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The OSCE Human Dimension Process and the Process of Customary International Law Formation[1]

Introduction

The Organization for Security and Co-operation in Europe (OSCE)[2] has been one of the most progressive and effective organizations for the advancement of human rights in recent history. In promoting respect for human rights among participating States, preventing human rights violations, setting high and detailed human rights standards, obtaining a wide consensus and the commitment of states to adhere to these standards, aiding states in implementing the commitments, monitoring compliance, and applying various means and mechanisms to encourage and enforce this compliance, the OSCE has been the leader in human rights work in the wider Europe since the end of the Cold War. The OSCE human dimension[3] has expanded the reach of an international body into the internal affairs of each participating State, in terms of extent[4] and content[5], further than any other international organization.[6] The evolving formula that the OSCE has employed to fulfil its human dimension mandate, while definitely not perfect, has been more appropriate, and thus more effective, than other European or global organizations in dealing with the actual challenges to human rights in those areas where they are most often and most severely violated.

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1 The views expressed in this article are those of the author alone and do not necessarily reflect the views of the OSCE, the government of any OSCE participating State, or PAE Government Services Inc. Nor do the views herein expressed necessarily reflect those of the International Criminal Tribunal for the former Yugoslavia or the United Nations in general.

2 OSCE will be used to signify both CSCE and OSCE in this article.

3 Formerly known as the "third basket" of the Helsinki Final Act, the human dimension combines human rights with democracy and the rule of law. Acceptance of human rights standards entails the acceptance of democracy and the rule of law as a basis for peace and co-operative security.

4 OSCE participating States have declared that the commitments of the human dimension "are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned." Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, in: Arie Bloed (ed.), *The Conference on Security and Co-operation in Europe. Analysis and Basic Documents, 1972-1993*, Dordrecht 1993, pp. 605-629, here: p. 606.

5 Thomas M. Franck, The Emerging Right to Democratic Governance, American Journal of International Law 1/1992, pp. 46-91, here: p. 67: "According to Professor Theodor Meron […] the 'language of Copenhagen goes far beyond any existing human rights instruments.' The document is detailed to an unprecedented degree, establishing a standard that the UN General Assembly might profitably emulate in a resolution." This refers to the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, in: Bloed (ed.), cited above (Note 4), pp. 439-465.

6 Except for the European Union, which is arguably beyond the scope of an "international organization".

In spite of this largely positive track record, many international lawyers (including those involved with human rights) still dismiss the OSCE human dimension commitments due to their lack of legally binding status. This article endeavours to illustrate that this is unwarranted and a missed opportunity to support the work that international human rights lawyers do (for the most part activism and advocacy). This article attempts to provide these lawyers with two possible "entry points" into the OSCE by suggesting, first, a manner in which the human dimension commitments in OSCE documents may participate in the process[7] of regional customary law formation and, second, that despite the denial by some states of their legally binding status, the OSCE human dimension commitments nevertheless retain the attributes and elements of law and that their binding force should hence be recognized as such.

This contribution starts by discussing the status and character of the OSCE and its human dimension commitments,[8] and ascertains whether the way the OSCE commitments come into being and the effect that they have are consistent with the process of the formation of customary international law. The second section examines the method by which customary international law originates and finds evidence of state practice and *opinio juris* in connection with the OSCE. After asking whether the intention of the OSCE participating States to act as a political organization disqualifies their documents as *opinio juris* and whether the distinction between political and legal obligation is so crucial, section three makes a brief excursus to investigate what the actual difference is between the political and the legal under international law. The fourth section tries to find a more promising way to address this problematic by looking at the debate concerning "soft law" and "hard law". Within this section, the contribution seeks to uncover what it is that determines the "hardness" of law, and investigates whether OSCE commitments can be said to be based on "hard" obligations and have "hard" binding force, thus possibly fulfilling the criteria necessary to serve as the subjective element of *opinio juris* for the formation of customary international law. Following this discussion of the applicability to OSCE commitments of the process of customary international law formation, the fifth section returns to the ongoing debate on the legal status of the OSCE. Finally, as the status of the OSCE, its documents, and the commitments contained therein pose a challenge for the traditional manner in which the sources and character of international law are determined, I will ask whether modes of definition and operation in current customary international law are appropriate for international human rights law or whether we must somehow endeavour to escape

7 On customary international law as a process, see Rosalyn Higgins, *Problems & Process: International Law and How We Use It*, Oxford 1994.

8 As this is not the main focus of this article, I will not give a complete descriptive account of the OSCE human dimension documents and compare them to comparable instruments. Likewise, the purpose of this article is not to exhaustively determine which provisions of OSCE documents are customary, but rather to investigate whether and how the OSCE *modus operandi* can participate in the formation of regional custom.

the trap of "positivism's binary paradigm"[9] and find new ways for international human rights lawyers to better confront the challenges of the advancement of human rights within the world.

The Status of the Organization for Security and Co-operation in Europe

The OSCE[10] started off in the early 1970s as a series of conferences attended by top officials from both political blocs in Cold War Europe as well as neutral countries. The purpose of the conferences was essentially to maintain dialogue and foster co-operation through a "low-profile diplomatic process".[11] From the beginning, the OSCE's *modus operandi* was focused on the political side of international relations. Even though the structure and mandate of the "conference-turned-organization" have changed dramatically since the end of the Cold War, the character of a behind-the-scenes discussion and co-operation forum persists. The new OSCE possesses many of the traits one expects of an international organization, including recognition as a "regional arrangement" under Chapter VIII of the UN Charter and Observer Status in the General Assembly of the UN,[12] in spite of the fact that it still does not have a founding charter, and thus is arguably not an international legal entity.[13] OSCE bodies, like the UN General Assembly, are currently not authorized to make decisions that are explicitly legally binding on its participating States. While there have been attempts to "legalize" the OSCE[14] (and a working group is currently debating this matter, as discussed in the conclusion), the prevailing opinion, championed by the United States, is to maintain

9 Steven R. Ratner, Does International Law Matter In Preventing Ethnic Conflict?, *International Law and Politics* 3/2000, pp. 591-698, here: p. 612.

