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OSCE NATIONAL MINORITY RIGHTS IN THE UNITED STATES: THE LIMITS OF CONFLICT PREVENTION

*Stuart Ford**

I. INTRODUCTION

The Organization for Security and Co-operation in Europe¹ [OSCE] has developed dramatically since its creation in 1975.² For its first fifteen years, it served primarily as a vehicle for promoting human rights and democracy in Eastern Europe, playing a role in ending the Cold War. Despite the collapse of communism in Europe and the emergence of fragile democracies behind the Iron Curtain, the emphasis on Eastern Europe has persisted because of the outbreak of ethnic conflicts in many former Soviet bloc states. These ethnic conflicts, of which the disintegration of Yugoslavia is the most infamous, have made conflict prevention and management the primary goal of the OSCE in the 1990s. Two responses to this new goal were a process of institutionalization and the development of national minority rights. As a result, today the OSCE has at its disposal both a body of national minority rights and a number of implementation mechanisms designed to improve compliance with those rights.

While the OSCE and national minority rights are certainly of relevance to ethnic tensions in Eastern Europe, there are also groups here in the United States who would benefit from the application of OSCE national minority rights.

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1. The Organization for Security and Co-operation in Europe (OSCE) was originally known as the Conference on Security and Co-operation in Europe (CSCE), until the name changed at the Budapest Summit Meeting in 1994. 34 I.L.M. 764, 773 (1995) [hereinafter Budapest Summit Declaration]. "OSCE" will be used to refer to both phases of the organization, unless clarity requires otherwise.

2. The OSCE process began on August 1, 1975 with the signing of the Final Act at Helsinki. The United States was one of the original signatories. See 14 I.L.M. 1292 (1975) [hereinafter Final Act].

This seems particularly true of Native Americans. The OSCE's collective approach to minority rights would provide relief unavailable under other domestic or international norms. There are two obstacles standing in the way of Native Americans. The first obstacle is the OSCE's focus on Eastern Europe. The second obstacle is the uncertain legal status of OSCE commitments. Many OSCE states, particularly the United States, have maintained that while OSCE commitments are "politically binding," the commitments are not legally binding. Such a conclusion would diminish the value of OSCE rights to minority groups, but it may not eliminate that value. The commitments may still exert some normative influence because of their political or moral strength.

This paper will examine the OSCE to determine which rights, principles, or implementation measures are available to national minority groups in the United States. Part II will begin with a brief history of the OSCE, followed by a section on the general development of OSCE human rights commitments. It will also present an overview of the OSCE's current structure. Part III lays out the commitments of the OSCE applicable to minority groups, followed by a discussion of the implementation and enforcement mechanisms for those commitments. Part IV addresses the question of the legal status of OSCE commitments, while Part V looks at whether OSCE commitments have normative value even if not legally binding. Part VI addresses the availability of OSCE minority rights in the United States by considering the case for the application of those rights to Native American tribes. Part VII contains a brief conclusion.

II. HISTORY AND STRUCTURE OF THE OSCE

A. A Brief History

Following the brinkmanship of the Cuban missile crisis, the East and West recognized the need for a multilateral

forum to discuss security and co-operation.³ In July of 1966, the Warsaw Pact called for the "convocation of a general European conference to discuss the questions of ensuring security in Europe."⁴ There followed a lengthy exchange of communications between NATO and the Warsaw Pact, which culminated when NATO agreed to enter preparatory talks on the scope and procedure of the conference.⁵ Multilateral preparatory talks resulted in the adoption of the Final Recommendations of the Helsinki Consultations, which contained the agenda and the rules of procedure for the conference.⁶ The agenda covered three topics: questions relating to security; co-operation in economics, science and technology; and co-operation on human rights.⁷ The most important procedural decision was the adoption of the rule of consensus,⁸ which would become a defining feature of the CSCE.

The CSCE began in 1973 and ended its first round with the signature of the Final Act of 1975⁹ (also referred to as the Helsinki Final Act because the conference signed the Act there). In keeping with its pan-European nature and the emphasis on security concerns, the forum included all European states plus Canada and the United States,¹⁰ and all who participated signed the Final Act with the exception of Albania.¹¹

The Warsaw Pact wanted the CSCE in order to legitimize its hold over Eastern Europe¹² and to foster econom-

3. See JAN SIZOO & RUDOLF TH. JURRIJENS, CSCE DECISION-MAKING: THE MADRID EXPERIENCE 24 (1984).

4. See Bucharest Declaration, *quoted in* SIZOO & JURRIJENS, *supra* note 3, at 25; *see also* P. van Dijk, *The Final Act of Helsinki*, 11 NETH. Y.B. OF INT'L L. 97, 101 (1980).

5. See SIZOO & JURRIJENS, *supra* note 3, at 25-32.

6. See Final Recommendations of the Helsinki Consultations (1973), *reproduced in* THE CONFERENCE ON SECURITY AND CO-OPERATION IN EUROPE: ANALYSIS AND BASIC DOCUMENTS 1972-1993, at 121-40 (Arie Bloed ed., 1993) [hereinafter BASIC DOCUMENTS 1972-1993].

7. See *id.* at 8.

8. See Erika B. Schlager, *The Procedural Framework of the CSCE: From the Helsinki Consultations to the Paris Charter 1972-1990*, 12 HUM. RTS. L.J. 221, 223 (1991).

9. See Final Act, *supra* note 2, at 1292.

10. See van Dijk, *supra* note 4, at 104. Real dialogue on the issue of European security without the participation of all the NATO states, which included the United States and Canada, would have been impossible. See *id.*

11. See SIZOO & JURRIJENS, *supra* note 3, at 77-81.

12. See van Dijk, *supra* note 4, at 101. The very fact that the Western

ic and scientific exchanges with the West. NATO, on the other hand, was interested in reducing military tension in Europe and promoting human rights behind the Iron Curtain.¹³ The result was that the three agenda points of the Conference were linked together, with the Warsaw Pact's interest in economic co-operation tied to progress on human rights and security co-operation.¹⁴ This linkage was the second defining feature of the CSCE.¹⁵

From the beginning, the CSCE was conceived of as more than a simple international conference. The provision in the Final Act for a follow-up meeting marked the CSCE as an ongoing process, the third defining feature.¹⁶ The concluding section of the Final Act declares that follow-up meetings will include both "a thorough exchange of views . . . on implementation" and discussion of the "deepening of their [the participating states'] mutual relations."¹⁷ Thus, opportunities for new economic, scientific and technical exchanges, desired by the Eastern European states, would be balanced by extensive and often highly confrontational discussions of the implementation of the human rights provisions of the Final Act.¹⁸ This model was followed by the three Cold War follow-up meetings, which took place at Belgrade (1977-1978), Madrid (1980-1983), and Vienna (1986-1989).¹⁹

The greatest achievement of the CSCE was its contribution to the collapse of communism in Europe. The Final Act of 1975 set human rights standards²⁰ that were

powers convened a European security conference with the states of the Warsaw Pact effectively recognized the governments, territorial boundaries, and political systems of the Soviet bloc. *See id.* This side effect did not appear in the agenda of the conference but was nonetheless an important consideration on the part of both the East and West. *See id.* *See FROM HELSINKI TO VIENNA: BASIC DOCUMENTS OF THE HELSINKI PROCESS 2* (Arie Bloed ed., 1990) (describing factors that led to establishment of CSCE). This recognition was embodied in Principle VIII of the Final Act.

13. *See* van Dijk, *supra* note 4, at 101-02.

14. *See* Final Act, *supra* note 2, at 1296.

15. *See* Schlager, *supra* note 8, at 222.

16. *See* BASIC DOCUMENTS 1972-1993, *supra* note 6, at 9.

17. Final Act, *supra* note 2, at 1325.

18. *See* BASIC DOCUMENTS 1972-1993, *supra* note 6, at 50-51.

19. *See* BASIC DOCUMENTS 1972-1993, *supra* note 6, at 50-59 (summarizing Cold War follow-up meetings).

20. *See infra* Part II.B, notes 33-54 and accompanying text (discussing human rights standards of Helsinki Final Act).

adopted and publicized²¹ by human rights groups within the communist states of Eastern Europe.²² These groups pressed their governments to honor the commitments in the Final Act and provided a constant flow of information to the West on compliance with human rights. This information was used by the West to pressure and embarrass the communist governments at the implementation review sessions that were central to the three Cold War follow-up meetings.²³ This has led Erika Schlager to conclude that the CSCE "significantly contributed to the . . . fall of [the] communist regimes."²⁴

The revolutions in Eastern Europe in 1989 fundamentally changed the nature of the CSCE. The Charter of Paris for a New Europe,²⁵ which unanimously accepted democracy, the inalienability of human rights, and the connection between democracy and a market economy as the basis for successful economic and social development, recognized the change of nature of the CSCE in 1990.²⁶ It seemed that the CSCE had triumphed as a tool for remaking Eastern Europe in a Western image, and the Charter of Paris euphorically claimed that "[T]he era of confrontation and division of Europe has ended."²⁷ The process of institutionalization began in order to help the new Eastern European governments make the transition to democracy and the free market.²⁸ For the first time the CSCE was endowed with permanent institutions. The Charter of Paris created a Secretariat, a Conflict Prevention Centre and an Office for Free Elections.²⁹

The euphoria of the Paris Summit, however, was short-lived. The outbreak of violent conflicts in Yugoslavia,

21. See *infra* note 40 and accompanying text (discussing importance of right of access to information concerning CSCE process and CSCE commitments).

22. See BASIC DOCUMENTS 1972-1993, *supra* note 6, at 50; Schlager, *supra* note 8, at 223.

23. See BASIC DOCUMENTS 1972-1993, *supra* note 6, at 50-59.

24. Erika B. Schlager, *An Introduction to Helsinki II*, in THE CHALLENGES OF CHANGE: THE HELSINKI SUMMIT OF THE CSCE AND ITS AFTERMATH 1, 3 (Arie Bloed ed., 1994).

25. See Charter of Paris, Nov. 21, 1990, 30 I.L.M. 190 (1991).

26. See *id.* at 193, 195.

27. *Id.* at 193.

28. See Schlager, *supra* note 24, at 3.

29. See Charter of Paris, *supra* note 25, at 206-07 (1991).

Nagorno-Karabakh, the Trans-Dniester and Ossetia proved that the era of confrontation in Europe had not ended.³⁰ The CSCE focused on conflict prevention and management, and this change increased the pressure to institutionalize that resulted in the rapid acceleration of institutionalization between the Paris Summit 1990 and the Helsinki Summit 1992.³¹ New structures and new implementation mechanisms proliferated. In order to better reflect the changing nature of the process, the 1994 Budapest Summit renamed the CSCE as the Organization for Security and Co-operation in Europe.³²

B. The Development of Human Rights

The OSCE adopted the 1975 Final Act of the Conference on Security and Co-operation in Europe³³ as its first official document. Despite being a document forged out of consensus between two antagonistic political blocs, it contains some striking language on human rights. At the heart of the Final Act was the "Declaration on Principles Guiding Relations between the Participating States."³⁴ These Guiding Principles were considered to reflect the "interests and aspirations" of the participating states³⁵ and touched on a number of human rights issues. Principle VII stressed the importance of "respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, all without distinction as to race, sex, language or religion."³⁶ In addition to this broad endorsement of human rights, the Act acknowledged that OSCE states had a duty to respect the rights of individuals belonging to national minority groups.³⁷ The OSCE states also promised to act in accordance with the human rights

30. See Schlager, *supra* note 24, at 4-5.

31. See Dominic McGoldrick, *The Development of the Conference on Security and Co-operation in Europe (CSCE) After the Helsinki 1992 Conference*, 42 INT'L & COMP. L.Q. 411, 411 (1993).

