

National Minorities in Post-Communist Europe:  
The Role of International Norms and European Integration  
Will Kymlicka

Since 1989, we have witnessed a remarkable trend towards the internationalization of minority rights issues in the European context. There is now a wide range of international institutions - including the Organization for Security and Cooperation in Europe (OSCE), the Council of Europe, the European Union and NATO - actively involved in decision-making about state-minority relations. These institutions formulate standards about how states should treat their minorities, monitor whether states are living up to these standards, and make recommendations about how to improve state-minority relations. They also offer a wide range of rewards for countries that comply with these international standards and recommendations, while imposing penalties on countries that fail to do so. While these norms are in principle supposed to apply to all European countries, West and East, the focus of these organizations to date has fallen almost exclusively on the post-communist states of central and eastern Europe.

The precise details of how these various international organizations operate - their standards, monitoring functions, reporting procedures, and enforcement mechanisms - have been described elsewhere.<sup>1</sup> And while many of these institutions are still relatively new, there have been some attempts to evaluate the effectiveness of particular mechanisms in protecting minorities and preventing or reducing ethnic violence in post-communist Europe.<sup>2</sup>

In this paper, I want to step back and ask more general questions about this trend towards internationalizing minority rights. The very project of internationalizing minority rights implies that there are such things as "international norms" (or at least "European standards") regarding the rights of national minorities. In reality, however, there are important disagreements about the rights of national minorities, both within the Western democracies, and between Western and Eastern Europe. In particular, there are deep disagreements about whether national minorities have a right to territorial autonomy or self-government.

Given these disagreements, European organizations have tried to avoid appealing to such a right when formulating their international norms. Instead, they have relied heavily on two other, less

---

<sup>1</sup> See Gaetano Pentassuglia, "The EU and the Protection of Minorities: The Case of Eastern Europe", European Journal of International Law 12/1 (2001): 3-38; Pentassuglia, Minorities in International Law (Strasbourg: Council of Europe Publishing, 2003); Minority Rights Group, The Framework Convention for the Protection of National Minorities: A Guide (London: Minority Rights Group, 1999).

<sup>2</sup> John Packer, "The OSCE and international guarantees of local self-government", in Local Self-Government, Territorial Integrity, and protection of minorities (Strasbourg: European Commission for Democracy Through Law, Council of Europe Publishing, 1996), pp. 250-72; Packer, "Making International Law Matter in Preventing Ethnic Conflicts", New York University Journal of International Law and Politics 32/3 (2000): 715-24; Jonathan Cohen, Conflict Prevention Instruments in the Organization for Security and Cooperation in Europe (The Hague: Netherlands Institute of International Relations, 1998); Gudmundur Alfredsson and Danilo Turk, "International Mechanisms for the Monitoring and Protection of Minority Rights: Their Advantages, Disadvantages and Interrelationships", in Arie Bloed (ed) Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms (Norwell: Kluwer, 1993), pp. 169-86; Kinga Gal, Bilateral Agreements in Central and Eastern Europe: A New Inter-State Framework for Minority Protection (Flensburg: European Centre for Minority Issues, Working Paper #4, 1999); Rob Zaagman, Conflict Prevention in the Baltic States: The OSCE High Commissioner on National Minorities in Estonia, Latvia and Lithuania (Flensburg: ECMI Monograph #1, European Centre for Minority Issues, 1999); Arie Bloed and P. Van Dijk (eds) Protection of Minority Rights Through Bilateral Treaties (The Hague: Kluwer, 1999).

controversial, ideas: (i) the right to enjoy one's culture; and (ii) the right to effective participation. European organizations have hoped that if these two rights are respected, there will be no need for, and no demand for, more controversial ideas of autonomy and self-government.

I will try to show, however, that the idea of self-government, while contested and resisted, cannot easily be avoided. It often re-enters the debate through the back-door, albeit in ad hoc ways. The result, I believe, is a number of confusions, ambiguities and moral inconsistencies in the application of international norms to post-communist Europe. These ambiguities have their short-term uses in deferring or papering over difficult issues, but I believe that the long-term prospects for the peaceful and democratic accommodation of minority nationalisms in post-communist Europe require rethinking the nature and function of international norms of minority rights.

## 1. The Internationalization of Minority Rights in Post-Communist Europe

As communism collapsed in central and eastern Europe in 1989, a number of violent ethnic conflicts broke out. In retrospect, these violent conflicts have largely been confined to the Caucasus and the Balkans. But this wasn't clear at the time. In the early 1990s, many commentators feared that ethnic tensions would spiral out of control in wide swaths of post-communist Europe. For example, predictions of civil war between the Slovak majority and Hungarian minority in Slovakia, or between the Estonian majority and Russian minority in Estonia, were not uncommon. Overly-optimistic predictions about the rapid replacement of communism with liberal-democracy were supplanted with overly-pessimistic predictions about the replacement of communism with ethnic war.

Faced with these potentially dire trends, the Western democracies in the early 1990s felt they had to do something. And they decided, in effect, to "internationalize" the treatment of national minorities in post-communist Europe. They declared, in the words of the OSCE in 1990, that the status and treatment of national minorities "are matters of legitimate international concern, and consequently do not constitute exclusively an internal affair of the respective State".

The international community often makes pious declarations of its concern for the rights and well-being of peoples around the world, without ever really intending to do much about it. But in this case, the West backed up its words with actions. The most important and tangible action was the decision by the European Union and NATO in December 1991 to make minority rights one of the four criteria that candidate countries had to meet in order to become members of these organizations. Since most post-communist countries viewed membership in the EU and NATO as pivotal to their future prosperity and security, any "recommendations" that the West might make regarding minority rights were taken very seriously. As a result, minority rights moved to the centre of post-communist political life, a core component of the process of "rejoining Europe".

Having decided in 1990-91 that the treatment of minorities in post-communist Europe was a matter of legitimate international concern, the next step was to create institutional mechanisms that could monitor how post-communist countries were treating their minorities. Since 1991, therefore, various international bodies have been created with the mandate of monitoring the treatment of minorities, and of recommending changes needed to live up to European standards of minority rights. A crucial step here was the formation of the Office of the High Commission on National Minorities of the OSCE (OSCE-HCNM) in 1993, linked to OSCE mission offices in several post-communist countries. Another important step occurred at the Council of Europe, which set up a number of advisory bodies and reporting mechanisms as part of its Framework Convention on the Protection of National Minorities (FCNM) in 1995. The European Union and NATO did not themselves create new monitoring bodies

specifically focused on minority rights,<sup>3</sup> but they have made clear that they support the work of the OSCE-HCNM and the Council of Europe, and expect candidate countries to cooperate with them, as a condition of accession.

In short, Western states have made a serious commitment to internationalizing minority rights, embedded not only in formal declarations but also in a dense web of European institutions. It's an interesting question how and why this commitment emerged. After all, the EU had shown very little interest in the question of minority rights prior to 1989, and had deliberately avoided including any reference to minority rights in its own internal principles. Nor have Western countries traditionally shown much interest in protecting minorities elsewhere around the world. On the contrary, Western states have often propped up governments in Africa, Asia or Latin America that were known to be oppressive to their minorities, even to the point of selling military equipment with the knowledge that it would be used against minority groups (eg., selling arms to Indonesia to suppress minorities in Aceh and East Timor, or to Guatemala to suppress the Maya). So why did the West suddenly become a champion of minorities in post-communist Europe?

I think there were a number of reasons. One factor was humanitarian concern to stop the suffering of minorities facing persecution, mob violence, and ethnic cleansing. But humanitarian concern is rarely enough, on its own, to mobilize Western governments. A more self-interested reason was the belief that escalating ethnic violence would generate large-scale refugee movements into Western Europe, as indeed happened from Kosovo and Bosnia. Also, ethnic civil wars often create pockets of lawlessness which become havens for the smuggling of arms and drugs, or for other forms of criminality and extremism.

Another reason, more diffuse, was the sense in the West that the ability of post-communist countries to manage their ethnic diversity was a test of their overall political maturity, and hence of their readiness to "rejoin Europe". As the General Secretary of the Council of Europe put it, respect for minorities is a fundamental measure of a country's "moral progress".<sup>4</sup> The ability of a country to get its deficits under 3% of GDP (one of the other accession criteria) may be important from an economic point of view, but doesn't tell us much about whether the country will "fit" into European traditions and institutions.<sup>5</sup>

In short, for a complex mixture of humanitarian, self-interested, and ideological reasons, minority rights have become "internationalized" in Europe. Acceptance of the international monitoring and enforcement of these norms has become a test of a country's readiness for Europe. Meeting international norms of minority rights is seen as proof that a country has left behind its "ancient ethnic hatreds" and "tribal nationalisms", and is able to join a "modern" liberal and cosmopolitan Europe.

