THE MORAL FOUNDATIONS AND GEOPOLITICAL FUNCTIONS OF INTERNATIONAL NORMS OF MINORITY RIGHTS: A EUROPEAN CASE STUDY[1]

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The last 15 years has seen an explosion of efforts to develop international norms of minority rights, both at the global level and at regional levels. Globally, the UN adopted a declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in 1992, and is debating a Draft Declaration on the Rights of Indigenous Peoples. Other international organizations, such as the International Labour Organization and the World Bank, have also developed norms on minority rights. Declarations have also been drafted by organizations at the regional level, such as the Organization of American States and the Council of Europe.

These developments offer the promise of protecting some of the most vulnerable groups in the modern world from serious injustices. Ethnic minorities have not fared well under the Westphalian system of sovereign "nation-states". Various policies of assimilation and exclusion have been directed at minorities in the name of constructing homogenous nation-states, and the international community has historically turned a blind eye to these injustices. Today, however, there is a growing commitment to remedying this situation, and it is increasingly accepted that the treatment of minorities is a matter of legitimate international concern and monitoring. At a minimum, these evolving norms set limits on the means that states can use to pursue their visions of national homogenization. But they also, implicitly at least, offer a competing vision of the state, one which views diversity as an enduring reality and defining feature of the polity, and which views tolerance as a core value.

Viewed in this light, the trend towards codifying international norms of minority rights is surely a desirable and progressive one. And yet it raises a number of moral dilemmas and ambiguities. These emerging norms are uneven in their coverage, in part because of the way they have been shaped by larger geopolitical considerations, and in part because we simply lack the conceptual vocabulary to define these norms in a consistent and principled way.

In this paper, I want to explore some of these dilemmas through a close examination of recent attempts to codify the "rights of national minorities" in Europe. As I hope to show, the European experience provides a fascinating, if

1. Prepared for the IVR World Congress, Granada, May 2005.

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flawed, experiment in developing international norms of minority rights, one with lessons for other contexts.

1. THE DRIVE TO INTERNATIONALIZE MINORITY RIGHTS IN POST-COMMUNIST EUROPE

The story begins with the collapse of communism in central and eastern Europe in 1989, which was accompanied by a number of violent ethnic conflicts. In retrospect, these violent conflicts have largely been confined to the Caucuses 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.[2]

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.[3] They declared, in the words of the Organization for Security and Co-operation in Europe 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

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2. See the issue of the *New Statesman and Society*, June 19, 1992, headlined "Eurogeddon? The Coming Conflagration in East-Central Europe".

3. By "national minorities" I mean groups living on (what they view to be) their historic homeland, but whose homeland (or part of it) has been incorporated into a larger state in which they form a minority. This includes both trans-border minorities —ie., national groups which form the majority in one state, but whose historic homeland extends across what is now an international boundary, so that some members of the group are on the "wrong" side of the border from their "kin-state" (eg., ethnic Hungarians in Romania and Slovakia). It also includes stateless nations —ie., groups which think of themselves as `nations' but do not control any state, and whose historic homeland is incorporated into a larger country (eg., Scots) or divided between two or more countries (eg., Basques). Some commentators would also include indigenous peoples, like the Sami, into this category, since they too share the characteristic of having their historic homeland incorporated into a larger state. However, most commentators distinguish indigenous peoples from national minorities, partly on the grounds that indigenous peoples have not traditionally understood themselves as "nations", or engaged in the project of "nation-building". I will return to these definitional issues below.

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 Organization for Security and Co-operation in Europe (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,[4] but they have made clear that they support the work of the OSCE-HCNM and the Council of Europe, and expect post-communist 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

4. 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.

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" (Burgess 1999). 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.

In short, for a complex mixture of humanitarian, self-interested, and ideological reasons, minority rights have became "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.

2. THE SOURCES OF INTERNATIONAL MINORITY RIGHTS NORMS: THE RIGHT TO ENJOY ONE'S CULTURE

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.

But what were these "international norms"? Western states differ significantly in terms of which rights they accord to which minorities, or indeed whether they even acknowledge the existence of "minorities" (Dimitras 2004). Where then does one look to formulate "European standards" of minority rights?

Observers with a long memory recalled that this question had been tackled earlier, at the last major period of imperial breakdowns after World War 1, 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 (e.g., Kovacs 2003; Cornwall 1996; Sharp 1996; Burns 1996).

