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**MINORITY RIGHTS AS PREVENTIVE DIPLOMACY
OSCE SPONSORED LEGAL REFORM AND THE PREVENTION
OF ETHNIC CONFLICT IN POST-COMMUNIST COUNTRIES**

by

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A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfillment of
the requirements for the degree of

Master of Arts

Norman Paterson School of International Affairs

Carleton University
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A handwritten signature in dark ink, appearing to read 'Martin Rudner', written over a horizontal line.

Professor Martin Rudner, Director
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Professor Fen Hampson, Supervisor

Abstract

In the post-Cold war era, regional organizations have become important tools of ethnic conflict mediation. Seeking to avoid the financial and political problems of managing conflict once it has started, preventive diplomacy and conflict prevention have become the new international catchwords. Many efforts of preventive diplomacy have involved the implementation of international human rights norms. The OSCE HCNM has operated according to this idea and, since 1993, has sought to prevent inter and intra-State ethnic conflict by implementing international minority rights norms within the national legislation of host-States. The author studies Latvia, Estonia, Slovakia and Romania, and argues that after five years of involvement therein, the HCNM has not succeeded in building long term ethnic harmony. This may be explained by the nature of the disputes in those cases, of the denial of minority rights, and by the HCNM's characteristics as a "process-oriented" mediator.

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MINORITY RIGHTS AS PREVENTIVE DIPLOMACY
OSCE Sponsored Legal Reform and the Prevention of Ethnic Conflict
in post-Communist Countries

CHAPTER ONE

INTRODUCTION

Nine years after the revolutions of Central and Eastern Europe, and seven following the dissolution of the Soviet Union, the complexity of the problems communism obscured have become starkly evident. In a situation analogous to the de-colonization of Asia and Africa, much of the region's ostensible ethnic stability under communism may have been a result of the controlling hand of totalitarianism,¹ as, in many States, the removal of Soviet imperialism has been accompanied by the reassertion of national animosities.² This state of affairs has become most threatening for the national minorities* located within post-communist** States whose governments, motivated by the national idea of State building, and without communism as a cohesive, organizing idea, have implemented nationalist-inspired policies to ensure the ethnic majority's dominance.³ As the former Yugoslavia and other examples have illustrated, the combination of nationally-motivated majorities, disenchanted national minorities, and economic instability,⁴ creates a strong potential for both inter and intra-State conflict.⁵ This situation has caused great concern for stability and security among especially the nations of Europe.

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¹Stephen R. Bowers, "Ethnic Politics in Eastern Europe," Conflict Studies 248 (February 1992), at 8.

²James Mayall, "Sovereignty and Self-Determination in the New Europe" in Hugh Miall ed., Minority Rights in Europe. The Scope for a Transnational Regime (London: Pinter Publishers, 1994) at 7.

* In this paper, the term "national minority" will be used interchangeably with other terms such as "ethnic minority" or simply "minority", and does not necessarily indicate a deliberate differentiation between those terms.

** For the purposes of readability, the term "post-communist" in this paper connotes the States of Central and Eastern Europe and the former Soviet Union.

³Andras Sajó, "Protecting Nation States and National Minorities: A Modest Case for Nationalism in Eastern Europe," in University of Chicago Law School Roundtable (1993), at 56.

⁴Pal Dunay, "Nationalism and Ethnic Conflicts in Eastern Europe: Imposed, Induced or (Simply) Reemerged" in Istvan Pogány ed., Human Rights in Eastern Europe (Hants: Edward Elgar Publishing Ltd., 1995) at 30.

⁵Marc Holzapfel, "The Implications of Human Rights Abuses Currently Occurring in the Baltic States Against the Ethnic Russian National Minority" (1995-1996) 2 Buff. Jour. Int'l L. 329 at 330.

With the superpower struggle over, the responsibility of managing this potential ethnic powder keg has shifted. Owing to their proximity to conflicts, and their knowledge of local conditions,⁶ many scholars and practitioners of international relations believe that regional organizations such as the Organization for Security and Cooperation in Europe [hereinafter OSCE] are extremely important tools of ethnic conflict mediation in the post-Cold War era. Seeking to avoid the financial and political problems of managing conflict once it has started, the strategies to deal with conflict have also changed. Preventive diplomacy and conflict prevention⁷ have become the new international catchwords. Although it may come in various manifestations, many efforts of preventive diplomacy have had the implementation of international human rights norms as a prominent and central feature. The Carnegie Commission on Deadly Conflict, for example, believes that a crucial element in preventing the emergence of violent conflict is ensuring that international human rights guarantees are respected domestically by States.⁸ The importance of human rights standards in preventive diplomacy has become even more pronounced in relation to intra-State conflict, and national minorities.

This paper focuses upon the connection between guaranteeing minority rights and preventing ethnic conflict. Specifically, it examines whether national legislation, induced, drafted or amended through the involvement of third parties, can be used to guarantee minority rights and prevent conflict between host-States and their minorities, and between host and kin-States.⁹ Although other international organizations, such as the Council of

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⁶Charles Van der Donckt, "Looking Forward by Looking Back: A Pragmatic Look at Conflict and the Regional Option," in Policy Staff Paper No.95/01 (Ottawa: Department of Foreign Affairs and International Trade, 1995), at 17.

⁷The terms preventive diplomacy and conflict prevention have slightly different meanings. The former attempts to stop conflicts from becoming violent, while the latter aims at the supposed roots of those conflicts (Stephen John Stedman, "Alchemy for a New World Order: Overselling Preventive Diplomacy," in Foreign Affairs (74:3 May/June 1995), p.18). The two terms will be used interchangeably because, as will become clear, the OSCE High Commissioner on National Minorities engages in both.

⁸Carnegie Commission on Deadly Conflict, Preventing Deadly Conflict. Final Report (New York: Carnegie Corporation, 1997), at xvii.

⁹As coined by Zartman in "Internationalization of Communal Strife: Temptations and Opportunities of Triangulation" in The Internationalization of Communal Strife, ed Manus I. Midlarsky (New York: Routledge, 1992), at 27. Host State indicates the State in which national minorities are located. Kin-State connotes the third-party State that shares a national identity with those minorities. These terms have been adopted and used consistently by the OSCE High Commissioner on National Minorities.

Europe, European Union, and United Nations have undertaken efforts to promote the amendment or introduction of national minorities legislation as a solution to minorities problems in the region under study, this paper will focus primarily upon the work of the OSCE High Commissioner on National Minorities [hereinafter HCNM], owing to that institution's limited mandate to deal specifically and only with minorities, to its consistent employment of domestic legal reform as a tool, and its unique status as a position created specifically for preventive diplomacy.

Since 1993, the HCNM has employed a variety of different methods in various situations of potential conflict between minorities and host-States, and between host and kin-States; however, the vast majority of the institution's work has involved and focused upon the rights of national minorities as guaranteed in national legislation. This is especially true in Estonia, Latvia, Slovakia and Romania, which will serve as the case studies in this paper. These four States have been involved with the HCNM since 1993, and are often cited as positive examples of the HCNM's effectiveness by scholars and by the OSCE. Although large scale conflict has not erupted in any of the four examples, this paper concludes that the HCNM has been less than effective in all four cases. Some scholars, adhering to process-oriented theories of mediation, suggest that the HCNM *has* been effective because he has succeeding in maintaining a "dialogue" with aggrieved parties. It is suggested that these scholars have failed to examine the empirical reality that, even in the "best cases" to be discussed in this paper, such dialogue might have limited value for establishing long-term ethnic harmony and preventing conflict.

This paper argues that the failure of the HCNM can be attributed to two inter-related factors. First, it has much to do with the *nature of the disputes* in the cases under study, of minority rights, and with the HCNM's almost exclusive focus upon guaranteeing those rights in national legislation. Second, the HCNM's *characteristics as a mediator* - primarily his attributes as a "process-oriented" mediator with little leverage and influence - have also contributed to his lack of effectiveness. Before outlining the structure of this paper, the

concept of process-oriented mediation, and of using mediation theory to examine the work of the HCNM and other institutions employing preventive diplomacy will be discussed.

I. Preventive Diplomacy and Mediation Theory

Following the massive financial burden of containing and managing intractable conflicts such as the former Yugoslavia and Somalia, many international organizations have followed a global trend by initiating efforts to prevent conflicts *before* they arise - a much cheaper alternative, in financial and political terms, to "peacekeeping and rebuilding societies after a violent conflict".¹⁰ This change of focus has been supported by countries such as the United States, which has made preventive diplomacy and conflict prevention pillars of its foreign policy,¹¹ and by the former United Nations Secretary General, who stated that "preventive diplomacy is the most important issue facing us today."¹² It has been within this international climate that the OSCE chose to define itself as "a primary instrument for early warning, conflict prevention, and crisis management",¹³ and created the HCNM to identify the nature of, contain or resolve inter-ethnic tensions involving national minorities in the OSCE area before they erupt.¹⁴ Indeed, Max van der Stoep - who has served as HCNM since the institution's creation in 1993 - consistently reiterates the financial and political benefits of preventive diplomacy during speaking engagements and in academic writing.¹⁵

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¹⁰Max van der Stoep, "The Role of the CSCE High Commissioner on National Minorities in CSCE Preventive Diplomacy," in The Challenge of Preventive Diplomacy: The Experience of the CSCE (Stockholm: Ministry for Foreign Affairs, 1994), at 33.

¹¹Stephen John Stedman, "Alchemy for a New World Order: Overselling Preventive Diplomacy," in Foreign Affairs (74:3 May June 1995), at 14.

¹²Kyle R. Scott, "International Responses to Ethnic Conflict: Part II: Agenda for Change," in Hoover Working Paper Series in International Studies (July 1995), at 1.

¹³Diana Chigas et al. "Preventive Diplomacy and the Organization for Security and Cooperation in Europe: Creating Incentives for Dialogue and Cooperation," in Preventing Conflict in the Post-Communist World, eds. Abram Chayes and Antonia Handler Chayes (Washington: The Brookings Institution, 1996), at 68.

¹⁴Konrad Huber, "Preventing Conflict in the New Europe: The CSCE High Commissioner on National Minorities," in Minorities: The New Europe's Old Issue, eds., Ian M. Cuthbertson and Jane Leibowitz (New York: Institute for EastWest Studies, 1993), at 286.

¹⁵Max van der Stoep, "The Role of the CSCE High Commissioner on National Minorities in CSCE Conflict Prevention, Address to the Seminar on The CSCE as a Security Tool in Europe (Brussels, 4 June 1994), at 1.

What theory, however, can be used to evaluate methods of preventive diplomacy? Depending on the scope of what is considered mediation, some scholars have argued that mediation theory may be used, and suggest that preventive diplomacy is simply another manifestation of mediation undertaken at a different time in the conflict cycle, before conflict has erupted. Whether this is the case depends on the definition of mediation one adheres to. Some scholars such as Touval believe that mediation involves the provision of good offices and conciliation - the former involving assisting adversaries to communicate, and the latter being aimed at employing strategies meant to change parties' attitudes toward one another, suggesting ideas for compromise, and bargaining.¹⁶ Fisher disagrees, and argues that good offices cannot be included within the concept of mediation. Furthermore, mediation, argues Fisher, must also involve *leverage* on the part of the mediator.¹⁷ To complicate matters, Bercovitch provides a broader definition:

...a process of conflict management where disputants seek the assistance of, or accept an offer of help from, an individual group, state, or organization to settle their conflict or resolve their differences without resorting to physical force or invoking the authority of the law.¹⁸

As is clear from the literature, the scope of activities labeled "mediation" is broad. So much so that Burton and Dukes have declared the field as being in a "state of confusion".¹⁹ Through the confusion, two broad schools of mediation theory have developed - one of which may be used to frame the activities and methods of the HCNM, and perhaps explain his failures.

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¹⁶Saadia Touval, "Gaining Entry into Mediation in Communal Strife," in The Internationalization of Communal Strife, ed. Manus I. Midlarsky (New York: Routledge, 1992), at 255

¹⁷Ronald J. Fisher, "Pacific, Impartial Third-Party Intervention in International Conflict: A Review and an Analysis," in Beyond Confrontation, eds. J. Vasquez et al. (1995), at 40.

¹⁸Jacob Bercovitch, "The Nature of the Dispute and the Effectiveness of International Mediation," in Journal of Conflict Resolution (37:4 1993), at 671.

¹⁹John Burton and Frank Dukes, Conflict: Practices in Management, Settlement and Resolution, ed. Naomi Chazan (Lynne Rienner, 1991), at 20.

1. The Structuralist vs. Process-Oriented Approaches to Mediation

Crocker et al. believe that the differing definitions of mediation may be organized into two broad paradigms. The *structural* paradigm, advocated by scholars such as Zartman and Touval, believes that the causes of conflict are objective, and may be identified and neutralized through negotiation. According to the minimalist view of the structural approach, certain conflicts will be pre-disposed to mediation if they have reached a "hurting stalemate", or if the parties involved have become otherwise "ripe" for mediation because neither side believes that continued hostilities would be to their interests. This view suggests that the identity or characteristics of the mediator are less important.²⁰ The maximalist view of the structural approach recognizes the importance of the timing of a conflict, but places more importance on the identity and characteristics of the mediator for facilitating a negotiated solution to a conflict.²¹

Other scholars argue that mediation's conceptual flexibility is its greatest strength, and believe that forms of mediation *should* alter considerably as the structure of international society changes.²² With the end of the Cold War, the dissolution of the controlling hand of bipolarity, and the increasing importance of preventing intra-state conflict, a second, "process-oriented" approach to mediation has developed.²³ Many scholars now argue that without superpower dominance, many mediation efforts will necessarily be lower-key, pre-emptive, and less settlement-oriented. Chigas, for example, argues,

Post cold war conflict-resolution strategies will need to focus not on conflict 'settlement' but on conflict 'management', and pay greater attention to developing structures and processes for dialogue, for rebuilding confidence and relationships, and for enabling the parties to deal constructively with their differences over the long term.²⁴

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²⁰Chester Crocker, Fen Hampson and Pamela Aall, "Multiparty Mediation and the Conflict Cycle," in Multiparty Mediation Project (Washington D.C.: U.S. Institute of Peace, 1998) [manuscript copy], at 2-3.

²¹Crocker et al, at 3-4

²²C.R. Mitchell, "The Motives for Mediation," in New Approaches to International Mediation (New York: Greenwood Press, 1988), at 5.

²³Crocker et al, at 4.

²⁴Chigas (1996), at 29.

Chigas believes that the creation of a "new mediation" of the "insider third party" is necessary, which combines the basic characteristics of a mediator - of impartiality and lack of vested interests - with those of an insider third party who acts as "a trusted advisor and partner in dialogue rather than a detached mediator." Most of this activity should occur *before* parties resort to armed conflict, and is more concerned with a process of communication between them, in order to alter their attitudes and beliefs and lead to agreement²⁵. In the post Cold War era, the line between mediation and preventive diplomacy seems to have faded.

Although the OSCE defines the HCNM as a position of preventive diplomacy, and as one primarily involved in good offices in situations of inter-ethnic tension, as opposed to conflict, it is clear that Max van der Stoep, as the HCNM, is guided in-practice by the process-oriented approach. Since 1993, he has included mediative techniques with traditional good offices as tools to be employed in situations of communal conflict. He focuses upon cooperative management and dialogue as a means of preventing escalation and violence as opposed to settlement and enforcement.²⁶ The HCNM plays a mediative *role* - for example, mediating between governments and other ethnic groups; however, because his mandate is not to *resolve* complex ethno-national disputes, but to "prevent acute escalation of tensions" and implement a long-term process of dialogue between the government and minority to deal with root causes,²⁷ he is not a conventional mediator in the structural sense. The blending of mediation theory and preventive diplomacy is not, however, without its conceptual and empirical difficulties.

2. Problems with using mediation theory for preventive diplomacy

Two conceptual problems, of *timing* and *effectiveness*, surface with preventive diplomacy which are not considered in conventional, structural theories of mediation.

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²⁵Crocker et al, at 4.

²⁶Chigas (1996), at 27.

²⁷Chigas (1996), at 52.

Although perhaps trite, scholars note that preventive diplomacy must be employed "at the time best calculated to secure optimal outcomes."²⁸ Unlike most theories of mediation, which advocate the use of mediative techniques after the parties have reached a "hurting stalemate"²⁹ or an "impasse",³⁰ preventive diplomacy can be distinguished, as it attempts to gain support from parties *before* they have learned through experience that violence will not be effective for resolving their conflict. This is often problematic, however, since parties are not often willing to accept external intervention during the early stages of a conflict. Chigas argues that this only shifts the onus from the parties to the *mediator* to *create* a "ripe moment". Instead of focusing on the production of comprehensive settlements, the mediator such as the HCNM using the process-oriented approach, must focus on

'ripening' the situation through building trust, opening communication and correcting distortions in perceptions, helping to build mutual understanding of underlying interests, or shaping attitudes within relevant governments...³¹

Although building mutual understanding may have inherent value, problems of measuring effectiveness arise with the process-oriented approach. Unlike traditional post-conflict mediation, it is difficult to *prove* that certain methods of preventive diplomacy are more effective than others. Indeed, the very definition of effectiveness is open to question. At what point can trust, communication and perception building be considered as having prevented conflict? Conversely, what standards are to be employed to indicate when a process-oriented effort of mediation has failed? As the case studies in this paper will illustrate, minorities, host-States and kin-States might continue their communication with one another and with a mediator like the HCNM, while their inter-ethnic situation steadily

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²⁸Van der Stoep, (Stockholm: Ministry for Foreign Affairs, 1994), at 51.

²⁹Zartman, as quoted in Stephen Ryan, Preventive Diplomacy, Ethnic Conflict and United Nations Peacekeeping (1994).

³⁰Jacob Bercovitch, "International Mediation: A Study of the Incidence, Strategies and Conditions of Successful Outcomes," in Cooperation and Conflict (21, 1986), at 25

³¹Diane Chigas, "Bridging the Gap Between Theory and Practice: The CSCE High Commissioner on National Minorities," in Helsinki Monitor (5:3, 1994), at 29.

deteriorates. Communication may simply encourage parties to pay lip-service to the concerns of the international community, but continue with policies against their minorities.

Some scholars argue that the effectiveness of preventive diplomacy can be measured. Unlike structuralist paradigm, however, which examines either the conflict or the mediator to explain results of mediation, the process-oriented approach has not offered a reliable unit of analysis to measure effectiveness. Ryan argues that certain tell-tale signs of potential conflict may be discernible, such as conflicts over land, participation in government, and issues of education, language and culture, which will be examined below.³² Other scholars urge further attention towards inter-ethnic relations which are *non-violently* contentious to learn what prevented them from becoming bloody.

Finding a reliable unit of analysis is important, as persuasive arguments have been put forward to suggest that efforts of preventive diplomacy are extremely difficult to measure. Stedman rightly argues that social science has only a limited ability to predict when conflicts will occur, and that, based on that ability, foreign policy experts have been characterized only by their failure "to predict the most important political changes."³³ Some scholars also argue that although one may be able to *predict* an inter-ethnic conflagration, experiences in the former Yugoslavia have illustrated that there is rarely one answer for *avoiding* the explosion of that conflict.³⁴ Furthermore, if a conflict *is* avoided, it is difficult to draw causal conclusions, which are not wholly spurious, regarding which strategies have contributed to that result.³⁵ As the case studies to follow will illustrate, although large scale violent conflict has been avoided in the Baltics, and in Slovakia and Romania, it is difficult to attribute the avoidance of violent conflict to the HCNM. Furthermore, it is also problematic attaching inherent value in the "mutual understanding" that has developed in those States since 1993.

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³²Ryan, at 14.

³³Stedman, at 16.

³⁴Stedman, at 17.

³⁵Kriesburg, at 1.

II. The Structure and Analysis of this Paper

Owing to a lack of clear units of analysis under the process-oriented approach, this paper will use an analysis taken from structuralist mediation theory to analyze the effectiveness of the HCNM, in the cases under study, since 1993. Chapter Two analyzes the *nature of the disputes* in the four cases under study: the issue of minority rights, their denial by the host-States in question, and the potential for conflict. It outlines the content and sources of international human rights law relating to minorities, and illustrates why domestic solutions are required and have been focused upon by the HCNM. At the same time, this chapter will also explore the dangers of undertaking legal reform in post-communist countries undergoing transitions to democracy, and explains the difficulties in attempting to implant nascent legal systems with internationally-recognized standards of human rights. Chapter Three examines the *characteristics of the mediator*: the HCNM as a tool of preventive diplomacy. It will focus upon the HCNM institutionally and normatively within the OSCE, and illustrate the mandate, methods and tools of the position that make it a clear example of process-oriented mediation. Chapters Four and Five will examine the four case studies of Estonia, Latvia, Slovakia and Romania, where the HCNM has employed legal reform as a tool of preventive diplomacy since 1993. All four cases may be successfully compared, as they involve similar issues of language, education, association and political participation. Finally, Chapter Six will attempt to draw lessons from the case studies, as well as from the nature of the disputes and the characteristics of the HCNM. It will suggest why the HCNM has met with little success as a tool of preventive diplomacy, and call into question the utility of process-oriented approaches to mediation.

CHAPTER TWO:

THE NATURE OF THE DISPUTES

The Rights of National Minorities and Inter-Ethnic Conflict

Adhering to the structuralist paradigm of mediation, Bercovitch argues that even before considering the identity of the mediator and his or her methods, some disputes will be more amenable to mediation than others.³⁶ He argues that the two most important variables in analyzing the conflicts themselves are the nature of the dispute,³⁷ and the identity and characteristics of the parties³⁸ involved. Using the latter criteria, the conflicts under study - involving the Hungarian and Russian minorities, and their Estonian, Latvia, Slovak and Romania host-States - should be amenable to mediative efforts. First, Bercovitch requires that the parties have well defined identities in order to recognize one another as legitimate.³⁹ In the four cases, all parties are ethnically distinct and possess clear identities; however, they also have certain commonalities such as a shared history and proximate religious affiliations, which should facilitate discussion between them. Stephens also notes that there must be a low-level of political extremism within each group so as to permit each leadership the flexibility to negotiate.⁴⁰ The case studies will show that although extremism has emerged in all of the situations under study, such manifestations have been limited, and have not prevented the parties involved from cooperating, at least outwardly, with the HCNM.

Instead of focusing upon the identity and characteristics of the parties, this paper suggests that the HCNM's low level of success in all four case studies may first be explained by the nature of the disputes - of the rights of national minorities, and the relative absence of those rights in the national laws of the countries under study. Many of the

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³⁶Bercovitch (1993), at 670.

³⁷Bercovitch (1986), at 161.

³⁸Bercovitch (1986), at 160.

³⁹Bercovitch (1986), at 160.

⁴⁰John B. Stephens, "Acceptance of Mediation Initiatives: A Preliminary Framework," in New Approaches to International Mediation (New York: Greenwood Press, 1988), at 57.

organizations and individuals involved in efforts to prevent violent conflict have recognized a crucial link between guaranteeing the human rights of national minorities, and the long term prevention of conflict between those minorities and their host-States. For example, Packer argues that "minority rights constitute and contribute to tolerance, and, in that way, they serve to reduce the sources of conflict and to sustain and enhance peace."¹ The HCNM believes in this connection, and has focused primarily upon guaranteeing the rights of minorities in the States under study:

Human [rights] concerns are often a critical component of conflict prevention in the short term, although it is in particular from the longer-term perspective that the intimate relationship between conflict prevention and human [rights] becomes apparent.²

This chapter seeks to further explore the connection between minority rights and inter-ethnic conflict, the concomitant use of those rights as a tool of preventive diplomacy, and the ultimate difficulty in attempting to implant those rights into domestic legal systems. It will first examine international sources of minority rights protection, including the purpose and content of minority rights, the regimes guaranteeing those rights, and the factors undermining the effectiveness of those norms and regimes. This chapter will then explore why the problems of protecting minorities through international law necessitates a shift to the *national* level, thus explaining why the HCNM has chosen ultimately to focus on domestic legislation for the implementation of minority rights. Assisting States to amend their national legislation to conform to international standards is problematic in many ways, however, and the problems involved in persuading States to undertake such reforms will be discussed in the final section. It is this problem that may help to partly explain the limited success of the HCNM in the case studies. Before turning to the examination of the protection of minorities on the international and national levels, this chapter first elaborates upon the nature of nationalism in post-Communist States, and the destabilizing nature of dissatisfied national minorities.

⁺¹John Packer, "The Content of Minority Rights," in Do We Need Minority Rights? J. Raikka, ed. (The Hague: Kluwer Law International, 1996) at 167.

⁺²Max van der Stoep, "Political Order, Human Rights, and Development, Introduction to the Seminar on Conflict and Development, Instituut Clingendael. (The Hague, 24 March, 1994) at 2.

I. Minority Rights and Conflict in post-Communist States

1. Nationalism in post-Communist States

The form of nationalism found in many post-communist States helps to explain why minority rights in that region are especially threatened, as compared to Western Europe. Modern Western Europeans have traditionally defined their States on the *civic* criteria of liberal democratic institutions and universal citizenship; whereas post-communist countries have chosen the *national* model, founded upon the identity of a particular people or nation.⁴³ This model becomes especially problematic in view of the fact that, in Central and Eastern Europe, State borders only rarely have corresponded to the actual distribution of nationalities. Further complicating factors are political and economic turmoil. Although nationalism may be imbedded in the culture of the region, it is radicalized by economic and political hardship, which results in *ethnic politics*. As Bowers notes, ethnic politics is characterized by a greater degree of organization beyond sporadic confrontations, usually through political parties, and involves the adoption by politicians of policies and positions based on ethnic issues.⁴⁴ In transitional, post-communist States, divisive notions of nationalism have become attractive because of economic insecurity, and have manifested themselves in political parties and host-State governments that espouse such notions to the detriment of their national minorities.⁴⁵

To different extents, the stress and uncertainty of the post-communist transition is present in all four States under study in this paper. Estonia, Latvia, Slovakia and Romania all are experiencing a "discrepancy between the immensity of the reconstruction tasks facing [them], and their political, economic and moral capacity to cope with them."⁴⁶

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⁴³Dick A. E. Howard, "Constitution-Making in Central and Eastern Europe," in Suffolk University Law Review (28:1 Spring 1994), at 14.

⁴⁴Bowers, at 2.

⁴⁵Packer (1996), at 167.

⁴⁶Ivanka Nedeva, "Democracy Building in Ethnically Diverse Societies: The Cases of Bulgaria and Romania," in Minorities: The New Europe's Old Issue eds. Ian M. Cuthbertson and Jane Leibowitz (New York: Institute for East-West Studies, 1993) at 126.

Although each country is experiencing its own unique problems of transition, and is perhaps at a different level of economic and legal development, the majority and minority populations of Latvia, Estonia, Slovakia, and Romania, have become increasingly susceptible to nationalistic rhetoric, as have the kin-States of Hungary and Russia. Except perhaps for Estonia, all of the countries under study will participate in the "second wave" of integration with the European Union and NATO, or have been by-passed altogether. That other transitional countries seem closer to integration with Western Europe and its institutions has only exacerbated the desperation and loss of hope among many citizens of the States under study. As occurred in the region during the interwar period, nationalism is serving as an important conduit through which political leaders may maintain national cohesion and sovereignty in the face of destabilization.⁴⁷

2. *Minorities and Destabilization*

As Packer notes, ethnic politics - whether pursued by host-States or minority political parties - is often conducted in variance with principles of human rights, which results in inter-ethnic instability:

At the least, nationalism is typically chauvinistic and discriminatory and so its political programmes are fundamentally incompatible with respect for human rights, especially minority rights. Nationalism is, therefore and not surprisingly, inherently conflict-creating.⁴⁸

Historically, State policies inspired by the national model in the region of the former Soviet-bloc have come into direct conflict with national minorities who do not share the host-state's view of itself. Should that minority have ethnic ties to a "motherland" contiguous to the host State, a situation strongly present in the States under study, conflicts involving minorities have the potential to become internationalized.⁴⁹ A dominant feature in all four case studies is the perception among the host-States that the Russian or Hungarian kin-States are poised to either invade the States where their ethnic kin are living,

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⁴⁷Nedeva, at 127.

⁴⁸Packer (1996) at 167.

⁴⁹Zartman, at 27.

or at the very least have territorial aspirations. History has shown that the fears of host-States are not unfounded. The norm of non-intervention has historically failed to prevent States from becoming involved in neighbouring conflicts involving their ethnic kin,⁵⁰ and such intervention has often resulted in inter-State conflict.⁵¹ Recognizing this fact, the West has come to understand that minority issues in transitional societies threaten to destabilize and plunge the former Soviet bloc into chaos.⁵² For these reasons, minority rights, historically viewed as representing the "soft side" of international relations,⁵³ are now accepted within the lexicon of "high politics", and have become instrumental in the strategies of preventive diplomacy and conflict prevention employed by institutions such as the OSCE HCNM.

II. International Sources of Minority Rights Protection

The idea of using international legal guarantees for national minorities in order to avoid conflict is not a novel one in the region under study. During the Interwar period, when the international protection of minorities was "in fashion", bilateral treaties between countries in Eastern Europe that shared minority populations were drafted in abundance.⁵⁴ In fact, between 1919 and 1924, some nine treaties, five declarations and four local conventions embodying minorities obligations were drafted under the aegis of the League of Nations.⁵⁵ After 1945, however, the issue of protecting national minorities under international law was first subsumed by the idea of the "general and universal protection of human rights" and then obscured by the new priorities of the superpower struggle. With

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⁵⁰Alexis Heraclides, "Secessionist Minorities and External Involvement," in International Organization (44:3 Summer 1990), at 376.