---

<sup>3</sup> The EU did set up the European Monitoring Centre on Racism and Xenophobia in 1997, but it has focused primarily on immigrant groups (rather than national minorities), and primarily on member-states in the West, not post-communist Europe.

<sup>4</sup> Quoted in Adam Burgess, "Critical Reflections on the Return of National Minority Rights to East/West European Affairs", in Karl Cordell (ed) Ethnicity and Democratisation in the New Europe (London: Routledge, 1999), pp. 49-60.

<sup>5</sup> The case of Greece was perhaps a warning here. Greece has the formal trappings of a liberal-democracy with a market economy, and would seem therefore to be a good fit for the EU. But in fact, most Western European countries are exasperated by the way Greece's often xenophobic and illiberal political culture has jeopardized various EU projects, and no one in the EU wanted to admit a dozen countries that would act in the same way. Greece's poor record on minority rights is often seen as a symbol or indicator of its overall political culture.

## 2. Defining European Minority Rights Norms

Between 1990 and 1993, then, a rapid consensus developed amongst all the major Western organizations that the treatment of national minorities by post-communist countries should be a matter of international concern, and that there should be international mechanisms to monitor a country's compliance with international norms of minority rights.

However, there was one glaring problem with this approach: namely, it presupposes that there are "international norms" or "European standards" of minority rights for post-communist countries to comply with. In reality, there were no such standards. There were no formal declarations or conventions enumerating the rights of national minorities. Indeed, the very term "minority rights" or "rights of national minorities" was largely unknown in the West.

Western countries differ greatly in how they talk about issues of accommodating diversity. For example, some countries (eg., France, Greece, Turkey) simply deny that they have "minorities".<sup>6</sup> Other countries acknowledge that they have "minorities", but differ about what sorts of groups this term applies to. In some countries (eg., the UK), the term "minorities" generally refers to post-war migrant groups, typically from the Caribbean or South Asia, not to the historic Welsh or Scottish groups. In other Western countries (as in most of post-Communist Europe), it is the opposite: "minorities" typically refers to historic groups (like the Slovenes in Austria), not to post-war migrants (like the Turks in Austria), who are instead described as "foreigners".

So the term "minority" has different connotations across the West. In any event, in none of these countries was there widespread reference to general principles about "the rights of national minorities". Consider debates about Scots in the UK, or about Catalans in Spain, or about Slovenes in Austria. These debates were not phrased in the form:

- all national minorities have a right to X;
- Scots/Catalans/Slovenes are a national minority;
- therefore Scots/Catalans/Slovenes have a right to X.

Claims of particular national groups are not deduced from some broader principle or theory about what "national minorities" as a category have "rights" to. Instead, the rights of particular groups are debated in terms of historic settlements, built up over time, by which various accommodations have been reached between different communities.

In fact, to my knowledge, the term "national minority" had no legal status or meaning in any Western country prior to the adoption of the Framework Convention in 1995. No legislation in any Western country specified which groups were "national minorities", and which rights flowed from having this status. No Western country had an "Office of National Minorities", or a "Law on National Minorities".

In short, there was no Western discourse of "the rights of national minorities" prior to 1990, either within particular countries or across Europe as a whole. If you asked citizens or elites in Western Europe what were "the rights of national minorities", you would probably get a blank stare. So the decision to internationalize state-minority relations through the articulation of "European standards of the

---

<sup>6</sup> Rachel Brett, "The Human Dimension of the CSCE and the CSCE Response to Minorities", in M.R. Lucas (ed) The CSCE in the 1990s: Constructing European Security and Cooperation (Baden-Baden: Nomos Verlagsgesellschaft, 1993), pp. 157-8. For a detailed discussion of the way various countries try to deny the existence of minorities, see Panayote Elias Dimitras, Recognition of Minorities in Europe: Protecting Rights and Dignity (London: Minority Rights Group, 2004).

rights of national minorities" was, in a sense, a remarkable decision. It's not surprising that Western governments wanted to "do something" about ethnic conflict in post-communist Europe, but it is surprising that they chose to do so in an idiom or vocabulary that is essentially foreign to the Western experience. As Chandler notes, Western countries were determined to develop European standards as a way of monitoring post-communist countries, but they "had no conception of how to apply such policies in relation to their own minorities".<sup>7</sup>

How then were these international norms constructed? Observers with a long memory recalled that this question had been tackled earlier, at the last major period of imperial breakdowns after World War I, resulting in the "minority protection scheme" of the League of Nations. A mini-industry has arisen examining that older scheme, and trying to learn lessons from its successes and failures for contemporary European debates.<sup>8</sup>

However, the minority protection scheme of the League of Nations was particularistic, not generalized. It involved multilateral treaties guaranteeing particular rights for particular minorities in particular (defeated) countries, while leaving many other minorities unprotected. It did not attempt to articulate general standards or international norms that all national minorities would be able to claim. That indeed was one reason why the idea of minority rights fell out of favour and largely disappeared from the postwar international law context, replaced with a new focus on "human rights".

However, the idea of minority rights did not entirely disappear from international law. It retained a foothold in some of the human rights declarations at the United Nations. In fact, there were two quite different provisions at the UN that could be seen as laying a foundation for international norms on the rights of national minorities. The first provision, dating back to the very Charter of the United Nations, and reaffirmed in Article 1 of the 1966 International Covenant on Civil and Political Rights (ICCPR), states that all "peoples" have a right to "self-determination" by which they can "freely determine their political status". The second provision, found in Article 27 of the same Covenant, states that "members of minorities" have the right to "enjoy their own culture...in community with other members of their group".<sup>9</sup>

These two provisions have been part of international law since at least 1966, and have been invoked by minorities around the world. But neither of them, as articulated by the UN's ICCPR, is adequate for the context of national minorities in post-communist Europe. To oversimplify, we can say that for most national minorities, Article 1 (as traditionally understood) is too strong, and Article 27 (as traditionally understood) is too weak. Most national minorities need something in-between, and recent

---

<sup>7</sup> David Chandler, "The OSCE and the internationalisation of national minority rights", in Karl Cordell (ed) Ethnicity and Democratisation in the New Europe (London: Routledge, 1999), p. 66.

<sup>8</sup> See Michael Burns, "Disturbed Spirits: Minority Rights and the New World Orders, 1919 and the 1990s", in S.F. Wells and P. Bailey-Smith (eds.) New European Orders: 1919 and 1991, (Washington: Woodrow Wilson Center Press, 1996); Mark Cornwall, "Minority Rights and Wrongs in Eastern Europe in the Twentieth Century", The Historian Vol. 50 (1996): 16-20; Alan Sharp, "The Genie That Would Not Go Back Into the Bottle: National Self-Determination and the Legacy of the First World War and the Peace Settlement", in S. Dunn and T.G. Fraser (eds) Europe and Ethnicity: The First World War and Contemporary Ethnic Conflict (London: Routledge, 1996).

<sup>9</sup> Article 1: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". Article 27: "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".

developments in Europe regarding minority rights are precisely an attempt to codify certain standards in-between Articles 1 and 27.

The right to self-determination in Article 1 is too strong, for it has traditionally been interpreted to include the right to form one's own state. Precisely for this reason, its scope has been drastically restricted in international law. It has been limited by what is called the "salt-water thesis". The only "peoples" who have a right to independence are those subject to colonization from overseas; national minorities within a territorially contiguous state do not have a right to independence. Hence internal minorities are not defined as separate "peoples" with their own right of self-determination, even if they have been subject to similar processes of territorial conquest and colonization as overseas colonies.

For those national minorities denied recognition as "peoples" under Article 1, the only other option was to appeal to Article 27 of the ICCPR. But this Article is too weak, for "the right to enjoy one's culture" has traditionally been understood to include only negative rights of non-interference, rather than positive rights to assistance, funding, autonomy or official language status. In effect, it simply reaffirms that members of national minorities must be free to exercise their standard rights of freedom of speech, freedom of association, freedom of assembly, and freedom of conscience.

Needless to say, there is a vast space between Article 1 rights to an independent state and Article 27 rights to freedom of cultural expression and association. Indeed, almost all of the conflicts relating to national minorities in post-communist Europe are about this middle area: eg., about the right to use a minority language in courts or local administration; the funding of minority schools, universities and media; the extent of local or regional autonomy; the guaranteeing of political representation for minorities; the prohibition on settlement policies designed to swamp minorities in their historic homelands with settlers from the dominant group, and so on. These issues are an important source of ethnic conflict and political instability in post-communist Europe. yet international law, until recently, had virtually nothing to say about any of them.