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 stan-

dards 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 Article 27 of the UN's 1966 International Covenant on Civil and Political Rights (ICCPR), which states that:

> "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".

For all intents and purposes, this was the only example of an international norm of minority rights that was available in 1990, and so it inevitably provided the background for attempts to define European norms.

While this Article provided a starting point, it was widely viewed as insufficient, for two reasons. First, the right to "enjoy one's culture" as originally formulated included 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 minorities must be free to exercise their standard rights of freedom of speech, association, assembly, and conscience.[5]

These minimal guarantees, while vital, are inadequate to address the issues underlying violent ethnic conflicts in post-communist Europe. These conflicts centred on various positive claims, such as 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; or the prohibition on settlement policies designed to swamp minorities in their historic homelands with settlers from the dominant group. Article 27 has nothing to say about such claims. It protects certain civil rights relating to cultural expression, but it does not prohibit states from rescinding funding to minority-language schools and universities, abolishing local autonomy, gerrymandering electoral rules or constituency boundaries, or encouraging settlers to swamp minority homelands. None of these policies, which can be catastrophic for national minorities, and which often lead to violent conflict, violate the rights to cultural expression and association protected in Article 27.[6] If European standards

5. Over the years since 1966, the UN Human Rights Committee has attempted to re-interpret the Article so as to include certain positive rights, particularly for indigenous peoples, but it has not been interpreted in a way that addresses the positive claims underlying the conflicts in post-communist Europe.

6. For a more detailed elaboration of the way that traditional civil rights principles fail to protect national minorities from grave injustice, see Kymlicka 2001: chap. 4.

were to be useful in resolving such conflicts, they would have to address claims for positive minority rights.

Article 27 has a second limitation. It applies to all types of ethnocultural minorities, no matter how large or small, recent or historic, territorially concentrated or dispersed. Indeed, the UN Human Rights Committee has declared that Article 27 applies even to visitors within a country! Article 27, in other words, can be seen as a truly *universal* cultural right —a right that can be claimed by any individual, and carried with her as she moves around the world.

This commitment to identifying universal cultural rights limits the sorts of minority rights that can be recognized. In particular, it precludes claims that flow from facts of historic settlement or territorial concentration. Since Article 27 articulates a universal and portable cultural right that applies to all individuals, even migrants and visitors, it does not articulate rights that are tied to the fact that a group is living on (what it views as its) historic homeland. Yet it is precisely claims relating to residence on a historic homeland that are at stake in all of the violent ethnic conflicts in post-communist Europe —e.g., in Bosnia, Kosovo, Macedonia, Georgia, Chechnya, Ngorno-Karabakh. Indeed, homeland claims are at the heart of most violent ethnic conflicts in the West as well (e.g., the Basque Country, Cyprus, Corsica, Northern Ireland). In all of these cases, minorities claim the right to govern themselves in what they view as their historic homeland, including the right to use their language in public institutions within their traditional territory, and to have their language, history and culture celebrated in the public sphere (e.g., in the naming of streets, the choice of holidays and state symbols). None of these claims can plausibly be seen as universal or portable —they only apply to particular sorts of minorities with a particular sort of history and territory. In short, these are all cases of ethno*national* (or ethnonationalist) conflict, revolving around competing claims to nationhood and national territory.

If European standards were to be useful in resolving conflicts in post-communist Europe, they would need to go beyond universal minority rights and articulate *targeted* minority rights, focused on the specific types of ethnonational groups involved in these conflicts. As a result, the new European norms that have emerged since 1990 are all targeted at so-called "national" minorities. Whereas Article 27 lumps together "national, ethnic, religious and linguistic" minorities, the Council of Europe's Framework Convention refers only to "national minorities", and the OSCE High Commissioner focuses solely on "national minorities". While there is no universally agreed-upon definition of "national minorities", the term usually refers to historically-settled minorities, living on or near what they view as their national homeland. These are the sorts of groups involved in the violent and destabilizing ethnic conflicts that generated the call for European norms in the first place. Most European countries have explicitly stated that immigrant groups are therefore not national minorities.

