In: IFSH (ed.), OSCE Yearbook 2006, Baden-Baden 2007, pp. 237-249.

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Double or Treble Human Rights Protection? The Interplay of OSCE Standards with Other Systems of Norms

In 1975, the Final Act of Helsinki was seen as epochal because it declared the protection of human rights to be a principle of security and co-operation in Europe. The key formulation was contained in Principle VII:

> The participating States recognize the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and co-operation among themselves as among all States.[1]

Politicians (in the West) and the people in the Socialist states eagerly seized upon this formula, and many celebrated it as a major breakthrough.[2] That it actually was such became evident at the end of the 1980s, as the stipulations of the Helsinki Final Act with respect to human rights became an instrument for overcoming the division of Europe.[3] Although the political effect of the Final Act was powerful and ultimately contributed a great deal to the overthrow of Communism, the actual human rights that it asserts were by no means new.

Does the Final Act Merely Reiterate UN Obligations?

The Charter of the United Nations already obliges states to respect human rights and, in Article 13, empowers the General Assembly to initiate studies and make recommendations to assist in the realization of human rights and fundamental freedoms for all, irrespective of race, gender, language, or religion. Thus, in 1945, human rights became an object of international law for the first time in history. Previously, they had been exclusively the domestic affairs of states, in which no other state had a right to interfere. The grievous million-fold human rights violations committed by the National Socialists, however, made the international community starkly aware that the effects of

1 Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1 August 1975, in: Arie Bloed (ed.), *The Conference on Security and Co-operation in Europe. Analysis and Basic Documents, 1972-1993*, Dordrecht 1993, pp. 141-217, here: p. 147.

2 Cf. the evidence in Arie Bloed, Two Decades of the CSCE Process: From Confrontation to Co-operation, in: Bloed (ed.), cited above (Note 1), pp. 1-118, here: pp. 40-44.

3 Cf. Walter Schwimmer, *Der Traum Europa* [The Dream of Europe], Berlin 2004, p. 88.

such inhuman practices cross national borders and threaten peace and that they therefore needed to be made the remit of an international security organization. This explains the inclusion of human rights in the UN Charter. Admittedly, the stipulations made in the Charter in 1945 remained very general. Above all, the concept of human rights was very unclear, as at least three different concepts of human rights were incorporated in the document: the Western, the Socialist, and that of the (at that time few) developing countries. Therefore, in 1948, this was followed by the Universal Declaration of Human Rights, whose 28 Articles contain an exact catalogue of the human rights that should be protected by the UN. Because it was a resolution of the UN General Assembly, the Declaration was non-binding in formal legal terms but remained at the political level. The UN began the task of codifying human rights in 1949, immediately following the acceptance of the Declaration, which led to a whole system of treaties under international law. This system is based upon the twin poles of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights. The Covenants were adopted by the General Assembly as early as 1966 and took effect in 1976 thanks to their ratification by 35 states – including most of the Socialist countries.

It follows that the 1975 Helsinki Final Act only reiterated human rights commitments that had already been the object of an international treaty since 1966 and were recorded in UN reports. By 1976, they were also recorded in the statute books of all UN member states, including those of the Socialist countries. It is therefore necessary to ask where the explosive power of the Helsinki Final Act came from, if it only repeated what was already well known. The chief reason was that resolutions made within the scope of the UN were unknown to a broad public. CSCE documents had a very different readership from dry-as-dust law gazettes and UN reports. They spoke to the people, who felt themselves addressed by CSCE documents, which were formulated in language they could understand. Furthermore, the Final Act was not published in law gazettes but in national newspapers and had a large print run. With respect to the Helsinki Final Act, therefore, we can state that it was above all the difference in readership that justified repeating state commitments that had already been made in the context of the UN. This approach was later to be adopted as a rule thanks to the CSCE/OSCE. However, there were additional reasons for the reinforcement of human-rights commitments, as is most apparent in relation to the protection of minorities.

In: IFSH (ed.), OSCE Yearbook 2006, Baden-Baden 2007, pp. 237-249.