10 For a description of the OSCE's historical development, institutions, and mechanisms, see Organization for Security and Co-operation in Europe, *The OSCE Handbook*, Vienna, 2000; Arie Bloed, Two Decades of the CSCE Process: From Confrontation to Co-operation. An Introduction, in: Bloed, cited above (Note 4), pp. 1-118; Marcus Wenig, The Status of the OSCE under International Law – Current Status and Outlook, in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 1997*, Baden-Baden 1998; Stuart Ford, OSCE National Minority Rights in the United States: The Limits of Conflict Prevention, *Suffolk Transnational Law Review* 1/1999, pp. 1-55; Rachel Brett, Human Rights and the OSCE, *Human Rights Quarterly* 3/1996, pp. 668-693; Ulrich Fastenrath, The Legal Significance of CSCE/OSCE Documents, in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 1995/1996*, Baden-Baden 1997, pp. 411-427. See also section 5 of the current paper concerning the OSCE's implementation and enforcement mechanisms.

11 *OSCE Handbook*, cited above (Note 10) chapter 8.

12 Cf. Wenig, cited above (Note 10), p. 369. On p. 378, he adds: "This means that with regard to the CSCE/OSCE the politically relevant bodies of the UN have interpreted the concept of 'regional arrangement' in such a way as to disregard the earlier requirement of a founding treaty under international law."

13 Cf. ibid. p. 371; Arie Bloed (ed.), *The Conference on Security and Co-operation in Europe: Analysis and Basic Documents, 1993-1995*, The Hague/London/Boston 1997, p. xix; See also the conclusion of the current paper.

14 Cf. Bloed, cited above (Note 4), p. 24; Bloed, cited above (Note 13), p. xix.

the Organization as an informal diplomatic discussion group, albeit with executive powers. There seems to be a conscious effort to maximize the benefits of an established organizational structure and minimize the disadvantages that usually accompany it. The OSCE wants to be considered a normal international organization while maintaining "flexibility" in its options for action. The desire to be viewed as a *de facto* legal entity can be seen from this self-description:

> The OSCE has a unique status. On the one hand, it has no legal status under international law and all its decisions are politically but not legally binding. Nevertheless, it possesses most of the normal attributes of an international organization: standing decision-making bodies, permanent headquarters and institutions, permanent staff, regular financial resources and field offices. Most of its instruments, decisions and commitments are framed in legal language and their interpretation requires an understanding of the principles of international law and of the standard techniques of the law of treaties. Furthermore, the fact that OSCE commitments are not legally binding does not detract from their efficacy. Having been signed at the highest political level, they have an authority that is arguably as strong as any legal statute under international law. [15]

This ambiguous legal status has not stopped the OSCE from drafting legally binding treaties, such as the Convention on Conciliation and Arbitration within the OSCE, the Treaty on Conventional Armed Forces in Europe (CFE), and the Open Skies Treaty.[16]

In character with its strictly political, diplomatic origins, and its basis in the concepts of "co-operative security", "community of values", and "community of responsibility", decisions within the OSCE are made on a consensual basis.[17] Decision making by consensus means that decisions enter into force, and thus are binding, immediately – the "universality principle". This requirement for consensus gives the decisions and documents of the OSCE added weight in terms of state practice and *opinio juris*, as shall be discussed below.

That OSCE documents and the commitments contained therein are politically binding has been stated by the OSCE and is well recognized.[18] While this is usually followed by the claim that the norms and principles created are not legally binding, this absence of the legal character or "legalness" of the commitments has been questioned. Many of the human dimension commit-

15 *OSCE Handbook*, cited above (Note 10) p. 3.
16 Unlike documents of the OSCE, these legal treaties apply only to those participating States that have ratified them. Cf. ibid. pp. 37, 90, 127-131.
17 See ODIHR, *OSCE Human Dimension Commitments: A Reference Guide*, Warsaw 2001, pp. xv-xvi.
18 Cf. ibid., p. xv; Arie Bloed/Pieter van Dijk (eds.), *Protection of Minority Rights Through Bilateral Treaties*, The Hague 1999, p. 5.

ments are similar to those listed in overtly legally binding instruments,[19] although they are considered to go further in terms of normative content.[20] Some commentators have stated that the OSCE commitments have purposely been made to be not legally binding,[21] while others have claimed that the commitments cannot be legally binding.[22] Yet this is not the end of the argument, as Steven R. Ratner points out: "The non-treaty nature of the OSCE documents only tells us what they are not, not what they are."[23] Then, somewhat surprisingly, the International Court of Justice in the *Nicaragua* case[24] referred to the Helsinki Final Act[25] as evidence of *opinio juris*, thus opening up the possibility that the Final Act and perhaps also other OSCE documents may qualify as customary international law. Much of the literature on the OSCE has not dared to mention this possibility. While a few authors have raised the question, they have usually done so in passing, without giving it detailed consideration.[26]

The most common position on the status of OSCE commitments is that the difference between the politically and the legally binding is, in reality, of little importance, since the commitments are still considered binding by the participating States – i.e. they fulfil the criteria of normativeness and obligatoriness. In this much quoted passage, van Dijk and Bloed underscore the low degree of significance of this distinction:

> The binding force of these documents is not seriously doubted. Van Dijk correctly states: "A commitment does not have to be legally binding in order to have binding force; the distinction between legal and non-legal binding force resides in the legal consequences attached to the

19 Such as the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), and the Council of Europe Framework Convention for the protection of National Minorities (FCNM).

20 Cf. ODIHR, cited above (Note 17), p. xv: "In a number of cases, OSCE human dimension commitments go far beyond the level provided for in 'traditional', legally binding human rights instruments."

21 Cf. Fastenrath, cited above (Note 10), p. 415: "It should be added that there is no reason to think that the participating States wanted to neglect their registration obligations under the UN Charter and the Vienna Convention on the Law of Treaties. More likely is that they were concerned about domestic legislative procedures which at the very least would have caused substantial delays in the Helsinki Final Act's entry into force, if they would even have caused it to fail."

22 Cf. Brett, cited above (Note 10), p. 676.

23 Ratner, cited above (Note 9), p. 609; Wenig, cited above (Note 10), p. 370.

24 *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986); Christine Chinkin, The Challenge of Soft Law: Development and Change in International Law, in *International and Comparative Legal Quarterly* 38/1989, pp. 850-866, here: p. 858.