This commitment to developing targeted norms for "national" minorities was courageous. No other international body has attempted to formulate such norms. Several international organizations have targeted minority rights for other types

of minority groups. For example, the United Nations, the International Labour Organization, and the Organization of American States have all developed targeted norms regarding indigenous peoples. Some of these organizations have also formulated norms targeted at migrants.[7] However, no one had previously attempted to formulate international norms directed at "national minorities".

This gap is puzzling. If one thinks about the sorts of state-minority relations with the greatest potential for large-scale harm, injustice and violence, one could argue that they typically involve national minorities. While both indigenous peoples and migrants are vulnerable groups in need of international protection, most of the violent and destabilizing ethnic conflicts around the world involve conflicts between states and homeland ethnonationalist groups (e.g., Kashmir, Kurdistan, Tamil Eelam, Aceh, Tigray, etc). As Walker Connor notes, the phenomenon of minority nationalism is a truly universal one. The countries affected by it

> are to be found in Africa (for example, Ethiopia), Asia (Sri Lanka), Eastern Europe (Romania), Western Europe (France), North America (Guatemala), South America (Guyana), and Oceania (New Zealand). The list includes countries that are old (United Kingdom) as well as new (Bangladesh), large (Indonesia) as well as small (Fiji), rich (Canada) as well as poor (Pakistan), authoritarian (Sudan) as well as democratic (Belgium), Marxist-Leninist (China) as well as militantly anti-Marxist (Turkey). The list also includes countries which are Buddhist (Burma), Christian (Spain), Moslem (Iran), Hindu (India) and Judaic (Israel). (Connor 1999: 163-4).

In this light, developing international norms that address the difficult challenges raised by such ethnonational groups is a central task for the theory and practice of minority rights around the world. The European experiment in defining these norms, therefore, is of pivotal significance.

Unfortunately, having set themselves this courageous task, European organizations then lost their nerve. The new norms that have been developed by the Council of Europe and the OSCE do not in fact address the distinctive challenges raised by national minorities. The Council of Europe's FCNM and the OSCE's Recommendations do move beyond Article 27 by explicitly including certain modest positive rights, such as public funding of minority elementary schools, the right to spell one's surname in accordance with one's own language, and the right to submit documents to public authorities in the minority language. These changes are significant, but they remain essentially versions of the idea of a "right to enjoy one's culture". As such, they do not address the distinctive characteristics and aspirations of national minorities —ie., their sense of nationhood and claims to a national homeland. What such groups typically seek is not just the right as individuals to join with other individuals in enacting particular cultural practices,

7. Eg., the UN's Convention on the Protection of the Rights of All Migrant Workers, 1990.

but the right as a national community to govern themselves on their homeland, and to use their self-government powers to express and celebrate their language, history and culture in public space and public institutions.

The FCNM and OSCE Recommendations are strangely silent on all of the central claims at stake in the post-communist ethnic conflicts. They do not discuss how to resolve (often competing) claims relating to territory and self-government, or how to assign official language status. Nor do they provide any guarantees that minorities can pursue higher-level education or professional accomplishment in their own language. States can fully respect these new 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). Given that these norms do not preclude state policies aimed at the disempowering and decapitation of minorities, they are widely criticized by minority leaders and commentators as "paternalism and tokenism" (Wheatley 1997: 40).[8]

The resulting framework of minority rights norms is both ineffective and unstable. It is ineffective because these norms do not solve the problems they were intended to address. Recall that the original point of developing these norms was to deal with violent ethnic conflicts in post-communist Europe, such as in Kosovo, Bosnia, Croatia, Macedonia, Georgia, Azerbaijan, Moldova and Chechnya. None of these conflicts revolved around the right of individuals to join with others to enjoy their 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.

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8. For example, these norms often allow minorities to submit documents to public authorities in their language, but don't require that they get an answer in their own language.

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 —e.g., 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 (e.g., 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. 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.[9] And for these groups, the FCNM and OSCE norms are largely irrelevant. 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.[10]

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9. 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 Rights Charter.

10. 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

The current framework of minority rights is not only politically ineffective, it is also conceptually unstable. Only "national minorities" are currently protected by these European norms, but since the actual rights being codified are not based on claims of historic settlement and territorial concentration, there is no reason why they shouldn't apply to immigrant groups as well. And indeed we see a movement within both the Council of Europe and the OSCE to redefine the category of "national minorities" to include immigrants.[11] This would be a move back to the original Article 27 model that attempts to articulate universal cultural rights applicable to all minorities, new or old, large or small, dispersed or concentrated.

