In: IFSH (ed.), OSCE-Yearbook 1995/1996, Baden-Baden 1997, pp. 411-427.

Ulrich Fastenrath

The Legal Significance of CSCE/OSCE Documents

Distinction between Agreements under International Law and Non-legal International Agreements

Categories of International Agreements

Not all agreements between states or other subjects of international law are concluded as *legally binding treaties under international law*. Along with these there are *Gentlemen's Agreements* which were originally understood to be agreements reached between statesmen or diplomats in which they commited themselves personally and politically only.[1] The basis of such agreements is not law but trust in one's partner. Such personal agreements of large political consequence have become rare with the diminishing power of ambassadors to influence events and the frequent changes of government in democratic and republican times.[2]

However, the term "Gentlemen's Agreement" has in the meantime also come to be used for agreements through which the participants want to bind their countries politically.[3] These instruments are also called *"non-binding" agreements* or, better, *"non-legal" agreements* since a binding effect, even if only a political one, is desired. We will need to come back to the various consequences. Some authors even term treaties as "non-binding agreements" when, owing to the vagueness of their contents, no concrete obligations can be derived from them[4] as when, for example, a commitment to cooperation is given no concrete form. This, however, confuses the two issues of contents and legal category, which from the viewpoint of legal theory does not make sense.

1 Wilfried Fiedler, Gentlemen's agreement, in: Rudolf Bernhardt (Ed.), Encyclopedia of Public International Law, Volume II, Amsterdam 1995, pp. 546-548.

2 One example is the Atlantic Charter which was signed by Roosevelt and Churchill in 1941.

3 P.M. Eisemann, Le Gentlemen's agreement comme source du droit international, in: Clunet, Volume 106 (1979), pp. 326-348.

4 Fritz Münch, Non-binding agreements, in: Rudolf Bernhardt, Encyclopedia of Public International Law, Instalment 7 (1984), pp. 353-358.

Criteria for Distinguishing Legal and Non-legal Treaties

According to Article 2 of the Vienna Convention on the Law of Treaeties[5] an international agreement between states is only a treaty under international law if it is governed by international law. Whether this is the case or not depends on the *will of the parties*. It lies with them to determine the legal or non-legal status of an agreement. However, this intention is rarely made explicit; usually it has to be deduced from the circumstances.

Thus the *name* of the document only tends towards an answer but gives no definite one. If it is called a "pact", "treaty" or "agreement" it will usually be categorized as a legal document while a "joint declaration" or "communiqué" usually creates no legal ties but is intended to announce political judgements and intentions. Along with these, there are many other terms whose meaning is less clear, but it should be pointed out that they usually describe the political value of an agreement rather than making a statement about its legal status.

One clear expression of the will of the parties as to an agreement's legal status is its *registration in accordance with Article 102 of the UN Charter.*[6] Only those agreements which are under international law may be and - according to Article 102 of the UN Charter, Article 80 of the Vienna Convention on the Law of Treaties and Article 81 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations[7] - indeed must be registered.[8] If an agreement is not registered, however, one may not necessarily conclude that it is non-legal in character. The only sanction for violation of the obligation to register is that one may not invoke that treaty or agreement before any organ of the United Nations, including the International Court of Justice. Non-registration does not put into question its validity under international law (so far this is desired) or its observance and application by state authorities, other international organizations, courts or courts of arbitration.

The formal participation of parliaments in the conclusion of a treaty provides another indication of its character as an agreement under international law. But, again, if the legislative organs did not formally approve the treaty no compelling conclusions may be drawn. Their participation is only prescribed for certain treaties - in Germany only for those which regulate the political relations or relate to matters of federal legislation (Article 59, Para. 2 of the German Basic Law).[9] Only in the case of states based on the rule of law

5 Convention of 23 May 1969 (UNTS 1155, p. 331).
6 UNCIO Vol. XV, p. 335.
7 International Legal Materials 1986, p. 543.
8 Ursula Knapp, Commentary on Article 102, margin Nos. 6, 26, in: Bruno Simma (Ed.), Charter of the United Nations, Oxford 1994.
9 On the concepts of the "treaties which regulate political relations" and "treaties which re

where constitutionally appropriate behaviour can be assumed and of agreements which - according to the constitution of that state - must be approved by the parliament because of its content, if they were treaties under international law, one may conclude that the absence of parliamentary participation means there was no intent to make an agreement legally binding.
Neither does *publication* or non-publication of a document in *law gazettes* provide a dependable indication. For one thing, by no means all legally binding agreements are so printed. On the other hand, documents which are clearly not treaties under international law occasionally find their way into such publications. In France, for example, the General Declaration on Human Rights[10] was put into the *Journal Officiel.*[11]
Conclusions about the will of the parties as to the character of an agreement can also be drawn from the way the text is formulated, the persons who have signed it, the signature formula, accompanying statements, etc.

Classification of CSCE/OSCE Documents

A number of *treaties* which clearly have the character of agreements *under international law* have been concluded in or in connection with the CSCE. They are the *Convention on Conciliation and Arbitration within the CSCE,*[12] the *Treaty on Conventional Armed Forces in Europe*[13] along with its modifying agreements[14], and the *Treaty on Open Skies.*[15] All of them provide for ratification[16] and thus for a legally formal treaty conclusion.