Global Standards for Minority Protection and Their Enforcement

The protection of minorities remained a taboo topic for a long time in the aftermath of the Second World War.[4] Causes of this were the experience with the system of minority protection of the League of Nations, which had been created in the aftermath of the First World War. It framed the protection of minorities in terms of group rights, which opened the door for minority protection to be abused in order to destabilize the young and weak states created out of the collapse of Austria-Hungary and the Ottoman Empire. The destruction of Czechoslovakia in 1938 as a consequence of Nazi Germany's policy of conquest was a prime example.

The founding of the UN saw a turn away from group rights towards the rights of individuals. During the drafting of the ICCPR in the 1960s, the concept of applying individual rights to minorities won out. Although this was frequently criticized in the specialist literature,[5] it made it possible to overcome the stalemate in the codification of minority protection. The result of lengthy debates is contained in Article 27 of the ICCPR:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[6]

This approach, which granted legal rights not to groups, but to the individual members of a minority, proved to be a success. The Covenant's 156 States Parties accepted the obligation with only two exceptions (France and Turkey).[7] The Covenant obliges the 154 states to report to the Human Rights Committee upon legislative, judicial, and administrative measures every five years. This establishes a procedure to enforce minority rights by way of a discussion between the Committee and the State Party concerned. In addition, persons belonging to minorities living in states that have ratified the Optional

4 As late as 1972, Felix Ermacora could rightly state that "the state representatives in the Council of Europe treat questions of the protection of ethnic groups or minorities as though they were a 'disreputable business'". Felix Ermacora, Der Minderheiten- und Volksgruppenschutz vor dem Europarat [The Protection of Minorities and Ethnic Groups at the Council of Europe], in: Theodor Veiter (ed.), *System eines internationalen Volksgruppenrechts* [A System of International Rights for Ethnic Groups], vol. 3, Part II, Vienna 1972, p. 77 (author's translation).

5 Cf. Johannes Niewerth, *Der kollektive und der positive Schutz von Minderheiten und ihre Durchsetzung im Völkerrecht* [Collective and Positive Minority Protection and Its Implementation in International Law], Berlin 1996, pp. 96-97.

6 International Covenant on Civil and Political Rights, at: http://www.ohchr.org/english/law/ccpr.htm.

7 France and Turkey have entered reservations regarding Article 27. Cf. http://www.ohchr.org/english/countries/ratification/4_1.htm.

Protocol to the Covenant[8] may enter an international complaint against their own state if their rights have been infringed and they have exhausted all available domestic legal means of redress. That is true of 105 states, at least. If we recall that most international treaties do not include a procedure for their enforcement, then we must agree that it is astonishing that such a procedure has been established precisely for the "hot potato" of human rights, and minority protection in particular.

However, neither the state-reporting procedure nor the procedure for individual complaints is a fact-finding mechanism. Both rather rely upon information provided by the reporting state and its willingness to co-operate with the Committee. Victims of human rights violations are not heard. The weakness of the reporting procedure is demonstrated clearly by the fact that, as late as 1979, Yugoslavia was able to evade further discussion of its minorities policy in the Human Rights Committee by making the following general statement: "Replying to the questions concerning the position of minorities, the representative of Yugoslavia said that his Government had adopted special measures to further the economic and social development of the areas inhabited by minority groups about which fuller account would be given in the next periodic report."[9] This example illustrates the use of diplomatic language to conceal the weaknesses of the reporting process. These were especially unfortunate for the individuals affected: They had no further means of seeking redress at an international level because Yugoslavia had not ratified the procedure for individual complaints contained in the Optional Protocol.

During the 1980s, the discrepancies between the actual situation in Yugoslavia and the government's official portrayal became increasingly obvious. However, the dominance of sovereignty-based thinking and the formal regulations of relevant UN instruments left no opportunity for reacting to minority rights violations. As a result, the UN's human rights instruments were no more able to prevent the break-up of Yugoslavia with all the tragic consequences that this brought for the country's population. Nor were they able to hinder the dissolution of the USSR. The experience of the disintegration of these two states led to the question being raised of how to establish new and more flexible instruments and, above all, to create them quickly. This last criterion ruled out the UN as the forum for creating such instruments, as the codification of international law is not only generally a lengthy process, but also requires the ratification by the states.