Many commentators assume that redefining the category of 'national minorities' to include immigrants is a progressive step: the more groups that are protected, the better. Moreover, immigrants today in Europe are clearly a vulnerable group in need of international protection from hostile national governments. Since it is unlikely that EU states will adopt any declarations aimed at the protection of immigrants,[12] the only realistic way to achieve this protection is by fitting immigrants under some pre-existing scheme of minority protection, which in the European context means sliding them under the umbrella of `national minorities'.

While this extension is progressive in some respects, giving protection to groups that would not otherwise be protected, we must also recognize that it is potentially regressive in other respects. If the category of "national minorities" is redefined in this way, it will make it even less likely that these norms will develop in a way that grapples with the distinctive claims of historic/territorial minorities. The bold experiment of articulating international norms targeted at national minorities, and capable of resolving potentially violent ethnonationalist conflict, is slowly being abandoned. It would be ironic if European norms on the rights of national minorities turned out to be more beneficial to immigrant groups, for whom they were not originally intended, than for the ethnonational groups whose plight generated the call for international norms in the first place.

3. THE SELF-GOVERNMENT ALTERNATIVE?

Was there a viable alternative? Is it possible to formulate norms that can provide a principled basis for responding to the claims of ethnonational groups?

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status. Indeed, 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 (Tamir 1993; Margalit and Raz 1990). But, politically speaking, there is no chance that such a "nationalist" reading of a right to culture will be adopted in international law. As I discuss below, the Article 27 right to enjoy one's culture was intended as an alternative to the right of national self-determination.

11. See, for example, Hofmann 2002: 254-6.

12. It's worth noting that none of the EU states has ratified the 1990 UN Convention on migrant rights.

Some commentators have argued that the most promising alternative lies elsewhere in international law —namely, in the principle that all "peoples" have a right to "self-determination". This principle of self-determination dates back to the founding Charter of the United Nations, and is reaffirmed in Article 1 of the 1966 International Covenant on Civil and Political Rights.[13] It is, therefore, a long-standing norm within international law, although it has not traditionally been applied to national minorities. According to some commentators, however, a suitably revised interpretation of the principle of self-determination can and should be applied to national minorities, and would provide a principled basis for addressing their claims.

It is generally accepted that the right to self-determination in Article 1 *as traditionally interpreted* cannot simply be extended to national minorities, since it is typically understood to include the right to form one's own state. Precisely for this reason, its scope has traditionally been drastically restricted in international law. It has been limited by what is called the "salt-water thesis". Although the Article says that "all peoples" have the right of self-determination, in fact the only "peoples" who have been able to assert this right are those subject to colonization from overseas. National minorities within a territorially contiguous state have not been recognized as separate "peoples" with their own right of self-determination, no matter how culturally or historically distinct they have been. Groups like the Scots or Kurds may think of themselves as distinct "peoples", and most historians and social scientists may accept this label, but the international community has not recognized them as such, for fear that this would entail granting them a right to form an independent state.

However, if we adopt a more modest interpretation of the right to self-determination, one that is consistent with the territorial integrity of states, it may be possible to extend its scope to include national minorities. This is the goal of various models of "internal self-determination". According to these models, national minorities, as distinct "peoples" or "nations" living on their historic homelands, have the right to some form of self-determination within the boundaries of the larger state, typically through some form of territorial autonomy (hereafter TA). Many commentators have argued that it is morally arbitrary to accord self-determination to overseas peoples while denying it to internal peoples. Both have a sense of distinct nationhood and a desire for self-government, and both have typically been subject to conquest, involuntarily incorporation and historic discrimination. A morally consistent approach to self-determination would, therefore, recognize its applicability to internal national minorities (and indigenous peoples), at least in the form of a right to territorial autonomy (eg,. Moore 2001).

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13. 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".