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late to matters of legislation" see: Ulrich Fastenrath, Kompetenzverteilung im Bereich der auswärtigen Gewalt [Division of Competences in Foreign Affairs], München 1986, pp. 217-230.

10 Resolution 217 (III) of the General Assembly of the United Nations of 10 December 1948, General Assembly, Official Records, 3rd Session, Resolutions pt. 1, p.71.

11 See Christoph Schreuer, Die Behandlung internationaler Organakte durch staatliche Gerichte [The Treatment of Acts of International Institutions by National Courts], Berlin 1977, p. 223.

12 Stockholm Meeting of the CSCE Council, Stockholm, 15 December 1992, in: Arie Bloed (Ed.), The Conference on Security and Co-operation in Europe. Analysis and Basic Documents, 1972-1993, Dordrecht/Boston/London 1993, pp. 845-899, here: Convention on Conciliation and Arbitration within the CSCE, pp. 870-888.

13 Treaty on Conventional Armed Forces in Europe, Paris, 19 November 1990, in: Ibid., pp. 1223-1253.

14 Final Document of the Extraordinary Conference of the States Parties to the CFE Treaty (Oslo Document), in: Stockholm International Peace Research Institute, SIPRI Yearbook 1993, World Armaments and Disarmament, Oxford 1993, pp. 677-682, and Document of the States Parties to the Treaty on Conventional Armed Forces in Europe, in: The Netherlands Ministry of Foreign Affairs, Arms Control Section, Treaty on Conventional Armed Forces in Europe and Related Documents, May 1996, pp. 164-170.

15 Treaty on Open Skies, Helsinki, 24 March 1992, in: Bloed (Ed.), cited above (Note 12), pp. 1271-1311.

16 Article 33 of the Convention on Conciliation and Arbitration within the CSCE; Article XXII of the Treaty on Conventional Armed Forces in Europe; Article XVII of the Treaty on Open Skies.

Moreover, they were subject to the domestic procedures for the confirmation of treaties.[17]

It is likewise clear and, by now, undisputed that *the rest of the documents* of the CSCE/OSCE process must be called *non-legal*.[18] It is true that terms such as "Final Act" and "Charter" (of Paris) are quite ambivalent and can also be used in treaties under international law. The same is true of the "decisions" (of Ministerial Council meetings) and the "documents" (of the follow-up meetings, the meetings on the human dimension and the negotiations on Confidence and Security-Building Measures); agreements under international law occasionally even are called "declarations" (of Summit Meetings). Nor do the texts of such documents permit confident conclusions. Along with rather loose statements of intent there are formulations which establish precisely defined commitments, as in the Catalogue of Principles of the Final Act,[19] the Vienna Documents on Confidence- and Security-Building Measures[20] or in the Copenhagen[21] and Moscow Documents[22] on the Human Dimension.

Nevertheless, the clause which appears in the Final Act,[23] the Charter of Paris,[24] the Summit Declarations,[25] the Concluding Act of the Negotiations

17 See German Federal Law Gazette 1994 II, p. 1326 (Conciliation and Arbitration Convention); 1991 II, p. 1154 (CFE Treaty); 1992 II, p. 1037 and 1994 II, p. 406 (Agreements Modifying the CFE Treaty); 1993 II, p. 2046 (Treaty on Open Skies).

18 Cf. Jens Bortloff, Die Organisation für Sicherheit und Zusammenarbeit in Europa: Eine völkerrechtliche Bestandsaufnahme [The Organization for Security and Cooperation in Europe: An Inventory of International Law Aspects], Berlin 1996, pp. 327-329; Massimo Coccia, Helsinki Conference and Final Act on Security and Cooperation in Europe, in: Bernhardt (Ed.), cited above (Note 1) pp. 693-705, esp. pp. 694-695; Jost Delbrück, Die völkerrechtliche Bedeutung der Schlußakte der Konferenz über Sicherheit und Zusammenarbeit in Europa [The Significance under International Law of the Final Act of the Conference on Security and Cooperation in Europe], in: Rudolf Bernhardt/Ingo von Münch/Walter Rudolf (Eds.), Drittes deutsch-polnisches Juristen-Kolloquium [Third Colloquium of German and Polish Legal Experts], Volume 1: KSZE-Schlußakte [CSCE Final Act], Baden-Baden 1977, pp. 31-50, esp. 39-42; Krzysztof Skubiszewski, Der Rechtscharakter der KSZE-Schlußakte [The Legal Character of the CSCE Final Act], ibid., pp. 13-30; Theodor Schweisfurth, Zur Frage der Rechtsnatur, Verbindlichkeit und völkerrechtlichen Relevanz der KSZE-Schlußakte [On the Question of the Legal Character, Binding Quality and Relevance under International Law of the CSCE Final Act], Zeitschrift für ausländisches öffentliches Recht und Völkerrecht [Heidelberg Journal of International Law] 36 (1976), pp. 681-725.

19 Final Act of Helsinki, Helsinki, 1 August 1975, in: Bloed (Ed.), cited above (Note 12), pp. 141-217, here: pp. 143-149.

20 Vienna Document 1990 and Vienna Document 1992, in: Ibid., pp. 489-532 and pp. 645-699. For the Vienna Document 1994 see in this volume pp. 431-482.

21 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 12), pp. 439-465.