8 Cf. the list of states at: http://www.ohchr.org/english/countries/ratification/5.htm.
9 UN Doc. A/34/18, para. 217.

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The human rights principle of the Helsinki Final Act already contains a reference to minorities. Paragraph 4 of Principle VII calls upon participating States with national minorities on their territory to "afford [persons belonging to such minorities] the full opportunity for the actual enjoyment of human rights and fundamental freedoms and […] in this manner, [to] protect their legitimate interests in this sphere".[10] The Final Act thus accords with the spirit of Article 27 of the ICCPR without duplicating its provisions. Rather, it limits the protection to *national* minorities, i.e. groups that are characterized by the existence of a "kin state" or "mother country". The Hungarian populations of Slovakia and Romania are national minorities of this kind and demonstrate the potential political tensions that may be associated with the existence of a national minority.

The CSCE's approach towards minority protection in the Final Act was more limited than that of the UN to the extent that it deliberately restricted its reference to national minorities and the inter-state aspect of minority issues, thereby underlining that it considered itself first and foremost as a security organization. Later developments in Yugoslavia, where the rights of national minorities played a particularly important role in the outbreak of conflict, leading to genocide and "ethnic cleansing" on a massive scale, tragically confirmed just how necessary and sensible the CSCE's approach was.[11] A further difference from the UN is that the Final Act does not ascribe religious, cultural, and linguistic rights to persons belonging to minorities, but restricts itself to calling for non-discrimination. However, this is not the fault of any aversion to culture in the Final Act, but an effect of its structure. In other sections – and specifically in basket 3 under the heading of human rights – the Final Act certainly does demand respect for the cultural rights of members of national minorities.

Overall, the Final Act cannot be seen as merely repeating the standards of the ICCPR. The regional CSCE document is rather focused on the specific situation in Europe. The Final Act also has a different status from the Covenant, which is a treaty under international law, but had not entered into force by 1975 and could thus not exert binding force on member states. The Final Act thus filled a gap. This is also generally true of the period following the entry into force of the ICCPR in 1976, as the Covenant was at first only binding on 35 states, and it was a long time before all CSCE states became members. Furthermore, it should be noted that, while the Covenant had a legally binding effect on members, ignorance of its stipulations and the need to

10 Final Act of Helsinki, cited above (Note 1), p. 146.

11 In the light of subsequent events, it is remarkable that, during the negotiations of the Helsinki Final Act, Yugoslavia of all countries argued in favour of the most radical provisions for the protection of minorities. Cf. Jan Hegelsen, Protecting Minorities in the Conference for Security and Co-operation in Europe (CSCE) Process, in: *International Journal on Group Rights* (2) 1994, p. 7.

establish the means of enforcement meant that it also created some grey areas. In contrast, the Final Act developed a very strong political and moral binding force after it was solemnly signed in 1975 by the Heads of State or Government in the full glare of the world's media – a fact that made many governments feel obliged to turn its stipulations into actions.

Overall, the CSCE's concern with the issue of minorities can be considered useful and not merely a recapitulation of existing standards. Nonetheless, above all given the escalation of minorities-related problems in the Balkans since the 1980s, it became evident that further CSCE initiatives were necessary. However, calls for these were opposed by the Socialist states, as well as by France and Turkey, which rejected the entire concept of the protection of minorities. Consequently, only minor improvements to the Final Act could be made at follow-up meetings of the CSCE States.[12]

Nonetheless, these small steps were more than the UN was able to achieve by persisting with the ICCPR in an unchanged form and, in addition to that, merely publishing several surveys produced by the Human Rights Subcommission. It was only with the collapse of the Eastern Bloc that a new "window of opportunity" opened thanks to the elimination of one of the most powerful opponents of robust minority protection. The CSCE acted in a unique way to take advantage of this opportunity, which must be considered a further demonstration of the incredible flexibility of this institution.

