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## The Significance of the Thematic Recommendations of the OSCE High Commissioner on National Minorities

The OSCE and its predecessor the CSCE are known for their icebreaking function. They have always turned their hand to issues that seemed intractable. Thus, the CSCE was able to voice an opinion on Europe's borders in 1975 at a time when West Germany was unwilling to recognize Germany's eastern frontier. The dispute over the recognition of the Oder-Neisse line (the post-War German-Polish border) was an intractable conflict, and politicians were unable to solve this fundamental problem of European security. The CSCE could not resolve it either, but by applying the principle of "agreeing to disagree", it could at least cut a channel through the Cold War ice to tackle practical issues and facilitate human contacts despite ongoing fundamental differences of opinion.

### *Flexibility – The Legacy of the CSCE*

Another issue of European security that was taboo during the Cold War was the question of minority protection. The unwillingness of European states to deal with this topic is only superficially surprising. Minority protection is an important aspect of efforts to secure human rights under international law, a branch of international law that received a huge boost after 1945, with its first formal establishment in the Charter of the United Nations. By adopting the Universal Declaration of Human Rights in 1948, the UN General Assembly established a list of rights to be protected. However, minority rights are not included in this catalogue, despite the fact that the UN's predecessor, the League of Nations, had operated a whole system of minority protection. The cause of this inconsistency is simple. The League of Nations conceived of minority rights as group rights, and this approach was abused by Nazi Germany in the 1930s.<sup>1</sup> In the aftermath of the First World War, the Sudeten German Party used the pretext of minority rights to undermine the already weak Czechoslovak Republic, effectively leading to the collapse of this state following the 1938 Munich Agreement. This cautionary tale explains the hesitancy of not only the UN, but also the Council of Europe to take on the issue of minority protection. The topic next came up in connection with the codification of the UN Covenant on Civil and Political Rights (ICCPR) in 1966. This time, it was decided to take an approach based on human rights.

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<sup>1</sup> Cf. Sebastian Bartsch, *Minderheitenschutz in der internationalen Politik* [Minority Protection in International Politics], Opladen 1995, pp. 35ff.

Article 27 of the Covenant stipulates that the bearer of rights is not the minority itself, but the individual person who is a member of an ethnic, religious, or linguistic minority. The Covenant grants such individuals the right to cultivate their identity, practise their religion, and use their language in community with other members of this minority. Minority rights are thus individual rights, however they have a collective dimension, for they entitle individuals who belong to ethnic, religious, or linguistic groups the right to enjoy their rights in community with the other members of the group.<sup>2</sup>

Yet even this minimal catalogue of individual minority rights was not accepted by all states. Thus, on acceding to the Covenant in 1980, France issued the following reservation: “In the light of Article 2 of the Constitution of the French Republic, the French Government declares that Article 27 is not applicable so far as the Republic is concerned.”<sup>3</sup> France based its position on its domestic legal order, which does not recognize the concept of minorities and views minority protection as a form of discrimination against the majority.<sup>4</sup> It is easy to understand why a state which opposes the establishment of minority protection at the universal level would do so even more strongly in a regional context, where its influence is necessarily greater. As a consequence, there is no reference to minorities in the European Convention on Human Rights (ECHR) of 1950.

If politico-legal considerations – the fear of collective rights that could be politically abused and the fear of discrimination – were one reason for rejection, a second applied to states that faced powerful demands for secession from minorities. Here one need refer only to the Basque country, Northern Ireland, and South Tyrol. In these cases, Spain, the United Kingdom, and Italy were wary of interference by other states. They wanted to solve these problems themselves.

Because of these vested interests, for decades little was achieved in the area of minority protection, despite the development of a comprehensive set of human-rights norms in the UN and Council of Europe frameworks. What was needed was a more flexible institution than the established organizations, one that was willing to grasp such “hot potatoes”. The CSCE had shown during the Cold War that it possessed the necessary dynamism to deal with taboo topics. Against the backdrop of escalating ethnic problems in the successor states of the former Soviet bloc, it broached the issue of minorities in the 1990 Copenhagen Document. This Document linked minority protection to the values of a democratic society and called for a comprehensive concept of security that combines peace and security directly with democracy and

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2 Cf. Sabine Riedel, *Minderheitenpolitik in der EU-Erweiterungsperspektive* [Minority Policy in the Context of EU Enlargement], SWP-Studie S 24, Berlin 2001, pp. 15f.

3 Full details of all signatories and their reservations are available at: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec).

4 Cf. Gilles Despeux, *Die Anwendung des völkerrechtlichen Minderheitenrechts in Frankreich* [The Implementation of Minority Rights under International Law in France], Frankfurt am Main 1999, p. 180.

human and minority rights.<sup>5</sup> This standpoint can be partly accounted for by the fact that the suppression of minorities in a state leads to tension that prevents the formation of an active civil society. This was why support for this approach was initially euphoric, particularly in the post-socialist states. The Western states, however, were unable to achieve a unified position on this; while Germany, for instance, was in favour of establishment of minority rights, France spoke against.