⁵¹Rein Mullerson, "Minorities in Eastern Europe and the Former USSR: Problems, Tendencies and Protection," in The Modern Law Review (56:6 November 1993), at 809.

⁵²Boguslawa Bednarczyk, "Nationalism, Ethnic Minorities and Human Rights in Post-Cold War Central and Eastern Europe," in NATO Defence College Occasional Paper No.2 (July 1994) at 12.

⁵³Daniel Livermore, Ethnic Conflict in the New Europe, (Kingston: Centre for International Relations, Queen's University Press, 1994) at 2.

⁵⁴Patrick Thornberry, International Law and the Rights of Minorities (Oxford: Clarendon Press, 1991), at 6.

⁵⁵Richard B. Bilder, "Can Minorities Treaties Work?" in Yoram Dinstein ed., The Protection of Minorities and Human Rights (London: Martinus Nijhoff Publishers, 1992) 59 at 63.

the Cold War over, national minority protection has once again become an issue in international law, and many legal scholars are again advocating for the use of international legal instruments to protect those groups. Because of its long-neglected status, however, the level of international protection for minorities has remained relatively underdeveloped, when compared to other areas of international human rights law, such as instruments against torture or discrimination, or those protecting the rights of children, which have progressed according to changing international circumstances.⁵⁶ For the HCNM, this has meant a shift to the national level for the enforcement and implementation of those rights. Nonetheless, international law remains the normative source of minority rights protection, and is regularly cited by the HCNM in his work. A brief review of the content, sources, and weaknesses of international law as it relates to national minorities will help to fully illustrate the roots of the conflicts under study, and help to explain the HCNM's ultimate focus on national legislation.

1. The Purpose and Content of Minority Rights.

As mentioned, in an uncertain political and economic environment, host-States may easily overlook the interests of their national minorities, and may employ policies which violate those interests, even if that is not the host-State's primary motivation. Minorities require protection against the potentially blind and destructive ethnic politics of the majority to which they are vulnerable. This is especially important given the link between granting minorities protection and preventing conflict. Kymlicka notes an important aspect of membership in a culture, and further explains why national minorities must be guaranteed special protection.

Membership in a culture is qualitatively different from membership in other associations, since our language and culture provide the context within which we make our choices. Loss of cultural membership, therefore, is a profound harm that reduces one's very ability

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⁵⁶Andras B. Baka, "The European Convention on Human Rights and the Protection of Minorities under International Law," in *Connecticut Journal of International Law* (8:27, 1993), at 227. Examples would include the *Convention on the Elimination of All Forms of Racial Discrimination*, or the *Convention on the Rights of the Child*.

to make meaningful choices. Hence special rights compensate for unequal circumstances which put the members of minority cultures at a systematic disadvantage in the cultural marketplace, regardless of their personal choices in life."⁵⁷

Minorities require "free space" in order to pursue their own ideals which might be threatened by majority rule.⁵⁸ As outlined in numerous international instruments, the ability to pursue these ideals is firmly grounded in respect for human rights in general. This is despite the fact that minority rights seem to contradict equality and autonomy by "positing fundamental differences between human beings in terms of...cultural identity or inseparable cultural characteristics."⁵⁹ As with human rights overall, minority rights impose a duty upon States to assist persons belonging to minorities to realize the freedoms which are available to members of the majority, that may be threatened because the democratic structure of society disfavours them.⁶⁰

Upon closer examination, the specific rights included under the aegis of "minority rights" are not unique rights unto themselves, but are also recognized human rights which are to be enjoyed by everyone. Freedom of religion, freedom of expression (right to use one's mother tongue in private and in public and to receive information in one's mother tongue); the freedom of education in or of one's mother tongue in private and in public; freedom of association; freedom of assembly; and the right to participate in public affairs⁶¹ are not rights distinct from the human rights which are to be guaranteed to everyone, through international instruments, but are applied to a smaller population within a population.

The examination of all heads of minority rights would be beyond the scope of this paper, and would preclude a precise examination of the case studies. For the purposes of this paper, four specific categories of minority rights will be focused-upon in examining the cases of Estonia, Latvia, Slovakia and Romania: language, education, association, and the

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⁵⁷Will Kymlicka, as quoted in Packer (1996) at 131.

⁵⁸Packer (1996) at 166.

⁵⁹Packer (1996) at 132.

⁶⁰Packer (1996) at 148.

⁶¹Packer (1996) at 147.

right to popular participation. As will become clear, the four rights are guaranteed in almost the same manner by a myriad of instruments.

a. Language

When the national-model prevails, language is often granted the significance of a "sacred value" for the preservation of national identity in post-communist States. As such, it does not simply perform the function of communication, but reflects and perpetuates the "entire civilizational and cultural heritage" of a group, and authenticates that group's existence.⁶² The ability of a national minority to use its own language is directly addressed in several international instruments offered by various international legal regimes; however, the specific language rights being guaranteed in these documents are quite similar and obviously derived from one another. For the United Nations, Article 27 of the *International Covenant on Civil and Political Rights* [hereinafter *Covenant*], protects the right of individuals who are members of national minorities to "use their own language".⁶³ The UN *Declaration in the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* [hereinafter *Declaration on Minorities*], which was inspired by the *Covenant*, states that minorities should be allowed to "use their own language, in private and in public, freely and without interference or any form of discrimination."⁶⁴ The OSCE's *Document of the Copenhagen Meeting of the Conference on the Human Dimension* also requires that States grant minorities the right to "use freely their mother tongue in private as well as in public."⁶⁵ Finally, the Council of Europe's *Framework Convention for the Protection of National Minorities* [hereinafter *Framework Convention*] protects the language rights of individuals who are members of national minorities most

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⁶²Josef Chlebowczyk, On Small and Young Nations in Europe. Nation Forming Processes in Ethnic Borderlands in East-Central Europe (Warsaw: Zaklad Narodowy, 1980) at 120.

⁶³International Covenant on Civil and Political Rights (1966) 999 U.N.T.S. 171, 1976 Can. T.S. No. 47, art.27 [hereinafter *ICCPR*].

⁶⁴Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, G.A. Res. 47/135, 47 U.N. GOAR Supp. (No.49) at 210, U.N. Doc. A/47/49 (1992), at art.2(1) [hereinafter *Declaration on Minorities*].

⁶⁵Conference on Security and Cooperation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension, 20 June 1990, 29 I.L.M. 1305, at §32.1 [hereinafter *Copenhagen Document*].

directly, by guaranteeing their right to use their minority language when dealing with public authorities, in relation to their name, and to designate place and street names.⁶⁶

2. *Education*

Unlike language rights, the right of a national minority to be educated in its own language is generally considered a positive right, as it requires that States take concrete, positive steps to establish and administer schools or programmes for members of national minorities. The right to education in one's own language, and for minorities to organize and operate their own schools, is closely related to language rights; however, it is this *positive* element that justifies its examination as a separate category. Perhaps one of the first pronouncements on the education rights of national minority, and on the positive nature of those rights, was offered by the interwar precursor to the International Court of Justice. The Permanent Court of International Justice upheld education rights in its 1935 *Advisory Opinion Concerning Minority Schools in Albania*. In that opinion, the court rejected arguments put forward by the Albanian government, that legislation abolishing all private schools was not in breach of the Greek minority's rights because the law applied equally to the Albanian majority.⁶⁷

Education rights of minorities are guaranteed in several international instruments. The right of members of a national minority to "establish and maintain their own educational...institutions" and to "have adequate opportunities for instruction of their mother tongue or in their mother tongue" are enumerated in the *Copenhagen Document*.⁶⁸ The 1960 *UNESCO Convention Against Discrimination in Education*, guarantees the right of "members of national minorities to carry on their own education activities."⁶⁹ The

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⁶⁶Council of Europe: *Framework Convention for the Protection of National Minorities*, February 1, 1995, 34 I.L.M. 351 (1995), at arts. 10(2), 11(1), 11(3) [hereinafter *Framework Convention*].

⁶⁷Thornberry, at 229.

⁶⁸*Copenhagen Document*, at §32(2), 34.

⁶⁹Y. Dinstein. "The Degree of Self-Rule of Minorities in Unitarian and Federal States" in Catherine Brölán, René Lefeber and Majoleine Zieck, eds. *Peoples and Minorities in International Law* (London: Martinus Nijhoff Publishers, 1993) 223 at 228.

Declaration on Minorities includes similar provisions on the ability of national minorities to learn and have instruction in their mother tongue, and to gain knowledge of their own minority's history.⁷⁰ The *Framework Convention* also guarantees similar rights.⁷¹

3. *Right of Association*

In addition to being able to operate their own schools, many scholars agree that minorities should also be free to establish and maintain other types of cultural institutions apart from those of the majority.⁷² In its Advisory Opinion, discussed, *supra*, the Permanent Court of International Justice also held:

...there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being a minority.⁷³

Article 27 of the *Covenant* also has been interpreted as guaranteeing the right of minority groups to form associations, owing to the inclusion of "as a community" in that provision.⁷⁴ Building upon this foundation, the *Declaration on Minorities* states clearly that "persons belonging to minorities have the right to establish and maintain their own associations".⁷⁵ The *Copenhagen Document* similarly guarantees minorities the right to maintain their own "cultural institutions" and to preserve "unimpeded contacts among themselves".⁷⁶ Finally, the *Framework Convention* guarantees that national minorities shall have "freedom of association", and the right to establish organizations and associations.⁷⁷

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⁷⁰Declaration on Minorities at art.4(3), 4(4).

⁷¹Framework Convention at art.14.

⁷²Baka, at 240.

⁷³Daniel Thurer, "National Minorities: A Global, European and Swiss Perspective" (1995) 53 Fletcher. F. World Aff. 54 at 58.

⁷⁴Covenant, *supra* note 14 at art.27.

⁷⁵Declaration on Minorities at art.4.

⁷⁶Copenhagen Document at §32.2, 32.4.

⁷⁷Framework Convention at arts. 7, 8.

4. *Political Participation*

In addition to operating their own associations and organizations, national minorities should also be granted the right to participate in the public life of the State in which they are located, so as to give them the power to have a voice in the decisions that determine their daily life.⁷⁸ Although the *Covenant* does not specifically enumerate the right to political participation in Article 27, the Human Rights Committee has stated that the requirements of the provision must not be exercised "in a manner or to an extent inconsistent with the other provisions of the *Covenant*."⁷⁹ Because Article 25 of the *Covenant* (which applies to all persons) guarantees the right of individuals to take part in public affairs and to have access to the public service without discrimination, it can be interpreted that Article 27 protects this right among minorities as well.⁸⁰ The *Declaration on Minorities* may confirm this interpretation, by directly guaranteeing national minorities the right to participate effectively in public life.⁸¹ As with the other rights enumerated herein, the right to participate in public life is duplicated by the other international documents dealing directly with minorities. The right to effective participation in public affairs is also asserted in the *Copenhagen Document*,⁸² and in Article 15 of the *Framework Convention*.⁸³

International law provides a *normative* basis for protecting the rights of national minorities under focus in the four case studies; however, most of the instruments enumerated suffer from other normative and remedial issues which weaken their ability to directly protect the rights of national minorities in post-communist countries. A review of the regimes in place and their weaknesses will explain the HCNM's focus on the national level, where the international legal principles of State sovereignty and non-enforceability of

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⁷⁸Baka, at 240.

⁷⁹Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994) [hereinafter General Comment 23].

⁸⁰Covenant, at art. 25.

⁸¹Declaration on Minorities at art.2.

⁸²Copenhagen Document at §35.

⁸³Framework Convention at art.15.

human rights treaties cannot operate, and where, ostensibly, human rights norms may actually be implemented, followed and enforced, and can serve as a long-term guarantor of ethnic harmony.

2. *Regimes in Place*

The international protection accorded to minorities comes as a result of various binding and non-binding international documents. At present, the minority rights which exist to protect national minorities in the region under study are mostly found within instruments offered by three international organizations, of the United Nations, Council of Europe and OSCE.

a. *United Nations*

The various covenants, declarations and resolutions of the United Nations and its numerous bodies, serve as an illustration of the general state of minority rights protection under international law. Some scholars have suggested that although it fails to mention minorities, the *Charter of the United Nations* [hereinafter *UN Charter*] may protect national minorities,⁸⁴ such as those articles which refer to the self-determination of peoples,⁸⁵ and the prohibition of discrimination.⁸⁶ Both these interpretations of the *Charter* have been strongly disputed, however. Other documents such as the *UNESCO Convention Against Discrimination in Education*⁸⁷ and the *UN Convention on the Elimination of All Forms of Racial Discrimination* may protect minorities indirectly.⁸⁸

Certain documents and institutions of the UN more directly apply to the situations under study. Bearing the "main burden in international law on protection of minority

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⁸⁴Thornberry at 122.

⁸⁵Thornberry at 119.

⁸⁶*Charter of the United Nations*, 26 June 1945, art.1(3) [hereinafter *UN Charter*].

⁸⁷John Quigley, "Towards International Norms on Linguistic Rights: The Russian-Romanian Controversy in Moldova" (1994) 10 Conn. J. Int'l. L. 90 at 91.

⁸⁸M.N. Shaw, "The Definition of Minorities in International Law" in Yoram Dinstein ed. *The Protection of Minorities and Human Rights* (London: Martinus Nijhoff Publishers, 1992) at 18.

identity",⁸⁹ Article 27 of the *Covenant*, and its treaty-body, the Human Rights Committee, is perhaps the most direct manner in which UN norms can be utilized to protect a minority. Article 27 was drafted specifically to protect minorities from assimilation, and forbids States from denying minorities the right to "enjoy their own culture, to profess and practice their own religion, or to use their own language."⁹⁰ Minority rights under Article 27 of the *Covenant* may be protected through the State reporting requirement, where States are questioned on the extent to which minorities are protected under Article 27.⁹¹ An individual from a minority in that host-State may also bring a complaint before the Human Rights Committee,⁹² which releases a decision on the individual complaint to the State party, the individual affected, and sometimes the international community.⁹³

In addition to the Human Rights Committee, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities was also created by the UN to study the problem of minority rights. In 1954, however, it decided to postpone the study of minorities, and has focused primarily on issues of discrimination.⁹⁴ Finally, as mentioned above, the *UN Declaration on Minorities*, adopted in December 1992, requires States to "protect the existence and the national or ethnic, cultural religious and linguistic identity of minorities,"⁹⁵ and also guarantees the right of a minority to existence.⁹⁶ The most recent action by the UN regarding national minorities has been the establishment of a United Nations Working Group on Minorities, charged with the task of better clarifying the content of minority rights.⁹⁷

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⁸⁹Thornberry, at 117.

⁹⁰*Covenant*, at art.27.

⁹¹*Covenant*, at art.2(2).

⁹²Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 59, U.N. Doc A 6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976 at art. 2. [hereinafter Optional Protocol].

⁹³Thornberry, at 147.

⁹⁴Shaw, at 10.

⁹⁵Quigley, at 91.

⁹⁶Packer (1996) at 157.

⁹⁷Packer (1996) at 126.

b. Council of Europe

The Council of Europe - an organization to which the four host-States and two kin-States under study belong - offers three relevant documents. First, Article 14 of the 1950 *European Convention on Human Rights* [hereinafter *ECHR*] states that persons may not be discriminated against by virtue of their membership in a minority group.⁹⁸ The potential protection of this provision, however, has been strictly limited by the European Commission on Human Rights, which has stated:

...the Convention does not provide for any rights of a linguistic minority as such, and the protection of individual members of such minorities is limited to the right not to be discriminated in the enjoyment of the Convention rights on the ground of their belonging to the minority.⁹⁹

Should a member of a national minority adhere to the above, narrow definition of discrimination, that individual may have standing to bring a case before the European Commission and/or Court of Human Rights. Two further documents which would prove useful to a member of a national minority also exist under the aegis of the Council of Europe, but do not fall under the jurisdiction of the European Court. As mentioned, the *European Charter for Regional or Minority Languages*, adopted in 1992, requires States to promote the use of minority languages.¹⁰⁰ Finally, the 1994 *Framework Convention*, noted earlier, has been labeled the "first international treaty which is exclusively devoted to the protection of national minorities and which establishes substantive legal principles."¹⁰¹ With the ratification of Finland, in October 1997,¹⁰² twelve States have now ratified the Convention, causing it to enter into force.¹⁰³ Four of the States that have ratified the

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⁹⁸Baka, at 235.

⁹⁹Thurer, at 59.

¹⁰⁰Quigley, at 93.

¹⁰¹Anders Ronquist, "The Council of Europe Framework Convention for the Protection of National Minorities" (1995) 6 *Helsinki Monitor* 38 at 38.

¹⁰²"Convention for the Protection of National Minorities to Enter into Force," *Council of Europe Press Release* 574(97) (October 3, 1997).

¹⁰³*Framework Convention* at art.28(2).

Convention are under examination in this paper - Slovakia, Romania, Hungary and Estonia.¹⁰⁴ It has been signed, but not yet ratified by Latvia.¹⁰⁵

c. OSCE

Although the UN and Council of Europe have the potential to offer certain legally binding agreements, documents of the OSCE also offer minority protections, but are *politically* binding only. The differences between politically and legally binding international agreements will be outlined in the next chapter.

The Final Act of the CSCE (the OSCE before 1994), signed in 1975, represented the first occasion where the protection of minorities was highlighted in an international forum.¹⁰⁶ In that document the rights of "persons belonging to...minorities" were highlighted.¹⁰⁷ Subsequent documents of the OSCE have created a comprehensive protection regime for the rights of national minorities. The *Concluding Document of the Vienna Follow-up Meeting of the CSCE*, 1989, called on States to "create conditions for the promotion of the ethnic, cultural, linguistic and religious identity" of national minorities.¹⁰⁸ Additionally, as discussed, *supra*, the *Copenhagen Document*, 1990, which was drafted in the euphoria of the end of the Cold War dedicates an entire chapter to the protection of minorities, and involves broad obligations. Finally, the CSCE's Meeting of Experts on National Minorities in Geneva, 1991,¹⁰⁹ led to the *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE*. This document builds

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¹⁰⁴American Society of International Law, "Recent Actions Regarding Treaties to which the United States is not a Party", in International Legal Materials 35 (1996), 807 at 807.

¹⁰⁵Council of Europe Press Release.

¹⁰⁶Nichola Girasoli, National Minorities: Who Are They? (Budapest: Academiaia Kiado, 1995) at 53.

¹⁰⁷Girasoli, at 50.

¹⁰⁸Concluding Document of the Vienna Follow-Up Meeting of the Conference on Security and Cooperation in Europe, 15 January 1989 in A. Bloed and P. Van Dijk, eds., The Human Dimension of the Helsinki Process (London: Martinus Nijhoff Publishers, 1991) at §19 [hereinafter Vienna Follow-up].

¹⁰⁹Packer (1996), at 159.

upon the provisions of *Copenhagen* and indicates that minorities are no longer the internal affairs of States.¹¹⁰

All three human rights regimes contain norms and/or mechanisms which provide a relatively solid norm structure for the protection of national minorities. The task remains, however, to discuss the limits of those regimes for protecting minorities both on a normative level and with respect to their methods of enforcement.

2. Factors Undermining the Effectiveness of International Regimes Protecting National Minorities

The previous section illustrated that national minorities have been accorded a measure of normative attention under international instruments. These instruments often serve as important normative models for States to work-from in their own domestic minority rights legislation. Indeed, the HCNM regularly draws upon the norms of the OSCE, Council of Europe, or UN, to highlight deficiencies in the domestic minority rights legislation of the States under study. The actual protection and remedies offered by these international instruments, however, falls short of what is required if minorities are to be protected in practice. Specifically, the minority rights regimes outlined above suffer to different extents from five cardinal flaws which require a focus upon national legislation to truly protect minorities.

a. Definition

At first consideration, the concept of "minority" seems almost intuitive in nature. Indeed, many international legal scholars believe that it is "self-evident" and based upon "common sense".¹¹¹ In the case studies, the Hungarian and Russian minorities are distinguishable - both objectively and subjectively - from the majorities in the four host-

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¹¹⁰ Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (1991) §12 [hereinafter Moscow Meeting].

¹¹¹ John Packer, "On the Definition of Minorities" in John Packer and Krisian Myntti, eds., The Protection of Ethnic and Linguistic Minorities in Europe (Abo: Institute for Human Rights, Abo Akademi University, 1993) 23 at 25.

States under study. Internationally, however, "there seems only to be general agreement that there is no generally agreed definition,"¹¹² As perhaps the starkest evidence of this, after having attempted and failed three separate times to define "minority", the UN Sub-Commission ultimately gave up in exasperation.¹¹³ As a result, no definition is offered by Article 27 of the *Covenant*;¹¹⁴ and, perhaps unbelievably, the *UN Declaration on Minorities* also fails to define the subject around which it has been drafted.¹¹⁵ Finally, neither the OSCE or Council of Europe have managed to define "national minority" in any documents or conventions.¹¹⁶

What obviously underlines part of the reluctance of States to accept a definition of "minority" is the term's hidden complexity. In Packer's words, minorities are not "static, monolithic groupings of human beings" and to a certain extent defy definition.¹¹⁷ Despite these problems, however, an ultimately acceptable definition should not be impossible to achieve. It is evident, for example, that objective factors such as language, culture, race, and territory might be combined with subjective elements such as a sentiment of solidarity.¹¹⁸ Further qualifications, such as the minority group having an inferior position of power within the State, may also be necessary. In the past, such combinations have produced relatively long-winded definitions. In contrast, Packer has chosen a simpler definition of "a group of people who freely associate for an established purpose where their shared desire differs from that expressed by the majority rule."¹¹⁹

This lack of definition has produced serious consequences. If minorities are to be protected under international law, the problem of identification is fundamental. Without a definition, it is impossible to "determine clearly the ranges of persons to whom the legal

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¹¹²Thornberry, at 164.

¹¹³Shaw, at 10.

¹¹⁴Thornberry, at 165.

¹¹⁵Packer (1993), at 53.

¹¹⁶Girasoli, at 56.

¹¹⁷Packer (1993), at 42.

¹¹⁸Holzapfel, at 335.

¹¹⁹Packer (1993), at 45.

norms are applicable."¹²⁰ Owing to its long history, the avoidance of the definition issue has become almost second-nature for States and International Organizations.

b. Individual vs. Group Rights

Many of the regimes above also only have limited effectiveness because most protect only *individual members* of minorities. In reality, for minorities to be adequately protected, they must be protected as a *group*, and granted legal standing as such under international law. As the President of the European Court of Human Rights recently stated:

...non-discrimination and *individual rights* may not be sufficient to meet the needs of minorities: special rights and preferential treatment are necessary to afford minorities appropriate safeguards to preserve their own characteristics and traditions [emphasis added].¹²¹

Despite this, group rights are almost completely absent from international human rights instruments. This normative gap is owing to the insecurity of States, and their belief that group rights threaten both their sovereignty, and the stability of their borders. As will be seen, Romania and Slovakia are especially concerned that group rights will lead to autonomy, and irredentism.

At present, minorities are protected as individuals in the documents reviewed.¹²² For instance, Article 27 of the *Covenant* applies to "*persons* belonging to such minorities [emphasis added]."¹²³ The Human Rights Committee, in General Comment 23, has also stated that Article 27 "relates to rights conferred on individuals".¹²⁴ Nowak confirms that the individual approach was selected out of fear that "collective protection of minorities might threaten national unity in some States."¹²⁵ The OSCE Final Act also reflects the attitude that the individual prevails over the group, and the participating States failed to discuss the issue altogether during the Copenhagen meeting.¹²⁶ As for the Council of

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¹²⁰Baka, at 231.

¹²¹Baka, at 235.

¹²²Thornberry, at 11.

¹²³*Covenant*, at art.27.

¹²⁴Human Rights Committee, *General Comment* 23, at par.3.1.

¹²⁵Manfred Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary*, (Arlington: N.P. Engel, 1993) at 497.

¹²⁶Girasoli, at 57.

Europe, the *ECHR* only grants individuals standing before the European Court of Human Rights, and the *Framework Convention* has also maintained an individualist stance by using wording similar to the *Covenant*.

Certain scholars criticize this idea of group rights, and argue that, given the fact that no group of people are entirely homogeneous, and that "few individuals within any cultural grouping are 'totally-in' or 'totally outside' their cultural group", presumptions of groups over individuals is unrealistic.¹²⁷ Unless individual-based rights are taken to the level of the group, however, minorities will continue to be denied legal personality under international law, and will be prevented from seeking adequate remedies from appropriate bodies. In the cases under discussion, some of the host-States have repeatedly capitalized upon the lack of protection for minorities as groups by boldly asserting in internationally released documents that their policies adequately protect the *individual* rights of minorities.¹²⁸ As regards the minorities under study, it is difficult to imagine how the Hungarian minority in Slovakia and Romania, or the Russian minority in Latvia and Estonia could adequately protect its community's right to language, education, association and participation without being recognized as a group.

c. *State-Centrism*

The reluctance of international law to recognize group rights is likely a symptom of a larger problem - that international law, guided mostly by States, has not yet accommodated to the proliferation of voices in international affairs. National minorities are often "perceived to be directly in competition with the voice of States",¹²⁹ or "a precursor to disintegration of the State".¹³⁰ This sentiment has been especially present among newly-independent transitional societies who are "particularly sensitive to their regained

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¹²⁷Packer (1993), at 133.

¹²⁸Dusan Slobodnik, "Some Aspects of Recent Slovak-Magyar Relations," in Slovak-Magyar Relations in Central Europe (Bratislava: Ministerstvo kultury Slovenskej republiky, 1995) at 108.

¹²⁹David Wippman, "Hearing Voices Within the State: Internal Conflicts and the Claims of Ethno-National Groups," in New York University Journal of International Law and Politics 27:585 (Spring 1995) at 586.

¹³⁰Packer (1996) at 121.

sovereignty."¹³¹ As a result, States have traditionally attempted to define them as strictly internal matters, and international law has been carefully molded to bolster the voice of States through the basic principles of non-intervention and sovereign equality.¹³²

An analysis of the three regimes outlined illustrates the measures taken by States to protect their sovereignty. Regarding the UN, many States have submitted reservations to the *Covenant* in order to limit the applicability of Article 27. Venezuela, for instance, adopted the *Covenant* with the reservation that the "provisions relating to the rights of minorities should not be so applied as to...*thwart the process of assimilation and so threaten the unity of the State* [emphasis added]."¹³³ In its General Comment on Article 27, the Human Rights Committee has also reiterated that "the enjoyment of the rights to which Article 27 relates does not prejudice the sovereignty and territorial integrity of a State party."¹³⁴ The OSCE, in the *Copenhagen Document*¹³⁵ and Council of Europe in the *Framework Convention*¹³⁶ have all adopted similar statements that minority rights do not threaten the "territorial integrity of States". The *Framework Convention* is also not immune from reservations. Estonia, while ratifying, submitted a declaration that it does not recognize foreigners as minorities - thus precluding the protection of its Russian minority under that instrument.

d. Remedial Issues

Finally, all three regimes discussed suffer to different extents, from remedial problems deriving from their lack of enforcement. Although the Human Rights Committee serves as the enforcement mechanism for the *Covenant*, its ability to actually affect change within States is severely curtailed. Its concluding observations to States parties are usually not followed-up, and the Committee has a limited ability to force States to comply with

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¹³¹Packer, (1996) at 145.

¹³²Wippman, at 587.

¹³³Thornberry, at 202.

¹³⁴Human Rights Committee, General Comment 23 at par. 3.2.

¹³⁵Copenhagen Document, at §37.

¹³⁶Framework Convention, at art.21.

them. Decisions on individual communications are similarly difficult to enforce.¹³⁷ Regarding the Council of Europe, a member of a national minority would only be entitled to the enforcement mechanisms of the European Commission or Court of Human Rights if he or she qualified under the very narrow definition of discrimination mentioned above.¹³⁸ Now that it has been ratified, the *Framework Convention* is perhaps the best hope for minorities in Europe; however, the specific ramifications which may flow from the violation of that document would likely involve only political pressure from Committee of Ministers of the Council of Europe, since the document is not under the jurisdiction of the Court. Scholars remain hopeful that an implementation mechanism will be established by the Committee of Ministers.

Many of the remedial problems noted above are a direct result of the very nature of international human rights treaties, and their inherent un-enforceability. Unlike other types of treaties, human rights treaties govern rights not for the State signatory *vis a vis* other States, but between the individuals within those States and the State. For this reason, the principle of reciprocity, by which most other treaties operate, only operates with difficulty in human rights treaties. The *Vienna Convention*, which governs the law of treaties, is clear that the breach of a human right by one State party does not free the other parties from their respective obligations.¹³⁹ As a result, despite being perhaps the best example of an enforceable human rights regime, the Human Rights Committee has "little leverage to ensure that States comply with...recommendations."¹⁴⁰ Scholars have noted that only about 25 per cent of decisions offered by the Committee are actually implemented by States.¹⁴¹

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¹³⁷Stephen Roth, "Toward a Minority Convention: Its Need and Content," in The Protection of Minorities and human Rights, ed. Yoram Dinstein (London: Martinus Nijhoff Publishers) at 90.

¹³⁸Markus G. Schmidt, "Follow-Up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond," Enforcing International Human Rights Law: The Treaty System in the 21st Century (Toronto: Centre for Refugee Studies Conference, June 22 to 24, 1997) at 2.