32. See Budapest Summit Declaration, *supra* note 1, at 773.

33. See Final Act, *supra* note 2, at 1292.

34. Final Act, *supra* note 2, at 1293-96.

35. Final Act, *supra* note 2, at 1293.

36. Final Act, *supra* note 2, at 1295.

37. See Final Act, *supra* note 2, at 1295.

provisions of both the United Nations Charter and the Universal Declaration of Human Rights.³⁸ They agreed to further human rights principles regarding the reunification of families separated by the Iron Curtain³⁹ and access to information.⁴⁰

This language perhaps seems surprising for a document agreed to by both the Soviet Union and the United States during the Cold War. Indeed, the force of these human rights commitments was mitigated to some extent by Principle VIII, which stressed that "peoples always have the right . . . to determine . . . their internal and external political status, . . . and to pursue as they wish their political, economic, social and cultural development."⁴¹ This essentially made an escape clause for the Soviet bloc, which allowed them to agree to freedom of thought, conscience, religion and belief, while obtaining legitimization of their political systems.⁴² Nevertheless, overall the Helsinki Final Act contained significant human rights commitments.⁴³

As noted above,⁴⁴ the Helsinki conference was followed by further periodic meetings. Much time at these follow-up meetings was devoted to discussion of the implementation of existing human rights commitments.⁴⁵ The follow-up meetings also expended considerable effort exploring the extent of the commitments made in the Final Act. The

38. See Final Act, *supra* note 2, at 1295.

39. See Final Act, *supra* note 2, at 1314.

40. See Final Act, *supra* note 2, at 1295, 1316 ("They [the participating states] confirm the right of the individual to know and act upon his rights and duties in this field.").

41. Final Act, *supra* note 2, at 1295.

42. See *supra* notes 20-24 (detailing failure of escape clause due to CSCE's contribution to collapse of communism in Eastern Europe).

43. See Thomas Buergenthal, *The CSCE Rights System*, 25 GEO. WASH. J. INT'L L. & ECON. 333, 335-44 (1991) (discussing human rights provisions of Final Act).

44. See BASIC DOCUMENTS, *supra* note 6, at 50-59.

45. See Concluding Document of the Vienna Meeting November 4, 1986-Jan. 17, 1989, 28 I.L.M. 527, 531 (1989). The document notes that

"[a]n open and frank discussion was held about the application of and respect for the principles of the Final Act. Concern was expressed about serious violations of a number of these principles. In particular, questions relating to respect for human rights and fundamental freedoms were the focus of intensive and controversial discussion."

Id.

Concluding Document of the Vienna Meeting contains: extensive language on effective access to information,⁴⁶ further language on the freedom of religions and belief,⁴⁷ and language expounding the effective implementation of the family contact and reunification principle.⁴⁸ The Cold War follow-up meetings provided important detail on how the OSCE expected the participating states to implement the provisions of the Final Act. They did not generate many new human rights commitments.

The fundamental expansion of OSCE human rights commitments came at the end of the Cold War. The 1990 Copenhagen Meeting of the Conference on the Human Dimension⁴⁹ embraced a dramatic expansion of OSCE human rights commitments. The OSCE states agreed that free elections, representative government, the rule of law, separation of states from political parties, the independence of the judiciary, the right to a fair trial in criminal cases, and a host of other "Western" ideals were essential to the enjoyment of human rights and fundamental freedoms.⁵⁰ "The participating states declare[d] that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government."⁵¹ The document also contained a number of specific pledges with respect to national minority rights.⁵² On the whole, the Copenhagen Document appears revolutionary in its expansion of OSCE human rights commitments. The undertakings of the Copenhagen Conference were specifically endorsed in 1990 by the heads of state of the OSCE states at the Paris Summit.⁵³ Since then, the broad commitment to democracy, human

46. *See id.* at princs., para. 13, 533-34; *see also id.* at 545-46.

47. *See id.* at princs., para. 16, 534.

48. *See id.* at 543-45.

49. *See* The Copenhagen Meeting of the Conference on the Human Dimension, June 29, 1990, 29 I.L.M. 1305 (1990). The "Human Dimension" is a phrase used by the OSCE to refer to the human rights aspects of OSCE commitments. *See id.*

50. *Id.* at 1307-09.

51. *Id.* at 1309.

52. *See id.* at 1318-20; *see also infra* Part III.C.

53. *See* Charter of Paris for a New Europe, 30 I.L.M. 190, 199 (1991) Under the heading "Guidelines for the Future," the Charter stated, "[w]e will fully implement and build upon the provisions relating to the human dimension of the CSCE." *Id.*

rights, and the rule of law has been regularly confirmed by the participating OSCE states.⁵⁴

C. Structure

The OSCE structure is an *ad hoc* creation. The Helsinki Final Act was the concluding document of an international conference, not a formal treaty.⁵⁵ The concluding documents of subsequent meetings were created in the same way. Consequently, no single document exists that sets forth the overall structure of the OSCE.⁵⁶ Instead, the many OSCE documents, pieced together, create the OSCE structure.

Institutionalization has mostly been a response to the changing nature of the OSCE after the end of the Cold War. At times, this structure has developed in an almost haphazard way. New bodies, new positions and new mandates have been created in response to specific problems, like the need to foster democracy in the new republics of Eastern Europe and the need to respond to ethnic conflicts. The rule of consensus, defined as "the absence of any objection expressed by a Representative [of a participating state] and submitted by him [or her] as constituting an obstacle to the taking of the decision in question," remains the primary feature of this structural growth.⁵⁷ Consensus

54. See generally Budapest Summit Declaration, *supra* note 1, at 769. The declaration stated, "We confirm the significance of the Human Dimension in all activities of the CSCE. Respect for human rights and fundamental freedoms, democracy and the rule of law is an essential component of security and co-operation in the CSCE region." *Id.*

55. See *infra* Part IV.

56. See Guidelines on an OSCE Document-Charter on European Security, Decision No. 5 of the Ministerial Council, Dec. 19, 1997, 37 I.L.M. 693, 695 (1998) (affirming commitment on part of OSCE states to "develop comprehensive and substantive OSCE Document-Charter on European Security"). It appears, however, that the OSCE is considering creating just such a document. See *id.*

Though it is perhaps a bit premature to raise this point, "Document-Charter" is a name which suggests confusion about the OSCE's legal status. See *id.* "Document" is a word the OSCE has used in the past to emphasize the non-legal status of its agreements. See *id.* "Charter" is a word commonly associated with treaty-based constituent instruments of international organizations (e.g., the United Nations Charter). See *id.* The juxtaposition of the two words may indicate tension or ambivalence within the OSCE about its legal status. See *id.*; see also *infra* Part IV (discussing legal status of OSCE commitments).

57. BASIC DOCUMENTS 1972-1993, *supra* note 6, at 133.

is an integral part of the OSCE, despite a number of recent deviations.⁵⁸ Even decisions to create structures or powers that do not depend on consensus first require consensus.

The following comprises a description of the present structure of the OSCE, in roughly hierarchical order. Unless otherwise noted, all participating states sit on all bodies, and all decision-making occurs by consensus.

Meetings of Heads of State or Government

These meetings occur every two years on the occasion of review conferences. They "set priorities and provide orientation at the highest political level."⁵⁹

Review Conferences

These are meetings of the permanent representatives to the OSCE. They precede the meetings of heads of state or government and have three tasks: to review implementation of OSCE commitments; to consider steps to strengthen the OSCE; and to prepare a "decision-oriented document" for adoption by the heads of state or government.⁶⁰

Ministerial Council

Formerly known as the Council of Ministers for Foreign Affairs, it was renamed the Ministerial Council at the Budapest Summit 1994.⁶¹ The Ministers for Foreign Affairs meets at least once a year⁶² and constitutes the "central decision-making and governing body" of the OSCE.⁶³

Senior Council

Formerly known as the Committee of Senior Officials,⁶⁴ the Senior Council meets at least twice a year to set poli-

58. See *infra* Part III.D.1.

59. Declaration and Decisions From Helsinki Summit, July 10, 1992, 31 I.L.M. 1385, 1394 [hereinafter Helsinki Summit]. Cynics might suggest that these meetings serve primarily as public relations opportunities for the Heads of State. See *id.* After all, the Review Conferences will have already drafted the document that is signed. See *id.*

60. *Id.*

61. See Budapest Summit Declaration, *supra* note 1, at 774.

62. See Charter of Paris, *supra* note 25, at 206.

63. See Helsinki Summit, *supra* note 59, at 1394.

64. See Budapest Summit Declaration, *supra* note 1, at 774.

cy and budgetary guidelines.⁶⁵ The Senior Council meets at least once a year as the *Economic Forum* to facilitate dialogue on the transition to and development of free market economies.⁶⁶

Permanent Council

Permanent representatives of the participating states comprise the permanent council and serve as the "regular body for political consultation and decision-making."⁶⁷ The permanent council also provides support and follow-up to OSCE Missions.⁶⁸ Most of the day to day decision-making of the OSCE occurs in weekly meetings of the Permanent Council.⁶⁹

Chairman-in Office (CIO)

This individual assumes responsibility for co-ordination of current OSCE business. He or she also communicates the decisions of the various Councils to OSCE institutions and gives advice on implementing those decisions.⁷⁰ *Ad Hoc Steering Groups*, composed of a restricted number of states, may be established on a case-by-case basis to assist the Chairman-in-Office to deal with a specific issue in conflict prevention, crisis management or dispute resolution.⁷¹

Conflict Prevention Centre (CPC)

The Charter of Paris established the CPC in order to reduce the risk of conflict in the OSCE area.⁷² The CPC created a forum to facilitate implementation of OSCE confidence and security-building measures by operating as a mechanism for consultation, facilitating the exchange of military information, and maintaining a repository of ex-

65. See Budapest Summit Declaration, *supra* note 1, at 774.

66. See Helsinki Summit, *supra* note 59, at 1415.

67. Budapest Summit Declaration, *supra* note 1, at 77.

68. See Budapest Summit Declaration, *supra* note 1, at 775.

69. See THE CONFERENCE ON SECURITY AND CO-OPERATION IN EUROPE: BASIC DOCUMENTS 1993-1995, at xx (Arie Bloed ed., 1997) [hereinafter BASIC DOCUMENTS 1993-1995].

70. See Helsinki Summit, *supra* note 59, at 1394.

71. See Helsinki Summit, *supra* note 59, at 1394.

72. See Charter of Paris, *supra* note 25, at 207.

changed military information.⁷³ The *Forum for Security Co-operation* was created within the CPC in order to carry out negotiations on new measures for arms control, disarmament, and confidence and security-building.⁷⁴

Office for Democratic Institutions and Human Rights (ODIHR)

The Charter of Paris created the ODIHR, formerly known as the Office for Free Elections, to facilitate exchange of information on elections, foster implementation of free elections, and organize seminars on election procedures and democratic institutions.⁷⁵ The ODIHR has the duty of organizing a meeting to review implementation of human rights commitments in those years when a review conference is not held.⁷⁶

High Commissioner on National Minorities (HCNM)

The HCNM is appointed to provide "early warning" and "early action," with regard to tensions involving national minority issues that have the potential to develop into conflicts affecting the peace or stability of OSCE states.⁷⁷

Secretary General

The Secretary General acts under the guidance of the CIO in order to manage OSCE structures and operations, in particular the work of the OSCE Secretariat.⁷⁸ He or she advises on the financial implications of proposals before the OSCE and prepares an annual report on the operations of the OSCE for the Ministerial Council.⁷⁹

Secretariat

The Secretariat, as an administrative organ, provides

73. See Charter of Paris, *supra* note 25, at 212-13.

74. See Helsinki Summit, *supra* note 59, 1404-05.

75. See Charter of Paris, *supra* note 25, at 207, 214, 220.

76. See Documents from the Prague Meeting of the Council, Jan. 30-31, 1992, 31 I.L.M. 976, 988 [hereinafter Prague Meeting].

77. See Helsinki Summit, *supra* note 59, at 1395; see also *infra* Part III. C (discussing post of High Commissioner on National Minorities).