As a result, national minorities have been vulnerable to serious injustice. Article 27 has helped protect certain civil rights relating to cultural expression. But it has not stopped states from rescinding funding for minority-language schools, or abolishing traditional forms of local autonomy, or encouraging settlers to swamp minority homelands. None of these policies, which can be catastrophic for national minorities, violate the rights to cultural expression and association protected in Article 27.<sup>10</sup>

For these and other reasons, it is widely recognized that we need a new conception of the rights of national minorities that can fill in the gap between Articles 1 and 27. We need a conception that accords national minorities substantive rights and protections (unlike Article 27), but that works within the framework of larger states (unlike Article 1). This was the task facing European organizations when developing "European standards of minority rights".

While there was a broad consensus that these standards should fill in the space between Articles 1 and 27, there was disagreement about where to start. To oversimplify, we can say that some actors wanted to start with Article 1's right to self-determination, but to weaken it to render it consistent with the territorial integrity of states. This leads us in the direction of various models of "internal self-

---

<sup>10</sup> For a more detailed elaboration of the way that traditional human rights principles fail to protect national minorities from grave injustice, see my Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship (Oxford: Oxford University Press, 2001), chap. 4. The Helsinki CSCE Decisions stated that states "will refrain from resettling and condemn all attempts, by the threat or use of force, to resettle persons with the aim of changing the ethnic composition of areas within their territories" (Helsinki Decisions 1992: VI 23 and 27). However, prohibitions on re-settling people (ie., ethnic cleansing) does not preclude deliberate state settlement policies - ie., providing financial incentives (such as free land or lower taxes) to people who move into a minority's homeland.

determination". Other actors wanted to start with Article 27's right to enjoy one's culture, but then to strengthen it to provide substantive protections. To date, neither option has proven adequate. I will examine the problems each option has faced in the next two sections.

### 3. The Right to Internal Self-Determination

Not surprisingly, most minority elites preferred to start with a (weakened) form of a right to self-determination. Throughout the early 1990s, many intellectuals and political organizations representing national minorities pushed for recognition of a right to internal self-determination, typically through some form of territorial autonomy (hereafter TA). And, for a brief period from 1990 to 1993, there was some indication that this campaign might be successful. For example, the very first statement by a European organization on minority rights after the collapse of communism - the initial 1990 OSCE Copenhagen declaration - went out of its way to endorse territorial autonomy (article 35):

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.

This paragraph does not recognize a "right" to TA, but recommends it as a good way of accommodating national minorities.

An even stronger endorsement of TA came in 1993, in Recommendation 1201 of the Council of Europe Parliamentary Assembly. It contained a clause (article 11) stating that

in the regions where they are a majority, the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching this specific historical and territorial situation and in accordance with the domestic legislation of the State.

Unlike the OSCE Copenhagen declaration, this Recommendation recognizes TA as a "right". Of course, parliamentary recommendations are just that: a recommendation, not a legally binding document. But still this shows that in the early 1990s, there was movement in the direction of endorsing a general principle that justice required some or other effective mechanism for sharing power between majority and national minorities, specifically mentioning TA as one such mechanism.

Many national minority organizations in post-communist Europe viewed the passage of Recommendation 1201 as a great victory. Ethnic Hungarian organizations in particular viewed it as evidence that Europe would support their claims for TA in Slovakia, Romania and Serbia. They assumed this Recommendation would play a central role in the Council of Europe's FCNM which was being drafted at the same time, and that complying with this Recommendation would be required for candidate countries to join the EU.

This expectation was bolstered by the fact that internal self-determination for national minorities has clearly become the general trend within the West itself. The practice of territorial autonomy for sizeable, territorially-concentrated national minorities has become virtually universal in the West. Indeed, one of the most striking developments in ethnic relations in the Western democracies over the past century has been the trend towards creating political subunits in which national minorities form a local majority, and in which their language is recognized as an official language, at least within their self-

governing region, and perhaps throughout the country as a whole. At the beginning of the twentieth-century, only Switzerland and Canada had adopted this combination of territorial autonomy and official language status for substate national groups. Since then, however, virtually all Western democracies that contain sizeable substate nationalist movements have moved in this direction. The list includes the adoption of autonomy for the Swedish-speaking Aland Islands in Finland after the First World War; autonomy for South Tyrol in Italy, and for Puerto Rico in the US, after the Second World War; federal autonomy for Catalonia and the Basque Country in Spain in the 1970s; for Flanders in Belgium in the 1980s; and most recently for Scotland and Wales in the 1990s.

If we restrict our focus to sizeable and territorially-concentrated national minorities, this trend is now essentially universal in the West. All groups over 250,000 that have demonstrated a desire for TA now have it in the West, as well as many smaller groups (such as the German minority in Belgium).<sup>11</sup> The largest group that has mobilized for autonomy without success is the Corsicans in France (175,000 people). But even here, legislation was recently adopted to accord autonomy to Corsica, and it was only a ruling of the Constitutional Court that prevented its implementation. So France too, I think, will soon join the bandwagon.

Moreover, while the shift to territorial autonomy was originally controversial in each of the countries that adopted it, it has quickly become a deeply entrenched part of political life in these countries. It is inconceivable that Spain or Belgium or Canada, for example, could revert to a unitary and monolingual state. And no one is campaigning for such a reversal. Indeed, no Western democracy

---

<sup>11</sup> My focus here is on groups that demonstrate a desire for TA, as reflected for example in consistently high levels of support for politicians or political parties that campaign for TA. We can call these "mobilized" national minorities, since their members have demonstrated consistent support for typically nationalist goals of autonomy and official language rights. The emergence of such mobilized national minorities is of course the result of political contestation. National minorities do not enter the world with a fully-formed nationalist consciousness: they are constructed by ethnic entrepreneurs and ethnic elites who seek to persuade enough of their members that it makes sense to mobilize politically as a national minority for national goals. There are cases where these attempts to generate a nationalist consciousness amongst the members of a minority have failed. One case in Western Europe are the Frisians in the Netherlands. From a historical viewpoint, they have as much claim to be a distinct "nation" as any other ethnonational group in Europe. Yet attempts by Frisian elites to persuade people of Frisian descent or people living in historic Friesland that they should support nationalist political objectives have repeatedly failed. This is of course fully acceptable from a liberal point of view. National minorities may have a *right* to mobilize for territorial autonomy, but they certainly have no *duty* to do so. Whether or not claims for territorial autonomy are advanced should be determined by the wishes of the group's members, as shaped and expressed through free democratic debate and contestation.

My focus here is on how European states deal with those groups that have demonstrated a desire for territorial autonomy - ie., in which nationalist political leaders have succeeded in a free and democratic debate in gaining the support of a majority of the members of the group. I am not assuming that such nationalist constructions will (or should) succeed. Their success has to be explained, not simply taken as a given, just as the failure of the nationalists in Friesland has to be explained, rather than taken as somehow normal or natural. My project in this paper is not to explain the success or failure of particular acts of nationalist construction, but rather to explore how states should respond to the cases of successful mobilization, in which the members of national minority groups have shown consistently high levels of support for nationalist objectives. It is these cases that are the "problem" to which European organizations were seeking a solution through the adoption of international norms of minority rights.

that has adopted territorial autonomy and official bilingualism has reversed this decision. This is evidence, I think, that this model for accommodating sizeable/concentrated national minorities has been very successful in terms of liberal-democratic values of peace, prosperity, individual rights, and democracy.<sup>12</sup>

In short, if there is such a thing as a "European standard" for dealing with mobilized national minorities, some form of internal autonomy would appear to be it. This is the model Western democracies today use to deal with the phenomenon of substate nationalist groups, and national minorities in post-communist Europe had reason to hope that it would be established as a norm for their countries as well.

Of course, the fact that internal autonomy has become the norm in practice in the West does not mean that it can be codified as a general norm in international law. As I noted earlier, these Western practices were not debated in terms of general principles of "the rights of national minorities", and it is not clear how a norm of internal self-determination could be formulated in a generalized way. However, it's worth noting that this very issue was being debated in a closely related context of international law: namely, the rights of indigenous peoples. The UN's Draft Declaration on the Rights of Indigenous Peoples, submitted in 1993, has several articles affirming the principle of internal self-determination, including:

Article 3: Indigenous peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.

Article 15: [Indigenous peoples] have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Article 26: Indigenous peoples have the right to own, develop, control and use the lands and territories... which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources...

Article 31: Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal affairs...

Article 33: Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

This draft declaration is still a draft, and hence not binding international law.<sup>13</sup> But the basic idea that indigenous peoples have a right to internal self-determination is now widely endorsed throughout the international community, and is reflected in other recent international declarations on indigenous rights, including by the Organization of American States and the International Labour Organization.

