International Human Rights Intervention on Behalf of Minorities in Post-World War I Eastern Europe and Today: Placebo, Poison, or Panacea?

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Since the collapse of communism, the media dutifully has reported the latest ethnic conflicts which have percolated to the forefront of East European politics. Seeking resolution of these conflicts, politicians and analysts have advanced a plethora of prescriptions. These proposals can be categorized as "bottom up" prescriptions, which rely upon grassroots social activity, and "top down" prescriptions, which rely primarily upon a "command-obedience" relationship.¹

¹ Law Professor, Central European University, and Director, Institute for Constitutional and Legislative Policy. The views expressed herein are my own and not those of my employer, the Soros Foundation. An earlier version of this paper was presented at the University of Chicago Law School Roundtable's Symposium on the Rights of Minorities in East European Constitutions on February 20, 1993. I express thanks to those who attended and participated in the Symposium for their comments.

¹ For elaboration of this distinction, see Ethan Klingsberg, Judicial Review and Hungary's Transition from Communism to Democracy, 1992 BYU L Rev 41, 43-46 & nn 1-5 (drawing from the philosophical insights of Hannah Arendt and Emanuel Levinas); Hanna Pitkin, Obligation and Consent, 49 Am Pol Sci Rev 990 (1965) (drawing from Locke); See also Richard Epstein, International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News, 78 Va L Rev 85, 85 (1992) (if "property comes from the bottom up, and not from the top down. . . ., the state does not hand down the law or create property rights,. . . . its chief function is to discover and reflect accurately . . . the community").
Part I provides an overview of such bottom up mechanisms as popular sovereignty based constitutionalism, a revival of civil society corporatism, and free market activity. I then analyze the historical, sociological, and political foundations of criticisms that these mechanisms are incompatible with social reality. Although these criticisms overlook significant post-conventional or cosmopolitan trends in the region, I conclude that there is a strong case against reliance upon bottom up solutions to East European ethnic conflicts. Consequently, the rest of the article focuses upon a top down alternative—international promulgation and enforcement of legal rules and rights necessary for a version of liberal pluralism.

Unfortunately, this top down prescription may more often function in Eastern Europe as a placebo or a poison than as a panacea. Part II explains why the problems plaguing current international efforts to resolve ethnic conflicts in Eastern Europe resemble those pitfalls that Hannah Arendt, a socio-political scholar, and Pablo de Azcarate, Director of the League of Nations’ Minorities Section, detected in the League of Nations’ work to solve minority problems in the very same region after World War I. Both then and now, the international community has recognized the rights of certain ethnic groups to national self-determination and then has attempted to implement legislation to protect minorities in the new nations. I point to past and contemporary problems with this “self-determination syndrome” and rebut thoughtful and practical arguments in favor of partition along ethnic lines. Then I analyze the ineffectiveness of post-World War I and current international minorities protection legislation and the adjudicatory organs charged with enforcing such legislation. The sources of that ineffectiveness include the absence of grassroots legitimacy, reactionary “backlashes” from domestic governments and both majority and minority ethnic groups, and administrative difficulties.

At the outset, I would like to make it clear that this article argues against neither the ends of international human rights instruments and initiatives nor the dedication of energy toward international human rights efforts. In particular, I do not mean to suggest that international human rights endeavors are the root cause of the present conflicts. My point is simply that resorting to internationally imposed and enforced minorities protection instruments has many inadequacies and indirect costs. There are the lessons to be learned from these pitfalls, but these lessons
call for a conscientious approach, not the end of international human rights enforcement.

As set forth in my closing remarks, historical support does exist for international bodies to use certain mechanisms in the effort to resolve East European ethnic conflicts. I draw these conclusions from an analysis of the relative success of the League of Nations' Minorities Committee in comparison with the League’s adjudicatory organ, the Council. I conclude by arguing that if the international community cannot bear the costs of generation-long, full-scale military intervention, then an approach like that of the Minorities Committee is necessary.

I. THE CASE AGAINST ‘BOTTOM UP’ SOLUTIONS TO EAST EUROPEAN ETHNIC CONFLICTS

Prescriptions for the resolution of East European ethnic conflicts from the bottom up—via mechanisms such as popular sovereignty based constitutionalism, a revival of civil society corporatism, and free market opportunities—are subject to criticism for being incompatible with social reality. The popular sovereignty based constitutionalism prescription, as advocated by Bruce Ackerman, envisions the blossoming of pluralistic, social democracies in East-Central Europe via the process of “liberal revolution,” which entails supermajority-oriented (republican) mechanisms for drafting, ratification, and implementation of rights-based constitutions. Civil society prescriptions call for the empowerment of private sector “associational life” on the grounds

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2 Why treat the different ethnic conflicts of East-Central Europe and the former Soviet Union as all subject to the same normative analysis? John A. Armstrong provides a good justification based not only on the somewhat shared past under Marxist-Leninism, but also upon common characteristics that run much deeper historically. See John A. Armstrong, Toward a Framework for Considering Nationalism in East Europe, 2 E Eur Pol & Societies 280 (1988).

3 Bruce Ackerman, The Future of Liberal Revolution (Yale, 1992). Ackerman prescribes the formation of republican constitutional conventions that would “construct a constitutional symbol that might serve as a rallying point for a mobilized liberal politics.” Id at 62. He foresees a ratification process that would bring forward the “considered support [for ‘liberalism’] of a self-conscious and deliberate majority.” Id at 15. Finally, he advocates a specially structured and politically astute judiciary that could “build strong support for the constitution among the People.” Id at 99. He emphasizes that the courts would not function as merely an imposing “political and judicial elite” issuing “benign decisions,” but as vehicles for “channel[ing] . . . political energies” and “seiz[ing] the moment to mobilize popular support for a liberal constitution.” Id at 112. He concludes that achievement of this mass political consciousness raising is a prerequisite to economic productivity, the implementation of privatization and a free market, and the development of civil society. Id at 46-47.
that interaction among grassroots groups produces harmonious and efficient results. Finally, the free market remedy foresees new capitalist opportunities as inspiring rational market behavior, which in turn causes movement away from ethnic clashes and toward Western democratic values.