¹³⁹Vienna Convention on the Law of Treaties (1969) 1155 U.N.T.S. 331 (in force 1980), art. 60 [hereinafter Vienna Convention] at art.60(5).

¹⁴⁰Schmidt (1997) at 1.

¹⁴¹Burns and Okafor, at 14.

As noted above, international law offers a basic normative structure with the potential for direct or indirect protection for individuals belonging to national minorities; however, it is weak, and has perpetuated a veritable vacuum of minority protection under international law. Unfortunately, the difficulty of negotiating multilateral human rights instruments, and the reluctance of States to recognize minorities, has ensured that the situation will not improve within the foreseeable future. Some scholars suggest that the focus instead turn to bilateral human rights treaties between host-States and kin-States. Indeed, bilateral environments sometimes provide constructive means by which two States may discuss minority issues. However, the relative inability of bilateral treaties to adequately regulate minority rights protection was illustrated not only during the interwar period, but already in regard to the situations under study. Hungary and Slovakia have signed a treaty guaranteeing the respect for minorities; however, its effectiveness has been hampered by both countries' divergent interpretations of the treaty's text, and by numerous reservations.¹⁴² Hungary and Romania signed a basic treaty containing provisions on minorities in 1996; however, nine separate sub-commissions have so far not come to any agreement as to how it should be implemented.¹⁴³ For the other countries under study, the very existence of such a treaty has been used as a "carrot" for the rectification of minorities issues first, and has met with little success. Russia has repeatedly delayed signing any sort of bilateral treaty with Latvia¹⁴⁴ and with Estonia,¹⁴⁵ until the Russian minority's situation is remedied.

According to the HCNM, bilateral treaties are not useful because of three factors. First, treaties should only result following a process of reconciliation and rapprochement, and cannot serve as facilitators of those processes. When relations between States are

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¹⁴²70th Plenary Meeting of the Permanent Council of the OSCE, 23 May 1996, DDS 96-25.

¹⁴³"Hungarian Foreign Minister in Romania," Open Media Research Institute Daily Digest, 2:135 (9 October, 1997).

¹⁴⁴"Russia Raises Question over Border Treaty with Latvia," Open Media Research Institute Daily Digest, 2:144 (22 October, 1997).

¹⁴⁵"Estonia Set for Border Talks with Russia," Open Media Research Institute Daily Digest, 2:127 (29 September, 1997).

poor, as with the States under study, "efforts to conclude a bilateral treaty only serve to underline the differences of opinion between them." Second, bilateral treaties are negotiated very slowly because of the sensitive nature of issues being discussed, which may permit national minority issues to get out of control, and undermine efforts at preventive diplomacy. Third, in the HCNM's opinion, bilateral treaties still do not solve the fundamental pre-requisite for helping to solve minority issues and prevent conflict - that solutions to minority problems must be found primarily *within* States.¹⁴⁶

III. The Domestic Solution.

The importance of multilateral international legal instruments should not be minimized, as international law serves as a valuable guideline for transitional societies such as those under study in this paper. However, despite the potential normative importance of international law, Hannah Arendt once noted the potential futility of international protection if "those dependent upon international authority lack the protection of their own national government."¹⁴⁷ For this reason, and because of international law's limitations, the HCNM has sought to protect national minorities and prevent conflict by drawing from international legal norms, using those norms to improve national legislation, and capitalizing upon the domestic level's strengths of enforcement and implementation. The HCNM is not alone, however, in his attempt to amend national legislation in post-communist societies according to international standards. Taking their "window of opportunity"¹⁴⁸ seriously, many NGOs, States and international organizations have made it a priority to facilitate the successful transformation of their former communist foes into liberal democratic cousins who respect human rights.¹⁴⁹

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¹⁴⁶Van der Stoep, "Political Order, Human Rights, and Development," at 6.

¹⁴⁷Ethan E. Kingsberg, "International Human Rights Intervention on Behalf of Minorities in Post-World War I Eastern Europe and Today: Placebo, Poison or Panacea?" (1993) U. Chic. L. S. Rdtbl. 1 at 15.

¹⁴⁸William Kelly, The Economic Situation in Central and Eastern Europe, Including the New Independent States of the Former Soviet Union (Vienna: CSCE General Committee on Economic Affairs, Science, Technology and Environment, 1994), at 2.

¹⁴⁹Gianmaria Ajani, "By Chance and Prestige: Legal Transplants in Russia and Eastern Europe," in American Journal of Comparative Law (43:93 Winter 1995), at 107.

Perry notes that the number of public and private organizations now involved in legal reform could fill a 200-page directory of assistance and consulting in Central and Eastern Europe alone.¹⁵⁰ This massive consulting effort has started to cause resentment in post-communist States, which is important in considering the probable reaction by the States under study to the efforts of the HCNM. Many East Europeans began years ago to resent the "planeloads of frustrated Western law professors who brought to Eastern Europe their pet private draft codes that had been ridiculed back home," and the Western "rights-culture vending operations" which have established themselves in the major cities of the region.¹⁵¹ For better or worse, it is clear that foreign actors have perhaps an unprecedented ability to directly affect the domestic political and economic development of post-communist States. Nonetheless, it is clear that the task of implementing human rights norms into the domestic legislation of post-communist States is both unique and massive in scope.

a. Is the present situation unique?

Although other transformations have occurred in the past, it is possible that the post-communist transformation is *sui generis*, as it may be the first time that a political and economic system have been overturned.¹⁵² Theoretically, the implementation of national minority rights legislation may be extremely important for promoting long term ethnic harmony. National legislation has staying power, as regardless of the potentially nationalist character of future post-communist governments, minorities laws establish principles "which constrain the power of government, [and] oblige it to conduct itself according to a series of prescribed and publicly known rules."¹⁵³ It is clear that the HCNM

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¹⁵⁰Barbara A. Perry, "Constitutional Johnny Appleseeds: American Consultants and the Drafting of Foreign Constitutions," in Albany Law Review (55:3, 1992), at 775.

¹⁵¹Andras Sajó, "Universal Rights, Missionaries, Converts and Local Savages," East European Constitutional Review (6:1, Winter 1997), at 45.

¹⁵²Csaba Varga, "Transformation to Rule of Law from No-Law: Societal Contexture of the Democratic Transition in Central and Eastern Europe," in Connecticut Journal of International Law (8:2, Spring 1993), at 489.

¹⁵³Neil J. Kritz, "The Rule of Law in the Post-Conflict Phase: Building a Stable Peace," Unpublished Draft, at 4.

has viewed national language, education, association and political participation laws, based on international norms, as concrete guarantees that may build confidence among the national minorities, and kin-States, that negative behaviour will not re-surface as long as the host-State adheres to the law.¹⁵⁴ Perhaps the clearest illustration of gauging the extent to which post-communist states have had to amend their legal systems, and to appreciate the task the HCNM is attempting to achieve in the four States under study, is to examine their legal systems under communism, as they related to human rights.

b. Human Rights Legislation Before the Dissolution of Communism

Latvia and Estonia, as part of the Soviet Union, and Slovakia and Romania, as Soviet satellites, enjoyed entirely different understandings of law, and of the function of human rights prior to 1989 and 1991. During communism, law existed primarily to construct and support socialism under the tenets of socialist legality, which was established to effect the central government's control.¹⁵⁵ The rule of law was rejected as "hopelessly bourgeois",¹⁵⁶ and most constitutions eliminated the separation of powers, and lowered the importance and status of lawyers.¹⁵⁷ Law was also uncertain, as it was consistently amended and often went unpublished, in order to meet the ever-changing priorities of social and economic planning.¹⁵⁸ In addition, large gaps in legislation were left in order to allow for administrative discretion and secret regulations.¹⁵⁹

The application of national human rights norms also had a different conception under communism. All of the States under study ratified the majority of international human rights instruments during communism¹⁶⁰; however, their implementation

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¹⁵⁴Kritz, at 2.

¹⁵⁵Andras Sajó, "New Legalism in East Central Europe: Law as an Instrument of Social Transformation," in Journal of Law and Society (17:3, Autumn 1990), at 331.

¹⁵⁶Kathryn Hendley, "The Spillover Effects of Privatization on Russian Legal Culture," in Transnational Law and Contemporary Problems (5:39, Spring 1995), at 42.

¹⁵⁷John W. Van Doren, "Romania: Ripe for Privatization and Democracy? Legal Education as a Microcosm," Houston Journal of International Law (18, Fall 1995) at 32.

¹⁵⁸Hendley, at 43.

¹⁵⁹Sajó (1990), at 332.

¹⁶⁰Latvia and Estonia, of course, were bound by the Soviet Union's ratifications.

domestically was made impossible because of two factors. First, as a general precondition, human rights may only be guaranteed in a State which recognizes the existence of a civil society and the autonomy of the individual *vis a vis* the State.¹⁶¹ Communist human rights law did away with the individual, by replacing civil and political rights with economic and social rights "protecting" the society as a whole.¹⁶² Second, even if human rights norms existed to a certain extent, the absence of an independent judiciary or other institutions ensured that there were no institutions available for the defence and therefore guarantee of those rights.¹⁶³ In a way, human rights guarantees under communism had the same sort of problems of implementation as international norms do today.

Almost immediately after the fall of communism, States in the former Soviet bloc began to re-draft their own human rights instruments. In Slovakia and Romania, and the rest of Central and Eastern Europe, the first laws amended were those involving violations of civil and political rights. In Hungary, more than fifty laws were passed in 1989 by a parliament accustomed to passing two or three yearly under communism.¹⁶⁴ After 1991, most former Soviet States such as Estonia and Latvia also initiated a campaign aimed at replacing former Soviet legislation, which resulted in a first generation of laws that were "insufficiently clear" and "insufficiently systematic" according to outside experts.¹⁶⁵ Despite this flurry of human rights drafting, it became clear as early as 1989 that most States had begun reflecting "unrestricted majoritarianism"¹⁶⁶ in their legislation, thus indicating the need for outside assistance in drafting human rights legislation that respected the rights of national minorities.

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¹⁶¹ Rein Mullerson, International Law, Rights and Politics. Developments in Eastern Europe and the CIS, (London: Routledge, 1994), at 160.

¹⁶² Mullerson, (1994) at 169.

¹⁶³ Osiatynski, Wiktor, "Rights in New Constitutions of East Central Europe," Columbia Human Rights Law Review (26, Fall 1994) at 3.

¹⁶⁴ Sajo, (1990), at 336.

¹⁶⁵ Paul H. Rubin, "Growing a Legal System in the Post-Communist Economies," in Cornell International Law Journal (27:1, Winter 1994), at 10.

¹⁶⁶ Osiatynski, at 7.

2. Problems in Implementing National Legislative Change in Post-Communist States

Unfortunately, empirical information did not exist to assist the HCNM in selecting one *method* of legislative transformation over another.¹⁶⁷ Without a "simple instruction kit for installing a rule of law State,"¹⁶⁸ there is still significant disagreement on how best to integrate international human rights norms into the domestic legislation of transitional States. While some argue that states of the former-communist bloc must be helped to develop their own, unique legal systems, others insist that "reinventing the wheel" is unnecessary, and provide sound arguments for the outright transplantation of Western legislation. Regardless of the approach, there are both positive and negative factors in attempting to facilitate the introduction of human rights standards into the domestic legislation of other States, as the HCNM has attempted to accomplish.

a. Factors in Favour of Externally-Sponsored Legal Reform

Many organizations undertaking legal reform in post-communist countries believe that legislation based on international human rights norms may be easily implanted into the evolving legal systems of post-communist countries. The starting point for such beliefs is usually that international human rights principles are universal, and should not depend upon culture or historical experience for their implementation. Many scholars argue that since the entire Soviet bloc participated in the drafting of such important international human rights instruments such as the *Covenant*, they should be answerable to those standards. As Mullerson notes,

...contemporary human rights standards are not immutable values, inherent only to Western countries....[The] receptiveness of different societies to international standards of

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¹⁶⁷Geoffrey Pridham, "The International Dimension of Democratisation: Theory, Practice and Inter-Regional Comparisons," in Building Democracy? the International Dimension of Democratisation in Eastern Europe, eds. Geoffrey Pridham, Eric Erring and George Sanford (New York: St. Martin's Press, 1994), at 10.

¹⁶⁸Gabor Halmai, "Establishing a State Governed by the Rule of Law in Hungary," Review of Central and East European Law (22:4, 1996) at 347.

human rights is less conditioned by the cultural peculiarities of a given society than by the stage of its social, economic, and political development.¹⁶⁹

With the universality of human rights, the national legislation implementing those rights has become more similar in an integrating world. Increased interaction and communication between the continents has furthered the blending of various legal traditions.¹⁷⁰ As a result, many comparative legal scholars and economists argue that, just as "principles of physics" apply everywhere in the world, certain legal norms and structures are applicable to all societies.¹⁷¹ Of course, some problems exist with these beliefs. Apart from the "core" human rights principles, third parties may have serious practical difficulties in convincing countries to implement legislation that is in total variance with their culture. As the HCNM has discovered, States with strong nationalist leanings will especially resist legislation that gives their national minorities the rights to which they are entitled, and, as will be seen in the case studies, will tend to grant simply the bare minimum of rights if little leverage is placed upon them to comply.

A further argument is that if those States are to "return to Europe", they should learn to adhere to the legal norms of European and international organizations.¹⁷² Constitutionally, there has been already a great deal of direct borrowing by post-communist States from Europe.¹⁷³ Further, many post-communist countries have readily adopted European legislation in order to make their legal systems more familiar to prospective European investors, and to facilitate entry into European institutions.¹⁷⁴ As Ajani notes, owing to their control over extremely important purse-strings, the Legal Department of the

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¹⁶⁹Mullerson (1994), at 192.

¹⁷⁰Thomas W. Waelde and James L. Gunderson, "Legislative Reform in Transition Economies: Western Transplants - A Short-cut to Social Market Economy Status?" in International and Comparative Law Quarterly (43:2, April 1994), at 373.

¹⁷¹Walter Adams and James W. Brock, Adam Smith Goes to Moscow: A Dialogue on Radical Reform (Princeton: Princeton University Press, 1993), at 5.

¹⁷²Pridham, at 8.

¹⁷³"Constitutional Refolution in the Ex-Communist World: The Rule of Law." American University Journal of International Law and Policy Symposium (12, 1997), at 23.

¹⁷⁴John Pinder, "The European Community and Democracy in Central and Eastern Europe," in Building Democracy? The International Dimension of Democratization in Eastern Europe, eds. Geoffrey Pridham, Eric Herring and George Sanford (New York: St. Martin's Press, 1994), at 129.

International Monetary Fund also has a strong influence on how post-communist laws are reformed.¹⁷⁵

Third, there is also the possibility that the *cultural* acceptance of the rule of law and human rights will evolve *after* the introduction of externally-sponsored laws. Brenner, for instance, believes that the introduction of Western law into post-communist societies will cause the citizens of those states to respect the stability of the law, and will lead to respect for the law.¹⁷⁶ The uniqueness of the transition taking place, however, has necessarily meant that the advocating scholars have little or no evidence to support such theories.

b. Problems of Externally-Sponsored Legal Reform

Despite some factors supporting the possibility that outside actors may be successful in implementing international human rights guarantees in post-communist legal systems, four factors operate against that presumption, and have effected the success of the HCNM in trying to do so. First, there is the danger that outside intervention may be perceived as paternalistic by the States receiving the assistance. External involvement in legal reform has the potential to resemble a "noble savage - missionary" relationship, and might be rejected outright.¹⁷⁷ Human rights may be seen to symbolize the moral superiority of foreigners, and criticism by outsiders will be labeled as biased and ignored. Speaking of the ability of Americans to directly export their constitutional system to Romania, Van Doren makes the adept observation that "I do believe that such ideas may be exportable, but I am not as clear that the audience...is receptive."¹⁷⁸

Even if human rights norms are successfully placed within national laws by instruments such as the HCNM, there is also the reality that because they did not evolve within that legal system and society, recipient countries may not truly learn for themselves

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¹⁷⁵Ajani, at 113.

¹⁷⁶Reuven Brenner, "The Long Road from Serfdom and How to Shorten It." in The Canadian Business Law Journal (17, 1990-1991), at 221.

¹⁷⁷Sajo (1997) at 46.

¹⁷⁸Van Doren, at 154.

the purpose behind or limitations of those norms. As Brietzke notes, post-communist countries might have to choose and design their own laws on the basis of "learning by doing and [through] hard analysis of the problems and potentials of various forms."¹⁷⁹ It is possible that certain laws must be "organically grown" over time, and cannot successfully be implanted.¹⁸⁰ It may be that only by trial and error, and the correction of mistakes, will post-communist societies learn to use their laws, and overcome their previous view of the law as an obstacle to be circumvented for survival.

The second obstacle facing the HCNM is the impossibility of creating a *culture* of human rights simply through legislation. The very fact that most Latin American States have constitutions identical to that of the United States', yet have societies that operate in diametrically different ways, indicates that legal reform itself cannot serve as a panacea for a society's problems. As Varga argues, law does not have a life of its own, but must operate in conjunction with the culture of a society.¹⁸¹ In many post-communist States, such as the four under study, ideas of human rights and the rule of law are still viewed as suspect. New human rights legislation in post-communist societies, brought by third parties such as the HCNM will only be effective if a legal culture develops to replace feelings of cynicism, distrust and disrespect toward the law by the public.¹⁸² Waelde perhaps perfectly summarizes this argument:

A legal culture cannot be produced by a magic wand or a spectacular feat of social engineering: it can be supported by abroad - for example, training, discussion and other forms of technical assistance - but it must essentially evolve and be accepted from within the society and its emerging social forces.¹⁸³

The specific method by which a legal culture may be eventually formed is not clear. Posner simply states that "as no one seems to know how to alter a culture, there is not much to be gained from dwelling on the point."¹⁸⁴

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¹⁷⁹Paul H. Brietzke, "Designing the Legal Frameworks for Markets in Eastern Europe," in Transnational Lawyer (7:35, Spring 1994), from Westlaw - no page references.

¹⁸⁰Rubin, at 8.

¹⁸¹Varga, at 499.

¹⁸²"Constitutional Refolution", at 29.

¹⁸³Waelde, at 377.

¹⁸⁴Richard A. Posner, "The Cost of Rights: Implications for Central and Eastern Europe - and for the United

Apart from not being able to create a legal culture, the HCNM must also be careful not to ignore the legal culture that *already exists* in post-communist countries. The persuasiveness of the existing culture is a crucial consideration if the laws being introduced in post-communist countries are to be complied with; since the more an imported legislative model is opposed to "powerful strands in the existing and emerging socio-economic and legal culture" the more likely it is that the law will either not work at all, or will operate in a very different manner from what its drafters intended.¹⁸⁵

Many efforts of externally-sponsored legal reform have been undertaken with the view that post-communist countries are initiating their transition to the rule of law from the position of "no law."¹⁸⁶ In fact, this is not the case. During the interwar period, for instance, the states of Central and Eastern Europe were greatly influenced by statutes and scholarly thought from France, Germany, Austria, Italy and Switzerland.¹⁸⁷ Many post-communist legal reforms, in fact, have adopted these pre-socialist legal codes. The citizenship legislation of Estonia and Latvia, which will be examined below, was directly adopted from interwar legislation. This is significant for the HCNM, who has attempted to have that legislation replaced.

Legal culture may also have social aspects, and externally-sponsored legislation may attempt to introduce legislation that is inimical to the society receiving the law. For instance, pure liberal notions of individual human rights meaning the protection of external intrusion into an individual's life may be incompatible with socialist ideas of freedom as the development of human potential.¹⁸⁸ Ignoring the culture receiving the legislation may have detrimental effects on compliance. Sajo makes the following analogy:

The more one wants his own gods, i.e.: human rights and the rule of law, to prevail among "barbarians", the less likely is it that he will succeed....The Jesuits demonstrated

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States," Tulsa Law Journal (32, Fall 1996), at 33.

¹⁸⁵Waelde, at 376.

¹⁸⁶Rubin, at 9.

¹⁸⁷Ajani, at 94.

¹⁸⁸Osiatynski, at 16.

their keen knowledge of cultural constraints when, in Spanish South America, they allowed pagan rights to survive alongside Christian teachings and values.¹⁸⁹

IV. Conclusions:

This chapter began with establishing that a firm link exists between guaranteeing minority rights and preventing inter-ethnic conflict. As illustrated, various international documents - offered by the UN, Council of Europe and OSCE - offer a basic normative structure; however, they are remedially weak, and have perpetuated a veritable vacuum of minority protection under international law. Furthermore, it is unlikely that a new and improved multilateral instrument will be drafted with any expediency, owing to the fact that international legal norms require the consent of numerous State parties, and change only incrementally at best.¹⁹⁰

Until international protection improves, the national level seems to present the only solution for the creation of a set of norms and enforcement mechanisms that are acceptable for the protection of national minorities. At the same time, despite the so-called universality of human rights norms, or the necessity for legal continuity in Europe, there are serious difficulties in implanting human rights norms into nascent legal systems. Efforts such as this, sponsored by third parties such as the HCNM, threaten to ignore whether the receiving societies understand the use and implications of their laws, develop a legal culture, and may not take underlying historical, social, economic, cultural and religious factors of the receiving State into consideration. Of course, culture cannot be used to justify ignoring human rights; however, the difficulties of implementing human rights norms into transitional legal systems has profound implications upon the work of the HCNM, who has focused in the States under study, almost exclusively on legal reform. Indeed, even before turning to the characteristics of the mediator - as this paper will do in

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¹⁸⁹Sajo (1997), at 48.

¹⁹⁰Wippman, at 609.

its next chapter - it seems clear that the nature of the dispute in the States under study have made them difficult foci of preventive diplomacy.

CHAPTER THREE:

THE CHARACTERISTICS OF THE MEDIATOR: *OSCE's High Commissioner on National Minorities*

I. Introduction

There are many factors that might prevent States from accepting outside mediators. As Touval writes, the acceptance of an external mediator, especially in intra-state matters, is tantamount to permitting external intervention in the domestic affairs of a state.¹⁹¹ Third party involvement also gives *credence* and a *voice* to the national minority that is dissatisfied.¹⁹² In addition to whether the nature of a conflict should be amenable to preventive diplomacy, then, a crucial factor is whether the intermediary being offered will be *acceptable* to the parties. To Bercovitch, the success of a mediator is contingent not only on his or her knowledge and skill in conflict management, but on a myriad of other factors including his or her prestige and authority, originality of ideas, access to resources, and the ability to act unobtrusively.¹⁹³

In this chapter, the characteristics of the HCNM as a mediator will be discussed, in order to gain further insight as to why the institution might be less effective as a tool of preventive diplomacy. This will be achieved by first looking at the HCNM's constituency - the OSCE - and examining that organization's normative and institutional structure, and the HCNM's place in the organization. Second, the methods and tools of the HCNM will be discussed. Although the nature of the disputes in question, of the denial of minority rights, are undoubtedly difficult to solve in the States under study, it is suggested that the characteristics of the HCNM as a mediator, such as the tools he employs and the organization he represents, may provide part of the explanation of why the institution has

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¹⁹¹Touval, at 255.

¹⁹²Touval, at 266.

¹⁹³Bercovitch (1986), at 163.

not been successful in convincing the States under study to amend their minority rights legislation according to international standards.

II. The Constituency of the HCNM - The OSCE Human Dimension

Stephens writes that the constituency of a mediator - or, the powers and interests that he or she represents - is often very important for his or her acceptability to parties involved in conflict.¹⁹⁴ Under structuralist mediation theory, the most effective constituency is one equipped with coercive or economic power, such as the United States. In line with process-oriented approaches to mediation, however, Chigas argues that "power mediation" is not longer acceptable in the post Cold War world. She argues that the "likelihood of states accepting any procedure that imposes on them binding decisions on issues touching on national and cultural identity and sovereignty is low."¹⁹⁵ The HCNM, then, must look elsewhere for factors that make the constituency he represents effective in convincing parties that he is to be cooperated with.

Although the HCNM operates independently, the importance of his institutional ties to the OSCE, an organization of member States spanning from Vancouver to Vladivostok, and enforced not by legal treaty but political agreement and discussion,¹⁹⁶ cannot be minimized. Many scholars have argued that the OSCE represents the most effective organization for preventive diplomacy in the former communist bloc because it is not a relic of the Cold War such as NATO. Some have also suggested that because all post-communist States are legitimate participants of the OSCE, and are not forced, for instance, to accept "associate status" as in other International Organizations, it is especially important for the pursuit of multilateral solutions in the region.¹⁹⁷ In theory, the fact that the four States under study are actively involved in a community that agrees upon common

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¹⁹⁴Stephens, at 62.

¹⁹⁵Chigas (1996), at 41.

¹⁹⁶Chigas (1996), at 33.

¹⁹⁷Michael R. Lucas, "Russia and the Commonwealth of Independent States: The Role of the CSCE," in Helsinki Monitor (5:4 1994), at 19.

standards of human rights, then, should be helpful for lending legitimacy and moral authority to the HCNM's efforts. Indeed, the HCNM himself admits that "more and more the weight of consensus among fifty-plus governments is strengthening the impact of the High Commissioner's functioning."¹⁹⁸ Before examining the HCNM's characteristics as a mediator, then, an analysis of the institutional and normative aspects of the OSCE will be undertaken.

1. The Final Act, and the OSCE Before 1989

The OSCE process, originally known as the Conference on Security and Cooperation in Europe [hereinafter CSCE], was initiated in 1975 with the signing of the *Final Act* by thirty-four States, including the US, USSR and Holy See.¹⁹⁹ Occurring within the context of détente, the *Final Act* was initiated to fulfill the Soviet Union's need to have the post-war division of Europe recognized and legitimized internationally. The West agreed to participate once its request, that human rights guarantees be included in the final document, were agreed to.²⁰⁰ Despite these compromises, the CSCE represented a new tool of cooperation between "countries with very different political societal ideologies and systems".²⁰¹ The *Final Act* highlighted four "baskets" of cooperation: European security as elaborated through ten guiding principles which ranged from equality of States, sovereign equality territorial integrity, inviolability of frontiers and respect for human rights and fundamental freedoms; cooperation in the field of economics, science and technology, and the environment; cooperation in humanitarian fields; and the commitment to hold periodic follow-up meetings in order to review the implementation of the *Final Act* principles and develop more specific standards of conduct.²⁰² The discussion of human

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¹⁹⁸OSCE Newsletter (September, 1994), at 4.

¹⁹⁹Thornberry, at 249.

²⁰⁰Thomas Buergenthal, "The CSCE Rights System" (1991) 25 Geo. Wash. J. Int'l L. & Econ. 334 at 335.

²⁰¹P. Van Dijk, "The Final Act of Helsinki - Basis for a Pan-European System?" (1980) 11 Neth. Y.B. Int'l L. 97 at 120.

²⁰²Buergenthal, at 336.

rights and humanitarian issues would become known as the Human Dimension Mechanism, and serves as the institutional backdrop for the work of the HCNM.

During its first fourteen years, the CSCE, commonly referred to as the Helsinki Process, resembled more of a "debating society" than an International Organization.²⁰³ The value of the Follow-up process for facilitating East-West dialogue cannot, however, be under emphasized. In the context of the Cold War, the first round of meetings served as a method by which both Non-Governmental Organizations known as "Helsinki Groups" (which had formed throughout the Soviet bloc because of the *Final Act*), and Western governments could demand that the States of the Soviet bloc adhere to their CSCE commitments.²⁰⁴ When considering that these processes occurred within the "worst of geopolitical realities",²⁰⁵ the CSCE enjoyed a relatively high measure of success regarding the protection of human rights in its region. With the end of the Cold War, however, and the disintegration of the Soviet bloc, the CSCE's structure and outlook underwent a fundamental transformation.

2. *The OSCE in the post-Cold War Era*

Occurring in the context of tumultuous change in Europe, the 1989 *Concluding Document of the Vienna Follow-up Meeting* [hereinafter *Vienna Follow-up*] effectively initiated the transformation of the CSCE, with the creation of institutional, policy-guiding structures, and a specific mechanism for questioning States on their adherence to CSCE principles. The subsequent documents produced at the Human Dimension meetings in Copenhagen, 1990, and Moscow, 1991, broadened the range of CSCE norms to include

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²⁰³J. W. Sneek, "A Case-Study on the Legal Aspects of the Transformation of the Conference on Security and Cooperation in Europe from a Political Process to a Regional Arrangement under Article 52 of the United Nations Charter," in *Indiana International and Comparative Law Review*, 5 (Fall 1994) at 7.

²⁰⁴Katherine Birmingham, *The OSCE and Minority Issues* (The Hague: Foundation on Inter-Ethnic Relations, 1995) at 5.

²⁰⁵Livermore, at 3.

the rule of law,²⁰⁶ democracy,²⁰⁷ basic freedoms²⁰⁸ and the protection of minorities,²⁰⁹ and established stronger mechanisms to investigate adherence to those norms.²¹⁰ This norm-generation was accompanied by institution building. The *Charter of Paris for a New Europe* [hereinafter *Charter of Paris*], 1990, established a permanent Secretariat in Prague, in addition to other bodies in Warsaw, Vienna and The Hague.²¹¹ These institutionalizing and norm-expanding processes were furthered by virtue of the *Helsinki Summit Declaration*, 1992, which declared the CSCE a regional arrangement under Article 52 of the *Charter of the United Nations*;²¹² and the *Budapest Document*, 1994, which changed the name of the CSCE to the OSCE to give the organization a "new political impetus" and enabled it to "play a cardinal role in meeting the challenges of the twenty-first century."²¹³ Clearly, from 1989 to 1994, the CSCE/OSCE was transformed from a *process* into an *organization* which, in addition to expanding Human Dimension norms, shifted its focus to emerging issues of conflict prevention, early warning and conflict management.²¹⁴ With this transformation, an ongoing debate has emerged regarding whether the OSCE has maintained its originally non-legal, political nature, or whether its principles have grown to represent norms of customary international law.