The CSCE as a Taboo Breaker: The Copenhagen Document of 1990

The key breakthrough, which until it occurred had not been thought possible, must be considered to be the adoption of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Copenhagen Document) on 29 June 1990. Formulated during the collapse of the Eastern Bloc, it contains several quite astonishing (and highly apposite) provisions. Just one year earlier, a document of this kind, with such subversive contents, would have vanished into the secret files of the Socialist protectors of ideological purity. It should therefore be no surprise that it was greeted euphorically by both politicians and experts as a signal of the creation of a liberal European community of values.[13] The enthusiasm was perfectly justified, as the Copenhagen Document linked the criteria for democratic statehood and the rule of law with those for the protection of human rights and minorities. This underlined the fact that genuine democracy included respect

12 Cf. Christiane Höhn, *Zwischen Menschenrechten und Konfliktprävention. Der Minderheitenschutz im Rahmen der OSZE* [Between Human Rights and Conflict Prevention, the OSCE and Minority Protection], Berlin 2005, pp. 13ff.

13 Cf. Alexis Heraclides, The Human Dimension's Swansong in Helsinki-II: The Normative Aspect with Emphasis on National Minorities, in Arie Bloed (ed.) *The Challenge of Change: Helsinki Summit of the CSCE and its Aftermath*, Dordrecht 1994, pp. 283-303, here: p. 285.

for minority rights. Respect for the rights of persons belonging to national minorities was explicitly declared to be an essential factor for peace, justice, stability, and democracy in the participating States. The CSCE States committed themselves to adopting "special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens".[14] Individuals are granted the right to decide if they want to belong to a national minority or not. The use of their mother tongue, the free exercise of religion, the guarantee of unimpeded contacts across frontiers with citizens of other states with whom they share a common ethnic or national origin, cultural heritage, or religious beliefs, freedom of association, and the right to engage in cultural and educational activities in their mother tongue are mentioned alongside protection and promotion of the identity of national minorities and the establishment of local and autonomous administrative entities. Thus, the Copenhagen Document – although applying to a different group of states (one that also considered itself as a community of values) and possessing a different legal status (once more, we are concerned here with a politically binding document) – goes far further than the ICCPR.

The Charter of Paris confirmed the Copenhagen Document that same year. However, it became apparent afterwards that the CSCE could not sustain the tempo with regard to the acceptance of minority rights and the establishment of relevant standards. After the initial euphoria over Europe's new common democratic values, the window of opportunity had closed. The opponents were creating a new formation that cut across the old division between East and West. This became evident as early as July 1991 at the CSCE Meeting of Experts on National Minorities in Geneva, where an alliance of former Eastern Bloc states (Bulgaria, Romania, and Yugoslavia) emerged that, just like France, Greece, and Turkey, sought to abandon the Copenhagen standards. The final document of the Geneva meeting shows that this opposition was not entirely unsuccessful: "[The participating States] note that not all ethnic, cultural, linguistic or religious differences necessarily lead to the creation of national minorities."[15] Once again, thinking in terms of national sovereignty had trumped concern for minority protection.

Nonetheless, the relationship between democracy and minority protection was now on the European and global agendas: With the Copenhagen Document, the CSCE had broken a taboo. In doing so, it threw down the gauntlet not only to a number of individual states, but also to other (well-established) international organizations, who are extremely proud of their achievements in human rights protection. They felt the need to take up this challenge and defend their positions. At the same time, the minority conflicts

14 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, in: Bloed (ed.), cited above (Note 1), pp. 439-465, here: p. 456.

15 Report of the CSCE Meeting of Experts on National Minorities, in: Bloed (ed.), cited above (Note 1), pp. 593-604, here: p. 596.

in Yugoslavia and other formerly Socialist states had escalated, and the public expected politicians to take decisive measures.