25 The Helsinki Final Act is the "founding" document and principle source of guidance for the OSCE.

26 E.g., Bloed, cited above (Note 4), p. 23; Fastenrath, cited above (Note 10), pp. 422-423; to this author's knowledge, Stuart Ford has made the only serious attempt to test whether OSCE documents could become customary international law, cf. Ford, cited above (Note 10), pp. 26-38; He shows evidence of custom from OSCE documents, but does not move beyond the "artificial distinction" between the politically binding and the legally binding. The present article will attempt to proceed further with this argument in sections 3 and 4.

> binding force", not in the binding force as such. Violation of politically, but not legally binding agreements is as inadmissible as any violation of norms of international law. In this respect there is no difference between politically and legally binding rules.[27]

Thus, OSCE documents arguably do not fit the mould of treaties, even though in many cases they have similar characteristics.[28] However, does this mean that these documents and commitments are irrelevant to international law? If the commitments are still binding on the OSCE participating States, does it really matter whether they match narrow definitions of international law?

As that question remains open, I will placate the lawyers by testing the OSCE commitments against the usual criteria of customary international law. I will not try to determine whether a specific provision of the OSCE human dimension commitments has become custom, but rather whether the OSCE "process"[29] is compatible with the "process"[30] of the formation of regional customary law.

OSCE Human Dimension Commitments as Custom?

It is beyond the scope of this contribution to examine exhaustively the troubled development of customary international law (CIL) and its many varying and competing theories.[31] Therefore, I will concentrate on those as-

27 Bloed, cited above (Note 4), p. 22.

28 For more on treaty form and OSCE documents, see Ford, cited above (Note 10), pp 27-30; Fastenrath, cited above (Note 10), pp. 413-417.

29 ODIHR, cited above (Note 17), p. xiv-xv.

30 See Higgins, cited above (Note 7); also Michael Byers, Custom, Power, and the Power Of Rules Customary International Law from an Interdisciplinary Perspective, in *Michigan Journal of International Law* 17/1995, pp. 109-180, here: p. 113.

31 On customary international law, see the "official definition" in Art. 38(1)(b) of the Statute of the International Court of Justice; see Karol Wolfke, *Custom in Present International Law*, Dordrecht 1993, pp. 2-10, on the origins, confused terminology, early dissatisfaction, and inconsistent court decisions; Dinah Shelton, Law, Non-Law and the Problem of "Soft Law", in: Dinah Shelton (ed), *Commitment and Compliance – The Role of Non-Binding Norms in the International Legal System*, Oxford 2000, pp. 1-13, here: p. 7, on how the definition of CIL changes to fit the times; see also the case of the *SS Lotus*, Permanent Court of International Justice Decisions 1927, on the need for state practice; *North Sea Continental Shelf (FRG/Den.; FRG/Neth.),* ICJ Reports (1969), on the need for both state practice and *opinio juris*; Byers, cited above (Note 30), p. 137, on CIL as a social institution; Theodor Meron, *Human Rights And Humanitarian Norms As Customary Law*, Oxford 1991, on CIL and human rights; Charney, Universal International Law, in: *The American Journal of International Law* 2/1993, pp. 529-551, here: p. 546, on uncertainty or flexibility in the components of CIL; J. Patrick Kelly, The Twilight of Customary International Law, *Virginia Journal of International Law* 2/2000, pp. 449-543, here: pp. 452-455, on the meaninglessness and non-empirical character of CIL; Anthea Elizabeth Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, in *The American Journal of International Law* 4/2002, pp. 757-779, here: p. 775, on how the traditional formula excludes all non-state actors, e.g., the ICRC; Higgins, cited

pects of CIL necessary for the argument concerning the status of OSCE commitments. After a brief description of the particular conception of CIL that I will be employing here, I will present evidence of state practice and *opinio juris* from the activities and experience of the OSCE to demonstrate the possibility that the OSCE commitments can qualify, according to the required criteria, as regional customary law.

Elizabeth Roberts divides the various theories on CIL into the traditional and modern approaches.[32] The former lays more emphasis on state practice, while proponents of the latter – which includes international human rights law – tend to employ *opinio juris* to further their political and moral agendas. "The dynamo perspective concentrates on modern custom and embraces it as a progressive source of law that can respond to moral issues and global challenges."[33] Trying to distinguish between these two elements, both of which are recognized as necessary for the creation of CIL, is often difficult. The International Court of Justice (ICJ) and various scholars claim sometimes that a particular manifestation, e.g., a declaration of an international organization, can be evidence of either state practice, *opinio juris*, or both.[34] The subjective element of *opinio juris* is also difficult to ascertain due to psychological and epistemological problems, as well as ambiguity as to what exactly "as law" means.[35] In spite of the general confusion over the definition, classification, and role of customary international law within the field, in my discussion below, I utilize the basic formula of the two components, while admitting its problematic state beforehand.

As the scope of this contribution is limited to activity within the OSCE region, no claim to establishing international, i.e. global, custom is being made. The possibility of *regional* custom was indirectly allowed for by the ICJ in the *Asylum* Case,[36] even though the Court did not find evidence of it in that particular case.

Evidence of State Practice

There are at least three areas in which we may look to identify sufficient evidence of state practice for OSCE human dimension commitments: the process of drafting OSCE documents, the documents themselves, and multi- and bilateral minority rights treaties in the OSCE region that have incorporated OSCE commitments.

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above (Note 7), pp. 19-38; Paul H. Brietzke, Insurgents in the "New" International Law, *Wisconsin International Law Journal* 1/1994.

32 Cf. Roberts, cited above (Note 31), p. 758.

33 Ibid., p. 759; on the "establishment's" reaction to modern custom, see Brietzke, cited above (Note 31).

34 Cf. Wolfke, cited above (Note 31) p. 45.

35 Cf. ibid., pp. 7-9, 19-25; Byers, cited above (Note 30) p. 136.

36 *Colombia v. Peru*, ICJ Report (1950). See also Ford, cited above (Note 10), p. 30; Wolfke, cited above (Note 31), p. 9.