78. See BASIC DOCUMENTS 1972-1993, *supra* note 6, at 863.

79. See BASIC DOCUMENTS 1972-1993, *supra* note 6, at 864.

support to the executive bodies of the OSCE.⁸⁰ The Secretariat also maintains an archive of OSCE documents and disseminates information to the public.⁸¹

Parliamentary Assembly

While the Parliamentary Assembly lies within the framework of the OSCE, it is not directly accountable to the OSCE.⁸² Delegates from parliaments in participating states comprise the Assembly, unlike most OSCE organs, as there is weighted representation and majority decision-making. The Parliamentary Assembly may make recommendations to the OSCE Councils.⁸³

Ad Hoc Seminars

A variety of *ad hoc* meetings of experts, seminars, and subject-specific implementation reviews take place within the OSCE. Some, like the human rights implementation reviews undertaken by the ODIHR, occur regularly. The OSCE convenes the majority of meetings in response to a specific problem or crisis.

D. The OSCE Today

The OSCE has proceeded a long way from its beginnings in 1975. During the Cold War there existed a slow growth and explication of OSCE human rights commitments, but no permanent structures were created. The OSCE remained in name and practice an international conference, albeit a more or less regular one. The fall of the Berlin Wall initiated a period of rapid change in the OSCE. The OSCE began the process of institutionalization between 1990 and 1992, in order to support fledgling democracies in Eastern Europe and respond to the outbreak of violent ethnic conflicts in former Soviet bloc countries. Parallel to this institutionalization, a dramatic expansion of

80. See Charter of Paris, *supra* note 25, at 206, 211.

81. See Charter of Paris, *supra* note 25, at 211.

82. See Final Resolution of the Madrid Conference Concerning the Establishment of the CSCE Parliamentary Assembly, Apr. 3, 1991, 30 I.L.M. 1344, 1345 (1991) [hereinafter Establishment of CSCE Parliamentary Assembly].

83. See *id.* at 1345-47.

OSCE human rights commitments developed. Though the general thrust of the expansion at established democracy and the rule of law in the Eastern Europe states, the ethnic nature of the conflicts developed a body of human rights commitments and implementation mechanisms for national minority groups. Today, the national minority rights commitments of the OSCE must be viewed against a background of broad human rights commitments and a complex institutional structure.

III. NATIONAL MINORITY RIGHTS: COMMITMENTS AND IMPLEMENTATION

A. Some Preliminary Issues

From its inception, the OSCE has recognized the existence of national minorities. Principle VII of the Helsinki Final Act committed the OSCE states to respect human rights and fundamental freedoms. Principle VII stated that "[t]he participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, [and] will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms."⁸⁴

Two things are worth noting about this formulation. First of all, national minorities have access to all of the general human rights and fundamental freedoms of Principle VII. The phrase "human rights and fundamental freedoms" represents a term of art that refers to the human rights conferred by OSCE documents.⁸⁵ The national minorities provision of Principle VII makes it clear that OSCE states have an obligation to extend these general OSCE human rights to individuals belonging to national minority groups.⁸⁶ The OSCE states, however, felt strong-

84. Final Act, *supra* note 2, at 1295.

85. Final Act, *supra* note 2. "The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion." *Id.* The phrase is apparently borrowed from the Charter of the United Nations. See U.N. CHARTER art. 1, para. 3 (committing UN members to promote human rights and fundamental freedoms).

86. See Document of the Copenhagen Meeting of the Conference on the Human Dimension, 29 I.L.M. 1305, 1318 (1990) [hereinafter Copenhagen

ly enough about minorities to single them out for recognition as a special group. This set the stage for the development of a body of OSCE national minority rights commitments separate from the general human rights provisions.

Secondly, the wording of the national minority rights provision of Principle VII focuses on an individual conception of minority rights. It has been suggested that most international responses to the problem of minority rights have adopted either an individual rights focus that implicitly favors assimilation or a quasi-collective focus that stresses the promotion of a minority identity.⁸⁷ The Final Act extends the right of equality before the law to "persons belonging to such minorities." Principle VII does not confer any rights on national minorities as groups. This individual rights focus is consistent with other human rights documents adopted in the decades following WWII, including the International Covenant on Civil and Political Rights.⁸⁸

David Wippman has argued that in the last decade, international human rights documents have undergone a partial movement towards collective rights for minority groups, with the OSCE leading the way.⁸⁹ A perusal of the provisions of recent OSCE documents shows a distinct shift towards a quasi-collective focus after the end of the Cold War.⁹⁰ Part III.C. will address collective rights in more detail.

Meeting] (stating that "Persons belonging to national minorities have the right to exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in full equality before the laws").

87. See David Wippman, *The Evolution and Implementation of Minority Rights*, 66 FORDHAM L. REV. 597, 598 (1997).

88. See *id.* at 602-04. Wippman argues that the individual rights focus used in human rights documents after WWII was a reaction to the perceived failure of a quasi-collective approach used by the League of Nations after WWI. See *id.* In some sense, the current trend towards collective rights is a swing back towards the post-WWI approach. See *id.* at 599-601.

89. See *id.* at 604-09.

90. See Buergenthal, *supra* note 43, at 359 (noting "very significant shift" in emphasis from individual to collective rights in Copenhagen Document).

B. What is a National Minority Group?

Before beginning the process of identifying national minority rights, it would be useful to have a definition of national minority groups. The Final Act, however, does not define national minority groups, nor in fact does the concluding document of any OSCE meeting. This lack of definition is not as surprising as it seems. Wippman and others have noted that because of the controversy surrounding the issue of minority rights, few contemporary international instruments include a definition.⁹¹ Inferences about the composition of national minority groups, however, can be drawn from OSCE documents. The most important clue comes from the 1991 Geneva Meeting of Experts on National Minorities, which concluded that "not all ethnic, cultural, linguistic, or religious differences necessarily lead to the creation of national minorities."⁹² This statement frames the discussion of national minority groups. It assumes that national minority groups will primarily be defined by ethnic, cultural, linguistic or religious differences, though the possession of such differences will not automatically lead to standing as a national minority group.

The 1991 Moscow Conference on the Human Dimension provides a second clue to the definition of national minority groups. The Moscow Conference draws a distinction between the rights of national minority groups and the rights of migrant workers.⁹³ By drawing a distinction be-

91. See Wippman, *supra* note 87, at 597; see also Jelena Pejic, *Minority Rights in International Law*, 19 HUM. RTS. Q. 666, 667 (1997) (stating that "almost a century after the creation of the first minority rights regime there is still no definition of what is a minority under international law"). Pejic's article canvasses international law to show both the lack of a definition, and the inherent difficulties in drafting an effective definition. See *id.* at 667-75.

92. Report of the CSCE Meeting of Experts on National Minorities, July 19, 1991, 30 I.L.M. 1692, 1696 (1991) [hereinafter Report on National Minorities]. Normally, a report from a meeting of experts would not create OSCE commitments because it would not be a document formed out of the consensus of the permanent representatives of the OSCE states. See *id.* The Moscow Meeting of the Conference on the Human Dimension, however, produced a consensus document which specifically adopts the provisions of the 1991 Meeting of Experts. See Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Fact-Finding, Oct. 3, 1991, 30 I.L.M. 1670, 1686 [hereinafter Document of Moscow Meeting].

93. See Document of Moscow Meeting, *supra* note 92, at 1686 ("The par-

tween migrant workers lawfully residing in a participating state and national minority groups, the Moscow Conference implies that citizenship (or at least eligibility to become a citizen) constitutes a requirement of a national minority group.⁹⁴ Populations of migrant workers are not national minority groups⁹⁵ and are not entitled to special protections provided to national minorities.

These two inferences do not greatly narrow the definition, but another source of definition exists. The High Commissioner on National Minorities [HCNM] works with national minority groups on a day-to-day basis and has noted the lack of a definition of national minorities.⁹⁶ The High Commissioner has argued that the "existence of a minority is a question of fact" but nevertheless suggested a loose definition: "First of all, a minority is a group with linguistic, ethnic, or cultural characteristics which distinguish it from the majority. Secondly, a minority is a group which usually not only seeks to maintain its identity but also tries to give stronger expression to that identity."⁹⁷ The High Commissioner suggests that a distinct linguistic, ethnic, or cultural identity is crucial but that the decision in any particular situation is fact specific. Of course, the High Commissioner does not have the authority to bind the OSCE states to a definition of national minority groups. Nonetheless, as the office of the HCNM has

ticipating States recognize the need to ensure that the rights of migrant workers and their families lawfully residing in the participating States are respected").

94. See Copenhagen Meeting, *supra* note 86, at 1318, para. 31. The reference to "the other citizens" implies a requirement of citizenship. Cf. Wippman, *supra* note 87, at n.3 (quoting definition of minorities which includes nationality as essential characteristic).

On the other hand, the High Commissioner's willingness to get involved on behalf of the Russian community living in Estonia suggests that eligibility to become a citizen may be grounds for status as a national minority group. See BASIC DOCUMENTS 1993-1995, *supra* note 69, at 670-81 (cautioning Estonian government against adopting strict citizenship requirements that might exclude large numbers of Russian community).

95. See BASIC DOCUMENTS 1993-1995, *supra* note 69, at 650-56. In response to Albanian concerns about the fate of an Albanian minority in Greece, the HCNM reported that Greece took the position that though Albanians worked in Greece as migrant workers, the Greek Government did not consider an Albanian minority to exist in Greece. See *id.* at 650.

96. See *Factsheet of the High Commissioner on National Minorities* (last visited Nov. 27, 1998) <<http://www.osce.org/inst/hcnm/fsheet/factsh.html>> (quoting from a speech of the HCNM).

97. See *id.*

the most contact with national minority issues of any OSCE institution, the High Commissioner's definition has considerable persuasive value.

Despite the lack of a definition of national minority groups in authoritative OSCE documents, it is certainly possible to propose a broad definition for national minority groups drawn from OSCE sources. Accordingly, national minorities are groups of individuals, within an OSCE state, who are citizens or who are eligible to become citizens and retain a distinct ethnic, linguistic, religious, or cultural identity.⁹⁸ This is not a bright line definition, and any decision whether or not to consider a group a national minority will depend on the individual facts and quite possibly on the political situation.

C. National Minority Rights

As noted in Part III.A., the Final Act's treatment of national minorities adopted an individual rights focus, but since the end of the Cold War, there has been an increasing shift to collective rights. Today, these two different approaches exist simultaneously in OSCE documents. In fact, national minority rights can be roughly categorized into rights exercisable by the individual and duties towards minority groups imposed upon OSCE states. Individual rights will be discussed first.

1. Individual Rights

The individual rights tradition in the OSCE stems from Principle VII of the Final Act, which guaranteed equality before the law to members of national minority groups as well as the protection of all the general human rights provisions of the OSCE. Post Cold War documents have further elaborated this, particularly the Copenhagen Docu-

98. See Charter of Paris, *supra* note 25, at 199 (focusing on protection and promotion of "ethnic, cultural, linguistic and religious identity of national minorities"); Document of the Copenhagen Meeting *supra* note 86, at 1319 (creating duty to protect and promote ethnic, cultural, linguistic, and religious identity of national minorities). Cf. Wippman, *supra* note 87, at 597 (accepting that key to national minority status is identity which "set the group apart" from mainstream of society).

ment. OSCE states accept that “[t]o belong to a national minority is a matter of a person’s individual choice.”⁹⁹ Further, individuals “belonging to national minorities have the right to freely express, preserve and develop their ethnic, cultural, linguistic or religious identity.”¹⁰⁰

These general statements on the right of individuals to define their own membership in a minority and preserve their distinct identity are fleshed out with a series of more specific rights. In particular, individuals have the right to: speak their mother tongue in public or private;¹⁰¹ establish and maintain their own educational, religious and cultural organizations;¹⁰² establish and maintain contact with citizens of other states who share their cultural, religious, linguistic or ethnic identity;¹⁰³ and profess and practice their religion, including a right of access to appropriate religious objects or materials.¹⁰⁴ In case these rights are insufficient to guarantee equality, OSCE states also have undertaken to “adopt, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens.”¹⁰⁵ The result is that members of national minority groups possess all the general human rights available in the OSCE, plus a number of additional individual rights designed to aid them in preserving and developing their minority identity.