3. *The Legal Status of OSCE Norms*

As noted in the previous chapter, there are a variety of instruments in relation to human rights. Like those regimes, the OSCE also employs norms which attempt to affix

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²⁰⁶Copenhagen Document, at §2.

²⁰⁷Copenhagen Document, at §3, 6.

²⁰⁸Such as freedom of expression, Copenhagen Document, at §9.1.

²⁰⁹Copenhagen Document, at part IV.

²¹⁰Moscow Meeting §12.

²¹¹Charter of Paris for a New Europe, 19-21 November 1990, (Ottawa: External Affairs and International Trade, 1990) [hereinafter Charter of Paris].

²¹²CSCE Helsinki Document 1992. The Challenges of Change, 10 July 1992 at §25 [hereinafter Helsinki Document].

²¹³CSCE Budapest Document 1994. Towards a Genuine Partnership in a New Era, at §3.

²¹⁴Birmingham, at 6.

international human rights standards onto a State's internal and external behaviour.²¹⁵ Despite its occasional characterization as the "conscience of the continent";²¹⁶ however, the norms of the OSCE are of a non-legal or political character, and have not normally been considered as coming under the aegis of international law.

a. Legal v. Politically Binding Regimes

Neither governments nor scholars have come to an agreement regarding the specific division between legal and political agreements, especially in the case of human rights instruments. For example, the American Law Institute, in 1969, stated that:

the distinction between an agreement that results in a binding commitment under international law and one that does not is not always clear and there are no absolute tests for determining whether an agreement constitutes a binding agreement.²¹⁷

Despite some conceptual difficulties, however, differences between the two can be enumerated on the basis of international legal theory and practice.

Theoretically, as mentioned in the previous chapter, law-creating processes internationally have the status of *lex lata*, or "firm law", as opposed to regimes such as the OSCE which represent *lex ferenda*, or "soft law".²¹⁸ Firm law, in the form of a treaty, gives rise to the principle of *pacta sunt servanda*, that the agreements of State parties must be observed. In practice, this principle translates into the operation of an international doctrine of estoppel, under which States agreeing to a treaty are estopped from violating its provisions. The doctrine of estoppel, however, does not apply to agreements of a political nature.²¹⁹

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²¹⁵Duncan B. Hollis, "Accountability in Chechnya - Addressing Internal Matters With Legal and Political International Norms" 36 B.C.L. Rev. 793 at 798.

²¹⁶Sneek, at 7.

²¹⁷Marian Nash, "International Acts Not Constituting Agreements. International Documents of a Non-Legally Binding Character" (1994) 88 Am. J. Int'l L. 515 at 516.

²¹⁸Hugh M. Kindred et al, eds., International Law Chiefly as Interpreted and Applied in Canada, 5th ed. (Toronto: Emond Montgomery Publications, Ltd., 1993) at 78.

²¹⁹Michael Bothe, "Legal and Non-Legal Norms - A Meaningful Distinction in International Relations?" Netherlands Yearbook of International Law 11 (1980) 65 at 95.

There are also practical differences. First, for those States requiring enabling procedures, non-legal agreements do not require ratification by States' national legislatures to come into force. For example, no participating State of the CSCE followed internal, constitutional procedures in order to approve the *Final Act*.²²⁰ The consequences of breaking firm law may also differ from those which might follow the infringement of soft law, although, in practical and legal terms, some consequences are not applicable to human rights treaties. The breach of firm international law may give rise to international legal responsibility, in that, if a State breaches a treaty and causes injury to another State or its representatives, it may be obliged to pay reparation to the injured party.²²¹ Failure to abide by a legal treaty also has the potential to trigger other legal responses, such as the suspension of equivalent obligations of the other party,²²² or judicial remedies imposed by the International Court of Justice or similar supra-national tribunal.²²³ Political agreements, in contrast, create moral and political obligations²²⁴ which do not represent a ground for reparation or for judicial remedies.

b. The OSCE as a Politically-Binding Regime

As a political agreement, then, OSCE documents are outside *pacta sunt servanta*, and place only moral and political obligations on States. If there is any doubt of this status, a primary principle of international law helps to clarify the OSCE's politically-binding nature. For a treaty to be legally enforceable, two fundamental elements must be present: the parties must be *subjects* of international law, and must *intend* to create binding obligations under international law.²²⁵ Certainly, all participating States of the OSCE, as

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²²⁰Van Dijk, at 109.

²²¹Kindred et al., at 521.

²²²Vienna Convention, at art. 60.

²²³Of course, as discussed in the previous chapter, however, the applicability of these theories to human rights treaties may be problematic due to the inherently un-enforceable nature of most human rights treaties.

²²⁴Alexandre Charles Kiss and Mary Frances Dominick, "The International Legal Significance of the Human Rights Provisions of the Helsinki Final Act" (1980) 13 Vand. J. Transnat'l L. 293, at 300.

²²⁵Kindred et al., at 83.

States, are subjects of international law, and have the *ability* to conclude treaties;²²⁶ however, the wording of OSCE documents, and the common intentions of the participating States exhibited at Follow-up meetings, indicate that States of the OSCE have not *intended* to create legally binding obligations under international law.

In the *Final Act*, Guiding Principle X states that the document does not diminish the value of treaties, other agreements, and "generally recognized principles and rules of international law" - which seems to distinguish that document from a document governed by international law. The non-binding language of most OSCE documents is also a clear indication that the participating States did not mean to grant OSCE documents a legally binding character. The following paragraph has appeared, in slightly varied forms, in every OSCE document since the *Final Act*, and can be found in the *Charter of Paris*:

The Government of the French Republic is requested to transmit to the Secretary-General of the United Nations the text of the Charter of Paris for a New Europe which is not eligible for registration under Article 102 of the Charter of the United Nations, with a view to its circulation to all the members of the Organization as an official document of the United Nations.²²⁷

Since only treaties are meant to be registered under Article 102 of the *UN Charter*,²²⁸ this wording clearly suggests that OSCE documents are not legally binding. This status has also not changed with the alteration in name from the CSCE to OSCE. The *Budapest Document* states that this transformation has not effected the political "character" of OSCE commitments, nor the "status of the CSCE and its institutions".²²⁹ Continued use of this "distinguishing terminology" should effectively prevent the OSCE standards from becoming legally binding.²³⁰

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²²⁶Vienna Convention, at art.6.

²²⁷Charter of Paris.

²²⁸UN Charter, art.102(1).

²²⁹Budapest Document, at C.I, §29.

²³⁰Buergenthal, at 378.

c. Does Legally-Binding Status Matter?

Chapter Two has established that international *legal* norms fall short of protecting national minorities. In some ways, however, the discussion regarding legal status is a purely academic one, especially with regard to human rights norms. Outside the realm of scholarly debate, does political or legal status really matter in terms of the adherence-to, enforceability, stability or precision of international human rights instruments? In actuality, the OSCE may more legitimately perform its task of protecting human rights than many of the legally-binding regimes discussed. In fact, the normative weight and legitimacy of OSCE norms should serve to strengthen the HCNM's constituency, and his ability to change the domestic legislation of States to closer approximate OSCE norms.

i. Adherence

State responsibility and potential for reparations have not changed the reality that States often interpret for themselves what actions are considered legal under international law, and are only legally bound if they give their express consent thereto.²³¹ Regardless of legal status, the most important consideration is whether or not States *feel* committed to principles and whether they act in accordance with them. Although OSCE commitments are not legally binding, when participating States sign OSCE documents, they do not do so lightly, and "intend, as a rule, to comply with the agreement and expect the same from the other side."²³² At the same time, although they may treat them seriously, States may believe that political documents provide flexibility not found in legally-binding documents. For example, many participating States of the CSCE chose to sign the *Final Act* in order to avoid making legally binding commitments viewed as impossible during the tenuous era of Détente.²³³ As a result, non-legally binding agreements tend to address issues viewed as politically dangerous, that have been either omitted or softened in a legally binding

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²³¹Hollis, at 844.

²³²Bothe, at 68.

²³³Both, at 91.

document. The national minority norms the HCNM is applying from the OSCE, then, are normatively superior than those from other legal regimes that tend to be general and vague, when aimed at contentious issues such as culture or minority rights.²³⁴ Once signed, evidence also suggests that OSCE participating States have adhered to or at least recognized those norms to the same extent as legally binding agreements. For example, Russia accepted the politically binding commitments of the OSCE during the civil war in Chechnya, and permitted an OSCE Mission to be established there. Furthermore, when Russia ultimately admitted that the manner in which it preserved its territorial integrity in Chechnya violated the human rights of its citizens, it referred to OSCE norms, and not to the legally-binding norms of, for example, the United Nations.²³⁵

ii. *Enforceability*

Despite the fact that the participating States of the OSCE generally adhere to OSCE norms, there will undoubtedly be occasions when they will exercise their right of non-intervention, and refuse to adhere to OSCE principles. What perhaps most distinguishes the OSCE is its ability to offer a variety of political responses to such behavior, which might bolster the HCNM's influence. Through the *Vienna Mechanism*, a participating State may challenge another on the latter's adherence to OSCE commitments. Should the accused State refuse to answer, it may be required to justify its interpretation of OSCE norms at an annual meeting of the OSCE Conference on the Human Dimension.²³⁶ This mechanism was furthered and strengthened through the creation of the "Moscow Mechanism" of the *Moscow Document*, where a participating State may become the focus of both an OSCE rapporteur mission or sanctions, should other States suspect that it has acted in violation of OSCE commitments.²³⁷ This mechanism was, in fact, first used with

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²³⁴Oscar Schachter, "The Twilight Existence of Nonbinding International Agreements," in American Journal of International Law (71, 1977), at 298.

²³⁵Hollis, at 842.

²³⁶Hollis, at 841.

²³⁷Moscow Document, at §12.

reference to the Estonian and Latvian situations. Although the HCNM does not, then, have coercive power behind him, it might be argued that the OSCE offers its own methods of ensuring that participating States comply with its norms.

iii. *Flexibility and Relevance*

A common criticism of politically enforceable agreements is that they do not enjoy the stability and precision of legally binding documents. OSCE documents are easily amended during subsequent meetings of the OSCE, and may be criticized for lacking in durability. Furthermore, because OSCE instruments are often negotiated within a limited time period, and without the advice of State legal advisors, OSCE provisions may not have the precision expected from legally-binding documents.²³⁸ Interpretation of OSCE instruments is also less-precise, as the elaborate rules of interpretation to which legal documents are entitled under the *Vienna Convention*, are not applicable to OSCE commitments;²³⁹ thus relegating the responsibility of interpretation to political figures.

As with adherence, the above weaknesses may actually represent the greatest strengths of the OSCE system. The lack of precision and stability of OSCE norms has given the organization a flexibility through which it has been able to react quickly and effectively to changing international circumstances. For example, the Chechen conflict was, by definition, an internal matter of the Russian Federation, and thus outside the purview of the Geneva Convention and *UN Charter* - both of which deal only with struggles of an inter-State nature.²⁴⁰ Although the OSCE is not immune from lengthy decision and implementation periods - since many of its policies are still determined through consensus²⁴¹ - its politically-binding nature also has meant that it can react to

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²³⁸Arie Bloed, "The Human Dimension of the OSCE: Past, Present, and Prospects," *OSCE Office for Democratic Institutions and Human Rights Bulletin* (3:3 Fall, 1995), at 18.

²³⁹*Vienna Convention*, at art.31.

²⁴⁰Hollis, at 817.

²⁴¹Rob Zaagman, "Focus on the Future. A Contribution to Discussions on a New OSCE" (1995) 6 *Helsinki Monitor* at 43.

crises quickly. For example, members of minority groups facing discrimination and inching toward violent conflict need not exhaust all domestic, local remedies²⁴² before asking for the help of the HCNM.

Finally, the fact that politically binding norms do not have the permanence of legal norms gives the OSCE a certain flexibility for finding solutions to new international problems. Unlike many international legal instruments the OSCE's follow-up process has allowed its commitments to be "amplified, reinterpreted and extensively revised" to adapt to changing international circumstances, and has resulted in a "dynamic and creative process" of norm formulation.²⁴³ For example, the original guarantees of non-interference and State sovereignty in the *Final Act* were priorities during the Cold War; however, they have since been diminished in importance to facilitate the more intrusive character of recent OSCE commitments guaranteeing, for example, the rights of national minorities. This ability to change priorities may be contrasted with the process experienced with the United Nations human rights treaties, which took many years to draft and adopt.²⁴⁴ Instead of acting, many legal regimes devote years or decades to the definition of single terms,²⁴⁵ owing to their permanent, legally-binding nature. Relieved of the pressure to draft legally-binding principles which may not be possible to amend, States are more likely to sign political commitments - even if contentious - because they may be altered at subsequent conferences, should the need arise for change.²⁴⁶

As is clear from the above analysis, the HCNM is greatly strengthened by his constituency, and the organization he is part of. The existence of a set of flexible and evolving norms through which he may work to ensure that minorities are protected in national legislation and prevent ethnic conflict are certainly elements in his favour. The fact that once signed, the politically-binding OSCE commitments are often more successful, in

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²⁴²Bloed, at 25.

²⁴³Buergenthal, at 344.

²⁴⁴Bothe, at 92.

²⁴⁵Kindred et al., at 834.

²⁴⁶Van Dijk, at 116.

adherence and enforceability, than similar legally-binding documents, should only increase the HCNM's ability to persuade States to amend their legislation according to those norms. As will be seen, however, the HCNM has not been able to convince the States under study to incorporate the national minorities norms of the OSCE. As noted, the nature of national minority protection, and attempting to guarantee it on the national level, may be one aspect. A further aspect may be the characteristics of the HCNM, and his adherence to the process-oriented approach in choosing his methods for conflict prevention.

III. The Characteristics of the HCNM

Perhaps more than any other OSCE institution, the HCNM came as a result of the OSCE's ability to react to changing international circumstances. As noted, in keeping with its new focus of conflict prevention, and the realization that security-threatening conflicts were more likely to arise within States than between them, the CSCE created the HCNM. The HCNM's mandate is to first contain and de-escalate situations of potential conflict involving minorities at the earliest possible stage and, second, to act as a tripwire to alert the OSCE when a situation cannot be contained.²⁴⁷ This first role means that, as a tool of conflict prevention, the HCNM does not have a mandate to deal with a situation once it has degenerated into violent conflict, which explains the HCNM's lack of involvement in conflicts in the OSCE region such as Nagorno-Karabakh, or the recent hostilities in Kosovo.²⁴⁸ The second function has not yet been put to use.²⁴⁹ If the HCNM chose to use the tripwire function, this would indicate the failure of the first part of the mandate.

Although an organ of the OSCE, the HCNM is distinctive because of its high degree of discretion and independence from the organization.²⁵⁰ The HCNM does not

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²⁴⁷Rob Zaagman, "The CSCE High Commissioner on National Minorities: An Analysis of the Mandate and the Institutional Context," in The Challenges of Change. The Helsinki Summit of the CSCE and its Aftermath, ed. Arie Bloed (London: Martinus Nijhoff Publishers, 1994), at 126

²⁴⁸Alexandra Rothenberger, "Introduction". Bibliography on the OSCE High Commissioner on National Minorities: Documents, Speeches and Related Publications. The Hague: Foundation on Inter-Ethnic Relations, 1997, at 4.

²⁴⁹Rothenberger, at 5.

²⁵⁰Zaagman, (1994), at 134.

require consensus from OSCE States, or approval from the Chairman-in-Office or even the host-State concerned to become involved. Practically-speaking, however, the HCNM requires the overall support of the participating States of the OSCE. Clearly, as the HCNM admits, "the High Commissioner cannot function properly without the political support of the participating States."²⁵¹

Despite the importance of having the OSCE behind him, the methods employed to prevent ethnic conflict, however, are entirely up to the HCNM's discretion. To a certain degree, then, the means by which the HCNM goes about preventing ethnic conflict are highly dependent on the individual personality of the person in the position.²⁵² Max van der Stoep, as HCNM has conducted numerous on-site missions, and has used a variety of methods to promote dialogue between parties, and clearly seems to be inspired by the process-oriented model. Five primary characteristics - determined by his mandate and by personal choice - of the way in which the HCNM seeks to employ domestic legal reform, may be cited.

1. Swiftess of Action

As mentioned above, the HCNM may determine unilaterally - without the permission of the OSCE's fifty-two participating states, including the State comprising the focus of his efforts - whether a particular issue requires attention.²⁵³ In theory, this facilitates a swift reaction to potentially explosive tensions if required, and the flexibility to determine the time "best calculated to secure optimal outcomes."²⁵⁴ This stands in stark contrast to some of the United Nations' mechanisms, which are sometimes slow in action

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²⁵¹Max van der Stoep, "Keynote Speech to the CSCE Seminar on Early Warning and Preventive Diplomacy" (Warsaw, 19 January 1994), at 2.

²⁵²John Packer (Legal Advisor to the OSCE High Commissioner on National Minorities), Interview, (The Hague, June 1996).

²⁵³Zaagman (1994), at 110.

²⁵⁴Max van der Stoep, "The Role of the CSCE High Commissioner on National Minorities in CSCE Preventive Diplomacy," at 51.

and "excessively formalized."²⁵⁵ As Kartoska argues, the HCNM has improved upon the OSCE's own ability to react quickly to situations since "ethnically-based tension inside states can be managed and prevented" without having to await the decision of the OSCE's participating states.²⁵⁶ In the case studies to be analyzed, timing has been crucial, allowing the HCNM to initiate participation before many of the controversial laws were passed by the respective parliaments, thus increasing the chance that they could have been amended or softened before tensions escalated. Thus far, the HCNM still tends to act in a *reactive* manner by waiting until invited by the government or minority in question before investigating a situation.*

2. *Facilitation, Not Dictation*

The first principle required by the OSCE mandate of the position, and over which the HCNM has no control, is that the HCNM must not attempt to impose solutions, but must function on the basis of voluntary cooperation with the parties involved. Both proponents and critics of preventive diplomacy agree that for a mediator to be truly effective and accepted, the parties must essentially be willing to voluntarily solve the problems themselves.²⁵⁷ As Stedman rightly points out, the "humanitarian tragedies of today were caused mainly by leaders who were interested in neither reaching nonviolent resolutions to conflict nor making concessions."²⁵⁸ Just as the voluntary *acceptance* of mediation is important, it is common knowledge within the literature that voluntary *participation* of the parties is also necessary for the success of a mediation initiative. In the case of preventive diplomacy, in fact, the involuntary interposition of a mediator early in a conflict is likely to

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²⁵⁵ Andrzej Karkoszka, "The Future of the CSCE: The Needs of East Central Europe," in Redefining the CSCE: Challenges and Opportunities in the New Europe, ed. Ian M. Cuthbertson (Helsinki: Institute for EastWest Studies, 1992), at 222..

²⁵⁶ Kartoska (1992), at 219.

* The High Commissioner has so far *not* utilized the full extent of his mandate and become involved in a situation against the will of the parties involved. This choice has been a personal one on the part of the High Commissioner, who feels that voluntary acceptance of preventive diplomacy is key.

²⁵⁷ Ugglas, at 15.

²⁵⁸ Stedman, at 18.

exacerbate the situation, and may cause the escalation the intervention was meant to avoid.²⁵⁹

In this way, the HCNM believes that first step in this process is obtaining the consent of the parties before becoming involved, and, once involved, does not impose solutions on the parties but rather works with them to facilitate a solution. This is despite the fact that, by adopting the Helsinki Document, OSCE states have given their *a priori* consent to be visited by OSCE officials such as the HCNM when OSCE principles are at stake.²⁶⁰ According to van der Stoel, the full consent to outside intervention by all parties involved in a conflict is crucial for the success of mediation and preventive diplomacy.²⁶¹ Further, instead of imposing solutions in a "top-down" approach, the HCNM works *with* states to develop acceptable legislation. As noted, however, facilitation is only effective when the parties are conflict are willing to work towards a compromise - a difficult proposition when considering the nature of the disputes in question, and the difficulty of changing domestic legislation.

3. *Confidentiality*

The second principle required by the HCNM's OSCE mandate is that the majority of the position's work must be conducted in confidence. The HCNM's recommendations to States are usually made public only with the consent of the Permanent Council of the OSCE. HCNM reports to the Chairman-in-Office of the OSCE regarding in-country visits, are never published.²⁶² It has been suggested that the HCNM's ability to conduct dialogue without publicity, and to avoid elaborating upon his substantive activities to the media, may also increase his acceptability to conflicting parties for two reasons. Based on the nuances of ethnic politics - where States are attempting to construct their identities under the national principle - confidential discussions may alleviate the concern of leaders that they not be

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²⁵⁹Chigas, (1996), at 30.

²⁶⁰Zaagman (1995), at 160.

²⁶¹Van der Stoel, "The Role of the High Commissioner on National Minorities", at 45.

²⁶²Rothenburger, at 7.

seen as weak by their constituents in the face of public pressure.²⁶³ Unlike confidential sessions, public discussions often result in strong public statements which can exacerbate a potential conflict and undermine attempts at resolution. The HCNM himself notes that "often parties directly involved feel they can be more cooperative and forthcoming if they know that the discussion will not be revealed to the outside world".²⁶⁴ Confidentiality also prevents national minorities from using the office of the High Commissioner as a publicity tool²⁶⁵ - a tactic which can also undermine the constructive character of discussion.

At the same time, there are also clear disadvantages of confidentiality. Tselivich argues that confidentiality may serve to keep members of the national minority totally uninformed as to the progress of the HCNM, which may contribute to the exacerbation of inter-ethnic problems. Moreover, insulating the negotiating parties from the public may also prevent them from receiving input or criticism from the populations they represent. In the case of the Russian minority in Latvia, Tselivich notes that the behind-the-scenes approach of the HCNM has prevented the Russian minority or the majority populations from learning of the content of negotiations between the OSCE and Latvian government, and of knowing whether or not their interests are being represented.²⁶⁶

4. *Management and Dialogue, not Settlement*

An important distinction between the HCNM, and other organs of international organizations which might have the ability to conduct missions to problem areas, such as the UN High Commission on Human Rights, or missions of the Council of Europe, is that the HCNM is first and foremost an instrument of conflict prevention. The HCNM is not obliged to promote the protection of minority rights or to act as an ombudsman; rather, the

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²⁶³Ugglas, at 26.

²⁶⁴Van der Stoep, "The Role of the High Commissioner on National Minorities" at 45.

²⁶⁵Zaagman (1995), at 121.

²⁶⁶Boris Tselivich, High Commissioner and Permanent Mission: The OSCE at Work in the Latvian Conflict on Citizenship and Human Rights (Kiel: Projektverbund Friedenswissenschaften Kiel, 1995), at 5.

position's sole focus is to *prevent conflict*.²⁶⁷ The HCNM's lack of ombudsman status is perhaps most reflected in the HCNM's title - High Commissioner "on" National Minorities, as opposed to "for" National Minorities.

Max van der Stoel has concentrated upon three aspects of the relationship between minorities and their host-States: promoting communication between them, facilitating the participation of national minorities in public affairs, and ensuring their integration within the host-State. The latter two aspects are the ones achieved through the use of domestic minority rights legislation, whereas the promotion of communication is, typically, a starting point to that end.²⁶⁸ The exact content of eventual legislation is often inspired and guided by the principles and standards espoused by OSCE documents, but not necessarily so. In this way, then, the HCNM is not a formal institution of the OSCE human dimension, but, in his words, "all situations with which I have had to deal contain many human dimension aspects."²⁶⁹ With respect to the implementation of international minority rights standards, the problem of focusing upon dialogue, of course, is that failures in implementation - such as the outright refusal of a State to comply - may be accepted and not challenged, because the State is still willing to argue its position. A State may simply continue "dialogue" with the HCNM, but retain legislation that runs contrary to international standards. In van der Stoel's opinion, "international treaties can never be a substitute for solutions within States;"²⁷⁰ however, as will become clear in the case studies, when those solutions fail to materialize, negative results may not be perceived, either by the State or HCNM, if dialogue nonetheless continues.

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²⁶⁷Koch, at 255.

²⁶⁸Packer, Interview.

²⁶⁹Max van der Stoel, "Controlling Ethnic Tensions in Europe: The Experience of the CSCE High Commissioner on National Minorities," Address by Mr. Max van der Stoel, CSCE High Commissioner on National Minorities to the Oxford University Civil Liberties Society, (Oxford, 28 October, 1994) at 2.

²⁷⁰Max van der Stoel, "The Role of the High Commissioner on National Minorities in OSCE Conflict Prevention," Address to the Meeting of the Third Committee of the OSCE Parliamentary Assembly (Ottawa, 4 July 1995), at 3.

5. *Impartiality*

Heraclides notes that for a dispute to be successfully defused, the mediator chosen must be seen by both parties as impartial and independent.²⁷¹ Although absolute impartiality is perhaps an unrealistic goal, since the activity of mediating is still a declaration of values held by the mediator,²⁷² it remains important that the mediator appear apart from the interests of the *opponents*.²⁷³ There are serious psychological barriers involved in one party taking compromises from an adversary.²⁷⁴

Many scholars have argued that representing an international organization with a "general interest in the preservation of international stability and the upholding of shared values" adds to a mediator being perceived as objective.²⁷⁵ This is not always the case, however. The previous UN High Commissioner for Human Rights, for instance, had minimal effectiveness in issues of national minorities owing to his tendency to actively support the case of the minority population.²⁷⁶ As an independent authority apart from the other instruments of the OSCE, it is believed that HCNM is perceived as more impartial.²⁷⁷ This added independence also ensures that if a government adheres to the suggestions of the HCNM, it is less likely to be accused of giving-in or backing down to pressure from both its adversaries or from the member-states of the OSCE.²⁷⁸

6. *Inclusiveness*

Finally, although the HCNM's status as a neutral party is attractive to national minorities, the fact that he agrees to *meet with them*, and not simply with the leaders of the

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²⁷¹Heraclides, at 3-46.

²⁷²K. Webb, "The Morality of Mediation," in New Approaches to International Mediation (New York: Greenwood Press, 1988), at 16.

²⁷³Stephens, at 57.

²⁷⁴Lee Ross and Constance Stilling, "Barriers to Conflict Resolution," in Negotiation Journal (7:4, October 1991), at 394.

²⁷⁵Mitchell, "The Motives for Mediation", at 37.

²⁷⁶Scott, at 6.

²⁷⁷Uggas, at 26.

²⁷⁸As is clear, there is often a delicate balance between the positive and negative effects of a strong constituency. In many cases, too strong a constituency may be viewed as undue influence to the parties in a conflict.

host and kin-States, might also be significant. According to his mandate, the HCNM may consult with any party provided they are related to the area of tension,²⁷⁹ and has the ability to "collect and receive information...from any source." As a result, despite occasional protests by host-States over the participation of the minorities in discussions,²⁸⁰ the HCNM meets not only with ministers and public officials during his visits, but with minority cultural organizations and representatives of ethnic political parties.²⁸¹ Because they are treated in a similar way as the State parties directly involved, national minorities may be more inclined to react positively to the HCNM's efforts.²⁸²

Of course, including national minorities in negotiations might also lend credence to separatist aspirations. As a result, the HCNM has taken a very firm stand against secession or irredentism, in order for the host-States to participate in such discussions. As much as possible, the HCNM has operated under the principle that the means for containing and reducing tensions between national minorities, host-States and kin-States, must be pursued "within the framework of the existing State."²⁸³ The HCNM argues that national minority rights legislation may actually curtail secession or irredentism, as

"self-realization [of minority aspirations do] not necessarily have to find a territorial expression but [can] often be realized through legislation promoting the development of the identity of the minority in various fields, such as culture, education, local government et cetera."²⁸⁴

The HCNM believes that minority rights legislation based in part on international norms leads to loyalty from national minorities to their host-State, and vice versa, thereby engendering the stability of the host-State.

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²⁷⁹Zaagman, at 139.

²⁸⁰Reisch, at 54.

²⁸¹"Report from the High Commissioner on National Minorities," in *OSCE Newsletter* (2:6 June 1995), at 2.

²⁸²Rob Zaagman and Hannie Zaal, "The CSCE High Commissioner on National Minorities: Prehistory and Negotiations," in *The Challenges of Change. The Helsinki Summit of the CSCE and its Aftermath*, ed. Arie Bloed (London: Martinus Nijhoff Publishers, 1994), at 110.

²⁸³Max van der Stoep, "Controlling Ethnic Tensions: The Experience of the CSCE High Commissioner on National Minorities." *Remarks at the Annual Conference of the European Research Centre on Migration and Ethnic Relations, Utrecht University* (19 September 1994), at 3.

²⁸⁴Max van der Stoep, "The Role of the High Commissioner on National Minorities in OSCE Conflict Prevention," at 3.