This shows that there is no inherent reason why international law cannot accept the idea of internal self-determination. The status of national minorities in post-communist Europe is not identical to that of indigenous peoples in the Americas or Asia. But there are some important similarities in both history and aspirations, and many of the standard arguments for recognizing a right of internal self-

---

<sup>12</sup> For a defense of this claim, see my "Justice and Security in the Accommodation of Minority Nationalism", in Alain Dieckhoff (ed) The Politics of Belonging: Nationalism, Liberalism and Pluralism (New York: Lexington, 2004), 127-54.

<sup>13</sup> S. James Anaya, Indigenous Peoples in International Law (Oxford: Oxford University Press, 1996).

determination for indigenous peoples also apply to national minorities.<sup>14</sup>

So there were several reasons why national minorities in post-communist states could reasonably hope that some form of internal self-government would be codified as part of the "European standards" for the treatment of national minorities. This approach is in fact the norm within Western Europe today, it has been recognized as a valid principle in international law with respect to indigenous peoples, and it was endorsed in important statements by European organizations, including the OSCE in 1990 and the Council of Europe Parliamentary Assembly in 1993.

However, as it turns out, the Assembly's Recommendation 1201 reflects the high-water mark of support for TA within European organizations. Since then, there has been a marked movement away from support for TA. The Framework Convention, adopted just two years after Recommendation 1201, avoids any reference to TA. Not only is TA not recognized as a "right", it is not even mentioned as a recommended practice. Nor does TA appear in any subsequent declaration or recommendation of European organizations, such as the series of Hague, Oslo and Lund Recommendations adopted by the OSCE from 1996 to 1999,<sup>15</sup> or the new constitution of the European Union. And the European Commission for Democracy Through Law has ruled that national minorities do not have rights of self-determination.<sup>16</sup> For all intents and purposes, ideas of internal self-determination have disappeared from the debate about "European standards" on minority rights.

There are a number of reasons for this. For one thing, the idea of autonomy faced intense opposition from post-communist states. They feared that recognizing any idea of internal self-determination or minority autonomy would be destabilizing. Governments feared that granting TA to some groups would lead to problems of both "escalation" and "proliferation".<sup>17</sup> The former fear is that groups granted internal self-determination will then escalate their demands into full-blown secession. The latter fear is that if internal self-determination is offered to one highly vocal or mobilized group, then other groups, previously quiescent, will come out of the woodwork and demand their own autonomy.

Of course, the same two fears of escalation and proliferation were present in the West as well, and yet Western states have nonetheless proceeded with internal autonomy. Fears of escalation and proliferation have turned out to be exaggerated, at least in the Western context.<sup>18</sup> However, these fears are exacerbated in many post-communist countries by the fact that national minorities often share a

---

<sup>14</sup> Indeed, the most influential commentator on the international law on indigenous rights accepts that other national groups should also be able to claim rights to internal self-determination (Anaya, Indigenous Peoples). For a detailed discussion of the similarities and differences between indigenous peoples and national minorities, see my Politics in the Vernacular, chap. 6. It's worth noting that organizations representing one national minority in Eastern Europe - namely, the Crimean Tatars - have explicitly defined themselves as an "indigenous people" for the purposes of international law.

<sup>15</sup> Hague Recommendations on Education Rights of National Minorities (1996); Oslo Recommendations on Linguistic Rights of National Minorities (1998); Lund Recommendations on Effective Participation of National Minorities (1999).

<sup>16</sup> European Commission for Democracy through Law, Opinion of the Venice Commission on the Interpretation of Article 11 of the draft protocol to the European Convention on Human Rights appended to Recommendation 1201 (Strasbourg: Council of Europe, 1996).

<sup>17</sup> Claus Offe, "'Homogeneity' and Constitutional Democracy: Coping with Identity Conflicts with Group Rights", Journal of Political Philosophy 6/2 (1998): 113-41; Offe, "Political Liberalism, Group Rights and the Politics of Fear and Trust", Studies in East European Thought 53 (2001): 167-82.

<sup>18</sup> I dispute Offe's claim that escalation and proliferation are inherent dangers of TA in "The Impact of Group Rights on Fear and Trust: A Response to Offe", Hagar: International Social Science Review 3/1 (2002): 19-36.

common ethnic or national identity with a neighbouring state, which they may therefore view as their "kin-state" or "mother-country" (eg., ethnic Hungarian minorities in Slovakia vis-a-vis Hungary; ethnic Russian minorities in the Baltics vis-a-vis Russia). In such cases, the fear of escalation is not so much that minorities will become secessionist, but rather that they will become irredentist - ie., that they serve as a fifth-column, supporting efforts by their neighbouring kin-state to take over part or all of the country.<sup>19</sup>

More generally, the very idea of recognizing minorities as "nations within", possessed of their own inherent rights to self-government, challenges the ideology of most post-communist states. These states aspire to be seen as unified nation-states, premised on a singular conception of popular sovereignty, rather than as unions or federations of two or more peoples.<sup>20</sup>

For a variety of reasons, then, claims to internal self-determination have been bitterly resisted in post-communist Europe. As the OSCE High Commissioner on National Minorities has noted, claims to TA meet "maximal resistance" on the part of states in the region. Any attempt by Western organizations to push such models would therefore require maximum pressure, and would make relations between East and West much more conflictual and costly. Hence, in the High Commissioner's judgement, it is more "pragmatic" to focus on more modest forms of minority rights.<sup>21</sup>

Moreover, there was also strong opposition to the idea of entrenching a right to TA for minorities in the West, and to the idea that there would be international monitoring of how Western states treated their minorities. As we've seen, France, Greece and Turkey have traditionally opposed the very idea of self-government rights for national minorities, and indeed deny the very existence of national minorities. And even those Western countries that accept the principle do not necessarily want their laws and policies regarding national minorities subject to international monitoring. This is true, for example, of Switzerland and the United States.<sup>22</sup> The treatment of national minorities in various Western countries remains a politically sensitive topic, and many countries do not want their majority-minority settlements, often the result of long and painful negotiation processes, re-opened by international monitoring agencies. In short, while they were willing to insist that post-communist states be monitored for their treatment of minorities, they do not want their own treatment of minorities examined.

Given these obstacles, it is not surprising that efforts to codify a right to autonomy or internal self-determination for national minorities have failed.

#### 4. The Right to Enjoy One's Culture

---

<sup>19</sup> This is one of the factors that contributes to the general "securitization" of state-minority relations in post-communist Europe (discussed further in my "Justice and Security"). It's interesting to note that even when national minorities in the West are linked by ethnicity to a neighbouring state, they do not today raise fears of disloyalty or security. The French in Switzerland or Belgium are not seen as a fifth-column for France; the Flemish are not seen as a fifth-column for the Netherlands. Even the Germans in Belgium, who have historically collaborated with Germany's aggression against Belgium, are no longer viewed that way. This is testament to the extraordinary success of the EU and NATO in "desecuritizing" ethnic relations in Western Europe.

<sup>20</sup> This is particularly true of those countries, like Romania or Turkey, influenced by the French Jacobin tradition.

<sup>21</sup> Max van der Stoep, Peace and Stability through Human and Minority Rights: Speeches by the OSCE High Commissioner on National Minorities (Baden-Baden: Nomos Verlagsgesellschaft, 1999), p. 111.

<sup>22</sup> Chandler, "OSCE", pp. 66-68; Stuart Ford, "OSCE National Minority Rights in the United States: The Limits of Conflict Resolution", Suffolk Transnational Law Review 23/1 (1999): p. 49.

As support for recognizing a right to internal self-determination has dwindled, the obvious alternative has been to build instead on the principle underlying the ICCPR's Article 27 - namely, the "right to enjoy one's culture". In many ways, the provisions of the Council of Europe's 1995 Framework Convention, and of the 1996-1999 OSCE Recommendations, can be understood in this way. They start from a right to enjoy one's culture, but seek to strengthen it, so as to entail certain positive rights and protections.<sup>23</sup> These positive rights include such things as public funding of minority elementary schools and of minority media, or the right to spell one's surname in accordance with one's own language. In contexts where minorities form a local majority, these rights might also include the right to bilingual street signs and the right to submit documents to public authorities in the minority language. All of these are said to enable the members of minorities to "enjoy their own culture, to profess and practise their own religion, or to use their own language".

While stronger than the original Article 27, this approach is still relatively weak in the rights it accords to national minorities. In particular, it provides no recognition of self-government rights, and no guarantees of official language status. Nor does it guarantee that minorities can pursue higher-level education or professional accomplishment in their own language.

More generally, there is nothing in the Framework Convention or OSCE recommendations that challenges the desire of post-communist states to be unitary nation-states with a single official language. States can fully respect these standards, and yet centralize power in such a way that all decisions are made in forums controlled by the dominant national group. They can also organize higher education, professional accreditation and political offices so that members of minorities must either linguistically assimilate in order to achieve professional success and political power, or migrate to their kin-state. (This is often referred to as the "decapitation" of minority groups: forcing potential elites from minority communities to leave their community to achieve higher education or professional success). In short, these norms do not preclude state policies aimed at the disempowering and decapitation of minorities.