The opponents of further enhancing minority-rights commitments in the CSCE context were unsuccessful, as the escalation of ethnic conflicts in the Balkans and the former Soviet Union made it all too clear that conflicts of this kind develop a momentum of their own that is almost impossible for external actors to stop. Hence, the goal had to be to establish minority rights in order to ensure that all members of society could enjoy the rights to which they are entitled and that no one was subject to discrimination on grounds of race, language, or religion. At the same time, every citizen had to be granted the right to participate in the state. In view of military developments in the Balkans, the CSCE felt a particular urgency to prioritize efforts to prevent the escalation of ethnic conflicts. This is expressed clearly in CSCE documents from the early 1990s, and reached its pinnacle in the 1990 Charter of Paris, a document that played a major role in the establishment of the CSCE. Admittedly, CSCE documents are political statements and do not represent legal norms. However, the fact that they are agreed in consensus is not only an expression of their political character but also gives them some political weight.

#### *The Office of the High Commissioner on National Minorities (HCNM)*

Every legal or political agreement is only as effective as the enforcement mechanism that lies behind it. One can assume that the institutionalization of the organs of enforcement is the most effective mechanism. Consequently, a number of states called for the creation, within the CSCE, of an office responsible for the implementation of the stipulations of the Charter of Paris concerning minorities. The establishment of an organ of this kind was thus proposed by the Netherlands at the CSCE Helsinki Follow-Up Meeting in April 1992, and Max van der Stoel was named the first holder of the office late that same year.<sup>6</sup>

However, this did not meet with the full approval of all CSCE States, as van der Stoel candidly admitted: “Frankly, I am not sure whether some participating States were very keen on the idea of having a High Commissioner

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5 Cf. Max van der Stoel, *Principles and Pragmatism: Twenty-Five Years with the Helsinki Process*, in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 2000*, Baden-Baden 2001, pp. 25-33, here: p. 27.

6 Cf. *ibid.*, p. 28.

on National Minorities.”<sup>7</sup> Nonetheless, the states with minority problems could not prevent the establishment of this office without losing face. They therefore shifted their approach to framing the mandate of the office as restrictively as possible. The effects of these efforts could already be felt in the naming of the office itself: It was not a High Commissioner *for* National Minorities that was created but a High Commissioner *on* National Minorities. This distinction is not merely linguistic, but has significant consequences. The title itself already indicates that the HCNM does not have the right to take up individual complaints from persons belonging to minorities. This sets the office apart in a fundamental way from human-rights enforcement mechanisms in Europe, such as the European Court of Human Rights, which primarily deals with individual complaints of human-rights infringements. A second restriction lies in the fact that the HCNM may only concern himself with “national minorities”. Although the mandate of the HCNM does not contain a legal definition of the term, it restricts the office’s activity to minorities that possess a “kin state”, i.e. that for each minority group, there exists another state in which this group is the “titular nation”. This applies, for instance, to the Hungarian minorities in Romania or Slovakia.

The restriction to national minorities was a necessary precondition for acceptance of the Dutch proposal by many states, as it made clear the international dimension of minority protection. The fact that two states are always involved guarantees that the HCNM will not interfere in the domestic affairs of the CSCE States. One consequence of this proviso is that discrimination against Roma and Sinti in individual CSCE States does not come under the mandate the HCNM. This focus on the interstate dimension of minority protection can be attributed to the office’s early-warning function. The aim of monitoring the situation of minorities is ultimately to enable the HCNM to intervene when things escalate, offering to mediate in confidence between the relevant states and minorities. This construct is a consequence of the experiences that the international community went through with regard to the conflicts in Yugoslavia: After the floodgates of ethnic enmity had burst, there was little the external world could do to stop the conflicts. It follows that the international community needs to intervene in a mediatory capacity as early as possible; the HCNM is an institutionalized mechanism for this.

Admittedly, the Western states with minority problems created a further barrier to ensure that the HCNM did not receive a mandate to take action on their sovereign territory. This was achieved by prohibiting the HCNM from becoming involved in minority conflicts in which organized acts of terrorism are carried out. Cases such as Northern Ireland were thus expressly excluded. As a consequence, the HCNM’s area of activity was effectively restricted to the successor states of the former Eastern bloc. This created the impression of double standards, by which the young states were subject to an ever-growing

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7 Ibid.

set of commitments and control mechanisms, while the West, despite facing similar problems, had managed to place itself beyond any international intervention.<sup>8</sup> The first HCNM, Max van der Stoel, was aware of the impression this created, and found a way to make statements on general minority issues in all OSCE States despite the restrictions of his mandate. The results of his considerations became the thematic recommendations. It is most welcome that his successors in the office have also adopted this approach.

### *Status of the Thematic Recommendations*

As van der Stoel never ceased to remind us, the office of the HCNM, though created by the OSCE, was provided with only very limited resources by the Organization. That was why he established the Foundation on Inter-Ethnic Relations as an independently funded NGO that could operate outside OSCE control.<sup>9</sup> Its aim is to support the work of the HCNM by engaging in research and collaborating with experts in relevant areas.