2. *Collective Rights*

The Copenhagen Document also adopted significant collective rights. These collective rights take the form of affirmative duties placed upon the OSCE states. The most important duty reads: “The participating States will protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions

99. Copenhagen Meeting, *supra* note 86, 1318, para. 32.

100. Copenhagen Meeting, *supra* note 86, at 1318, para. 12.

101. Copenhagen Meeting, *supra* note 86, at 1318, para. 32.1.

102. See Copenhagen Meeting, *supra* note 86, at 1318, para. 32.2.

103. See Copenhagen Meeting, *supra* note 86, at 1318, para. 32.4.

104. See Copenhagen Meeting, *supra* note 86, at 1318, para. 32.3.

105. Copenhagen Meeting, *supra* note 86, at 1318, para. 31.

for the promotion of that identity.”¹⁰⁶ This relates to the right of the individual to preserve and develop his or her own minority identity but goes much farther. *States remain under an affirmative duty to protect and promote the identity of national minority groups as a whole.*

The other collective rights adopted in the Copenhagen Document elaborate on the duty to protect and promote the identity of national minority groups. OSCE states are under an obligation to provide opportunities for minority groups to be taught in their mother tongue.¹⁰⁷ OSCE states must respect the “effective participation in public affairs” of national minorities.¹⁰⁸ The OSCE “unequivocally condemns . . . racial and ethnic hatred, anti-semitism, xenophobia and discrimination . . . as well as persecution on religious and ideological grounds.”¹⁰⁹ OSCE states also have a duty to “take effective measures, including the adoption . . . of such laws as may be necessary” to prevent acts that incite violence against national minorities as well as protect national minorities from such acts.¹¹⁰ In relation to the above, OSCE states also recognize the right of interested “groups” (presumably including organizations formed to advance the cause of national minorities) to initiate and support complaints about acts of discrimination on behalf of individuals.¹¹¹ States are also committed to providing “effective remedies” for such acts of discrimination.¹¹² Finally, the Copenhagen Document suggests¹¹³

106. Copenhagen Meeting, *supra* note 86, at 1319, para. 33.

107. See Copenhagen Meeting, *supra* note 86, at 1319, para. 34.

108. Copenhagen Meeting, *supra* note 86, at para. 35.

109. See Copenhagen Meeting, *supra* note 86, at 1320, para. 40.

110. Copenhagen Meeting, *supra* note 98, at 1320, para. 40.1, 40.2; see also Helsinki Summit, *supra* note 59, at 1411. At the Helsinki Summit, the OSCE made it clear that OSCE states “will refrain from resettling and condemn all attempts, by the threat or use of force, to resettle persons with the aim of changing the ethnic composition of areas within their territories.” *Id.*

111. Copenhagen Meeting, *supra* note 86, at 1320, para. 40.5.

112. Copenhagen Meeting, *supra* note 86; see also Report of National Minorities, *supra* note 92, at 1697. The concept of “effective remedies” was further developed by the Geneva Meeting of Experts on National Minorities which calls for “a broad array of administrative and judicial remedies” to be made available to individuals who have experienced discrimination on the basis of belonging to a national minority. *Id.* The document stresses the need for protection from discrimination in respect of employment, housing and education. See *id.*

113. The choice of the word “suggests” is important. While this is potentially the most far-reaching collective provision of the Copenhagen Document, it

that the duty of promoting and protecting minority identity would be facilitated by the creation of "appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities."¹¹⁴

These rights are not generally exercisable by the individual but represent collective rights accruing to national minority groups, which OSCE states are obliged to fulfill. The most important minority rights commitment is that participating states are under an affirmative obligation to promote and protect the identity of national minority groups. Since the Copenhagen Document, the OSCE has produced few new national minority rights, although it has reaffirmed the commitment to the human rights of the previous documents.¹¹⁵ While substantive rights have not been materially advanced since the Copenhagen Document, more recent documents have developed new institutions and mechanisms for the implementation of national minority rights.

D. Implementation Mechanisms

National minority rights comprise a component of overall OSCE human rights, the so-called "human dimension" of the OSCE. As a consequence, all human dimension implementation processes remain available on issues concerning a national minority group. General human dimension implementation processes will be discussed first. In addition, the OSCE has a particular office devoted to national minorities, the High Commissioner on National Minorities [HCNM]. Consequently, the operation and powers of the HCNM will be discussed as well.

1. General Human Dimension Implementation Mechanisms

Generally, a rule of consensus characterizes the OSCE. The creation of new OSCE commitments requires consen-

is carefully phrased as a suggestion rather than a duty. See Pejic, *supra* note 91, at 680-81.

114. Copenhagen Meeting, *supra* note 86, at 1319, para. 35.

115. See Helsinki Summit, *supra* note 59, at 1411.

sus, and most implementation decisions require consensus as well. The rule of consensus, however, has been a stumbling block to implementation of OSCE human rights commitments. The dramatic growth of new human rights commitments, and the pressing need to address the conflicts that have plagued Eastern Europe since the end of the Cold War, have led to the creation of new mechanisms to implement those rights, mechanisms that deviate from the rule of consensus.

The Berlin Mechanism constituted the first significant deviation from the rule of consensus.¹¹⁶ If a participating state feels that an emergency situation¹¹⁷ is developing in another participating state, it may request clarification of the matter from that state.¹¹⁸ If the requesting state is unsatisfied with the clarification, it may then request an emergency meeting of the Senior Council. Once twelve states have seconded the request, an emergency meeting will be held.¹¹⁹ The deviation from consensus, however, only applies to the calling of the emergency meeting. Once the meeting is convened, the normal rule of consensus applies again.¹²⁰ This mechanism allows the calling of emergency meetings of the Senior Council in order to discuss the violation of OSCE human rights provisions, including national minority rights. While any concrete action requires consensus, the Berlin Mechanism provides a forum for the frank discussion of violations.

The Moscow Mechanism applies only to issues relating to OSCE's human rights commitments.¹²¹ Any state may invite a mission of experts to gather information on a human rights issue and to "use its good offices and media-

116. See Berlin Meeting of the CSCE Council, June 19-20, 1991, Annex 2, 30 I.L.M. 1348, 1353-55 [hereinafter Berlin Meeting].

117. See *id.* at 1353. An emergency situation is characterized as potentially arising from the violation of the Principles of the Final Act. See *id.* Since Principle VII covers human rights, a violation of OSCE human rights provisions can constitute an emergency situation that would justify the invocation of the Berlin Mechanism. See *id.*

118. See *id.*

119. See *id.* at 1354.

120. See *id.* at 1355. Presumably the consensus rule at the emergency meeting would be subject to Consensus Minus One, an implementation mechanism developed later in time than the Berlin Mechanism. See *infra* notes 126-28 and accompanying text.

121. See Document of Moscow Meeting, *supra* note 92, at 1674-76.

tion services.”¹²² If a state, however, requests that another state invite a mission of experts and that request is declined, or a state feels that a question has not been resolved by a mission of experts, then it may request the establishment of a mission of rapporteurs.¹²³ If five other OSCE states concur, then the rapporteurs are sent, and the recipient state becomes bound to accept them and provide the access they need to carry out their mission.¹²⁴ The rapporteurs have the power to establish the facts and may give advice on possible solutions.¹²⁵ The Moscow Mechanism creates a compulsory fact-finding capacity for the OSCE on human rights issues. The mechanism has no power to compel a solution, but it does provide for an investigation and the presentation of the results to the Senior Council of the OSCE for frank discussion.

Consensus Minus One allows the Ministerial or Senior Council to take “political steps” or make “political declarations” in cases of “clear, gross, and uncorrected” violations of OSCE commitments without the consent of the state concerned.¹²⁶ Consensus Minus One was used in 1992 against Yugoslavia (Serbia and Montenegro), when the Senior Council condemned Yugoslavia for its part in the Bosnian crisis (a political declaration) and organized Sanction Assistance Missions to co-ordinate OSCE states’ compliance with UN sanctions against Yugoslavia (a political step).¹²⁷ No power exists to compel compliance by the offending state, but the ability to take political steps and make political declarations gives the OSCE the authority to condemn violations by OSCE states and co-ordinate a response. The force of international condemnation should not be underestimated.¹²⁸

122. Document of Moscow Meeting, *supra* note 92, at 1674.

123. See Document of Moscow Meeting, *supra* note 92, at 1675.

124. See Document of Moscow Meeting, *supra* note 92, at 1675.

125. See Document of Moscow Meeting, *supra* note 92, at 1676.

126. Prague Meeting, *supra* note 76, at 989-90.

127. See McGoldrick, *supra* note 31, at 413-14.

128. See Wippman, *supra* note 87, at 616.

2. *The High Commissioner on National Minorities*

The post of High Commissioner on National Minorities [HCNM] is focused on the situation of national minorities.¹²⁹ The mandate of the HCNM is to provide “early warning” and “early action” with regard to “tensions involving national minority issues” that have the “potential to develop into a conflict . . . affecting peace, stability, or relations between participating States”¹³⁰ The High Commissioner intervenes at the stage of state-minority tensions. Once actual conflict breaks out the role of the High Commissioner is diminished as the OSCE’s other bodies take over.¹³¹ As the language of the mandate suggests, the High Commissioner does not represent an express advocate of national minority rights; rather the post is designed as “an instrument of conflict prevention.”¹³² Nevertheless, in order to provide early warning and early action, the High Commissioner deals directly and primarily with national minority issues, which perforce include the implementation of national minority rights.¹³³

The High Commissioner is empowered to collect and receive information on national minority issues from any source¹³⁴ except organizations that practice or condone terrorism.¹³⁵ When combined with the High Commissioner’s independence from OSCE states,¹³⁶ this gives the HCNM broad investigative ability. In addition,

129. See generally Maria Amor Martin Estebanez, *The High Commissioner on National Minorities: Development of the Mandate*, in THE OSCE IN THE MAINTENANCE OF PEACE AND SECURITY 123 (Michael Bothe et al. eds., 1997) (describing post of High Commissioner).

130. Helsinki Summit, *supra* note 59, at 1396.

131. See Estebanez, *supra* note 129, at 127.

132. Helsinki Summit, *supra* note 59, at 1396; See also Estebanez, *supra* note 129, at 125-26, 127 (characterizing requirement that tensions between OSCE states may develop into potential conflicts as “main substantive delimitation” on post of High Commissioner).

133. See Helsinki Summit, *supra* note 59, at 1396 (stating High Commissioner deals with rights of groups, not individuals); But see Estebanez, *supra* note 129, at 129 (discussing Commissioner’s investigations against individuals where violations affected group as whole).

134. See Helsinki Summit, *supra* note 59, at 1397. The media and non-governmental organizations are listed as non-exclusive examples of information sources. See *id.*

135. See Helsinki Summit, *supra* note 59, at 1398.

136. See Helsinki Summit, *supra* note 59, at 1396.

the Commissioner has the power to travel within OSCE states in order to communicate first-hand with parties to the situation.¹³⁷ The term "parties to the situation" includes OSCE states but also includes "religious and other groups of national minorities directly concerned."¹³⁸ Thus, the High Commissioner has a mandate to consult directly with national minority groups.¹³⁹ Finally, the HCNM may employ experts to assist on matters that require "specialized investigation."¹⁴⁰ Consequently, the HCNM has broad powers, including collecting and receiving information, traveling freely to consult first-hand with national minority groups, and utilizing experts. In addition, the High Commissioner has adopted the practice of exchanging correspondence with states experiencing visits. These letters "permit the methodical spelling out of the particular tensions observed . . . the suggestion of possible solutions and the obtaining of formal State replies to these recommendations."¹⁴¹ By putting the Commissioner's concerns into writing and making the letters public, the correspondence may also mobilize political pressure.¹⁴²

If the HCNM concludes, after investigation of a situation, that there exists a *prima facie* risk of potential conflict, then the Commissioner can issue an early warning.¹⁴³ This early warning automatically becomes an agenda item for the next meeting of the Senior Council. The document creating the post of High Commissioner

137. See Helsinki Summit, *supra* note 59, at 1397. The ability to travel is subject to some procedural requirements, mainly involving consultation with the participating state to which the High Commissioner intends to travel. See *id.* at 1398. But, the HCNM's ability to travel is not subject to the consent of the state to which the Commissioner intends to travel. See *id.* Indeed, the receiving state has a duty to assure the "free travel and communication of the High Commissioner." See *id.*

138. See Helsinki Summit, *supra* note 59, at 1397.

139. See Estebanez, *supra* note 129, at 145. As a practical matter, the HCNM usually engages in direct contact with state authorities at the national and regional levels, non-governmental organizations (including bodies organized by and for national minority groups), and individuals. See *id.*

140. Helsinki Summit, *supra* note 59, at 1398.

141. Estebanez, *supra* note 129, at 146; see also *supra* note 95 and accompanying text; see *infra* note 225 and accompanying text (describing some of this correspondence in more detail).

