, but on the responses of governments and other actors to these claims. Based on interviews with actors on the receiving end of van der Stoel's arguments, a complex picture emerges of the impact of normative hardness on behavior.

1. Who Knows?: Ignorance of Legal Valences

First, many of the actors to whom the High Commissioner directs his arguments and recommendations simply are unaware of the differences in hardness among the norms. This phenomenon appears at the higher political levels of government, as well as among members of parliaments, but it also pertains to members of minority communities as well. It may originate in a variety of factors, such as the lack of legal training or even advanced education. [\[FN222\]](#) To these people, "the *662 standards," as mentioned by van der Stoel, were a monolith, which they would cite or even interpret themselves as necessary to bolster their argument. [\[FN223\]](#) They would thus, for instance, not respond to arguments based on the Copenhagen Document by making a distinction between legal and non-legal obligations.

2. Who Cares?: Indifference to Legal Valences

Even if decision-makers understand the distinction between a treaty to which their state is a party and OSCE commitments, U.N. General Assembly resolutions, and other forms of soft law, inquiry as to the relevance of this difference reveals it to be quite limited in many contexts. Key decision-makers faced with arguments that mix hard and soft law often do not seem particularly concerned about the distinction. Rather, audiences tend to fall into three categories.

First, some targets, in particular among elected officials, do not focus upon the differences because they reject the applicability of international norms to the particular problem. In Latvia, for instance, some hard-line nationalist elements find the OSCE commitments and the rules in the Council of Europe's treaties equally objectionable. Human rights norms, of whatever status, have little meaning for them. They regard the OSCE and Council of Europe as tainted by their failure to help them during the days of Soviet control. They also complain about a double standard, as they see European organizations enforcing norms concerning minorities against Latvia but not Russia (or France or Germany), or they claim that minority rights do not apply to Russians due to their status as former occupiers. [\[FN224\]](#)

*663 Second, some targets of claims accept the importance of international norms, but see no reason to delve into the details of their legal status. As an initial matter, some governmental leaders would regard major political commitments, such as those in OSCE documents, as just as significant as legal commitments. [\[FN225\]](#) This view, of course, supports the assumptions that the OSCE has made in seeking to implement its instruments. [\[FN226\]](#) Minority leaders would invoke OSCE standards alongside treaties in encounters with the government. [\[FN227\]](#) Others had less concern about whether the standards were legal or non-legal because they directed their attention to whether the High Commissioner had stated that they were standards requiring the government to act a certain way. [\[FN228\]](#)

The decision by influential outside actors to treat the non-legal standards on par with the legal ones for purposes of the incentives they could offer for compliance contributed to this erosion of the normative distinctions between treaties and softer law. Thus, in Latvia, the EU's determination to make compliance with the High Commissioner's recommendations *664 an element for inclusion on the short list of criteria for membership candidacy proved critical to the attempts of van der Stoel and others to persuade the parliament to change the citizenship law. [\[FN229\]](#) As noted above, some of these proposals had a basis in treaty law (citizenship for stateless children), while others were simply based on van der Stoel's assessment that European practice required the change (eliminating the window system).

For a third group, however, the distinction between soft and hard law retains significance. Within each country, a small group is both aware of and affected by the differences among norms. These are predominantly bureaucrats in the foreign ministry with exposure to the nature of differing legal instruments, although they might include senior politicians or NGO leaders as well. They regard the treaty obligations of their state as particularly significant compared to commitments based on other norms, such as the Copenhagen Document. Some might note that only treaties, such as the ICCPR or European Convention, require the filing of reports with international organizations, allow for individual complaints, or contain legal obligations to pass certain domestic legislation. [\[FN230\]](#) They might also point out, sometimes with regret, that only treaties can be cited to and by courts. [\[FN231\]](#) Indeed, some refer to the non-binding nature of the document as a legitimate reason for non-compliance. [\[FN232\]](#) Their recognition of a *665 special place for hard law may be based on a variety of factors. Some see the difference as relevant as a result of legal training, while others note the impact of visits to international organizations (in particular the Council of Europe or the United Nations) to meet officials involved in

monitoring treaty compliance or other repeated exposure to international issues. [\[FN233\]](#) At the same time, this very experience with international organizations might also cause them to treat arguments based on non-treaty norms seriously as well if they saw them as influential signposts of acceptable behavior. [\[FN234\]](#)

C. Toward a New Relevance for Soft Law

The pattern elaborated above regarding the attitude of decision-makers toward hard versus soft law in the context of ethnic minorities reinforces a core insight explicit in the New Haven School of international law and inherent in institutionalist approaches from international relations: that the relevance of the hardness or softness of a norm for the behavior of actors depends a great deal on the forum in which the norm is invoked. [\[FN235\]](#) A priori assumptions about the power of hard legal rules run afoul of the actual ways in which actors make and respond to claims based on soft law; and conclusions asserting the special power of hard legal rules based on studies of treaty regimes or state responses to international court decisions neglect the non-judicial fora that serve as the more typical arenas for those claims. Instead, the data above traces out the beginning of a possible explanation of the relevance of the distinction among norms. It suggests, at the least, that the usefulness of soft law and hard law is a function of a set of variables within the target community.

Although the full contours of this theory require further research and go beyond the scope of this article, it clearly has *666 consequences for extant theories of norm compliance. [\[FN236\]](#) First, it means that the hypothesis of purely normative or legitimacy-based theories is incomplete. At its simplest, that hypothesis states, in Franck's words, that nations obey (hard) rules "because they perceive the rules and its institutional penumbra to have a high degree of legitimacy." [\[FN237\]](#) The theory is a bit less (or more) than this, as Franck admits that he cannot prove causation but simply seeks to derive factors, the presence of which will make it more likely that a state will comply with a rule. [\[FN238\]](#) But the results above suggest that states--or, more precisely, the decision-makers within states--often react quite the same to claims about the requirements of legal rules and claims about the requirements of nonlegal norms. Indeed, critical decision-makers are often unaware of the legal valences among the standards van der Stoel invokes, a situation further undercutting causation arguments about the special nature of legal rules.

These conclusions do not mean that Franck is wrong, as the legitimacy of a rule may well constitute one reason for compliance. If key actors treat hard rules and soft norms with equal seriousness (or lack thereof), however, then it certainly casts doubt on any claim that the legitimacy of legal rules alone induces compliance; and it calls into question whether the legitimacy of legal rules is a major factor in compliance. Instead, whatever factors induce compliance with hard legal rules may be identical to those inducing compliance with softer norms. This might well include, and indeed in my view does include, their legitimacy; however, Franck would then need to revise his main thesis about the special legitimacy of legal rules to cover all prescriptions, however soft. Other factors could equally contribute to an understanding of why states respond as they do to claims based on hard rules and soft norms.

Second, the evidence points to the need for modifications to less pure forms of legitimacy-based theories, such as those of Chayes and Chayes. It suggests that in the "diplomatic conversation" that, in their words, dominates international relations, *667 actors will make arguments based on treaty rules and arguments based on softer norms, and such claims may yield similar results rather than the former automatically assuming some preferred position. [\[FN239\]](#) The Chayeses' division of diplomatic arguments into two broad categories--either those based on treaties or those based on alternatives such as "broadly utilitarian appeals" or "accepted background principles rooted in practical experience and common sense" (such as precedent or fairness)--misses the role played by soft law. [\[FN240\]](#) Their ultimate conclusion that "the discursive elaboration and application of treaty norms is at the heart of the compliance process," a process they call "dialectic," [\[FN241\]](#) while a major insight, must be broadened to consider soft law norms as well. For instance, the invocation by the High Commissioner of the Copenhagen Document, coupled with his detailed recommendations for meeting such a non-treaty commitment, clearly forms part of the dialectic that fleshes out its meaning and clarifies the behavior expected of governments. The repeated exposure of some governmental officials to international organizations does reinforce Koh's views about the effect on internalization of norms of a state's participation in the transnational legal process, as well as

the role of internalization to the construction of identities noted by constructivists. [\[FN242\]](#) Such exposure would appear to increase respect for norms generally; it may also bring about increased awareness of the relevance of soft law as well as, or even instead of, special respect for treaties.

Third, theories focussing on domestic structures must deepen their approach to soft law. On the one hand, the fundamental liberal insight that the makeup of domestic polities affects the seriousness with which they react to international law, and that the state includes myriad actors each incorporating international law in different ways, seems reaffirmed by the experiences of the High Commissioner. Actors within states, whether within ministries or minority groups, who see their state as a liberal one are inclined to take soft law embodying *668 liberal principles very seriously. However, the focus of liberal scholars on the role of courts in incorporating treaty or customary hard law into domestic law misses the impact of soft law on domestic societies. Soft law can be incorporated in many ways, whether through inclusion in legislation or as other guidelines for governments.

The message carried by the High Commissioner on National Minorities--a quiver of normative arrows of differing dimensions--suggests that norm compliance concerns not just treaties, but a broad array of normative commitments. Among certain audiences, promises may matter as much as legal obligations. Where treaty law does not represent the last word on legal regulation of a particular subject, it becomes imperative to consider the extent to which soft law can make a difference. Soft law and the relevance (or irrelevance) of different degrees of normativity deserve a full place in theories of compliance.

V. The Messenger and the Message: Introducing the Normative Intermediary

Beyond the insights offered by the High Commissioner's work for the role of soft law, his methods provide critical data for considering the role of the messenger in inducing compliance with international norms. Indeed, they point to the need for explicit treatment of a distinct kind of messenger--an entity I refer to as the normative intermediary. A normative intermediary is a party, authorized by states or an international organization seeking to promote observance of a norm, who involves himself or herself in a particular compliance shortcoming of a state and seeks to induce compliance through a hands-on process of communication and persuasion with relevant decision-makers. Such a party might be a single person acting alone (such as Jimmy Carter in some of his diplomatic assignments [\[FN243\]](#)) or a direct agent representing a state or international organization. In the case of the latter, he or she might serve on an ad hoc basis or, as with the High Commissioner, as an institutionalized mechanism of an organization.

*669 Normative intermediaries comprise part of a broader category of international actors, whom one might call normative agents, who represent normative constituencies (the concerned states and international organizations) and seek to restore compliance in states violating norms. The typical agent might be a bureaucratic emissary of the norm-concerned states or organizations--such as a technical or legal expert who seeks to explain the norms to a particular government. These agents undoubtedly play some role in compliance, whether through the process of educating those unfamiliar with the norms or working with others in the state who may agree with them, along the lines of Haas' model of the epistemic community. [\[FN244\]](#) However, the normative intermediary distinguishes himself from other normative agents and makes a special contribution by dint of certain independent powers and a larger scope of authority. To gain an understanding of the way in which the normative intermediary makes the law relevant, one must turn to a branch of political science not heretofore considered by either theories of international law or international relations addressing compliance issues--mediation theory.

A. Explaining the Normative Intermediary: Mediation Theory and International Norms

Mediation theory is an amalgam of ideas drawn from a variety of disciplines-- sociology, psychology, economics (especially industry-labor relations), game theory, and political science. Mediation itself has proved the source of numerous definitions. For purposes of this Article, I view it as a process of conflict resolution where the parties to a dispute voluntarily utilize the services of an outside party to change their perceptions, positions, or behavior, without the ability by

that party to resort to physical force and without a legally binding effect of that party's decisions. [FN245] Such a definition thus covers a range of strategies by outside parties to assist, persuade, influence, and cajole the disputants. It nonetheless excludes both extremely mild forms of third party involvement, such as passing *670 messages or facilitating physical contact, as well as more coercive or binding forms, such as military intervention or arbitral or judicial processes. [FN246] Mediation theory stands at the intersection of negotiation theory, which concerns the dynamics of conflict resolution through direct contacts between the parties (with or without outside assistance), and theories of third party intervention, which cover the involvement of third parties in a variety of contexts, ranging from judicial settlement all the way to military involvement. [FN247]

The basic premise of mediation theory is quite simple: outside parties who involve themselves in settling disputes--intermediaries [FN248]--can and do make a difference in outcomes, even when those parties lack any legal or coercive power over the disputants. It attempts to offer an integrated approach to explaining the effect of intermediaries as determined by (1) exogenous variables that intermediaries may or may not be able to alter, and (2) variables endogenous to the process of intervention, namely the characteristics of the intermediary and the tools or methods upon which he may rely to alter the changeable exogenous variables. [FN249] Certain approaches to the field have emphasized the exogenous variables, in particular the stage of the dispute in terms of the degree of antagonism *671 or mistrust between the parties, [FN250] the relationship between domestic politics and the particular international issue, [FN251] and the subject matter of the underlying dispute. [FN252] Each of these variables may appear at first glance as constants, but the intermediary can also alter them, or at least the parties' perceptions of them.

Some scholars have placed special weight on the identity and the strategies of the intermediary. Oran Young broke ground on this issue a generation ago, and since that time, other students have focussed upon various tools of intermediaries, such as the ability to redefine issues, to offer carrots and sticks to the disputants, and to permit the parties to save face. [FN253] Still others have sought to glean conclusions from detailed case studies involving high-profile mediators. [FN254] Most promising for purposes of both explanation and practical assistance to intermediaries and decision-makers would seem to be recent efforts to combine the insights regarding the relative importance of exogenous and endogenous factors above. These so-called "contingency approaches" view the outcome of third party intervention as a function of the different characteristics of the conflict and the actors in it (including the mediator), *672 as well as the actions of the mediator, and seek to maximize the chances of resolving the particular conflict. [FN255] Nevertheless, mediation theory suffers some analytic shortcomings, and empirical testing of various hypotheses has to date been limited to selected case studies. [FN256] Mediation theory does not assume that mediators always make a difference (as the number of failed mediations makes clear) but seeks to develop the conditions under which they can lead to an agreement between the parties.

B. The High Commissioner as Normative Intermediary

The OSCE's High Commissioner clearly does not engage in mediation in the same way as the intermediaries considered by mediation theorists; the normative intermediary and some of his methods are different. Nevertheless, such theory offers a powerful tool for explaining why the work of normative intermediaries has or has not yielded results in terms of norm compliance. In this context, I analyze the High Commissioner as a normative intermediary with reference to three of the core referents of mediation theory: (1) exogenous variables, (2) strategies of mediation, and (3) the nature of the mediator. [FN257]

*673 1. Exogenous Variables and the Limits of the Intermediary

Mediation theory recognizes that the impact of any intermediary will depend upon exogenous variables, principally defined in terms of the nature of the dispute and the nature of the parties. The work of the High Commissioner demonstrates the relevance of these major contextual factors to the promotion of norm compliance as well. Put simply, the normative intermediary's ability to make any kind of difference depends initially upon the willingness of the parties to take his views into account and to make relevant concessions, both of which are a function of the issues and the parties' makeup.

a. The Nature of the Dispute

Mediation theorists have sought to categorize international conflicts that have formed the subject of mediation to predict their susceptibility to successful mediation. For instance, some scholars have found disputes over territory more amenable to mediation than larger issues of ideology or independence; others have rejected this construct in favor of viewing disputes as concerning either interests (favorable to mediation) or deeply rooted values (not favorable to mediation). [\[FN258\]](#) Mediation theory's attention to interstate disputes has not yet permitted detailed consideration of the susceptibility of intrastate ethnic disputes to mediation, [\[FN259\]](#) but the variables considered at the international level thus far suggest that the theory would at least regard ethnic disputes as raising a special set of concerns for mediators.

The experiences of the High Commissioner support this insight's relevance to normative intermediaries. They suggest that ethnic tensions, while far from historically predetermined or intractable, do raise special challenges for international norms and normative intermediaries. In Macedonia, for instance, the majority still harbors fears of further dismemberment *674 of their country, even if such a view is based on a somewhat mythical construct of historical Macedonia, and the Albanian minority distinguishes itself from its Slavic fellow countrymen. [\[FN260\]](#) In Latvia, the struggle is over the legacy of fifty years of Soviet occupation, with the majority seeking ways to reverse many of its effects and the minority seeing itself under a new threat. [\[FN261\]](#) This context makes arguments by intermediaries regarding international law face an immediate barrier, one that arguments regarding other norms--such as trade norms--may not face. These factors also cause the normative intermediary to tailor his arguments, as the High Commissioner did in basing his protests to Latvia regarding legislation mandating the use of Latvian on the right of all individuals (not just ethnic Russians) to speak their own language in the private sphere. [\[FN262\]](#)

b. The Parties to the Dispute

Mediation theory has also stated that the nature of the parties affects the prospect of successful mediation. Two variables concern the internal organization of each side--(1) its cohesiveness in terms of lines of authority, and (2) its form of organization in terms of decision-making processes--and two address the relationship of the parties to each other--(3) their prior relations, and (4) the balance of power between them. [\[FN263\]](#) Theorists generally agree on the importance of internal cohesiveness of each side to successful mediation, as it means that the mediators' proposals will not be sidetracked by factional disputes within a party. They also seem to be adopting the same view on the relevance of the democratic structure of the parties, but they agree less on the effect upon mediation success of the prior relationship of the parties (friendly vs. unfriendly) and the balance of power between them (equal vs. unequal). [\[FN264\]](#)

*675 The work of the High Commissioner suggests the applicability of most of these insights to normative intermediaries. First, the lack of internal cohesiveness of minorities and governments has proved an impediment to gaining acceptance of norms and norm-based solutions. Minorities may suffer from multiple groups claiming to represent their interests, and governments may fall victim to unstable coalitions. In Latvia, the fragility of the governing coalition has meant that politicians involved in law-drafting exercises often concerned themselves with legal arguments only if they could use them to advance their own power in the coalition. [\[FN265\]](#)

Second, regarding the democratic versus non-democratic character of the parties, although all the states in which the High Commissioner has worked have governments elected through reasonably free and fair balloting, most are young democracies. They lack a complete culture of respect for the rule of law, in particular as a way of protecting those not in the majority. [\[FN266\]](#) Similarly, although some leaders of minority groups seem committed to the democratic process, others have remained wary of working with or in the government. [\[FN267\]](#) This shortcoming serves as a barrier to normative arguments as well. [\[FN268\]](#) It could help explain whether the methods of normative intermediaries such as the High Commissioner can be applied to other regions of the world facing ethnic strife.