IV. Conclusions

This chapter has established that, in theory, many of the HCNM's characteristics as a mediator are promising. The position's constituency - the OSCE - with its broad set of effective and dynamic norms, as well as its breadth of participants that include the four kin-States and two host-States under study, have the potential to provide the HCNM with the institutional and normative support necessary to convince States that they must conform to those norms with respect to their national minorities. Building upon this strength of constituency, the HCNM's methods, that include the ability to act quickly, confidentially and impartially to initiate dialogue with all the parties involved, are also positive factors, theoretically. The task remains, however, to test these attributes of the HCNM empirically, by studying the institution's efforts in four States since 1993, to determine whether success has been achieved. It may in fact be that a constituency without the ability to use sanctions and enforce its will, or a mediator less-focused upon solutions than management and dialogue, may be of little value in even low-intensity inter-ethnic disputes.

CHAPTER FOUR

The OSCE High Commissioner on National Minorities and the Russian Minority in Latvia and Estonia

I. Introduction

To the participating States of the OSCE, it was clear that Latvian and Estonian intolerance toward their Russian minority might have potentially grievous security repercussions. Within a short time after the dissolution of the Soviet Union, the newly independent States of Estonia and Latvia attempted to construct uni-national states in a bi-national environment.²⁸⁵ These actions sparked the scorn of both the large Russian national minority in both States, and Russia itself, a former "occupier" with troops still stationed in both countries. This situation represented the CSCE's first chance to put the HCNM to the test as its new mechanism of preventive diplomacy. After only two months in office, Max van der Stoep visited Latvia and Estonia in 1993 to assess the situation and recommend legislative and other solutions to the brewing ethnic conflict. As the HCNM has been involved in this situation for almost five years, a case study of the Latvian and Estonian conflicts should provide some empirical evidence to measure the effectiveness of the HCNM as a tool of preventive diplomacy.

This case study of the HCNM in Latvia and Estonia, with respect to the Russian national minority there, will be organized into three sections. First, in order to provide background to the conflict, the host-States, kin-State and national minorities will be discussed, as well as the overall increasing tensions between those groups since 1991. Second, the specific issues of contention between those groups, of language and education and citizenship, will be analyzed according to their development before the involvement of the HCNM. Finally, the activities and involvement of the HCNM in Latvia and Estonia

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²⁸⁵M. Opalski, B. Tsilevich and P. Dutkiewicz, Ethnic Conflict in the Baltic States: The Case of Latvia (Kingston: Kashtan Press, 1994), at 1.

will be traced from 1993, the position's possible effect on the resolution of those issues will be discussed, and its effectiveness evaluated.

II. Background

As with many instances of inter-ethnic conflict, the foundations of the Russian-Baltic conflict are historically based and deeply rooted. Russians and Balts have traditionally viewed one another through incommensurate historical lenses, and have been unable to develop a shared understanding. For both, memories of former national glories or abuses have radicalized each community's internal political atmosphere, which provided ample background for the escalation of conflict between them after 1991.

1. The Host-States - Latvia and Estonia

As is the norm for states which have historically found themselves within the sphere of interest of great powers, Baltic historical consciousness concentrates mostly on their brief but democratic interwar experiences with independence, and on their subsequent subjugation by Russia in 1940 as a result of the Molotov-Ribbentrop Pact.²⁸⁶ After deporting 30,000 Balts to Siberia by 1949, Russian settlers began flowing into Latvia and Estonia throughout the Cold War, both because they were directed to by the Soviet government, and because those republics had the highest standard of living in the Soviet Union. The results of these migrations are evident today, where, despite the republics' relative ethnic homogeneity before the Second World War, ethnic Russians now constitute between 40 to 48 per cent of the Latvian population, and one-third of the Estonian population.²⁸⁷ As Weiner writes, the use of emigration by the Soviets to assert "the dominance of one ethnic community over another" is a common one among empires, and has formed the basis for ethnic conflict in numerous historical situations and geographical

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²⁸⁶Pal Kolsto, "The New Russian Diaspora: Minority Protection in the Soviet Successor States," in *Journal of Peace Research* (30:2, 1993), at 209.

²⁸⁷Michael Rywkin, *Moscow's Lost Empire* (New York: M.E. Sharpe, 1994), at 31.

locales.²⁸⁸ For Latvians and Estonians, the most damaging aspect of the immigrations has been psychological, and "the very real threat under Soviet rule, of being reduced to a minority within their own homeland...has left deep scars upon [their] psyches."²⁸⁹

During Soviet rule, the Latvian and Estonian sense of historic injustice was further heightened by policies of Russification, and by other administrative practices that favoured the Russian minority.²⁹⁰ The fact that, as compared to pre-1940, the Baltic States experienced greater hardship and lower standards of living under Soviet occupation, only furthered the resentment of the Baltic States.²⁹¹ The experiences under Soviet rule have formed an important aspect of Latvian and Estonian identity, and have directly contributed to the xenophobic character of both republics' legislation following their secession from the Soviet Union. Instead of considering themselves as newly independent, as other States of the former USSR, both Estonia and Latvia have viewed themselves as *restored* States. Operating under the international legal dictum *ex iniuria jus non oritur* - that an illegal act cannot give rise to legal rights - both countries have maintained that their occupation by the Soviet Union was illegal.²⁹² This position has been bolstered by the fact that Western powers did not recognize the occupation of the Baltics by the Soviet Union. As a result, both countries have based their post-Soviet legal orders on a restorationist view, and have used this to justify mono-ethnic policies despite their sizable Russian minorities.²⁹³ These restorationist roots are evident in both countries' constitutions. For example, Estonia's constitution is "based on the inextinguishable right of the Estonian people to self-determination" and the protection of that culture "throughout the ages".²⁹⁴

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²⁸⁸Myron Weiner, "Security, Stability, and International Migration" in International Security (17:3 Winter 1992-1993), at 113.

²⁸⁹Anatol Lieven, The Baltic Revolution. Estonia, Latvia and Lithuania and the Path to Independence (London: Yale University Press, 1994), at 185.

²⁹⁰A. & M. Kirch, "National Minorities in Estonia", in Ethnicity and Conflict in a Post-Communist World, eds. Kumar Rupesinghe, Peter King and Olga Vorkunova (New York: St. Martin's Press, 1994), at 98.

²⁹¹Lieven, at 178.

²⁹²Richard C. Vissek, "Creating the Ethnic Electorate Through Legal Restorationism. Citizenship Rights in Estonia" in Harvard International Law Journal (38, Spring 1997) at 15.

²⁹³Vissek, at 21.

²⁹⁴Lowell Barrington, "Nations, State and Citizens: An Explanation of the Citizenship Policies in Estonia and Lithuania," in Review of Central and East European Law (21:2, 1995) at 134.

Despite their exclusive ethnic outlook, both Estonia and Latvia have played a consistently active role in multilateral organizations since the end of the Cold War; especially those centred in Europe. This likely made intervention by the OSCE much more acceptable to both States, and should provide a "best-case" scenario, as far as States willing to cooperate with external intervention, for the purpose of this paper. Estonia became the first State to invite an OSCE mission onto its soil, in order to observe the Russian minority situation there.²⁹⁵ Latvia, in addition to also permitting a mission, also used the OSCE as an impartial mediator during its successful negotiations with Russia over the Skrunda space radar station.²⁹⁶ Both States are also members of the Council of Europe, signed free trade agreements with the European Union in 1994,²⁹⁷ and became associate Members of the EU in June 1995.²⁹⁸ Since then, it has been confirmed that Estonia will be among the first wave of countries to join the EU, with Latvia representing part of the second wave.

Originally, it appeared as though relations between the Baltics and the Russian Federation would not be problematic. When their newly-declared independence was seen as precarious in 1991, the three Baltic States agreed with the Soviet Union that persons residing in either territory would have dual citizenship rights.²⁹⁹ Once it became evident that the Soviet Union was doomed to fail, attitudes hardened, and bitterness prevailed. Political leaders in Estonia and Latvia quickly saw the presence of the Russian minority as a security threat,³⁰⁰ and began advocating for the latter's return to Russia, and the "decolonization" of their countries. Shortly after independence, Latvian and Estonian political parties began speaking openly of the Russians as "illegal immigrants",³⁰¹ and advocated the "peaceful emigration of non-citizens." Negative Russian stereotypes also circulated,

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²⁹⁵Lucas, at 59.

²⁹⁶Wilhelm Hoynck, "New Challenges on the OSCE Conflict Resolution Agenda," in OSCE Office for Democratic Institutions and Human Rights Bulletin (3:2, Spring 1995), at 2.

²⁹⁷Saulius Girmius, "Reaching West While Eyeing Russia," in Transitions (1:1, 30 January 1995), at 14.

²⁹⁸Foreign Broadcast Information Service, (17 January 1996), at 36.

²⁹⁹Kolsto, at 210.

³⁰⁰Wiener, at 102.

³⁰¹Lieven, at 303.

and it was within this atmosphere that ideas of limiting the legal rights of the Russian minority first surfaced.³⁰²

2. *The Kin-State - The Russian Federation*

Russians' historical perceptions of the Baltics are strongly molded by the fact that, apart from a brief glimpse of nationhood during the interwar period, the Baltics have constituted part of the Russian Empire and then the Soviet Union for hundreds of years.³⁰³ This phenomena, that "Russian national consciousness and Russian imperial consciousness have been one and the same from the time of Peter the Great," has presented a complicating factor for many post-Soviet States.³⁰⁴ Many Russians during the early years after 1991 had significant difficulty coming to terms with the reduced size of their country. When the OSCE HCNM first became involved in the Russian-Baltic situation in 1993, the immediate post-Cold war "honeymoon" had ended. At this time, there were fears that Russian leaders would minimize the legitimacy of national independence movements in their "near abroad", and, subsequently, find it perfectly legitimate to follow their *national interests* and intervene in those States.³⁰⁵

For the Russian Federation, the ill treatment of their ethnic brethren in the Soviet successor states is of twofold importance. First, in its present state of transition, the beleaguered Russian social infrastructure simply cannot absorb a deluge of discontented ethnic Russians from the Baltics.³⁰⁶ Second, as is now accepted among international relations scholars, internal political uncertainty has driven Russian politicians to defend vehemently the interests of Russians abroad in order to maintain the support of the Russian public. In 1991, Russian politics were relatively benign owing to massive internal

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³⁰²Rywkin, at 96.

³⁰³Rywkin, at 29-30.

³⁰⁴Miron Rezun, "Introduction" in Nationalism and the Breakup of an Empire. Russia and its Periphery, ed. Miron Rezun (Wesport: Praeger Publishers, 1992), at 3

³⁰⁵James E. Goodby, "Collective Security in Europe After the Cold War," in Journal of International Affairs (46, Winter 1993), at 321.

³⁰⁶Barrington, at 118.

uncertainly and restructuring; however, by 1993 - the height of tension over the Baltic situation - the situation had changed, and continues today, where even *moderate* Russian politicians have succumbed to a new attitude. Brzezinski notes that "increasingly, the most articulate and politically appealing leaders seem to be those who argue that Russia is destined to exercise geopolitical sway over Eurasia."³⁰⁷ In November 1993, Russia promulgated a new military doctrine that placed a heavy emphasis on defending the "rights, freedoms and legitimate interests" of Russians residing in the near abroad.³⁰⁸ In February 1994, Russian President Boris Yeltsin, during a speech at the newly elected Russian parliament stated:

...a strong and powerful Russian state is the most reliable and real guarantor of stability on the entire territory of the former Soviet Union....When it comes to the violations of the lawful rights of people of Russia, *that is not an exclusive internal affair of some country, but also our national affair...*[italics mine].³⁰⁹

In keeping with this attitude, Russia has proven quite willing to re-assert its dominance in the Baltic States through pressure tactics such as keeping Russian troops stationed on Baltic soil, ceasing natural gas deliveries to the region, or refusing to recognize borders - actions it has taken from 1992.³¹⁰ Indeed, the Russian Federation has not taken Estonian and Latvian historical fears toward them very seriously, and has squarely concentrated upon the interests of Russians abroad. During a 1996 meeting, the Russian Ambassador to the OSCE stated quite clearly that "we flatly reject the idea that the Estonian attitude towards citizenship issues is designed to mitigate the consequences of 'occupation' and 'colonization'".³¹¹ Often, threats of intervention have been quite overt, as with comments from the head of the Russian Presidential Commission on Citizenship:

If this lawlessness continues with respect to our compatriots, they may unite and establish their own autonomies in those [Latvian and Estonian] republics, with their own

³⁰⁷Zbigniew Brzezinski, "The Premature Partnership," in *Foreign Affairs* (73:2, March-April 1994), at 31.

³⁰⁸Bruce D. Porter and Carol R. Saivetz, "The Once and Future Empire: Russia and the Near Abroad," in *Washington Quarterly* (17:3), Summer 1994), at 88.

³⁰⁹Teresa Rakowska-Harmstone, "Russia's Monroe Doctrine: Peacekeeping, Peacemaking, or Imperial Outreach?" in *Canada Among Nations 1994. A Part of the Peace*, eds. Maureen Appel Molot and Harald von Riekhoff (Ottawa: Carleton University Press, 1994), at 243.

³¹⁰Porter and Saivetz, at 88.

³¹¹Statement by Ambassador V. Shustov, Representative of the Russian Federation to the OSCE, (May 9, 1996), OSCE Doc. PC.298/96, at 3.

bodies of power in order to defend their own interests, or else, may acquire Russian citizenship and there will be big enclaves of Russian citizens there. In that case Russia will have all the right to protect their interests. This is my warning to our colleagues in Estonia and Latvia.³¹²

It is now evident that the reduction in the size of the USSR to its veritable rump form as the Russian Federation, and the fact that 17 per cent of Russians reside outside of that territory,³¹³ had painful psychological repercussions on many Russian nationals.

3. *The Ethnic Russian Minority in Estonia and Latvia.*

Many persons representing the Russian minority clearly did not have any control over the "occupation" of the Baltics, and were simply trying to live their lives. Accordingly, they have consistently argued that, in the post-War period, they have assisted in building Estonian and Latvian society, and have paid their taxes to those States, as much as ethnic Estonians and Latvians have.³¹⁴ In addition to historical factors, however, two additional aspects of the Russian minority's demographic situation within Latvia and Estonia have also prevented the two communities from finding a common understanding. First, the Russian minority's dense concentration within cities has prevented interaction between the two communities. For example, although their presence is scarcely felt in rural areas, Russians predominate in Riga, and form about half of Tallin's population.³¹⁵ Similarly, in the Estonian city of Narva, only 3,000 out of 76,000 people are ethnic Estonians.³¹⁶ Because they associate almost exclusively with one another, the culture of the State in which they found themselves during Soviet times was always ignored in favour of the Russian culture and language.³¹⁷ Second, the Russian minority is also divided from the majorities of Estonia and Latvia by class. Most Russians in the Baltics constitute a proletarian diaspora. Moreover, the restructuring and privatization of Soviet-style heavy

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³¹²As quoted in Visek, at 56.

³¹³Kolsto, at 198.

³¹⁴Visek, at 47.

³¹⁵Rywkin, at 94.

³¹⁶OSCE Mission to Estonia, Activity Report No. 96 (14 June 1996), OSCE Doc. Ref.Sec./333/96, at 2.

³¹⁷Rywkin, at 31.

industrial enterprises has led to high unemployment and layoffs of unskilled and semiskilled workers, which has hit the Russian minority especially hard.³¹⁸ The fact that many Estonians and Latvians are educated and middle class has further prevented the formation of community ties between Russians and Balts.³¹⁹ Perhaps fortunately, the Russian minority has not been politically active. Mostly, their activity has been characterized by general strikes and boycotts, and forming "front organizations", both of which experienced a relatively quiet death with the fall of the Soviet Union and the onset of their new minority status.³²⁰

The nuances of the relationship between Latvia and Estonia, their Russian minority, and the Russian Federation, presented a clear situation of potential conflict to the member States of the OSCE. This potential resulted in steadily increasing tension between these groups after Latvia and Estonia gained independence in 1991.

II. The Issues

As is clear from the second chapter, legislation is an extremely powerful tool through which a newly established State may define and solidify its new identity. Owing largely to their view of themselves as restored States, the two most contentious types of laws in Estonia and Latvia that effectively marginalized and created the possibility of conflict with its Russian national minority involved language and education, and citizenship. Although language and education were introduced as clear heads of minority rights protection under international law in the second chapter, the relationship between citizenship rights and the rights of minorities is a more complicated connection to establish.

It would be beyond the scope of this paper to fully explore whether a right to citizenship under customary international law is developing. Traditionally, issues of citizenship have been considered as clearly within the discretion of States to grant or not

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³¹⁸OSCE Mission to Estonia (14 June 1996), at 2.

³¹⁹Lieven, at 186.

³²⁰Lieven, at 200.

grant. Recent writing and the behaviour of States in international organizations does not reveal whether *opinio juris* has developed to say that such a right now exists under customary international law.³²¹ Without dealing with this issue, this chapter approaches the issue of citizenship in a more practical and procedural way. Regardless of whether or not a State has the *obligation* to grant citizenship to national minorities, the denial of citizenship has the *effect* of not only infringing upon that community's right to political participation - a category of minority rights which was identified in the second chapter - but to its ability to *have* or *enforce* human rights themselves. As Groenendijk writes, denying citizenship to national minorities is problematic because, without citizenship, a government is no longer legally responsible for a minority's well being.³²² Without citizenship, a national minority is denied any protection whatsoever under domestic law, and is unable to enforce its rights as a minority. During his involvement in Latvia and Estonia, the HCNM has drawn a very strong link between citizenship and right to political participation, and to human rights as a whole. An excerpt of his correspondence with the Government of Latvia illustrates this connection:

...to deny citizenship to hundreds of thousands of non-Latvians residing in Latvia is tantamount to refusing to grant them political rights....If the overwhelming majority of non-Latvians in your country is denied the right to become citizens, and consequently the right to be involved in key decisions concerning their own interests, the character of the democratic system in Latvia might even be put into question.³²³

As will become clear, the denial of citizenship for the Russian minority infringed upon their rights of political participation, as well as upon their rights to be protected against discrimination under the law. In this first section, the status of language and education, and citizenship legislation in Estonia and Latvia before the arrival of the HCNM will be examined.

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³²¹Erika B. Schlager, "The Right to Have Rights: Citizenship in Newly Independent OSCE Countries," in Helsinki Monitor (8:1, 1997), at 4.

³²²Kees Groenendijk, "Nationality, Minorities, and Statelessness. The Case of the Baltic States," in Helsinki Monitor (4:3, Winter 1993), at 19.

³²³Letter from Max van der Stoep, CSCE High Commissioner on National Minorities to Georgs Andrejevs, Minister for Foreign Affairs of the Republic of Latvia (10 December, 1993), OSCE Doc.1463/93/L at 2.

1. Language and Education Legislation

For both Latvia and Estonia, the use of the language of the "occupiers" was soon discouraged after independence, regardless of their initial willingness to accept Russian as a second language. As Visek notes, even though the majority of Balts became bilingual by necessity during Soviet rule, many refused to speak the language in order not to legitimize that occupation.³²⁴ This process was especially threatening to the Russian minority in both States, as, owing to their dense concentrations, mentioned above, many had not found the need to learn either Latvian or Estonian.

Although in 1989, Latvia granted Russian the status of "the language of inter-ethnic communication," the situation changed as nationalism grew. In 1992, amendments to the Latvian language law reduced Russian to an ordinary foreign language, and penalties such as fines were instituted for its use in public.³²⁵ Russian signs were removed in Riga, despite that city's ethnic Russian population of 63 per cent,³²⁶ and Latvia amended its Labour code so that Russian speakers could, directly or indirectly, be fired from their jobs for failing to use Latvian.³²⁷

The original Estonian Law on Language also forbid Russian language signs outright,³²⁸ and instituted strong regulations regarding the use of Russian in the media.³²⁹ Some of the strongest measures were imposed upon those in local government or the bureaucracy, and directly infringed the Russian minority's right of political participation. Knowledge of Estonian was soon required for those working within State institutions or local government - regardless of whether those institutions were located within Russian-speaking areas. In fact, both the city councils of Sillamae and Narva were forbidden to use

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³²⁴Visek, at 46.

³²⁵Opalski, et al., at 6.

³²⁶Lieven, at 312.

³²⁷Opalski et al., at 6.

³²⁸Vello Pettai, "The Situation of Ethnic Minorities in Estonia," in Ethnic Minority Rights in Eastern Europe, eds., Magda Opalski and Piotr Dutkiewicz (Ottawa: Canadian Human Rights Foundation Forum Eastern Europe, 1996), at 47.

³²⁹Raimo Pekkanen and Hans Danelius, "Human Rights in the Republic of Estonia," in Human Rights Law Journal (13:5-6, 1994), at 241.

Russian for internal communications. In order to run for local elections, candidates had to have either graduated from Estonian language school, or to have passed a language examination.³³⁰ For those employed in private enterprises, provisions in the Estonian labour code were introduced which permitted the firing of those not using the Estonian language in conversation.³³¹ Russian education in areas populated by the Russian minority was also severely curtailed by the Estonian government. Although the original language laws instituted by the Latvian and Estonian governments were harsh, it was the citizenship legislation which most threatened to cause tensions with the Russian minority.

2. *Citizenship*

For the Baltic states, the determination of citizenship was the first tangible step toward defining the boundary between those who belonged to the community and others who did not.³³² For both Latvia and Estonia, this meant excluding those who arrived after 1940. As mentioned, although the *criteria* for obtaining citizenship in both countries was harsh, it was the different *rights* of citizens and non-citizens which has made citizenship an especially contentious issue.³³³ In both Latvia and Estonia, citizenship legislation quickly changed the majority of ethnic Russians from citizens into stateless persons, regardless of the fact that many had lived in those countries their entire lives.

The original draft of the Latvian Law on Citizenship was adopted in the first reading by the Latvian Parliament on 25 November, 1993, and was obviously based on the notion that its "uninvited immigrant population" did not deserve the rights of citizens.³³⁴ Latvian citizenship was denied outright for those without a "legal income" (which precluded the growing masses of unemployed Russians from becoming citizens), and to those who had served in the Russian military or had worked *in some way* against Latvian

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³³⁰Visek, at 50.

³³¹Opalski, et al., at 6.

³³²Groenendijk, at 16.

³³³Barrington, at 107.

³³⁴Andrea J. Hanneman, "Independence and Group Rights in the Baltics: A Double Minority Problem," in Virginia Journal of International Law (35:2, Winter 1995), at 522.

independence.³³⁵ This last criterion for exclusion was, of course, liable to extremely wide, arbitrary interpretations, and precluded all retired Soviet military personnel, and others who had shown pro-Soviet sympathies.³³⁶ For those not excluded by the above, a process of naturalization was established. It required that those wishing to obtain citizenship have a high level of Latvian language proficiency, and instituted a ten-year residential qualification that could be delayed through a quota system applied according to the "demographic and economic situation in Latvia." This quota system was especially subject to great criticism by the Russian minority, as it introduced a large amount of uncertainty into their future status.³³⁷ Provided these conditions were met, persons could begin to qualify for naturalization beginning in 1996.

The September 1992 version of the Estonian citizenship law also reduced the ethnic Russian minority in that country to the status of aliens. Based on the attitude that "with the restoration of Estonia's de facto independence came the de facto restoration of its citizenry," the 1938 Law on Citizenship was simply resurrected and applied, despite the significant change in Estonia's demography since 1938. Automatic citizenship was granted to all persons who were citizens prior to 1940, and to their descendants.³³⁸ For others, an elaborate set of requirements were established, similar to those of Latvia. In order to gain citizenship, applicants were required to have a high level of proficiency in Estonian and were given difficult civics exams.³³⁹ Aside from these requirements, naturalization levels also remained low owing to arbitrary decisions by bureaucrats who interpreted provisions incorrectly;³⁴⁰ however, the original Estonian law did not have the vague exclusions of the Latvian law, regarding those persons who had worked against independence. The most damaging effect for the Russian minority in Estonia and Latvia were the rights suddenly

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³³⁵Lieven, at 310.

³³⁶Nils Muiznieks, Ethnic Politics in Post-Soviet Latvia (Latvian Center for Human Rights and Ethnic Studies, 1995) at 10.

³³⁷Letter from CSCE High Commissioner on National Minorities (10 December 1993), at 2.

³³⁸Law on Citizenship (Estonia, Adopted 1938), at art.6.

³³⁹Kolsto, at 210.

³⁴⁰OSCE Mission to Latvia. Activity Report No. 14 (30 March, 1995), at 8.

denied to them as "aliens." Under both laws, only citizens could vote, or own certain types of property.³⁺¹ As a result, at one point only 10 per cent of the voting age population of Narva and Sillamae (cities with large Russian populations) were eligible to vote in the first parliamentary elections.³⁺²

For those not qualifying for automatic naturalization in Estonia, the 1993 Law on Aliens turned former citizens essentially into temporary residents. It gave non-citizens one year to submit applications for residency or be expelled by July 1995. Owing to the practical impossibility of having all non-citizens registered by then, the Estonian government eventually agreed not to enforce the July 1995 deadline and planned to grant alien status and passports to 300,000 non-citizens which would be valid for five years. These alien passports, however, still curtailed the right of ethnic Russians to travel abroad, as they contained only a one-time-use travel permit which stated clearly that the bearer was not entitled to the protection or aid of Estonian diplomatic officials abroad.³⁺³

III. The Involvement of the OSCE HCNM

Sparked by the requests of the Russian minority for assistance, the Russian Federation voiced its complaints via the "Moscow Mechanism" to the CSCE during the summer of 1992,³⁺⁴ and the Baltic situation became a predominant concern at the Helsinki II Summit meeting of 1992.³⁺⁵ Although Russia's initial request that a mission be sent to Estonia was denied, Estonia's own invitation for a mission was accepted.³⁺⁶ In 1993, based on similar concerns, the OSCE Mission to Latvia was established in order to monitor the situation regarding citizenship.³⁺⁷ Although Russia initiated the process in a relatively non-confrontational manner, its attitude soon gave way to an aggressive stance. By 1993,

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³⁺¹Pettai, at 41.

³⁺²Vissek, at 22.

³⁺³Pettai, at 43.

³⁺⁴Lieven, at 378.

³⁺⁵Heraclides (1990), at 99.

³⁺⁶Lucas, at 19.

³⁺⁷Tsilevich, at 3.

Russia began using a combination of economic and military threats to ensure that Latvia and Estonia would recognize Russia's "preeminence and adjust their policies to Moscow's liking".³⁴⁸ When the Estonian parliament passed its language law, Russia ceased natural gas deliveries to Tallinn, which delayed the legislation's coming into force.³⁴⁹ Furthermore, although former Soviet troops had been removed from Lithuania, owing to that country's relatively liberal citizenship law, Russian President Boris Yeltsin refused to withdraw Russian troops from Latvia and Estonia until the rights of the Russian minority were guaranteed.³⁵⁰ Ominous warnings also began emanating from Russia regarding its relinquishment of the Skrunda space-radar station and Leipaja military base in Latvia.³⁵¹

It is perhaps not surprising that the CSCE in 1993 chose to first implement the HCNM in the potentially explosive situation of Latvia and Estonia. Initially, the HCNM faced criticism from the ethnic Estonian and Latvian public, who believed he was acting as an advocate for the Russian minority.³⁵² These views have largely tempered over the course of his involvement. Notably, despite the threats of the Russian Federation, the HCNM has avoided linking the withdrawal of troops with the improvement of minority legislation, which has likely improved his image among ethnic Estonians and Latvians.³⁵³

Although the following section will focus upon the reform of language and citizenship legislation, the HCNM also implemented confidence building measures in both States, which did not necessarily involve legislation. For instance, according to a suggestion by the High Commissioner, the Estonian President agreed to open round-table talks with Russian minority leaders.³⁵⁴ As a result, several OSCE roundtables on inter-ethnic relations involving the Russian minority have unofficially continued in Estonia and

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³⁴⁸Rywkin, at 197.

³⁴⁹Porter and Saivetz, at 81.

³⁵⁰Rywkin, at 96.

³⁵¹Lieven, at 310.

³⁵²Letter from Max van der Stoep, CSCE High Commissioner on National Minorities to Juri Luik, Minister for Foreign Affairs of Estonia (9 March, 1994), OSCE Doc.3005-94/L, at 1.

³⁵³Tsilevich, at 6.

³⁵⁴Richard Dalton, "The Role of the CSCE," in Minority Rights in Europe: The Scope for a Transnational Regime, ed. High Miall (London: Pinter Publishers), at 104.

Latvia.³⁵⁵ The OSCE's role in mediating the Russian-Latvian discussions on the Skrunda station also led to an agreement where it would be temporarily operated by Russia, and eventually dismantled. The OSCE was given the ability to conduct on-site inspections to ensure compliance with that agreement.³⁵⁶

1. *Language Legislation*

In both Estonia and Latvia, the HCNM has concentrated not upon guaranteeing the Russian minority's language rights to use and be educated in the Russian language, even in the face of anti-Russian language policies which are *prima facie* violations of international law. Instead, his efforts have revolved around ensuring that ethnic Russians may learn either Estonian or Latvian, and thereby better integrate with those societies. In Latvia, the HCNM applauded the hiring of new Latvian language teachers, the creation of new Latvian language textbooks,³⁵⁷ and the implementation of a new national programme for Latvian language training. He noted that these initiatives would be especially helpful for "non-citizens who want to acquire the Latvian citizenship and who have to pass a language test to obtain it."³⁵⁸ The HCNM's choice to focus upon the learning of Latvian is interesting given the fact that Latvian language policy has grown increasingly intolerant toward the Russian language. As one example, in September 1997, the Latvian government issued a decree limiting the use of textbooks published abroad in the country's classrooms.³⁵⁹ This decree, of course, will have the effect of abruptly terminating the availability of textbooks in the Russian language for use by students in ethnically Russian areas of Latvia, and indirectly violates their right to education in Russian. Moreover, although the original

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³⁵⁵OSCE Mission to Estonia (14 June 1996), at 5.