142. See Wippman, *supra* note 87, at 616 (noting normative force of public scrutiny).

143. See Helsinki Summit, *supra* note 59, at 1397.

suggests that an early warning may constitute grounds for the initiation of the Berlin Mechanism.¹⁴⁴ Even if no early warning is issued, the High Commissioner will provide a report to the Chairman-in-Office, which will be forwarded to the Senior Council.¹⁴⁵ Consensus Minus One could then be used, in response to a report by the HCNM, to condemn a state's violation of national minority rights over that state's objection. The activities and practical impact of the High Commissioner will be examined in Part V.

IV. THE LEGAL STATUS OF OSCE COMMITMENTS

A cursory reading of the text of the Helsinki Final Act probably creates the impression that it constitutes a treaty.¹⁴⁶ There is good reason, however, to believe that the signatory states of the Final Act, particularly the Western states, did not intend it to be legally binding.¹⁴⁷ As a consequence of the apparent contradiction, international lawyers have been pondering the legal status of OSCE commitments since the ink dried on the Final Act.

The beginning of any inquiry into the legal status of OSCE commitments requires a discussion of the sources of

144. See Helsinki Summit, *supra* note 59; see also *supra* notes 116-20 and accompanying text (describing Berlin Mechanism).

145. See Helsinki Summit, *supra* note 59.

146. See van Dijk, *supra* note 4, at 106. This impression would be even stronger after a reading of a concluding document from one of the more recent consensus meetings. See *id.* While the Final Act contains both discretionary and mandatory language, the language in more recent documents is mostly indicative of mandatory rights and duties. See *id.*

147. See, e.g., Michael Bothe, *Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?*, 11 NETH. Y.B. INT'L LAW 65, 65 (1980) ("In his final speech at the Helsinki Conference (CSCE) in 1975, Prime Minister Wilson called the Final Act of the Conference a 'moral commitment,' not an international treaty"); Buerghenthal, *supra* note 43, at 375 (noting most states at original Helsinki conference did not intend to conclude treaty); Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 88 AM. J. INT'L L. 515, 517 (1994) (indicating United States did not consider Helsinki Final Act to be legally binding); Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296, 296 (1977) (stating that "Statements by delegates during the Conference, notably by the United States and other Western delegations, expressed their understanding that the Final Act did not involve a 'legal' commitment and was not intended to be binding upon the signatory Powers."); van Dijk, *supra* note 4, at 106 & n.48 (collecting citations to speeches indicating Final Act was not intended to be legally binding).

international law. The Statute of the International Court of Justice sets out the sources of international law in Article 38:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations;¹⁴⁸

The two principle sources of international law, “international conventions” (i.e., treaties) and “international custom,” will be discussed below in Parts IV.A and IV.B.

A. Treaty Obligations

The Vienna Convention on the Law of Treaties states that a treaty represents “an international agreement concluded between States in written form and governed by international law.”¹⁴⁹ The essence of the Vienna Convention definition of treaties is that they be governed by international law.¹⁵⁰ Whether an agreement is governed by international law is a matter of the intent of the parties to the treaty.¹⁵¹ That intent can be deduced from the language and

148. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38, para. 1. Article 38, para. 1 mentions three sources of international law but the third, “general principles,” is usually superseded by the first two. *Id.* “General principles” were probably included in the Statute as a source of international law to prevent a *non liquet* in the absence of an apposite custom or treaty. *See id.* *See* SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996* § III.376, at 1601-02 (3d. ed. 1997). While the position of “general principles” in Article 38 indicates that they are not formally inferior to customs or treaties, when present, customs and treaties will usually prevail over general principles because *lex specialis derogat generali*. *See id.* at 1605-1606. Consequently, the category of “general principles” has little legal vitality and will not be separately discussed. *See id.*

149. Vienna Convention on the Law of Treaties, art. 2(1)(a), 1155 U.N.T.S. 331, 333 [hereinafter Vienna Convention].

150. *See id.* at art. 3 (noting above requirements of Convention do not affect legal validity of non-conforming agreements). The requirements that the agreement be between states and in written form are not essential parts of the definition of a treaty; *see also* Nash, *supra* note 147, at 515; van Dijk, *supra* note 4, at 107.

151. *See* Nash, *supra* note 147, at 515; Schachter, *supra* note 147, at 296-97; van Dijk, *supra* note 4, at 107. *See also* Aegean Sea Continental Shelf

context of the document, from the circumstances of its conclusion, or from the explanations or statements made by the signatories.¹⁵² Unless essentially the same statement was made by all the parties at signature, there may be doubt that all the signatories possessed the identical intent.¹⁵³ Inferring intent from the language of the document remains preferable to inferring intent from the statements of some or even a majority of states at signing.

Plenty of evidence exists in the language of the Helsinki Final Act to infer that the document was not intended to be governed by international law. Three provisions in particular are important. Immediately following the Guiding Principles of the Final Act is the following statement:

The participating States, paying due regard to the principles above and, in particular, to the first sentence of the tenth principle, "Fulfillment in good faith of obligations under international law," note that the present Declaration does not affect their rights and obligations, nor the corresponding treaties and other agreements and arrangements.¹⁵⁴

This statement claims that the Final Act does not affect the participating states' obligations under international law.¹⁵⁵ Since the Final Act contains new commitments, this would be true if the Act were not intended to be legally binding.¹⁵⁶

(Greece v. Turkey), 1978 I.C.J. 3, 44 (Dec. 19). Although the Court only refers to intent once, it is clear from the Court's inquiry, that it is evaluating the intent of the parties. *See id.* at 44, para. 107.

152. *See* Nash, *supra* note 147, at 515; Schachter, *supra* note 147, at 297; *See also Aegean Sea Continental Shelf*, *supra* note 151, at 43. The Court addresses the text of the alleged agreement only briefly, perhaps because the text was quite ambiguous. *See id.* at 43 para. 105. The Court devotes considerable space to a detailed evaluation of the context of the alleged agreement. *See id.* at 41-43, paras. 100-04. Interestingly, the Court also touched briefly on the subsequent practice of the parties as an indication of their respective intents. *See id.* at 43-44, para. 106.

153. *See supra* note 147 and accompanying text. For instance, most of the statements of intent cited in the OSCE literature come from Western states. *See id.* Were one to rely solely on statements of intent, the position of the Eastern European states might be unclear. *See id.*

154. Final Act, *supra* note 2, at 1296.

155. *See* Buergenthal, *supra* note 43, at 376.

156. *See* van Dijk, *supra* note 4, at 108.

The second important provision relates to Article 102 of the Charter of the United Nations. Article 102 of the Charter places an affirmative obligation on all members of the UN to register every treaty and international agreement with the UN Secretariat as soon as it comes into force.¹⁵⁷ The Final Act requests that the government of Finland transmit the text of the Act to the UN Secretariat for informational purposes but specifically states that the Act “is not eligible for registration under Article 102 of the Charter.”¹⁵⁸ Again, this implies that the Final Act was not intended to be a treaty or international agreement.¹⁵⁹

The final significant provision occurs at the end, where it is stated that the participating states are “mindful of the high *political* significance which they attach to the results of the Conference.”¹⁶⁰ In light of the other provisions of the Final Act, the choice of the word “political” to qualify the nature of the results of the Act cannot be dismissed as irrelevant. It represents a deliberate choice designed to draw a distinction between the political nature of the Act and the legal nature of other international agreements.

The language of the Helsinki Final Act indicates that it was not intended to be governed by international law. Consequently, the Helsinki Final Act was not a treaty or any other form of legally binding international agreement.¹⁶¹ Instead, it represents an example of a class of non-binding agreements made between states and often referred to as “gentleman’s agreements.”¹⁶²

For many of the same reasons that suggest the Final Act was not a treaty, close examination of subsequent OSCE documents suggest that they were not intended to be gov-

157. U.N. CHARTER art. 102, para. 1.

158. Final Act, *supra* note 2, at 1325.

159. See Buerghenthal, *supra* note 43, at 376; Schachter, *supra* note 147, at 298 (arguing that failure to register document under Article 102 is evidence that document was not intended to be legally binding); van Dijk, *supra* note 4, at 108 (concluding that failure to register document under Article 102, while not decisive, is evidence of intent not to create legal obligations).

160. Final Act, *supra* note 52, at 1325 (emphasis added).

161. See van Dijk, *supra* note 4, at 109.

162. See Bothe, *supra* note 147, at 70-75 (providing brief history of non-legal interstate agreements); Nash, *supra* note 147, at 515 (providing brief history of gentlemen’s agreements); Schachter, *supra* note 147, at 299 (describing “gentlemen’s agreements” as precise and definite agreements which are not legally binding but which nevertheless presume compliance).

erned by international law either. Most of these documents contain language with respect to Article 102 of the United Nations Charter that is very similar to the language in the Final Act.¹⁶³ Several of them also seem to embrace the political/legal distinction by stressing the political significance of the commitments.¹⁶⁴ This has led to the conclusion that OSCE documents are not treaties governed by international law.¹⁶⁵

B. Customary International Law

OSCE commitments, however, may have become international law, even though the documents which express them were not intended at their time of signature to be legally binding, because there exists a second method by which legally binding international norms can be formed. The commitments in OSCE documents could have become customary international law.¹⁶⁶ Custom is usually thought of as universal (i.e., binding on every state). Regional or even local customs, however, are possible.¹⁶⁷ If there is a customary international law generated by OSCE documents, it applies only to the OSCE states.

The requirements of custom stem from Article 38(1) of the Statute of the International Court of Justice,¹⁶⁸ which

163. See, e.g., Budapest Summit Declaration, *supra* note 1, at 770; Helsinki Summit, *supra* note 59, at 1393; Charter of Paris, *supra* note 25, at 208.

164. See, e.g., Guidelines on an OSCE Document-Charter on European Security, 37 I.L.M. 693, 695 (1998) (stressing that any comprehensive OSCE document on European security should be "politically binding"); Charter of Paris, *supra* note 25, at 208 (stressing the "high political significance" of the Charter of Paris); Concluding Document of the Vienna Meeting 1986, 28 I.L.M. 527, 532 (1989) (noting that "respect for and full application of these principles as well as strict compliance with all CSCE commitments deriving from them, are of great political importance") (emphasis added).

165. See Buerghenthal, *supra* note 43, at 375-78; Duncan B. Hollis, Note, *Accountability in Chechnya - Addressing Internal Matters with Legal and Political Norms*, 36 B.C. L. REV. 793, 836-37 (1995); Miriam Shapiro, *Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation*, 89 AM. J. INT'L L. 631, 633-34 (1995); Wippman, *supra* note 87, at 615.

166. See Bothe, *supra* note 147, at 87 (suggesting that non-legal documents can form basis for customary international law).

167. See *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 276-77 (Nov. 20) (recognizing possibility of, but ultimately rejecting, existence of regional Latin-American custom).

168. See *id.* at 266, 276-77 (Nov. 20) (noting that elements of custom follow from language of Article 38).

describes custom as a “general practice accepted as law.”¹⁶⁹ Custom, consequently, consists of a general state practice, plus a belief that the practice is a legal right or is compelled by law (often referred to as *opinio juris*).¹⁷⁰ Different ICJ cases have formulated the tests for the two elements in different language. Compare, for example, the idea of “constant and uniform” practice required by the ICJ in 1950¹⁷¹ to the idea of instant custom suggested in 1969¹⁷² or the loose approach the ICJ took to contradictory practice in 1986.¹⁷³ There is broad agreement, however, that custom formation requires two things:

1. A general practice among states, plus
2. A belief that the practice constitutes law (*opinio juris*).¹⁷⁴

Thus, the possibility arises that OSCE commitments have become customary international law, even though they were not intended to be legally binding at the time OSCE documents promulgated them. Evidence for this proposition may be found in OSCE documents.