Criticism of each of these bottom up prescriptions points out that given the “endogeneity” of the recommended bottom up solution, East European social realities render the proposal inapplicable to the region or “pre-sociological.” As sociologist Ernest Gellner puts it, these prescriptions bring to mind an analogy to Henry Higgins’ refrain, “Why can’t a woman be more like a man?”: “Why can’t these Russians and East Europeans be more like Americans?”

These schemes, which are drawn from Western social and political theory, are not necessarily transferrable. Ackerman’s critics describe an absence of constitutional consciousness in Eastern Europe. Post-communist civil society theory skeptics, among whom are many East European theorists who during the

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4 For examples, see Adam Seligman’s portrayal of Michael Walzer’s and Charles Taylor’s civil society prescriptions in the context of East European developments. Adam B. Seligman, *The Idea of Civil Society* 164, 197 (Macmillan, 1992) (describing theories set forth in Charles Taylor, *Modes of Civil Society*, 3 Public Culture 95 (1990) and Michael Walzer, *The Idea of Civil Society*, 38 Dissent 303 (1991)). Much of the basis for relying on the empowerment of civil society as a solution to East European ethnic conflicts stems from a reaction to the fact that communism’s severe suppression of interaction within civil society served to stunt the evolution of East European ethnic cultures toward the type of modern rationality prevalent among many ethnic cultures in the West today. See note 20 and accompanying text (discussing how communism fostered ethnic problems).


6 Judge Posner criticizes Ackerman for ignoring the “endogeneity” of constitution-making. Id at 36; Adam Seligman uses the term “pre-sociological” in his criticism of civil society theory. Seligman, *Civil Society* at 196 (cited in note 4).


8 For a criticism of the popular sovereignty based constitutionalism approach described in note 3, see Posner, E Eur Const Rev at 35-37 (cited in note 5); Gellner, *Innocent Abroad* at 39 (claiming that Ackerman’s prescription is unfeasible due to “an [insufficiently acute sense of . . . the present situation”)] (cited in note 7).

Although Seligman has not directly addressed Ackerman’s prescription, he has portrayed American style constitutionalism as a product of “the very ideology of Americanism, its civil religion,” Seligman, *Civil Society* at 109-110 (cited in note 4), as opposed to the product of a transferable liberal revolutionary process, which Ackerman seems to purport is at the foundation of the American design. See Ackerman, *Liberal Revolution* at 14-18 (cited in note 3). Seligman also sees judicial review in a different light than Ackerman. Compare Ackerman’s vision of the democratic-republican foundation of judicial review, Ackerman, *Liberal Revolution* at 99 (cited in note 3), with Adam B. Seligman, Oral remarks at Hungarian Sociological Association Convention’s Workshop on Civil Society, Budapest, 1991 (“judicial review is the last remnant of natural law”).
1980s propounded civil society as a means to fight communism, argue that functional interaction among private sector associations is inconceivable in East European societies "where pluralism is not solely of interests, but of affective ideological universes as well." A modern civil society cannot thrive where the notion of constructive interest group interaction "does not fully exist" beforehand. Detractors of free market salvation outline the monumental social obstacles to free market transition including: resistance by those actors (state managers and employees, as well as black marketeers) with vested interests in the old system, the burdensome and paradoxical prerequisite of affirmative state action on a grand scale to privatize a state socialist economy, the affinity of the region's widespread ethnic primordialism to the internal economic logic of state socialism, and how those subject to economic hardships during the initial stages of a free market transition are more susceptible to participation in ethnic

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9 Seligman, Civil Society at 200 (cited in note 4).
10 Id at 179.
11 Id at 179 (arguing that Eastern Europe has nothing to gain from Charles Taylor's call for re-empowerment of traditional-communitarian corporate ties). For an analysis of "the crisis of post-communist civil society," drawing on data and observations from throughout the region, see Ethan Klingsberg, Rebuilding Civil Society: Constitutionalism and the Post-Communist Paradox, 13 Mich J Intl L 865 (1992).
12 Posner's free market prescription may well be subject to the same "neglect of endogeneity" charge which he launches against Ackerman's popular sovereignty based constitution-making prescription and which Seligman launches against civil society theorists. Compare Posner, E Eur Const Rev at 35-39 (cited in note 5) (describing transition to a free market as necessitating only "fairly elementary" tasks of institutional transformation and the "technical" matter of privatization) with Klingsberg, 13 Mich J Intl L at 898-901 (cited in note 11) (describing monumental obstacles to free market transition stemming from: (1) contemporary economic actors' (state managers and employees, as well as black marketeers) and political actors' perceptions that they have vested interests in the old system and (2) the paradoxical requirement of affirmative state action on a grand scale to transform a state socialist economy to a free market) (citing Istvan R. Gabor, On the Immediate Prospects for Private Entrepreneurship and Re-embourgeoisement in Hungary (Cornell Project on Comparative Institutional Analysis, Working Papers on Transitions from State Socialism, No. 90.3, 1990); Edmund K. Mokrzycki, The Social Limits of East European Economic Reforms (New School for Social Research East & Central Europe Program Democracy Seminar Working Paper Series, 1991); and other evidence).
13 By "primordial" I intend to signify a publicly and privately separatist cultural outlook. For discussion of the term, see Armstrong, 2 E Eur Pol & Societies at 282 n 2 (cited in note 2) (warily transferring Arend Lijphart's definition of the term in the context of Western Europe to the context of Eastern Europe (citing A. Lijphart, Democracy in Plural Societies (Yale, 1977) (defining "primordial loyalties" as "ideological, religious, linguistic, and regional").
conflicts than rational market conduct.\textsuperscript{15}