The ICJ stated in, *inter alia*, the *Namibia Advisory Opinion* of 1971 and the *Fisheries Jurisdiction* cases of 1974 that *participation in codifying conferences* can be evidence of state practice: "Two concepts have crystallized as customary law in recent years arising out of the general *consensus* revealed at that Conference."[37] The OSCE process of formulating human dimension commitments in consensus-based political decision-making forums is illustrative of this type of state practice.[38] While still controversial to some, accepting *resolutions of international organizations* as evidence of state practice is now commonplace.[39] The situation is complicated further by declarations also occasionally being treated as evidence of *opinio juris*, as in the infamous *Nicaragua* case mentioned above. While most references have been to General Assembly resolutions, OSCE documents are also eligible as evidence of state practice. The qualifiers[40] of type of language and proportion of support for the resolutions are met as, OSCE documents usually use mandatory terminology, express obligations, and are accepted unanimously. In addition, while OSCE commitments have been around for over 25 years in the Helsinki Final Act, the shortened required time to demonstrate consistent state practice as elaborated in the *North Sea Continental Shelf* cases means that many of the most progressive have been developed since the end of the Cold War. Thus Stuart Ford would be correct in saying: "Stretching as they do over a period of nearly ten years, these declarations are evidence of a general state practice consistent with OSCE principles."[41]

The most immediate impact of OSCE commitments has been to create the foundation for, and at times even the exact wording of, *multi- and bilateral treaties on minority rights* signed in the 1990s between some OSCE participating States.[42] The adoption of and reference to OSCE human dimension commitments[43] in these treaties has turned "politically binding" obligations into legally binding ones.[44] The use of OSCE commitments in these treaties can also be considered evidence of regional state practice.[45]

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37 *Fisheries Jurisdiction* cases, ICJ Reports (1974), paragraphs 52 (UK) and 44 (Germany); *Namibia* ICJ Reports (1971).

38 Cf. Shelton, cited above (Note 31), p. 1: "The process of drafting and voting for non-binding normative instruments also may be considered a form of state practice."

39 Cf. e.g. *North Sea Continental Shelf* cases, cited above (Note 31); Higgins, cited above (Note 7), pp. 22-25.

40 Cf. Michael Akehurst, *A Modern Introduction to International Law*, London 1987, pp. 26-27.

41 Ford, cited above (Note 10), p. 32.

42 For more on OSCE minority rights commitments and these treaties, see Bloed/van Dijk, cited above (Note 18); Jane Wright, The Protection of Minority Rights in Europe: From Conference to Implementation, in: *International Journal of Human Rights* 1/1998, pp. 1-31; Hartmut Hillgenberg, A Fresh Look at Soft Law, *European Journal of International Law* 3/1999, pp. 499-515.

43 Mainly those of the Copenhagen Document.

44 Cf. Fastenrath, cited above (Note 10), p. 417: "Certain treaties under international law have referred to CSCE/OSCE documents and taken their political obligations over into the legally binding treaty […] A number of these treaties […] explicitly incorporate the commitments on the protection of national minorities contained in CSCE documents, espe-

Opinio juris sive necessitates

The second component required for the formation of custom is the subjective element referred to in the ICJ Statute simply as "accepted as law". This supplementary requirement in addition to the requirement of state practice means that the practice in question must be performed as an obligation or that one must perform it while believing that one is acting according to existing law.[46] The potential for confusion is obvious, and even the drafters of the Statute had doubts about the exact meaning of custom. Even the ICJ decisions at times confuse the terminology used to indicate *opinio juris*, e.g., as law, by law, legal conviction, consent, acquiescence, will of a state.[47] Essentially, *opinio juris* requires that States engage in a particular practice because they perceive they are bound or obligated to do so. As mentioned above, recent developments in CIL have emphasized *opinio juris* over state practice, especially when dealing with issues such as human rights; the traditional criteria are therefore changing.[48] "A lower standard of practice may be tolerated for customs with a strong moral content because violations of ideal standards are expected."[49] Once again, resolutions, decisions, and declarations of international organizations that are formulated in such a way as to state that they should be considered as law or binding commitments and obligations[50] for member states can be evidence of *opinio juris*. In the much-discussed *Nicaragua* case, the ICJ stated that the attitude of states towards, *inter alia*, the OSCE's Helsinki Final Act, as well as the "effect of consent to the text", were evidence – "with all due caution" – of *opinio juris*.[51]

Thus, the Helsinki Final Act and other OSCE documents fulfil criteria for state practice both on account of being decisions of an international organization and in terms of participation in the drafting of the documents, and as articulations of the *opinio juris* of the participating States that signed and accepted the documents and commitments contained therein. It appears as though the OSCE process of, on the one hand, creating standards and, on the other, establishing obligations to those standards on the part of its participating States may fit the requirements of customary international law formation.

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cially the Copenhagen Document […] The result of such references is that political obligations are transformed into legal ones."

45 Cf. Chinkin, cited above (Note 24), pp. 856-857; and ICJ *Continental Shelf (Libya v. Malta)* case, ICJ Reports (1985), pp. 29-30.

46 *North Sea Continental Shelf cases*, cited above (Note 31), pp. 43-44.

47 Cf. Wolfke, cited above (Note 31), pp. 1-25, 44-51, 152-153.

48 For more on the impact of the rise of international human rights law on *opinio juris*, see Meron, cited above (Note 31).

49 Roberts, cited above (Note 31), p. 790.

50 Cf. Franck, cited above (Note 5), p. 67 on the OSCE's Charter of Paris for a New Europe of November 1990: "Although the Charter is not a treaty, its language is weighted with the terminology of *opinio juris*. It is deliberately norm creating."

51 *Military and Paramilitary Activities in and against Nicaragua*, cited above (Note 24), para. 99f; see also Chinkin, cited above (Note 24), p.858; Alan Boyle, Some Reflections on the Relationship of Treaties and Soft Law, in *The International and Comparative Law Quarterly* 4/1999, pp. 901-913, here: p. 906.

"The CSCE/ OSCE documents express an *opinio juris* which, together with the ensuing practice, could provide the starting point for new regional international customary law."[52]

Yet one question remains: Does *opinio juris* refer only to the *legal* in the strictest sense of that term? Or, to follow Byers, does there not rather have to be a shared understanding of the legal relevance of the context in which the practice takes place?[53] If custom was originally a social institution, should not the process of customary international law formation reflect that? Or should this process remain constricted by positivism's artificial segregation of the legal from the political?