1. A General Practice Amongst OSCE States

Numerous statements in OSCE documents are written in terms indicative of a general practice among OSCE states. OSCE documents often include a statement that OSCE states intend to fully implement all OSCE commitments.

169. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38, para. 1.

170. See *Asylum*, *supra* note 167, at 276; *North Sea Continental Shelf* (F.R.G. v. Den. and F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20) (holding that “[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it”); *Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 97-98 (June 27) [hereinafter *Nicaraguan Case*].

171. *Asylum*, *supra* note 167, at 276.

172. See *North Sea Continental Shelf*, *supra* note 151, at 42.

173. See *Nicaraguan Case*, *supra* note 170, at 98 (stating that “[t]he Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule”).

174. See generally MARK VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES* 29-55, paras. 34-78 (2d ed. 1997) (giving overview of modern custom formation).

The language of the concluding document of the Vienna Meeting is typical of such statements: "Accordingly, [the participating states] reaffirmed their resolve to implement fully, unilaterally, bilaterally, and multilaterally, all the provisions of the Final Act and other CSCE documents."¹⁷⁵ Stretching as they do over a period of nearly ten years,¹⁷⁶ these declarations are evidence of a general state practice consistent with OSCE principles. The most likely critique of this conclusion is that the practice has not been sufficiently uniform or of sufficient duration to constitute a general practice.

Admittedly, the implementation of OSCE human rights commitments has not been perfect or uniform. Disagreement on the implementation of human rights was a hallmark of the Cold War follow-up meetings,¹⁷⁷ and the OSCE has acknowledged that while implementation has greatly improved in recent years, there is room for further improvement.¹⁷⁸ Neither perfection nor uniformity, however, is required. The declarations are sufficient evidence of a general practice to meet the standard set out by the International Court of Justice in the *Nicaragua Case*.¹⁷⁹ In

175. See Concluding Document of the Vienna Meeting 1986, Nov. 4, 1986-Jan. 17, 1989, 28 I.L.M. 527, 531 [hereinafter Vienna Meeting]. See also Budapest Summit Declaration, *supra* note 1, at 769 (1995) (noting that "[w]e confirm the significance of the Human Dimension in all activities of the CSCE. Respect for human rights and fundamental freedoms, democracy and the rule of law is an essential component of security and co-operation in the CSCE region"); Helsinki Summit, *supra* note 59, at 1390 ("[w]e reaffirm the validity of the guiding principles and common values of the Helsinki Final Act and the Charter of Paris"); Document of Moscow Meeting, *supra* note 92, at 1672 ("The participating States renew their commitment to implement fully all the principles and provisions of the Final Act . . . and of other CSCE documents"); Charter of Paris, *supra* note 25, at 193 ("Full implementation of all CSCE commitments must form the basis for the initiatives we are now taking to enable our nations to live in accordance with their aspirations.").

176. Some rights may have been generally practiced for nearly twenty-five years. For instance, the right of access to information originated in the Final Act. But the rights most important to this paper only came into being beginning in and after 1989. Consequently, the lower figure seemed the most appropriate.

177. See *supra* notes 18, 45 and accompanying text.

178. See generally Document of Moscow Meeting, *supra* note 92, at 1672 (noting that while "the degree of compliance with the commitments contained in the relevant provisions of the CSCE documents had shown substantial improvement since the Copenhagen Meeting . . . serious threats to and violations of CSCE principles and provisions continue to exist").

179. See *Nicaraguan Case*, *supra* note 170, at 173 and accompanying text.

that case, the ICJ found a customary norm prohibiting the use of force in international relations,¹⁸⁰ despite a history of recurrent violations of that norm.¹⁸¹ If the *Nicaragua Case* is the standard by which state practice is judged, then there is almost certainly a general practice consistent with OSCE commitments.

It might be contended that the *North Sea Continental Shelf Cases*¹⁸² are a better paradigm for analyzing practice in conformity with OSCE commitments. OSCE documents represent non-legal agreements that place on paper brand new commitments between the participating states. As such, they are analogous to the equidistance principle at issue in the *North Sea Continental Shelf Cases*, which was not a direct treaty obligation of the Federal Republic of Germany and did not state a pre-existing practice on the delimitation of continental shelf boundaries. The ICJ accepted that written documents, even if they did not instantly "crystallize" a new customary norm,¹⁸³ could function as "norm-creating" provisions around which a customary rule in accordance with the document would coalesce.¹⁸⁴ This is exactly the role that OSCE documents would perform in the creation of a customary rule in accordance with OSCE human rights commitments. The ICJ went on to conclude that while a written document could accelerate the formation of a customary rule, customs formed in such an accelerated fashion would be subject to a higher standard of state practice: the "extensive and virtually uniform" standard.¹⁸⁵ It makes sense to require a higher standard of uniformity when the length of the practice is shortened because of a claim that the process of custom

180. See *Nicaraguan Case*, *supra* note 170, at 99-100 para. 188 (deducing customary norm prohibiting use of force in international relations).

181. See, e.g., Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. J. INT'L L. 1, 6-28 (1990) (chronicling massive and recurrent violations of prohibition on use of force); Thomas M. Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT'L L. 809, 810-11 (1970) (noting that by 1970 there had already been more than one hundred violations of prohibition on use of force).

182. See *North Sea Continental Shelf*, *supra* note 151, at 3.

183. See *North Sea Continental Shelf*, *supra* note 151, at 41-42 (recognizing that treaty could crystallize norm of customary international law almost instantly).

184. See *North Sea Continental Shelf*, *supra* note 151, at 41.

185. See *North Sea Continental Shelf*, *supra* note 151, at 43.

formation has been accelerated by a written formulation of the rule. The reduction in the evidentiary value of a general practice because of the limited length of that practice is offset by a more stringent requirement of uniformity.

It is here that the analogy to OSCE documents breaks down. The provision at issue in the *North Sea Continental Shelf Cases* had been around for less than one year at the time that the dispute arose between the litigants.¹⁸⁶ OSCE commitments, however, have been the subject of a general practice since at least the end of the Cold War, a period of nearly ten years. In light of the much greater length of the practice in the OSCE, it does not make sense to require the "extensive and virtually uniform" standard of the *North Sea Continental Shelf Cases*. Instead, the standard of the *Nicaragua Case* is the appropriate standard by which to evaluate OSCE practice. Under that standard, OSCE commitments constitute a general practice among OSCE states (the first element of the formation of a custom).

2. *Opinio Juris*

Opinio juris is generally defined as a state's belief that the action it is engaging in is either a legal right or required by international law.¹⁸⁷ For the OSCE, the important question is whether there is a distinction between "required" and "required by law." OSCE states accept that OSCE human rights commitments are required by participation in the organization.¹⁸⁸ OSCE states have acknowledged that human rights commitments "are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned."¹⁸⁹ In addition, most OSCE human rights

186. See *North Sea Continental Shelf*, *supra* note 151, at 43.

187. See VILLIGER, *supra* note 174, at 47-48, pars. 65-66.

188. See Bothe, *supra* note 147, at 65 (noting that language and context of Final Act indicate that states have obligation to base their conduct on provisions of Act); van Dijk, *supra* note 4, at 110, 118-19 (indicating that many heads of state at signing of Final Act felt Act created binding, if non-legal, commitments).

189. Helsinki Summit, *supra* note 59, at 1390; See also Report of National Minorities, *supra* note 92, at 1695-96 ("Issues concerning national minorities . . . are matters of legitimate concern and consequently do not constitute

commitments are phrased as mandatory as opposed to aspirational or discretionary rights.¹⁹⁰ This conclusion is strengthened by the institutionalization of the OSCE since the end of the Cold War¹⁹¹ and the growth of human rights implementation mechanisms,¹⁹² which both imply the mandatory nature of OSCE commitments.

It is also instructive to see what commitments new OSCE states have undertaken since the end of the Cold War. At the 1992 Prague Meeting of the Council, ten former Soviet states joined the OSCE.¹⁹³ All ten states submitted identical acceptances of the OSCE commitments. Their letters of accession began:

The Government of [name of the State] hereby adopts the Helsinki Final Act, the Charter of Paris for a New Europe, and all other documents of the Conference on Security and Co-operation in Europe. The Government of [name of the State] accepts in their entirety all commitments and responsibilities contained in those documents, and declares its determination to act in accordance with their provisions.¹⁹⁴

This language makes it clear that compliance with OSCE commitments is not optional but required by participation in the organization.

At the same time, the OSCE has maintained a distinction between legal and political commitments. As recently as December of 1997, the Ministerial Council made reference to the "politically binding" nature of OSCE commit-

exclusively an internal affair of the respective State"); see Document of Moscow Meeting, *supra* note 92, at 1672 (announcing that "the participating states categorically and irrevocably declare that the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned").

190. See *supra* Part III. C. All but one of the national minority rights discussed in Part III. C is phrased as a mandatory right. See *id.* The one provision that is discretionary, the creation of autonomous national minority regions, is conspicuous for its difference. See *id.*

191. See *supra* Part II. C.

192. See *supra* Part III. D.

193. See Prague Meeting, *supra* note 76, at 978. The states present included Armenia, Azerbaijan, Belarus, Kazakhstan, Kirgistan, Moldova, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. See *id.*

194. See Prague Meeting, *supra* note 76, at 985-86.

ments.¹⁹⁵ Previous OSCE documents have repeatedly stressed the political/legal distinction.¹⁹⁶ The result is that OSCE documents clearly convey a belief that OSCE commitments are "politically required by participation." If *opinio juris* is satisfied by the mandatory nature of the commitments, then OSCE commitments are customary international law. On the other hand, if a belief in the legal nature of the requirement is critical to *opinio juris*, then OSCE commitments are not customary international law.

The elements of custom formation stem from Article 38 of the Statute of the International Court of Justice. The language of Article 38, "a general practice accepted as law," suggests that the legal nature of the requirement comprises a critical component of *opinio juris*. Furthermore, language following Article 38 can be found in ICJ cases.¹⁹⁷ The treatment of the issue in ICJ caselaw, however, warrants discussion. In the *Asylum Case*, the ICJ rejected evidence of a practice amongst Latin American states because Colombia could not show that the practice resulted from a "duty incumbent on [the states] and not merely for reasons of political expediency."¹⁹⁸ In the *North Sea Continental Shelf Cases*, the ICJ, commenting on *opinio juris*, stated that: "There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."¹⁹⁹

Both of these explanations of *opinio juris* set up a dichotomy between actions performed out of a sense of legal duty, on the one hand, and actions which are performed because of political expediency, courtesy, convenience, or tradition on the other. OSCE commitments do not fit cleanly into either category. While OSCE states have referred to them as political commitments, it is clear that the

195. See Guidelines on an OSCE Document-Charter on European Security, Dec. 19, 1997, 37 I.L.M. 693, 695 (1998).

196. See *supra* note 164 and accompanying text.

197. See *North Sea Continental Shelf*, *supra* note 151, at 44 (stating that *opinio juris* is "a belief that [the practice at issue] is rendered obligatory by the existence of a rule of law requiring it") (emphasis added).

198. *Asylum*, *supra* note 167, at 277.

199. *North Sea Continental Shelf*, *supra* note 151, at 44.

commitments are understood as mandatory. They are not done because of expediency, courtesy, convenience, or tradition. If OSCE commitments must be shoehorned into one category or the other, then they look more like the commitments that are performed out of a sense of legal duty.

As if to further confuse the issue, the ICJ's decision in the *Nicaragua Case* relies on Principle II of the Helsinki Final Act as evidence of *opinio juris* for a customary prohibition on the use of force in international relations.²⁰⁰ No mention at all is made of the political/legal distinction in the Final Act. There is no doubt that some of the commitments undertaken by OSCE states are legally binding on those states for reasons unrelated to the OSCE. The language the ICJ relied on in *Nicaragua* merely restated the commitments that all the participating states were subject to as members of the United Nations.²⁰¹ Yet the ICJ was not relying on the language as a restatement of the United States' treaty commitments because the ICJ did not have jurisdiction to address the treaty obligation. The Court relied on the language as an independent embodiment of *opinio juris*. Some statements in OSCE documents have *opinio juris*, but it is unclear whether only those statements that reprise existing legal commitments have *opinio juris*.