Such criticism is supported by a variety of historical, socio-
logical, and political legacies which indicate that contemporary
East European cultures are not prone toward solidarity, rational
interaction, or compromise with proximate "others" living within
the same region or even nation. Current trends toward ethnic
strife are fortified by the legacies of centralized government rather
than autonomous city-states, as well as by the traditional
ethnic segmentation within urban areas and the lack of urban-
countryside assimilation.\textsuperscript{16} Further support comes from the resi-
due of those pre-communist eras marked predominantly by dis-
cretionary elitist and state power rather than a reciprocity of
rights,\textsuperscript{17} and the exercise of economic control by neo-feudal ad-
ministrative nobles rather than independent entrepreneurs and
land owning peasants.\textsuperscript{18} Moreover, national ethnic identities in
Eastern Europe tend to have origins in myths contrived from
non-integrative peasant cultures rather than from politically
empowered cultures that had prior experience with harmonizing
different identities.\textsuperscript{19} Adding to these legacies is the communist

\textsuperscript{15} Tibor Varady, Oral Remarks at Roundtable Symposium on the Rights of Minorities in East European Constitutions, University of Chicago Law School, Feb 19, 1993.

\textsuperscript{16} For discussion of how the "residue" of the history of cities in East-Central Europe underlies contemporary cultural hostility toward minorities, see Armstrong, 2 E Eur Pol & Societies at 290-94, 304 (cited in note 2); Seligman, \textit{Civil Society} at 157-60 (cited in note 4).

\textsuperscript{17} Seligman, \textit{Civil Society} at 157-60 (cited in note 4).

\textsuperscript{18} Id.

\textsuperscript{19} Ernest Renan, \textit{What is a Nation?} (Martin Thom trans) in Homi K. Bhabha, ed, \textit{Nation and Narration} 8, 10-12 (Routledge, 1990) (describing how Western European nations were formed by integration of various ethnicities (often by violent means) and how, "by contrast... [to] these great laws of the history of Western European nations," East European ethnicities "remained as distinct as they were 800 years ago" when it came to the era of nation building); see also Armstrong, 2 E Eur Pol & Societies at 292-94 (cited in note 2) (describing the East European "process[es] of standardizing diverse peasant masses... by pedagogical and journalistic professionals appealing to rural segments[...]
... cultural patterns [which were] sharply divergent from gentry norms" and "which have continued to color nationalist attitudes... [with such elements as]: Celebration of inherited status over occupational achievement; rejection of rational calculation in favor of romantic daring and material liberality; praise of outdoor life in field and forest in contrast to cultivation of urban intellectual and aesthetic interests"); Gyorgy Csepeli, \textit{Competing Patterns of National Identity in Post-Communist Hungary}, 13 Media Culture & Society 328 (1991) (in Hungary "the concept of 'the nation' came before the establishment of proper [integrated and universally representative] national institutions and the emerging national ideology therefore had to refer more actively to elements of the ethnocentric heritage"); Ernest A. Gellner, \textit{L'avvento del nazionalismo, e la sua interpretazione. I miti della nazione e della classe}, in Perry Anderson, ed, \textit{Storia d'Europa} 1, 36-37, 48 (forthcoming 1993) (all citations are to Gellner's personal English translation which is on file with the author and the U Chi L Sch Roundtable) ("Gellner English...
era's negative modernity which entailed a combination of false universalism with harsh restrictions that prevented primordial ethnic identities from integrating meaningfully and developing out of their pre-communist condition. Furthermore, assimilation by different East European ethnic groups into a core culture was often frustrated by the absence of an overwhelming majority of any particular group within a country or region and the inability of any culture to stand out as stronger from either a productivity or spiritual perspective.

These characterizations of primordialism in Eastern Europe often overlook significant post-conventional trends in the region. Such trends include the social modernization in Hungary since the 1960s, the republican roots of much of the Hungarian Constitutional Court's Western style jurisprudence, the civil soci-

Manuscript") (in contrast to Western European nationalisms, "virulent" East European nationalisms emerged via freelance activist "awakeners" who created ethno-national myths "not in opposition to peasant idiosyncrasy, but on the basis of it" and its "Poetry of Unreason") (citing J. Plamenatz, Two Types of Nationalism in E. Kamenka, ed, Nationalism: The Nature and Evolution of An Identity (St. Martin's, 1976) (drawing distinction between Western nationalisms that emerged from expansion of a statist "high" culture and Eastern nationalisms that emerged from ethnic cultures without any pre-existing political authority)).

See Gellner English Manuscript at 38-39 (cited in note 19) (describing how communism stagnated ethnic cultures' evolution toward acceptance of globalization); Seligman, Civil Society at 163-65 (cited in note 4) (developing Elemer Hankiss' "negative modernity" thesis).

Moreover, communism often fostered ethnic primordialism by casting individuals in the dual role of pre-modern regional or tribal boss and communist apparatchik. See, for example, Misha Glenny, Yugoslavia: The Revenger's Tragedy, The New York Review of Books 37, 40-41 (Aug 13, 1992) (describing Albanian communist/ethnic leaders in Kosovo); George I. Mirsky, Central Asia's Emergence, Current History 334, 334-35 (Oct 1992) (describing how communism enhanced clan consciousness through example of local tribal/apparatchik "godfathers" of Soviet Central Asia); George Schopflin, Power, Ethnicity, and Communism in Yugoslavia, New Hungarian Q 3, 22-23 (Winter 1992-93) (describing how "communism operated hand-in-glove with nationalism in Macedonia" and with the evolution of "Moslem national consciousness").