This returns us to the question of intent behind the status of OSCE documents. As mentioned previously, there are many indications that both the original framers and the reformers in the 1990s consciously decided to make the OSCE and its documents only politically binding. The Helsinki Final Act and subsequent OSCE documents clearly state that, in accordance with Article 102 of the UN Charter, each of the documents should be transmitted to the Secretary-General of the UN, but that they are not document "eligible for registration" under the same article.[54] Furthermore, the documents state that the participating States pay due regard to the principles listed, but "note that the present Declaration does not affect their rights and obligations" under international law. Have these provisions been inserted to disallow definitely any legal status for the documents? Or were they merely entered in order to avoid giving the agreements the form of treaties, with all the baggage this entails? One could infer from these provisions that, as mentioned in section 2, the OSCE wants to enjoy all the benefits of being an international organization with binding force on its participating States without having to endure the disadvantages.[55] If these arrangements to sidestep the legal aspects of treaty formulation were included to show that the participating States did not take their commitments seriously, and thus that they were to be considered non-binding, why would it be continuously stressed that the participating States have a "firm commitment to the full implementa-

52 Fastenrath, cited above (Note 10), p. 423.

53 Cf. Byers, cited above (Note 30), pp. 139-142; on page 140, he writes: "*Opinio juris*, in terms of states believing that they are acting in accordance with preexisting or simultaneously developing legal rules, is not particularly helpful, either as a practical tool for determining the existence of customary rules, or as an explanation of how those rules arise."

54 The consequences of non-registration mean that states cannot institute proceedings in the ICJ alleging violations of OSCE commitments, see Ratner, cited above (Note 9), p. 611.

55 Disadvantages of concluding a formal treaty could include extensive deliberations at treaty conferences, a watering down of provisions to the lowest common denominator, inclusion of reservations, lengthy ratification procedures, involvement of national legislatures, and long delays in entering into force (vide the UN Bill of Rights). Some of the advantages of maintaining "flexibility" are that the organizational structure can be dynamic, allowing easier modification to fit evolving circumstances; the documents and commitments can build on each other without having to determine cancellation of previous treaties or how they relate to each other; and the whole process is kept out of the hands of the lawyers. Cf. ODIHR, cited above (Note 17), p. xvi; cf. also Wright, cited above (Note 42); and Wenig, cited above (Note 10), p. 373.

tion of all [OSCE] principles and provisions" and attach "high political significance" to those commitments?[56]

Therefore it follows that the OSCE documents are drafted in this manner not in order to deny them binding force, but rather to circumvent the complications involved in making conventional law. This leaves open the possibility that if it can be demonstrated that the participating States are not in opposition to OSCE commitments obtaining some sort of non-conventional legal consideration, e.g., in terms of custom or general principles, then *opinio juris* could be established, leading to the formation of customary international law.[57]

However, a more fundamental issue is at stake here: Specifically within international law, what is the real difference between "politically binding" and "legally binding", between a political and a legal obligation?

> The fact that, when assessed realistically, the difference between a treaty and the binding "political" effect of a non-treaty agreement is not as great to a politician as is often thought may also play a role in the decision to opt for a non-treaty form of agreement. Even treaties, if they are not simply to exist on paper, are dependent on continuing cooperation between states. And when that willingness to cooperate diminishes, it is unlikely that attempts will be made to enforce them either in court or through reprisals – owing to anticipated costs and political consequences – even if such possibilities do exist from a legal point of view.[58]

Political versus Legal

Some may claim that the difference between a legal obligation and a political one is that violating the former involves a breach of the law, while there is no equivalent in the case of the latter. However, distinguishing between the political and the legal with respect to international law is somewhat misguided, because, at this level, the legal is utterly permeated by the political.[59] International law is itself created from political processes: political negotiations, consensus amongst states, politically influenced court decisions, etc.[60] Cus-

56 Cf. Charter of Paris for a New Europe, Paris, 21 November 1990, in: Bloed, cited above (Note 4), pp. 537-566.
57 Cf. Ford, cited above (Note 10), pp. 37-38. See also the conclusion of the current paper.
58 Hillgenberg, cited above (Note 42), p. 5.
59 Shelton, cited above (Note 31), p. 11: "Some scholars have distinguished hard law and soft law by stating that breach of law gives rise to legal consequences while breach of a political norm gives rise to political consequences. Such a distinction is not always easy to make. Testing normativity based on consequences can be confusing, since breaches of law may give rise to consequences that may be politically motivated."
60 For more on the fundamental role of the political in international law, see Byers, cited above (Note 30), Kelly, cited above (Note 31).

tomary international law is created through political practice, and politically influenced *opinio juris* must, according to Guggenheim, have the acceptance of the leading powers.[61] According to Byers, legal scholars

> have to varying degrees generally assumed that international law is created through processes which are at least procedurally objective and in that sense apolitical […] Unfortunately, many international legal scholars have ignored the effects of power relationships on the development of customary rules, or have made ineffective attempts to explain these effects away.[62]

One distinction may lie in the preferred forms of approach (co-operative versus adversarial) and decision making (political consensus versus legal adjudication), and the remedies connected to them. The legal remedies of access to a judicial system,[63] individual petitions,[64] and compensation/reparation via the European Court of Human Rights and the European Court of Justice are not available within the OSCE,[65] though the monitoring and reviewing of the UN Human Rights Committee have parallels within the OSCE process. However, the lack of these instruments does not lessen the level of obligation states have towards OSCE commitments, just the means to which one has recourse.[66] Moreover, as mentioned above, even if these legal instruments are available, decisions on whether and how to employ them are political. These types of instruments are more effective when dealing with situations of isolated or "minor" human rights violations in states where the level of culture of compliance is already quite advanced (e.g., Western Europe).[67] Alston and Weiler point out that within the EU there is excessive reliance on and faith in "the power of legal prohibitions and judicial enforcement"[68], and that these measures are insufficient by themselves for an effective human rights regime, which also requires political measures. An adversarial adjudication system may not be the most effective way to deal with situations involving gross and systematic human rights violations. Ethnic conflict, minority issues, wide-

61 Cf. Paul Guggenheim, quoted in: Wolfke, cited above (Note 31), p. 49.
62 Byers, cited above (Note 30), pp. 116, 133.
63 For details of the Court of Conciliation and Arbitration within the OSCE, see Bloed, cited above (Note 13), p. xix; *OSCE Handbook*, cited above (Note 10), p. 37.
64 Cf. ODIHR, cited above (Note 17), p. xvii: "It is also important to note that the absence of an individual complaints process does not preclude that individual cases might be brought to the attention of the political bodies of the OSCE."
65 Cf. ibid. p. xvii. When restructuring the Organization, the OSCE refrained from creating such mechanisms because it did not want to duplicate already existing instruments.
66 Cf. Ratner (Note 9), p. 610: "Other than the inability of states to seek recourse for violations through international adjudicatory bodies, the OSCE commitments are just as binding on states – just as normatively significant – as treaties."
67 Cf. David Wippman, The Evolution and Implementation of Minority Rights, in: *Fordham Law Review* 66/1997, pp. 597-626, here: p. 625.
68 Philip Alston/Joseph H.H. Weiler, An "ever closer Union" in need of a human rights policy: the European Union and Human Rights, in Philip Alston (ed.), *The EU and Human Rights*, Oxford 1999, pp. 12-13.

spread abuse of state power, and other such scenarios call for prevention, mediation, and capacity-building, not reparations. The remedies involved may, therefore, indeed be a key difference between OSCE "politically binding" instruments and other, "legally binding", human rights instruments. However, when dealing with the sensitive and volatile issue of gross human rights violations, perhaps the OSCE's co-operative methods are a strength and not a weakness.