Throughout the early 1990s, many intellectuals and political organizations representing national minorities pushed for international recognition of such a right to internal self-determination. 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 contains 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 TA for sizeable, territorially-concentrated national minorities has become virtually universal in the West. Indeed, one of the most striking develop-

ments 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).[14] The largest group that has mobilized for autonomy without success are the Corsicans in France (175,000 people). But even here, legislation was recently adopted to accord autonomy to

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14. 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 national(ist) 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 clear case in Western Europe are the Frisians in the Netherlands. From a historical viewpoint, they have as much claim to be a distinct "people" 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 claim territorial autonomy, but they certainly have no *duty* to do so. Whether or not a national minority claims territorial autonomy should be determined by the wishes of the majority of its 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 TA — i.e., 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.

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 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.[15]

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. It is not clear how such a norm of internal self-determination could be formulated in a generalized way. However, it's worth noting that this very issue has been 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,

15. For a more detailed defense of this claim, see Kymlicka 2004.

> procedures and practices, in accordance with internationally recognized human rights standards.

This draft declaration is still a draft, and hence not binding international law (Anaya 1996). 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-determination for indigenous peoples also apply to national minorities.[16]

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; it can be seen as a more consistent application of the idea of the self-determination of peoples, avoiding the arbitrariness of the traditional `salt-water' interpretation; 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. As we've seen, 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,[17]

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16. Indeed, the most influential discussion and defense of the international law on indigenous rights accepts that other national groups should also be able to claim rights to internal self-determination (Anaya 1996). For a detailed discussion of the similarities and differences between indigenous peoples and national minorities, see Kymlicka 2001: 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.

17. 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).

or the new constitution of the European Union.[18] And the European Commission for Democracy Through Law has ruled that national minorities do not have rights of self-determination, even in the form of internal self-determination (European Commission for Democracy Through Law 1996). 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" (Offe 1998; 2001). 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.[19] However, these fears are exacerbated in many post-communist countries by the fact that national minorities often share a common ethnic or national identity with a neighbouring state, which they may therefore view as their "kin-state" or "mother-country" (e.g., 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 —i.e., that they serve as a fifth-column, supporting efforts by their neighbouring kin-state to take over part or all of the country.[20]

More generally, the very idea of recognizing minorities as "nations within", possessed of their own inherent rights to self-government, challenges the ideology

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18. The European Free Alliance, a coalition of minority nationalist parties from various regions of Western Europe (eg., Catalonia, Scotland, Flanders), proposed that the EU Constitution contain a clause that recognized "the right of self-government of all those territorial entities in the Union whose citizens have a strong and shared sense of national, linguistic or regional identity". The proposal was never seriously debated (www.greens-efa.org).

19. I criticize Offe's claim that escalation and proliferation are inherent dangers of TA in Kymlicka 2002.

20 . This is one of the factors that contributes to the general "securitization" of state-minority relations in post-communist Europe - see Kymlicka 2004. 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.

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.[21]

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 modest forms of minority rights, such as those guaranteed in the FCNM (van der Stoel 1999: 111).

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. 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 (Dimitras 2004). 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 (Chandler 1999: 66-68; Ford 1999: 49). 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. While the international community has shown some willingness to consider this idea in the case of indigenous peoples, it has proven too controversial in the case of national minorities.

4. FROM MINORITY RIGHTS TO GEOPOLITICAL SECURITY?

It seems then that neither of the two approaches to building European standards of national minority rights —whether based on a right to enjoy one's culture or a right to self-determination— has succeeded in developing meaningful and effective international norms. Even though the right to enjoy one's culture is now

21. This is particularly true of those countries, like Romania or Turkey, influenced by the French Jacobin tradition. For the strength of this ideology in post-communist Europe, see Liebich 2004.

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. And even though self-determination is now being pursued 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.

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.[22] 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 approve of 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, of course, is 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 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.[23] 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 spill over into neighbouring countries, and destabilize entire regions. The international community has a right to protect

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22. Recall that, prior to 1989, the EU tacitly allowed Greece to persecute its minorities, and NATO allowed Turkey to persecute its minorities (Batt and Amato 1998).

23. When Western governments were deciding whether to intervene in Kosovo, an American columnist famously said "give war a chance" (Littwak). 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 1999). 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.

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 (Estebanez 1997; van der Stoel 1999). 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").[24]

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.

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).

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24. For a more detailed discussion of these two tracks, see Kymlicka and Opalski 2001: 369-86.