One result of the foundation's work are general recommendations on specific aspects of minority protection, which are built on best practices drawn from work carried out in various states. The drafting of general recommendations of this kind is a common practice among organs charged with the enforcement of treaties under international law. The UN Human Rights Committee, for instance, which is responsible for monitoring the implementation of the ICCPR, has so far issued 34 General Comments dealing with the interpretation of the obligations on the States parties to the ICCPR arising out of the Covenant.<sup>10</sup> The States parties to the Covenant are required to comply with these interpretations, though the extent to which they are legally binding is disputed. If this can be a matter of dispute with regard to a treaty, it is doubly the case with respect to general recommendations on potential measures in the broad field of minority protection. In this context, however, it should be borne in mind that the HCNM himself is not an organ of enforcement, but only an independent, impartial, and co-operative actor, since "he employs the international standards to which each State has agreed as his principal framework of analysis and the foundation of his specific recommendations"<sup>11</sup>

The HCNM's thematic recommendations, which are under consideration here, were drafted by expert groups consisting of academics and repre-

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8 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.

9 Cf. van der Stoel, cited above (Note 5), p. 29.

10 The Comments can be accessed online at: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

11 This is the wording of the 1996 Hague Recommendations Regarding the Education Rights of National Minorities, reprinted in: *International Journal on Minority and Group Rights* 2/1997, pp. 199-213, here: p. 199; available at: <http://www.osce.org/hcnm/32180>.

sentatives of minority organizations, assembled to take into account the geographical balance of the OSCE States. The experts were also chosen to enhance the legitimacy of the recommendations and ultimately increase their acceptance, by linking the HCNM's authority with the international expert group: "It is due to this dual legitimacy that the HCNM recommendations play such a powerful role as instruments of persuasion, as practical guides, as compilation of standards and practices, as authoritative sources and integral part of international soft law."<sup>12</sup> The recommendations thus advance the development of existing standards. They go beyond the relatively static obligations set down in international treaties and therefore have a greater degree of contemporary relevance.<sup>13</sup> The thematic recommendations thus fit into the catalogue of the HCNM's working methods, as they offer participating States a means of dealing with problems more effectively rather than "forcing" them upon them. The recommendations generalize from the individual experiences that the HCNM has gathered in his involvement with various individual states. It can therefore be said that a number of the concrete recommendations have already been tested in the field, making the recommendations a fusion of theory and practice. As Krzysztof Drzewicki notes, "experts draw up, Commissioner endorses"<sup>14</sup>

The thematic recommendations are therefore not considered merely "printed matter" destined to land on the enormous piles of unread documents produced by any active international organization. They are an expression of the spirit behind the creation of the HCNM as an organ for the consolidation of international security. The recommendations not only address the rights of minorities, as is the case of organizations that concentrated entirely on human rights, but also address the duties of individuals who belong to these minorities. Thus the very first set of recommendations, on the education rights of national minorities, already set out their obligation to integrate in the majority society by learning the majority language.<sup>15</sup> Minority problems do have existential significance for many states, which therefore look for ways to manage conflicts. One way for them to do this is to involve the HCNM, and how much more force do his recommendations carry when he can demonstrate that they have been successfully applied in other states? The thematic recommendations are thus above all a collection of best practices for a variety of situations.

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12 Charlotte Altenhoener/Francesco Palermo, Civil Society Contributions to the Work of the OSCE High Commissioner on National Minorities, in: *International Journal on Minority and Group Rights* 2/2011, pp. 201-218, here: p. 215.

13 Cf. Asbjørn Eide, The Oslo Recommendations Regarding the Linguistic Rights of National Minorities: An Overview, in: *International Journal on Minority and Group Rights* 3/1999, pp. 319-328.

14 Krzysztof Drzewicki, The Lund Recommendations on the Effective Participation of National Minorities in Public Life – Five Years After and More Years Ahead, in: *International Journal on Minority and Group Rights* 2-3/2005, pp. 123-131, here: p.126.

15 Highlighted by Altenhoener/Palermo, cited above (Note 12), p. 216.

In practice, this is also how the thematic recommendations are used. In his consultations with states, the HCNM refers to the recommendations without the need for them to be official OSCE documents. Thanks to the confidential nature of the discussions between the HCNM and the states, these references are not included in official records, though they do appear in reports. For instance, the recommendations on the linguistic rights of persons belonging to national minorities were cited in a report on the situation in the OSCE area, alongside a number of treaties under international law, customary international law, and the UN Declaration on the Rights of Minorities.<sup>16</sup> The report in question put it the following way: “Although these Recommendations are formally non-governmental in origin and have not been accepted by states through the mechanisms of the OSCE, they nonetheless have been presented to participating states by the High Commissioner as a point of reference and have generally been received positively by them.”<sup>17</sup>

This is how the first HCNM made use of the thematic recommendations in his daily work. His successors have followed the same pattern. Rolf Ekéus presented the Recommendations on Policing in Multi-Ethnic Societies, whose writing he had commissioned, to the OSCE Permanent Council, noting that the document was relevant for all OSCE States.<sup>18</sup>

Finally, the HCNM’s recourse to the thematic recommendations was a clever move to avoid double standards in OSCE practice arising through a one-sided focus on the new democracies in the successor states of the former Eastern bloc. This also helped to demonstrate the impartiality of his office.<sup>19</sup> Now that the “new” states are no longer new, the question of how to ensure that large states and less powerful and influential countries are treated equally remains. The thematic recommendations therefore continue to be a key instrument for the holder of an office that aims to prevent the outbreak of ethnic conflict. There can be no doubt that this approach is justified by his mandate, which, with the exception of the terrorism clause, grants him the discretion to decide which issues to pursue and which documents to refer to.<sup>20</sup>

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16 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 18 December 1992, A/Res. 47/135.