See Democracy is the Guarantee of Modernisation: President Goncz on Hopes and Woes, Hungarian News Agency-Daily News 1 (Jan 7, 1993) (Goncz explained in his 1993 New Year's Address how since the mid-1960s, "social modernisation" has "changed the pattern of society and brought public thinking up to date. What's more, it effectively helped prepare the ground for the eventual social, economic and political transformation that is referred to as the change of regime."); see also Armstrong, 2 E Eur Pol & Societies at 299 (cited in note 2) (explaining how Hungary was an "exception" among the communist bloc in that after 1956 it engaged in at least "a tacit acceptance of the urban 'bourgeois' values once rejected by Magyar nationalism").

ety dynamism and public compromises that led to the adoption of the new Polish abortion law,\(^2_4\) the lack of strong ethnic identification among a significant number of citizens of the former Yugoslavia,\(^2_5\) the "meta-ethnic self-consciousness" of many citizens of the former Soviet Union,\(^2_6\) and the development of skills and cultural interests along Western rather than tribal lines among many former communist apparatchiks.\(^2_7\)

One hypothesis that would resolve the conflicting evidence of post-conventionalism and premodern impulses in Eastern Europe, which has not yet been researched adequately, is that East Europeans largely possess dual identities in that they simultaneously manifest both premodern and post-conventional allegiances.\(^2_8\) This idea of radical primordial/post-conventional

\(^2_4\) Pro-choice observers are quick to condemn the new Polish abortion law as an example of Church intolerance, while neglecting to notice that the process leading to the passage of the compromise legislation demonstrated healthy characteristics of a modern and dynamic civil society, such as: (1) a willingness on the part of the Church to interact and compromise with other civic movements; (2) the diversity of Catholic public opinion; and (3) the capacity of public opinion to mobilize itself effectively through vehicles other than the Church with respect to an issue central to Church beliefs. For descriptions of the events leading to the enactment of the abortion law, including reports on public surveys, the civic groups behind referendum initiatives, and the adoption of compromise positions by Church Primate Jozef Glemp and others. See The Warsaw Voice's weekly coverage from December 1992 through February 1993.

\(^2_5\) See Report of the CSCE Human Rights Rapporteur Mission to Yugoslavia 7 (Jan 1992) ("CSCE I") (discussing the "considerable number of Yugoslav citizens" who lack any strong ethnic identity and now "face[lo] risk of annihilation or forced assimilation") (on file with the U Chi L Sch Roundtable); Rasto Mocnik, Response to My Friends, in Roundtable Conference of Independent Scholars from All Republics of Former Yugoslavia 11, 12, 14 (Oct 1992) ("Mocnik Response") (on file with the U Chi L Sch Roundtable) (charging Westerners with being "blind to civil resistance against the war and the regime in Serbia and Montenegro, [and] dismiss[ing] important progressive and peace oriented groups in Croatia"; attributing "European public sphere[s] literal flood [of] stereotype interpretations" of inhabitants of former Yugoslavia to West's "orientalist' prejudice").

\(^2_6\) For a prediction that many of the communist world's so called "technical administrative intelligentsia" will abstain from tribal identification in the post-communist era because they possess skills and cultural interests along Western lines, see Herbert Kitschel, The Formation of Party Systems in East Central Europe, 20 Politics & Society 7, 23-26 (1992).

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\(^2_8\) See generally Homi K. Bhabha, Narrating the Nation, in Nation and Narration 1, 3-4 (cited in note 19) (describing inherent "Janus faced" ambiguity of nationalist identification); Klingsberg, 1992 BYU L Rev at 97 n 138 (cited in note 1) (discussing ease with
schizophrenia occurred to me during a visit to Zagreb where I joined crowds stopping in at a gallery to view an exhibit that brutally satirized Croatian nationalist symbols. I then continued with the same crowds as they moved on down the road to browse stalls with merchants selling Ustasha and Croatian Army paraphernalia.

II. INTERNATIONAL HUMAN RIGHTS: THE 'TOP DOWN' ALTERNATIVE

Despite the indications of a post-conventional counterweight in Eastern Europe, the evidence of ethnic primordialism and other trends antithetical to broad-based solidarity still presents a very strong case against reliance upon bottom up solutions to East European ethnic conflicts. For this reason, I have chosen to investigate a “top down” alternative: international enforcement of legal rules and rights necessary for some version of liberal pluralism.

The justification for this top down strategy is that once these rules and rights have been in place for a while, ethnic groups, like those nationalities whose capacities to engage in collective aggression were constrained after World War II, will observe the industrial age successes that emanate from living under such conditions and subsequently adopt the outsider enforced rules as their own. Apparently inspired by this hypothesis, the European Community and private foundations are currently dedicating resources to attempts to impose blueprints for pluralistic societies in ethnically divided areas of Eastern Europe via international law enforcement and other top down mechanisms. In particular, they have targeted the republics of the former Yugoslavia, such as Croatia.

The problems plaguing current international efforts to resolve ethnic conflicts in East-Central Europe bear a strong resemblance to those pitfalls that Hannah Arendt, a socio-political scholar, and Pablo de Azcarate, Director of the League of Nations’s Minorities Section, detected in their respective analyses of the League of Nations’s work in the very same region after World War I. The course of events then, as now, is a clamoring

which mimesis (compliance with stereotypical conduct) can be coupled with conduct that subverts a narrow identity) (citing M. Holquist, Stereotyping in Autobiography and Historiography, 9 Poetics Today 453 (1988); Luce Irigaray, This Sex Which Is Not One (Cornell, C. Porter trans, 1985) (discussing subversive duality of compliance with sexist stereotypes)).