22 Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 3 October 1991, in: Ibid., pp. 605-629.

23 Final Act of Helsinki, cited above (Note 19), p. 210.

24 Charter of Paris for a New Europe, Paris 21 November 1990, in: Bloed (Ed.), cited above (Note 12), pp. 537-566, here: p. 550.

on Personnel Strength of Conventional Armed Forces in Europe[26] and the Joint Declaration of 22 States of 19 November 1990[27] as to the the non-registerability of the documents in accordance with Article 102 of the UN Charter can hardly mean anything else than that a binding character under international law was not wanted. The clauses must thus be understood as a *legal disclaimer*. This view is supported by the statement of Aldo Moro, at the time Italian Prime Minister and holding the EC Presidency, at the Conference of Heads of State or Government in Helsinki on the occasion of the signing of the Final Act:

"Although these obligations have no legal character, they are nevertheless founded on political and moral responsibility and must, above all, be undertaken in good faith and without reservation."[28]

On the same occasion the then Chancellor of the Federal Republic of Germany, Helmut Schmidt, said:

"This Conference has created no new international law for Europe. But we have established common rules for the way in which we want to deal with each other and live together in Europe."[29]

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.[30] Still, it may be doubted whether it should be so easy, in domestic law, to evade parliamentary proce-

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25 CSCE Helsinki Document 1992: The Challenges of Change, Helsinki, 10 July 1992, in: Ibid., pp. 701-777, here: p. 710 (Para. 46 of the Summit Declaration); CSCE Budapest Document 1994, Towards a Genuine Partnership in a New Era, in: Helsinki Monitor 1/1995, pp. 79-106, here: p. 81 (Para. 22 of the Summit Declaration).

26 Section VIII, Para. 1, of the Concluding Act of the Negotiations on Personnel Strength of Conventional Armed Forces in Europe, in: Bloed (Ed.), cited above (Note 12), pp. 1255-1269, p. 1269; likewise: Para. 6 of the Document of the Participating States of the Concluding Act of the Negotiations on Personnel Strength of Conventional Armed Forces in Europe of 5 February 1993, in: The Netherlands Ministry of Foreign Affairs, cited above (Note 14), pp. 170-172, p. 172.

27 Cf. US Policy Information and Texts, 20 November 1990, pp. 17-19.

28 Europa-Archiv 1975, p. D 546 (German translation); see also the letter with which the Finnish Foreign Minister transmitted the Final Act to the Secretary General of the United Nations, ibid., p. D 574.

29 Ibid. p. D 551 (in German).

30 On this and also on motivations in relation to other CSCE/OSCE documents, see Bortloff, cited above (Note 18), p. 346f. and 351.

dures simply by assigning the agreement in question to the non-legal sphere.[31]

In the Stockholm[32] and Vienna Documents on Confidence and Security-Building Measures,[33] the Agreement on the Global Exchange of Military Information[34] and the Concluding Act of the Negotiations on Personnel Strength of Conventional Armed Forces in Europe[35] the political character of the agreements is explicitly stressed, in some cases accompanied by the statement that they are not subject to registration in accordance with Article 102 of the UN Charter.

For the remaining documents it is clear from the text, from the composition and from the mandate of the delegations, as well as from their overall relationship to the CSCE Final Act and the documents of the follow-up meetings and/or the Summit and Council Meetings at which specialized meetings were decided upon or proposed, that they are only of a political character, not a legal one. The organs of the OSCE are charged only with carrying on political consultations.[36] They may and indeed should make decisions; but because the OSCE was not established in legal form with appropriate rules in a constituent treaty, these decisions do not in themselves have any legal force. As to the experts' meetings and seminars, there is no mandate to negotiate binding conclusions at all. As a consequence their texts contain only observations, options for action and ideas. Even after their results have later been approved by the Ministerial Council[37] their legal status has been changed in no way. Of late the seminars and the Senior Council no longer adopt negotiated texts;[38] instead of this they end with a summary of the chairman or of the chairmen of the individual working groups. Such a result, even as regards form, no longer constitutes an agreement.

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31 On this, see Fastenrath, cited above (Note 9), pp. 104-105.

32 Document of the Stockholm Conference, Stockholm, 19 September 1986, in: Bloed (Ed.), cited above (Note 12), pp. 297-326, here: p. 317 (Para. 101 of the the Document).

33 Vienna Document 1990, cited above (Note 20), p. 521 (Para. 157 of the document); Vienna Document 1992, cited above (Note 20, p. 686 (Para. 156 of the document); Vienna Document 1994, cited above (Note 20), p. 474 (Para. 150 of the document).

34 CSCE Forum for Security Co-operation, Global Exchange of Military Information, reprinted in this volume, pp. 479-482, here: p. 482.

35 Section VIII, Para. 1 of the Concluding Act, cited above (Note 26), and Para. 6 of the Document of the Participating States of the Concluding Act, cited above (Note 26).

36 Charter of Paris, cited above (Note 24), Section "New Structures and Institutions of the CSCE Process", pp. 548-549, Supplementary Document to Give Effect to Certain Provisions Contained in the Charter of Paris for a New Europe, Section I.A, pp 551; CSCE Budapest Document 1994, cited above (Note 25), here: Budapest Decisions, Section I, Para. 17, p. 84.