The Gauntlet Is Picked up: The Race to Find the Best Instrument

The Council of Europe, which considered itself to be the cradle of European human rights protection, felt itself challenged by the CSCE's innovativeness. On behalf of the Council of Europe, the Venice Commission worked astonishingly quickly to draw up a document that is truly revolutionary in two respects. First, it contains a definition of a minority, ascribing each with group rights. This approach differs from that of every other instrument related to minorities, all of which have had to forego definitions and group rights owing to the resistance of many states. Second, it took the form of a treaty under international law, specifically that of a protocol to the European Convention on Human Rights (ECHR). Had the protocol been accepted, the enforcement mechanism of the ECHR would also have applied to minority rights. This would have made it possible for persons belonging to minorities to appeal to the European Court of Human Rights in cases where the protocol was violated.

If this protocol had been accepted by the states, it would have been a "Copernican revolution" in approach, in particular because it would have made minority rights enforceable. However, this revolution did not take place, as the document was only adopted by the Parliamentary Assembly of the Council of Europe as Recommendation 1201. The second and decisive step, adoption by the Committee of Ministers, failed. This body did not even consider the Recommendation,[16] because the Council of Europe summit had resolved to draw up a completely new treaty that differed from Recommendation 1201 in three key respects: Instead of a protocol to the EHCR, it was to be a framework convention that contained no specific obligations but rather delimited a general framework to be filled out and translated into specific measures by each state. Consequently, the European Court of Human Rights cannot be invoked in a case where the framework convention is violated. Nor does the document contain a definition of a minority, but rather leaves this to the member states.

If we contrast the initial vision of the Council of Europe and the final result, we might be reminded of an elephant that went into labour and delivered a mouse. Nevertheless, we should not undervalue what was achieved. The 32 Articles that make up the five Sections of the 1995 Framework Convention for the Protection of National Minorities may be unenforceable, but the Convention requires the member states to frame national laws in ways

16 Heinrich Klebes, Der Entwurf eines Minderheitenprotokolls zur EMRK [The Draft Protocol to the ECHR on the Protection of Minorities], in: *Europäische Grundrecht-Zeitschrift* 16 (1993), p. 149.

that conform with its stipulations. The flexibility that this enables makes the Convention a "living instrument", enabling it to adapt to the changing needs of national minorities.[17]

Aside from the fact that it is a binding treaty under international law, the major factor distinguishing the Framework Convention from OSCE documents is the existence of a mechanism for implementation. This requires member states to submit reports giving full information on legislative and other measures taken to fulfil their obligations under the Convention. The Committee of Ministers, assisted for this purpose by an advisory committee, shall make a legally binding assessment of whether the member states have taken appropriate steps to fulfil their obligations. This mechanism goes far beyond anything that can be called upon for the implementation of OSCE commitments. The extensive nature of the consequences have been demonstrated in practice.[18]

In general, the Framework Convention can be considered as the Council of Europe's answer to the gauntlet thrown down by the CSCE/OSCE. But the UN also considered itself to be challenged by the latter organization. This finds expression in Resolution 47/135 of the General Assembly, adopted in 1992, which contains a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. This document has just as little binding legal force as those of the OSCE, but obtains a certain legal force through being an interpretation of Article 27 of the ICCPR. The Declaration devotes nine articles to a matter that received merely two sentences in the ICCPR. The fact that this interpretation only became possible in 1992, i.e. 16 years after the ICCPR came into force, suggests that we are now witnessing a more assertive approach to minority questions – including at the level of universal rights.[19] This view is confirmed by the adoption in 1994 by the Human Rights Committee, which is responsible for the enforcement of Article 27, of "General Comment 23",[20] in which the obligations of member states are analysed in detail.

In general, we can conclude that the Council of Europe and the UN have remained true to their traditional approaches to human rights protection under international law, while extending this protection to the once taboo subject of minority protection. New treaties have been created, existing ones interpreted, and enforcement mechanisms created. The great advantage is to

17 Rainer Hofmann, Die Rahmenkonvention des Europarates zum Schutz nationaler Minderheiten [The Council of Europe Framework Convention for the Protection of National Minorities], in: *Menschenrechts-Magazin* 2 (2000), p. 12.