29 See Arendt, Totalitarianism 265-325 (cited in note 21); Pablo de Azcarate y Florez,
for the right to national self-determination by a distinct ethnic group, followed by international recognition of that right to nationhood on the condition that the new nation nominally adopt a minorities rights document, drafted by outside experts and subject to enforcement by the international community. Several problems arise from the international community's apparently well-intentioned acquiescence to and participation in this self-determination syndrome.

A. The Self-Determination Syndrome

The first problem with the role of international human rights law in this syndrome is that it supports the legitimation of the principle of national self-determination for distinct ethnic groups. At least in Eastern Europe, the application of this principle leads to the creation of nations for select groups either on an arbitrary basis, or, more often, in response to the demands of those ethnic groups most oriented towards tactics of collective aggression. Such a strategy actually implements and recognizes the very principles that cause many of the ethnic conflicts. For instance, the international community's approach to Yugoslavia has fueled conflicts by helping to shift what could have been a liberal rights revolution to a revolution of collective groups.\(^3\) The international community's failure to recognize or overtly support a movement unless it speaks "the conflict-oriented official jargon"\(^3\)\(^1\) has resulted in discrimination against those with either liberal oriented ethnic identities or no particular ethnic identity.\(^3\)\(^2\)

Despite the self-determination principle's discriminatory character, several thoughtful commentators disagree with my criticism. These analysts conclude that the only workable solution in Eastern Europe is to concede to demands for a plethora of ethnically homogenous states.\(^3\)\(^3\) Although they recognize that

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\(^3\) See Mocnik Response at 12-13 (cited in note 25).

\(^3\)\(^1\) Id at 7; Interview with Aleksa Djilas, Uncaptive Minds 25, 28 (Summer 1992) (the West's approach to Balkan conflicts overlooks the "genuine liberal democrats").

\(^3\)\(^2\) See note 25 and accompanying text (discussing often overlooked evidence of post-conventional trends in Eastern Europe).

\(^3\)\(^3\) See Aleksa Djilas, A House Divided, New Republic 38 (Jan 25, 1993) (arguing that the only realistic international intervention in former Yugoslavia would be support for
their chosen solution entails the costs of both population exchanges and multiplying the number of small nations, these commentators still argue that the social reality of the situation dictates in favor of partition and resettlement.\textsuperscript{34}

The short-cut partition solution must overcome not only the ethical problems of population exchanges and encouragement of discrimination against those without a strong ethnic identity, but also evidence that this solution is incompatible with social reality—which is supposedly the strongest argument in favor of partition. The physical features of the post-communist region dictate against the validation of an ethnic group's right to national self-determination. Arendt explains that while the Hapsburg Empire had failed to “take[] into account or respond[] to the needs” of 100 million who sought identification with a nation-state, the succession states failed to account for 30 percent of that 100 million.\textsuperscript{35}

The root cause of this failure is the great number, small size, and interregional residences of the ethnic groups of East-Central Europe. Similarly, even if the former Soviet Union had adopted Sakharov’s proposal to divide the USSR into 53 national units, this courageous move would have created several new problems: 67 “national minority groups” and over 700 smaller ethnic groups would lack their own national unit; “natives” would be a minority in many units; and a single non-native ethnic group would constitute a clear majority in certain units.\textsuperscript{36} If Eastern Europe is seen through the internationally validated paradigm of national self-determination as “liberation”, then whenever the international community purports to rescue an ethnic group from the “prisonhouse of nations” by recognizing a new nation, it probably has only created a “county jail for minorities.”\textsuperscript{37} It is doubtful


\textsuperscript{35} Arendt, \textit{Totalitarianism} at 271 n 7 (cited in note 21).

\textsuperscript{36} Bakhirov, \textit{New Ethnic Relations} at 6 (cited in note 26).

\textsuperscript{37} I borrow the “county jail” metaphor from Gellner English Manuscript at 24 (cited in note 19).
that a partition and resettlement scheme could bring order to this situation without causing disruptions equivalent to those which the international community claims to be trying to prevent or resolve.

B. The Pitfalls of International Minorities Protection Legislation

The next problem with the international human rights approach arises from its reliance upon internationally enforced minorities rights documents to overcome the discrimination which, as described in the previous section, inevitably stems from the recognition of the self-determination principle. The following application of Arendt's and Azcarate's respective analyses of the post-World War I Minorities Treaties to Croatia's recently adopted Constitutional Law of Human Rights and Freedoms and the Rights of National and Ethnic Communities or Minorities (hereafter referred to as “the Carrington Law,” after its author Lord Carrington) demonstrates the elements of this problem.\(^8\) The Carrington Law has a far greater breadth than the older Minorities Treaties. For the most part, the Carrington Law is not limited by distinctions between nationals, national minorities, nationalities, ethnics, religious minorities, and other labels that often distract such laws from their objective of universal protection. In addition, the Carrington Law provides for proportional representation, limited local self-government in regions where Serbs are in the majority, and both secondary or cultural rights and primary rights, such as the rights to residence and economic freedom. It also provides for international enforcement mechanisms. It is an excellent and comprehensive piece of work on paper. There is perhaps no other document in the world that invokes more international human rights accords, includes a greater list of both positive and negative rights, and simultaneously makes strides toward a consociational structure.

1. Legitimacy.

The Carrington Law, despite these great advances, falters exactly where the Minorities Treaties did earlier in the century.