The result is very unsatisfactory. Article 38 of the Statute of the International Court of Justice indicates that a legal duty represents a critical component of custom, as does the boilerplate language of ICJ decisions. The explanation of *opinio juris* in ICJ cases, however, focuses on a legality/expediency dichotomy. OSCE commitments do not fit comfortably into either category but are closer to the legal category. The ICJ's reliance on the Helsinki Final Act, as evidence of *opinio juris* in a customary prohibition on the use of force, further confuses matters.

It may be that if the participating states continue to maintain the artificial distinction between "politically bind-

200. See *Nicaraguan Case*, *supra* note 170, at 100, para. 189 (stating that "[a]cceptance of a text in these terms confirms the existence of an *opinio juris*.").

201. See *Nicaraguan Case*, *supra* note 170, at 100 para. 189; U.N. CHARTER art. 2, para. 4.

ing” and “legally binding” undertakings, then OSCE commitments will not become customary international law. After all, custom is the positive creation of states, and states presumably have considerable freedom to craft custom in ways that meet their needs. If OSCE states conclude that the strength and flexibility of OSCE commitments will be furthered by a distinction between political commitments and legal commitments,²⁰² then that distinction will probably be perpetuated.²⁰³

V. POLITICALLY BINDING COMMITMENTS

If OSCE commitments are not legally binding, then what are the consequences of “politically binding” commitments? To what extent is a politically binding commitment different from a legal obligation? Oscar Schachter has suggested that the primary difference is that the violation of politically binding commitments does not give rise to a claim for reparations or judicial remedies.²⁰⁴ Nevertheless, Schachter argued that politically binding commitments may still exert influence over the actions of states, both by causing specific acts by officials of a bound state to conform with such commitments and by opening covered matters to international scrutiny.²⁰⁵ Of these two effects, the latter has certainly occurred in the OSCE.²⁰⁶ The question remains

202. See BASIC DOCUMENTS 1993-1995, *supra* note 69, at xix; Shapiro, *supra* note 165, at 634-37 (arguing that some OSCE states, particularly the United States, have opposed attempted creation of legal commitments because of concerns that such attempt would damage OSCE’s “political flexibility or inclusive nature”).

203. See Buergeth, *supra* note 43, at 377-78, 378 (suggesting that recent OSCE documents have sought to prevent passage of OSCE commitments into customary international law by “reinforcing the political character of CSCE provisions”). But see Ernest S. Easterly III, *The Rule of Law and New World Order*, 22 S.U. L. REV. 161, 176-77 (1995) (arguing that “the nature of the practice evidenced by the several documents of the CSCE process, . . . and repeated affirmations of legal obligation (even when disguised as ‘political commitments’), suggest emerging norms of customary international law”). See also *supra* note 56 (suggesting that there may be tension within OSCE about legal status of OSCE commitments).

204. See Schachter, *supra* note 147, at 300. See also Bothe, *supra* note 147, at 87-88 (arguing that non-legal commitments do not give rise to judicial relief, and suggesting, in addition, that violation of non-legal commitments would not give rise to a right of reprisal).

205. See Schachter, *supra* note 147, at 303-04.

206. See Helsinki Summit, *supra* note 59, at 1390; Report of National Mi-

whether OSCE commitments have resulted in specific acts in conformity with those commitments. The evidence suggests that OSCE commitments have resulted in conforming acts.

Schachter's article appeared in 1977, before the OSCE had been around long enough for anyone to know whether its "political commitments" would influence the actions of states. Yet, the conclusion of more recent commentators is that whether one considers OSCE commitments to be legal or political, they have had a real influence on the actions of participating states.²⁰⁷ Thomas Buergenthal has described OSCE commitments as "the source of an overarching European constitutional order that sets the standard to which all national legal and political institutions in Europe must conform."²⁰⁸ While this claim is inherently difficult to substantiate, other writers have noted more concrete achievements of the OSCE.

A study of the conflict in Chechnya has suggested that the OSCE's role in the Chechen conflict "demonstrates both the normative force of its agreements as well as the utility in internal armed conflicts of its implementation mechanisms."²⁰⁹ Political pressure from OSCE states forced Russia to concede the applicability of OSCE principles to the Chechen conflict,²¹⁰ a conflict that most states recognized as an "internal" Russian matter.²¹¹ The Russian government eventually agreed to allow an OSCE mission to travel to Chechnya to observe the conflict. The mission's conclusions forced the Russian government to admit that its forces had committed grave human rights violations in Chechnya.²¹² Eventually, OSCE participation led to a permanent OSCE presence in Chechnya to monitor human rights and keep the peace.²¹³ Chechnya represents

norities, *supra* note 92, at 1695-96; Document of Moscow Meeting, *supra* note 92, at 1672.

207. See Schlager, *supra* note 24 (concluding that OSCE contributed significantly to fall of communism in Europe).

208. See Buergenthal, *supra* note 43, at 380-81.

209. See Hollis, *supra* note 165, at 842.

210. See Hollis, *supra* note 165, at 807-08.

211. See Hollis, *supra* note 165, at 805-07.

212. See Hollis, *supra* note 165, at 809-10.

213. See Hollis, *supra* note 165, at 810.

an example of a situation where the mobilization of international scrutiny affected the actions of a state.²¹⁴

While the general implementation mechanisms have achieved moderate success, some commentators have suggested that the post of High Commissioner on National Minorities constitutes the "most promising" OSCE implementation mechanism.²¹⁵ The Commissioner has garnered considerable success in directing the course of national minority policy in those OSCE states where the Commissioner has become involved.²¹⁶ Experts hope that an examination of activities of the High Commissioner,²¹⁷ in his first year of operation (1993),²¹⁸ will demonstrate the effectiveness of the position. In 1993, the High Commissioner visited Slovakia to study the situation of the Hungarian minority and Hungary to study the situation of the Slovakian minority. At his request, Hungary and Slovakia each consented to accept four visits by a team of minority rights experts over a period of two years. The team sub-

214. See Wippman, *supra* note 87, at 616 (pointing out normative power of public scrutiny).

215. See Wippman, *supra* note 87, at 617.

216. See BASIC DOCUMENTS 1993-1995, *supra* note 69, at xx-xxi. "Although the activities of the High Commissioner belong [to] the realm of silent diplomacy in most instances . . . , he has acquired a high reputation as an international institution which may be quite instrumental in defusing tensions around minority issues." *Id.* Martin Alexanderson, *The Need for a Generalised Application of the Minorities Regime in Europe*, 8 HELSINKI MONITOR, Issue 4, 1997 at 47, 52 (concluding that recommendations of HCNM have "often contributed to necessary revisions of national legislation and to establishing consultations mechanisms between minorities and the government"); Estebanez, *supra* note 129, at 158 (concluding that OSCE states have often welcomed participation of HCNM, and have been willing to accept Commissioner's recommendations); Pejic, *supra* note 91, at 683 (stating that "[T]he manner in which the office of the High Commissioner on National Minorities functions has been widely acclaimed as being on target."); Shapiro, *supra* note 165, at 633 (noting effectiveness of High Commissioner in defusing minority tensions in Baltics and Central Europe). *But see* Estebanez, *supra* note 129, at 158 (noting that some states have directly questioned role of HCNM, claiming both that Commissioner is not impartial, and that Commissioner has failed to properly appreciate states' domestic legislation).

217. See Estebanez, *supra* note 129, at 145-56 (providing general analysis of operation of post of High Commissioner).

218. See *Factsheet of the High Commissioner on National Minorities*, (last visited Nov. 27, 1998) <<http://www.osce.org/inst/hcnm/hcnm#.htm>>. The High Commissioner on National Minorities in 1993 was Mr. Max Van der Stoep of the Netherlands. *See id.* He was appointed in December of 1992 after the creation of the post, and his second and last term as High Commissioner will expire at the end of 1998. *See id.*

mitted its report, identifying the concerns of the respective national minority groups, to the High Commissioner in September of 1993.²¹⁹

The High Commissioner also visited Romania and submitted a number of recommendations to the Romanian government with respect to the Hungarian and Roma minorities.²²⁰ He visited the Former Yugoslav Republic of Macedonia to start a dialogue with the Yugoslav Macedonian government on the situation of the ethnic Albanian population.²²¹ He then traveled to Albania to hear the views of the Albanian government on the situation of ethnic Albanians in Macedonia and to address allegations of systematic discrimination and violence against ethnic Greeks in Albania. He subsequently visited Greece to discuss the situation of ethnic Greeks in Albania with the Greek government.²²²

Throughout the year, the High Commissioner made several visits to the Baltic states in response to allegations of discrimination against the sizeable Russian minorities in those countries. The High Commissioner's visits yielded no evidence of persecution, but the Commissioner submitted recommendations to the governments of Estonia and Latvia on the opening of a dialogue with national minority groups. The High Commissioner was forced to return to Estonia later in the year because of the adoption of a controversial law on the status of aliens, which would have affected much of the Russian minority. The Commissioner prepared an expert opinion for the President of Estonia on the law on the status of aliens. As a result of the advice, the Estonian Parliament amended the law.²²³

During the first year of the office's operation, the High Commissioner made extensive use of his travel and investigative powers to bring the situation of national minorities to the attention of OSCE states. The HCNM obtained the commitment of Hungary and Slovakia to a multi-year study

219. See BASIC DOCUMENTS 1993-1995, *supra* note 69, at 10-12 (reproducing annual report of secretary general).

220. See BASIC DOCUMENTS 1993-1995, *supra* note 69, at 10-12.

221. See BASIC DOCUMENTS 1993-1995, *supra* note 69, at 10-12.

222. See BASIC DOCUMENTS 1993-1995, *supra* note 69, at 10-12.

223. See BASIC DOCUMENTS 1993-1995, *supra* note 69, at 10-11.

of their national minority groups. The High Commissioner also successfully modified the national minority policy in Estonia.

Turning to the present, the High Commissioner is currently involved in situations in Albania, Croatia, Estonia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Macedonia, Romania, Slovakia and Ukraine.²²⁴ The Commissioner's involvement with Kyrgyzstan warrants closer scrutiny.²²⁵ Following a visit to Kyrgyzstan, the High Commissioner formulated a series of concrete proposals designed to bring Kyrgyzstan into compliance with its OSCE commitments.²²⁶ Most importantly, the Commissioner proposed the creation of an Executive Council within the national Assembly that would coordinate government policy aimed at compliance with OSCE commitments. Following that recommendation, the government of Kyrgyzstan agreed to the creation of such an Executive Council.²²⁷

The High Commissioner has obtained success shaping the national minority policy of OSCE states. For a number of reasons, however, the High Commissioner seems much more likely to successfully shape the direction of national minority policy in the states of Eastern Europe. First of all, the Eastern European states are more willing to embrace change on minority issues, particularly because of a desire to become members of Western European organizations like the European Union and the Council of Europe.²²⁸ Secondly, as an "instrument of conflict prevention," the Commissioner has been focused exclusively on the conflicts of Eastern Europe.²²⁹ Finally, the Western

224. See *Factsheet of the High Commissioner on National Minorities*, *supra* note 218.

225. See BASIC DOCUMENTS 1993-1995, *supra* note 69, at pages 707-15 (reproducing correspondence between High Commissioner and government of Kyrgyzstan, among others).

226. See BASIC DOCUMENTS 1993-1995, *supra* note 69, at 711-12.

227. See BASIC DOCUMENTS 1993-1995, *supra* note 69, at 715.

228. See Estebanez, *supra* note 129, at 140 (arguing that many Central and Eastern European countries are more willing to address minority issues because of their concern for international legitimacy). Estebanez notes that Eastern European states are also more likely to enact international human rights standards directly into their domestic laws and constitutions, out of a desire to achieve membership in 'Western' organizations. See *id.* at 145. See also Alexanderson, *supra* note 216, at 50-51.