³⁵⁶Hoyneck, at 2.

³⁵⁷Letter from Valdis Birkavs, Minister for Foreign Affairs of the Republic of Latvia to Max van der Stoep, OSCE High Commissioner on National Minorities (11 September 1997), OSCE Doc. 9704-ansLAT, at 1.

³⁵⁸Letter from Max van der Stoep, OSCE High Commissioner on National Minorities to Siim Kallas, Minister for Foreign Affairs of the Republic of Estonia (28 October 1996), OSCE Doc. 9701.rec.EST, at 2.

³⁵⁹"Latvia Restricts use of Foreign Textbooks," in RFE/RL Newswire (2:112, 8 September 1997).

Latvian Law on Language was harsh enough, a new draft alternative language law has been drafted which requires that in addition to the workplace, Latvian must be used in *private* situations (the enforcement of which is open for speculation). Unlike some other language laws, the HCNM *has* strongly condemned the draft as overly restrictive, and has urged the Latvian government to amend it in adherence with international standards.³⁶⁰

In Estonia, the language law has been amended, as per the recommendations of the High Commissioner, to be easier on the elderly, and the establishment of a "National Commissioner on Ethnic and Language Questions" was viewed favourably by the government.³⁶¹ Other laws involving language requirements have also been tempered in other ways. For example, the HCNM, in concert with the Council of Europe, was successful in removing the language requirement of the local elections law, which allowed non-citizens to participate, but required knowledge of Estonian to vote.³⁶² The HCNM has also attempted to foster a cooperative attitude between Estonia and its Russian minority by chairing round tables on education, and on language policy; however, as with his work in Latvia, the majority of efforts have not involved promoting the right of the Russian minority to use its language, but on teaching them Estonian. Indeed, the HCNM seems to have agreed with the Estonian government that "communication between communities and thus learning the State language [is] one of the main mechanisms for integration",³⁶³ and has assisted the Estonian government to establish language training centres (also funded by the PHARE programme) and promote the teaching of Estonian in schools with mostly ethnic Russian children.³⁶⁴ Recently, the Estonian Government passed legislation

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³⁶⁰OSCE Newsletter (4:10, October 1997), at 13.

³⁶¹"Letter from the High Commissioner on National Minorities to the Minister for Foreign Affairs of the Republic of Estonia, 6 April 1993," in The Conference on Security and Cooperation in Europe. Analysis and Basic Documents, 1972-1993, ed. Arie Bloed (Kluwer Academic Publishers, 1993), at 1067.

³⁶²OSCE Mission to Estonia, Local Elections Law (20 May 1996), OSCE Doc. Ref.Sec/273/96, at 2.

³⁶³Letter from Valdis Birkavs, Minister for Foreign Affairs of the Republic of Estonia to Max van der Stoep, OSCE High Commission on National Minorities (4 June 1997), OSCE Doc. 9708-ansEST, at 1.

³⁶⁴OSCE Newsletter (4:11, November 1997), at 9.

requiring that all Russian schools must have "State-Language Teachers" to improve Estonian language instruction.³⁶⁵

As with Latvia, the HCNM's involvement in the language issue in Estonia has not prevented the perpetuation of legislation or policies that are less tolerant toward the Russian minority. As a result, inter-ethnic relations between Latvians and ethnic Russians have remained unsatisfactory. The Estonian Government plans to totally eliminate all Russian secondary education, although the implementation of this policy has been delayed until after 2000 because of protests from the Russian minority.³⁶⁶ Moreover, the *Law on Language* still contains a provision that all public service employees must learn Estonian.³⁶⁷ In the Spring of 1997, the Estonian Ministry of Justice began dismissing and in some cases prosecuting judges and attorneys in Russian speaking areas for their lack of proficiency.³⁶⁸ Most recently, only the Estonian President's refusal to sign, prevented an amendment to the Law on Language which would have required all parliamentary deputies and *local* government officials to know Estonian.³⁶⁹ As is clear, the HCNM has not had an effect on promoting Russian language rights in Estonia. Even in areas almost entirely populated by Russian speakers, the general rule has been vigorously maintained that "every other language beside the Estonian language shall be a foreign language", despite the reality of Estonia's bilingual population. Aside from discrimination in employment, as seen above, the *Law on Language* has also instituted regulations forbidding the use of anything but Estonian in place names, the names of persons, and all signs and advertisements.³⁷⁰ Although the law does contain some provisions for the use of minority languages,³⁷¹ those

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³⁶⁵"Estonia's Russian Schools to get State-Language Teachers," *RFE/RL Newslines* (2:154, 6 November 1997).

³⁶⁶"Estonian President Meets Russian Minority Representatives," *RFE/RL Newslines* (2:126, 26 September 1997).

³⁶⁷*Law on Language* (Estonia. Adopted by the Riigikogu on 21 February 1995, Proclaimed as Law by the President of Estonia, 6 March 1995), at par.7.

³⁶⁸"Estonia Cracks Down on Russian-Speaking Officials with Poor Knowledge of Estonian" in *RFE/RL Newslines* (2:26, 7 May, 1997).

³⁶⁹"Estonian Parliament, President, Disagree over Language Law," in *RFE/RL Newslines* (1:183, 19 December 1997).

³⁷⁰*Law on Language* (Estonia), at pars.19, 20, 24.

³⁷¹*Law on Language* (Estonia), at chap. 3.

provisions have proven inapplicable to much of the Russian minority, owing to their lack of Estonian citizenship.

2. *Citizenship Legislation*

The HCNM has had similarly mixed results with respect to the citizenship laws in both countries. In Latvia, the HCNM had some influence on the country's citizenship and alien laws. After his first viewing of the citizenship law in the Spring of 1993, the HCNM wrote that it was "undesirable that Latvia would insist on such high requirements for citizenship that a great number of applicants would not be able to meet them."³⁷² When his suggestions were ostensibly ignored, and the un-amended legislation received its first reading, he again wrote to the Latvian Ministry for Foreign Affairs warning of the potential for conflict.³⁷³ At this time, his warnings became more direct. In correspondence with the Latvian Government, the HCNM reiterated his understanding of the need for Latvians to maintain and strengthen their identity after Soviet occupation, but made a very strong link between denying citizenship, and the violation of the Russian minority's rights to political participation. The HCNM also reminded Latvia that "massive expulsion of non-Latvian residents would be contrary to generally accepted international humanitarian principles." Throughout the Latvian-Russian issue, the HCNM has maintained that persons desiring citizenship should be able to acquire it, and that a balance must be struck between preserving the Latvian identity, and ensuring harmonious inter-ethnic relations.³⁷⁴ During his five years of involvement in Latvia, the HCNM has had some effect on the citizenship law itself, the process of naturalization, and the law on aliens.

The Latvian government agreed to amend some of the most contentious provisions in its new *Law on Citizenship*, passed 22 July, 1994. First, the quota system was replaced

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³⁷²"Letter from the CSCE High Commissioner", (6 April 1993), at 1072.

³⁷³Letter from CSCE High Commissioner (10 December 1993), at 1.

³⁷⁴Letter from CSCE High Commissioner (10 December, 1993), at 2.

by a time-table system, and application processing times were reduced to one year.³⁷⁵ Denial of citizenship was amended from vague grounds to those applicants who had actually been *convicted* of subversive activities,³⁷⁶ and judicial review of citizenship decisions was also instituted.³⁷⁷ The OSCE Mission to Latvia deemed these amendments as "a major step in the right direction", which went a substantial way towards accommodating the suggestions of the HCNM.³⁷⁸ These positive changes to the citizenship law have been retained, despite attempts by right wing parties to further restrict naturalization in Latvia.³⁷⁹

In addition to these legislative changes, however, Latvia has stubbornly refused to alter most other aspects of its citizenship legislation, despite consistent efforts of the HCNM and the international community over the past five years. If anything, the majority of amendments since 1993 have served only to increase the number of ethnic Latvians from abroad who can obtain citizenship, and have done nothing to increase the numbers of ethnic Russians entitled to citizenship.³⁸⁰ Non-Latvian parents are still not automatically granted citizenship, regardless of how long they have lived in the country,³⁸¹ and the requirement of a "legal source of income" has been maintained.³⁸² Although the quota system was replaced in the new law, the "window system" still gives priority to those born in Latvia, and to younger as opposed to older applicants for naturalization.³⁸³ The effect of this system is that 469,053 citizens must wait until after 2000 to even *apply* for naturalization.³⁸⁴ Perhaps the most contentious issue has been the denial of citizenship to

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³⁷⁵Opalski et al, at 9.

³⁷⁶Law on Citizenship (Latvia), at art.11(1), par. 7.

³⁷⁷Law on Citizenship (Latvia), at art.17(3).

³⁷⁸CSCE Mission to Latvia, Riga. Activity Report No.7 (July 30, 1994), at 1.

³⁷⁹Saulius Girmius, "Petition for Latvian Alternative Citizenship Bill Fails," Open Media Research Institute Daily Digest (2:35, 19 February 1996).

³⁸⁰Muiznieks, at 11.

³⁸¹Opalski et al. at 8.

³⁸²Law on Citizenship (Latvia), at art.12(1), par.5.

³⁸³Law on Citizenship (Latvia), at art.14.

³⁸⁴Letter from Max van der Stoep, OSCE High Commissioner on National Minorities to Valdis Berkavs, Minister for Foreign Affairs of the republic of Latvia (23 May, 1997), OSCE Doc.376/97/L, at 1.

ethnic Russian children born in Latvia, which has resulted in thousands of children who are effectively stateless. The HCNM has consistently maintained that this policy violates numerous international agreements to which Latvia is a party.³⁸⁵ In response, the Latvian government and parliament³⁸⁶ has steadfastly argued that, compared to other States in Europe, its citizenship legislation is quite fair, and that it strictly adheres to international legal standards on citizenship.³⁸⁷ The fact that it faces a demographic situation quite different from the rest of Europe, has not been mentioned.

The second issue with which the HCNM has been involved has been the process of naturalization, which is governed by Article 12 of the *Law on Citizenship*. For the last five years, the HCNM and the OSCE Mission to Latvia have worked closely with the Naturalization Board to discuss how the citizenship legislation might be applied in a manner which would effectively and fairly grant citizenship to those of the Russian national minority who wish to obtain it. Some positive results have been achieved. As a result of recommendations from the HCNM, the Government of Latvia has decided to reduce the naturalization fee for students and the poor. In addition, the language and history elements of the naturalization test have been made slightly easier for non-Latvians, and eliminated for the elderly.³⁸⁸ Over 93 per cent of applicants now pass the language test, and over 90 per cent the test on Latvian history and the constitution. At the same time, however, there remains a large discrepancy between those 80 per cent of non-Latvians who still want to become citizens, and those who are actually applying and taking the tests. In 1995, only twenty per cent of those expected to register for naturalization did so.³⁸⁹ In 1996, the level decreased to two per cent.³⁹⁰ These low rates may be attributed to the still daunting nature of the language and history tests. Regarding language, it is clear that the naturalization

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³⁸⁵Letter from OSCE High Commissioner (23 May, 1997), at 4.

³⁸⁶"Latvian Parliament Rejects Amendments to Citizenship Law," in *RFE/RL Newswire* (2:141, 17 October 1997).

³⁸⁷Letter from Minister of Foreign Affairs of the Republic of Latvia (11 September 1997), at 4.

³⁸⁸Republic of Latvia, *Amendments to the Law on Citizenship*, (Riga, March 22, 1995).

³⁸⁹OSCE Mission to Latvia, *Activity Report No.17* (28 June, 1995), at 1.

³⁹⁰*OSCE Newsletter*, 3:12 (December 1996), at 10.

board has actually set language requirements far above the conversation-level standards which were established in the *Law on Citizenship*.³⁹¹ In his correspondence with the Latvian Government, the HCNM has expressed concern that the history test also remains too difficult for the average ethnic Russian in Latvia:

I wonder whether it is really necessary for candidates for citizenship to know what Swedish educational policy was like in Vidzeme in the seventeenth century, or which religion was supported in Latgale during the period of Polish reign, or which state officials hold the most merits for achieving diplomatic recognition of Latvia in the beginning of the twentieth century.³⁹²

Many also do not apply for naturalization because the fee attached still represents about one month's wage. Despite involvement by the HCNM, as well as by the OSCE Mission to Latvia, the naturalization process remains a barrier to many ethnic Russians hoping to obtain citizenship status. Clearly, the Latvian government is still motivated by a nationalist-inspired programme to avoid granting citizenship to its ethnic Russian minority. Perhaps the clearest sign of Latvia's ethnic biases is the fact that, even after ethnic Russians are granted citizenship, their passports still describe them as ethnic Russian - a requirement out of step with international practice.³⁹³

As opposed to the situation before the involvement of the HCNM and the international community, non-citizens have at least been granted some security through the Latvian legislation on the status of aliens. The *Law on the Status of Former USSR Citizens* compensated slightly for the failings of the citizenship legislation by effectively granting legal status and some security to 700,000 Latvian residents who are not citizens.³⁹⁴ The law provides the Russian minority with the ability to have a residence in

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³⁹¹ Law on Citizenship (Latvia), at art.20. Specifically, the criteria are: "A person shall be regarded as having a command of the Latvian language if he/she: 20(1) fully understands information of an everyday and official nature; 20(2) can freely speak, discuss, and answer questions on subject of an everyday nature; 20(3) can fluently read and understand any text of an every nature, law and other normative acts, instructions and direction of an everyday nature; and 20(4) is able to write an exposition on an everyday theme."

³⁹² Letter from OSCE High Commissioner (23 May, 1997), at 3.

³⁹³ Letter from Max van der Stoep, OSCE High Commissioner on National Minorities to Valdis Birkavs, Minister for Foreign Affairs of the Republic of Latvia (21 November, 1996), OSCE Doc. 9703.recLAT, at 1.

³⁹⁴ OSCE Mission to Latvia, Activity Report No.15 (24 April, 1995), at 2.

Latvia, and to leave and return to Latvia freely.³⁹⁵ These aims have been mostly pursued through the issuance of "non-citizen passports"³⁹⁶ to ethnic Russians whose Soviet passports were about to expire, which has been continuing slowly, despite massive bureaucratic inefficiency, since December 1996.³⁹⁷ Although the alien passports have given ethnic Russians some ability to travel abroad, they are still barred from many activities in Latvia. They cannot vote,³⁹⁸ be elected to public office, hold a variety of jobs, own land, and face many other restrictions.³⁹⁹ Furthermore, many commentators have criticized the law on aliens for being unclear as to the rights of non-citizens, which has created "good room for bureaucratic arbitrariness, [and] promotes insecurity among non-citizens."⁴⁰⁰

In a situation very similar to Latvia, the HCNM has been involved with Estonia's citizenship and alien laws, as well as with procedures for naturalization. Similar to his strategies with Latvia, the HCNM has attempted to balance his understanding of the Estonian need to solidify its identity with the need to ensure legal status for ethnic Russians.⁴⁰¹ From the very beginning of his involvement, the HCNM has stressed that the citizenship policies of the Estonian government could lead to potentially destabilizing effects:

Apart from the fact that such a policy would scarcely be compatible with the spirit, if not the letter, of various international obligations..., such a policy would, in my view, involve a considerable risk of increasing tension with the non-Estonian population which, in turn, could lead to a destabilization of the country as a whole. In addition, it would have a strongly negative effect on relations between Estonia and the Russian Federation.⁴⁰²

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³⁹⁵Law on the Status of Former USSR Citizens Who Do Not Have the Citizenship of the Republic of Latvia or Any Other State, (Republic of Latvia), at art.2(2) [hereinafter Law on Aliens (Latvia)].

³⁹⁶Law on Aliens (Latvia), at art.3.

³⁹⁷OSCE Newsletter (December 1996), at 10.

³⁹⁸The Saeima Election Law (Riga, June 6, 1995), art.1. Under this law, art.5(5), those who "belong or have belonged to the salaried staff of the USSR, Latvian SSR or foreign state security, intelligence or counterintelligence services" are also not allowed to vote.

³⁹⁹Muiznieks, at 12.

⁴⁰⁰Tsilevich, at 6.

⁴⁰¹Letter from OSCE High Commissioner (9 March, 1994), at 1.

⁴⁰²Max van der Stoep, as quoted in Visok, at 52.

Originally, some of the HCNM's suggestions were successfully incorporated into subsequent drafts of the citizenship law. Estonia allowed applicants to take the language test over,⁺⁰³ reduced the language requirement to the ability to conduct a simple conversation in Estonian, and, like the language law, lowered that standard further for the elderly and physically challenged.⁺⁰⁴ Lastly, the residence requirement was lowered to two years.⁺⁰⁵ The problem of ethnic-Russians being deprived of the right to vote was also remedied by an amendment to the *Electoral Law* which granted that right for *local* elections.⁺⁰⁶

The value of these changes evaporated when Estonia passed an entirely new *Law on Citizenship* in 1995 which the HCNM immediately declared as significantly harsher than the previous law. Although the Estonian government claimed that it would "not limit the rights provided by earlier legislation",⁺⁰⁷ it expanded the residency requirement to five years,⁺⁰⁸ and waivers for language tests were narrowed. The new law also added vague criteria, similar to the Latvian law, where persons could be refused citizenship if they had, for example, "acted against the state of Estonia and its security".⁺⁰⁹ At the same time, other laws were passed, such as the *Law on Public Service*, which required that all civil servants who were not Estonian citizens be let go by February 1996 (a deadline eventually postponed).⁺¹⁰ Estonia's new citizenship law also eliminated a provision present in the earlier law which would have granted Estonian citizenship to ethnic Russian children born

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⁺⁰³Comments by the Ministry of Foreign Affairs of Estonia on the Recommendations of the Mission of the CSCE High Commissioner on National Minorities," in The Conference on Security and Cooperation in Europe. Analysis and Basic Documents, 1972-1993, ed. Arie Bloed (London: Kluwer Academic Publishers, 1993), at 1081.

⁺⁰⁴Letter from the OSCE High Commissioner on National Minorities to the Minister for Foreign Affairs of the Republic of Estonia, (8 December 1994), at 1.

⁺⁰⁵Letter from the Minister of Foreign Affairs to the Republic of Estonia to CSCE High Commissioner on National Minorities, (23 December 1994) OSCE Communication No.1, Vienna. at 1.

⁺⁰⁶Statement by Ambassador V. Shustov, at 4.

⁺⁰⁷Letter from Estonia (23 December 1994), at 1.

⁺⁰⁸Law on Citizenship (Estonia, Adopted by the Riigikogu on 19 January 1995), at art.6(2).

⁺⁰⁹Law on Citizenship (Estonia) at art.21(3).

⁺¹⁰OSCE Mission to Estonia, Activity Report No.93 (24 January 1995), OSCE Doc. Ref.Sec/29/96, at 7.

in Estonia.⁺¹¹ This change occurred and remained regardless of the HCNM's argument that ethnic Russian children "consider Estonia not as an alien country, but as their country".⁺¹² In response, Estonia has cited the fact that ethnic Russian children have the choice of obtaining Russian citizenship quite easily, and are therefore not "stateless".⁺¹³ As with Latvia, Estonia has also consistently argued that its citizenship legislation is comparable to that of the rest of Europe. Recently, the Estonian government wrote the HCNM:

Estonia should not be singled out for having adopted a legislation, which, as regards the specific issue raised by you [of granting children born in Estonia citizenship], does not differ from that of several other European States, also members of the OSCE and the Council of Europe.⁺¹⁴

The new *Law on Citizenship* has received harsh criticism from not only the HCNM, but from the Council of Europe, and the UN Human Rights Committee. The latter has proclaimed that the non-citizens in Estonia have been deprived of rights under the *Covenant* owing to the stringent regulation of citizenship. None of these criticisms have driven Estonia to change its law. Instead of amending the new legislation, the government has staunchly defended its position using terms that perhaps best encapsulate the difficulty of convincing States to amend their national legislation: "Estonia is a sovereign state, and no one can force us to change our laws."⁺¹⁵

Because of this refusal to amend its citizenship legislation, the HCNM, as with Latvia, has had no choice but to turn his attention to the naturalization process in Estonia. There has been some success with this issue, such as the Estonian government's agreement to exempt elderly applicants from the written civics test,⁺¹⁶ and the slight lowering of the standard of the language test. The Estonian government has claimed passing rates of over 90 per cent for the civics and language requirements of the naturalization test, and has

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⁺¹¹ Letter from Max van der Stoep, OSCE High Commissioner on National Minorities to Juri Luik, Minister for Foreign Affairs of Estonia (9 March, 1994), OSCE Doc. 3005/94/L, at 4.

⁺¹² Letter from High Commissioner (21 May, 1997), at 8.

⁺¹³ Letter from Minister for Foreign Affairs of the Republic of Estonia (4 June, 1997), at 4.

⁺¹⁴ Letter from Minister for Foreign Affairs of the Republic of Estonia (4 June, 1997), at 5.

⁺¹⁵ *Vissek*, at 32.

⁺¹⁶ Letter from the High Commissioner (28 October 1996), at 1.

declared itself willing to accept more recommendations to make it easier.⁺¹⁷ As with Latvia, however, the HCNM believes both sections to be too difficult for ethnic-Russians to pass, since they lack the education in those subjects. Specifically, questions such as "who decides the question of handing over a citizen of Estonia to a foreign state" would not be answered successfully by the majority of citizens of ethnic *Estonian* descent. Under the new law, children must also pass both tests, which has decreased their level of application as well.⁺¹⁸ As a result of the new citizenship law, the number of persons applying for naturalization has decreased dramatically in Estonia. Since independence, approximately 90,000 non-citizens have gained citizenship; however one-third of these have been ethnic Estonians.⁺¹⁹ Only 6,225 persons have become citizens under the new law on citizenship, which has been in force for almost three years. During the Spring of 1997, 210,000 persons in Estonia, mostly ethnic-Russians, were still without citizenship, which represents 14 per cent of the population.⁺²⁰

As with Latvia, the HCNM and OSCE Mission have also concentrated upon the protection of non-citizens by the law on aliens, and through a non-citizens passport system. Estonia has been, on the whole, more willing to amend the *Law on Aliens* than its citizenship legislation. In agreement with suggestions of the HCNM, Estonia amended the law to provide permanent residence permits ahead of schedule, and appointed a Minister for Inter-Ethnic Relations to keep dialogue open with the ethnic Russian community.⁺²¹ Time tables for applying for residency and work permits were extended to three years from one, and all non-citizens who settled in Estonia before 1990 were guaranteed non-citizen passports, provided they qualified.⁺²² Even Russian critics have agreed that the "most

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⁺¹⁷Letter from Minister of Foreign Affairs of Estonia (4 June 1997), at 3.

⁺¹⁸Letter from the High Commissioner (21 May 1997), at 4.

⁺¹⁹Vissek, at 27.

⁺²⁰Letter from the High Commissioner (21 May 1997), at 4.

⁺²¹Letter from the High Commissioner (21 May 1997), at 2.

⁺²²Law on Aliens (Estonia - Passed in Riigikogu on July 8, 1993, Proclaimed by the President of the Republic by Resolution No.158 of July 11, 1993, in force July 12, 1993), at art.20(2).

odious articles" of the aliens legislation have been removed.⁺²³ At the same time, however, some problematic provisions have remained, such as the vague criteria for denying residence permits on the basis of actions against Estonia.⁺²⁴ The process of actually issuing non-citizens' passports to aliens has also proceeded with some success, with 98,000 having been distributed by the Summer of 1997.⁺²⁵ As with the Latvian aliens law, however, non-citizens in Estonia are still deprived of rights such as the ability to vote, to own property, and to be securely employed.

IV. The HCNM in Estonia and Latvia - Successful Preventive Diplomacy?

It cannot be denied that, in many ways, there has been a reduction in tension surrounding situation in Estonia and Latvia since the HCNM become involved in 1993. Indeed, since the onset of the situation, there has been a marked absence of physical violence or open inter-ethnic clashes, and not a single Russian family was actually *expelled* during the entire period of tension.⁺²⁶ Most importantly, Russia's threats have never escalated beyond strong rhetoric. In fact, Russia has recently offered new concessions, such as the reduction of its ground and naval forces in the northwest of Russia as a confidence building measure, and has offered extended security guarantees to the Baltic States (which have been politely refused).⁺²⁷ As seen in this chapter, it cannot be denied that some effort has been made by Estonia and Latvia to adhere to the HCNM's suggestions. Under process-oriented models of mediation, the HCNM's involvement in both States may be cited as great successes for conflict "management" and for the continuation of "dialogue". Both have been cooperative as far as letting foreign human rights missions on their soil, have established lines of communications with the ethnic

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⁺²³Statement of Russian Ambassador to the OSCE, at 4.

⁺²⁴Law on Aliens (Estonia), at art. 12(4).

⁺²⁵Letter from the Minister of Foreign Affairs of Estonia (4 June 1997), at 3.

⁺²⁶OSCE Mission to Latvia, Activity Report No.15, at 10.

⁺²⁷"Baltics Welcome Proposed Troop Reductions in Russia's Northwest," in RFE/RL Newswire (2:172, 4 December 1997).

Russian communities, and passed aliens laws which provided for some of the rights taken away with citizenship.

It cannot be denied that some real evidence of reduced tension have occurred. In Estonia, many Russian troops had left by the end of 1993, and an agreement was signed between Russia and Estonia to support the voluntary repatriation of Russian soldiers and their families to Russia.⁺²⁸ Indeed, Estonia has been so pleased with its adherence with HCNM recommendations that it has recommended that the OSCE Mission to Estonia be closed (which has been characterized as somewhat premature by most OSCE participating States).⁺²⁹ On April 30, 1994, a troop withdrawal agreement was ratified between Latvia and Russia. The fact that, prior to that agreement's ratification, the Russian government was prepared to implement an already-drafted decree on the suspension of Latvia's Most Favoured Nation Status indicates the direction of events if an agreement had not been reached.⁺³⁰ The reversal of attitude was primarily responsible for the treaty signed with Russia on April 30, 1994 on the withdrawal of former Soviet troops from Latvian soil.

At the same time, however, it is not clear how much the lack of violence can be attributed to the HCNM's involvement, whether a conflict was "prevented" by him and the OSCE. Moreover, it is difficult to place inherent value on the dialogue and conflict management that has occurred. It is true that, since 1993, the ethnic Russian minority in both countries has not engaged in widespread acts of inter-ethnic violence. It is also true that the Russian Federation has taken no action to invade either Estonia or Latvia, apart from "saber rattling". At the same time, what value is to be placed upon dialogue where parties refuse to listen to the mediator, apart from giving lip service to certain suggestions, in order to maintain some relationship with him? This chapter has indicated that Estonia and Latvia have largely ignored the warnings and suggestions of the HCNM on several occasions, and nothing has been done to reduce the core of ethnically-oriented policies

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⁺²⁸Open Media Research Institute Daily Digest (218:2 8 November 1995).

⁺²⁹"Estonian Foreign Minister on Future of OSCE," in RFE/RL Newsline (2:12, 16 April 1997).

⁺³⁰CSCE Mission to Latvia, Activity Report No.7, at 3.

toward ethnic Russians. Regardless of the large numbers of Russian speakers in their countries, both States have steadfastly refused to grant the Russian language any legal status whatsoever. Regarding citizenship, although there have been some improvements in naturalization procedures and aliens laws, the fact remains that thousands of persons have been robbed of legal status and political rights simply because of their ethnic origins. Although violence has been avoided, great resentment from both ethnic Russian communities, and from Russia itself, remains a concern. With respect to Latvia, a recent delegation from the Russian Duma has threatened economic sanctions if the discrimination against the ethnic Russian minority does not stop,⁴³¹ and Russia has refused to sign a border treaty with Latvia until the minority situation is remedied to its satisfaction.⁴³² Russia has also linked the signing of a border treaty with Estonia with the minority problem, and has no plans to sign until it is resolved.⁴³³ Although the following quote speaks only of Estonia, the Russian Ambassador to the OSCE has perhaps best summed-up the frustration of his country toward both Latvia and Estonia:

...sometimes I feel like proposing to the esteemed Estonian colleagues to look at the geographical map more frequently. Even if one turns his back to his neighbour, the neighbour is still there to stay. Russia and Estonia are linked by a thousand of historical, cultural and economic ties. We do not want to cut them.⁴³⁴

Although the situation has yet to explode into intra or inter-State violence, there are signs that the situation is far from resolved. Since the onset of the Baltic crisis, some ethnic Russians have chosen to return to Russia; however, a more ominous security threat is the increasing numbers of ethnic Russians in Latvia and Estonia who are claiming *Russian* citizenship. Many ethnic Russians have lost hope of obtaining Latvian and Estonian citizenship, and, in 1996, for every ethnic Russian applying for Estonian citizenship, there were ten applying for Russian citizenship.⁴³⁵ This growing Russian presence within Latvia and Estonia not only threatens to destabilize those States internally, but will provide

⁴³¹ "Russian Deputies Urge End to Alleged Discrimination in Latvia," in RFE/RL Newswire (2:26, 7 May 1997).