Third, lack of communication between the sides in an ethnic dispute has created mistrust that impedes the intermediary's *676 successful invocation of international norms. [\[FN269\]](#) As shown above, each party is prone to regard the norms with some suspicion, viewing them as only benefiting the other side. [\[FN270\]](#) This makes the normative intermediary all

the more necessary but can taint him in the eyes of one side or the other. [\[FN271\]](#) As for the relevance of the fourth factor, the balance of power between the parties, just as mediation theorists have reached differing conclusions on the role of power parity of the two sides, the work of the High Commissioner does not suggest any obvious ramifications of the relative power of the two sides upon their susceptibility to accept normative arguments. In most situations of ethnic tensions, the majority enjoys greater political power through its larger presence within the apparatus of government. This situation may cause the majority to spurn normative arguments as irrelevant. On the other hand, if the majority does not feel sufficiently secure and fears the minority, it may view normative arguments as threatening its vision of the unity of the state. [\[FN272\]](#) As for the minority, it might regard norms as a way to rectify past abuses or simply as a tool of the majority.

2. Strategies of the Normative Intermediary

a. The Level of Involvement

Intermediaries can penetrate more or less into the negotiations between disputants. In a core insight, Saadia Touval and William Zartman described the continuum of involvement as passing through three possible levels of increasing depth: communication, formulation, and manipulation. [\[FN273\]](#) In the communication *677 strategy, the mediator focuses on encouraging meaningful dialogue between the parties, gaining their trust, and helping to identify the issues. At the formulation stage, the mediator helps structure the agenda and offers substantive suggestions and proposals, including concessions that one or both parties might make. At the level of manipulation, the mediator tries to alter the incentives of the parties toward accepting his proposals or some other solution through, for example, carrots, sticks, or threats to terminate the mediation. [\[FN274\]](#) Mediation theory posits, and seeks to prove through empirical research, that these three strategies contribute to the solution of the parties' dispute.

Part II above described, based on empirical research, five ways by which the OSCE High Commissioner utilizes and attempts to promote observance of international law--(1) translation of norms into concrete proposals (through the processes of explication and provision of recommendations), (2) elevation of norms into harder forms of law, (3) mobilization of support for outcomes consistent with international norms, (4) development of norms, and (5) dissemination of norms to relevant elites. Several of these functions fit squarely within the framework of the various layers of mediation derived from mediation theory. Indeed, this aspect of the theory offers powerful explanations, or at least hypotheses, capable of further testing how the High Commissioner's functions serve to promote compliance with norms.

First, the explanatory component of the translation function of the High Commissioner resembles and works in the way of the communication strategy of the intermediary. The explication of norms in a neutral way lays the groundwork for resolution of the problem. In explaining the content of the relevant international norms, he helps, albeit in a somewhat passive way, to define the limits of acceptable conduct in a way *678 that does not actively reproach either party for its non-compliance. [\[FN275\]](#)

Second, the other component of the translation function--offering specific recommendations that, if carried out, would result in compliance with the norms--represents a normative version of the intermediary's formulation strategy. In translating international law into concrete proposals, the High Commissioner relies upon his own ideas as a way of encouraging compliance, just as the typical mediator formulates his own proposals to bridge the gap between the parties on other issues. These give states and minorities detailed options on how to achieve compliance with the norms in a way that seems reasonable to them. [\[FN276\]](#) Indeed, when the High Commissioner has worked on a situation long enough to propose and pursue implementation of specific recommendations, compliance with those recommendations acts as a surrogate for compliance with the norms themselves. Thus, in Latvia, the EU stated that implementation of the High Commissioner's recommendations would fulfill the EU's standards in the area of minority rights. The elevation function of the High Commissioner represents one particular variety of formulation, namely, making proposals that seek to tie a state to certain international standards through the enactment of domestic legislation.

Third, the High Commissioner's mobilization function promotes norms in the manner of Touval and Zartman's concept of

the manipulation strategy. Here the intermediary acts in his or her most proactive manner to bring about a successful conclusion. [FN277] The empirical research underlines the relevance of such manipulation to the seriousness with which *679 elites consider the High Commissioner's normative arguments. In particular, he has convinced parties with influence over the sides, such as the EU and economically influential states, to support his recommendations. Thus, the EU's hint that non-compliance with his recommendations would be an impediment to the accession process represents a classic stick in mediation theory. [FN278] Indeed, in the eyes of many, that stick was more crucial than any argument made by the High Commissioner. [FN279] Similarly, the High Commissioner's search for funds to support certain of his recommendations--such as a private Albanian language college in Macedonia or greater Latvian language training programs in Latvia--shows the place for positive incentives, or carrots.

Beyond carrots and sticks, the High Commissioner has employed a classic mediation technique in bolstering one side when it makes concessions that the other may find inadequate. One example is his public statement in support of Latvia's new 1998 citizenship law. By citing the High Commissioner's statement, Latvia could claim that it had accomplished what he had asked, that it was complying with international standards, and that any further criticism from Russia was unwarranted. [FN280] Indeed, the High Commissioner has issued statements of support for legislation, even when it failed to incorporate some of his recommendations, if he believed it represented a significant step nonetheless. [FN281] The intermediary also plays a key *680 face-saving role, as a side can accept international law by portraying such acceptance as acceding to the intermediary's wishes and not as caving into the demands of the other party. [FN282]

It should be noted that mediation theory's identification of three levels of involvement of the intermediary does not shed light on all the normative functions of the High Commissioner. In particular, it does not take account of the role of either norm development or norm dissemination, two critical functions, as they do not form part of typical mediation activities. By developing new norms and educating relevant elites about norms, the High Commissioner lays some seeds for future compliance, even if not in the context of mediating a particular dispute.

b. Timing

Mediation theory has highlighted the significance of the "ripeness" of a conflict for third party intervention. The conventional wisdom views ripeness as an objective stage in a conflict, characterized by a "mutually hurting stalemate, optimally reinforced by an impending or narrowly avoided catastrophe to produce a deadlock and a deadline, plus the presence of a valid spokesman for the parties and the perception of each party that a way out is present." [FN283] It regards intervention before a conflict is ripe as at best fruitless and at worst counterproductive. Most work on ripeness has focused on violent conflicts *681 and sought to find a time when mediation will most likely succeed.

Ripeness has some relevance for the work of normative intermediaries, though perhaps not in the way intended by mediation theory. Certainly, if the parties are cooperating well, then intervention by the High Commissioner would be premature. But the work of the High Commissioner shows the possibility for the normative intermediary to involve himself long before violence breaks out and even before the parties have reached the serious stalemate inherent in the current understanding of ripeness. Instead, the norms themselves appear to operate to advance the moment of ripeness quite significantly. They do so because the failure of a state to comply with a norm--especially a norm of an international organization of which the state forms part--creates a legitimate reason for the organization and its normative intermediary to seek involvement. Even if the parties have not reached a situation where both see potentially unacceptable costs to continuing their policies (the essence of the mutually hurting stalemate), the moment is ripe for intervention by normative intermediaries as long as the state's compliance with its obligations is in question. Indeed, normative arguments may well have the best chance of making a difference where the parties have not yet resorted to violence and can still be persuaded to meet international commitments.

Beyond the question of ripeness, the work of the High Commissioner demonstrates the impact of tactical timing during the normative intermediary's involvement. For example, normative intermediaries may wish to keep silent during an election campaign (lest one side use cooperation with the mediator against the other) or to seize the initiative after elections,

when new governments may be open to new ideas, as occurred in Slovakia in 1999.

3. The Traits of the Mediator

Lastly, mediation theory has given prominent attention to the traits, as opposed to the strategies, of the mediator. Three issues have received most scholarly attention. First, scholars agree on the influence of certain rather obvious personal characteristics, such as intelligence, knowledge of the dispute, patience, *682 perseverance, and political acumen. [FN284] Second, the parties must perceive mediators as legitimate, that is, entitled to serve as intermediary and trusted to carry out that role well. This attribute stems principally from the mediator's status and stature; it fosters an environment where the parties treat the mediation process seriously and enhances the likelihood of their openness to the mediator's ideas and their willingness eventually to make concessions. [FN285] Third, greater debate has ensued on the necessity or desirability of the mediator's impartiality. Some students of international mediation hold that an intermediary must be impartial to gain the trust of the sides. An alternative perspective views other factors as more significant, such as the mediator's ability to exert leverage through access to various resources. [FN286]

The reactions of the High Commissioner's interlocutors to his proposals suggest the relevance of all three sets of attributes to the normative intermediary. First, both minorities and governments agreed that they found the High Commissioner's recommendations especially constructive because of his detailed knowledge of the country (which they distinguished from that of officials of other international organizations, who often simply visited the country for one short period and then wrote a report), his willingness to listen to all sides, and his persistence in continuing to visit the country and following up on his proposals. [FN287]

Second, status and stature also played a role. Although some of the High Commissioner's interlocutors did not find the OSCE a particularly prestigious or influential organization, others clearly found the link to the OSCE critical. These actors cared about the views of the OSCE, an organization with which they had experience, and saw a greater connection compared *683 to the United Nations or the Council of Europe. The OSCE has a headquarters in central Europe (Vienna), where states' permanent diplomatic missions actively participate, as well as on-site missions in various countries offering knowledge of the ethnic situation; the Strasbourg-based Council of Europe seems more distant, with its legalistic (and often very slow) procedures through the European Court of Human Rights. [FN288] Moreover, the institutionalization of the High Commissioner as a permanent mechanism of the OSCE enhanced his status. As someone working to reduce ethnic tensions in numerous states, he could claim that he is not simply picking on one state's compliance problem-- although governmental leaders would quickly point out to him whenever they noticed that he was not addressing, or addressing differently, a similar problem in another state. [FN289] Because he followed each situation for many years, actors knew he would persist in working with them. As for stature, many interlocutors confirmed that the profile of the incumbent High Commissioner, a senior Dutch diplomat with many years of domestic political and diplomatic experience, was relevant, although as much for his contacts with other instrumentalities as for the stature itself. [FN290]

Third, the High Commissioner's work suggests the pertinence of mediation theory's attention to impartiality to the normative intermediary's efforts. Arguments that impartiality is critical resonate well with the operations of this particular normative intermediary. Those who have dealt with him confirm *684 that much of his persuasiveness depends upon his willingness to invoke the norms with (or against) both sides, to challenge behavior of either side that he regarded as inconsistent with the norms, and to accept or approve of a side's conduct if it is consistent with the norms. [FN291] Indeed, criticisms of the High Commissioner stemmed from a belief that he was not impartial in that sense. [FN292] At the same time, his work also underlines the insights of the alternative view of mediation theory, namely that factors beyond impartiality may prove critical. The High Commissioner's leverage over the parties in terms of his ability to reward or punish them--principally through his close contacts with senior officials in the EU [FN293] and individual governments in a position to apply incentives to the parties-- clearly affected his ability to encourage normative compliance. Whether the experiences of other normative intermediaries support more the impartiality school or the leverage school is a matter for students of mediation to ponder. (See Part D below.) International lawyers should, however, take note that the normative intermediary's impartiality and leverage can play a role in fostering observance of norms.

C. Toward a New Relevance for Intermediaries

1. A Bridge Between Two Disciplines

A major impediment to incorporating the insights of mediation theory into ongoing debates on compliance remains the mutual ignorance that international law and theories of mediation have traditionally shown each other. Of course, at one level, international law recognizes the role for third party intervention in resolving disputes without coercion. The U.N. Charter's article on the peaceful settlement of disputes requires parties first to "seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort *685 to regional agencies or arrangements, or other peaceful means of their own choice." [FN294] All but the first of these necessarily involve some actors beyond the immediate disputants. Indeed, arbitration and judicial settlement entail a binding resolution by decision-makers either chosen by the disputants directly or available to them, such as a standing court or other body. [FN295]

Yet international law's approach to dispute resolution has effectively relegated mediation to an afterthought. The enforcement-centered scholars concentrate upon only certain kinds of third party intervention, i.e., arbitration and judicial settlement--especially the latter--as they view them as true legal processes in which legal norms determine the outcomes. [FN296] For them, international organizations matter principally insofar as they clarify that a state has violated a particular norm and authorize appropriate sanctions. [FN297] Mediation becomes merely a political process, separate from enforcement. [FN298] The Chayeses' managerial approach, for its part, considers intermediaries insofar as they might be agents of the institutions they regard as so central to compliance, but the exact process *686 by which they work to promote observance of law is not closely examined. Nor does Koh's internalization paradigm consider the insights of theories of third party intervention. As for Franck, while he talks about the various "cues" that the international community can use to convey a norm's legitimacy, the particular role for those communicating the cues does not merit attention. [FN299]

From the other side of the looking glass, studies of international mediation and other forms of third party intervention have given short shrift to international norms. For them, mediation seems to take place in a legal vacuum, where intermediaries do not raise normative arguments and the parties do not respond to them. Their perspective may seem predictable, as they remain principally concerned with solution to conflict and not with compliance with norms; however, their attitude essentially reflects not merely an instrumentalist view of norms, but one where the law essentially does not matter.

The disconnect between international law and mediation stands in some contrast to the work of domestic approaches to mediation. On the one hand, the conventional wisdom in that field remains Lon Fuller's dictum that "mediation is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves." [FN300] Yet scholars from legal and sociological backgrounds have argued about the relevance of legal norms as a backdrop for mediation. [FN301] The context of domestic mediation may account for the more collaborative approach. In domestic mediation, litigation or prosecution lurks in the background of the process as the clear alternative for the parties, thus linking such alternative dispute resolution to adjudication. The international *687 realm, however, rarely offers such a guaranteed adjudicatory alternatives for the parties.

The concept of the normative intermediary bridges the gap between international law and mediation theory. As the description of the High Commissioner's work reveals, he has served as an intermediary in the sense understood by students of third party intervention, for he has a mandate from the OSCE to prevent conflict by persuading parties to solve their inter-ethnic problems. [FN302] He relies upon tools similar to those used by other intermediaries who have been studied, although his techniques may differ. But he also has a normative component to his work in making arguments based upon, and attempting to ensure respect for, international norms. [FN303] Thus, for international lawyers, mediation theory offers a new analytical framework to gauge the extent to which individuals charged with promoting international norms can help induce compliance. That framework helps to transform the descriptions of the High Commissioner's method of invoking and applying norms into an explanation, or at least a theory, of the causal pathways by which the intermediary can bring about compliance or is limited in doing so. Moreover, and of special interest for students of mediation, it shows

the extent to which normative arguments play a role in the work of intermediaries.

2. Revisiting Extant Approaches

The concept of the normative intermediary is not meant to offer a comprehensive theory of why states comply with norms. The claims advanced here are the more modest ones *688 that (1) normative intermediaries matter in promoting compliance; and (2) in various situations, such as prevention of ethnic conflict, normative intermediaries offer a more promising way of facilitating observance of international law than suggested by the more impersonal or procedurally driven visions of compliance. From this perspective, a theory of normative intermediaries and the evidence of their relevance through the work of the High Commissioner support certain core insights of the existing schools, but also should cause them to revisit some of their assumptions.

Institutionalism's basic insight--that states comply with norms because the norms and the states form part of a regime that creates incentives for compliance and disincentives for non-compliance--complements some core insights of mediation theory. In particular, the intermediary's status as an agent (especially a permanent one) of an organization with whom the states and minorities identify contributes to his ability to convince actors to treat norms seriously. In addition, the ability of the human rights regime to make linkages--in particular with states and organizations capable of providing financial rewards for compliance, such as the EU--forms a core element in the willingness of states to heed the recommendations of the High Commissioner regarding norm compliance.

Nevertheless, the construct of the normative intermediary offered here suggests that institutionalists need to address the interpersonal linkages between the regime and its members. International law and relations do not operate through impersonal written correspondence in which states and international organizations urge other governments to comply with the rules of the regime. The messenger and the method by which he conveys the message may prove critical to the success of that message. In the end, institutionalists may still not find the normative intermediary highly significant in their theory, but they will have benefited from moving beyond structural explanatory factors to examine other variables.