17 Organization for Security and Co-operation in Europe (ed.), *Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area*, The Hague 1999, p. 7.

18 Cf. Vincent de Graaf/Annelies Verstichel, Recommendations on Policing in Multi-Ethnic Societies, in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 2006*, Baden-Baden 2007, pp. 317-330, here: p. 317.

19 Cf. van der Stoep, cited above (Note 5), p. 29.

20 Cf. Jakob Haselhuber, Der Hochkommissar für nationale Minderheiten der OSZE [The OSCE High Commissioner on National Minorities], in: Erich Reiter (ed.), *Grenzen des Selbstbestimmungsrechts* [Limits of the Right to Self-Determination], Graz 1996, pp. 109-117, here: p. 110.

### *The Thematic Recommendations in Detail*

The heart of minority protection is the right of persons belonging to a minority to preserve their identity. This can and must be accomplished via a range of means, as there is no universal panacea. The seven sets of thematic recommendations published so far can serve to show the way.<sup>21</sup>

#### *The Hague Recommendations on Education Rights*

The first set of recommendations, published on 1 October 1996, concerned the rights of national minorities to education, and bore the title “The Hague Recommendations Regarding the Education Rights of National Minorities and Explanatory Note”. The HCNM turned to this issue because education is of paramount importance in the preservation and consolidation of the identity of individuals who belong to national minorities. As a consequence, the document considers the object of discussion to be a fundamental human right. However, human-rights instruments do not have anything to say about the rights of minorities to education. In contrast, the Council of Europe Framework Convention for the Protection of National Minorities calls for minorities to receive adequate access to education.<sup>22</sup> This is the point of origin for demands for minority rights in this area, which, however, must be “reasonable”, i.e. they must be proportionate to the number of affected persons and the demographic concentration in a region, and contribute to the sustainability of the relevant services and facilities. A precondition for the realization of the interests of minorities is the creation of organizations that can represent these interests. Consequently, section 5 calls upon states to create conditions that allow representatives of minorities to participate effectively in the development and implementation of educational programmes. Particularly important in this regard is the involvement of regional and local authorities, when these have responsibility for education. The recommendations are directed at public and private institutions (sections 8-10), cover both primary and secondary levels (sections 11-14), and urge states to take account of the rights of minority rights in the development of curricula (sections 19-21).

#### *The Oslo Recommendations on Linguistic Rights*

The Hague Recommendations were followed on 1 February 1998 by the Oslo Recommendations regarding the Linguistic Rights of National Minorities. They started from the premise that ethnic conflicts tend to erupt when national minorities feel that their existence is threatened, because they are pre-

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21 All the thematic recommendations and guidelines can be accessed online at: <http://www.osce.org/hcnm/66209>.

22 Cf. Council of Europe, Framework Convention for the Protection of National Minorities, Strasbourg, 1 February 1995, Article 12 (3), at: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=157&CM=1&CL=ENG>.



vented from practising their linguistic and cultural traditions. Minority communities must therefore be granted the opportunity to speak their languages in both the public and private spheres. Given Europe's linguistic diversity, the collapse of the Eastern bloc led to many conflicts with a linguistic dimension that required the intervention of the HCNM.<sup>23</sup> These experiences encouraged him to take the topic as a subject for general recommendations drawn up by experts. The jumping off point was the fact that the use of one's own language is a human right, as set down in Article 27 of the ICCPR.<sup>24</sup> This right should be seen in connection with Article 19, which concerns the right to freedom of expression. Both rights have been reaffirmed by numerous human-rights agreements, as well as treaties and political declarations specifically relating to minorities. Consequently, it was not the HCNM's aim to engage in standard setting, which is not surprising, as he has no mandate to do such a thing. His concern was rather to assemble language-related recommendations on naming laws, religion, community life and NGOs, the media, economic life, administration, and the treatment of prisoners.