37 As in Para. 16 of the Conclusions of the Prague Meeting of the CSCE Council (Bloed [Ed.], cited above [Note 12], pp. 821-839, here: p. 826) with respect to the Geneva Meeting of Experts on National Minorities (ibid., pp. 593-604) and the Oslo Seminar of Experts on Democratic Institutions (ibid., pp. 631-644).

38 With regard to the seminars in the area of the human dimension this emerges from Section VI, Para. 20, of the Helsinki Document, cited above (Note 25), p. 747.

All CSCE/OSCE documents speak invariably of the participating States undertaking certain (political) commitments or aiming at certain goals, never of the statesmen or diplomats who were involved. The signature formulas used also show that the documents in question are not Gentlemen's Agreements entailing a merely personal relationship but non-legal agreements (with the exception of the few treaties concluded under international law). The (negotiated) documents are invariably signed by the participants in the name of their country with the incumbent Chairman of the Council of the European Union also always signing in this capacity.

Inclusion of Non-legal CSCE/OSCE Documents in Treaties under International Law

The distinction between legal and non-legal international instruments has been confused in recent times when certain treaties under international law have referred to CSCE/OSCE documents and taken their political obligations over into the legally binding treaty. This happened, for example, with the German-Soviet Treaty on Good Neighborly Relations, Partnership and Cooperation of 9 November 1990,[39] the German-Czechoslovakian Treaty on Good Neighborly Relations and Friendly Cooperation of 27 February 1992[40] and the German-Romanian Treaty on Friendly Cooperation and Partnership in Europe of 21 April 1992,[41] all of which contain a general reference to the Helsinki Final Act and succeeding documents. A number of these treaties, e.g. the German-Romanian one (Article 15), the German-Czechoslovakian one (Article 20) and the German-Hungarian Treaty of Friendship of 6 February 1992[42] (Article 19) also explicitly incorporate the commitments on the protection of national minorities contained in CSCE documents, especially the Copenhagen Document[43], and call for use of the OSCE's procedures for settling disputes when there are differences regarding interpretation or implementation of the agreed forms of protection. The result of such references is that political obligations are transformed into legal ones; indeed, if a formulation incorporating a dynamic reference is used, future changes or amplifications of the OSCE commitments may be included. To be sure, this transformation into obligations under international law applies only to relations between states which have concluded these treaties.
OSCE commitments can also be made binding by decisions of the Security Council of the United Nations. Examples are Resolutions 740 of 7 February

39 German Federal Law Gazette 1991 II, p. 702.
40 German Federal Law Gazette 1992 II, p. 463.
41 German Federal Law Gazette 1993 II, p. 1775.
42 German Federal Law Gazette 1992 II, p. 475.
43 See Note 21.

1992 and 743 of 21 February 1992[44] on the conflict in Yugoslavia which, however, only call on the parties to the dispute to make use of the Yugoslavia Conference to reach a settlement in accordance with CSCE principles.

The Relevance of Distinguishing between Agreements under International Law and Non-legal Agreements

The distinction which has hitherto been made between treaties under international law and non-legal agreements ensues from the doctrine of the sources of international law. According to this doctrine norms are legally valid, if they proceed from a recognized source; in other words, no further justification is required when claims and obligations are based on them in legal proceedings. However, the only genuine legal proceedings are those that take place in courts, which are rarely used on the international level. Even in conciliation proceedings it is possible to use other rules or to introduce political considerations. This also applies to the CSCE Court. In arbitration proceedings it makes its decisions, in conformity with Article 30 of the Convention on Conciliation and Arbitration within the CSCE[45], solely on the basis of international law; in conciliation proceedings CSCE commitments are also to be taken into consideration, in accordance with Article 24. Whether or not a norm is part of international law also plays a role in the admissibility of reprisals. These, as a limited departure from obligations under international law, are only permissible if the opposing side has also violated such obligations. Again, the use of reprisals on an international basis is relatively rare. More commonly, generally permissible forms of pressure are applied to get other states to change their behaviour (retorsion).
Even though the internationally legal character of a norm may support the position of a state in non-legal disputes it is customary to introduce other considerations into such disputes. The CSCE process, in particular, has shown that this can be extraordinarily effective. Commitments from the Helsinki Final Act, and from the follow-up and review meetings provided for there, played a substantial role in the final phase of the East-West conflict.[46] What was important was not the legal or non-legal character of the norms but the ability, by referring to agreed rules, to put one's point of view across in proceedings from which the opposing side could not withdraw without suffering great political damage. Thus the distinction between legal and non-legal agreements - which for the most part are functionally equivalent[47] -

44 See Supplements to the Official Records of the Security Council 1992.
45 Convention on Conciliation and Arbitration within the CSCE, cited above (Note 12), here: p. 884.
46 See Bortloff, cited above (Note 18), pp. 60-64.
47 On this, see Edda Blenk-Knocke, Zu den soziologischen Bedingungen völkerrechtlicher Normbefolgung [On the Sociological Conditions for Following International Legal Norms], Ebelsbach 1979, pp. 54-56.

may not be meaningless in diplomatic intercourse but is of subordinate significance.
And it is not only in politics and political science that this distinction fades, but in the law itself. The sources of international law include, in addition to international treaties, both customary law and general legal principles.[48] Its norms develop in a non-formal way, as the result of a process consisting of a number of components. These components can be non-legal agreements or the resolutions of international organizations. Moreover, they can have an influence on the way in which treaties under international law are understood and interpreted. Because of these effects on the law it is reasonable to regard them as part of the law and to characterize them accordingly. In contrast to "hard law", a concept which refers to the validity of norms, one can also speak of "soft law", which is not legally valid in itself but influences the content of the law.