The norm-centered theories of compliance, of course, claim that those other variables are the norms themselves. Indeed, for theories focusing on the legitimacy of norms, the force of the law completely outweighs the role of the intermediary: it is the message, not the mediator, that counts. The work of the High Commissioner clearly supports the significance of norms qua norms, but it does not offer evidence that *689 the legitimacy of norms acts as the critical determinant in a government's or minority's willingness to comply with them. Indeed, it offers evidence to the contrary in the varying degrees of compliance of different states subject to the same norms. [\[FN304\]](#)

At the same time, mediation theory need not undercut the insights of legitimacy theorists and, indeed, may complement them in at least three ways. First, mediation theory serves to explain the dynamics of one mechanism by which the prescriber of the norm conveys its legitimacy to those against whom it will be applied. The normative intermediary serves as the agent who can explain in an intelligent, politically sensitive manner why the norm deserves respect--the traits it enjoys to make it legitimate. Second, mediation theory suggests that the stature of the messenger contributes to the legitimacy of the rule. [\[FN305\]](#) Third, and related to the second, mediation theory suggests that legitimacy theorists should begin to consider legitimacy as attaching not only to the rules, but to the messenger as well. The traits and affiliation of the High Commissioner gave him a special legitimacy toward the parties. As for those legitimacy theorists, such as Chayes and Chayes, who already give greater attention to the communications between international organizations and their members, they should embrace mediation theory's insights regarding the formulation strategy of a mediator. But the central role of the manipulation functions for most mediation theorists suggests the inadequacy of the Chayeses' focus on dialogue alone as the critical method of compliance. [\[FN306\]](#)

The legitimacy-based theory that seems to best contemplate a role for normative intermediaries is Koh's theory of the internalization of norms. [\[FN307\]](#) Those involved with the High Commissioner's work repeatedly noted the need for domestic actors to adopt his views as their own in order to make them *690 more than just advice from a well intentioned

foreigner. [\[FN308\]](#) Koh's idea of the "governmental norm sponsor" who helps push states to comply also appears to include agents of intergovernmental organizations, such as the High Commissioner. [\[FN309\]](#) A theory of compliance based on internalization could benefit from attention to the particular process in which these normative intermediaries engage to promote domestic observance.

Constructivists, with their notion that norms help constitute the identity of states and actors within states, should find the insights of mediation theory beneficial. [\[FN310\]](#) Constructivism already recognizes a role for individual agents in changing state identities through persuasion, and this would presumably include both the broad category of normative agents and the smaller category of normative intermediaries. [\[FN311\]](#) The intermediary may, for instance, be able to develop new tools that focus on changing identities as well as interests. [\[FN312\]](#) Constructivists should examine the tools of intermediaries for altering these identities and consider how mediation theory can help to explain why certain norm entrepreneurs have succeeded at norm promotion.

Finally, the liberal model's idea that the structure of domestic society affects a government's propensity to comply with norms fits into mediation theory as one of the exogenous variables affecting the outcome of mediation. Indeed, the theory and practice of the normative intermediary support the view that the domestic makeup of the parties will affect their ***691** receptivity to his normative arguments. [\[FN313\]](#) Mediation theory, however, does not stop with this presumption; instead, it seeks to explain how domestic actors, not dedicated to international law, can come to accept it--how individuals within domestic structures can be subject to outside persuasion. The changes in governmental attitudes following the recommendations of the High Commissioner suggest (although they do not prove) that other forces are clearly at work and indeed capable of transforming behavior from the outside. [\[FN314\]](#)

The construct of the normative intermediary can thus complement and be integrated into various aspects of existing concepts of norm compliance. Nevertheless, my attempt to link mediation with the existing theories is only a preliminary effort. If theorists from the other schools find mediation theory a tool with explanatory potential, they need to consider how best to incorporate it into their own world views. Such a project will have two key benefits. First, it will enable each of the four (or more) approaches to deepen its understanding of how norms matter by taking account of the role of messengers between norms and targets. Second, it may indirectly help build links between the four approaches by identifying common ground. For example, mediation theory's idea of exogenous variables would seem to fit within a variety of extant theories. The possibility of integrating various theories of norm compliance is a critical challenge to both international law and international relations, and mediation theory may offer one connection among them, forming a sort of axle connected to each spoke. [\[FN315\]](#)

***692 D. Confronting Mediation Theory--Some Preliminary Sketches**

The bridge offered by the concept of the normative intermediary has, indeed, traffic in both directions. Beyond its importance for international lawyers, it offers students of mediation theory, long accustomed to explaining the strategies of the mediator without regard to normative arguments or norm-directed outcomes, a way of gauging whether norms play a role. While a full consideration of the impact of the normative intermediary on theories of mediation goes beyond this Article, the above discussion raises three immediate challenges to mediation theory.

First, it should by now be obvious that normative arguments are part of some mediators' tools, and norm compliance may indeed form part of their mission. Intermediaries can introduce normative arguments into mediation settings at a variety of stages and in a variety of contexts. At a relatively shallow level of mediation, the mediator may simply choose to educate the parties about the relevant law in the belief that it can offer common ground for working out a solution. At a deeper level, he may rely upon normative arguments to support specific proposals. The mediator may ultimately manipulate the parties into supporting his norm-based solution. The translation function of the High Commissioner strongly suggests that targets do react to these arguments differently from policy arguments, even if the degree of persuasiveness may depend upon the background of the target, the type of norm invoked, and other factors. International mediation theory thus

needs to take seriously international law's claims about certain special aspects of normative arguments and not just list them as another type of communication or formulation strategy (or alternatively, it must offer clear evidence that norms do not in fact matter).

Second, the work of normative intermediaries requires mediation theory to rethink certain of its ideas on ripeness of conflict for third party intervention. Norms can advance that moment. Indeed, ripeness may well matter less for successful third party intervention than the willingness of the parties to allow outsiders to assist them. [\[FN316\]](#)

***693** Third, norms and the normative intermediary change the nature of the debate over the relevance of impartiality as a quality of a mediator. As discussed above, the experience of the High Commissioner lends some support to those emphasizing impartiality, in that his credibility depends upon a willingness to invoke the norms against both sides when he perceives them not to be in compliance. Yet, impartiality viewed only as evenhandedness also has its limits. Because the normative intermediary's primary loyalty is to certain norms, he cannot be impartial in the sense of a total unwillingness to criticize a side for violation of norms, even if the result is that it appears he is only complaining about that side. This conclusion reinforces an observation made long ago by U.N. Secretary-General Dag Hammarskjöld, when he noted that even the impartial international civil servant "cannot be accused of lack of neutrality simply for taking a stand on a controversial issue when this is his duty and cannot be avoided." [\[FN317\]](#) This type of impartiality-as-loyalty-to-the-norms forms an essential element of the normative intermediary's strategies.

VI. Conclusion: Messages for Two Audiences

The OSCE High Commissioner's experiences help us answer in a more nuanced way the question posed in the title of this essay--does international law matter in preventing ethnic conflict? For as much as the wars in the former Yugoslavia may confirm the realists' confidence that the answer must be negative, a fuller picture of measures to prevent ethnic conflict in Europe suggests the answer is at the very least a tentative yes. Of course, international law does not itself prevent ethnic conflict any more than domestic law prevents conflict under either a proximate cause or but-for view of causation. But does international law matter, and matter significantly? The work of the High Commissioner strongly suggests that, in the hands of a normative intermediary, international law, defined ***694** to include norms of a variety of valences, has eased tensions within states. It has done so because the intermediary has devised strategies--translation, elevation, mobilization of support, development of norms, and education--to influence and persuade actors in situations of ethnic conflict to solve their dispute in a norm-based way. As the framework of mediation theory helps clarify, these processes make international norms meaningful and relevant to domestic actors. Indeed, with respect to the development of norms, we witness the intermediary helping to fill in gaps in existing law as a way of providing a principled basis for the parties to reach agreement. Norms are hardly the only influence on domestic actors, and the strategies above acknowledge the role of political factors. However, the data suggest that norms can affect these situations, where actors have readily shown themselves prepared to solve their disputes through violence.

These findings have implications for two distinct audiences. First, for scholars interested in understanding what makes states comply with law and how they can be increasingly induced to do so, they show both the necessity for and outlines of new research directions. As noted above, compliance studies need to reorient themselves away from compliance with hard rules to compliance with norms more generally. Whatever sharp distinctions theory may draw between hard and soft law are belied by the actual reactions of decision-makers to categories of norms.

More significantly, they also need to understand that studying why states comply and studying how outside actors can induce compliance are two sides of the same coin. Theories attempting to derive the former without considering the latter are sterile. A fundamental insight of the New Haven School of international law has been its emphasis on what it calls operations, as opposed merely to rules. [\[FN318\]](#) In one sense, operations concern how the target of a particular rule actually implements it--whether its "operational code"--the target's own internal system for addressing the issue governed by the rule--is consistent with the rule. [\[FN319\]](#) But operations also concern the policies and practices of those actors in the international ***695** arena who seek to ensure that the targets comply. Mediation theory's usefulness to compliance studies

lies in the framework it offers for understanding the role of a critical group of outside actors in the realm of norms--the normative intermediaries. When applied to the work of the High Commissioner, it shows the key place for messengers of norms, actors often neglected, and highlights the need for extant theories to revise some of their views. Students of compliance need to break free of the theoretical straitjacket that has made mediation and messengers often marginal to their work.

Second, the work of the High Commissioner offers two related lessons for those in governments, minority groups, NGOs, and elsewhere concerned with preventing ethnic conflict. First, international lawyers fixated on treaty norms for promoting values are neglecting a large corpus of norms important to ethnic conflict. While human rights treaties or customary law obviously offer some relevant norms--in particular non-discrimination--they typically only scratch the surface of the issues in ethnic conflict. The work of the High Commissioner shows the salience of softer forms of law not merely as pieces of paper, but as tools of persuasion. In attempting to build bridges between the sides, the normative intermediary has to rely upon whatever arguments he can muster, even when documents emanate from bodies without the authority to make the hardest forms of law. Although treaties are obviously key tools for the protection of individuals (especially if they allow for enforcement through domestic or international courts), international organizations are not wasting their time or the relevant taxpayers' money by convening states to issue non-treaty documents in the area of minority rights.

But norms, of course, are not enough. This leads to a second conclusion, which concerns the centrality of the mechanism for pushing those norms and solutions based upon them. In the area of ethnic conflict, the work of the High Commissioner suggests the special importance of the messenger. As discussed above, many actors so mistrust each other that they will neither understand nor observe norms unless an independent person--the normative intermediary--explains *696 the standards and the necessity of compliance. [FN320] In this process, he also uses political skills, including sensitivity to the emotional position of each side and timing of interventions, to try to reduce suspicions between them. In the end, law, which may make little difference as a treaty or document of an international organization, not only assumes relevance to ethnic conflict, but can indeed prove indispensable. Even if the medium is not the whole message, it is clearly a critical part of it.

The common theme of these lessons is the need for both audiences to give more serious consideration to what might be called the softer side of international law--both soft law and soft mechanisms. Garnering respect for law--the essence of the compliance debates--and respect for human rights--the key to preventing ethnic conflict--are about more than treaties, and about more than enforcement or even management by impersonal or procedurally bound international institutions. Instead, they require explicit recognition of the full range of norms invoked by actors, including soft law, and appreciation for the role of messengers in that process of communication.

Lastly, and of relevance for both audiences, an appraisal of normative intermediaries points to their inherent limitations in preventing ethnic conflict and securing compliance generally. Mediation theory recognizes these limitations in its hypotheses on the effect of various endogenous and exogenous factors upon the outcome of mediation. Most obviously, the normative intermediary--like more formal bodies for the enforcement of norms--is constrained by exogenous factors relating to the conflict and the parties. If a state or minority group refuses to incorporate him, then his influence will prove nil. Thus, for instance, the High Commissioner had no impact on the situation in Kosovo, as it deteriorated throughout the years of his mandate, because neither side wanted to involve him. [FN321] Moreover, the degree to which the parties feel connected with the normative community represented by the intermediary will influence his success. In this context, the strategies of the High Commissioner might not transfer well to regions *697 lacking a commitment to common values embodied in one international organization. [FN322]

As for the endogenous factors, the normative intermediary suffers shortcomings because he may only have enough time or resources, or a mandate, to concentrate on certain situations to the exclusion of others. In the case of the High Commissioner, the lens through which he is mandated to set his priorities is that of prevention of conflicts between states. Although the phenomenon of the kin state clearly shows how minority disputes can spill over borders, a focus on conflict

prevention does not coincide with a focus on norm promotion and does not further compliance in the same way. [\[FN323\]](#)

Thus, serious violations of human rights may remain beyond his field of view. One example is the Roma and Sinti (derogatorily referred to as the "gypsies"), whose plight as Europe's worst-off minority has generally failed to engage the attention of the High Commissioner because of the lack of short-term repercussions for conflicts between states (as they lack a kin state). [\[FN324\]](#) Another example is the Kurds, whose lack of any kin state has relegated them to a seemingly permanently disempowered status in Turkey (an OSCE state), Iran, Syria, and Iraq. Other normative intermediaries, whether from the United Nations or interested states, might fill this gap. But the inconsistent application of norms gives support to claims of double standards, thereby undermining the legitimacy of the norms and the institutions for promoting them. Institutions for promotion of human rights for their own sake, *698 such as the European Court of Human Rights or the Special Rapporteurs of the U.N. Commission on Human Rights, do not suffer from these problems, although they do from others.

Moreover, an overly sentimental view of the place for individuals risks putting too much faith in their ability to change the minds of the parties. Of course, those states and international organizations seeking to promote observance of human rights norms need to exercise diligence in their selection of intermediaries. Even for the most skilled intermediary, however, fulfilling all the items on a list of ideal personal traits can neither ensure compliance nor prevent ethnic conflict. At the same time, to the extent that the talents of each intermediary form one element in explaining outcomes, if normative communities rely extensively on mediators, they risk inconsistent application of norms. In this regard, institutions that rely less on personalities, such as courts (like the European Court of Human Rights), do offer an advantage, although the cumbersomeness of involving them can counterbalance that consideration.

Soft law and the normative intermediary thus represent opportunities for promotion of international norms in the area of ethnic conflict, but their unique role lies in their ability to act in the absence of a complete architecture for either enforcement or management of international norms. Obviously, governments, international organizations, and NGOs need to continue to develop hard law and construct mechanisms that are both systematic and less sensitive to the talents and mandates of individual mediators. A world where states and minorities resolve their ethnic disputes through such rules and fora does not, however, appear to be emerging in the near future. Until it does, the normative intermediary, with its capacity to connect international regimes and domestic actors and communicate a variety of norms to those who must implement them, represents a critical avenue for preventing ethnic conflict in the short term and laying the seeds for greater respect for human rights.

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[\[FN1\]](#). Paraphrased from separate conversations of the author with two Macedonian citizens, Skopje, Macedonia, March

1999.

[FN2]. Cf. Nyugen Quoc Dinh, *Droit International Public* 500 (Patrick Daillier & Alain Pellet eds., 5th ed. 1994) (noting "disengagement" of international law" in the area of self-determination).

[FN3]. See [Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 *Am. J. Int'l L.* 291 \(1999\)](#).

[FN4]. *The Relevance of International Law: Essays in Honor of Leo Gross* (Karl W. Deutsch & Stanley Hoffmann eds., 1968).

[FN5]. Michael Ignatieff, *Blood and Belonging: Journeys into the New Nationalism* 14 (1993).

[FN6]. See generally *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Edith Brown Weiss & Harold K. Jacobson eds., 1998) [hereinafter *Engaging Countries*].

[FN7]. E.J. Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality* 164 (2d ed. 1992). On a more practical level, one diplomat closely following these issues stated, "In dealing with these remnants of the Austro-Hungarian empire, the breakup of the Soviet Union was easy by comparison." Interview with Official at United States Mission to the Organization for Security and Cooperation in Europe, in Vienna, Austria (Dec. 9, 1998).

[FN8]. Elie Kedourie, *Nationalism* 134 (4th ed. 1993).

[FN9]. David Wippman, *The Evolution and Implementation of Minority Rights*, 66 *Fordham L. Rev.* 597, 599 (1997).

[FN10]. On the League's mechanisms, see [id.](#) at 599-602. See also [Hurst Hannum, *Contemporary Developments in the International Protection of the Rights of Minorities*, 66 *Notre Dame L. Rev.* 1431, 1432 \(1991\)](#); Francesco Capotorti, *Study of the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, U.N. ESCOR, 30th Sess., at 16-26, U.N. Doc. E/CN.4/Sub.2/384/Rev.1 (1979) [hereinafter *Capotorti Study*]; Asbjorn Eide, [Minority Situations: In Search of Peaceful and Constructive Solutions](#), 66 *Notre Dame L. Rev.* 1311, 1316-19 (1991); Diane F. Orentlicher, [International Responses to Ethno-Separatist Claims](#), 23 *Yale J. Int'l L.* 1 (1998).

[FN11]. Rogers Brubaker, *Nationalism Reframed: Nationhood and the National Question in the New Europe* 25 (1996).

[FN12]. See Ted Robert Gurr, *Minorities at Risk: A Global View of Ethnopolitical Conflicts* 135-38 (1993). See also Orentlicher, *supra* note 10, at 61-62.

[FN13]. See generally Ignatieff, *supra* note 5, at 1-41; Misha Glenny, *The Fall of Yugoslavia: The Third Balkan War* (2d ed. 1993).

[FN14]. Hobsbawm, *supra* note 7, at 174. The deeper question of whether nationalism emerged as a result of structural factors within the state or due to a conscious decision by political elites to invent a doctrine to secure power is hotly contested. Compare Ernest Gellner, *Nations and Nationalism: New Perspectives on the Past* 125 (1983), with Kedourie, *supra* note 8, at 136-44.

[FN15]. See *International Covenant on Civil and Political Rights*, Dec. 16, 1966, arts. 22, 25, 999 U.N.T.S. 171, 178, 179 [hereinafter *ICCPR*].

[FN16]. See Brubaker, *supra* note 11, at 44, 57.

[\[FN17\]](#). See, e.g., Wippman, *supra* note 9, at 602-05.