From the perspective of minorities, therefore, and of many commentators, these documents smack of "paternalism and tokenism".<sup>24</sup> By contrast, most post-Communist states are relieved about the general direction these norms are taking. They have expressed much less resistance to the 1995 Framework Convention and the 1996-99 OSCE recommendations than to earlier documents endorsing TA. Post-communist states grumble about the double-standards in the way these norms are applied, but they do not contest their basic validity.<sup>25</sup> In this sense, the decision to base European standards on an updated version of the Article 27 right to enjoy one's culture has indeed proven more "pragmatic".

In another sense, however, this approach has proven quite ineffective. Recall that the original point of developing these norms was to deal with violent ethnic conflicts in post-communist Europe,

---

<sup>23</sup> A similar approach was underway at the United Nations. The UN's 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities was similarly an attempt to expand and strengthen Article 27.

<sup>24</sup> Steven Wheatley, "Minority Rights and Political Accommodation in the 'New' Europe", European Law Review, Vol. 22 Supplement (1997), p. 40. For example, while these norms often allow minorities to submit documents to public authorities in their language, they don't require that they get an answer in their own language.

<sup>25</sup> Post-communist countries believe they are much more closely monitored for compliance with these norms than Western countries like France or Greece, and that they are criticized for engaging in practices that occur unnoted in the West (Steven Ratner, "Does International Law Matter in Preventing Ethnic Conflicts?", New York University Journal of International Law and Politics 32/3 (2000): 591-698; Cohen, Conflict Prevention.

such as in Kosovo, Bosnia, Croatia, Macedonia, Georgia, Azerbaijan, Moldova, and Chechnya. None of these conflicts revolved around Article 27-type rights to enjoy one's culture. The violation of such rights was not the cause of violent conflict, and respect for such rights would not resolve the conflicts. The same is true about the other major cases where European organizations feared potential violence, such as the Hungarian minorities in Romania and Slovakia, or the Russian minority in Ukraine.

In all of these cases, the issues in dispute are not covered by the FCNM or the OSCE recommendations. These are conflicts involving large, territorially-concentrated groups who have manifested the capacity and the aspiration to govern themselves and to administer their own public institutions in their own language, and who typically have possessed some form of self-government and official language status in the past. They have mobilized for territorial autonomy, official language status, minority-language universities, and consociational power-sharing. None of these groups would be satisfied with the meagre rights guaranteed by the FCNM and OSCE recommendations.

The fact that these national minorities are not satisfied with these provisions is sometimes taken as evidence of the illiberalism of their political culture, or the radicalism of their leadership. But it's worth noting that no sizeable politically mobilized national minority in the West would be satisfied either. No one can seriously suppose that national minorities in Catalonia, Flanders, Quebec, Bern, South Tyrol, Aland Islands or Puerto Rico would be satisfied simply with minority elementary schools but not mother-tongue universities, or bilingual street signs but not official language status, or local administration but not regional autonomy.

This isn't to say that there are no contexts in post-communist Europe where current FCNM or OSCE norms would provide a realistic basis for state-minority relations. I think they will work well in those countries which are essentially ethnically homogenous - eg., where the dominant group forms 90-95% of the population - and where the remaining ethnic groups are small, dispersed, and already on the road to assimilation. This is the situation, for example, in the Czech Republic, Slovenia, and Hungary. None of the minorities in these countries are in fact capable of exercising regional autonomy, or of sustaining a high degree of institutional completeness (eg., of sustaining their own universities), and most already show high levels of linguistic assimilation. For these groups, the FCNM/OSCE norms provide all that they could ask for. They allow such small and half-assimilated minorities to negotiate their integration into the dominant society with a certain amount of dignity and security. It allows them to "die with their boots on".<sup>26</sup> Similarly, the FCNM/OSCE norms will likely be satisfactory to small, dispersed and partly assimilated minorities in other post-communist countries, such as the Vlach in Macedonia, or the Armenians in Romania.

The problem, of course, is that these minorities were not (and are not) the ones involved in serious ethnic conflict. The problem of ethnic violence and potentially destabilizing ethnic conflict in post-communist Europe is almost exclusively confined to groups that are capable of exercising self-government and of sustaining their own public institutions, and which therefore contest with the state for control over public institutions.<sup>27</sup> And for these groups, the FCNM and OSCE norms are largely

---

<sup>26</sup> I take the phrase from Ina Druviete ("Linguistic Human Rights in the Baltic States", International Journal of the Sociology of Language 127 (1997): 161-85), although she was describing the attitude of the Soviet Union to minority languages.

<sup>27</sup> One possible exception to this generalization is the Roma. Some commentators speculate that issues relating to the Roma could become sources of violence and instability, even though the Roma have not shown an interest in territorial autonomy or in creating their own separate public institutions. European organizations are therefore devoting much time and effort into examining state policies towards the Roma. However, the current FCNM/OSCE norms were not intended to deal with the situation of the Roma. Indeed, the OSCE has recently recommended the adoption of a separate Romani

irrelevant.

In the end, therefore, the new European standards are not really very pragmatic after all. If the goal is to effectively deal with the problem of potentially destabilizing ethnic conflict, then we need norms that actually address the source of these conflicts. And any norms that start from an Article 27-style "right to enjoy one's culture" are unlikely to do that.<sup>28</sup>

### 5. A Retreat from Minority Rights?

It seems then that neither of the two approaches to building European standards of minority rights - whether based on a right to self-determination or a right to enjoy culture - has succeeded in developing meaningful and effective international norms. Even though self-determination is being interpreted in a weakened form compared to its original formulation in Article 1 of the ICCPR, it is still too strong for many countries to accept. And even though the right to enjoy one's culture is being interpreted in a strengthened form compared to its original formulation in Article 27 of the ICCPR, it is still too weak to actually resolve the sources of ethnic conflict.

If neither of these options is feasible and effective, what are the alternatives? One option is to abandon the idea of developing European norms on minority rights. After all, the EU and NATO survived and flourished for many years without paying any attention to minority rights.<sup>29</sup> Why not reconsider the decision to make minority rights one of the foundational values of the European order?

Indeed, one could argue that the original decision in the early 1990s to develop such norms was based on a mistaken prediction about the likelihood that ethnic conflict would spiral out of control. It has since become clear that ethnic violence is a localized phenomenon in post-communist Europe, and that the prospects for violence in countries like Slovakia or Estonia are virtually nil for the foreseeable future. So perhaps it is unnecessary to monitor whether these countries are treating their minorities in accordance with (so-called) European norms.

To be sure, Western observers might not like some of the policies that these countries would adopt if left to their own devices. But it is unlikely that these policies would lead to violence and instability. Some of these countries might experiment with heavy-handed assimilationist policies, but if so, these policies would almost certainly fail, and in the end a domestic consensus would emerge on a more liberal policy. This is precisely what happened in the West, and there's no reason to assume it wouldn't or couldn't happen in the East. Moreover, liberal policies are more likely to be perceived as legitimate, and hence to be stable, if they emerge from these sorts of domestic processes, rather than

---

Rights Charter.

<sup>28</sup> There is no conceptual or philosophical reason why a right to enjoy one's culture can't be interpreted in such a robust way as to support claims to territorial autonomy or official language status. This is precisely what various "liberal nationalist" political theorists have done in their writings. The idea of a right to culture is invoked by writers like Yael Tamir and Joseph Raz as the basis for their defense of a right to national self-determination (Yael Tamir, Liberal Nationalism (Princeton: Princeton University Press, 1993); Avishai Margalit and Joseph Raz, "National Self-Determination", Journal of Philosophy 87/9 (1990): 439-61). But, politically speaking, there is no chance that such a "nationalist" reading of a right to culture will be adopted in international law. As we've seen, the whole idea underlying the Article 27 right to enjoy one's culture was to provide an alternative to the Article 1 right of national self-determination.

<sup>29</sup> Recall that, prior to 1989, the EU tacitly allowed Greece to persecute its minorities, and NATO allowed Turkey to persecute its minorities (Judy Batt and J. Amato, "Minority Rights and EU Enlargement to the East" (Florence: European University Institute, RSC Policy Paper #98/5, 1998).

being imposed from without.

For these reasons, some commentators have suggested that we stop pressuring post-communist countries to comply with international norms on minority rights.<sup>30</sup> This would not necessarily preclude all forms of Western intervention. As I noted earlier, ethnic conflicts can undermine regional peace and stability. Violence, massive refugee flows, and arms-smuggling can spillover into neighbouring countries, and destabilize entire regions. The international community has a right to protect itself against such potentially destabilizing ethnic conflicts in post-communist Europe.