Effects of Soft Law and, particularly, of CSCE/OSCE Documents on International Law

If one distinguishes hard law and soft law, as we have done here, according to the criterion of legal validity then the concept of soft law - in contrast to a definition which is occasionally heard[49] - does not include especially "softly" formulated international law treaties with scant normative content. Rather, it is reserved for "rules of behaviour which come into existence in forms other than those canonized in Article 38 of the ICJ Statute" and do not in fact constitute "international law in the sense of the traditional doctrine on sources".[50] International soft law, understood in this way, can be described as having norm-generating, norm-regulating and norm-legitimating (or delegitimating) functions.

48 Cf. Article 38 of the Statute of the International Court of Justice (UNCIO Vol. XV, p. 355). It has come to be recognized that this catalogue of sources is incomplete, see: Ulrich Fastenrath, Lücken im Völkerrecht: Zu Rechtscharakter, Quellen, Systemzusammenhang, Methodenlehre und Funktionen des Völkerrechts [Lacunae in International Law: On the Legal Character, Sources, Systemic Cohesion, Methodology and Functions of International Law], Berlin 1991, pp. 81-145.

49 Cf. R.R. Baxter, International Law in "Her Infinite Variety", in: International and Comparative Law Quarterly 29 (1980), pp. 549-566; Wolfgang Heusel, "Weiches" Völkerrecht: Eine vergleichende Untersuchung typischer Erscheinungsformen ["Soft" International Law: A Comparative Investigation of Typical Manifestations], Baden-Baden 1991, pp. 235-259.

50 Alfred Verdross/Bruno Simma, Universelles Völkerrecht [Universal International Law], 3rd ed. 1984, § 654.

Soft Law as Norms "on Trial"

At conferences between states and, more frequently, in international organizations political ideas, standards and programs are developed which have not yet proceeded far enough to fix them in a binding treaty or which must first be tested as to their practicability. Only after they have passed this test treaties or agreements incorporating them will be negotiated. Rules which are not binding under international law have frequently taken on this "advance party" function in the areas of human rights and environmental protection, law of the sea and of outer space, and in the efforts to develop a new international economic system. The term "soft law" admittedly seems inappropriate to the extent that such rules are not really law at all but only a preliminary stage. It might make more sense to talk about *pré-droit* but that is not a very fortunate choice either. For it is impossible to say in advance which non-legal rules are going to find entry into treaties under international law. The "pre-legal" character of a rule only becomes evident when it is being replaced by a legal rule and thus becomes superfluous.
A rather untypical example of this function of soft law is provided by the rules in CSCE/OSCE documents on the protection of minorities[51] which, as already mentioned, have been incorporated *in toto* into treaties between individual states and thus made binding under international law. The individual documents retain their old status but the commitments they contain have acquired a different legal character in the relations between the states involved. To be sure, the efforts of the OSCE in regard to the protection of minorities need to be seen in the broader context of similar efforts on the part of the United Nations and the Council of Europe. The OSCE is providing some building blocks, still of a pre-legal kind, to this legal development.

Soft Law as an Expression of "Opinio Juris" and its Influence on the Contents of International Legal Norms

In its norm regulating function soft law determines what rules should become law or how existing or future norms of international law are to be interpreted. But distinctions have to be made, depending on the specific source of international law.
(i) In *treaties under international law* the question of validity is decided. Soft law is not able to influence it. But it can influence the contents of norms. Like all linguistic concepts and sentences, the legal concepts and provisions of

51 Especially the Document of the Copenhagen Meeting of the Conference on the Human Dimension, cited above (Note 21), Paras. 30-39, pp. 456-459; Geneva Report of the CSCE Meeting of Experts on National Minorities, cited above (Note 37); Helsinki Document, cited above (Note 25), Decisions VI, Paras. 23 to 27, p. 748.

treaties do not have a precisely defined meaning. Rather, they can be and need to be interpreted. This is particularly true of treaties under international law for which there are usually a number of equally authentic versions in different languages. If the range of meaning of expressions in a single language is never once and for all established, it varies even more when several languages are involved. If we are to presume, in accordance with Article 33 of the Vienna Convention on the Law of Treaties, that the expressions in all authentic texts have the same meaning, then additional interpretative help is needed. This is to some extent available in the world-wide discourse between international law experts, which serves to create specialized terminology. But what they can accomplish should not be rated too highly owing to the barriers of language and the significant differences in legal thinking which are formed by a variety of national legal systems.

However, soft law makes a significant contribution to the development of international linguistic conventions.[52] The concepts in treaties under international law can be defined or at least put into concrete terms for certain applications. Even when there is no explicit reference to specific legal concepts or international law treaties, the commitments and evaluations of soft law documents can be viewed in relationship to existing treaties under international law and the provisions of these treaties can be interpreted in a way to make them consistent with the goals, standards of conduct and judgements contained in the non-legal instruments.[53] The extent to which the understanding of treaty norms is influenced by soft law depends on the authority of the latter.[54] It is in the nature of things that global organizations and regional organizations, within their region, have an outstanding ability to influence language.