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 there is no feasible way to ground effective international norms of minority rights on either a right to enjoy one's culture or a right to self-determination, 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.[25] 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 treated unjustly is not enough to attract Western attention within the security track, unless it is backed up with a credible threat to be able to destabilize governments and regions.[26]

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

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25. It's interesting to note that the draft EU Constitution incorporates all of the "Copenhagen criteria" except for minority rights. This is a tacit recognition, I suspect, that the 1991 decision to make minority rights a determinant of EU membership was based on a (mis)-reading of events in the early 1990s, not any genuine normative commitment.

26. Chandler 1999: 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 1993: 176-7).

claims, including the Hungarians in Slovakia. But the OSCE has supported autonomy in several other countries, including Ukraine (for Crimea), Moldova (for Gaugazia 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" (Zaagman 1997: 253n84; Thio 2003: 132), but so far as I can tell, the only way in which they are exceptional is that minorities seized power illegally and extraconstitutionally, without the consent of the state.[27] Where 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 ethnic Russians in Crimea (illegally) established (van der Stoel 1999: 26).

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 (van der Stoel 1999: 25).

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.

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27. In all of these cases except Crimea, the minority seized power through an armed uprising. In the 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.

5. 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 provide a more principled guide for regulating the sort of claims that actually underlie ethnic conflict in post-communist Europe?

One option that seems to be gaining strength 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 good vehicle for achieving effective participation. More recent declarations have dropped the reference to internal autonomy, but retain the commitment to effective participation.[28] 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 (Kemp 2003).

From the perspective of normative theory, this approach has the added advantage of avoiding the danger of "essentializing" groups. Both the "right to enjoy one's culture" and the "right to self-determination" seem to rest on assumptions about the inherent character of national minorities: the former implies that such groups have a shared and distinctive "culture" that they seek to preserve, the latter implies that they have a shared and distinctive "national identity" that they seek to advance through self-government. Yet we know that such groups are not internally homogenous. Members of the group are likely to disagree over the sorts of cultural traditions they wish to maintain, and the extent to which they wish to remain

28. "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).

culturally distinct from the larger society. Similarly, they are likely to disagree over the nature of their `national identity', or the sort of self-government needed to protect it. For the international community to endorse a "right to culture" or a "right to self-determination" appears to prejudge these internal debates, siding with those who argue for greater cultural distinctiveness and/or greater national autonomy, as if "culture" or "nationhood" were somehow essential and indisputable characteristics of these groups, rather than contested claims. This sort of concern has been invoked by postmodernists and critical theorists as a grounds for rejecting the constitutionalization of substantive group rights, and endorsing instead purely procedural minority rights, such as guarantees of participation and consultation (eg., Benhabib 2002; Fraser 2003: 82). These procedural rights avoid making substantive assumptions about the distinctiveness of a group's culture or the boundedness of its identity. A right to effective participation allows members of a group to advance claims of culture and nationhood, but requires that these claims be vindicated through deliberative democratic processes, rather than pre-approved by international law.

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 (MRG 1997: 157). 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 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 —i.e., that participation changes the outcome. The only way to ensure that participation by minorities is effective in this sense within divided societies 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 —i.e., 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 (e.g., 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,[29] and has implicitly been invoked by the OSCE itself, when justifying its recommendations for TA and consociationalism in countries like Georgia and 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: i.e., 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 acquire and maintain serious forms of power-sharing in the name of effective participation; those minorities who have renounced threats of violence do not.

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29. Annelies Verstichel argues that the Advisory Committee examining conformity with the FCNM has implicitly adopted a non-retrogression clause regarding autonomy (Verstichel 2002/3). Similarly, 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 (Lewis-Anthony 1998). At a more philosophical level, Allen Buchanan argues 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 (Buchanan 2004).

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 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 multination state) or too weak (if it presupposes that minorities have accepted the idea of a unitary and monolingual state).[30]

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30. This puts a different light on claims about the "essentializing" character of minority rights. I noted earlier that many postmodernists and critical theorists have rejected the idea of substantive minority rights to culture or self-determination on the grounds that they prejudge and falsely homogenise the character of the group. Yet in rejecting such claims, they did not intend to be supporting essentializing accounts of the "nation-state" as a unitary and monolingual state composed of a single people. They hoped that the idea of effective participation could be neutral in the struggle between

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.