\(^8\) The Carrington Law tracks the provisions of an agreement designed in the Hague in October 1991. The law as it currently stands was enacted in May 1992 under the supervision of the European Community. It had been enacted earlier, but was then modified as a result of European Community supervision. A copy of this law is on file at the Archive of the University of Chicago Center for the Study of Constitutionalism in Eastern Europe and with the U Chi L Sch Roundtable.
The first pitfall lies with the document's exclusive origins in deals between outside experts and Croatian elites. The existence of a legal document of constitutional proportions that is crafted by experts resembles a kite or balloon: it looks beautiful floating above the earth, but has no influence on what goes on below. This axiom is especially applicable with respect to minority protection laws which touch upon matters traditionally of local concern, such as education, religion, agrarian reform, and language.

While Arendt recalls that post-World War I expert documents inspired "mistrust," this post-communist document seems to inspire ridicule. The unanimous response that I received to references to this law, passed by the Croatian Parliament, at meetings with a number of human rights activists and Western oriented lawyers in Zagreb during December 1992 was a chuckle and an "O yeah, that thing that was enacted for Lord Carrington." The Conference on Security and Co-operation in Europe's own rapporteur missions have reported similar reactions. Little seems to have changed since the post-World War I era, when Azcarate commented about international law's authority in the realm of minorities protection: "The public conscience is insufficiently developed to be impressed by such criteria."

2. The Backlash Factors.

Another set of undermining factors common to both the Mi...
orities Treaties and the Carrington Law stems from the attempt to have international adjudicatory bodies guarantee the provisions. The Minorities Treaties empowered the League of Nations Council to receive petitions, conduct fact-finding investigations, and issue directives to those nations in violation of the Treaties. Similarly, Article 58 of the Carrington Law calls for the creation of "an international body" to "supervise implementation." Moreover, Article 60 provides for the creation of a Court of Human Rights for Croatia to enforce the Minorities Law. That Court is to consist of a "President and two members . . . nominated by the Presidency of the European Community from among the ranks of citizens of its Member States; and the [other] two members shall be nominated by the Parliament of the Republic of Croatia from among its nationals." Thus, a majority of the Court charged with protecting minorities in Croatia will consist of foreigners selected by foreigners.

a) International Protection of Minorities and the Role of the State. International enforcement of minorities rights, as provided for in the Minorities Treaties and the Carrington Law, has two complementary costs in the context of Eastern Europe. First, international enforcement undermines the likelihood of nations promoting themselves as compromisers and mediators against particularized conflict. Second, it inspires regressive traditionalism as a defense mechanism against international interference's apparent threat to national integrity.

Having the foundation of minorities protection efforts in the authority of outsiders implies that the state itself is not expected to be responsible for integration, but only for taking care of and representing the will of its own—in the most narrow sense. Arendt, writing about international enforcement mechanisms in Eastern Europe earlier in the century, recalls:

The real significance of the Minorities Treaties lies . . . in the fact that they were guaranteed by an international body. . . . [R]ecognition that millions of people lived outside normal legal protection and needed an additional guarantee of their elementary rights from an outside body and the assumption that this state of affairs was not temporary, but

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44 See id at 104-08 (cited in note 29) (describing the adjudicatory process).
45 The Carrington Law at Article 58 (cited in note 38).
46 Id at Article 60.
that treaties were needed . . . [constituted a policy by the
treatment of the international community that] persons of different nationality
were needed some law of exception until or unless they were
completely assimilated and divorced from their origin. They
thereby admitted . . . that the transformation of the state
from an instrument of law to an instrument of the nation
had been completed.47

Along the same line of thought, Azcarate observes that “states-
men of the countries subject by treaties to minorities obligations”
found international enforcement of the obligations “as likely to
prejudice the internal consolidation of the[ir] state[s].”48 Professor
Branislaw Geremek, former Chair of the Polish Parliament’s
Constitutional Committee, comes to an identical conclusion about
how the growing strength of the European Community will cause
decreasing possibilities for minorities to integrate and find pro-
tection within a nation.49

Azcarate adds that public directives from the League of Na-
tions produced reactions within the “guilty” nation “against exter-
nal interference in purely internal questions [that was] much
stronger than the [Minorities] Treaties themselves.”50 The
League of Nations directives forced many progressive statesmen,
who otherwise could have used their domestic authority to solve
a minority’s complaints, “to adopt a negative and uncompromis-
ing attitude.”51 Moreover, state resistance based upon the invo-
cation of national prestige usually succeeds due to such
reasoning’s appeal to upper classes and other governments.52 Al-
though the Carrington Law’s Court of Human Rights has yet to
commence operation, a similar fate may await its rulings.

Underlying the backlash to the specter of internationalism
may be the cultural origins of East European nationalisms in
opposition to “bloodless, barren universalism.”53 According to
Ernest Gellner’s economic rationality model of nationalism, East
European nationalisms arose because they engendered socio-
economic structures that were more productive in the industrial

47 Arendt, Totalitarianism at 273-74 (cited in note 21).
48 Azcarate, League of Nations at 130 (cited in note 29).
49 See Stephen Holmes, A Conversation Among Students of Revolution, East and West
(Book Review), E Eur Const Rev 37 (Fall 1992) (quoting and paraphrasing Geremek).
50 Azcarate, League of Nations at 120-21 (cited in note 29).
51 Id at 121.
52 Id at 120.
53 Gellner English Manuscript at 9, 23 (cited in note 19).
era than the static estate and caste systems of the empires. But then why do East European nationalist cultures resist the universalism of the League of Nations and the European Community when these modern universalisms differ from Eastern Europe's agro-literate era empires with respect to the potential for advanced industrial era productivity? In contrast to the old East European empires, the League sought and the Community seeks to foster mobility, innovation, growth, universal education, and meritocracy. Unfortunately, the cultures that emerged in resistance to the universalism of agro-literate empires appear to be largely unable to distinguish between modern universalism geared toward industrial productivity and the unproductive universalism prevalent during the age of empires.