[\[FN18\]](#). ICCPR, *supra* note 15, art. 2, 999 U.N.T.S. at 173.

[\[FN19\]](#). *Id.* art. 27, 999 U.N.T.S. at 179 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language"). See also Hannum, *supra* note 10, at 1434-38. See generally Patrick Thornberry, *International Law and the Rights of Minorities* 173-201 (1991).

[\[FN20\]](#). See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221 at 232 [[hereinafter ECHR]; American Convention on Human Rights, Nov. 22, 1969, art. 1, 1144 U.N.T.S. 123 [hereinafter ACHR]. Indeed, neither the ECHR nor the ACHR contains a provision on minority rights corresponding to article 27 of the ICCPR.

[\[FN21\]](#). For cogent analyses of the large philosophical and legal literature, see Juha Rääkkä, *On the Ethics of Minority Protection*, in *Autonomy: Applications and Implications* 33 (Markku Suksi ed., 1998); John Packer, *On the Content of Minority Rights*, in *Do We Need Minority Rights? Conceptual Issues* 121, 150-53 (Juha Rääkkä ed., 1996); Fernando R. Tesón, *Ethnicity, Human Rights, and Self-Determination*, in *International Law and Ethnic Conflict* 86 (David Wippman ed., 1998).

[\[FN22\]](#). See Capotorti Study, *supra* note 10; Jules Deschênes, *Proposal Concerning a Definition of the Term "Minority,"* Subcommission on Prevention of Discrimination and Protection of Minorities, U.N. ESCOR, 37th Sess., U.N. Doc. E/CN.4/Sub.2/1985/31 (1985).

[\[FN23\]](#). See Hannum, *supra* note 10, at 1437-38.

[\[FN24\]](#). For the product of that process, see *infra* text accompanying notes 48-49.

[\[FN25\]](#). See, e.g., *Lovelace v. Canada*, Communication No. 24/1977, Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, at 166, U.N. Doc. A/36/40 (1981); *Kitok v. Sweden*, Communication No. 197/1985, Report of the Human Rights Committee, U.N. GAOR, 43rd Sess., Supp. No. 40, at 221, U.N. Doc. A/43/40 (1988); *Il-mari Länsman v. Finland*, Communication No. 511/1992, Report of the Human Rights Committee, U.N. GAOR, 50th Sess., Supp. No. 40, at 66, U.N. Doc. A/50/40 (1995). For a general critique of the Committee, see Douglas Lee Donoho, *The Role of Human Rights in Global Security Issues: A Normative and Institutional Critique*, 14 *Mich. J. Int'l L.* 827, 859-64 (1993).

[\[FN26\]](#). See, e.g., Case relating to certain aspects of the laws on the use of languages in education in Belgium, 6 *Eur. Ct. H.R.* (ser. A) (1968) [[hereinafter *Belgian Linguistics Case*]].

[\[FN27\]](#). See generally Francis G. Jacobs & Robin C.A. White, *The European Convention on Human Rights* 340-92 (2d ed. 1996) (describing proceedings before European Commission and Court).

[\[FN28\]](#). See General Comment No. 23 (50) (art. 27): Report of the Human Rights Committee, U.N. GAOR, 49th Sess., Supp. No. 40, Annex V, at 107, U.N. Doc. A/49/40 (1994).

[\[FN29\]](#). The definition of regime is taken from Marc A. Levy et al., *The Study of International Regimes*, 1 *Eur. J. Int'l Rel.* 267, 274 (1995). On the human rights regime and its limitations during the Cold War, see Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 *Int'l Org.* 599 (1986).

[\[FN30\]](#). See Donnelly, *supra* note 29, at 633 (move from declaratory and promotional regime to implementation or enforcement regime requires "qualitative increase in the commitment of states").

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[FN31]. See Peter M. Haas, Choosing to Comply: Theorizing from International Relations and Comparative Politics, in *Compliance with Soft Law* (Dinah Shelton ed., forthcoming 2000) (manuscript at 5, on file with author) (providing reasons for which states sign international instruments even if they do not intend to comply).

[FN32]. See, e.g., Victor-Yves Ghébal, L'OSCE dans l'Europe post-communiste, 1990-1996, at 27-103 (1996); Organization for Security and Cooperation in Europe, OSCE Handbook 7-19, 28-29 (3d ed. 1999) (visited Mar. 11, 2000) <<http://www.osce.org/publications/handbook/handbook.pdf>>.

[FN33]. See Conference for Security and Cooperation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1292 [hereinafter HFA]. See, e.g., William H. Luers, Czechoslovakia: Road to Revolution, *Foreign Aff.*, Spring 1990, at 77 (on the importance of the HFA).

[FN34]. See, e.g., Rob Siekmann, The Linkage between Peace and Security and Human Rights in the CSCE Process, 5 *Helsinki Monitor* 43 (1994).

[FN35]. Document of the Copenhagen Meeting of the Conference on Human Dimension, June 29, 1990, [29 I.L.M. 1305](#) [hereinafter Copenhagen Document]. The term "human dimension" is the CSCE's term for human rights and humanitarian issues, which it regards as one of several dimensions (including military, economic, and environmental) of comprehensive security. See *id.* at 1307.

[FN36]. See Thomas Buergenthal, The CSCE Rights System, 25 *Geo. Wash. J. Int'l L. & Econ.* 333, 358 (1991) (stating that the protections for minorities are "far reaching and bear considerable resemblance to the guarantees provided for in the minorities system in force in Europe after World War I"); Jane Wright, The OSCE and the Protection of Minority Rights, 18 *Hum. Rts. Q.* 190, 196-98 (1996).

[FN37]. See Charter of Paris for a New Europe, Nov. 21, 1990, [30 I.L.M. 190, 193-95](#) (1991).

[FN38]. See Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Cooperation in Europe, Jan. 17, 1989, [28 I.L.M. 527, 531, 547](#) (1989); Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Fact-Finding, Oct. 3, 1991, [30 I.L.M. 1670, 1673-77](#) (1991). See also Buergenthal, *supra* note 36, at 369-75.

[FN39]. See Rachel Brett, Human Rights and the OSCE, 18 *Hum. Rts. Q.* 668, 678-83 (1996).

[FN40]. See *id.* at 683-84.

[FN41]. See *id.* at 693.

[FN42]. Mandate of the CSCE High Commissioner on National Minorities, reprinted in *The Conference on Security and Cooperation in Europe: Analysis and Basic Documents, 1972-1993*, at 715 (Arie Bloed ed., 1993) [hereinafter HCNM Mandate]. For background on the National Minorities mandate and the negotiations leading to it, see María Amor Martín Estébanez, The High Commissioner on National Minorities: Development of the Mandate, in *The OSCE in the Maintenance of Peace and Security: Conflict Prevention, Crisis Management and Peaceful Settlement of Disputes* 123, 126-34 (Michael Bothe et al. eds., 1997). See also Wright, *supra* note 36, at 200-03; Janie Leatherman, The CSCE's (Im)possibilities for Preventive Diplomacy in the Context of Ethnic Conflict, 2 *Int'l J. Group Rts.* 35, 45-47 (1994).

[FN43]. HCNM Mandate, *supra* note 42, paras. 11-16, at 717-18.

[FN44]. ECHR, *supra* note 20, art. 46, 213 U.N.T.S. at 246. See also Jean E. Manas, The Council of Europe's Democracy Ideal and the Challenge of Ethno-National Strife, in *Preventing Conflict in the Post-Communist World: Mobilizing Inter-*

national and Regional Organizations 99, 106-14 (Abram Chayes & Antonia H. Chayes eds., 1996). For examples of compliance in particularly important cases, see, e.g., *Military is Removed from Court Trying Kurd Leader*, Chic. Trib., June 20, 1999, at C10; Warren Hoge, *Britain to Lift Ban on Gays in Military*, N.Y. Times, Dec. 14, 1999, at A25.

[FN45]. Framework Convention for the Protection of National Minorities, Feb. 1, 1995, [34 I.L.M. 351](#) (1995) [hereinafter Framework Convention]. For background, see Manas, *supra* note 44, at 127-33.

[FN46]. See Geoff Gilbert, *The Council of Europe and Minority Rights*, 18 Hum. Rts. Q. 160, 180-86 (1996). The Convention is also open for signature and ratification by non-members of the Council of Europe upon decision of the Committee of Ministers. See Framework Convention, *supra* note 45, art. 29, [34 I.L.M. at 359](#).

[FN47]. See Resolution (97) 10 of the Committee of Ministers of the Council of Europe, Rules Adopted by the Committee of Ministers on the Monitoring Arrangements Under Articles 24 to 26 of the Framework Convention for the Protection of National Minorities (Sept. 17, 1997) (visited Mar. 9, 2000) < <http://www.coe.fr/cm/ta/res/1997/97x10.html>>; Gaetano Pentassuglia, *Monitoring Minority Rights in Europe: The Implementation Machinery of the Framework Convention for the Protection of National Minorities--With Special Reference to the Role of the Advisory Committee*, 6 Int'l J. Minority & Group Rts. 417 (1999).

[FN48]. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, U.N. GAOR, 47th Sess., Supp. No. 49, at 210, U.N. Doc. A/47/49 (1992).

[FN49]. See *id.* at Preamble ("Considering that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live; Emphasizing that the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among peoples and States"). For analysis, see generally Russell L. Barsh, *Minorities: The Struggle for a Universal Approach*, in *The Living Law of Nations* (Gudmundur Alfredsson & Peter MacAlister-Smith eds., 1994).

[FN50]. Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(1)(a), 1155 U.N.T.S. 331, 333. See also HFA, *supra* note 33, 14 I.L.M. at 1325 (stating that Act "not eligible for registration under Article 102 of the Charter of the United Nations," referring to registration of treaties with the U.N. Secretariat); Buergenthal, *supra* note 36, at 375-78.

[FN51]. See, e.g., Brett, *supra* note 39, at 675 ("There is no way in which political commitments can have legal effect internationally or domestically."). For a more nuanced approach from the positivist perspective, see Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 Eur. J. Int'l L. 499 (1999) (accepting dichotomy in terms of legal bindingness but acknowledging role for international law in understanding non-treaty agreements).

[FN52]. See Erika Shlager, *Norms Relating to Human Rights: The Case of the OSCE*, in *Compliance with Soft Law*, *supra* note 31 (manuscript at 7-8).

[FN53]. OSCE Handbook, *supra* note 32, at 3. See also Interview with Giancarlo Aragona, Secretary-General of the OSCE, in Vienna, Austria (Dec. 10, 1998) [hereinafter Aragona Interview].

[FN54]. Pieter van Dijk, *The Final Act of Helsinki--Basis for a Pan-European System?* 11 Neth. Y.B. Int'l L. 97, 110 (1980).

[FN55]. Cf. Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 Am. J. Int'l L. 296, 300 (1977).

[FN56]. See, e.g., Framework Convention, *supra* note 45, arts. 10, 14, [34 I.L.M. at 355-56](#) (urging parties to "endeavour to ensure" the use of minority languages with administrative authorities and the teaching in or of minority languages "as far as possible").

[FN57]. This question has repeatedly arisen concerning the duty of states to implement the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. The ICESCR gives states significant flexibility regarding implementation. See, e.g., *id.* art. 2(1), 993 U.N.T.S. at 5 (stating that each party "undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means"). See Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 Hum. Rts. Q. 156 (1987).

[FN58]. See, e.g., Explanatory Report to the Framework Convention for the Protection of National Minorities, Doc. No. H(95)10 (1995), para. 64-65, 68 (describing arts. 10(2) and 11(1)).

[FN59]. See [Siegfried Wiessner & Andrew R. Willard, Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity](#), 93 *Am. J. Int'l L.* 316, 317-18 (1999) (stating that lawyers need to provide "guidance to scholar, adviser or decision maker for directing attention to the relevant features ... for purposes of inquiry and effective intervention").

[FN60]. For detailed treatments, with various definitions, see Francesco Francioni, *International "Soft Law": A Contemporary Assessment*, in *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* 167 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996); Paul Szasz, *General Law-Making Processes*, in 1 *United Nations Legal Order* 35 (Oscar Schachter & Christopher C. Joyner eds., 1995); Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 *Int'l & Comp. L.Q.* 850 (1989); Prosper Weil, [Towards Relative Normativity in International Law?](#), 77 *Am. J. Int'l L.* 413 (1983); Chris Ingelse, *Soft Law?*, 20 *Polish Y.B. Int'l L.* 75 (1993); Hillgenberg, *supra* note 51.

[FN61]. See Michael Reisman, *The Concept and Functions of Soft Law in International Politics*, in *Essays in Honor of Judge Taslim Olawale Elias* 135- 36 (E. Bello & Bola Ajibola eds., 1992). See also Kenneth W. Abbott, *The Many Faces of International Legalization*, 92 *Proc. Am. Soc'y Int'l L.* 57, 59 (1998) (arguing that legalization is a function of degree of obligation, precision, and delegation for implementation).

[FN62]. See, e.g., Copenhagen Document, *supra* note 35, para. 32.1, [29 I.L.M. at 1318](#) ("persons belonging to national minorities have the right ... to use freely their mother tongue in private as well as in public.").

[FN63]. See, e.g., Framework Convention, *supra* note 45, art. 10, [34 I.L.M. at 355](#) ("[I]n areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities."); ICESCR, *supra* note 57, art. 2(1), 993 U.N.T.S. at 5. See also [Frederick Schauer, Prescriptions in Three Dimensions](#), 82 *Iowa L. Rev.* 911, 912-15 (1997) (elaboration of precision versus vagueness).

[FN64]. See generally Rosalyn Higgins, *Problems and Process: International Law and How We Use It* 25-28 (1994). Under the U.N. Charter, for example, General Assembly resolutions are only recommendations, although they may reflect existing customary international law. See U.N. Charter arts. 10-14.

[FN65]. Christine Chinkin, *Binding and Non-Binding Instruments: Normative Development in the International Legal System*, in *Compliance with Soft Law*, *supra* note 31 (manuscript at 12-14).

[FN66]. Compare the quotation in note 62, *supra*, with Copenhagen Document, *supra* note 35, para. 34, [29 I.L.M. at 1318](#) ("In the context of the teaching of history and culture in educational establishments, [states] will also take account of the history and culture of national minorities.").

[FN67]. See, e.g., Chinkin, *supra* note 65 (manuscript at 5). See also Hillgenberg, *supra* note 51, at 511 (describing soft compliance mechanisms of OSCE commitments). Nonetheless, this soft law has found itself hardened by its inclusion in treaties. See, e.g., Vertrag zwischen der Bundesrepublik Deutschland und der Republik Polen über gute Nachbarschaft und freundschaftliche Zusammenarbeit vom 17. Juni 1991 [The Germany-Poland Treaty of Friendship of June 17, 1991], 1991 (BGBl.II.1314), (visited Mar. 9, 2000) < http://www.auswaertiges-amt.de/6_archiv/1/6-1aq.html > (incorporating Copenhagen Document). See also *Sidiropoulos v. Greece*, Eur. Ct. H.R. No. 57/1997/841/1047, July 10, 1998, para. 44, reprinted in 19 Hum. Rts. L.J. 328, 336 (1998) (citing the Copenhagen Document and the Charter of Paris as relevant law).

[FN68]. See Ingelse, *supra* note 60, at 82 ("[I]n the case of treaties [the form is] a decisive indication of an intention of parties to create a legal obligation. Soft arrangements in a legal form are simply law.").

[FN69]. See *supra* text and sources note 63.

[FN70]. See, e.g., Framework Convention, *supra* note 45, Preamble para. 8, [34 I.L.M. at 353](#) ("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."); Copenhagen Document, *supra* note 35, para. 30, [29 I.L.M. at 1318](#) ("[R]espect for the rights of persons belonging to national minorities ... is an essential factor for peace, stability, and democracy in the participating States.").

[FN71]. John Chipman, *Managing the Politics of Parochialism*, in *Ethnic Conflict and International Security* 237, 241-46, 261 (Michael E. Brown ed., 1993). France is the classic case of this policy, in that it does not rely upon an ethnic notion of the French nation, but nonetheless refuses to recognize national minorities by refusing, for instance, to sign or ratify the Framework Convention. See generally ICCPR, *supra* note 15, France's Declarations and Reservations no. 8, available in *Multilateral Treaties Deposited with the Secretary General--Status at 30 April 1999*, ST/LEG/SER.E/17 (declaring art. 27 not applicable to the French Republic because of its contradiction with art. 2 of the French Constitution); *Décision No. 99-142 du 15 juin 1999*, *Charte européenne des langues régionales ou minoritaires*, available in *Revue Gen. Droit Int'l Pub.* 783 (1999) (holding that the European Convention on Regional or Minority Languages contains clauses that are contrary to the French Constitution).

[FN72]. See Steven R. Ratner, *International Law: The Trials of Global Norms*, 110 *Foreign Pol'y* 65, 68 (1998) ("[S]oft law enables states to adjust to the regulation of many new areas of international concern without fearing a violation (and possible legal countermeasures) if they fail to comply.").

[FN73]. As David Wippman writes:

[S]pecific treaty obligations and judicial enforcement work best when a culture of compliance already exists, and that culture cannot easily be imposed from the outside [G]overnments who feel that obligations to national minorities have been unfairly or unreasonably imposed from outside will always find ways to nullify those obligations In short, the states most in need of strengthening majority-minority relations are also the states least likely to accept or comply with general minority rights treaties.