Of course, as discussed above, the distinction between the political and the legal – also concerning remedies – is usually blurred, and may not be noticed or seen as of great importance:

> One can assume that the partners in a non-treaty agreement are aware that if they do not conclude a treaty, they thus also exclude certain legal consequences of a treaty. This primarily concerns consequences relating to non-fulfilment; namely, compensation and the possibility of enforcement through dispute settlement procedures and reprisals. Whether the parties' ideas go much further than this may frequently be in doubt. Usually the negotiations concentrate on the substance of what the two parties want, leaving aside concomitant rules on validity, interpretation, implementation, consequences of non-fulfilment or preconditions for termination of the agreement.[69]

Since this distinction between "politically binding" and "legally binding" can be considered to be inadequate, inaccurate, and somewhat contrived, it might be more helpful to look at the status of the OSCE process and its resulting commitments in terms of "soft law" versus "hard law".

Soft Law and Hard Law

The term "soft law" arose in connection with de-colonization and the right to self-determination, economic co-operation and the right to development, and, more recently, in relation to environmental agreements. That the momentum for concluding soft law agreements appears to have increased soon after the finalizing of the Vienna Convention on the Law of Treaties[70] illustrates that states were looking for alternative means to regulate their relations outside of the strict formality of conventional international law, i.e., "hard law". As demonstrated above, not choosing the treaty form for an international agreement does not preclude its achieving legal significance nor deny its binding

69 Hillgenberg, cited above (Note 42), p. 12.

70 Cf. Chinkin, cited above (Note 24), p. 860. *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331 (1969); Article 2(1)(a) of the Vienna Convention defines a treaty as "an international agreement concluded between States in written form and governed by international law". The qualification of "by international law" is to distinguish from those treaties under domestic law, cf. Hillgenberg, cited above (Note 42), p. 7.

force.[71] The usual purposes of soft law instruments in general have been to facilitate in the interpretation of treaties, to "test the waters" and workability of certain provisions, and to prepare the ground for conventional treaties (e.g., the Copenhagen Document and the Framework Convention on National Minorities). Soft law agreements can themselves have "norm-generating, norm-regulating and norm-legitimating (or delegitimating) functions".[72]

So while soft law arrangements can retain a certain legal status, they also have many practical and political advantages over traditional treaties, some of which have already been described. Hartmut Hillgenberg lists some reasons for avoiding the conventional treaty form, which could also be valid for the OSCE:

- a general need for mutual confidence-building;
- the need to stimulate developments still in progress;
- the creation of a preliminary, flexible regime possibly providing for its development in stages;
- impetus for co-ordinated national legislation;
- concern that international relations will be overburdened by a "hard" treaty, with the risk of failure and a deterioration in relations;
- simpler procedures, thereby facilitating more rapid finalization (e.g. consensus rather than a treaty conference);
- avoidance of cumbersome domestic approval procedures in case of amendments.[73]

Yet how does one classify agreements into "soft law" and "hard law"? Beyond the category of treaties, how does one determine the "hardness" of the law?

Reisman has identified three elements in lawmaking, which makes the binding nature of the law a matter of degree. These are policy content, authority of the prescriber, and "the ability of the norm-makers to make the prescriptions controlling – to ensure that states comply with them",[74] i.e. implementation and enforcement mechanisms. The "hardness" of the policy con-

71 Hillgenberg, cited above (Note 42), p. 7: "However, this does not necessarily mean that all non-treaty agreements only follow 'political' or moral rules. There is no provision of international law which prohibits such agreements as sources of law, unless – obviously – they violate *jus cogens*." Boyle, cited above (Note 51), p. 903: "Non-binding instruments may still be useful if they can help generate widespread and consistent state practice and/or provide evidence of *opinio juris* in support of a customary rule."

72 Fastenrath, cited above, (Note 10), p. 419; see also Shelton, cited above (Note 31) p. 10; Boyle, cited above (Note 51), pp. 902-903; on the OSCE documents fulfilling these functions, see Bloed/van Dijk, cited above (Note 18), p. 6.

73 Cf. Hillgenberg, cited above (Note 42), p. 4. For more on the relative advantages of soft law over conventional law, see Chinkin, cited above (Note 24), pp. 861, 863; Brett, cited above (Note 10), p. 684; Wenig, cited above (Note 10), p. 382.

74 W. Michael Reisman, The Concept and Functions of Soft Law in International Politics, in: Emmanuel G. Bello/Bola A. Ajibola (eds), *Essays in Honour of Judge Taslim Olawale Elias*, vol. 1, Dordrecht 1992, pp. 135-136.

tent depends upon the language used (mandatory or permissive) and the level of detail and substance of the text: Non-treaty instruments have featured language with stronger terms of obligation, a higher degree of precision, and further-reaching normative content than many "legal" treaties.[75] Many OSCE Human Dimension documents are expressed using the language of mandatoriness. The Copenhagen Document, for instance, contains terms and phrases such as "full adherence to", "ensure that their laws conform to obligations", and "reaffirm their commitment to implement fully". In terms of policy content, the Copenhagen Document is considered "harder" than other human rights instruments. Of the Framework Convention, Bloed and van Dijk write: "Although this Convention aims at legalizing politically binding OSCE commitments, in fact it remains below the OSCE level."[76] In terms of the authority of the prescribing agency, the fact that OSCE human dimension documents are adopted unanimously by consensus and recognized as having "high political significance" suggests "hard" levels of bindingness.