18 Cf. Heinrich Klebes, Minderheitenschutz durch den Europarat: Richtungswechsel durch „Entrechtlichung" von Verträgen? [Minority Protection via the Council of Europe: A Change in Direction via the "Delegalization" of Contracts?], in: Hans-Joachim Heintze (ed.), *Moderner Minderheitenschutz – Rechtliche oder politische Absicherung?* [Modern Minority Protection – Legal or Political Safeguards?], Bonn 1998, p. 138

19 Cf. Ian Phillips/Allan Rosas (eds), *The UN Minority Rights Declaration*, Turku 1993, pp. 54ff.

20 UN Doc. CCPR/C/21/Rev.1/Add.5.

have considerably clarified the obligations of member states, while publicly demanding their fulfilment.

The OSCE Blazes Another Trail: Innovative Institutionalization

Following the CSCE's success in placing the issue of minorities on the international agenda, at its 1992 Helsinki Summit, it again developed an original approach that distinguished it clearly from other international organizations. Against the background of a number of escalating conflicts, the CSCE underlined its competency in the area of conflict prevention. In the Balkans, it had become apparent that it was extremely difficult to influence ethnic conflicts from outside once they had broken out. The international community therefore clearly had to focus on timely intervention. Henceforth, the CSCE would no longer see minority protection as above all a matter of human rights, but as an issue of security policy. It would add this to the field of conflict prevention in which the CSCE could display considerable experience. Consequently, the Helsinki Summit resolved in 1992 to establish the post of High Commissioner on National Minorities (HCNM). Thereafter, the HCNM was to be responsible for early warning and conflict prevention in relation to minorities.[21]

By creating a post for the prevention of minority conflicts, the CSCE followed a completely different path from the UN and the Council of Europe, which, by creating instruments for the protection of individual members of minorities, had chosen a road based on human rights. By contrast, the HCNM's security-related task explicitly and deliberately does not involve considering the rights of individual members of minorities or their group rights,[22] but rather deals with situations in which minority-related issues can become a threat to peace. In accordance with his mandate, the HCNM monitors the situation in the OSCE area and offers his services wherever he believes a situation is in danger of escalating into a conflict. Given the increasing seriousness of the situation in the Balkans, this idea could not simply be rejected. However, those Western states facing problems with their own minorities were concerned to ensure that the HCNM did not have the right to become involved with their situations. That was why France (Corsica), Spain (Basques), Turkey (the Kurds), and the UK (Northern Ireland) worked to limit the HCNM's mandate to *national* minorities by arguing that only these cases had the necessary inter-state dimension. This, however, was not sufficient, as an inter-state dimension did in fact exist, at least in the case of Northern Ireland. The HCNM's mandate was therefore also framed to pro-

21 Cf. Jacob Haselhuber, Institutionalisierung ohne Verrechtlichung: Der Hohe Kommissar für Nationale Minderheiten [Institutionalization without Legal Character: The High Commissioner on National Minorities], in: Heintze (ed.), cited above (Note 18), pp. 116ff.

22 This is illustrated by the deliberate choice of the designation High Commissioner *on* (and not *for*) National Minorities.

hibit him from taking action in cases where organized terrorism played a role. This finally limited the mandate to the formerly Socialist countries and was accepted by consensus.[23] Achieving the agreement of the other states may have been made easier by the fact that the HCNM was created to be an instrument of silent diplomacy, i.e. all his activities are confidential until the affected state agrees to their being publicized.

In the end, with the exception of Greece, the HCNM has not concerned himself with any Western state, but has made a major contribution to alleviating the problems of the former Eastern Bloc countries. He achieved this, above all, by visiting the states where he considered a conflict may have been brewing, and talking to the governments and representatives of minorities. The ultimate effect of this was to prevent conflicts in Slovakia, Romania, and Estonia – to name but three examples – from becoming violent. The HCNM thus proved to be an important instrument for conflict prevention and his work a success story.[24] Nonetheless, the picture would not be complete without mentioning that the HCNM also commissioned experts with the development of a number of recommendations that have led to the (positive) experiences of the international community in various aspects of minority protection, including education, language, and political participation, being gathered and presented to the states in the form of "best practices". This has made it possible to provide a stimulus to all OSCE States.