Wippman, *supra* note 9, at 625. See also Ethan A. Klingsberg, [International Human Rights Intervention on Behalf of Minorities in Post World War I Eastern Europe and Today: Placebo, Poison, or Panacea?](#), 1993 *U. Chi. L. Sch. Roundtable* 1, 12-18 (explaining the failure of Croatia to implement internationally prepared law on minority protection, including its provisions for judicial review).

[FN74]. See, e.g., [Geoffrey Palmer, New Ways to Make International Environmental Law](#), 86 *Am. J. Int'l. L.* 259 (1986).

[FN75]. Such a comprehensive review is now under way at the University of Hamburg, although with little consideration to the normative element. See Wolfgang Zellner, *On the Effectiveness of the OSCE Minority Regime: Comparative Case Studies on Implementation of the Recommendations of the High Commissioner on National Minorities of the OSCE* (Institut für Friedensforschung und Sicherheitspolitik, No. 111, 1999). For recent snapshot evaluations, see Steven R. Ratner, *Quietly Preventing Conflict*, *Christian Sci. Mon.*, Aug. 18, 1999, at 9; Max van der Stoel, *Minority Man*, *Economist* (U.S. Edition), Sept. 11, 1999, at 60.

[FN76]. Diana Chigas et al., *Preventive Diplomacy and the Organization for Security and Cooperation in Europe: Creating Incentives for Dialogue and Cooperation*, in *Preventing Conflict in the Post-Communist World: Mobilizing International and Regional Organizations*, supra note 44, at 52.

[FN77]. See supra text accompanying note 16; Max van der Stoel, *The Role of the OSCE in Conflict Prevention*, Address at the Koninklijk Instituut voor Internationale Betrekkingen 5 (Sept. 30, 1996) (visited Mar. 10, 2000) <<http://www.osce.org/inst/hcnm/index.html>> (focus on areas where kin state has interest in minorities in another state).

[FN78]. See HCNM Mandate, supra note 42, para. 5(b), at 716.

[FN79]. See the general description in Chigas et al., supra note 76, at 51- 56.

[FN80]. See infra Part V.

[FN81]. See HCNM Mandate, supra note 42, paras. 17-19, at 718. See also Foundation on Inter-Ethnic Relations, *The Role of the High Commissioner on National Minorities in OSCE Conflict Prevention: An Introduction* 21, 32-34 (1997) (study by Rob Zaagman and Joanne Thorburn) [hereinafter Zaagman & Thorburn].

[FN82]. See HCNM Mandate, supra note 42, para. 2, at 715. See also Zaagman & Thorburn, supra note 81, at 19.

[FN83]. See HCNM Mandate, supra note 42, para. 4, at 716 ("Within the mandate, based on CSCE principles and commitments, the High Commissioner will work in confidence and will act independently of all parties directly involved in the tensions."); id. para. 5(c), at 716 ("Nor will the High Commissioner consider violations of CSCE commitments with regard to an individual person belonging to a national minority."); id. para. 23(b), at 719 ("The High Commissioner may...receive specific reports ... on violations of CSCE commitments with respect to national minorities as well as other violations in the context of national minority issues.").

[FN84]. Other human dimension commitments, such as those concerning the building of democratic institutions--in the area of elections and the rule of law--became the responsibility of the Warsaw-based Office for Democratic Institutions and Human Rights. See generally *Semi-Annual Report, Office for Democratic Institutions and Human Rights* (June 1, 1999).

[FN85]. See, e.g., Report of Max van der Stoel, *OSCE High Commissioner on National Minorities, OSCE Implementation Meeting on Human Dimension Issues, Warsaw, Poland* (Oct. 2, 1995), (visited Mar. 9, 2000) <<http://www.osce.org/inst/hcnm/index.html>> [hereinafter 1995 HCNM Report] ("Lasting peace and stability on this continent are possible only if the Copenhagen Document, the [1992] UN Declaration ... and the Framework Convention ... are fully implemented We have seen in the past that non-observance of these commitments leads to tensions [In some situations], I do consider it necessary to recommend to a government a number of changes in its policies or its legislation regarding national minorities ... if I came to the conclusion that a state was not respecting the internationally recognised principles regarding the treatment of persons belonging to national minorities, especially the standards laid down in the 1990 Copenhagen Document.").

[FN86]. See id. See also Zaagman and Thorburn, supra note 81, at 19; 1995 HCNM Report, supra note 85 (recognizing

that "[t]he implementation of international norms and standards will often not be sufficient to ensure an adequate solution to the specific problems with which a particular minority has to cope" and encouraging governments to follow a "generous policy" over "a minimalist approach" toward national minorities).

[FN87]. This issue is hardly hypothetical. Compare Human Rights Watch, UN Role in Sierra Leone Peace Deal Condemned, Press Release (July 8, 1999) (visited Mar. 11, 2000) <<http://www.hrw.org/hrw/press/1999/jul/sl0708.htm>> (criticizing the United Nations for initial peace accord between governments and guerrillas that provides for blanket amnesty for horrific human rights abuses), with Kofi Annan, Window of African Promise Amid Great Suffering, Int'l Herald Trib., July 31, 1999, at 8 (visited Mar. 11, 2000) <<http://www.un.org/News/briefings/docs/1999/>> ("[T]he United Nations cannot stand between Sierra Leone's people and their only hope of ending such a long and brutal conflict.").

[FN88]. One OSCE official aptly called the standards "opaque at the point of crunch." Interview with Julian Peel Yates, Deputy Head of OSCE Spillover Mission, in Skopje, Macedonia (Mar. 22, 1999) [hereinafter Yates Interview].

[FN89]. See supra note 25; see also Ballantyne, Davidson, and McIntyre v. Canada, Comm. Nos. 359/1989 and 385/1999, in Report of the Human Rights Committee, U.N. GAOR, 48th Sess., Supp. No. 40, at 91, U.N. Doc. A/48/40 (1993) (holding that English speaking residents of Quebec are not a minority with a right to use their own language under ICCPR article 27, but that prohibition on use of English in advertising does violate freedom of expression).

[FN90]. See, e.g., Belgian Linguistics Case, supra note 26 (certain aspects of Belgian educational policy as violation of non-discrimination and right to education); Sidiropoulos v. Greece, supra note 67 (refusal to register Macedonian cultural association as violation of freedom of association).

[FN91]. Copenhagen Document, supra note 35, paras. 32.2, 34, [29 I.L.M. at 1318-19](#).

[FN92]. I owe the term "translation" to Adam Kobieracki, Ambassador of Poland to the OSCE, who served as the Chairman of the OSCE Permanent Council during 1998, when Poland was the OSCE's Chairman-in-Office. Interview with Adam Kobieracki, Ambassador of Poland to the OSCE, in Vienna, Austria (Dec. 9, 1998) [hereinafter Kobieracki Interview].

[FN93]. See, e.g., James Boyd White, Justice as Translation: An Essay in Cultural and Legal Criticism 229-56 (1990); Lawrence Lessig, [Fidelity in Translation](#), 71 *Tex. L. Rev.* 1165 (1993) (focusing on translating the ideas of the Framers to contemporary problems); and sources cited in id. at 1171 n.32. See also [West Virginia State Board of Education v. Barnette](#), 319 U.S. 624, 639 (1943) ("[T]he task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence.").

[FN94]. The official name of the state in the United Nations, OSCE, Council of Europe, and other international organizations is "The Former Yugoslav Republic of Macedonia" (located alphabetically in each organization's roster of members under the letter "T"), as a result of a longstanding protest by Greece. For details, see [Igor Janev, Legal Aspects of the Use of a Provisional Name for Macedonia in the United Nations](#), 93 *Am. J. Int'l L.* 155 (1999).

[FN95]. See Central Intelligence Agency, World Factbook 1998 (last modified Feb. 2, 2000) <http://www.cia.gov/cia/public_affairs/press_release/archives/1999/pr010799.html>.

[FN96]. See Stefan Troebst, An Ethnic War That Did Not Take Place: Macedonia, its Minorities and its Neighbours in the 1990s, in *War and Ethnicity: Global Connections and Local Violence* 77, 88-92 (David Turton ed., 1997); Hugh Poulton, Who are the Macedonians? 182-91 (1996); cf. [Steven R. Ratner, Drawing a Better Line: Uti Possidetis and the Borders of New States](#), 90 *Am. J. Int'l L.* 590, 592 (1996) (noting the propensity of larger states to protect minorities to guard against the breakup of states).

[FN97]. See Const. of the Rep. of Macedonia, art. 48(4) (visited Mar. 11, 2000) <http://www.uni-wuerzburg.de/law/mk00000_.html>.

[FN98]. Interviews with the Albanian Members of Macedonian Parliament, in Skopje, Macedonia (March 1999).

[FN99]. For background, see Kerin Hope, Minorities: Image Shattered by Clashes, *Fin. Times* (London), Dec. 17, 1997, Survey-Macedonia 97, at 34.

[FN100]. See supra note 57.

[FN101]. See, e.g., Letter from Christian Faber-Rod, Head of OSCE Spillover Monitor Mission to Skopje, to OSCE Chairman-in-Office, Feb. 17, 1998 (quoting HCNM at press conference as stating "I cannot come to the conclusion that there is an obligation for the government to recognize the 'University in Tetovo.' ") (on file with author); OSCE High Commissioner against Parallel Education System for Albanians, BBC television broadcast on Central Europe, Feb. 13, 1998 (transcript available in LEXIS, News: Europe: BBC Summary World Broadcast--European Stories); Letter from the OSCE High Commissioner on National Minorities to Blagoj Handziski, Minister of Foreign Affairs of the former Yugoslav Republic of Macedonia (Mar. 30, 1998) (on file with author) [[[hereinafter HCNM Letter, Mar. 30, 1998].

[FN102]. See the Organization for Security and Cooperation in Europe, Statement of the OSCE High Commissioner on National Minorities Concerning Inter-Ethnic Issues in the FYR of Macedonia (Nov. 6, 1998) (visited Mar. 15, 2000) <<http://www.osce.org/inst/hcnm/index.htm>> [hereinafter HCNM Statement, Nov. 6, 1998]; HCNM Letter, Mar. 30, 1998, supra note 101.

[FN103]. For other examples, see OSCE High Commissioner on National Minorities, Statement on Greece (Aug. 23, 1999) (visited Mar. 15, 2000) <<http://www.osce.org/inst/hcnm/news/23aug99.htm>> [hereinafter Statement on Greece] (in discussing the Greek opposition to legal recognition of the Turkish minority in Greece, the HCNM clarifies that the Copenhagen Document does not justify secession or even require territorial autonomy, but also notes that it prohibits discrimination based on nationality in registering organizations); Max van der Stoep, OSCE High Commissioner on National Minorities, Statement on Romania (Oct. 8, 1998) (visited Mar. 15, 2000) <<http://www.osce.org/inst/hcnm/index.htm>> ("The international norms regarding minority education do allow the formula [for offering tertiary education to the Hungarian minority through a university in which instruction would be in Hungarian and German] chosen by the Government.").

[FN104]. See Letters from Max van der Stoep, OSCE High Commissioner on National Minorities, to Stevo Crvenkovski, Minister for Foreign Relations of the Former Yugoslav Republic of Macedonia (Nov. 1, 1993, Nov. 16, 1994, Apr. 28, 1995) (on file with author). See also John Packer, The Role of the OSCE High Commissioner on National Minorities in the Former Yugoslavia, 12 *Camb. Rev. Int'l Aff.* 169, 173-74 (1999).

[FN105]. See HCNM Statement, Nov. 6, 1998, supra note 102.

[FN106]. See *id.*

[FN107]. See Interview with Human Rights Official in Macedonian Ministry of Foreign Affairs, in Strasbourg, France (Mar. 16, 1999).

[FN108]. A former Macedonian foreign minister stated that this process helped to "reshuffle the conversation" away from the "metaphysical" to concrete steps. Interview with Professor Ljubomir Frckoski, in Skopje, Macedonia (Mar. 22, 1999) [hereinafter Frckoski Interview].

[FN109]. See Treaty of Non-Aggression, Aug. 23, 1939, F.R.G.-U.S.S.R., Secret Additional Protocol, in Documents on

German Foreign Policy 1918-1945, ser. D, at 246 (1956).

[FN110]. See The Forced Migration Project, The Open Society Institute, Estonia and Latvia: Citizenship, Language and Conflict Prevention 21-24 (1997) [[hereinafter Forced Migration Project].

[FN111]. See Rob Zaagman, Conflict Prevention in the Baltic States: The OSCE High Commissioner on National Minorities in Estonia, Latvia and Lithuania 23 (European Centre for Minority Issues, Monograph No. 1, April 1999).

[FN112]. See Forced Migration Project, *supra* note 110, at 42-43.

[FN113]. See Paul Kolstoe, Russians in the Former Soviet Republics 118-19 (1995).

[FN114]. See Law on Citizenship, July 22, 1994, art. 14 (unofficial CSCE translation, on file with author). See also Zaagman, *supra* note 111, at 40-42.

[FN115]. Letter from Max van der Stoep, OSCE High Commissioner on National Minorities, to Georgs Andrejevs, Minister of Foreign Affairs, Republic of Latvia (Apr. 6, 1993) (visited Mar. 15, 2000) <<http://www.osce.org/inst/hcnm/index.html>> [hereinafter HCNM Letter, Apr. 6, 1993].

[FN116]. See ICCPR, *supra* note 15, art. 24(3), 999 U.N.T.S. at 179 ("Every child has a right to nationality.").

[FN117]. See Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175.

[FN118]. See European Convention on Nationality, Nov. 6, 1997, [37 I.L.M. 44](#).

[FN119]. See Convention on the Rights of the Child, Nov. 20, 1989, [28 I.L.M. 1448](#). Article 7 states:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. State Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular when the child would otherwise be stateless.

[FN120]. See Letter from Max van der Stoep, OSCE High Commissioner on National Minorities, to Valdis Birkavs, Minister of Foreign Affairs, Republic of Latvia (May 23, 1997) (visited Mar. 15, 2000) <<http://www.osce.org/inst/hcnm/index.html>> [hereinafter HCNM Letter, May 23, 1997]. See also Diane F. Orentlicher, Citizenship and National Identity, in *International Law and Ethnic Conflict*, *supra* note 21, at 296 (on emerging limitations on a state's ability to deny citizenship).

[FN121]. See Latvians Appear to Ease Citizenship for Russians, *N.Y. Times*, Oct. 4, 1998, at A9.

[FN122]. Kedourie, *supra* note 8, at 62.

[FN123]. See Statements of Latvian Parliamentarians to Author, Riga, Latvia (May 4-5, 1999).

[FN124]. See Draft State Language Law, adopted in the 2d reading (unofficial translation by OSCE mission to Latvia, on file with author), art. 6 ("[O]rganisations and enterprises ... must know and use the state language to the extent it is necessary for the performance of their professional and employment duties."); *id.* art. 11 ("The state language shall be used at public events."); *id.* art. 21(1) ("Each sign, billboard, poster, placard, announcement and other notice which is to inform the public in places accessible to the public shall be in the state language.").

[FN125]. See ICCPR, *supra* note 15, arts. 19, 22, 999 U.N.T.S. at 178; ECHR, *supra* note 20, arts. 10-11, 213 U.N.T.S. at 230-32. The conditions for restrictions are that they be "necessary in a democratic society, in the interests of national se-

curity, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." ECHR, *supra* note 20, art. 10(2). The ECHR has interpreted this term very restrictively. See, e.g., *Vereniging Weekblad Bluf! v. the Netherlands*, 306-A Eur. Ct. H.R. (ser. A) at 15-16 (1995). See generally *Jacobs & White*, *supra* note 27, at 297-309.

[FN126]. The ICCPR does specify the right of minorities to use their own language, but the High Commissioner chose not to rely on this provision. See *infra* text accompanying notes 133-34.

[FN127]. See, e.g., Letter from Max van der Stoel, OSCE High Commissioner on National Minorities, to H.E. Mr. Guntis Ulmanis, President, Republic of Latvia (Nov. 10, 1997) (on file with author) ("I am fully aware of not only the legitimacy, but also the desirability, of ensuring that the Latvian language has its proper place in Latvia as the State language.") [hereinafter HCNM Letter, Nov. 10, 1997]. Most states in Europe do not have language laws, but instead address the issue through individual subject-specific statutes. See generally Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area, OSCE High Commissioner on National Minorities (1999) (visited Mar. 15, 2000) <<http://www.osce.org/inst/hcnm/index.html>> [[hereinafter HCNM Language Report]; Fernand de Varannes, *Language, Minorities and Human Rights* 49-53 (1996).

[FN128]. See HCNM Letter, Nov. 10, 1997, *supra* note 127.

[FN129]. See, e.g., Letter from Max van der Stoel, OSCE High Commissioner on National Minorities, to Valdis Birkavs, Minister of Foreign Affairs, Republic of Latvia (Apr. 13, 1999) (on file with author).

[FN130]. See Discussions by Author with Latvian Parliamentarians, in Riga, Latvia (May 4, 1999). The author's argument to parliamentarians that no person had a right under international law to order a cup of coffee in the Latvian language, be understood, and be served in the Latvian language anywhere in Latvia met with a combination of astonishment and resentment.

[FN131]. See Office of the President of the Republic of Latvia, President's Press Office, Statement of July 14, 1999 (containing President's letter to Latvian Parliament) (unofficial translation by OSCE Mission to Latvia, on file with author); *Latvian President Calls on Lawmakers Not to Hurry with Revision of Language Law*, *Baltic News Service*, July 15, 1999, available in LEXIS, News: Latvia: *Baltic News Service*.