b) Reaction of the Croatian State. Turning to a more recent example, the Croatian state's reaction to the imposition of the Carrington Law has been in accordance with both the Carrington Law's indirect implication that Croatia's role is to represent primordial Croatian interests (while advocacy of integration and minorities rights are for international mechanisms) and the defensive impulse to protect Croatian interests (against the international community's interference on behalf of the minorities). In particular, Croatia has been "consolidating" itself through a highly exclusive citizenship process. Even soldiers in the Croatian Army have been denied citizenship. Officially, the citizenship law requires residence for ten years in Croatia or a declaration of Croatian heritage. In practice, the process relies heavily on tracing lineage to a book from the 1940s. A CSCE Rapporteur Report notes that Croatia's citizenship law is "creating many stateless people." This trend of stateless minorities is precisely the type of consequence that Arendt traced to the emergence of international authority with respect to the guarantee of domestic rights after World War I.

At first glance, the recent attempt by the Croatian prosecutor to ban the Croatian Party of Right as an extremist and racist political organization appears to be an assumption of responsibili-

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54 See id at 10-15; Ernest A. Gellner, Nations and Nationalism (Cornell, 1983).
55 CSCE I at 8 (cited in note 25).
56 One of the harshest consequences of not obtaining citizenship is denial of the continuity of pensions and other benefits to which Yugoslav citizens had vested rights.
ty by the Croatian government for minority integration and protection. However, a closer look reveals the situation to be otherwise. The Party of Right platform takes the same stand as President Tudjman’s party toward Croatia’s fascist legacy: approval of the Ustasha’s so-called “positive ideas” and rejection of the Ustasha’s anti-human rights rhetoric and deeds. The only significant difference is that the Party of Right had once backed the HOS brigade, which was distinct from the Croatian Army. However, at the request of the Party of Right, the HOS merged into the Croatian Army in 1991. Consequently, most insiders view the recent ban attempt as an effort by Tudjman’s government to consolidate power by eliminating competition, rather than a sincere effort to weed out extremists from influence in Croatia.

c) Reaction of Minorities. As for the reaction of minorities to international protection, Arendt and Azcarate observe that the minorities are the first ones to perceive the aforementioned implications of founding minorities protection in international authority. Minorities responded to the Minorities Treaties with the assertion that only those ethnic groups living in their own nation have “true freedom, true emancipation and true popular sovereignty,” while those dependent upon international authority lack the protection of “their own national government and are left in a fearful and dangerous position of "abstract nakedness[,] of being nothing but human." The Treaties represented a mistrusted and unfounded universality, which, like the negative modernity of communism, fostered primordialism rather than integration. Minorities “completely disregarded the League of Nations[]’ offer of protection as a universalist threat and they formed their own Congress of Organized National Groups in European States premised on principles of primordialism and separatism—an endeavor that did little to diffuse ethnic conflicts in the new nations.
Similarly today, most Serbs in Croatia have reacted to their internationally guaranteed “minority privileges” as if they pose threats rather than provide safeguards. Few Serbs want to participate in special Serbian language schools within Croatia, as called for by the Carrington Law, because they fear that a record of attendance will stigmatize them in Croatian society for life. Local Serbian councils provided for by the Carrington Law want their regions to secede and have taken no steps towards integration. As for the guarantees of proportional representation for Serbs in the lower house of the Croatian Parliament, the Serbs treat this privilege as a joke. In fact, the government had to search desperately through the party lists to find enough Serbs to fill those parliamentary seats designated for Serbs.

These reactions are partially the result of the on-again-off-again warfare in Serbian regions of Croatia. However, that fighting erupted originally in resistance to international recognition of Croatia, despite common knowledge that the international community would mandate Croatia's consent to such minority protection accords. Indeed, the war in Croatia was more likely another symptom, rather than a cause, of the insecurity and regres-

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Nations at 117, 131 (cited in note 29) (discussing the role of the Congress of Minorities and minority "animosity" to reliance upon international protection, and concluding that the most severe criticism of the Minorities Treaties came from the minorities).

64 Aleksa Djilas, Uncaptive Minds at 27 (cited in note 31).

65 As of January 1993, only one Serbian school has been opened pursuant to the Carrington Law. The school only attracted seven students. Interview by the author with Tia Pansic, Director of the Croatian Democracy Project, Zagreb (Dec 1992).


67 Under Article 18 of the Carrington Law, Serbs are currently guaranteed 8% of the seats in the lower house of Parliament (Ethnic communities or minorities who comprise more than 8% of the Croatian population are entitled to proportional representation in the Croatian Parliament. Ethnic communities or minorities who comprise less than 8% of the Croatian population are entitled to five representatives in the House of Representatives of the Croatian Parliament.) Nevertheless, no voters participate in elections in many Serb dominated districts. In the August 1992 election, no Serbs won seats based on the vote count. Three Serbs were taken from lists of parties that received over 3% of the vote, which is the minimum that a party needs to have a representative in Parliament according to the Electoral Law. The rest of the Serbian parliamentarians were taken from the Serbian People's Party (SPP), a group commonly referred to as “President Tudjman's invented Serbs.” Although, the SPP had received much less than 3% of the vote, the Constitutional Court permitted candidates from the SPP's list to be admitted to Parliament to satisfy the Carrington Law's proportionality requirement.

68 For example, in 1991 the EC Council of Ministers announced that it would only recognize the independence of Yugoslavian Republics that accepted the Declaration on the Criteria for the Recognition of the New States in Eastern Europe and USSR. Countdown: A Chronology of Yugoslavia's Final Months, E Eur Rptr 4, 8 (Jan-Feb 1992).
sive primordialism that arises from efforts to inspire reliance upon the authority of international guarantees of domestic minority rights among those inevitably left behind in “county jails for minorities” by efforts to destroy “prisonhouses of nations.”