However, insofar as *security* is the real motivation for Western intervention, then presumably state-minority relations should be monitored, not for their compliance with international norms, but for their potential threats to regional peace and security. Monitoring should aim to identify those cases in which the status and treatment of minorities might lead to these sorts of spillover effects.

And indeed European organizations have been engaged in this sort of security monitoring. In addition to the monitoring of compliance with international norms, European organizations have also been engaged in a parallel process of monitoring countries for their potential threats to regional security. This parallel process has largely been organized through the OSCE, including the office of the High Commissioner on National Minorities. Indeed, the High Commissioner's mandate is explicitly defined as part of the OSCE's "security" basket, and his task is to provide early-warnings about potential threats to security, and to make recommendations that would defuse these threats.<sup>31</sup> And behind the OSCE, of course, lies NATO, with its security mandate, and its power to intervene militarily if necessary, as we saw in Bosnia and Kosovo.

In short, we have two parallel processes of "internationalizing" state-minority relations: one process monitors post-communist states for their compliance with general norms of minority rights (what we can call the "legal rights track"); and a second process monitors post-communist states for their potential threats to regional stability (the "security track").<sup>32</sup>

The existence of this parallel security track means that even if compliance with international norms was no longer monitored, Western states could still intervene based on considerations of regional security where there are identifiable spillover risks. In fact, this security track has always been more important than the legal rights track in determining actual intervention in post-communist states. The most important and well-known cases of Western intervention on minority issues in post-communist states have worked through the security track. These interventions have been based on calculations about how to restore security, not on how to uphold universal norms such as the FCNM.

---

<sup>30</sup> When Western governments were deciding whether to intervene in Kosovo, an American columnist famously said "give war a chance". War is bad, he said, but it's important for both sides to learn the hard way that they can't defeat the other, and so accept the need to sit down and negotiate a compromise. A more modest version of the same idea is defended by Adam Burgess. He says we should "give assimilation a chance" (Burgess, 'Critical Reflections'). Assimilationist policies in post-communist Europe might be unpleasant, and might fail, but it's important for states (and dominant groups) to learn the limits of their capacities, and the strength of minority resistance, and so accept the necessity of coming to some settlement with their minorities.

<sup>31</sup> Martin Estebanez, "The High Commissioner on National Minorities: Development of the Mandate", in Michael Bothe et al (eds) The OSCE in the Maintenance of Peace and Security, (The Hague: Kluwer, 1997): 123-65; van der Stoep, Peace and Stability.

<sup>32</sup> For a more detailed discussion of these two tracks, see Will Kymlicka and Magda Opalski, Can Liberal Pluralism Be Exported? Western Political Theory and Ethnic Relations in Eastern Europe (Oxford: Oxford University Press, 2001), pp. 369-86.

Consider the way Western organizations have intervened in the major cases of ethnic violence in post-communist Europe: eg., in Moldova; Georgia; Azerbaijan; Kosovo; Bosnia; and Macedonia. In each of these cases, Western organizations have pushed post-communist states to go far beyond the requirements of the FCNM. They have pushed states to accept either some form of territorial autonomy (in Moldova; Georgia; Azerbaijan; Kosovo) and/or some form of consociational power-sharing and official language status (in Macedonia and Bosnia).

In short, in the contexts where Western organizations really have faced destabilizing ethnic conflict, they have immediately recognized that the FCNM is of little use in resolving the actual conflicts, and that some form of power-sharing is required. The precise form of this power-sharing is determined by a range of contextual factors, not least the actual military balance of power amongst the contending factions. Since the motivation for Western intervention is to protect regional security, it is necessary that the West's recommendations be based on an accurate assessment of the actual threat potential raised by the various actors.

Since the security track has done much of the real work in enabling and guiding Western policies towards post-communist Europe, why do we need the legal rights track? If, as I've argued, there is no feasible way to ground effective international norms of minority rights on either a right to self-determination or a right to enjoy culture, why not just give up on the idea of a legal rights track, while preserving the capacity to intervene in post-communist Europe based on considerations of security?

I suspect that there are some leaders of Western organizations who regret having established the legal rights track in 1990, and who might now wish to retreat from it. However, I doubt this is possible. As I mentioned earlier, ideas of minority rights have now become institutionalized at several different levels in Europe, and would be difficult to dislodge.

Moreover, the security track may not work without an underlying legal rights track. On its own, the security track has a perverse tendency to reward state intransigence and minority belligerence. It gives the state an incentive to invent or exaggerate rumours of kin-state manipulation of the minority, so as to reinforce their claim that the minority is disloyal and that extending minority rights would jeopardize the security of the state. It also gives the minority an incentive to threaten violence or simply to seize power, since this is the only way its grievances will reach the attention of the international organizations monitoring security threats. Merely being untreated unjustly is not enough to get Western attention within the security track, unless it is backed up with a credible threat to be able to destabilize governments and regions.<sup>33</sup>

For example, consider the OSCE's approach to TA. As we've seen, after its initial recommendation of TA in 1990, the OSCE has shifted towards discouraging TA, and has actively counselled various minorities to give up their autonomy claims, including the Hungarians in Slovakia. But the OSCE has supported autonomy in several other countries, including Ukraine (for Crimea), Moldova (for Gaguzia and TransDneister), Georgia (for Abkhazia and Ossetia), Azerbaijan (for Ngorno-Karabakh) and Serbia (for Kosovo). What explains this variation? The OSCE says that the latter cases are "exceptional" or "atypical",<sup>34</sup> but so far as I can tell, the only way in which they are exceptional is that minorities seized power illegally and extra-constitutionally, without the consent of the state.<sup>35</sup> Where

---

<sup>33</sup> Chandler, "OSCE", p. 68. Cf. "Minorities should not be confronted with the situation that the international community will only respond to their concerns if there is a conflict. Such an approach could easily backfire and generate more conflicts than it resolves. An objective, impartial and non-selective approach to minorities, involving the application of minority standards across the board, must therefore remain a crucial part" (Alfredsson and Turk, "International Mechanisms", pp. 176-7).

<sup>34</sup> Zaagman, *Conflict Prevention*, p. 253n84.

<sup>35</sup> In all of these cases except Crimea, the minority seized power through an armed uprising. In the

minorities have seized power in this way, the state can only revoke autonomy by sending in the army and starting a civil war. For obvious reasons, the OSCE discourages this military option, and recommends instead that states should negotiate autonomy with the minority, and accept some form of federalism or consociationalism that provides after-the-fact legal recognition for the reality on the ground. Hence the HCNM recommended that it would be dangerous for Ukraine to try to abolish the autonomy that Russians in Crimea (illegally) established.<sup>36</sup>

By contrast, wherever a minority has pursued TA through peaceful and democratic means, within the rule of law, the OSCE has opposed it, on the grounds that it would increase tensions. According to the HCNM, given the pervasive fears in post-communist Europe about minority disloyalty and secession, any talk about creating new TA arrangements is bound to increase tensions, particularly if the minority claiming TA borders on a kin state. Hence the HCNM's recommendation that Hungarians in Slovakia not push for TA, given Slovak fears about irredentism.<sup>37</sup>

In short, the security approach rewards intransigence on the part of both sides. If minorities seize power, the OSCE rewards it by putting pressure on the state to accept an "exceptional" form of autonomy; if the majority refuses to even discuss autonomy proposals from a peaceful and law-abiding minority, the OSCE rewards it by putting pressure on minorities to be more "pragmatic". This is perverse from the point of view of justice, but it seems to be the inevitable logic of the security-based approach. From a security perspective, it may indeed be correct that granting TA to a law-abiding minority increases tensions; while supporting TA after it has been seized by a belligerent minority decreases tensions.

Insofar as this is the logic of the security approach, it has the paradoxical effect of undermining security. Long-term security requires that both states and minorities moderate their claims, accept democratic negotiations, and seek fair accommodations. In short, long-term security requires that state-minority relations be guided by some conception of justice and rights, not just by power-politics. And this, of course, is what the legal rights track was supposed to be promoting, and why it must supplement the security track.

## 6. The Right to Effective Participation

We seem to be caught in a bind. European organizations have made an irreversible commitment to developing international legal norms regarding national minorities. However, existing attempts to develop such norms have been either too strong (if based on norms of self-determination) or too weak (if based on a right to enjoy one's culture). Is there some third approach that can fill the gap between Articles 1 and 27, and that can provide a more principled guide for regulating the sort of claims that actually underlie the serious cases of ethnic conflict in post-communist Europe?