[FN132]. See OSCE High Commissioner on National Minorities, High Commissioner Welcomes State Language Law in Latvia, Press Release (Dec. 9, 1999) (visited Mar. 15, 2000) <<http://www.osce.org/indexe-n.htm>> [hereinafter Statement on Latvian Language Law].

[FN133]. See ICCPR, *supra* note 15, art. 27, 999 U.N.T.S. at 179.

[FN134]. Interview with Boris Tsilevich, member of Latvian Saeima (Parliament), in Riga, Latvia (June 18, 1999) [hereinafter Tsilevich Interview].

[FN135]. See Donnelly, *supra* note 29, at 617; Harold Hongju Koh, [Bringing International Law Home](#), 35 *Houston L. Rev.* 623, 641-42, 669-73 (1998) (discussing "legal internalization" of international norms and using as example the incorporation of ECHR in British law). See generally *Enforcing International Human Rights in Domestic Courts* (Benedetto Conforti & Francesco Francioni eds., 1997).

[FN136]. See OSCE High Commissioner on National Minorities, High Commissioner Welcomes Restoration of Use of Minority Languages in Official Communications in Slovakia, Press Release (July 16, 1999) (visited Mar. 15, 2000) <<http://www.osce.org/inst/hcnm/index.html>> (congratulating Slovakia on adoption of new law as "bring[ing] Slovakia's

law in this matter back into conformity with the Slovak Constitution, applicable international standards and specific recommendations from relevant international institutions, including my own office."); HCNM Language Report, supra note 127.

[FN137]. For example, during negotiations between Hungary and Romania in 1996 on such a treaty, Hungary, as a gesture of its interest in ethnic Hungarians in Romania, insisted that the treaty incorporate as a legal obligation a 1993 recommendation of the Council of Europe's Parliamentary Assembly (the deliberative body directly elected by the citizens of the states of the Council) known as Recommendation 1201. See Recommendation 1201 (1993) on an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights, Eur. Parl. Ass., 22nd sitting (Feb. 1, 1993) (visited Mar. 15, 2000) <<http://stars.coe.fr/ta/ta93/erec1201.htm>>. This document had urged the Council's members to conclude a treaty on minority rights with a provision requiring states to provide territorial autonomy to minorities. This and other provisions, such as the resort to the European Court of Human Rights, caused the Council's members to reject the recommendation in favor of the scaled-back Framework Convention. See Manas, supra note 44, at 127-29, 133. Romania rejected the Hungarian proposal, as it saw Article 11 as referring to group rights and granting Hungarians territorial autonomy that would lead to the division of the country. The High Commissioner informed the parties that he found the reference to Recommendation 1201 unnecessary. See Letters from the OSCE High Commissioner on National Minorities to Teodor Melescanu, Minister of Foreign Affairs of Romania, and to László Kovacs, Minister of Foreign Affairs of the Republic of Hungary (Mar. 28, 1996) (on file with the author).

When Hungary insisted on the provision, the High Commissioner prepared an agreed interpretive statement noting that it "does not refer to collective rights, nor does it impose upon [the two states] the obligation to grant to the concerned persons any right to a special status of territorial autonomy based on ethnic criteria." See Treaty on Understanding, Cooperation and Good Neighborliness, Sept. 16, 1996, Hung.-Rom., Annex, [36 I.L.M. 340, 353](#) (1997). For signs that the treaty has not been entirely successful in bringing an end to tensions between those states on this issue, see, e.g., Kevin Done, Millennium Promises Many Happy Returns: The Magyars Can Look Forward to Their State's 1000th Birthday, *Fin. Times* (London), Dec. 7, 1998, Survey-Hungary, at 1.

[FN138]. See Letter from Bronislaw Geremek, Minister of Foreign Affairs, Republic of Poland, and Chairman-in-Office of the OSCE, to Guntars Krasts, Prime Minister of Latvia (June 19, 1998) (on file with author); Press Statement by James P. Rubin, Office of the Spokesman, U.S. Department of State, Latvian Government Proposes Legislation to Facilitate Integration of National Minorities (Apr. 16, 1998) (visited Mar. 15, 2000) <<http://secretary.state.gov/www/briefings/statements/1998/ps980461a.html>> (noting that passage of citizenship law "would address key recommendations of the ... OSCE's High Commissioner on National Minorities").

[FN139]. See Declaration by the Presidency on behalf of the European Union on Latvia (June 26, 1998) (Visited March 15, 2000) <http://europa.eu.int/comm/dg1a/daily/06_98/pesc_98_68.html> (welcoming passage of citizenship law and noting it will "fulfil the key elements of the recommendations of the OSCE High Commissioner on National Minorities ... in respect of citizenship"); Letter from Hans van den Broek, European Union Commissioner for External Relations, to party leaders in the Latvian Saeima (Parliament) 1 (July 2, 1999) (letter sent at the request of the HCNM noting "there have already been some contacts between the OSCE, Council of Europe, European Commissioner and Latvian authorities where we have emphasized the need to ensure that legislation [on language issues] is in conformity with international standards" and urging postponement of adoption of law). See also European Commission Opinion on Latvia's Application for Membership of the European Union, § B.1.3 (July 15, 1997) (visited Mar. 15, 2000) <http://europa.eu.int/comm/enlargement/latvia/op_07_97/b1.html> ("With the reservation that steps need to be taken to enable the Russian-speaking minority to become better integrated into society, Latvia demonstrates the characteristics of a democracy.").

[FN140]. See Richard Lein, Latvians support relaxing citizenship requirements for Russia, *Agence France-Presse*, Oct. 4, 1998, available in LEXIS, News File.

[FN141]. See Latvian Parliament Amends Language Law to Appease OSCE, Deutsche Presse-Agentur, Dec. 9, 1999, available in LEXIS, News File. For the EU role in a different state, see Commissioner Van Den Broek Considers Slovakia Now Meets Political Criteria for Beginning Membership Negotiations Early 2000, Agence Europe, July 15, 1999, at 1 (EU foreign affairs commissioner "waiting for the opinion of Max van der Stoel ... before giving his definitive stance on the compatibility of this new Slovakian law [on minority languages] with EU requirements on the protection of minorities and the freedom of expression").

[FN142]. See Letter from Max van der Stoel, CSCE High Commissioner on National Minorities, to Stevo Crvenkovski, Minister for Foreign Relations of the Former Yugoslav Republic of Macedonia (Nov. 16, 1994) (on file with author).

[FN143]. See The Foundation on Inter-Ethnic Relations, Annual Report 1998, at 15 (1999) (description of program). On the status of the Foundation, see *infra* note 159.

[FN144]. See S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) ("The rules of law binding upon States ... emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law Restrictions upon the independence of States cannot therefore be presumed.").

[FN145]. See HCNM Letter, Apr. 6, 1993, *supra* note 115. See also Note from the Office of the OSCE High Commissioner on National Minorities on International Obligations and European State Practice Relating to Conferral of Citizenship on Stateless Children (June 26, 1997) (noting practice among all EU member states on period of residency) (on file with author).

[FN146]. See generally Max Sorensen, *Principes de Droit International Public*, 101 (1960-III) *Recueil des Cours* 5, 16-34. Classic examples include estoppel, good faith in implementation of agreements, and the non-retroactivity of criminal law.

[FN147]. See, e.g., HCNM Letter, May 23, 1997, *supra* note 120 ("Regarding the list of questions which can be asked, I wonder whether it is really necessary for candidates for citizenship to know what Swedish educational policy was like in Vidzeme in the seventeenth century, or which religion was supported in Latgale during the period of Polish reign I wonder whether many citizens of other European states, and perhaps of Latvia as well, would not have difficulties in answering such questions.").

[FN148]. This is the difference between so-called territorial autonomy and non-territorial (sometimes called personal or functional) autonomy. See, e.g., Hans-Joachim Heintze, *On the Legal Understanding of Autonomy*, in *Autonomy: Applications and Implications*, *supra* note 21, at 7, 18-24; Ruth Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflicts* 37-40 (1996).

[FN149]. See Lapidoth, *supra* note 148, at 70-77, 100-12 (Aland Islands and South Tyrol); Asbjorn Eide et al., *Cultural Autonomy: Concept, Content, History and Role in the World Order*, in *Autonomy: Applications and Implications*, *supra* note 21, at 251, 261-71 (examples of non-territorial autonomy). See generally Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination* (2d ed. 1995).

[FN150]. See Lapidoth, *supra* note 148, at 175-77. The one notable exception concerns indigenous peoples, where international law increasingly recognizes their right to certain autonomy. See, e.g., Draft United Nations Declaration on the Rights of Indigenous Peoples, Res. 1994/45: Report of the Subcommission on Prevention of Discrimination and Protection of Minorities, U.N. ESCOR Commission on Human Rights, 46th Sess., 36th mtg., art. 31, U.N. Doc. E/CN.4/Sub.2/1994/56 (1994) ("right to autonomy or self-government in matters relating to their internal and local affairs").

[FN151]. For a sense of the hesitancy of scholars to posit firm duties of universal application, see generally The Founda-

tion on Inter-Ethnic Relations, The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note (1999) (recommendations of academic experts to states produced at the initiative of the High Commissioner stating that "[e]ffective participation of minorities in public life may call for territorial or non-territorial arrangements of self-governance.") (emphasis added); *id.* para. 19, at 12 ("states should favorably consider ... territorial devolution of powers") (emphasis added).

[FN152]. Copenhagen Document, *supra* note 35, para. 35, [29 I.L.M. at 1319](#).

[FN153]. See Pal Kolsto, The New Russian Diaspora: Minority Protection in the Soviet Successor States, 30 J. Peace Res. 197, 204-05 (1993).

[FN154]. See On the Autonomous Republic of Crimea, Mar. 17, 1995; On Certain Questions of the Relationship Between the Central Bodies of State Executive Power and the Bodies of Executive Power of the Autonomous Republic of Crimea, Mar. 31, 1995 (both on file with author).

[FN155]. For the definitive publicly available account, see John Packer, Autonomy Within the OSCE: The Case of Crimea, in *Autonomy: Applications and Implications*, *supra* note 21, at 308-11.

[FN156]. Letter from Max van der Stoel, OSCE High Commissioner on National Minorities, to Hennady Udovenko, Minister of Foreign Affairs, Republic of Ukraine (May 15, 1995) <<http://www.osce.org/inst/hcnm/index.html>>; Letter from Max van der Stoel, OSCE High Commissioner on National Minorities, to Hennady Udovenko, Minister of Foreign Affairs, Republic of Ukraine (Oct. 12, 1995) (visited Mar. 15, 2000) <<http://www.osce.org/inst/hcnm/recomm/ukraine/1995/27hc105.html>>.

[FN157]. See Letter from Max van der Stoel, OSCE High Commissioner on National Minorities, to Hennady Udovenko, Minister of Foreign Affairs, Republic of Ukraine (Apr. 5, 1996) (visited Mar. 15, 2000) <<http://www.osce.org/inst/hcnm/index.html>>.

[FN158]. See Packer, *supra* note 155, at 311. These provisions still remain in dispute.

[FN159]. As a formal matter, the experts were convened by the Foundation on Inter-Ethnic Relations, a Hague-based NGO created at the initiative of the High Commissioner to fund projects that back his work and housed in the same row-house as his office. The process was designed to avoid suggestions of overt OSCE or HCNM endorsement of the outcome, although the experts were selected by the High Commissioner and his staff, who played a significant role in the drafting as well.

[FN160]. The Hague Recommendations Regarding the Education Rights of National Minorities and Explanatory Note, Foundation on Inter-Ethnic Relations (1995) (visited Mar. 15, 2000) <<http://www.osce.org/inst/hcnm/index.html>>.

[FN161]. The Oslo Recommendations Regarding the Linguistic Rights of National Minorities and Explanatory Note, Foundation on Inter-Ethnic Relations (1998) (visited Mar. 15, 2000) <<http://www.osce.org/inst/hcnm/index.html>>.

[FN162]. See *supra* note 151.

[FN163]. See, e.g., Letter from Max van der Stoel, OSCE High Commissioner on National Minorities, to Sofia Todorova, Minister of Education and Physical Culture of the Former Yugoslav Republic of Macedonia (Mar. 17, 1997) (citing Hague Recommendations on importance of teacher training) [hereinafter HCNM Letter, Mar. 17, 1997] (on file with author).

[FN164]. See Klingsberg, *supra* note 73, at 14 (international enforcement of minority rights "inspires regressive traditionalism as a defense mechanism against international interference's apparent threat to national integrity").

[FN165]. See Louis Henkin, *How Nations Behave* 47 (2d ed. 1979).

[FN166]. Compare [Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 *Harv. Int'l L.J.* 487 \(1997\)](#) (two general approaches), with Koh, *supra* note 135, at 634-35 (five approaches), and Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 *Mich. J. Int'l L.* 345, 350-60 (1998) (four approaches).

[FN167]. Keohane, *supra* note 166, at 489, 492.

[FN168]. See *id.* at 490-91. I appreciate this insight from Anne-Marie Slaughter.

[FN169]. As most international relations scholarship does not focus on the role of norms, each orientation within it may not have a coherent position on norm compliance. Moreover, those orientations may themselves be regrouped. See, e.g., Peter J. Katzenstein et al., *International Organization and the Study of World Politics*, 52 *Int'l Org.* 645 (1998).

[FN170]. See Andre Nollkaemper, *On the Effectiveness of International Rules*, 1992 *Acta Politica* 49, 52 (1992).

[FN171]. See Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics*, 38 *Va. J. Int'l L.* 107, 114-19 (1998).

[FN172]. See Keohane, *supra* note 166, at 490. See also Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* 26 (1984) ("[W]hat distinguishes my argument from structural realism is my emphasis on the effect of international institutions and practices on state behavior.").

[FN173]. See Nollkaemper, *supra* note 170, at 55-56.

[FN174]. See, e.g., *Engaging Countries*, *supra* note 6.

[FN175]. See, e.g., Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law is Made*, in *International Law Essays* 355, 377 (Myres S. McDougal & W. Michael Reisman eds., 1981) (one key question is whether duty "is viewed as authoritative by those to whom it is addressed").

[FN176]. See Thomas M. Franck, *The Power of Legitimacy Among Nations* (1990). See also Frederich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989); cf. Pieter van Dijk, *Normative Force and Effectiveness of International Norms*, 30 *German Y.B. Int'l L.* 9, 15-16 (1987) (arguing that "normative force"--"the effect of a norm directed at influencing behavior"--is a function of factors internal to the norm and external pressure).

[FN177]. See generally Franck, *supra* note 176, at 50-194.

[FN178]. See Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* 88-134 (1995).

[FN179]. See Koh, *supra* note 135. See also Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *Yale L.J.* 2599, 2646-58 (1997).

[FN180]. John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 *Int'l Org.* 855, 878- 82 (1998). See also Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 *Int'l Org.* 391 (1992); Ronald L. Jepperson et al., *Norms, Identity, and Culture in National Security*, in *The Culture of National Security* 33 (Peter J. Katzenstein ed., 1996). Some international relations scholars have recently seen constructivism as such a challenge to existing theories as to redefine the field as divided

between rationalists and constructivists. See Katzenstein et al, *supra* note 169, at 678.

[FN181]. See, e.g., Martha Finnemore, National Interests in International Society 128-29 (1996) (norms "constitutive" of states and reconfigure their interests); cf. Kingsbury, *supra* note 166, at 350-60 (grouping theories to include Franck's as part of a "directive" account where lawmakers have deliberate intentions, and constructivism as a distinct account where lawmakers' intentions are dependent variables).

[FN182]. See, e.g., Martha Finnemore & Kathryn Sikkink, International Norm Dynamics and Political Change, 52 *Int'l Org.* 887 (1998); Martha Finnemore, Constructing Norms of Humanitarian Intervention, in *The Culture of National Security*, *supra* note 180, at 153. Indeed, such constructivists have tapped into institutionalism to describe how norms help define the identity of international organizations and thereby their ability to influence states.

[FN183]. See, e.g., Matthew Evangelista, Domestic Structure and International Change, in *New Thinking in International Relations Theory* 202 (Michael W. Doyle & G. John Ikenberry eds., 1997); Thomas Risse-Kappen, Public Opinion, Domestic Structure, and Foreign Policy in Liberal Democracies, 43 *World Pol.* 479 (1991); Andrew Moravcsik, Taking Preferences Seriously: A Liberal Theory of International Politics, 51 *Int'l Org.* 513 (1997).

[FN184]. See, e.g., Anne-Marie Slaughter, International Law in a World of Liberal States, 6 *Eur. J. Int'l L.* 503 (1995) (emphasizing the importance of disaggregated actors for compliance with norms).

[FN185]. See, e.g., Engaging Countries, *supra* note 6; Chayes & Chayes, *supra* note 178, at 115 ("Our concern is compliance with treaties."); John K. Setear, An [Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law](#), 37 *Harv. Int'l L.J.* 139 (1996). For a rare application of international relations theory to custom, see Michael Byers, Custom, Power and the Power of Rules: International Relations and Customary International Law (1999). For a recognition of softness, although still within a generally binary, positivist framework, see van Dijk, *supra* note 176, at 19- 22.

[FN186]. See, e.g., Higgins, *supra* note 64, at 267 ("International law is a process, a system of authoritative decision-making. It is not just the neutral application of rules.").