Some treaties (by definition "hard law") can in fact be "soft" as far as their effects are concerned. Likewise, there are non-treaties (officially "soft law") that are effectively "hard".[77] So, with the effectively hard but officially soft Copenhagen Document and the effectively soft yet officially hard Framework Convention in mind, let us turn to the last components in the lawmaking process: implementation, enforcement, and compliance.

With this final element, politics once again enters the fray, since one must look at the various means that organizations have at their disposal for ensuring compliance with their "soft" legal norms. Are the strictly legal instruments and the mechanisms that they employ the most effective for the professed purpose of protecting human rights? Or does the superior effectiveness of other instruments foster greater compliance with norms, thus raising the status of those instruments in terms of obligation and binding force?[78] The main treaty-based legal mechanisms for ensuring compliance were previously touched upon when discussing remedies. The limitations of these systems for dealing with human rights, ethnic tension, and minority issues have been extensively debated.

For the protection of human rights, the most effective form of implementation is prevention. Mechanisms that seek to forestall the worsening of critical situations as well as long-term capacity-building programmes that set out to prevent violations and aid in the implementation of human rights

75 "The provision concerned should, at all events potentially be of a fundamentally norm-creating character." *North Sea Continental Shelf* cases, cited above (Note 31), para. 72; See also Shelton, cited above (Note 31), p. 4: "Some soft law instruments may have a specific normative content that is 'harder' than the soft commitments in treaties."

76 Bloed/van Dijk, cited above (Note 18), p. 1. Comparisons of the various minority rights regimes of the OSCE, the Council of Europe, and UN can be found in Wright, cited above (Note 42) and Ratner, cited above (Note 9).

77 Cf. Boyle, cited above (Note 51), pp. 906-907; Chinkin, cited above (Note 24), n. 5.

78 I am not suggesting that might makes right, but how legally significant (especially in CIL) can a paper tiger be?

commitments are more effective in ensuring future compliance than mechanisms that address violations after the fact in the hope that they will not be repeated.[79] Preventive mechanisms can contain legal elements as well, as illustrated with regard to the OSCE's High Commissioner on National Minorities:

> [With] his often ground-breaking application of existing standards for purposes of conflict prevention (and, in effect, as a proactive mechanism of implementation), the HCNM has become a source of "soft jurisprudence," drawing upon textual instruments, doctrine, and state practice in the composition of his own argumentation to arrive at a specific recommendation.[80]

The OSCE arguably has the best capabilities and the best record of implementation and enforcement of human dimension commitments in the areas where it matters the most: regions of high tension and post-conflict recovery. The mechanisms include:[81] political forums for creating human dimension norms and discussing implementation and compliance with these norms; Human Dimension Implementation Meetings for monitoring and reviewing states' compliance with commitments; the Office of Democratic Institutions and Human Rights for monitoring and capacity-building programmes to assist in the implementation of commitments within participating States; election-monitoring for ensuring that commitments to free and fair elections are adhered to; long-term field missions on the ground with day-to-day contacts for advising on implementation and compliance; the yet-to-be-used Court of Conciliation and Arbitration within the OSCE; and, of course, the High Commissioner on National Minorities.[82] Thus, the OSCE process, documents, and commitments can be deemed "hard" in terms of the three elements of lawmaking and therefore have a "hard" binding nature.

In sum, the OSCE has avoided the disadvantages that come with treaties, and the legal remedy that it in actuality lacks – a working judicial system – is not exactly appropriate for the type of work that it does. At the same time, it enjoys the benefits of soft law: the flexibility to be innovative in setting standards and to react to new situations quickly; it has many of the mechanisms necessary for ensuring compliance with its commitments; and its commitments have the binding force necessary to be taken seriously on the international stage.

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79 Cf. Boyle, cited above (Note 51), p. 912.

80 John Packer, Making International Law Matter in Preventing Ethnic Conflict: A Practitioner's Perspective, in: *New York University Journal of International Law and Politics* 3/2000, pp. 715-724, here: p. 717.

81 For an exhaustive description of the various bodies and instruments, see *OSCE Handbook* cited above (Note 10).

82 The work of the HCNM has been written about extensively. For more insightful comments, see Bloed, cited above (Note 13), Bloed/van Dijk, cited above (Note 18), Ratner, cited above (Note 9), Packer, cited above (Note 80).

So it seems safe to conclude that while the OSCE may officially be soft in the sense of not having generated conventional law, it is actually quite hard as far as its legally binding status is concerned. If this is true, then maybe some of the definitions and delineations of international law should be re-examined.

> If states expect compliance and in fact comply with rules and principles contained in soft law instruments as well as they do with norms contained in treaties and custom, then perhaps the concept of international law, or the list of sources of international law, requires expansion. Alternatively, it may have to be conceded that legal obligation is not as significant a factor in state behaviour as some would think.[83]

What about *opinio juris*? This depends one how one understands "accepted as law". Is it possible, by stepping out of the narrow positivist stance, to see the OSCE's hard "soft law" as qualifying as *opinio juris*? And since evidence of state practice has already been established, could it be possible to consider the human dimension commitments as regional customary law?

The OSCE human dimension (documents, commitments, instruments) is a *de facto* treaty regime,[84] as it is founded on *pacta sunt servanda*[85] – on the good faith of the participating States.[86] It is a treaty in the sense that there are legitimate expectations[87] among the States that each will act in good faith, but this *de facto* contractual agreement does not address merely a single document, but rather the OSCE process as a whole. This intention to act in good faith in a *de facto* contractual agreement (combined with its "hard" obligations and binding force), may thus amount to evidence of *opinio juris*.

Therefore, if we must appease the positivists and fulfil their incoherent criteria and definitions of customary international law, the OSCE human dimension process may indeed qualify as regional customary law.

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83 Shelton, cited above (Note 31), p. 11.

84 Hillgenberg, cited above (Note 42), p. 26: "In the final analysis, it is of little import whether one attaches limited legal quality to such self-contained regimes. In any event, their political function resembles that of treaties: non-treaty agreements, too, provide the parties to international arrangements with the power to 'to justify and persuade'."