These consequences of non-legal consensus-building for the law, which are generally overlooked by legal experts, are acknowledged at least partially by Article 31, Para. 3(a) of the Vienna Convention on the Law of Treaties. It stipulates that all understandings between the parties to a treaty on its interpretation and application are to be taken into account in the interpretation of

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52 For a detailed treatment of what follows, see Fastenrath, cited above (Note 48), pp. 176-199; id., Relative Normativity in International Law, in: European Journal of International Law 4 (1993), pp. 305-340, esp. pp. 312-315

53 Rejected without sufficient justification by Bortloff, cited above (Note 18), p. 361.

54 Detailed views on this in Herbert Miehsler, Zur Autorität von Beschlüssen internationaler Institutionen [On the Authority of the Decisions of International Institutions], in: Christoph Schreuer (Ed.), Autorität und internationale Ordnung [Authority and International Order], Berlin 1979, pp. 35-61; Rosalynn Higgins, Compliance with United Nations Decisions on Peace and Security and Human Rights Questions, in: Stephen M. Schwebel (Ed.), The Effectiveness of International Decisions, Leyden 1971, pp. 32-50; Oscar Schachter, Theory of International Obligation, in: Virginia Journal of International Law 8 (1968), pp. 300-322.

the treaty. True, what usually is involved here is only the special use of language by the parties in a particular treaty on which agreement has been reached, not the development of international usage of specialized terms.
There is, in the CSCE/OSCE documents, a definite elaboration of treaty law, especially with regard to human rights. The Copenhagen and Moscow Documents of the Conference on the Human Dimension[55] outline some rights much clearer than the European Convention for the Protection of Human Rights and Fundamental Freedoms did.[56] To give just two examples, one only needs to compare the rules on freedom of association in Article 11 of the European Human Rights Convention with those in paragraphs 9.3, 10.3 and 10.4 of the Copenhagen Document, or the rules on free elections in Article 3 of the Protocol No. 1 to the European Human Rights Convention[57] with paragraphs 5.1, 6 and 7 of the Copenhagen Document. Nevertheless, the guarantees in the Human Rights treaties are formulated so broadly that they could be interpreted as including the more concrete guarantees of the CSCE text. This kind of harmonization by interpretation is, to be sure, only possible when the parties to the treaty are also parties to the non-legal agreement. With regard to both of the United Nations Covenants on Human Rights[58] this method fails wherever, in other parts of the world, there is no comparable understanding of the law or no indication has been given of agreement with the CSCE/OSCE documents or the relevant provisions contained therein.
(ii) The non-legal agreements and decisions of international conferences or international organizations can also reflect the legal convictions of the participating states. The *opinio juris*, along with the practice which will usually follow once an international consensus has been reached, is an essential component of *international customary law.* Thus non-legal instruments can contribute doubly to the formation of customary law: as an expression of *opinio juris* and at the same time as a stimulus for uniform behaviour on the part of states. In the process, they can take on a character similar to legal provisions and of course also contribute to the further development of customary law or refine certain aspects of it.[59] In the Nicaragua case[60], for example, the International Court of Justice did not hesitate to have recourse to the Friendly

55 See Note 21 and Note 22.
56 Treaty of 4 November 1950 (UNTS Vol. 213, p. 221).
57 UNTS Vol. 213, p.262.
58 International Covenant on Civil and Political Rights of 19 December 1966 (UNTS Vol. 993, p. 171) and International Covenant on Economic, Social and Cultural Rights of 19 December 1966 (UNTS Vol. 993, p. 3).
59 More detail on this in René Jean Dupuy, Declaratory Law and Programmatory Law: From Revolutionary Custom to "Soft Law", in: Declarations on Principles, A Quest for Universal Peace, Leyden 1977, pp. 247-257; Fastenrath, cited above (Note 48), pp. 203-208.
60 ICJ Reports 1986, p. 14, esp. p. 99f.

Relations Declaration[61] in order to define the normative content of the prohibition of the use of force and to find in it - as also in the Decalogue of Principles from the Helsinki Final Act[62] - the expression of an existing *opinio juris*. Caution is certainly advisable. When states conclude a non-legal agreement rather than a treaty under international law they generally want to avoid legal obligations. There have to be special reasons for it to be different in an individual case. They usually can be found in the way in which it is formulated. For example, the Preamble to the Decalogue of Principles of the Helsinki Final Act[63] emphasizes that the principles which follow are in conformity with the Charter of the United Nations and thus reproduce valid international law.[64] In the Charter of Paris and the Copenhagen and Moscow Documents on the Human Dimension fundamental freedoms are characterized as rights and reference is made to their inalienability.[65] According to the Helsinki Summit Declaration human rights, including the rights of persons belonging to national minorities, democracy and the rule of law are immutable.[66] This shows clearly that there was an intention to fix certain things in law, an intention which - with regard to the demand for democracy, separation of powers, the rule of law and procedural rights in court - goes substantially beyond existing international law. 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.[67]

(iii) Soft law instruments can also play a role as *general principles of law* in the meaning of Article 38 of the Statute of the International Court of Justice now that the Court has derived these principles in its judgements on delimitation of the continental shelf not just from a comparison of national legal provisions but directly from considerations of equity and justice.[68] This revives some of the old thoughts on natural law which were presented when the Statute for the Permanent International Court of Justice was being worked

61 Resolution 2625 (XXV) of 24 October 1970.

62 Final Act of Helsinki, cited above (Note 23), pp. 143-149.

63 Ibid., p. 143; similarly, the Charter of Paris, cited above (Note 36), p. 539.

64 For a comparison of the Decalogue of Principles with valid international law, see Bortloff, cited above (Note 18), pp. 176-300.