[FN187]. See *supra* text accompanying notes 60-65.

[FN188]. See, e.g., Levy et al., *supra* note 29, at 276-77; Haas, *supra* note 31. For an exception, see Friedrich Kratochwil, Contract and Regimes: Do Issue Specificity and Variations of Formality Matter?, in *Regime Theory and International Relations* 73, 84-93 (Volker Rittberger ed., 1993).

[FN189]. See van Dijk, *supra* note 176, at 20. For a refreshing perspective from positivism, see Hillgenberg, *supra* note 51, at 502 ("[W]hen assessed realistically, the difference between a treaty and the binding 'political' effect of a non-treaty agreement is not as great to a politician as is often thought."). For a somewhat realist perspective, see Charles Lipson, Why Are Some International Agreements Informal?, 45 *Int'l Org.* 495 (1991).

[FN190]. Chayes & Chayes, *supra* note 178, at 118-20.

[FN191]. See, e.g., [Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication](#), 107 *Yale L.J.* 273 (1997); Harold Hongju Koh, [Transnational Public Law Litigation](#), 100 *Yale L.J.* 2347 (1991).

[FN192]. See Keohane, *supra* note 166, at 494 ("we need somehow to trace out the causal pathways on which these two optics rely"); Nollkaemper, *supra* note 170, at 64 (noting need to "identify which factors cause a state (not) to comply with a rule and thus to establish to what extent any theoretical approaches has [sic] explanatory power").

[FN193]. See, e.g., Nollkaemper, *supra* note 170, at 54-57.

[FN194]. See *id.* at 56. See also Byers, *supra* note 185, at 31.

[FN195]. See Vienna Convention on the Law of Treaties, *supra* note 50, art. 60, 1155 U.N.T.S. at 346 (allowing states to suspend or terminate treaties due to material breach).

[FN196]. See Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, 269 *Recueil des Cours* 9 (1997).

[FN197]. See U.N. Charter art. 51 (individual and collective self-defense in response to aggression) and art. 42 (U.N.-authorized responses to threats to the peace, breaches of the peace, or aggression). On whether recent NATO action in the Balkans evinces a change in this norm, see Bruno Simma, *NATO, the U.N. and the Use of Force: Legal Aspects*, 10 *Eur. J. Int'l L.* 1 (1999).

[FN198]. See, e.g., Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 *Recueil des Cours* 101 (1998). For a review of current tribunals and debates, see [Symposium: The Proliferation of International Tribunals: Piecing Together the Puzzle](#), 31 *N.Y.U. J. Int'l L. & Pol.* 179 (1999). See also Jose Alvarez, *Why Nations Behave*, 19 *Mich. J. Int'l L.* 303, 311 (1998) (noting the "particular (if predictable) fascination" of courts for students of compliance).

[FN199]. See Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 *Yale L.J.* 2619, 2621 (1991) ("[A] necessary criterion for the validity of any norm of ... positive international law, is the willingness of ... states and international bodies [[[] to enforce it.").

[FN200]. McDougal & Reisman, *supra* note 175, at 355, 377.

[FN201]. Chayes & Chayes, *supra* note 178, at 2.

[FN202]. See *id.* at 135-65.

[FN203]. See Franck, *supra* note 176, at 20-21.

[FN204]. See Keohane, *supra* note 166, at 493.

[FN205]. See W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 *Am. Soc'y Int'l L. Proc.* 101, 105 (1981) ("[L]awmaking or the prescribing of policy as authoritative for a community is a process of communication ... involv[ing] the mediation of subjectivities from a communicator to an audience and, in successful cases, a reception and incorporation by the intended audience, resulting in a set of appropriate expectations."); Siegfried Wiessner, *International Law in the 21st Century: Decisionmaking in Institutionalized and Non-Institutionalized Settings*, 26 *Thesaurus Acroasium* 129, 145 (1997) (suggesting that rules require the "conveyor belt of human action").

[FN206]. See Ethan Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 *Int'l Org.* 479, 524-25 (1990). See also Finnemore & Sikkink, *supra* note 182, at 896-99 ("norm entrepreneurs"). See generally Margaret E. Keck, *Activists Beyond Borders: Advocacy Networks in International Politics* (1998).

[FN207]. Finnemore, *supra* note 181, at 137, 141.

[FN208]. Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 *Int'l Org.* 1, 3, 27 (1992). See also Yasemin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* 152 (1994) (on transnational "collectivities" as influencing policies on immigration).

[FN209]. For a study of how such communities may make a difference in particular cases, see Haas, *supra* note 31.

[FN210]. See Koh, *supra* note 135, at 646-55.

[FN211]. See Thomas Risse-Kappen, Structures of Governance and Transnational Relations: What Have We Learned?, in *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures, and International Institutions* 280 (Thomas Risse-Kappen ed., 1995).

[FN212]. I exclude realism, as it essentially holds that norms have little independent force in affecting state behavior. See *supra* text accompanying notes 170-71.

[FN213]. See, e.g., HCNM Letter, Mar. 30, 1998, *supra* note 101, at 1; Statement by the OSCE High Commissioner on National Minorities on the Occasion of His Mission to Romania on 28-31 August 1995 (Sept. 1, 1995) (visited Mar. 15, 2000) <<http://www.osce.org/inst/hcnm/index.html>> (referring to Copenhagen Document, U.N. Declaration, and Framework Convention jointly as "international standards subscribed to by Romania").

[FN214]. See, e.g., Letter from Max van der Stoel, OSCE High Commissioner on National Minorities, to Valdis Birkavs, Minister for Foreign Affairs of the Republic of Latvia (Jan. 16, 1998) (on file with author) (noting Latvia as a party to the U.N. Convention on the Rights of the Child in discussing citizenship issue).

[FN215]. See HCNM Letter, Nov. 10, 1997, *supra* note 127 (invoking Framework Convention to criticize draft language law even though Latvia not a party to it). In this case, because Latvia had at least signed the treaty, it had an obligation not to undermine its object and purpose pending ratification. See Vienna Convention on the Law of Treaties, *supra* note 50, art. 18, 1155 U.N.T.S. at 336.

[FN216]. See HCNM Letter, May 23, 1997, *supra* note 120 (relying upon European Convention on Nationality, adopted by the Committee of Ministers of the Council of Europe the previous week, to support interpretation of the Convention on the Rights of the Child).

[FN217]. See, e.g., Letter from Max van der Stoel, OSCE High Commissioner on National Minorities, to Guntis Ulmanis, President of the Republic of Latvia (Feb. 10, 1998) (on file with author) (citing Charter of Paris as commitment of OSCE states to "economic liberty" to criticize draft law requiring termination of employment where employees do not speak Latvian). See Letter from Max van der Stoel to Stevo Crvenkovski (Apr. 28, 1995), *supra* note 104; Statement on Greece, *supra* note 103.

[FN218]. See HCNM Letter, Mar. 30, 1998, *supra* note 101 (citing Recommendation 1353 on access of minorities to higher education). For a short description of the status of the Parliamentary Assembly, see the Council of Europe's website at (visited Mar. 15, 2000) <<http://www.coe.fr/eng/present/about.htm>>.

[FN219]. See HCHM Letter, Mar. 30, 1998, *supra* note 101.

[FN220]. See HCNM Letter, Mar. 17, 1997, *supra* note 163.

[FN221]. See Interview with Max van der Stoel, at The Hague, Netherlands (May 13, 1999) [hereinafter *van der Stoel Interview*]. See also *supra* text accompanying notes 144-58.

[FN222]. See Interview with Inese Birzniece, Member of Latvian Saeima (Parliament), in Riga, Latvia (June 17, 1999) [hereinafter *Birzniece Interview*]; Tsilevich Interview, *supra* note 134; Interview with Senior Western Diplomat, in Riga, Latvia (June 18, 1999) [hereinafter *Senior Western Diplomat Interview*]. Needless to say, interviewees served both to clarify the view of others and to express their own views.

[FN223]. To cite one of numerous examples, the leader of the Turkish minority in Macedonia was aware of standards in the field of education of minorities but not aware of the status of these standards at all. See Interview with Ergodan Sarac,

President of Democratic Party of Turks, in Gostivar, Macedonia (Mar. 23, 1999).

[FN224]. See Birzniece Interview, *supra* note 222; Interview with Nils Muiznieks, Director, Latvian Center for Human Rights and Ethnic Studies, in Riga, Latvia (June 17, 1999) [hereinafter Muiznieks Interview] (noting normative arguments matter only for centrists and moderates). Similar views surfaced during the author's interviews in Macedonia. See Yates Interview, *supra* note 88 (international standards seen as a "threat"); Interview with Lela Jacovlevska, Former Adviser to Macedonian Undersecretary of Education, in Skopje, Macedonia (Mar. 23, 1999) [hereinafter Jacovlevska Interview] (noting OSCE concern for Albanians in Macedonia but not Macedonians in Greece).

[FN225]. See Interview with Official in International Organizations Section of Macedonian Ministry of Foreign Affairs, in Skopje, Macedonia (Mar. 22, 1999) [hereinafter Macedonian MFA Official Interview]; Birzniece Interview, *supra* note 222; Interview with Emilja Simoska, Director, Center for Ethnic Relations, in Skopje, Macedonia (Mar. 20, 1999); Interview with Aija Priedite, Director, Latvian Language Program Unit, National Program for Latvian Language Training, in Riga, Latvia (June 18, 1999).

[FN226]. See *supra* text at note 53; Hillgenberg, *supra* note 51, at 502. OSCE officials in Vienna continually downplayed the difference between legal and political commitments, emphasizing the pressure put on states to comply with OSCE standards. See Aragona Interview, *supra* note 53; Interview with Melissa Fleming, OSCE Spokesperson, in Vienna, Austria (Dec. 8, 1998); Kobieracki Interview, *supra* note 92; Interview with Juraj Migas, Head of the Permanent Mission of the Slovak Republic to the OSCE Institutions, in Vienna, Austria (Dec. 9, 1998) (on equal importance of OSCE commitments and treaties).

[FN227]. See Interview with Ismet Ramadani, Party for Democratic Prosperity Parliamentary Group Coordinator, in Skopje, Macedonia (Mar. 24, 1999) [[hereinafter Ramadani Interview]; Interview with Tatyana Zhdanok, Latvian Human Rights Committee, in Riga, Latvia (June 17, 1999) [hereinafter Zhdanok Interview].

[FN228]. See Frckoski Interview, *supra* note 108; Macedonian MFA Official Interview, *supra* note 225; Muiznieks Interview, *supra* note 224.

[FN229]. See *supra* text accompanying notes 131-32; Interview with Official in International Organizations Section of Latvian Ministry of Foreign Affairs, in Riga, Latvia (June 17, 1999) (noting that politicians do not care if standards are legally binding once EU backs High Commissioner's determinations) [hereinafter Latvian MFA Official Interview].

[FN230]. See Frckoski Interview, *supra* note 108; Macedonian MFA Official Interview, *supra* note 225.

[FN231]. See Interview with Dragan Tumanovski, Judge, Supreme Court of Macedonia, in Skopje, Macedonia (Mar. 24, 1999); Zhdanok Interview, *supra* note 227 (representative of pro-Russian minority NGO noting inability to invoke OSCE standards before European Court of Human Rights). But see *Sidiropoulos v. Greece*, *supra* note 67.

[FN232]. See, e.g., Interview with Maris Riekstins, State Secretary of the Latvian Minister of Foreign Affairs (Feb. 12, 1999) (translation provided by OSCE Mission to Latvia) (noting, in response to invocation by ethnic Russian politicians of the Hague Recommendations that the "so-called Hague Recommendations ... are recommendations, and not international law"); Tsilevich Interview, *supra* note 134; van der Stoel Interview, *supra* note 221 (noting that he sometimes senses in meetings that governmental officials treat OSCE standards less seriously than treaties); Interview with Adviser A to the Prime Minister of Latvia, in Riga, Latvia (June 18, 1999) [hereinafter Adviser A Interview] (referring to Hague and Oslo Recommendations as simply rhetoric by NGOs).

[FN233]. See Latvian MFA Official Interview, *supra* note 229; Interview with Adviser B to the Prime Minister of Latvia, in Riga, Latvia (June 16, 1999) [[hereinafter Adviser B Interview].

- [FN234]. See Macedonian MFA Official Interview, *supra* note 225; Senior Western Diplomat Interview, *supra* note 222.
- [FN235]. See Reisman, *supra* note 61, at 144.
- [FN236]. See Nollkaemper, *supra* note 170, at 65-66 (calling for consideration of softness and specificity to research agenda).
- [FN237]. Franck, *supra* note 176, at 25.
- [FN238]. See *id.* at 47-49.
- [FN239]. Chayes & Chayes, *supra* note 178, at 119.
- [FN240]. *Id.* at 120.
- [FN241]. *Id.* at 123.
- [FN242]. See *supra* notes 181-82; Finnemore & Sikkink, *supra* note 182, at 904-05.
- [FN243]. See, e.g., Don Oberdorfer, The Peacemaker: How Jimmy Carter Helped Save Us from War with North Korea, *Wash. Monthly*, Dec. 1997, at 31 (concerning his role in the 1994 North Korea nuclear crisis).
- [FN244]. See Haas, *supra* note 208.
- [FN245]. Jacob Bercovitch, Mediation in International Conflict: An Overview of Theory, A Review of Practice, in *Peacemaking in International Conflict: Methods and Techniques* 125, 130 (I. William Zartman & J. Lewis Rasmussen eds., 1997) [hereinafter Bercovitch, *Mediation in International Conflict*].
- [FN246]. See Kjell Skjelsbaek, Peaceful Settlement of Disputes by the United Nations and Other Intergovernmental Bodies, 21 *Cooperation & Conflict* 139, 144 (1986).
- [FN247]. For an excellent discussion of mediation in the broader context of third party intervention, see William J. Dixon, Third-party Techniques for Preventing Conflict Escalation and Promoting Peaceful Settlement, 50 *Int'l Org.* 653 (1996).
- [FN248]. I will use the term "intermediary" and "mediator" interchangeably, with the understanding that it refers to those who utilize the process of mediation defined above, rather than those engaging in a more limited process, or those employing broader forms of third party intervention, such as arbitration. See, e.g., Ronald J. Fisher & Loreleigh Keashly, Third Party Interventions in Intergroup Conflict: Consultation Is NOT Mediation, 4 *Negot. J.* 381, 381-83 (1988) (limiting the meaning of mediation).
- [FN249]. See Jacob Bercovitch, International Dispute Mediation: A Comparative Empirical Analysis, in *Mediation Research: The Process and Effectiveness of Third-Party Intervention* 284 (Kenneth Kressel et al. eds., 1989) [hereinafter Bercovitch, *International Dispute Mediation*]. For another division of the variables, see Marieke Kleiboer, Understanding Success and Failure of International Mediation, 40 *J. Conflict Resol.* 360, 361 (1996) (positing contextual variables (nature of the dispute, parties, mediator, and international context) and process conditions (tools of the mediator)).
- [FN250]. See, e.g., Friedrich Glasl, The Process of Conflict Escalation and Roles of Third Parties, in *Conflict Management and Industrial Relations* 119 (Gerard B.J. Bomers & Richard B. Peterson eds., 1982); Michael S. Lund, Preventing Violent Conflicts: A Strategy for Preventive Diplomacy 39-46, 86-93 (1996).
- [FN251]. See, e.g., Robert D. Putnam, Diplomacy and Domestic Politics: The Logic of Two-level Games, 42 *Int'l Org.*

427, 433-35 (1988); David Carment & Patrick James, Two-level Games and Third-party Intervention: Evidence from Ethnic Conflict in the Balkans and South Asia, 29 *Can. J. Pol. Sci.* 521 (1996); Frederick W. Mayer, Managing Domestic Differences in International Negotiations: The Strategic Use of Internal Side Payments, 46 *Int'l Org.* 793, 793-95 (1992).

[FN252]. See, e.g., Jacob Bercovitch & Jeffrey Langley, The Nature of the Dispute and the Effectiveness of International Mediation, 37 *J. Conflict Resol.* 670 (1993); Barbara F. Walter, The Critical Barrier to Civil War Settlement, 51 *Int'l Org.* 335 (1997).

[FN253]. See Oran Young, *The Intermediaries: Third Parties in International Crises* (1967); *International Mediation in Theory and Practice* (Saadia Touval & I. William Zartman eds., 1985); Saadia Touval, Why the U.N. Fails, 73 *Foreign Aff.* 44 (1994); Michael Watkins & Kim Winters, Intervenors with Interests and Power, 13 *Negot. J.* 119 (1997).

[FN254]. See, e.g., Saadia Touval, *The Peace Brokers: Mediation in the Arab-Israeli Conflict, 1948-1979* (1982); *Dynamics of Third Party Intervention: Kissinger in the Middle East* (Jeffrey Z. Rubin ed., 1981).

[FN255]. See Jacob Bercovitch & Allison Houston, The Study of International Mediation, in *Resolving International Conflicts: The Theory and Practice of Mediation* 11, 15 (Jacob Bercovitch ed., 1996); Hugo Prein, A Contingency Approach for Conflict Intervention, 9 *Group & Org. Studies* 81, 82 (1984); Ronald J. Fisher & Loreleigh Keashly, The Potential Complementarity of Mediation and Consultation within a Contingency Model of Third Party Intervention, 28 *J. Peace Res.* 29 (1991). See also Lund, *supra* note 250, at 107-201 (extending contingency approach to sanctions and military intervention as a way of building a "preventive regime" regarding interstate and intrastate conflict).