A particular focus in the discussion emerged around the question of the delineation of the public and private spheres. The private sphere is protected by human rights, and the state is obliged to uphold these rights in public space. However, the use of public space can be restricted when it poses a threat to public safety. This raises the question of the circumstances under which it is legitimate for the state to interfere in the private sphere. The authors of the Oslo Recommendations also felt obliged to deal with this issue. Initially, they tended towards the view that the linguistic rights of national minorities should not be subject to any restrictions imposed by the legal system of a democratic state in order to protect public safety, public order, public health, national security, and public morals. However, this would have meant a departure from the conventional approach to human rights by granting these minority-related rights absolute status. Since very few human rights have the character of absolutes – namely only those that are non-derogable, a category that does not include freedom of expression – the experts decided not to address the problem of derogation in the document.<sup>25</sup> Instead, the recommendations authorize persons belonging to national minorities to use names in their traditional languages and in accordance with their own traditions. Public authorities are called upon to recognize and make use of these names. Private entities, cultural institutions, and commercial enterprises should also enjoy this right. In areas where national minorities live

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23 Cf. John Packer/Guillaume Siemienski, *The Language of Equity: The Origin and Development of the Oslo Recommendations Regarding the Linguistic Rights of National Minorities*, in: *International Journal on Minority and Group Rights* 3/1999, pp. 329-350, here: pp. 329-330.

24 Cf. International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, at: <http://www2.ohchr.org/english/law/ccpr.htm>.

25 Cf. Packer/Siemienski, cited above (Note 23), p. 341.

in concentrated numbers and where demand exists, local authorities should display town, village, and street names in the local language (section 3).

Other recommendations address local authorities in a similar way. For instance, in areas where there is a high concentration of a minority population, and where the desire exists, civil documents and certificates should be made available in both the language of the state and the minority language (section 13). The same should apply to civil registers. Members of minorities should also be allowed to use their own language in communications with local authorities, as should elected members of local governing bodies, again dependent on numbers and desire.

In sum, a number of recommendations underline existing standards, but reformulate them as recommendations. The "Explanatory Note" attached to these recommendations, as to all the HCNM's thematic recommendations, specifies the goals of the document and formulates the principles of equality and non-discrimination with regard to linguistic rights.

#### *The Lund Recommendations on Minority Participation in Public Life*

The inclusion of minorities in public life is a core issue of democratic societies. Nonetheless, it throws up complex questions about issues including:

- the framing of the right to participation in public life as a group or an individual right,
- positive discrimination, and
- self-government.

These issues are addressed by the Lund Recommendations, which were published on 1 September 1999.<sup>26</sup> The recommendations include an annex with an explanatory note that sets out clearly the broad extent to which existing commitments already require states to allow the effective participation of minorities. OSCE documents, in particular, contain many relevant stipulations that have a "politically" binding character.<sup>27</sup>

The Lund Recommendations assume that minority rights are human rights, which means that, in the last analysis, this is a discourse of individual rights. This approach is valid from a legal point of view, as all the documents in this area stress the individualist understanding.<sup>28</sup> It is nonetheless surpris-

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26 Cf. Hans-Joachim Heintze, *The Lund Recommendations on the Effective Participation of Minorities in Public Life*, in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 2000*, Baden-Baden 2001, pp. 257-270.

27 Cf. Rob Zaagman/Arie Bloed, *Die Rolle des OSZE-Hochkommissars bei der Konfliktprävention [The Role of the OSCE High Commissioner on National Minorities]*, in: *OSZE-Jahrbuch 1995*, Baden-Baden 1995, pp. 225-240.

28 For further discussion of this issue, see: Hans-Joachim Heintze, *Maßnahmen zum Schutz von Minderheiten. Eine Bilanz nach zehn Jahren Minderheitenpolitik in Europa [Minority Protection Measures. Taking Stock of Ten Years of European Minority Policy]*, in: Irene

ing, as the HCNM's mandate is precisely not focused on the individual rights of persons belonging to minorities. He is, for instance, forbidden from receiving individual complaints. Instead of this, he negotiates with government representatives and minority organizations behind closed doors, so that his work rather shows evidence of a group-rights approach.

Nonetheless, the human-rights dimension of minority protection opens the possibility for individuals to decide for themselves whether they belong to a given minority. This is underlined in Chapter I section 4 of the Lund Recommendations. Chapter II of the recommendations focuses on elections, which are considered as the basis of government authority and legitimacy. The right of minorities to self-organize is understood as an aspect of the freedom of association, legitimizing the establishment of political parties representing minorities. However, it must be ensured that this does not involve discrimination against other groups.

The form of the electoral system is of crucial importance for the political participation of minorities. States are therefore called upon to find the most representative form of government for their situation and to frame their electoral systems accordingly. This may make it necessary to privilege a minority, for instance by lowering election thresholds for certain parties. This should help to ensure adequate participation of minorities in the public life of a state. This demand appears appropriate to the extent that anti-minority gerrymandering has often led to underrepresentation in the past. The significance of the Lund Recommendations with regard to electoral law is also evident in the fact that they provided the basis for co-operation between the HCNM and the Venice Commission of the Council of Europe, Europe's leading think-tank in this regard.<sup>29</sup>

The significance of citizenship in the context of election law cannot be overstated. However, it remains a matter of controversy whether the legal concept of minority protection applies only to citizens or to all minorities in a state. General Comment No. 23 (50) of the UN Human Rights Committee from 1994 assumes that the rights of minorities are not restricted to citizens of the state.<sup>30</sup> However, many states do not share this view, as the interpretative declaration of the German federal government on the occasion of its accession to the Council of Europe Framework Convention made clear.<sup>31</sup>

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Wiegand/Sabine Riedel (eds), *Die Minderheitenpolitik im EU-Erweiterungsprozeß* [Minority Policy in the EU Enlargement Process], German Institute for International and Security Affairs (SWP), June 2002, pp. 8-10.