65 Charter of Paris, cited above (Note 36), p. 537; Copenhagen Document, cited above (Note 21); Moscow Document, cited above (Note 22), in which, along with guarantees of rights, there are also numerous "best endeavour" commitments.

66 Para. 6 of the Helsinki Summit Declaration, Helsinki Document 1992, cited above (Note 25), pp. 701-702.

67 See Thomas M. Franck, The Emerging Right to Democratic Governance, in: American Journal of International Law 1992, pp. 46-91, esp. p. 67.

68 Cf. ICJ Reports 1969, p. 3, and esp. p. 47 (North Sea Continental Shelf); Reports 1982, p. 18, esp. p. 60 (Continental Shelf Tunisia/Libyan Arab Jamahiriya); Reports 1984, p. 246, esp. 278, 290 (Gulf of Maine); Reports 1985, p. 13, esp. p. 39 (Continental Shelf Libyan Arab Jamahiriya/Malta).

out.[69] Thus soft law serves to give form to equitable criteria and derive normative precepts from the concept of justice. This is precisely what happens in the Copenhagen Document of the Conference on the Human Dimension in which the participating States declare solemnly (under Para. 5) "that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and unalienable rights of all human beings are the following: (...) [there follows a detailed description of democratic principles and principles governing the rule of law, human rights and guarantees of procedural rights, especially in criminal court proceedings]".[70]
In addition, soft law instruments have been regarded as providing international recognition of general principles of law so that international law can directly be created through such an instrument.[71] Here, however, one must examine carefully whether what was wanted by the states was a legal principle or merely a political one.

Soft Law which Strengthens and Soft Law which Weakens International Law

The non-legal agreements or decisions of international organizations can, finally, have the effect of legitimating the norms of international law or depriving them of legitimacy by either confirming existing legal rules or undermining them with substantial deviations or by calling them completely into question. From the standpoint of legal positivism this need have no effect on international law. But it is impossible to view law, and international law in particular, solely in positivistic terms. Moreover, there are now alternative legal theories being presented all over the world according to which the normative strength of rules is a matter of degree.[72] To that extent, the confirmation or disapproval of legal norms does have significance.

69 On this see Fastenrath, cited above (Note 48), pp. 100-104.
70 Copenhagen Document, cited above (Note 21), pp. 441-444.
71 Alfred Verdross, Les principes généraux de droit dans le système des sources du droit international public, in: Recueil d'études de droit international, Mélanges à Paul Guggenheim, Geneva 1968, pp. 521-530; Jochen A. Frowein, Der Beitrag der internationalen Organisationen zur Entwicklung des Völkerrechts [The Contribution of International Organizations to the Development of International Law], Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 36 (1976), pp. 147-167; Blaine Sloan, General Assembly Resolutions Revisited (Forty Years Later), British Yearbook of International Law 58 (1987), pp. 39-150, esp. p. 80; Verdross/Simma, cited above (Note 50), §§ 606, 639.
72 For a detailed discussion see Fastenrath, Relative Normativity in International Law 4 (1993), in: European Journal of International Law, pp. 305-340.

The Decalogue of Principles in the Helsinki Final Act, for example, has a confirmatory effect,[73] as does the merely demonstrative list of individual human rights in the Charter of Paris.[74]

Significance of CSCE/OSCE Documents for the Application of International Law

Effects on the Implementation of Rules

As a rule international legal norms leave open a large number of options for action, all of which are legally permitted. Non-legal agreements can narrow this range of options by calling for very specific actions. Conversely, they may require the use of all options, thus disallowing self-imposed limits. In this way, non-legal agreements create a state of affairs based on trust. The principle of good faith, which applies to international law[75] as it does to all legal systems, provides legal protection in this case, but only to an extent that other states, in the expectation that the agreement will function, have let themselves be induced into a form of action that would be damaging to them if the agreement were not observed.[76] This will not always be the case. Any farther-reaching tie to non-legal agreements, for which a case is sometimes made[77], would ultimately be a legal tie by way of the "back door".[78]
Conversely, any state which observes a non-legal agreement can in good faith expect other states not to take any actions that would force it to abandon this behaviour. Those other states are estopped to act in this way - a principle, which is recognized in decisions of the International Court of Justice[79]. This can only hold true, however, to the extent that the non-legal agreement is consistent with obligations contained in valid treaties under international law. This limitation is established by the Helsinki Final Act itself, in its Principle X, where the fulfillment of obligations under international law is given priority over the Final Act, whose provisions are only to be given appropriate consideration in the exercise of sovereign rights, leaving obligations under international law explicitly unaffected by the Final Act. Hungary's refusal in 1989, based on the Final Act of Helsinki and other CSCE documents, to meet