One option is to invoke the principle that the members of national minorities have a right to "effective participation" in public affairs, particularly in matters affecting them. This idea of "effective participation" was already present in the original 1990 Copenhagen Declaration. Indeed it was on the basis of this principle that the Declaration recommended TA. Minority autonomy was advocated as a

---

case of Crimea, the Ukrainian state barely existed on Crimean territory, and so the Russians did not have to take up arms to overthrow the existing state structure. They simply held an (illegal) referendum on autonomy and then started governing themselves.

<sup>36</sup> van der Stoel, Peace and Stability, p. 26; Packer, "Autonomy within the OSCE: The Case of Crimea", in Markku Suksi (ed) Autonomy: Applications and Implications (The Hague: Kluwer, 1998), pp. 295-316.

<sup>37</sup> Van der Stoel, Peace and Stability, p. 25.

good vehicle for achieving effective participation. More recent declarations have dropped the reference to internal autonomy, but retain the commitment to effective participation.<sup>38</sup> Indeed, references to effective participation are becoming more prominent. For example, it is the central topic of the most recent set of OSCE Recommendations (the Lund Recommendations on Effective Participation of National Minorities, adopted in 1999).

This idea of a right to effective participation is attractive for a number of reasons. For one thing, it sounds admirably democratic. Moreover, it avoids the tokenist connotations of a right to "enjoy one's culture". It recognizes that minorities want not only to speak their languages or profess their religions in private life, but also want to participate as equals in public life. A right to effective participation recognizes this political dimension of minority aspirations, while avoiding the "dangerous" and "radical" ideas of national self-determination.<sup>39</sup>

The main reason why effective participation has become so popular, however, is that it is vague, subject to multiple and conflicting interpretations, and so can be endorsed by people with very different conceptions of state-minority relations. In this sense, the apparent consensus on the importance of effective participation hides, or postpones, deep disagreements on what this actually means.

On the most minimal reading, the right to effective participation simply means that the members of national minorities should not face discrimination in the exercise of their standard political rights to vote, engage in advocacy, and run for office. This minimalist reading is invoked to push Estonia and Latvia to grant citizenship to their ethnic Russians, and to enable them to vote and run for office even if they lack full fluency in the titular language.

On a somewhat more robust reading, effective participation requires not just that members of minorities can vote or run for office, but that they actually achieve some degree of *representation* in the legislature. This may not require that minorities be represented precisely in proportion to their share of the overall population, but serious under-representation would be viewed as a concern. This reading is invoked to prohibit attempts by states to gerrymander the boundaries of electoral districts so as to make it more difficult to elect minority representatives. It can also be invoked to prohibit attempts by states to revise the threshold needed for minority political parties to gain seats in PR electoral systems.

In Poland, for example, the German minority regularly elects deputies to parliament because it is exempted from the usual 5% threshold rule. A similar policy benefits the Danish minority party in Germany. By contrast, Greece raised its electoral threshold precisely to prevent the possibility of Turkish MPs being elected.<sup>40</sup> This sort of manipulation might well be prohibited in the future.

But neither of these two readings - focusing on the non-discriminatory exercise of political rights and equitable representation - really gets us to the heart of the problem in most cases of serious ethnic conflict. Even when minorities are able to participate without discrimination, and even when they are represented in rough proportion to their population, they may still be permanent losers in the democratic

---

<sup>38</sup> "The participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities" (OSCE Copenhagen Declaration, 1990, Article 35). "The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them" (FCNM, 1995, Article 15).

<sup>39</sup> Walter Kemp, "Applying the Nationality Principle: Handle with Care", Journal on Ethnopolitics and Minority Issues in Europe, Issue 4, 2002.

<sup>40</sup> Minority Rights Group, World Report on Minorities (London: Minority Rights Group, 1997), p. 157.

process. This is particularly true in contexts where the dominant group views the minority as potentially disloyal, and so votes as a bloc against any policies that empower minorities. (Consider the nearly-universal opposition within Slovakia to autonomy for the Hungarian-dominant regions, or the opposition within Macedonia to recognizing Albanian as an official language). In these contexts, it may not matter whether minorities exercise their vote, or elect MPs in accordance with their numbers: they will still be outvoted by members of the dominant group. The eventual decision will be the same whether minorities participate in the decision or not.

Taken literally, the term "effective participation" would seem to preclude this situation of national minorities being permanent political minorities. After all, "effective" participation implies that participation should have an effect - ie., that participation changes the outcome. The only way to ensure that participation by minorities is effective, in this sense, is to adopt counter-majoritarian rules that require some form of power-sharing. This may take the form of internal autonomy or of consociational guarantees of a coalition government.

We can call this the maximalist reading of a "right to effective participation" - one that requires counter-majoritarian forms of federal or consociational power-sharing. This is obviously the interpretation that many minority organizations endorse. But it is strongly resisted by most states, East and West, for precisely the same reason that earlier references to internal self-determination were resisted (fears of escalation, proliferation, irredentism, etc.). Having successfully blocked the move to codify a right to internal autonomy, states are not going to accept an interpretation of effective participation that provides a back-door for autonomy. Agreement on a right to effective participation was possible precisely because it was seen as an alternative to, not a vehicle for, minority self-government. The interpretation of effective participation is therefore likely to remain focused at the level of non-discrimination and equitable representation - ie., at a level which does not address the actual sources of ethnic conflict.

There is one potential exception to this generalization. European organizations may adopt a maximalist interpretation of effective participation *where forms of power-sharing already exist*. It is widely recognized that attempts by states to abolish pre-existing forms of minority autonomy are a recipe for disaster (eg., Kosovo, Ngorno-Karabakh, Ossetia, etc.). European organizations would therefore like to find a basis in international law to prevent states from revoking pre-existing forms of minority autonomy. The norm of effective participation is a plausible candidate: attempts to revoke pre-existing autonomy regimes can be seen as a deliberate attempt to disempower minorities, and hence a denial of their right to effective participation.

This idea that effective participation protects pre-existing forms of autonomy and power-sharing has been developed by some commentators,<sup>41</sup> and has implicitly been invoked by the OSCE itself, when justifying its recommendations for TA and consociationalism in countries like Georgia and

---

<sup>41</sup> Annelies Verstichel argues that the Advisory Committee examining conformity with the FCNM has implicitly adopted a non-retrogression clause regarding autonomy ("Elaborating a Catalogue of Best Practices of Effective Participation of National Minorities", European Yearbook of Minorities Issues 2002/3). Similarly, Sian Lewis-Anthony argues that the jurisprudence regarding Article 3 of the First Protocol of the European Charter of Human Rights can be extrapolated to protect existing forms of autonomy ("Autonomy and the Council of Europe - With Special Reference to the Application of Article 3 of the First Protocol of the European Convention on Human Rights", in Markku Suksi (ed) Autonomy: Applications and Implications (The Hague: Kluwer, 1998), pp. 317-42). At a more philosophical level, Allen Buchanan has argued that there should be international protections for existing forms of TA, but denies that there should be norms supporting claims for TA by groups that do not yet have it (Justice, Legitimacy and Self-Determination, Oxford: Oxford University Press, 2004).

Moldova. I said earlier that these power-sharing recommendations emerged out of the "security track", rather than from any reading of international legal norms. But Western organizations have been keen to show that these recommendations were not just a case of rewarding belligerent minorities, and that there is a normative basis for their recommendations. The claim that abolishing pre-existing forms of power-sharing erodes effective participation provides a principled basis for their recommendations.

The difficulty, of course, is to explain why it is only *pre-existing* forms of TA that protect effective participation. If TA is needed to ensure the effective participation of Abkhazians in Georgia, or Armenians in Azerbaijan, why isn't it also needed for Hungarians in Slovakia or Albanians in Macedonia? If abolishing pre-existing autonomy disempowers minorities, why aren't minorities whose claims to autonomy were never accepted also disempowered? (Conversely, if power-sharing institutions are not needed to ensure the effective participation of the Hungarians in Slovakia, why are they needed for Armenians in Ngorno-Karabakh, or Russians in Crimea?).

There seems to be no principled basis for privileging those minorities that happen to have acquired or seized autonomy at some point in the past. The differential treatment of minority claims to autonomy can only be explained as a concession to realpolitik. From a prudential point of view, it is simply much more dangerous to take away pre-existing autonomies from minorities who have fought in the past to acquire it than to refuse to grant new autonomies to minorities who have not shown the willingness to use violence in their pursuit of autonomy.

In short, interpretations of "effective participation" that privilege pre-existing autonomy suffer from the same flaw as the security track: ie., they reward belligerent minorities while penalizing peaceful and law-abiding minorities. Like the security track, the "effective participation" approach, as it is currently being developed, is calibrated to match the threat potential of the contending parties. Those minorities with a capacity and willingness to destabilize governments and regions can get serious forms of power-sharing in the name of effective participation; those minorities who have renounced threats of violence do not.