[FN256]. For a critique of mediation theory, see Andrew Moravcsik, A New Statecraft? Supranational Entrepreneurs and International Cooperation, 53 *Int'l Org.* 267, 272-74, 299-300 (1999) (noting selection bias, lack of control, and failure to show causation). For one recent case study that explicitly tests theories, see I. William Zartman, Explaining Oslo, 2 *Int'l Negot.* 195 (1997). For a statistical view, see R. William Ayres, Mediating International Conflicts: Is Image Change Necessary?, 34 *J. Peace Res.* 431 (1997). See also Bercovitch, *International Dispute Mediation*, *supra* note 249.

[FN257]. As noted *supra* text accompanying note 249, mediation theory has often focussed on two broad groups of factors--fixed "contextual" factors, which include the nature of the parties and the nature of the conflict along with the nature of the intermediary, and "process" factors involving the strategies of the intermediary. See also Bercovitch & Houston, *supra* note 255, at 20-28. I prefer to treat the traits of the mediator as a separate variable.

[FN258]. For a review of the contending categorizations, see Kleiboer, *supra* note 249, at 364, and sources cited therein.

[FN259]. For moves in this direction, see Lund, *supra* note 250, at 78-104. See also Kleiboer, *supra* note 249, at 360 (noting "difficult[y] to distinguish between internal and external conflict, and subsequently between domestic and international mediation").

[FN260]. See *Jacovlevska Interview*, *supra* note 224. See also Hope, *supra* note 99.

[FN261]. See *Birzniece Interview*, *supra* note 222; *Zhdanok Interview*, *supra* note 227. See also *Forced Migration Project*, *supra* note 110, at 21-24.

[FN262]. See *supra* text accompanying notes 133-34.

[FN263]. See Kleiboer, *supra* note 249, at 364-68; Bercovitch & Houston, *supra* note 255, at 20-22, and sources cited therein.

[FN264]. See Bercovitch & Houston, *supra* note 255, at 22.

[FN265]. See Adviser B Interview, *supra* note 233; Interview with Dzintars Abikis, Chairman of Latvian Saeima Committee on Education, Culture, and Science, in Riga, Latvia (June 18, 1999); Tsilevich Interview, *supra* note 134.

[FN266]. See Carl Cohen, *Democracy 72-77* (1971); Carlos Santiago Nino, *The Constitution of Deliberative Democracy 1-4* (1996); Yash Ghai, *The Theory of the State in the Third World and the Problematics of Constitutionalism*, in *Constitutionalism and Democracy: Transitions in the Contemporary World 186-187* (Douglas Greenberg et al. eds., 1993). The states, of course, varied in this respect, with, for example, Macedonia suffering more than Latvia.

[FN267]. See, e.g., Report of the High Commissioner on National Minorities Regarding His Visit to the FYR of Macedonia, July 10-13, 1997, at 2 (noting views of certain Albanian politicians) (on file with author).

[FN268]. See Yates Interview, *supra* note 88 (democratic deficit means that outsiders must help "the intellectual" prevail over "the instinctual").

[FN269]. See, e.g., 1995 HCNM Report, *supra* note 85 ("I have become ... convinced of the necessity for adequate structures for dialogue between government and minority.").

[FN270]. See *supra* note 224.

[FN271]. See Ramadani Interview, *supra* note 227; Priedite Interview, *supra* note 225.

[FN272]. See van der Stoel Interview, *supra* note 221 (recounting conversation with Latvian minister who asserted existence of two types of international standards--"those Latvia could afford to respect and those it could not afford to respect").

[FN273]. See Saadia Touval & I. William Zartman, *Introduction: Mediation in Theory*, in *International Mediation in Theory and Practice*, *supra* note 253, at 7, 11-14. See also Howard Raiffa, *Analytical Barriers*, in *Barriers to Conflict Resolution 133, 142-43* (Kenneth Arrow et al. eds., 1995). For somewhat similar roles in domestic mediators, see Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 *Law & Pol'y* 7 (1986).

[FN274]. See Bercovitch, *Mediation in International Conflict*, *supra* note 245, at 137-38; Louis Kreisberg, *Varieties of Mediating Activities and Mediators in International Relations*, in *Resolving International Conflicts: The Theory and Practice of Mediation*, *supra* note 255, at 219, 224-25.

[FN275]. See Interview with Jan Sand Sorenson, U.N. Development Program Resident Representative in Latvia, in Riga, Latvia (June 17, 1999); Macedonian MFA Official Interview, *supra* note 225; van der Stoel Interview, *supra* note 221 (on importance of legal arguments and independent experts).

[FN276]. Cf. Chigas et al., *supra* note 76, at 49 (describing the OSCE as an "insider third party" that "combines some of the basic characteristics of traditional mediation by international organizations with those of an 'insider' to the conflict working for change from within the governmental and political processes in the state concerned, and in some cases actually becoming part of the government process"); Interview with Artis Pabriks, Mission of the European Union to Latvia, in Riga, Latvia (June 17, 1999) (on importance of demonstrating how compliance "won't destroy society").

[FN277]. For a complete list of manipulative strategies, see Bercovitch, *Mediation in International Conflict*, *supra* note 245, at 137-38.

[FN278]. See Halonen Advises Latvia Against Strict Language Law, *Deutsche Presse-Agentur*, July 14, 1999 (statement by Finnish foreign minister representing the EU Presidency noting language law as passed by parliament "is not favorable" for Latvia's invitation to join EU accession negotiations). See also *supra* notes 139-41.

[FN279]. See Tsilevich Interview, *supra* note 134 ("what's really important is who says [it] and how it is said"); Zhdanok Interview, *supra* note 227; Adviser A Interview, *supra* note 232.

[FN280]. See OSCE High Commissioner on National Minorities, *The Outcome of the Referendum in Latvia*, Press Release (Oct. 5, 1998) (visited Mar. 14, 2000) <<http://www.osce.org/inst/hcnm/index.html>>; OSCE High Commissioner on National Minorities, *Press Statement on Latvia* (July 17, 1998) (visited Mar. 14, 2000) <<http://www.osce.org/inst/hcnm/index.html>> (noting that he has no intention of proposing additional recommendations regarding Law on Citizenship); Latvian MFA Official Interview, *supra* note 229; Adviser A Interview, *supra* note 232.

[FN281]. See *Statement on Latvian Language Law*, *supra* note 132. See also Letter from Max van der Stoel, OSCE High Commissioner on National Minorities, to Yevgeny Primakov, Minister of Foreign Affairs, Russian Federation (Apr. 2, 1998) (urging Russia not to link normalization of relations to full implementation of all HCNM recommendations as this might cause some Latvian politicians to oppose them) (on file with author).

[FN282]. See Interview with Craig Oliphant, Adviser to the OSCE High Commissioner on National Minorities, in *The Hague, Netherlands* (Oct. 1, 1998) (noting High Commissioner's ability to allow Latvian government to avoid portrayal of acceptance of standards as a concession to Russia); Frckoski Interview, *supra* note 108 (High Commissioner helps to "provide cover" for the government); Interview with Sami Ibrahim, Undersecretary, Macedonian Ministry of Foreign Affairs, in *Skopje, Macedonia* (Mar. 22, 1999) [hereinafter Ibrahim Interview] ("we need the third party" in order for the government to justify to the Macedonian majority steps in favor of the Albanian minority).

[FN283]. Zartman, *supra* note 256, at 198. See also Stephen John Stedman, *Peacemaking in Civil War: International Mediation in Zimbabwe, 1974-1980* 25-28, 235-42 (1991); Richard N. Haass, *Ripeness and the Settlement of International Disputes*, 30 *Survival* 232 (1988).

[FN284]. See, e.g., Touval & Zartman, *supra* note 273, at 15; Jacob Bercovitch, *Understanding Mediation's Role in Preventive Diplomacy*, 12 *Negot. J.* 241, 252-53 (1996).

[FN285]. See Bercovitch, *supra* note 284, at 254.

[FN286]. For an overview of the debate, see Peter J. Carnevale & Sharon Arad, *Bias and Impartiality in International Mediation*, in *Resolving International Conflicts: The Theory and Practice of Mediation*, *supra* note 255, at 39. For a middle position showing how impartiality may be relevant to certain forms of mediation but not others, see Zartman, *supra* note 256, at 210.

[FN287]. See, e.g., Macedonian MFA Official Interview, *supra* note 225; Frckoski Interview, *supra* note 108.

[FN288]. See *id.* See also Muiznieks Interview, *supra* note 224; Latvian MFA Official Interview, *supra* note 229; Senior Western Diplomat Interview, *supra* note 222. On the OSCE's field offices or "missions of long duration," see OSCE Handbook, *supra* note 32, at 54-85. See also Kenneth W. Abbott & Duncan Snidal, *Why States Act through Formal International Organizations*, 42 *J. Conflict Resol.* 3, 24-26 (1998) (international organizations as community representative).

[FN289]. For example, the High Commissioner gave significant attention to Estonia's language requirements for candidates for public office, but not Latvia's. See Birzniece Interview, *supra* note 222.

[FN290]. See Interview with Simon Fuller, United Kingdom Ambassador to the OSCE, in *Vienna, Austria* (Dec. 11, 1998); Kobieracki Interview, *supra* note 92 (noting van der Stoel had the "telephone numbers in his notebook from the beginning"). In the context of the High Commissioner's involvement in encouraging Greece to recognize its Turkish minority, see *supra* note 103, his work a generation ago in galvanizing European opposition to the colonels who seized power in Greece in 1967 gave him significant credibility with current Greek officials.

[FN291]. See Latvian MFA Official Interview, *supra* note 229; Macedonian MFA Official Interview, *supra* note 225. See also *supra* text accompanying notes 280-81.

[FN292]. Jacovlevska Interview, *supra* note 224 (noting double standards applied by HCNM).

[FN293]. The common Dutch nationality and long-term friendship of the High Commissioner and the EU's Commissioner for External Relations, Hans van den Broek, helped contribute to the former's ability to mobilize the support of the EU for his initiatives.

[FN294]. U.N. Charter art. 33, para. 1.

[FN295]. See generally U.N. Handbook on the Peaceful Settlement of Disputes Between States, U.N. Sales No. 92.V.7 (1992).

[FN296]. For a classic statement from a pedagogical perspective, see Mark W. Janis & John E. Noyes, *International Law: Cases and Materials* 217 (1997) ("The process of interpreting, applying, and enforcing international law involves not only municipal courts but occasionally various forms of international dispute settlement procedures. In this chapter, we introduce both public international arbitration and ... the International Court of Justice.").

[FN297]. See Damrosch, *supra* note 196, at 102-54 (focus on U.N. enforcement through economic sanctions).

[FN298]. For a suggestion of the need to incorporate negotiation theory (though not mediation theory) into international law, see [Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 *Am. J. Int'l L.* 367, 387 \(1998\)](#). Ironically, despite its political nature, mediation theory has not been properly considered by mainstream scholars within international relations seeking to explain state behavior. For example, neither the special issue of *International Organization* assessing the current state of international relations theory (see 52 *Int'l Org.* 645 (1998)) nor an authoritative review of current theories, see *New Thinking in International Relations Theory*, *supra* note 183, gives any attention to mediation theory. For an effective critique of mediation scholarship from an international relations theorist, see Moravcsik, *supra* note 256.

[FN299]. See Franck, *supra* note 176, at 111-34.

[FN300]. Lon Fuller, *Mediation--Its Forms and Functions*, 44 *S. Cal. L. Rev.* 305, 308 (1968).

[FN301]. Compare Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *Yale L.J.* 950, 968 (1979) ("The outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips"), with Leonard Marlow, *The Rule of Law in Divorce Mediation*, 9 *Mediation Q.* 5, 11 (1985) ("The mediator does not view these legal rules and principles as embodying either wisdom or justice, and does not believe that they represent a necessary yardstick by which to judge the agreement that has been concluded.").

[FN302]. See HCNM Mandate, *supra* note 42, paras. 2-3, 16, at 715-16, 718.

[FN303]. See *supra* note 85. For a recent statement of the OSCE's concerns for norms, see *Istanbul Charter for European Security*, para. 7, Nov. 19, 1999 (visited Mar. 14, 2000) <<http://www.osce.org/e/docs/summits/istachart99e.htm>> ("We reaffirm our full adherence to the Charter of the United Nations, and to the Helsinki Final Act, the Charter of Paris and all other OSCE documents to which we have agreed. These documents represent our common commitments and are the foundation for our work."). In this sense, the normative intermediary, as I define it, differs in key respects from a domestic mediator. See Fuller, *supra* note 300, at 325-26 (stating that the purpose is "not that of inducing the parties to accept formal rules ... but that of helping them to free themselves from the encumbrance of rules"); John S. Murray et al., *Mediation and Other Non-Binding ADR Processes* 103 (1996) ("[A] mediator may not impose his or her perceptions, values,

or judgments on the parties.").

[FN304]. Cf. Packer, *supra* note 104 (discussing the different results of the High Commissioner's work in various states of the former Yugoslavia).

[FN305]. Franck's focus on the "pedigree" of a rule concerns its institutional origin, not its messenger. See Franck, *supra* note 176, at 91- 134.

[FN306]. See Chayes & Chayes, *supra* note 178, at 167-79.

[FN307]. See Koh, *supra* note 135.

[FN308]. See Macedonian MFA Official Interview, *supra* note 225; Senior Western Diplomat Interview, *supra* note 222; Latvian MFA Official Interview, *supra* note 229.

[FN309]. See Koh, *supra* note 135, at 648.

[FN310]. Mediation theory reflects some of constructivism's insights through the notion of a distinct form of third party intervention known as "consultation." Originating with psychologists, it works from the premise that much conflict stems from the subjective attitudes of the parties, not fixed interests, and that skilled intermediaries can help the parties change these perceptions. See, e.g., Fisher & Keashly, *supra* note 248, at 381; Loreleigh Keashly & Ronald J. Fisher, *A Contingency Perspective on Conflict Interventions: Theoretical and Practical Considerations*, in *Resolving International Conflicts: The Theory and Practice of Mediation*, *supra* note 255, at 235.

[FN311]. See Finnemore & Sikkink, *supra* note 182, at 896-901.

[FN312]. See, e.g., Finnemore, *supra* note 181 (on states changing both identities and interests through participation in UNESCO).

[FN313]. See [Andrew Moravcsik, Explaining International Human Rights Regimes: Liberal Theory and Western Europe](#), 1 *Eur. J. Int'l Rel.* 157, 178-80 (1995); cf. Wippman, *supra* note 9, at 625 (finding a need for "culture of compliance" to make treaty obligations and judicial enforcement effective).

[FN314]. See [Jeffrey T. Checkel, International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide](#), 3 *Eur. J. Int'l Rel.* 473 (1997).

[FN315]. For recent attempts at connecting and combining theories, see, e.g., Checkel, *supra* note 314; Haas, *supra* note 31. Cf. Katzenstein et al., *supra* note 169, at 683 (In international relations scholarship, "[t]he greatest promise in the intellectual debate between proponents of rationalism and constructivism does not lie in the insistence that reality can only be analyzed in one conceptual language.").

[FN316]. See Marieke Kleiboer, *Ripeness of Conflict: A Fruitful Notion?*, 31 *J. Peace Res.* 109, 115-116 (1994).

[FN317]. Dag Hammarskjöld, *The International Civil Servant in Law and in Fact*, in *Servant of Peace: A Selection of the Speeches and Statements of Dag Hammarskjöld, Secretary-General of the United Nations, 1953-1961*, 329, 348 (Wilder Foote ed., 1962). For the tension for the United Nations between impartial mediation and implementation of peace settlements, see Steven R. Ratner, *The New U.N. Peacekeeping: Building Peace in Lands of Conflict After the Cold War* 51-54, 198-204 (1995).

[FN318]. See, e.g., Wiessner & Willard, *supra* note 59, at 319.

[FN319]. See W. Michael Reisman, *Folded Lies: Bribery, Crusades, and Reforms* 15-36 (1979). See also Michael W. Gordon, *Of Aspirations and Operations: The Governance of Multinational Enterprises by Third World Nations*, 16 U. Miami Inter-Am. L. Rev. 301, 330 (1984).

[FN320]. See Ibrahimi Interview, *supra* note 282.

[FN321]. See Packer, *supra* note 104, at 176-78.

[FN322]. See John Packer, *Conflict Prevention by the OAU: The Relevance of the O.S.C.E. High Commissioner on National Minorities*, 4 Afr. Y.B. Int'l L. 279 (1996).

[FN323]. This point has been made in the context of Latvia by both Russian Latvians and the Russian government. See Tsilevich Interview, *supra* note 134; Interview with Tatiana Soulitskaya, Counsellor of the Permanent Mission of the Russian Federation to the OSCE, in Vienna, Austria (Dec. 10, 1998).

[FN324]. For a recent and cogent OSCE report on the situation of the Roma in Europe, see OSCE Contact Point for Roma and Sinti Issues, *Looking at Human Security in a Regional Context--The Situation of the Roma and Sinti in the OSCE* (1997) (visited Mar. 14, 2000) <http://www.osce.org/odhr/cprsi/i_br97.htm>. The High Commissioner issued one report on the Roma in 1993 and another in 2000. See *Report on the Situation of Roma and Sinti in the OSCE Area*, OSCE (April 5, (2000) (visited April 10, 2000) <http://www.osce.org/inst/hcnm/docs/report_roma_sinti_2000.pdf>

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