73 The conformity with valid international law is emphasized right in the Preamble of the Decalogue, Final Act of Helsinki, cited above (Note 23), p. 143.
74 Charter of Paris, cited above (Note 24), pp. 537-538.
75 Cf. Principle X of the Decalogue, Final Act of Helsinki, cited above (Note 19), p. 148.
76 Cf. Verdross/Simma, cited above (Note 50), § 615.
77 Schweisfurth, cited above (Note 18), p. 721ff.
78 Cf. Heusel, cited above (Note 49), pp. 276-279; Skubiszewski, cited above (Note 18), p. 49.
79 ICJ Reports 1962, p. 39ff. (Temple of Preah Vihear).

its obligation under a bilateral treaty to stop the flight of GDR citizens[80] can only be justified by regarding the treaty as invalid on the grounds that it violated fundamental human rights and was thus contrary to *jus cogens*. Another conceivable approach might be to interpret the non-legal CSCE/OSCE documents as a waiver, binding in good faith, of the rights established under international law. But this cannot generally be assumed, owing to the clarity with which the Final Act states that obligations under international law remain unaffected; only in case of special circumstances the opposite conclusion may result.

Effects on the Applicability of Rules

The customary law prohibition against intervention stipulates that states may not intervene in matters which are essentially within the domestic jurisdiction of another state. But the area thus reserved to the states has not been defined conclusively or in a generally valid way. Internationalized, and thus removed from the exclusive domestic jurisdiction of states are, first, all matters regulated by international law. Thus the scope of the *domaine reservé* of states varies, depending on treaty ties of a bilateral and multilateral kind, and it has been especially eroded by the international protection of human rights.
But it is not just through rules of international law that matters are internationalized. Non-legal agreements and other international soft law can accomplish this as well. It was in this sense that the Foreign Minister of the Federal Republic of Germany pointed out that "applying pressure to ensure that the commitments taken over from the Final Act of Helsinki are observed does not constitute intervention in the internal affairs of another state".[81] Thus it is no longer an intervention when the participating States of the OSCE deal with the constitutional order of other participating States, which traditionally belongs to the core elements of state's sovereignty. Starting with the Conference on the Human Dimension and the Charter of Paris, democracy, the separation of powers and the rule of law have become international matters, subject to international control through the Moscow Mechanism[82] and the implementation meetings on human dimension issues.[83]

80 See Thomas Buergenthal, CSCE Human Dimension: The Birth of a System, in: Collected Courses of the Academy of European Law 1990, Vol. I/2, pp. 165-209, esp. p. 203.

81 Bulletin des Presse- und Informationsamts der Bundesregierung [Bulletin of the Press and Information Office of the German Federal Government] 1978, p. 872 (in German).

82 Paras. 1-16 of the Moscow Document, cited above (Note 22), p. 607-611.

83 Helsinki Document, cited above (Note 25), Decisions VI, Paras. 9-16, pp. 745-746. On this see also Louis Henkin, Human Rights and "Domestic Jurisdiction", in: Thomas Buergenthal (Ed.), Human Rights, International Law and the Helsinki Accord, Montclair (N.Y.) 1977, pp. 21-40, esp. p. 34ff.; Gaetano Arangio-Ruiz, Human Rights and Non-Intervention in the Helsinki Final Act, in: Recueil des Cours de l'Académie de Droit international de la Haye, Vol. 157 (1977 IV), pp. 192-332, esp. p. 288ff.

Personnel strengths of armed forces, the deployment of weapons and equipment, and the holding of maneuvers of substantial size have likewise become international matters.[84] OSCE mechanisms are also available to provide information on unusual military activities and hazardous incidents.[85]

The Effects of International Soft Law on Domestic Law

International agreements are fully binding on the participating states and all of their organs. But that does not mean that domestic law could not allow them to deviate from the requirements of such an agreement. International and national law are separate spheres. A violation of international law does not have to be a violation of domestic law.
It is particularly true of non-legal international agreements that they cannot create obligations or rights under domestic law. The competent authorities must first see to it that they are transformed into national law before they can have legal effect. But even here the dividing line between the law and the non-legal sphere is not particularly sharp. CSCE/OSCE documents can, for example, be consulted in the interpretation of laws. And it is conceivable that administrative bodies might be required to take non-legal agreements into account in making discretionary decisions.[86] These would then have a function similar to that of adminstrative regulations - which at the same time shows the problematic character of the situation. The non-legal agreements can only achieve this effect if the central authorities are entitled to prescribe administrative activity through administrative regulations; but the competences for doing that do not necessarily correspond to the competence for acting in the international sphere. The CSCE/OSCE documents, for their part, can to a large extent be interpreted as a manifestation of views, prevailing in all participating States, on what is right - views which as a consequence have a decisive influence on the interpretation and the application of domestic law.

84 Cf. Concluding Act of the Negotiations on Personnel Strength of Conventional Armed Forces in Europe, cited above (Note 26), Treaty on Conventional Armed Forces in Europe, cited above (Note 13), Vienna Document 1994, cited above (Note 20), Chaps. IV and V, pp. 451-458.
85 Ibid., Chap. II of the Document, pp. 443-445.
86 Thus the *Bundesverwaltungsgericht* [Federal Administrative Court], in: Neue Juristische Wochenschrift 1982, p. 1958ff., esp. p. 1960.