This suggests that the effective participation approach replicates, rather than resolves, the problems we identified with the other approaches. If effective participation is interpreted maximally to entail power-sharing, then it is too strong to be acceptable to states, and will be rejected for the same reason that the internal self-determination approach was rejected. If effective interpretation is interpreted minimally to cover only non-discrimination and equitable representation, then it is too weak to actually resolve serious cases of ethnic conflict, and will be ineffective for the same reasons that the right to culture approach was ineffective. And if we examine how the idea of effective participation has actually been invoked in cases of conflict, we will see that, like the security track, it is based on power politics, not general principles.

We can make the same point another way. When we talk about effective participation, we need to ask "participation in what"? From the point of view of most post-communist states, the members of national minorities should be able to effectively participate in the institutions of a unitary nation-state with a single official language. From the point of view of many minority organizations, the members of national minorities should be able to effectively participate in the institutions of a multilingual, multination federal or consociational state. These different conceptions of the nature of the state generate very different conceptions of what is required for effective participation within the state. Commentators sometimes write as if the principle of effective participation can be invoked to resolve these conflicts between states and minorities over the nature of the state, but in fact we need first to resolve the question of the nature of the state before we can even apply the principle of effective participation. And to date, that basic conflict over the nature of the state has been resolved in post-communist Europe by force, not principles. Where minorities have seized autonomy, effective participation is interpreted as supporting federal and/or consociational power-sharing within a multilingual, multination state. Where

minorities have not used force, effective participation is interpreted as requiring only non-discriminatory participation and equitable representation within a unitary, monolingual state.

Advocates of the idea of effective participation suggest that it can provide a principled formula for resolving deep conflicts over the nature of the state. It seems to me, however, that the idea of effective participation presupposes that this issue has already been resolved, and is therefore either too strong (if it presupposes that states have accepted the idea of internal self-determination within a multinational state) or too weak (if it presupposes that minorities have accepted the idea of a unitary and monolingual state).

Notwithstanding these limitations, it seems clear that European organizations now view the idea of effective participation as the most promising avenue for the ongoing development of international norms on minority rights. So we are almost certain to see new, and perhaps more successful, interpretations emerging in the future.<sup>42</sup>

## 6. Conclusion:

I've argued that attempts to develop international norms of minority rights in Europe since 1990 have run into a series of dilemmas. Appeals to a right to internal self-determination have proven too controversial; appeals to a right to enjoy one's culture have proven too weak; and appeals to a right to effective participation have proven too vague to actually address any of the conflicts in post-communist Europe that generated the call for the "internationalization" of minority issues in the first place.

This is not necessarily a bad thing. As I noted earlier, the initial impulse to develop these norms was an unduly pessimistic view about the likelihood of ethnic violence in post-communist Europe. If violence is unlikely, then why not let countries come to their own settlements on ethnic issues at their own speed? After all, it took Western countries many decades to work out their current accommodations with national minorities, and some people would argue that the success of these accommodations is due to the fact that they were the result of gradual domestic negotiations, rather than being imposed through external pressure.

Actually, international pressure did play an important and beneficial role in several Western cases, although this is now often forgotten. For example, the autonomy arrangement for the Åland Islands was an externally-determined solution under the League of Nations, which has nonetheless worked very well. Germany's accession to NATO in 1955 was conditional on its working out a reciprocal minority rights agreement with Denmark, an agreement which is now seen as a model of how kin-states can work constructively through bilateral relations to help minorities in neighbouring states. There was strong international pressure on Italy to accord autonomy to South Tyrol in 1972, which today is seen as an exemplar of successful accommodation. In all of these cases, a certain degree of international pressure was needed to initiate the settlement,<sup>43</sup> although these settlements have now become domestically self-sustaining (and indeed have often been enhanced or expanded as a result of

---

<sup>42</sup> For a more optimistic view of the potential of the right to effective participation to overcome this impasse, see Verstichel, "Elaborating a Catalogue"; and Marc Weller's report prepared for the conference "Filling the Frame: 5<sup>th</sup> Anniversary of the entry into force of the Framework Convention for the Protection of National Minorities" (Strasbourg, Council of Europe, 30-31 October 2003).

<sup>43</sup> Conversely, several commentators argue that some of the more intractable conflicts in the West, such as Northern Ireland and Cyprus, cannot be resolved by purely domestic procedures and negotiations, and that the international community needs to play a more active role. See the essays in Michael Keating and John McGarry (eds) Minority Nationalism and the Changing International Order (Oxford: Oxford University Press, 2001).

domestic procedures).<sup>44</sup>

So it would be inaccurate to suggest that Western states have “naturally” or inevitably gravitated towards fair accommodation of national minorities without international pressure. In fact, some combination of international pressure and/or domestic violence was present at one point or another in most Western cases of autonomy.<sup>45</sup> Given this history, it seems naïve to assume that countries in eastern and central Europe will inevitably and peacefully move towards significant minority rights through their own domestic democratic processes. As in the West, some extra-parliamentary push – whether it is international pressure and/or domestic violence – may be needed for post-communist countries to seriously consider federal or consociational power-sharing. However, the goal of any international pressure should be to start a process that becomes domestically self-sustaining (and, ideally, domestically self-improving).

In that sense, perhaps the international community should limit its role in post-communist Europe to ensuring that there is the minimum level of respect for human rights and political freedom needed to create a democratic space for states and minorities to slowly work out their own accommodations. The increasing prominence of the idea of “effective participation” may reflect the belief that Western intervention should be aimed at creating the conditions for post-communist societies to work out their own account of minority rights through peaceful and democratic deliberations, rather than seeking to impose some canonical set of internationally-defined minority rights.

This may be the direction we are headed in. And perhaps this is the most we can reasonably expect. Attempts to formulate general principles of international law to resolve deep conflicts over autonomy, power-sharing and language rights may simply be unrealistic.<sup>46</sup> Over time, we might hope and expect post-communist countries to follow the Western trend towards multilingual, multinational states, but it is unnecessary, and perhaps counter-productive, to try to jump-start this process through the codification and imposition of international norms of substantive minority rights.

However, if this is indeed the direction we are headed in, it is important that the minimal standards being demanded of post-communist states be presented as precisely minimum standards. A serious problem we confront at the moment, I believe, is that many actors view the FCNM and other international norms, not as a minimum floor from which minority rights should be domestically negotiated, but rather as a maximal ceiling beyond which minorities must not seek to go.

There is in fact a concerted effort by most post-communist states to present the FCNM and OSCE recommendations as the outside limits of legitimate minority mobilization. Any minority leader or organization that asks for something beyond what these documents provide is immediately labelled as a “radical”. These minimal international standards are not being treated as the preconditions needed to

---

<sup>44</sup> For a discussion of some of the factors that have helped make these settlements domestically self-sustaining and self-enhancing, see my “Canadian Multiculturalism in Historical and Comparative Perspective”, Constitutional Forum 13/1 (2003): 1-8.

<sup>45</sup> The role of violence is obvious in Northern Ireland, the Basque Country, Cyprus and Corsica, but there were also low-level acts of violence in Quebec and South Tyrol (eg., bombings of state property like mailboxes or energy pylons). The knowledge that some members of the minority were willing to resort to violence undoubtedly concentrated the mind of the state. As Deets puts it, “Across Europe, autonomy came out of specific historical and political contexts, and it is far easier to discuss the political calculations and the desire to quell bombing campaigns that went into autonomy decisions than it is to point to a clear acceptance of principles of justice for minorities” (“Liberal Pluralism: Does the West Have Any to Export?”, Journal on Ethnopolitics and Minority Issues in Europe, Issue 4, 2002).

<sup>46</sup> However, the case of indigenous peoples shows what can be achieved on these issues through international law where there is a political commitment to do so.

democratically negotiate the forms of power-sharing and self-government appropriate to each country, but rather are viewed as eliminating the need to adopt, or even to debate, forms of power-sharing and self-government. When minority organizations raise questions about substantive minority rights, post-communist states respond "we meet all international standards", as if that foreclosed the question of how states should treat their minorities. The claim that "we meet all international standards" has in fact become a mantra amongst post-communist states, taking the place of any substantive debate about how to actually respond to minority claims regarding powers, rights and status.

Sadly, I believe that the international community is often complicit in this effort to treat international norms as a maximal ceiling rather than a minimal floor, and to stigmatize minority leaders who dare to ask for the sorts of substantive minority rights enjoyed by most sizeable national minorities in the West.<sup>47</sup> If it proves impossible to codify substantive minority rights in international law, we must at least be clear that the meagre provisions currently codified in European instruments are the starting-point for democratic debate, not the end-point.

---

<sup>47</sup> Or so I argue in Can Liberal Pluralism be Exported? .