⁴³² "Russia Raises Question over Border Treaty with Latvia," in RFE/RL Newswire (2:144, 22 October 1997).

⁴³³ "Estonia Set for Border Talks with Russia," in RFE/RL Newswire (2:127, 29 September 1997).

⁴³⁴ Statement by the Russian Ambassador to the OSCE, at 6.

⁴³⁵ Visek, at 54.

Russia with increased ability and legitimacy to intervene to protect its nationals, should the international conditions develop where such an intervention is possible.⁴³⁶ Clearly, despite continued dialogue and conflict management on the part of the HCNM spanning five years, the problem of the ethnic Russian minority in Latvia and Estonia is far from resolved.

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⁴³⁶Vissek, at 56.

CHAPTER FIVE

The OSCE High Commissioner on National Minorities and the Hungarian National Minority in Slovakia and Romania

I. Introduction

As with the situation in the Baltics, ethnic harmony in Slovakia and Romania dissolved soon after the fall of communism. In 1989, as ethnic Hungarians and Romanians stood together facing Ceausescu's security forces, and both the Slovak and Hungarian political parties in Slovakia collaborated against their totalitarian government, issues of ethnic conflict seemed unimportant compared to the euphoria of newly established democracy. As the dust settled, however, and both States began constructing newly democratic societies, the nationalistic flavour of Slovak and Romanian policies soon became clear. As early as 1989, Hungary's Minister of Foreign Affairs feared for his country's diaspora of 600,000 ethnic Hungarians in Southern Slovakia and 1.6 million in Romania, and became one of the first State leaders to call for "new, up-to-date international rules to protect minorities" at the General Assembly of the United Nations.⁴³⁷

Having had their national aspirations heretofore suppressed by the Great Powers, and then muted by totalitarianism, Slovakia and Romania drafted new laws in keeping with nationalist law-making principles - that the "nation is in danger and that the state savior needs...powers to preserve it."⁴³⁸ Despite promises made to the Hungarian diaspora before 1990, ideas of multiculturalism were found to be simply incongruous with core values of nationalism. Shortly after becoming involved in the Baltic situation, described in the previous chapter, the HCNM was soon also attempting to prevent conflict from developing between the Hungarian diaspora and its host-States of Slovakia and Romania, and between both host-States and the Hungarian kin-State.

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⁴³⁷Roth, at 83.

⁴³⁸Sajo (1990), at 59.

As with the Baltic situation, legislative reform has been at the core of the HCNM's efforts in Slovakia and Romania, and the HCNM has been involved in the Hungarian national minority situation for five years as well. As with the case study involving Latvia and Estonia, this chapter will comprise three sections. First, to provide background to the conflict, the host-States, kin-State and national minorities will be discussed, as well as the overall increasing tensions between those groups since 1989. Second, the specific issues in dispute between those groups, of language, education administrative participation and association, will be examined according to their development prior to the involvement of the HCNM. Finally, the HCNM's involvement in the situation will be examined after 1993, the institution's effect on the resolution of those issues will be discussed, and its effectiveness evaluated.

II. Background

1. The Kin-State - Hungary

The Hungarian national minority came to be situated within the borders of the two host-States in question because of Hungary's collaboration with Germany during the First World War (during its partnership with Austria), where it lost two-thirds of its territory in the Trianon Peace Treaty of 1919-1920, to Czechoslovakia, Romania and the Soviet Union.⁴³⁹ The fact that it attempted to regain much of this territory during the early years of the Second World War, but was forced to relinquish it, has led Slovakia and Romania to believe that Hungary may again become revisionist in the post-communist era. Taken from the perspective of those States, these fears have not been entirely unfounded. In 1990, Hungary's first post-communist Prime Minister proclaimed himself the leader of 15 million Hungarians (while leading a nation with a population of only 10 million)⁴⁴⁰ and underlined

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⁴³⁹Slawomir Lodzinski, "Protection of National Minorities in Central Eastern Europe: Political and Legal Approaches in the Light of International Law," in *Ethnic Minority Rights in Eastern Europe*, eds. Magda Opalski and Piotr Dutkiewicz (Ottawa: Canadian Human Rights Foundation Forum Eastern Europe, 1996 [manuscript copy], at 35.

⁴⁴⁰Alfred A. Reisch, "The New Hungarian Government's Foreign Policy," in *Radio Free Europe - Radio Liberty Research Report* (3:33 26 August 1994), at 47.

Hungary's interest in supporting the "preservation of the Magyar nation" outside of Hungary's borders.⁺⁺¹ Other foreshadowings of resurgent Hungarian revisionism also followed, such as the establishment by the Hungarian Government in 1992 of an Officer for the Affairs of Hungarians Living Abroad⁺⁺² to monitor the conditions of the Hungarian diaspora, and Hungary's financial support of ethnic Hungarian organizations in neighbouring countries.⁺⁺³ As a result, despite the fact that Hungary sits on the verge of accession into NATO and the EU and would be unlikely to expand its borders, or the Hungarian foreign minister's assurances that Hungary is free of any "sense of mission, history lessons, references to past merit or grievance", any concern Hungary has shown for its diaspora has naturally been interpreted by its neighbours as resurgent expansionism.⁺⁺⁴

2. *The Host-States - Slovakia and Romania*

Historical perception has also forged Slovakia's attitude toward its Hungarian minority. Before the creation of Czechoslovakia in 1918, Slovakia had been ruled by Hungary for approximately a millennium, and, as mentioned above, Hungary attempted to annex Southern Slovakia, where the Hungarian minority is concentrated, in 1939.⁺⁺⁵ This memory still dominates Slovak national consciousness, as illustrated by the calls among some Slovak politicians that Hungary formally apologize for its occupation of Southern Slovakia during World War Two.⁺⁺⁶ The idea of Hungary as an expansionist nation is kept alive in Slovakia today. Radical Slovak nationalists insist that the Hungarians are not a "real" nationality, but a constructed one that consists as a conglomerate of the cultures

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⁺⁺¹Michael R. Geroe and Thomas K. Gump, "Hungary and a New Paradigm for the Protection of Ethnic Minorities in Central and Eastern Europe," in Columbia Journal of Transnational Law (32:3 1995), at 692.

⁺⁺²Sharon Fisher, "Meeting of Slovakia's Hungarians Causes Stir," in Radio Free Europe / Radio Liberty Research Report (3:4 28 January 1994), at 45.

⁺⁺³Reich, at 51.

⁺⁺⁴Geroe and Gump, at 685.

⁺⁺⁵Fisher (28 January 1994), at 43.

⁺⁺⁶Sharon Fisher, "Slovak Deputy: Hungary Should Apologize for Occupation," in Open Media Research Institute Daily Digest (29:2, 9 February 1996).

they have assimilated through their "barbaric" legacy of expansionism.⁺⁴⁷ Even moderate Slovaks believe that Hungary is not satisfied with its present borders. This fear explains the attempt by the Slovak government to prohibit communication between ethnic Hungarians in Slovakia, and Hungarians in Hungary, which the HCNM has condemned as a violation of minority rights guarantees, and freedom of expression.⁺⁴⁸ This distrust of the Hungarian minority re-surfaced shortly after 1989, but was magnified with the peaceful dissolution of Czechoslovakia on January 1, 1993, which left Slovakia with a larger proportional minority population constituting 15 per cent of its total population.⁺⁴⁹ Considering the Hungarian minority's concentration - representing 80 per cent of the population in some regions - Slovaks are extremely concerned that, given a nationalist government in Budapest, Hungary could once again become revisionist.

Driven by the memory that a bulk of its territory also has been historically dominated by Hungary, Romanian policy towards its Hungarian minority reflects a similar paranoia of irredentism. The result has been a consistent effort to either disregard or stamp-out the Hungarian national minority. The treaties of Saint Germain and Trianon in 1919-1920 granted Romania a national minority population of twenty-five percent; however, the nation was conceived on nationalist lines in 1923 despite those minorities.⁺⁵⁰ With the brief annexation of Transylvania by Hungary in 1940 fresh in their minds, Romanian communist leaders began denying their Hungarian minority special rights following the failed 1956 uprising in Hungary. From 1960 to 1980, this was expanded into a state-sponsored policy of Romanization, the directed migration of Romanians into Transylvania to dilute the percentage of ethnic Hungarians there, and the expulsion of ethnic Hungarian

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⁺⁴⁷Slovak Society for the Protection of Democracy and Humanity, Slovak-Hungarian Relations: History and the Present in Facts (Bratislava: Publishing House Signum, 1995), at 1.

⁺⁴⁸Letter from Max Van der Stoep, OSCE High Commissioner on National Minorities to Juraj Schenk, Minister for Foreign Affairs of the Slovak Republic (13 August 1996). OSCE Doc. 910:96/L, at 5.

⁺⁴⁹S. Mihalikova, "Legal and Political Status of Minorities in the former Czechoslovakia," in Ethnic Minority Rights in Central Eastern Europe, eds. P. Dutkiewicz and M. Opalski (Ottawa: Canadian Human Rights Foundation Forum Eastern Europe, 1995), at 35.

⁺⁵⁰Nedeva, at 131.

intellectuals from that region.⁺⁵¹ Ironically, it has been this transplanted Romanian population of the last 20 years that has most resented the strong presence of ethnic Hungarians in Romania, and has represented a strong constituency of supporters for the central government's negative policies against Hungarians.⁺⁵² Propelled by traditional fears of its national minority, post-communist Romanian governments, as in the interwar period, still define their country as a "unitary national State".⁺⁵³

3. *The Hungarian National Minority*

Whether the Hungarian diaspora in both States is inherently irredentist is difficult to determine, as it has mostly found itself on the defensive against the anti-minority policies of its host-States. In both countries, the Hungarian minority is well entrenched and considers itself culturally distinct; however, it has been suggested that very few actually have a legitimate desire to be "reunited" with Hungary.⁺⁵⁴ As Kusy notes, "the fight against the so-called Hungarian danger originated not from the Hungarian minority as such, but from the Hungarian maternal nation and its nation-state."⁺⁵⁵ Accordingly, the Hungarian minority has usually only become activist when pushed by their host-States. History has also contributed to their distrust of both host-States. For the Hungarian minority in Slovakia, memories of the 1950 law which prevented Hungarians from registering their names in Hungarian, and the decree of 1945 which assigned them collective guilt for atrocities committed within Czechoslovakia during the war, remain well entrenched.⁺⁵⁶

⁺⁵¹Magda Opalski, "National Minorities in Post-Ceausescu Romania," in Ethnic Minority Rights in Eastern Europe, eds. Magda Opalski and Piotr Dutkiewicz (Ottawa: Canadian Human Rights Foundation Forum Eastern Europe, 1996 [manuscript copy]), at 82.

⁺⁵²George Schopflin, "Inter-Ethnic Relations in Transylvania: Rhetoric and Reality," RFE/RL Newswire (2:119, 17 September 1997).

⁺⁵³Ministry for Foreign Affairs, Republic of Romania, White Paper on the Rights of Persons Belonging to National, Ethnic, Linguistic or Religious Minorities in Romania (Bucharest, 1992) [hereinafter Republic of Romania White Paper].

⁺⁵⁴Schopflin.

⁺⁵⁵Miroslav Kusy, "Minorities and Regionalization in Slovakia," in Helsinki Monitor (7:1, 1996), at 61.

⁺⁵⁶Sharon Fisher, "Ethnic Hungarians Back Themselves Into a Corner," in Transition (29 December 1995), p.59.

Hungarians in Romania also remember well the policies of Romanization and population transfers, mentioned above.

As in Slovakia, the ethnic Hungarian minority in Romania became politicized only when the post-communist Romanian government began implementing policies reminiscent of past behaviour, and threatened their distinctiveness. Hungarian national parties in Romania are now convinced that their host-State aims "to change the character of Hungarian-inhabited areas by gradually eliminating Hungarian educational and cultural institutions and the Hungarian historical legacy."⁴⁵⁷ Given such a background of distrust, fear, and suspicion, it is perhaps not surprising that the ostensible ethnic harmony of 1989 dissolved quickly, and necessitated the involvement of the HCNM in Slovakia and Romania in 1993.

III. The Issues

Constitutions are often the first statement of how a country views itself, and about how it intends to deal with its national minorities.⁴⁵⁸ Both the Slovak and Romanian constitutions ostensibly guarantee the rule of law, democratic principles and respect for human rights. In keeping with the national principle of state formation, however, each constitution contains provisions which, either by plain meaning or inference, deny the rights of minorities. The fact that much discriminatory legislation in both Slovakia and Romania is, legally speaking, in adherence with those countries' unitary Constitutions, has complicated the role of the HCNM. As will be illustrated below, when faced with criticism from the HCNM, both governments have often responded that the discriminatory legislation in question is in conformity with their constitutions, as they are based on unitary States. The *Constitution of Slovakia* begins with "We the Slovak nation", which ignores the existence of the Hungarian minority and, in Kusy's words, has reduced them to

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⁴⁵⁷Democratic Alliance of Hungarians in Romania, Nation State and the Minority Question in Romania (unpublished, 1995), at 1.

⁴⁵⁸Bednarczyk, at 19.

"second-class citizens."⁴⁵⁹ Members of national minorities are guaranteed some rights derived from international instruments; however, Article 34 states that citizens belonging to national minorities cannot engage in activities which could "breach the integrity of the Slovak republic" or discriminate against other citizens. Similarly, the *Constitution of Romania* defines Romania as a state that is "national, sovereign and independent, unitary and indivisible".⁴⁶⁰ It guarantees the right of "conservation, development and expression of ethnic, cultural, linguistic and religious identity,"⁴⁶¹ but forbids the freedom to speak in ways which would provoke war or aggression, or would defame the country or nation.⁴⁶² Both constitutions provide the Slovak and Romanian governments with the potential to protect the nationality of the majority against the minority - a power which has been used in the drafting of each State's legislation governing language, education, administration and association. It is to the examination of these issues prior and leading to the HCNM's involvement that this chapter now turns.

1. Language

With constitutions promoting a unitary national view of their States, both Slovakia and Romania moved quickly after 1989 to use language legislation as a guarantee that the language of the majority would predominate in both States. The 1990 Slovak *Law on the Official Language* permitted the use of minority languages in official dealings only where minorities comprised twenty per cent of a region's population. Although restrictive, the HCNM's involvement in 1993 was largely motivated by a harsher draft law which was to replace it.⁴⁶³ In addition, the Slovak *Law on Bilingual Names of Cities and Villages* forbid road signs with Hungarian names in Southern Slovak districts, and ordered Hungarian signs removed by July 31, 1993.⁴⁶⁴ The original *Law on First Names and Female*

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⁴⁵⁹Kusy, at 60.

⁴⁶⁰Nedeva, at 140.

⁴⁶¹Opalski, at 83.

⁴⁶²Howard, at 11.

⁴⁶³Fisher (29 December, 1995), at 59.

⁴⁶⁴Sarlota Pufflerova, "National Minorities in Slovakia," in *Helsinki Monitor* (5:1, 1994), at 54.

Surnames in the Original Language also demanded the translation of Hungarian names into Slovak.⁴⁶⁵ For the Hungarian minority, which advocated the use of Hungarian as the official language where Hungarians represented the majority of the population, and for the use of bilingual signs and information in the same circumstances,⁴⁶⁶ these laws were extremely problematic.

In Romania, the HCNM's involvement was also sparked by growing radicalism among ethnic Romanians, which threatened to curtail the Hungarian minority's language rights. Officially, the Romanian government's position was to allow national minorities to use their mother tongue in communication and broadcasting.⁴⁶⁷ Hungarian language rights were nonetheless curtailed owing to a strong nationalist lobby which suggested that ethnic Hungarians be examined on their knowledge of Romanian, and that those not proficient be fired from their jobs.⁴⁶⁸ The HCNM became involved in Romania just as a restrictive draft of the new language law began being considered, and after the mayor of Cluj - a Transylvanian town with a large concentration of ethnic Hungarians - unilaterally prohibited Hungarian language signs identifying streets, schools and other institutions.⁴⁶⁹

2. *Education*

Both the Slovak and Romanian governments either reduced or ceased funding of Hungarian educational programmes,⁴⁷⁰ closed Hungarian schools, and fired ethnic Hungarian teachers and professors,⁴⁷¹ shortly before the HCNM's involvement. Slovakia's actions in the area of the education rights of national minorities were mostly in the area of regulatory measures or government decrees. The HCNM's actions in Romania, however, were initiated over Romania's *Law on Education* which, in its draft

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⁴⁶⁵Mihalikova, at 37.

⁴⁶⁶Fisher (28 January, 1994), at 45.

⁴⁶⁷Republic of Romania, *White Paper*, at 9.

⁴⁶⁸Romanian National Unity Party, *Communiqué* (1995), at 2.

⁴⁶⁹Geroe and Gump, at 682.

⁴⁷⁰Fisher, (29 December 1996), at 61.

⁴⁷¹Geroe and Gump, at 683.

form, essentially required that Romanian be the sole language of instruction within the school system.⁺⁷² While still in its draft form, it caused the greatest opposition from both the Hungarian minority and Hungary itself, both of which had pressed for the establishment of a Hungarian-language educational system from kindergarten to university. The draft uniformly enforced education in the Romanian language, and ceased funding minority education. Apart from the law, the Romanian government also fired eleven ethnic Hungarian professors from the Transylvanian medical university at Tigu.⁺⁷³

3. *Political/Administrative Participation*

Finally, the HCNM also became involved because both host-States undertook measures to prevent their minorities from having any policy-making or administrative power. This was undertaken by vehemently resisting any talk of autonomous regions, and by placing those of the majority nationality in key political positions in areas with a high percentage of national minorities. Although Slovakia instituted a Council on National Minorities to serve as an advisory body to the government on national minority issues, no plans were instituted for the Hungarian minority to have actual representation in regional bodies with policy-making power. In fact, in 1993 the Slovak government initiated plans to design the administrative regions of Slovakia in a manner which ensured that the Hungarian minority would consist of less than 20 per cent of each territorial region regardless of the dense concentration of ethnic Hungarians in some areas of Southern Slovakia.⁺⁷⁴ Ultimately the national minority's frustration led to the gathering of seven thousand ethnic Hungarians in the city of Komarno in January 1994 to advocate the creation of an autonomous region (and a parallel demonstration by ethnic Slovaks against the Hungarians).⁺⁷⁵

⁺⁷²Law on Education (Romania), 1993, L.I., art.5(3).

⁺⁷³Geroe and Gump, at 683.

⁺⁷⁴Fisher (29 December 1995), at 62.

⁺⁷⁵Fisher (28 January, 1994), at 42.

Romania also consistently refused to grant ethnic Hungarians political posts or administrative control within Transylvania prior to the HCNM's involvement. Despite the government's assurances that it sought to hire members of national minorities,⁴⁷⁶ ethnic Hungarians held almost no positions of any influence. Virtually all members of the police, army, judiciary and regional administration were ethnic Romanians in all Hungarian regions of Romania.⁴⁷⁷ As in the Slovak example, a Council for National Minorities was established in order to satisfy Council of Europe demands; however, Hungarian representatives withdrew from this body in the fall of 1993 citing the Romanian government's "lack of political will",⁴⁷⁸ and the fact that the Council's recommendations on national minority legislation were consistently ignored.⁴⁷⁹ Administrative participation of ethnic Hungarians was similar to Slovakia. Within Hungarian areas, virtually all members of the police, army, fire departments, judiciary⁴⁸⁰ and regional administrators were ethnic Romanians.⁴⁸¹ In Mures County, for example, where 43 per cent of the population is ethnic Hungarian, only 3 per cent of officials were Hungarian.⁴⁸² To further its control over Transylvania, the Romanian government also passed the *Law on Public Administration* which permits the judiciary to suspend civil liberties with the help of police - a provision used by a mayor in Transylvania to forbid public meetings of ethnic Hungarians.⁴⁸³

Despite the establishment of an autonomous district in Transylvania in 1950 (subsequently dissolved in 1960),⁴⁸⁴ the post-communist Romanian government took a similar stand as the Slovak government in respect to the granting of autonomy to ethnic

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⁴⁷⁶Government of Romania, White Paper, at 17.

⁴⁷⁷Tom Gallagher, "Controversy in Cluj" (1995) 15 Transition 52 at 59.

⁴⁷⁸Opalski, at 85.

⁴⁷⁹Letter from the Parliamentary Group of the National Minorities to the Council for National Minorities (Government of Romania), (16 September 1994), at 2.

⁴⁸⁰Opalski, at 92.

⁴⁸¹Gallagher, at 58.

⁴⁸²Hungarian Human Rights Foundation, "Rumania's Appointments to Key Privatization Posts Discriminate Against National Minorities" in HHRF Alert (13 September 1994), at 1.

⁴⁸³Opalski, at 92.

⁴⁸⁴Nedeva, at 131.

Hungarian areas. It labeled calls for autonomy extremist,⁴⁸⁵ and used legal sanctions to enforce the constitutional provision prohibiting incitement to "territorial separatism."⁴⁸⁶ In opposition, the Hungarian minority threatened to hold its own referendum on autonomy,⁴⁸⁷ arguing that autonomy would be the only way of resolving the "contradiction between the [Romanian] notion of a 'unitary nation state' and the existence of the two-million strong Hungarian community."⁴⁸⁸ In raising the autonomy issue, however, the ethnic Hungarian community in Romania emphasized that it was not advocating an alteration of national boundaries.

IV. The Involvement of the HCNM

Owing to the above legislation and policies, tensions rose steadily between the Hungarian diaspora and its host-States, and between the host and kin-States. The three States involved therefore invited the HCNM in 1993 to prevent the further escalation of the conflict. In Slovakia, the government initially downplayed the complaints of the Hungarian national minority, as an "extensive campaign of disinformation" motivated by the desire to win international support.⁴⁸⁹ Soon, however, rising tensions caused the Slovak government to invite the HCNM to intervene. Although violent conflict had been avoided thus far, danger seemed to lurk on the horizon. The Slovak Republican Army, a paramilitary group, proclaimed its intention to use force against Hungarians in Slovakia and to destroy Hungarian goods coming into the country.⁴⁹⁰

The Romanian situation escalated further and much more quickly. In March 1990, at Tirgu Mures, Transylvania, six died and two hundred were injured after Romanian peasants stormed the headquarters of the Hungarian Democratic Alliance and beat a highly

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⁴⁸⁵Matyas Szabo, "Romanian President Rejects Bishop Toke's Alternative Reconciliation Proposal," in Open Media Research Institute Daily Digest (221:2, 13 November 1995).

⁴⁸⁶Opalski, at 84.

⁴⁸⁷Gallagher, at 659.

⁴⁸⁸Democratic Alliance of Hungarians in Romania, Nation State, at 3.

⁴⁸⁹Slovak Society for the Protection of Democracy, at 1.

⁴⁹⁰Bowers, at 23.

regarded Hungarian intellectual.⁴⁹¹ Rhetoric also escalated. The mayor of Cluj warned the Hungarian minority that "Romania has force, military as well as moral, to prevent the country's destabilization"⁴⁹², demands circulated for the confiscation of weapons "illegally" held by the Hungarian minority,⁴⁹³ and the Greater Romania Party threatened to invade Hungary if the Hungarian minority chose to secede from Romania. Hungarian groups in Romania also called on the international community to help "normalize" their country's situation.⁴⁹⁴

The minority issue also exacerbated Slovak-Hungarian and Romanian-Hungarian bilateral relations. Despite the top priority given by the Hungarian government to improving relations with Slovakia and Romania through the negotiation of bilateral treaties, both treaties remained, prior to the HCNM's involvement, either non-existent or unratified. The uncertain status of the Hungarian minority prevented the first steps from being taken to even draft a Romanian-Hungarian treaty.⁴⁹⁵ Although a treaty had been signed between Slovakia and Hungary, it remained unratified by Slovakia owing to the minority issue. Disagreement over the minority issue may also have contributed to the hardening of Slovak and Hungarian attitudes over the issue of the Gabčíkovo-Nagymaros hydro-electric project.⁴⁹⁶

Upon becoming involved, the HCNM brought together a team of impartial experts, who have visited both countries yearly since 1993 to study the situation of minorities there and to report to both governments on their status.⁴⁹⁷ The HCNM has also visited each country at least twice per year since 1993, during which he has discussed the minority issue with the Slovak and Romanian leaders and other senior officials, as well as with

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⁴⁹¹Geroe and Gump, at 692.

⁴⁹²Gallagher, at 60.

⁴⁹³Romanian National Unity Party, at 2.

⁴⁹⁴Democratic Alliance of Hungarians in Romania, *Nation State*, at 2.

⁴⁹⁵Josephine Schmidt, "Musketeers' Vote?" in *Transition* (15 December 1995), at 61.

⁴⁹⁶Reich, at 50.

⁴⁹⁷Letter from Max van der Stoep, CSCE High Commissioner on National Minorities to the Minister for Foreign Affairs of the Slovak Republic (20 June 1994), at 1.

representatives of the Hungarian minorities. As will become clear, however, although some positive developments have occurred, the inter-ethnic situation regarding language, education, and administrative participation have, on balance, *deteriorated* in both Slovakia and Romania since the HCNM's involvement. Moreover, in the case of minority rights of association - which was not an issue for the Hungarian diaspora prior to 1993 - an entirely new issue of concern has evolved.

1. *Language*

After the involvement of the HCNM, some issues of minority language rights improved. In Romania, the government permitted the use of bilingual signs in areas where minorities comprised 20 per cent of the population.⁴⁹⁸ Apart from the HCNM, this development, as well as the re-opening of the Hungarian consulate in Cluj, was also owing to the participation of Hungarian ethnically-based political parties in the ruling coalition of Romania. Nonetheless, Romanian-Hungarian bilingual signs continue to be painted-over in Romanian colours, and the Hungarian *consulate* in Targu Mures was fined \$280,000 by the mayor of that city for hoisting the Hungarian national flag.⁴⁹⁹ There is very little evidence that attitudes or practice toward the Hungarian language have moderated in Romania since 1993.

Based on the comments of the High Commissioner and Council of Europe, Slovakia repealed both laws on signs and names mentioned earlier. A new law was passed in May 1994 legalizing the use of Hungarian names.⁵⁰⁰ A general law on bilingual signs was also drafted, but was narrowly defeated in June 1994⁵⁰¹ owing to the election of a nationalist government under Meciar. This early defeat in 1994 foreshadowed a new wave of Slovak legislation and actions undertaken in almost total disregard to the suggestions of the HCNM and the European community.

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⁴⁹⁸Michael Shafir, "Transylvania's Glass Still Half Empty" in RFE/RL Newslines (2:96, 19 August 1997).

⁴⁹⁹"Bilingual Signs in Targu Mures Painted Over Again" in RFE/RL Newslines (2:81, 25 July 1997).

⁵⁰⁰Reisch, at 52.

⁵⁰¹Letter from the CSCE High Commissioner (20 June 1994), at 3.

Despite the vehement opposition of the HCNM who reviewed it in draft form,⁵⁰² Slovakia passed the *Law on Official Language in the Slovak Republic*, and abolished its previous language law. The new law incorporated some of the suggestions of the HCNM offered during the drafting stage;⁵⁰³ however, the majority of provisions clearly infringed upon the Hungarian minority's language rights. International reaction was uniformly negative. Apart from the reaction of the HCNM, the European parliament passed a resolution condemning Slovakia's lack of respect for democratic principles,⁵⁰⁴ and the Secretary General of the Council of Europe condemned it as a violation of international guarantees.⁵⁰⁵ In the explanatory memorandum to the law, the Slovak government justified it as being necessary, given the "spirit of disloyalty toward Slovak statehood" by the Hungarian national minority.⁵⁰⁶ The new law limits the use of languages other than Slovak in schools, hospitals and military installations, and leaves a legal vacuum in place of the 1990 law's allowance for the use of minority languages in official dealings where minorities constituted twenty percent of the population.⁵⁰⁷ Although minority language rights are mentioned, most provisions are vague, and depend upon the passing of parallel regulations for specific minority language rights to be further defined. Other provisions may be interpreted as not providing for minority language rights at all.⁵⁰⁸

Slovakia has dismissed criticism as "double standards",⁵⁰⁹ and as unjustified interferences in the internal affairs of Slovakia. Even before fines could be issued under

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⁵⁰²Zsófia Szilagyi, "Van Der Stoel Criticizes Slovak Language Law?" in Open Media Research Institute Daily Digest (11:2, 16 January 1996).

⁵⁰³Letter from Max van der Stoel, OSCE High Commissioner on National Minorities to Juraj Schenk, Minister for Foreign Affairs of the Slovak Republic (13 November, 1995), OSCE Doc. 1169/95/L, at 1.

⁵⁰⁴Sharon Fisher, "Hungary Criticizes Slovak Language Law," in Open Media Research Institute Daily Digest (22:2, 17 November 1995).

⁵⁰⁵"Council of Europe Secretary-General on Slovak Language Law" in RFE/RL Newline (2:58, 23 June 1997).

⁵⁰⁶Letter from Max van der Stoel, OSCE High Commissioner on National Minorities to Juraj Schenk, Minister for Foreign Affairs of the Slovak Republic (26 February 1996), OSCE Doc. HC/4/96.

⁵⁰⁷Fisher (29 December 1995), at 62.

⁵⁰⁸Letter from Max van der Stoel, OSCE High Commissioner on National Minorities to Juraj Schenk, Minister for Foreign Affairs of the Slovak Republic (24 August 1995), OSCE Doc. HC/9/95, at 4.