29 Cf. Krzysztof Drzewicki, OSCE Lund Recommendations in the Practice of the High Commissioner on National Minorities, in: Marc Weller (ed.), *Political Participation of Minorities*, Oxford 2010, pp. 265-285, here: p. 272.

30 Cf. United Nations, Human Rights Committee, General Comment No. 23 (50) (Art. 27), adopted by the Committee at its 1314th meeting (fiftieth session) on 6 April 1994, UN-Doc. CCPR/C/21/Rev.1/Add.5, para. 5.1.

31 Cf. Deutscher Bundestag, 12. Wahlperiode, *Unterrichtung durch die Bundesregierung, 2. Menschenrechtsbericht der Bundesregierung*, Drucksache 12/6330, 2 December 1993, p. 8, available at: <http://dipbt.bundestag.de/dip21/btd/12/063/1206330.pdf>.

Against this background, it is regrettable that the Lund Document did not address this question. However, this is understandable, as the question of statelessness was a major issue in many Eastern European countries – such as the stateless Russians in Estonia.<sup>32</sup>

Given the OSCE's orientation, it appears only natural for the Lund Recommendations to address the call for democracy in the context of minority protection. This requires states to ensure the participation of minorities. The Lund Recommendations thus advocate measures to overcome discrimination where it has previously existed. Measures to achieve this can include self-governance. Chapter III of the document is thus dedicated to autonomy arrangements that grant certain territories within a state competencies in specific areas of governance. This does not grant these territories the status of states, but enables their populations to manage their own affairs in accordance with the principle of subsidiarity. Functions that are usually reserved for central government include defence, foreign policy, macroeconomic affairs, monetary and fiscal policy, immigration, and customs. However, precisely which functions are devolved to autonomous territories is always decided on a case-by-case basis, as the final aim is always to realize the internal right to self-determination of the population of a given territory – and especially the locally settled minorities. Since the situation varies from place to place around the world, autonomy arrangements vary accordingly.<sup>33</sup> Generally, however, they encompass education, culture, language, environment, local planning, natural resources, economic development, police, housing, health, and social policy. The fact that the Lund Recommendations address the question of autonomy at all can itself be seen as major progress, since the OSCE States long rejected any and all discussion of territorial autonomy. They tended to see it as a step towards independence and the resulting loss of territories.<sup>34</sup> They were slow to recognize – though the Lund Recommendations helped – that locally contained minorities cannot easily be served by any other kind of minority rights. If states respect these rights, they can in turn expect to receive the loyalty of citizens that belong to minorities.

#### *Guidelines on the Use of Minority Languages in the Broadcast Media*

The HCNM has been confronted with numerous situations in which members of minorities were refused permission to establish a broadcasting service or were unable to access radio and television programming in their own lan-

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32 Cf. Margit Sary, *Integration by Reframing Legislation: Implementation of the Recommendations of the OSCE High Commissioner on National Minorities to Estonia, 1993-2001*, Core Working Paper 7, Hamburg 2002, pp. 19ff.

33 For an overview, see Markku Suksi, Legal Foundations, Structures and Institutions of Autonomy in Comparative Law, in: Jorge Oliveira/Paulo Cardinal (eds), *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution*, Berlin 2009, pp. 495-520.

34 Francesco Palermo, When the Lund Recommendations are Ignored. Effective Participation of National Minorities through Territorial Autonomy, in: *International Journal on Minority and Group Rights* 4/2009, pp. 653- 663, here pp. 655f.

guage. In a number of states, legally established broadcasting quotas can restrict the use of minority languages. The prescription of broadcasting times in the majority language can also reduce the opportunities for programmes in the minority language. Restrictions on access to foreign broadcast media can also have negative effects on relations between a national minority and its “kin state”. Frequently, the law makes no distinction between state and privately owned radio stations.

Given that access to media is of existential importance to minorities – it is the only way they can preserve their cultural identity, exercise their right to freedom of expression on an equal basis, and receive information that is relevant to them regardless of national boundaries – a number of OSCE States expressed interest in this subject. In 2001, therefore, the OSCE Permanent Council called upon the HCNM to address the subject.<sup>35</sup> In response, he drew up an overview of state practice and invited experts to develop guidelines on this topic. These were published on 10 October 2003 and comprise four sections: General Principles, Policy, Regulation, and Promotion of Minority Languages. The key role of the media for the functioning of an open and democratic society is indisputable, and has been stressed by the OSCE States in key documents on many occasions. At the Cracow Symposium on Cultural Heritage of the OSCE participating States in 1991, they stressed that a diversity of private broadcasters helps to promote pluralism and the freedom of artistic and cultural expression.<sup>36</sup>

There is widespread consensus among the OSCE States on the significance of the media. As a basic principle, states may only regulate the activity of the media to the extent allowed by law in the context of a democratic society. In practice, however, the extent to which the state can interfere is often disputed. The issue of minority languages is one area where state interference may be necessary and justified. One of the key aims of the guidelines is therefore to define parameters for acceptable regulation of language use in broadcasting. Although states may step in to encourage the use of specific languages, this legitimate interest may not cause minority languages to be neglected. The goal must rather be a fair and balanced relationship to the benefit of all groups in society. The guidelines contain a range of proposals on how states can encourage the use of minority languages in broadcasting. Ultimately, however, they note that every case is different, and there is no formula that will apply in all situations.