The innovative concept of the HCNM and his successful activities have helped open the door to EU membership for many states with which he was at one time involved. As a consequence, their minority-related problems – such as still exist – are again removed from the arena of security policy, in which format they were dealt with by the CSCE/OSCE, to the sphere of human and minority rights. From then on, UN and Council of Europe instruments seem to come into play.

Closing Remarks

It is only at first glance that the activities of international organizations appear to be causing inflation in human rights standards, leading to double and treble regulation. A closer look reveals that there is indeed an eminently sensible division of tasks among the various actors. The protection of minorities is most successful when it becomes the object of global and European cooperation through both international treaties and agreements of a political

23 Cf. Hans-Joachim Heintze, Minorities in Western Europe – (Not) a Subject for the OSCE? In: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 1997*, Baden-Baden 1998, pp. 215-226.

24 Cf. Pál Dunay, *The OSCE in Crisis*, Chaillot Paper No. 88, Paris 2006, p. 55.

nature.[25] If UN and Council of Europe accords are typical of the former, the OSCE is responsible for political instruments. Despite all their many differences, the two types of instrument have identical goals: They both aim to improve the coexistence of majorities and minorities and to prevent or resolve potential conflicts. The means they employ to achieve this are, however, different. The norms they develop address different groups, and the binding force varies. It has become clear that the political norms of the CSCE/OSCE have often been more effective than legally binding provisions. A consideration of state practice shows that legal norms are not always more effective *per se*. The OSCE has been particularly good at acting innovatively and flexibly to fill existing gaps and uncover shortfalls. The fact that other institutions that are slower-moving or have a strong sense of tradition felt moved to follow the OSCE and take up this issue using their own methods only shows that the established organizations need an "ice-breaker" such as the OSCE.

The OSCE has also scored another success, albeit unintentionally. One result of the network of treaties between European states (within and outside the EU) that has grown rapidly in recent years has been an increasing tendency for juridification of the political agreements made within the scope of the OSCE. This is partly a result of the estoppel principle in international law, which protects states' trust in certain justified expectations in their international dealings. The OSCE's documents on minority protection, in particular, must now make it difficult for states to go back on their promises, as this would amount to abuse of right. The application of this principle means that states have made self-binding promises.[26] But this jurisprudential argument is not the only evidence of the increasing juridification of OSCE norms that can be mobilized. The EU has also quite openly drawn upon the OSCE's sub-legal norms in determining the readiness to accede of candidate states, thereby lending them a very specific importance. It should also be noted that even the UN Security Council referred to OSCE norms in its binding Resolution 740 (1992),[27] as well as that in the treaties on good neighbourly relations between European states, OSCE norms were expressly declared to be legally binding in a bilateral context.[28]

Juridification is a quite astonishing consequence of the flexible and unconventional activities of the OSCE. The taboo subject of minorities was not only made respectable by the CSCE/OSCE, but, through the back door – i.e.

25 Cf. Brigitte Reschke, Minderheitenschutz durch nichtvertragliche Instrumente: Soft Law im Völkerrecht? [Minority Protection through Non-Contractual Instruments: Soft Law in International Law?], in: Heintze (ed.), cited above [Note 18], p. 56.

26 Cf. Höhn, cited above (Note 12), p. 234.

27 Cf. 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 1996, pp. 411-427, here: pp. 417-418.

28 Cf. Hans-Joachim Heintze, Rechtliche oder politische Absicherung von Minderheitenrechten? [Legal or Political Safeguarding of Minority Rights?], in: Heintze (ed.), cited above (Note 18), pp. 20ff.

bypassing a process that was at once tiresome (codification) and fraught with risks (ratification) – has been added to the basic legal *acquis* of the community of European states (both within and outside the EU). This success story is unjustly neglected, but shows once more how indispensable the OSCE is in a system of European states whose key characteristic is an incredible lack of flexibility that makes it increasingly difficult to react rapidly (and as effectively as the OSCE) to acute challenges such as minority protection.