⁵⁰⁹Sharon Fisher, "Slovak Foreign Minister on Council of Europe," in Open Media Research Institute Daily Digest (22:2, 31 January 1996).

the legislation, four "language consultants" were hired to supervise adherence, and several mayors warned that the use of Hungarian in official contacts would henceforth be forbidden.⁵¹⁰ Slovakia has repeatedly defended the law as having been passed democratically by a majority of deputies in the legislature, and believes it to be in compliance with the Slovak constitution that declares Slovak to be the official language.⁵¹¹ In draft form, the HCNM warned that the law was incompatible with Slovakia's international commitments, and that it went against the "balance between the right of a state to ensure that the position of the state language is safeguarded and the need to ensure that languages of the national minorities are protected."⁵¹² Once the language law was passed, however, the HCNM could only obtain Slovakia's undertaking to submit annually to its own parliament a list of regulations and activities undertaken pursuant to the law, to ensure that the rights of minorities were being respected.⁵¹³

2. *Education*

Early in his involvement, Slovakia seemed relatively receptive to the HCNM's comments on the need for educating the Hungarian minority in its own language.⁵¹⁴ With the election of a nationalist government, however, Slovak educational policy deteriorated. Unlike the Romanian example, which will be discussed below, Slovakia has not passed a general law on education, but has infringed upon the Hungarian minority's rights in a piecemeal fashion, through either narrowly-focused legislation or regulations. For example, in April 1995, the Slovak parliament passed legislation which increased the influence of the Education Minister over local education. Funding to Hungarian educational

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⁵¹⁰Sharon Fisher, "Continued Controversy over Slovak Language Law," in Open Media Research Institute Daily Digest (24:2, 2 February 1996).

⁵¹¹Letter from Juraj Schenk, Minister for Foreign Affairs of the Slovak Republic to Max van der Stoep, OSCE High Commissioner on National Minorities (23 April 1996), OSCE Doc HC/4/96, at 1.

⁵¹²Letter from OSCE High Commissioner (24 August 1995), at 4.

⁵¹³Letter from Pavol Hamzik, Minister of Foreign Affairs of the Slovak Republic to Max van der Stoep, OSCE High Commissioner on National Minorities (21 October 1996), OSCE Doc. 9612-ansSLO, at 3.

⁵¹⁴Letter from the CSCE High Commissioner on National Minorities to the Minister for Foreign Affairs of the Republic of Slovakia (8 November 1993), at 1.

programmes was then diverted to Slovak schools, and ethnic Hungarian high school directors that criticized educational policies were dismissed. Regarding the latter, the HCNM attempted, diplomatically, to question the Slovak government:

In the last two years a considerable number of persons have been dismissed from the posts they were occupying in the educational sector, while the number of persons of Hungarian ethnicity amongst them seems to have been considerably higher than one would expect considering the percentage of Hungarians in the total population. I would welcome an explanation of this phenomenon.⁵¹⁵

In response, the Slovak government simply responded that, as independent institutions, it had no control over universities.⁵¹⁶ The most contentious change in Slovak educational policy came with the government's introduction of an "alternative" language programme in which certain key subjects would be taught in Slovak, in order to "release the members of Hungarian minority from the monolingual grip [sic]."⁵¹⁷ The HCNM's argument that there were other means by which to teach the Hungarian minority than to force Slovak education were mostly ignored.⁵¹⁸ Other discriminatory regulations and directives on education have continued. In 1997, bilingual school reports in areas with substantial Hungarian minorities were abolished, and a decree from the Minister of Education required that certain subjects be taught only by ethnic Slovaks. Apart from being a violation of international minority rights law, the HCNM criticized the latter as infringing the Slovak constitution.⁵¹⁹

Romania's draft *Law on Education* was the HCNM's primary concern upon being invited to Romania.⁵²⁰ According to discussions with the HCNM, Romania included provisions regarding the need for textbooks and curricula to reflect the traditions of national minorities,⁵²¹ and agreed to allow the HCNM to periodically supervise the application of

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⁵¹⁵Letter from OSCE High Commissioner (13 August 1996), at 7.

⁵¹⁶Letter from Minister of Foreign Affairs of the Slovak Republic (21 October 1996), at 3.

⁵¹⁷Letter from Minister of Foreign Affairs of the Slovak Republic (21 October 1996), at 2.

⁵¹⁸Letter from OSCE High Commissioner (24 August 1995), at 3.

⁵¹⁹"OSCE High Commission on National Minorities in Slovakia," in *RFE/RL Newswire* (2:12, 16 April 1997).

⁵²⁰Letter from the Minister of Foreign Affairs for Romania to the CSCE High Commissioner on National Minorities (30 May 1994) at 3.

⁵²¹*Law on Education* (Romania), at art. 120(3).

the law.⁵²² Ultimately, however, the education law was passed in June 1995 with very few amendments despite massive demonstrations by the Hungarian minority there, and strong condemnations by the European Parliament, Council of Europe, and HCNM, all of which had commented on the draft. The law proclaims that national minorities have the right to study in their language,⁵²³ but then curtails those rights severely. Similar to the Slovak "alternative" programme, the new law proclaims Romanian as the sole language of instruction, and, from Junior High School onwards, students are obliged to study certain core subjects such as history and geography, and write all admission exams, in the Romanian language.⁵²⁴ University entrance and final examinations must be taken in Romanian as well,⁵²⁵ despite the HCNM's disagreement with this provision.⁵²⁶ Pursuant to regulation, separate universities in the languages of ethnic minorities have also been forbidden.⁵²⁷ Ostensibly to counter criticism, the Slovak government sent the new law to the Constitutional Court in July 1995, which declared it to be in conformity with the Slovak constitution. In addition to the education law, the Romanian government has also closed a number of Hungarian schools.⁵²⁸

Responding to criticisms from the HCNM, the Romanian foreign minister has justified the necessity of teaching certain subjects only in Romanian using questionable reasoning. For instance, medicine, he stated, "due to its very specificity, has always been made [sic] in the official language - Romanian" and argued that the law was not "a question of restricting the education for minorities which, on the contrary, is continuously

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⁵²²Statement by the OSCE High Commissioner on National Minorities on the Occasion of his Mission to Romania on 28-31 August 1995 (Bucharest: 1 September 1995), OSCE Doc. HC/6/95, at 1.

⁵²³Law on Education, at art. 118.

⁵²⁴Law on Education, at arts.8 and 120(2).

⁵²⁵Law on Education, at art.124.

⁵²⁶Letter from Max Van der Stoep, OSCE High Commissioner on National Minorities to Teodor Melescanu, Minister of State, Minister for Foreign Affairs of Romania (26 April 1996), OSCE Doc. HC/6/96, at 2.

⁵²⁷"Romanian Senate Approves Amended Education Law Regulations," in RFE/RL Newslines (2:181, 17 December 1997).

⁵²⁸Shafir (1995), at 27.

expanding".⁵²⁹ Romania also disregarded a resolution of the European Parliament that condemned the law, and rejected the Hungarian minority's complaints that it circumvented their constitutional rights⁵³⁰ and their threats to leave the governing coalition as "radical" and "ethnocentric."⁵³¹ Although the HCNM has continued to visit Romanian schools to observe its implementation, the Romanian government has not altered the law to make it more compatible with the rights of the Hungarian national minority.

3. *Administrative Participation*

Apart from the fact that in 1997 the Hungarian minority parties became part of the governing coalition in Romania,⁵³² representation of members of the Hungarian minority in positions of influence in Romania and Slovakia has not improved since the HCNM's involvement. Both States have also only further strengthened their resolve to prevent the Hungarian regions from obtaining any sort of autonomy or special status.

Slovakia has perhaps implemented the harshest policies to resist autonomy. It has continued with its planned administrative system which would implement regions amenable to the "national interests of the Slovak nation."⁵³³ In response to the HCNM's suggestion that there are many variants of autonomy that do not threaten Slovakia's territorial integrity or sovereignty, the foreign minister of Slovakia has firmly stated that "any form of autonomy for the Hungarian minority would be a direct instrument of the dissolution of the democratic constitutional order of the Slovak Republic."⁵³⁴ Slovakia also passed amendments to its Penal Code in March 1996, that made participants in assemblies advocating autonomy liable to imprisonment, irrespective of the HCNM's comments that it

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⁵²⁹Letter from the Minister of Foreign Affairs for Romania (30 May, 1994), at 3.

⁵³⁰Democratic Alliance of Hungarians In Romania, The Romanian Law on Education in the Context of the Framework Convention for the Protection of National Minorities of the Council of Europe (Unpublished, 1995), at 3.

⁵³¹Ministry of Foreign Affairs, Romania, Aide Memoire (July 1995), at 2.

⁵³²"Van der Stoep on Hungarian Minority in Romania," in RFE/RL Newswire (2:3, 3 April 1997).

⁵³³Letter from the Minister of Foreign Affairs of the Slovak Republic to the CSCE High Commissioner on National Minorities (25 November 1993), at 2.

⁵³⁴Letter from OSCE High Commissioner (24 August 1996), at 1.

was difficult to believe that peaceful meetings for autonomy could realistically threaten national security.⁵³⁵ Amendments were introduced that imposed penal consequences for spreading "false information" as well, which was also aimed at preventing public discussion of autonomy. In response to the HCNM's criticism that this law violated democratic principles,⁵³⁶ Slovakia stated that it was fully within its "sovereign resolution" to deal with its minorities as it wished. In its last correspondence with the HCNM, Slovakia refused to provide any further rights of national minorities than are included in international instruments, including most of all any notion of autonomy for the Hungarian minority.⁵³⁷

4. Association

Although not an issue prior to the HCNM's involvement, both Slovakia and Romania have implemented laws and policies to curtail the Hungarian minority's rights to form their own cultural organizations. Romania has taken several steps to suppress Hungarian cultural activities by reducing the funding of Hungarian organizations,⁵³⁸ and changing the Hungarian channel on Romanian television to one that cannot be received in Transylvania.⁵³⁹ Slovakia has also reduced funding to Hungarian cultural organizations. Although almost 75 per cent of projects submitted by other minorities are approved, this occurs in only 13 per cent of cases when Hungarian organizations apply.⁵⁴⁰ At the same time, funding of Slovak cultural activities in Hungarian areas has increased,⁵⁴¹ which the HCNM has declared as a violation of Slovakia's commitments under the OSCE. In addition, Slovakia has passed legislation specifically meant to affect the ability of ethnic Hungarians to operate their own organizations. In its relatively new law *On Foundations*,

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⁵³⁵Letter from OSCE High Commissioner (24 August 1996), at 1.

⁵³⁶Letter from OSCE High Commissioner (26 February 1996), at 3.

⁵³⁷Letter from Minister of Foreign Affairs of the Slovak Republic (21 October 1996), at 2.

⁵³⁸Nedeva, at 133.

⁵³⁹Nedeva, at 142.

⁵⁴⁰Letter from OSCE High Commissioner (13 August 1996), at 7.

⁵⁴¹Letter from OSCE High Commissioner (24 August 1995), at 5.

the Slovak government requires that all foundations first receive approval of the government before organizing⁵⁴² and possess a wholly disproportionate amount of assets before being permitted to operate.⁵⁴³ The bill also prohibits foundations for the purposes of "political parties" and "movements"⁵⁴⁴ - a provision which has been interpreted by human rights groups as threatening minorities' right to organize on ethnic lines.⁵⁴⁵ As with other issues, the comments of the HCNM, international community, and Hungarian national minority, have been disregarded.

IV. The HCNM in Slovakia and Romania - Successful Preventive Diplomacy?

As with the example of Latvia and Estonia, there has been some overall reduction in tension between the host and kin-States, and between the Hungarian diaspora and both host-State since 1993. In 1996, Hungary and Romania successfully signed a bilateral basic treaty, which includes provisions on minorities. Since then, nine bilateral sub-commissions have discussed the treaty's implementation.⁵⁴⁶ Hungary and Slovakia also signed and ratified their *Treaty on Good Neighbourliness and Friendly Cooperation* which established principles regarding the position of national minorities in each country. At the same time, serious problems remain in both bilateral relationships. Squabbles on the international scene are common, and attitudes within both States have not tempered significantly with respect to the Hungarian diaspora.

In Romania, the Romanian nationalist parties unified in April 1997, creating a radical nationalist bloc. Calls for the creation of a Romanian National Guard to defend against ethnic Hungarians have continued.⁵⁴⁷ Perhaps the most serious deterioration has been in Slovakia, which has led to its concomitant international isolation. Nationalist

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⁵⁴²Bill of the Slovak National Council on Foundations (Slovak National Council), 1996, art.1, s.9.

⁵⁴³Ibid. at art.1, s.3.

⁵⁴⁴Ibid. at art.1, s.5.

⁵⁴⁵"The Most Serious Objections to the Bill on Foundations" (1996) Treti Sektor SOS 1 at 1.

⁵⁴⁶"Hungarian Foreign Minister in Romania," in RFE/RL Newslines (2:135, 9 October 1997).

⁵⁴⁷Michael Shafir, "Neither Left nor Right, but Simply Wrong" in RFE/RL Newslines (2:9, 11 April 1997).

rhetoric by the Slovak leadership has continued to increase. In October 1997, Prime Minister Meciar seemed to abandon any notion of protecting national minorities, and spoke in violation of the Slovak-Hungarian treaty when he suggested to the Hungarian leader that the two countries exchange minority populations.⁵⁴⁸ In the face of increasing restrictions in Slovakia, Hungarian parties have prepared themselves for "dictatorship and increasing tyranny in Slovakia."⁵⁴⁹ In reaching its decision to exclude Slovakia from the first round of talks for membership, the EU stated clearly that Slovakia is not "sufficiently democratic" and has severe political problems.⁵⁵⁰ Prime Minister Meciar has rejected all criticisms by the EU, stating that Slovakia is a sovereign State.

With respect to the issues under discussion in this chapter, it cannot be denied that the HCNM has achieved some success on both general and specific levels. The fact that he was accepted as a mediator, was able to initiate a dialogue on the issues involved, are all positive factors and should not be under-emphasized. Serious violence has also been avoided in both States. At the same time, however, although small amendments and compromises have been achieved, both Slovak and Romanian governments have resisted pressure to change their legislation on language, education, administration and association on any fundamental level over the past five years of the HCNM's involvement. In many respects, the Hungarian minority in both countries enjoys less rights now than it did in 1993. Since 1990, the Slovak and Romanian governments have disregarded the protests of the Hungarian minorities. Instead of defusing them, both States have concentrated upon efforts of constructing their States according to the national model. If those governments continue with their blatant policies of discrimination the reactions of the Hungarian minorities and their kin-State may only become further radicalized, which, in a vicious circle of escalating conflict, may necessitate harsher measures by Slovakia and Romania to contain those reactions.

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⁵⁴⁸Jane Perlez, "Slovakian Leader making Hungary Nervous," in Globe and Mail (14 October 1997), at A12.

⁵⁴⁹John Chipman, "Meciar Consolidates Hold on Power in Slovakia," in Globe and Mail (5 March 1998), at A10.

⁵⁵⁰"EU Leaders Agree on Enlargement" in RFE/RL Newswire (2:179, 15 December 1997).

CHAPTER SIX

CONCLUSIONS

Since the position's creation in 1993, the HCNM has enjoyed a consistently high level of support among the participating States of the OSCE. The institution has also received approval from international scholars, which is evident from the present lack of criticism of the HCNM within academic writing. A further sign of this support is that the number of participating States of the OSCE availing themselves of the institution has also increased. Although only four States have been examined in this study, the HCNM continues to engage in preventive diplomacy in the FYR of Macedonia, Albania, Croatia, Ukraine, Kazakhstan, and Kyrgyzstan.⁵⁵¹ The case studies in this paper may be distinguished from these other States, as the others have had inter-ethnic warfare on their borders, or have enjoyed independence for only a brief period, following seventy-five years as part of the Soviet Union. The four States under study have a history of independence, some experience with legal traditions based on the rule of law, and have, since their emergence from communism, shown themselves to be full participants in the international and regional organizations.

Indeed, as non-violent inter-ethnic conflicts occurring in cooperative, internationally active States, the cases under study should be considered as "best case scenarios" for a mediated solution, and for preventive diplomacy. It is clear that the host-States of Estonia, Latvia, Romania and Slovakia, contain historically rooted, inter-ethnic tensions with national minorities, and that those tensions have potentially inter-State repercussions owing to the existence of kin-States nearby who have historically dominated the host-States; however, the four cases have been characterized by a veritable absence of violence, low level of extremism, and by the apparent willingness of the parties to cooperate with international organizations such as the HCNM. In the face of such factors, it seems

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⁵⁵¹OSCE, High Commissioner on National Minorities Fact sheet (1998).

paradoxical that, after five years of consistent engagement in conflict management, preventive diplomacy, and "dialogue building" by the HCNM, inter-ethnic relations have deteriorated instead of improved in all four States since 1993. As this paper has argued, this failure may be explained by the nature of the disputes in the cases under study, of the denial of minority rights, and with the HCNM's characteristics as a mediator.

I. The Nature of the Disputes

As this paper has established, it is clear that a strong correlation may be found between guaranteeing minority rights and preventing inter-ethnic conflict. In the case studies, situations of potential conflict only arose when the four host-States began implementing legislation based on unitary principles, in violation of the minorities' rights of language, education, association and political participation. Prior to the introduction of such laws, the Russian and Hungarian national minorities did not find it necessary to mobilize or express irredentist or separatist aspirations. Concomitantly, it was only following the introduction of anti-minority legislation that the kin-States of Russia and Hungary became involved. The HCNM has recognized the crucial link between minority rights and preventing conflict; however, as noted in the second chapter, his task has been complicated by the weaknesses of international minority rights instruments to guarantee those rights. Owing to international law's limitations, the HCNM has attempted to protect national minorities and prevent conflict by implementing those norms on the national level of the host-States. Other methods, such as roundtables, conferences or other forms of good offices have been used by the HCNM; however, in the four cases under study, the HCNM has focused almost exclusively on the reform of domestic legislation as a means of implementing long-term solutions to inter-ethnic tension. Although an intuitively logical focus, especially given the remedial weakness of international law, the second chapter and case studies have established that attempting to amend national legislation according to international human rights norms is inherently problematic.

With respect to the States under study, this difficulty has manifested itself in two negative results apparent from the case studies, and argued in the second chapter. First, with some minor exceptions, the host-States have grown increasingly resistant and have refused to implement the HCNM's suggestions for legislative reform. Estonia, Slovakia and Romania passed legislation that clearly violates international law, with very few amendments, despite vehement denunciations by the HCNM. Instead of discussing and accepting the views of the HCNM as a "trusted advisor", the host-States have viewed the HCNM's interventions as paternalistic interferences in their internal affairs, and irrelevant and inappropriate for their particular domestic situations. Any dialogue that has occurred has not been successful in convincing the host-States of the need to guarantee minority rights. Indeed, much of the discussion between the HCNM and host-States has only involved those States paying lip service to his suggestions. As a result of this consistent defiance to amend national laws in light of international norms, and declarations by the host States of their inalienable right of sovereignty and non-interference when criticized, the HCNM has been forced to accept results that will not build inter-ethnic harmony in the long term. Accordingly, the HCNM has encouraged Latvia and Estonia to improve the ability of ethnic Russians to learn the newly defined "State languages", and has concentrated on their rights as aliens, as opposed to ensuring that the minorities' languages and participation rights are guaranteed in each State. Similarly, after condemning Slovakia's actions, the HCNM could only ask that Slovakia submit annual reports to its own parliament on the implementation of its new and more intolerant education law. These compromises have only added to the disenchantment of the Russian and Hungarian national minorities, and have certainly not contributed to the building of long-term solutions.

As the second chapter also argued, in those situations where the States agreed to change their minority laws, the case studies have made it abundantly clear that legislative reform has contributed very little to actually improving the treatment of minorities in practice. As noted in the second chapter, legislative reform cannot create a legal culture, or

ensure that attitudes and beliefs change with externally-sponsored legal reform. Despite some changes to citizenship legislation in Latvia and Estonia, difficult language and history exams for naturalization, high fees, and the listing of Russian ethnicity on passports have undermined any positive effects of the legislation. Similarly, although Romanian law now permits bilingual signs, they are continually painted over in Romanian colours by residents, and the mayor of Cluj continues to make pronouncements and policies against the ethnic Hungarian populations. Most importantly, the constitutions of all four host-States continue to espouse unitary founding principles. Clearly, very little long-term ethnic cooperation between host-States and their minorities has resulted from the HCNM's attempt to alter national legislation in the image of international norms.

As has been argued in this paper, the difficulty of implanting nascent legal systems with international human rights norms only partly explains the failure of the HCNM in the cases under study. Indeed, contemporary international relations provides numerous examples of other States that have complied with third party suggestions for legal reform. Examples include economic legal reforms suggested by the World Bank or IMF, or the human rights standards demanded by the European Union for newly acceding States. Ensuring that States have legislation that approximates international standards is difficult, but not impossible, provided the appropriate institution, with the proper institutional and normative tools, suggests those reforms. This paper has established that the HCNM does not seem to be this sort of institution.

II. Characteristics of the Mediator

In addition to the nature of the disputes, this paper has also argued that the characteristics of the HCNM as a mediator have had a significant effect upon the position's lack of success in the cases under study. It is true that the very acceptance of the HCNM as a mediator - noted by Bercovitch as an important step toward a mediated solution - has been achieved in all four cases, and should not be under-emphasized. This is especially

important because the cases under study represent efforts at preventive diplomacy, which are often complicated by the difficulty of convincing parties to discuss a solution before the situation has escalated into violence. Since 1993, the host-States of Estonia, Latvia, Slovakia and Romania have continued to correspond and meet with the HCNM throughout his involvement. These meetings have been accompanied by visits by the HCNM to representatives of national minorities, and to the kin-States. Yet despite this willingness to discuss and cooperate, very little has changed in each State with the involvement of the HCNM. This paper has argued that the HCNM's characteristics as a mediator have greatly contributed to the lack of solution in the case studies. As noted in the third chapter, these characteristics may be discussed according to the HCNM's constituency, as well as the institution's mandate and methods.

It is clear that the constituency of the HCNM, of the OSCE Human Dimension, and the participating States of the OSCE, has been beneficial in his ability to bring international pressure upon the host-States under study, and to maintain their cooperation. Normatively, the OSCE offers a broad range of politically binding norms that are consistently evolving, and protect a broader range of rights than many international human rights instruments. Most significantly, the third chapter established that the norms of the OSCE also tend to be respected by States, despite their politically binding nature. Institutionally, the fact that both host and kin-States in the cases under study are participating States of the OSCE has only furthered the legitimacy and moral authority of the HCNM as a mediator, and likely has encouraged all parties to continue their cooperation. The various institutions and instruments offered by the OSCE, such as the Moscow and Vienna Mechanisms, OSCE Missions, as well as the organization's stated priority on conflict prevention, may have also assisted the HCNM in his work, albeit indirectly. The case studies reveal, however, that the HCNM's constituency has only convinced the host-States to maintain communication with the HCNM, but not necessarily implement his suggestions. As the third chapter and

case studies have established, this limited effect is owing to the HCNM's methods and mandate.

As the case studies indicate, the HCNM has numerous strengths as a mediator. First, the HCNM's independence permitted early involvement in all four situations at the very first stages of tension. The fact that in all four host-States, the HCNM was able to view domestic legislation while it was still in its draft form is an illustration of this strength. The inclusion of all parties in discussions and good offices, including representatives of national minorities, is also a strength of the HCNM's approach. Finally, the fact that discussions were confidential may have also encouraged the ongoing participation of host-States, kin-States and national minorities. Whether or not the shielding of the process from publicity might have also eliminated public pressure upon the host-States to alter their minority policies is open to question.

Despite some strengths as a mediator and tool of preventive diplomacy, however, the HCNM's approach, of management and dialogue, as opposed to settlement, has perhaps most hindered his success in the cases under study. This focus upon dialogue may fit with the HCNM's mandate not to act as an ombudsman or to protect minority rights; however, the case studies have shown that it may not be appropriate when the aim of the HCNM is legislative reform. In the case studies, the HCNM's focus upon dialogue has permitted the host-States to avoid implementing suggestions offered by the HCNM, but to nonetheless pay lip-service to the HCNM's comments. Although "long term dialogue" remains the goal of the HCNM, it is trite to say that a perspective that looks too far into the future threatens to destroy any benefit gained from the HCNM's ability to react quickly to inter-ethnic tensions. The HCNM's focus upon dialogue also ignores the reality that, to prevent conflict, human rights must be *guaranteed*, and should not be subject to discussion and negotiation.

In addition to the institution's focus on dialogue, the case studies have also revealed that the HCNM's impartiality and independence from the OSCE, and from other

international organizations, may have worked against his ability to find solutions. Although there is some benefit in the perception of the HCNM as impartial, the institution's independence has deprived it of the ability to call upon the OSCE when host-States prove uncooperative, to draw from the sanctioning mechanisms offered by that institution if required. Moreover, although the HCNM has consulted and cooperated with organs the UN, Council of Europe, or European Union, and may rely upon the support of those institutions, such contacts have been pursued behind the scenes, and have not increased the weight of the HCNM's opinions. As this paper has argued, the HCNM's mandate and methods contain many positive aspects that could make it an effective instrument of preventive diplomacy. Indeed, it has been suggested that a position with such independence and ability to react quickly without regard to issues of State sovereignty could not have been created in a time other than during the euphoria following the end of the Cold War. In the end, improving upon results, and eliminating the institution's weaknesses may require a change in the HCNM's approach to mediation.

III. The Feasibility of Preventive Diplomacy, and of Process-Oriented Mediation

This paper has proceeded upon the assumption that, despite its critics, preventive diplomacy of ethnic conflict is possible. Despite criticisms by scholars such as Stedman that the causes of conflicts are extremely difficult to identify, and even harder to neutralize, this paper has illustrated that, at least in the case of the denial of minority rights by a host-State, the cause of potential conflict may be easily identified. Provided the proper methods are chosen, such causes might also be neutralized in the long-term through the implementation of national minority rights legislation based on international norms. Unfortunately, the only theory offered to frame the activities of the HCNM in the four case studies - of the process-oriented approach - would label his efforts a success, as the HCNM has managed to maintain an ongoing dialogue between parties, and has been ostensibly accepted by all as a trusted advisor and partner.

At the end of December 1998, Max van der Stoel's mandate as the HCNM will come to an end. Although his mandate has been defined by the participating States, his method of dealing with potential conflicts has been also affected by his personal choices. In light of the cases examined in this study, it is clear that two avenues are available to the participating States of the OSCE, and to the successor to van der Stoel, if the position is to succeed as an instrument of preventive diplomacy. Should the position continue to focus upon the domestic implementation of minority rights as a means of long-term conflict prevention, the HCNM's adherence to a process-oriented model of mediation should be abandoned. On the other hand, if the position is to remain focused upon dialogue and management, as opposed to finding solutions to conflict, it should abandon its focus upon changing national laws, and perhaps concentrate upon other methods of preventive diplomacy, such as roundtables, seminars, and other forms of good offices that are less dependent upon concrete results.

It is suggested that if the first route is selected, the successor to the present HCNM should pursue a policy of preventive diplomacy based more on the structural approach to mediation, that places more value upon the characteristics of the mediator, the timing of involvement, and the necessity for mediated solutions, as opposed to simply dialogue. Of course, the HCNM's power to sanction non-compliant States will always be limited, as an instrument of the OSCE that is only politically binding and operates on a consensual basis. Indeed, all international institutions attempting to guarantee adherence to international human rights norms are similarly limited. As long as international law espouses state sovereignty and non-intervention as fundamental precepts, uncooperative States willing to risk international isolation will be able to treat their populations as badly as they wish. To offset the remedial weaknesses of the HCNM, additional, open cooperation is required between the myriad of international organizations active in Europe to ensure that those institutions do not operate at cross-purposes. The recent decision by the European Union to begin negotiating with Estonia for admission to the common market, despite Estonia's

very poor record with respect to its national minority, is a case in point. Its decision to exclude Slovakia from such discussions, although immediately not effective, has at least sent a message that such behaviour toward national minorities will not be tolerated. States that do not respect the rights of their national minorities should not be permitted to participate in European institutions, owing to the destabilizing nature of such policies.

At present, the HCNM's lack of success in such low-intensity disputes as those under study threatens to transform it into yet another international position created from the best of intentions but devoid of real effectiveness. It might be argued that the situations under study will not escalate into violence in any case. It may also be argued that, had the HCNM not become involved in the four States under study, the small number of concessions from the host-States would not have been obtained, and inter and intra-State relations would have deteriorated further. As recent events in Kosovo have illustrated, and as history has repeatedly shown, the past absence of violence between ethnic groups cannot entirely rule out violence in the future, given the proper conditions. Counter-factual arguments regarding what may have occurred had the HCNM not become involved do not take into consideration that national minorities, their kin-States and international law demand nothing less than *full adherence* to international minority rights norms on the part of host-States. The fact that both host-States implemented a few of the HCNM's suggestions may make little difference, in the long term, in preventing an inter-ethnic conflagration. The partial successes of the HCNM may be easily negated by failures on other issues that might cause the escalation of an inter-ethnic dispute into violence. The fact remains that the HCNM has done very little to engender lasting ethnic harmony in the States under study. It is hoped that, as the international community remains ever-aware of the danger of ethnic conflict as a primary catalyst for inter and intra-State conflict, appropriate reforms will be undertaken to make the HCNM a valuable tool for preventive diplomacy in the next millennium.

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