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35 Cf. John Packer/Sally Holt, The use of minority languages in the broadcast media: Introducing new guidelines, in: *Helsinki Monitor* 2/2004, pp. 103-126, here: p. 105.

36 1991 Document of the Cracow Symposium on the Cultural Heritage of the OSCE Participating States, para. 6.2, available at: <http://www.osce.org/library/24396>.

*General Recommendations on Policing in Multi-Ethnic Societies*

The Recommendations on Policing in Multi-Ethnic Societies were presented by HCNM Rolf Ekéus on 9 February 2006. He had commissioned them because in the course of his work it had become clear that the police can (and must) have a key role in the de-escalation of tension and the promotion of harmonic inter-ethnic relations. In his talks with governments and minority representatives, the role of the police had been a regular topic of discussion. He expressed concern that some states possessed no institutional standards for the promotion of interaction and co-operation between the police and national minorities. The mono-ethnic composition of police forces has often led to discriminatory practices and the escalation of conflicts.<sup>37</sup>

The 23 recommendations assume the need for a broad consensus on the integration of minorities within a multi-ethnic society. The value of cultural, linguistic, and religious diversity must be acknowledged. This should be the foundation for a police concept of operations that ultimately amounts to a revolution in policing by transforming police forces from law-enforcement organs into guardians of equal treatment, integration, and social cohesion.<sup>38</sup> Other recommendations concern general principles of modern policing, which should be based on respect for human rights. The document points out the need for a long-term shift in policing culture and policies for policing in a multi-ethnic society – something that cannot be accomplished overnight. Action plans should therefore be developed, describing step by step the progress that needs to be made. An independent oversight body (e.g. an ombudsperson institution) should be established to monitor the reforms. An institution of this kind, which could initially face opposition, would ultimately also benefit the police by showing up weaknesses and raising acceptance.

Police forces are encouraged to employ persons belonging to national minorities. This would ensure that this organ of the state reflects the composition of society while allowing the police to draw on the extensive knowledge and experience of minority groups. It would also improve relations to minority communities while promoting integration. At the same time, however, the recommendations stress strongly that police officers recruited from minorities should not be responsible exclusively for minority issues, but must perform the full range of policing tasks throughout society.

The recommendations also address the criteria used to select applicants for positions with the police and the need to increase the recruitment of underrepresented minorities. At the same time, they stress that a multi-ethnic police force is not sufficient to promote the equality and integration of minorities. In practice, police officers who are members of minorities are often subject to discrimination and do not enjoy the same career opportunities as their colleagues. They therefore frequently leave the police service after a

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37 Cf. de Graaf/Verstichel, cited above (Note 18), p. 320.

38 Cf. *ibid.*, p. 324.

short time, which is why it is recommended that positive steps be taken to encourage their career development. Other recommendations refer to the training and professional development of police personnel, engagement with ethnic communities, and operational practices in a multi-ethnic environment. Stress is laid on the need for the police to avoid paying disproportionate attention to law enforcement in minority communities. “Over-policing” based on ethnic stereotypes needs to be avoided. This can come about, for instance, when a specific group of persons is singled out for vehicle inspections or stop and search operations, giving the impression of discriminatory practice. This should be countered by means of a code of conduct. Finally, the recommendations maintain that the police should not only become involved when conflicts have already broken out, but also have a preventive role to play.<sup>39</sup>

This list alone shows that the recommendations on policing are fairly detailed. Commentators have therefore voiced the criticism that a shorter and less academic document would have been more useful for the practical work of the HCNM. Ultimately, political decision-makers were said not to have the time to “consume” such a detailed document, which reduced their level of interest.<sup>40</sup>

#### *The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations*

The Bolzano/Bozen Recommendations were adopted on 2 October 2008. Their controversial character stems from the fact that they deal directly with the relationship between the national minorities and their kin states. This immediately brings up questions concerning the interdiction of interference in domestic affairs and national sovereignty. Particularly in the young states of the former Eastern bloc, which are currently involved in transformation and democratization processes, conflicts often arise that the democratic institutions can only respond to imperfectly.<sup>41</sup>

The Bolzano/Bozen Recommendations begin by underlining state sovereignty, but go on immediately to point out that this includes an obligation to respect human rights – precisely in the spirit of the responsibility to protect. At the same time, they warn against infringements of state sovereignty,

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39 Cf. Krzysztof Drzewicki, *Introducing Recommendations on Policing in Multi-Ethnic Societies – a new tool for the OSCE High Commissioner on National Minorities*, in: *Helsinki Monitor* 2/2006, pp. 175-183, here: pp. 181ff.