85 Cf. Vienna Convention, cited above (Note 70), Art. 26.

86 See Organization for Security and Co-operation in Europe, Charter for European Security, Istanbul, November 1999, in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH, *OSCE Yearbook 2000*, Baden-Baden 2001, pp. 425-443, here: p. 428; and Organization for Security and Co-operation in Europe, Budapest Summit Declaration. Towards a Genuine Partnership in a New Era, 5-6 December 1994, in Bloed, cited above (Note 13), pp. 145-149, para. 19.

87 Cf. Byers, cited above (Note 30), p. 166.

The Legal Status of the OSCE Revisited

As previously mentioned, there have been various attempts over the years to alter the legal status of the OSCE in order to establish it as an international legal entity. A working group is currently investigating the options for establishing the OSCE primarily as a legal personality with legal capacity and privileges and immunities, and a draft convention has been developed to address these issues. According to a Permanent Council report on this issue,[88] an overwhelming majority of participating States are in favour of a convention, with some participating States pushing for a model bilateral agreement instead. Such a convention would establish the OSCE as a legal entity, which would include the legal capacity to participate in legal proceedings. An attached report by the Secretariat,[89] which discusses OSCE's current legal status, uses the criteria (according to "doctrine") of intention of the states (*opinio juris*), continuity (state practice), and implied powers to conclude that the OSCE has become a *de facto* subject under public international law with the capacity to act in its own right. While the report does mention the "verification of compliance with […] OSCE commitments" and "the establishment of norms and rules of conduct in areas of concern to the OSCE", it does not directly discuss the binding force these have on participating States. Yet one receives the impression that the work of verification and the status of the norms are not in question. The problematic of the legal position of the Organization does not concern the actual authority and status of the human dimension process, but lies elsewhere. Nevertheless, one can see that the OSCE is actively trying to resolve the question of legal status, which will no doubt also have implications for the status of the OSCE human dimension commitments.[90]

Conclusion: Escaping the Trap of Positivism's Binary Paradigm?

Traditional customary international law has been the solidification of tradition, i.e., it has been conservative. This is now reinforced by the conservatism of positivism. Considering the present state of world affairs, international human rights law is necessarily normative, prescriptive, and activist. To

88 *OSCE Legal Capacity and Privileges and Immunities: Report of the Permanent Council to the Ministerial Council*, PC.DEC/383, 26 November 2000, Annex.

89 SEC.GAL/20/00, Restricted, 6 March 2000, II.4.

90 Most recently, the Panel of Eminent Persons on Strengthening the Effectiveness of the OSCE stated that the Organization would greatly benefit from being accorded legal personality. The Panel recognized that creating a founding Charter would be a "time-consuming process" (as referred to above), while mentioning the already existing draft convention. Of course, political consensus is still the major obstacle; cf. CIO.GAL/102/05, 30 June 2005. The Final Report and the Recommendations of the Panel of Eminent Persons on Strengthening the Effectiveness of the OSCE are reproduced in this volume, pp. 359-379; on the question of a statute or charter for the OSCE, see in particular, p. 369.

adapt a saying from Marx, it is no longer about describing the law, but changing it. International human rights law has already changed the face of international law dramatically. Now the OSCE human dimension process is challenging the traditional conceptions of both customary and conventional international law. Its very existence is a call for a re-examination of the doctrine of customary international law and of positivism's artificial segregation of the legal from the political.

> Certainly, the forums may move the solutions substantially toward acquiring the status of international law. Those solutions that are also positively received by the international community through state practice or other indications of support will rapidly be absorbed into international law, notwithstanding the technical legal status of the form in which they emerged from the multilateral forum. While this process may not conform to traditional customary lawmaking, nothing in the foundations of the international legal system bars such an evolution in the international lawmaking process. The international community itself holds the authority to make changes in this process.[91]

Traditional international law instruments and modes of thinking have also proven insufficient in dealing with serious human rights concerns. While much progress has been made over the past 50 years, the "legal" human rights mechanisms are still ineffective and have made little real impact on the human rights situation on the ground where it is needed most.

Nowadays, some international human rights lawyers, scholars, and judges have become activists and have tried to employ international human rights law for the fundamentally "political" mission of advancing respect for and adherence to international human rights standards. Regionally, lawyers and politicians have used the "sacred" nature of law to establish fundamental political and moral "truths" in reaction to the massive abuse of the principles that Western civilization thought it was based upon.

However, the attempt by some of these new activists to maintain and operate from the positivist legal regime have caused them to overestimate the ability of these instruments to exercise their sacred mandate – how can one maintain faith in a powerless priest?

> International jurists […] sometimes naively expect legal norms and processes to determine outcomes in international relations […] Until the architecture of an international legal system is completed, international jurists should not expect more from international standards than these can deliver, while they should work creatively to maximize what can be achieved now.[92]

91 Charney, cited above (Note 31), p. 545.
92 Packer, cited above (Note 80), p. 724.

Some international human rights lawyers have underestimated the significance and usefulness of the OSCE human dimension commitments for their work. This article has endeavoured to show these lawyers why they are mistaken to overlook these commitments. As demonstrated above, OSCE human dimension commitments can be considered as regional customary law, thus providing these commitments with the binding legal basis that has been continuously denied. Moreover, as OSCE commitments are "harder" than those of most legal mechanisms, it is worth reconsidering the criteria for determining the value and weight of sources of international law. The binding force of these human dimension commitments has been recognized and utilized for political purposes by diplomats. International lawyers should employ these commitments for legal purposes in promoting human rights. Likewise, in this 30th anniversary year of the Helsinki Final Act, the OSCE should have greater confidence in its role in Europe and its position among international organizations. In its human dimension commitments, it has not only developed human rights standards that are among the most progressive of their kind in the world, but it has also created effective mechanisms for their promotion in member states. This is the success story and value of the OSCE that should be celebrated in this anniversary year.

For diplomats and practitioners, international law is just another tool in their toolbox. For lawyers to restrict themselves to just this tool, or, in fact, to just one very limited version of this tool, leaves them professionally impoverished and reduces both their potential scope of activity and their effectiveness. Whether or not the OSCE Human Dimension commitments are recognized as emerging regional customary law, international human rights lawyers would benefit from employing these commitments in their work.

The insistence of some lawyers on remaining within the sacred precinct of positivist law blurs their vision and reduces their ability to address the realities outside. While they recognize the power and privilege inherent in maintaining their sacred status, they must find ways to effectively engage in the world in order to save it. If they want to truly promote the cause of human rights, they must be creative and alter their doctrine to allow for new methods of influence and inspiration that can further their goals.