3. Administrative difficulties.

The final undermining factor common to the Minorities Treaties and the Carrington Law is the administrative impossibility of implementation from the outside. While the enforcement efforts of the League of Nations Council were characterized by “extreme inadequacy,” the Carrington Law’s Court of Human Rights may never even function. How can five judges resolve all of the minority conflicts in Croatia? It is little wonder that neither remedial mechanisms nor procedures have been promulgated. The enforcement of the Carrington Law is thus left to a rather depressing scenario: an international mechanism that exists only on paper and a Croatian court system that local law professors concede is embarrassingly passive and lacks independence.70

III. CLOSING REMARKS ON THE CONVERSION OF EASTERN EUROPE: BEYOND MINORITIES COUNCILS AND COURTS

Outsiders who aim to resolve such social crises as ethnic conflicts risk becoming failed missionaries, because ethnic nationalists adhere to rigid and distinct metaphysical outlooks. The League of Nations and its Council failed.71

69 Arendt, Totalitarianism at 282-3 (cited in note 21); Azcarate, League of Nations at 97 (cited in note 29) (“the extreme inadequacy of the means placed at [the League of Nations Council’s] disposal by the Great Powers”), 118, 126 (“the Council did not possess the necessary impetus to emerge successfully”).

70 Professor Mihajlo Dika and other law professors and teachers in Zagreb frankly explained to me that the Croatian judiciary, including the Croatian Constitutional Court, has no concept of reasoned opinions and the use of authorities. Apparently, the Croatian courts are still victims of the “total legality—no legality” trend that existed during the communist era. Pursuant to this trend, judges issue decisions without any reasoned interpretation under the pretense that they are automatons. The result is the easy manipulation of results and the absence of the development of judicial or legal thinking that insulates the judiciary’s independence. See Klingsberg, 1992 BYU L Rev at 123-24 nn 201-04 (cited in note 1) (discussing the implications of the Soviet vision of self-applying law). There is also evidence of parliamentary and executive branch attempts to manipulate the judiciary. During Christmas 1992, the Croatian government reportedly had a judge sent to the front line and transferred to a less powerful court after the judge had ordered the release of a Serb prisoner.

71 All who consider the matter dispassionately must recognize that the guarantee of
All indicators also point to the failure of the Carrington Law and its Court of Human Rights. An adjudicatory organ, especially one consisting of foreigners, is usually a poor proselytizer.  

The best reformers of a metaphysical universe often appear to come from within that universe rather than from outside. Azcarate recalls that the League of Nations succeeded when the League's adjudicatory organ, the Council, played no role and change seemed to result from “spontaneously adopted decisions” of an “accused' government” to fulfill a provision of the Minorities Treaties. Actually, these “spontaneous decisions” were stimulated by neutral and secret mediation by the Minorities Committee, a distinct entity that addressed matters prior to judicial consideration by the Council. The role of the Committee was neutral in the most fundamental sense: the Committee acted not by applying the same rule fairly to all parties or by representing a “straight and clear-cut line . . . of justice,” but by serving as an anonymous catalyst and vehicle for rational discourse that may have never taken place otherwise. Azcarate rebuffs those “superficial” observers of minority conflicts who prefer the “spirit and method of the judge,” and concludes that his Committee’s secret, neutral talks “represented the most advanced point which has been reached in what may be termed international intervention in the internal life of states.” If “missionaries” are able to become part of “the internal life of states” via subtle infiltration, they may be able to contribute to the conversion process.

minority rights established by the League of Nations on the basis of the Minorities Treaties did not give satisfaction to governments of the 'minority' countries, to the minorities themselves, or—and this was the most serious factor of all—to that world public opinion which was interested in minority questions.

Azcarate, League of Nations at 130 (cited in note 29).


73 Azcarate, League of Nations at 120-21, 133 (cited in note 29). A possible contemporary analogy may be Bulgaria's successful implementation of human rights concessions to the Turks via what appeared to be spontaneous actions of domestic state organs, but actually were a result of "behind the scenes" pressures from the European Community. Rumyana Kolarova, Oral Remarks at Roundtable Symposium on the Rights of Minorities in East European Constitutions, University of Chicago Law School, Feb 20, 1993.

74 Azcarte, League of Nations at 131 (cited in note 29).

75 Id at 128, 131, 134.

76 Id at 127.
At the other end of the spectrum from the procedure utilized by Azcarate's Committee is the full-fledged military enforcement scenario utilized after World War II. History demonstrates that the latter approach is also an effective means for converting metaphysical outlooks in order to foster public solidarity, although such a strategy is costly and requires a lengthy commitment. The Carrington Law may only be able to succeed if accompanied by a generation-long, full-scale military enforcement effort from the international community.

Subtle infiltration into "internal life" and the realistic threat of violence are two effective means not only for resolving ethnic conflicts from the outside, but also for forming the distinct metaphysical identities of ethnic groups. It is ironic that the means for resolving these conflicts resemble the means for actually forming oppressive nationalisms. This irony is a reason to be wary of far-reaching solutions such as the promotion of a thoroughly homogeneous culture, a prescription that I have not discussed, but which through vehicles like Music Television (a frightfully successful example of the infiltration strategy) may be doing more than any other effort to overcome disharmonious traditions. My hope is that some more mild conversion process will succeed in resolving ethnic conflicts before we are left with sterile homogeneity.

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77 See Ernest Renan, What is a Nation? at 11 (cited in note 19) ("Historical enquiry brings to light deeds of violence which took place at the origin of all political formations, even of those whose consequences have been altogether beneficial. Unity is always effected by means of brutality.").