40 Cf. Arie Bloed, *Comments on the new set of recommendations on policing in multi-ethnic societies*, in: *ibid*, pp 184-189, here: p. 188.

41 Cf. Natalie Sabanadze, *States, Minorities and Regional Hegemons in the South Caucasus: Whose Responsibility to Protect?* In: Francesco Palermo/Natalie Sabanadze (eds), *National Minorities in Inter-State Relations*, Leiden 2011, pp. 167-183, here: p. 167; cf. also Natalie Sabanadze, *States and Minorities in the South Caucasus: A Test Case for the Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations*, in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 2010*, Baden-Baden 2011, pp. 291-300, here: p. 291.

which can lead to danger for minorities. For this reason, the principle of territorial integrity must not be called into question. Actions that undermine the integration and social cohesion of multi-ethnic states can pose a threat to regional and international peace. States should therefore refrain from supporting both separatist movements and non-state actors. The recommendations therefore warn against the funding of political parties and movements from abroad, as this may lead to the politicization of minority issues. The recommendations are also critical of developments in the conferral of dual citizenship, which can lead to problems of loyalty. They further note that states have limited competencies with regard to citizens abroad. This is particularly true of dual citizens, who can generally claim no rights accruing from foreign citizenship as long as they are under the jurisdiction of a state of which they are also citizens.

While states are entitled in principle to determine criteria for the conferral of citizenship, the Bolzano/Bozen Recommendations correctly point out that the rights of other states must be respected in this. At the same time, states are obliged to respect minority rights as a means of avoiding conflicts. Chapter II deals with these obligations in detail, drawing extensively from the Framework Convention for the Protection of National Minorities of the Council of Europe.

On the whole, the Bolzano/Bozen Recommendations reiterate well-known principles of international law, respect for which increases a state's legitimacy in the eyes of its minorities.<sup>42</sup> The stipulations concerning citizenship deserve particular attention, as they address a fundamental problem of national minorities, namely the question of who is responsible for what. This is increasingly becoming a problem in many contiguous states in the OSCE area. It appears to be questionable whether the Bolzano/Bozen Recommendations can give a sufficient answer to this question. However, the fact that this challenge to modern minority protection has been addressed and placed in the context of the much-discussed concept of the responsibility to protect should be welcomed.<sup>43</sup>

#### *The Ljubljana Guidelines on Integration of Diverse Societies*

Adopted on 7 November 2012, the Ljubljana Guidelines deal with the problem arising from the fact that simply recognizing and accommodating minority cultures, identities, and political interests, and promoting the participation of all may not be sufficient to build sustainable and lasting peace. As a result, the High Commissioner has recommended that states adopt measures and implement policies aimed at promoting the integration and cohesion of di-

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42 Cf. Sabanadze, *States and Minorities in the South Caucasus: A Test Case for the Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations*, cited above (Note 41), p. 300.

43 Cf. Tom Ruys, *The "Protection of Nationals" Doctrine Revisited*, in: *Journal of Conflict & Security Law* 2/2008, pp. 233-271.



verse, multi-ethnic societies. Otherwise “there is the danger that different communities, particularly large and territorially concentrated ones, may become increasingly separate, with few or no common interests and no shared sense of belonging”.<sup>44</sup> Separation poses a risk to the stability of multi-ethnic states, and the guidelines therefore recommend that states ensure communication and interaction between ethnic groups. National minorities should not only enjoy the legal right of effective participation in the overall governance of a state but should also be encouraged to exercise this right. States should adopt policies aimed at creating societies in which diversity is respected and all individuals, whatever ethnic, linguistic, cultural, and religious groups they belong to, may contribute to building and maintaining a common and inclusive civic identity. There is thus a need both for equal opportunities and for the conditions that allow everybody to take on their share of responsibility. However, at the end of the day, the states always have to apply solutions on a case-by-case basis, and no general advice could ever be given that is equally applicable to all states. The Ljubljana Guidelines recognize the responsibility of states to support the integration process under their jurisdiction in accordance with the principles of human rights and minority protection. The document provides policy makers with some practical advice on how to elaborate and implement policies to facilitate integration.

### *Concluding Remarks*

In general, the thematic recommendations should be considered a unique contribution by the HCNM to the evolution of minority protection under international law. Because they are conducive to conflict prevention, they are a working instrument that is consistent with the mandate of his office. According to Article 6 of his mandate, the HCNM is required to examine whether democratic means are available and whether applicable international instruments have been fully taken into account by the parties involved. Since these international instruments leave a great deal of room for manoeuvre, particularly in the area of minority protection, and binding interpretations are often not available, the HCNM has found, in the form of the thematic recommendations, a way to draw OSCE States’ attention to possible means of improving the situation of minorities. This has also enabled him to contribute to the interpretation and implementation of international instruments in this area. This is a contribution by the OSCE to human rights protection under international law that should be held in high regard.

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44 OSCE High Commissioner on National Minorities, *The Ljubljana Guidelines on Integration of Diverse Societies*, The Hague 2012, p. 3.