For example, some commentators have suggested that the Advisory Committee which monitors compliance with the FCNM can and should adopt a norm of 'progressive implementation'. According to this norm, countries would be expected and required to fulfil progressively stronger interpretations of the various FCNM provisions. What counts as adequately fulfilling the FCNM's norms regarding language rights or effective participation today will not be sufficient five years from now. Each time a state submits a report to the Committee, it will be asked 'what have you done for minorities *lately*?'. The idea is not simply to prevent countries from back-sliding (the non-retrogression clause I mentioned earlier), but also to progressively raise the bar in terms of what is required to meet the FCNM norms.[31]

There is no doubt that the Advisory Committee has done some innovative thinking along these lines, aided by the fact that it is composed of independent experts rather than state representatives (Hoffman 2002). If my analysis is correct, however, there are likely to be limits on the extent to which the independent experts on the Advisory Committee will be able to ratchet up the requirements of the FCNM. In particular, I doubt that official language status or TA will come to be seen as requirements of the FCNM, except where minorities have shown a willingness and capacity to undermine stability and security. At the end of the day, the Advisory Committee is only advisory: its recommendations must be approved by states. I suspect that any attempt at raising the bar to include TA and official language status will be rejected by states for the same reason that previous attempts to codify such rights have failed.

6. CONCLUSION

I've argued that attempts to develop international norms of national minority rights in Europe since 1990 have run into a series of dilemmas. Appeals to a right

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minority nationalists and nationalizing states, and could be implemented without prejudging whether it is a multilingual, multination state or a monolingual, unitary nation-state. Yet it is not clear to me that the idea of effective participation can be implemented without taking a stand on this question. If so, the risk of essentialism arises equally whether we accept or reject claims to internal self-determination. Accepting such claims runs the risk of essentializing our conception of the national minority; rejecting them runs the risk of essentializing our conception of the state. Whichever choice we make, we must therefore put in place safeguards that allow citizens to continually challenge oppressive essentialisms, whether minoritarian or majoritarian. This is a central element of a genuinely *liberal* conception of minority rights.

31. For optimistic views along these lines, see Verstichel 2002 and Weller 2003.

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. As a result, the European experiment in formulating the rights of national minorities remains a fascinating but flawed attempt to grapple with one of the most urgent issues of the 21st century. Despite the extraordinary efforts made to codify a set of principles and norms, most ethnopolitical conflicts in Europe are still being resolved on the basis of bargaining power, threat potential, and force, not considerations of justice or international law.

Part of the explanation for this is simply that considerations of realpolitik have trumped arguments of justice: attempts to develop a morally consistent approach to minority rights have run up against the self-interest and security fears of states. But that is not the whole story. There have also been genuinely conceptual difficulties. Effective norms seem to require a degree of "targeting" of minority rights, connecting different categories of rights to different categories of groups. But any such targeting is intensely controversial, and immediately raises fears of arbitrariness, under- and over-inclusion, and essentialism. This is particularly true of the attempt to specify the rights of "national minorities". The decision by European organizations in 1990 to single out this category of group for legal protection was bold, and potentially of global relevance. However, little progress has been made in developing a consensus on the validity of the category or of the sorts of rights attached to it. While progress is continuing in international settings on codifying the rights of other types of groups, such as indigenous peoples and migrants, it remains very unclear whether the European experiment of elaborating norms for national minorities will endure, let alone be repeated in other contexts. The flurry of activity around international norms of national minority rights in Europe in the early 1990s may prove to be a temporary and passing phase.

If so, I think this would be regrettable, although the consequences are unlikely to be catastrophic, at least in the European context. 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 the success of these accommodations is arguably 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 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 a exemplar of successful accommodation. In all of these cases, a certain degree of international pressure was needed to initiate settlements,[32] although they have become domestically self-sustaining, and indeed have often been enhanced or expanded as a result of domestic procedures.[33]

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.[34] Given this history, it seems naïve to assume that countries in Eastern and Central Europe (or elsewhere in the world) 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

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32. 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 Keating and McGarry 2001.

33. For a discussion of some of the factors that have helped make these settlements domestically self-sustaining and self-enhancing, see Kymlicka 2003.

34. 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" (Deets 2002).

law to resolve deep conflicts over autonomy, power-sharing and language rights may simply be unrealistic.[35] 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 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.[36] 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.

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35. 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.

36. Or so I argue in Kymlicka and Opalski 2001.

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