229. See Alexanderson, *supra* note 216, at 52 (statute that "[U]ntil now, all of the recommendations issued by the High Commissioner have focused exclu-

democracies have been less willing than Eastern European states to accept interference.²³⁰ As a result, the HCNM is unlikely to become involved in the Western democracies.²³¹

PART VI. NATIONAL MINORITY RIGHTS IN THE UNITED STATES

A. The Diversity of Native American Culture

While it would be possible to simply begin discussing the application of OSCE national minority rights in the United States, it will be much more engaging to place that discussion in a specific context. Consequently, what follows is a discussion of the application of OSCE national minority rights to Native American tribes in the United States.

It is best to begin with some information about Native Americans. Today, there are more than five hundred federally recognized tribes in the United States, though slightly more than two hundred of those live in Alaska.²³² In addition, there are more than one hundred tribes which are no longer federally recognized.²³³ Nearly half of all Native Americans live on more than three hundred reservations, with the largest land holdings in the Southwestern United States.²³⁴ The 1990 census indicated that almost two million people in the United States consider themselves to be Native American.²³⁵ The largest tribes, like the Cherokee and Navajo, have populations in excess of one hundred thousand, while more than one hundred tribes have populations under one thousand.²³⁶ With more than

sively on problems concerning national minorities in Central and Eastern Europe").

230. See Estebanez, *supra* note 129, at 140 (suggesting that 'Western democracies' use their leading position in OSCE to avoid addressing national minority issues). See also Alexanderson, *supra* note 216, at 51 (noting that "few of the Western states have taken significant recent measures to protect and promote the interests of minorities").

231. See Alexanderson, *supra* note 216, at 52.

232. See DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 8 (3d ed. 1993).

233. See *id.* at 12.

234. See *id.* at 9, 15 (summarizing Table of Indian Land Holdings).

235. See *id.* at 13.

236. See *id.* at 12-13 (referring to Table).

five hundred tribes living all across the country in groups as small as a few hundred members to as large as one hundred thousand, one can begin to understand the diversity of Native Americans. Tribes live in the deserts of the Southwest, the plains of the Midwest, the forests of the Northwest, and the northern reaches of Alaska. Furthermore, they have adapted their cultures to their environments.

Native American tribes do not represent parts of a monolithic whole. While tribes may share characteristics, in the aggregate, Native American tribes show great diversity in culture, religion, and language. Entire sections of modern libraries are filled with books describing and comparing the cultures of Native Americans.²³⁷ There even exists an academic journal, the *American Indian Culture and Research Journal*, devoted to the study of Native American cultures.²³⁸ In addition to diverse cultures,²³⁹ Native Americans speak more than one hundred separate languages²⁴⁰ and possess varied religious beliefs.²⁴¹ There is simply not enough space here to describe the variety of Native American culture, language, or religion. It must be enough to simply note that such variety exists and that it sets Native Americans apart from the dominant cultural influences in the United States.

B. Establishing A Violation

Many difficulties for Native Americans stem from the US-Mexican and US-Canadian borders. Both borders are political creations that do not correspond to the historical boundaries of native territories. As a result, many tribes

237. See generally DUANE CHAMPAGNE, *NATIVE AMERICANS: PORTRAIT OF THE PEOPLES* (1994) (presenting comparative survey of Native American history, culture, language, and religion).

238. See *id.* at 748-50 (listing academic journals devoted to Native American issues).

239. See *id.* at 55-396 (comparing Native American cultures by geographic region).

240. See *id.* at 397. Originally there may have been more than three hundred native languages, but centuries of contact with European and American societies have resulted in the loss of many. See *id.* at 397.

241. See *id.* at 441-523 (giving overview of some of basic similarities and differences amongst Native American religions).

were divided²⁴² and are forced to deal with the border as part of their daily lives. Unfortunately, the modern border regimes place numerous restrictions on border tribes and threaten their cultural survival.²⁴³

For instance, the Tohono O'odham have lands in both the United States and Mexico separated only by the border.²⁴⁴ As part of their religion, economy and culture, the Tohono O'odham practice a migratory lifestyle. But many Tohono O'odham have difficulty crossing the border because they do not possess the documentation required by US border officials.²⁴⁵ The Tohono O'odham believe that US immigration laws restrict their ability to travel to sacred sites, teach their children nomadic ways, and maintain their language.²⁴⁶ In addition, U.S. customs officials often confiscate articles such as feathers, pine leaves, and sweet grass at the border, which are essential to the religion and culture of the Tohono O'odham.²⁴⁷ These border-related restrictions inhibit the preservation of the Tohono O'odham's traditional religion and culture.

Nor are the Tohono O'odham alone in their plight. Native Americans on the U.S.-Canadian border face similar difficulties. The American Blackfeet and the Canadian Bloods are related tribes separated by the border.²⁴⁸ Tribal gatherings between the two groups form the center of tribal cultural and religious life as well as provide forums to trade raw materials, traditional handmade goods, and medicine bundles.²⁴⁹ Customs laws, however, forbid the

242. See Sharon O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 FORDHAM L. REV. 315 (1984).

243. See Megan S. Austin, Note, *A Culture Divided by the United States-Mexico Border: The Tohono O'odham Claim for Border Crossing Rights*, 8 ARIZ. J. INT'L & COMP. L. 97 (1991) (suggesting that "[c]urrent restrictions on [border crossing] deny the Tohono O'odham fundamental human rights and threaten the continued existence of their culture."); O'Brien, *supra* note 242, at 315. Stating that "[t]his border is an arbitrary barrier to their sovereignty and a sunderer of their political institutions, tribal membership and even family cohesion. It thus seriously impedes tribal political, economic, and social development." *Id.*

244. See Austin, *supra* note 243, at 101.

245. See Austin, *supra* note 242, at 101.

246. See Austin, *supra* note 243, at 101, n.19.

247. See Austin, *supra* note 243, at 102.

248. See O'Brien, *supra* note 242, at 322.

249. See O'Brien, *supra* note 242, at 322.

import or export of certain traditional plants and animals. In addition, the searching of some religious objects (like medicine bundles) destroys their religious significance.²⁵⁰ Finally, customs duties impair the practice of traditional skills such as the production of craft items. As the items themselves are often made and sold across the border, two sets of customs duties may be due, one on the importation of raw materials and another if the finished product is sold across the border.²⁵¹ As a result, the Blackfeet and Bloods have difficulty maintaining their traditional cultures.

And it is not just border tribes which are experiencing difficulty maintaining their religion and culture. In *Lyng v. Northwest Indian Cemetery Protective Association*,²⁵² the Supreme Court reversed a lower court's injunction against the building of a logging road through an area sacred to local tribes,²⁵³ despite conceding that the road could destroy the tribes' ability to practice their religion.²⁵⁴ The Court concluded that the Free Exercise clause of the First Amendment did not provide a remedy for the harm.²⁵⁵ Yet, the identity of the Yurok, Karok and Tolowa remains inextricably bound up in their religion and its connection to the land.²⁵⁶ The building of the logging road might well lead to the elimination of the tribes' cultures.²⁵⁷

As one commentator has noted, although the U.S. Constitution and international documents protect the basic human rights of Native Americans,²⁵⁸ "the sources of protection tend to focus on individual rights, thereby impairing

250. See O'Brien, *supra* note 242, at 322.

251. See O'Brien, *supra* note 242, at 331.

252. 485 U.S. 439 (1988).

253. See *id.* at 458.

254. See *id.* at 451 ("The Government does not dispute, and we have no reason to doubt that the logging and road-building projects . . . could have devastating effects on traditional Indian religious practices"). See also Christopher P. Cline, Note, *Pursuing Native American Rights in International Law Venues: A Jus Cogens Strategy After Lyng v. Northwest Indian Cemetery Protective Association*, 42 HASTINGS L.J. 591, 600-03 (1991) (describing close connection between tribes' religion and proposed location of logging road).

255. See *Lyng*, 485 U.S. at 450-53 (drawing distinction between governmental coercion of religious belief, which is prohibited, and "incidental effects" of governmental action which are not prohibited).

256. See Cline, *supra* note 254, at 601.

257. See Cline, *supra* note 254, at 602-03.

258. See Austin, *supra* note 243, at 110-11.

the recognition of group rights.”²⁵⁹ The rights most important to Native American tribes are collective rights that would protect their cultures.²⁶⁰ It is in the realm of collective rights that the application of OSCE national minority rights looks particularly appealing. While the individual rights of the Blackfeet, Bloods, Tohono O’odham, Yurok, Karok, and Tolowa tribes to practice their religion (including a right of access to religious objects)²⁶¹ and maintain contacts with members of their minorities in other states have arguably been infringed,²⁶² the most significant infringement is the United States’ failure to adequately protect and promote Native American culture, language, and religion.²⁶³ If U.S. governmental action makes it impossible for Native American groups to preserve their minority identity, then the United States is under a duty to modify its laws and actions to preserve Native American culture. At the very least, the United States would be under a duty to balance the benefit of the governmental action against the harm to minority identity. A balancing of harm and benefit was absent from the court’s decision in *Lyng* but would have resulted in an opposite outcome because the benefit of the logging road was negligible while the harm to the tribes was extreme.²⁶⁴

It is clear that OSCE documents contain collective rights that would benefit Native American groups in the United States. Furthermore, the United States has committed itself to implementing OSCE rights. This, however, does not mean that Native American groups can actually obtain the benefit of those rights. The rest of this section will focus on whether Native Americans are likely to secure any real benefit from OSCE national minority rights.

259. Austin, *supra* note 243, at 110-11.

260. See Austin, *supra* note 243; See also Cline, *supra* note 254, at 618-19.

261. See Copenhagen Meeting, *supra* note 86.

262. See Copenhagen Meeting, *supra* note 86, at para. 32.4.

263. See Copenhagen Meeting, *supra* note 86 and accompanying text (indicating most important duty of OSCE states will be to protect ethnic, cultural, linguistic, and religious identity of national minorities on their territory and to promote that identity).

264. See Cline, *supra* note 254, at 607.

C. Legal Enforceability

The first question is whether Native American groups fall within the OSCE definition of national minority groups. Since the OSCE definition revolves around the existence of a distinct ethnic, religious, linguistic, or cultural identity, it is clear that Native American tribes are national minority groups.²⁶⁵ In fact, given the diversity between Native American tribes, there may well be hundreds of individual national minority groups in the United States. Since Native American tribes are national minority groups, they are entitled to the rights in OSCE documents.

This leads to the legal enforceability of OSCE rights. As discussed in Part IV, OSCE documents do not represent treaties. If OSCE rights are legally enforceable, it is because they have become customary international law. It is doubtful, however, whether this has happened. The outcome turns on the definition of *opinio juris*, and the analysis of ICJ jurisprudence on the issue provides no simple answers. OSCE rights do not easily fit into the legality/expediency dichotomy that has characterized ICJ caselaw. While OSCE rights are required, the OSCE has perpetuated the distinction between legal and political commitments. A court might conclude that the mandatory nature of OSCE commitments is sufficient to demonstrate *opinio juris*, but it would be foolish to bank on it.

In addition, the United States would probably raise the

265. See Donald L. Fixico, *The Persistence of Identity in Indian Communities of the Western Great Lakes*, in AMERICAN INDIANS: SOCIAL JUSTICE AND PUBLIC POLICY 109 (Donald E. Green & Thomas V. Tonnesen eds., 1991) (arguing that Native Americans have retained distinct identity despite centuries of contact with Anglo-Americans and numerous attempts at forced assimilation); GETCHES ET AL., *supra* note 232, at 26-30 (noting that Native Americans have consistently strived to maintain a separate cultural identity despite attempts at assimilation). See also *supra* notes 232-41 and accompanying text.

Native Americans were chosen as the subject of this section partly because they are clearly national minority groups under the OSCE definition. It is harder to fit other groups (e.g., African-Americans) which are traditionally thought of as minorities in the U.S. into the OSCE definition of a national minority. National minority status revolves around ethnic, linguistic, religious and cultural identity. While African-Americans arguably have an ethnic and cultural identity, they share religions and language with Anglo-Americans. In light of the cautionary language of the 1991 Geneva Meeting of Experts on National Minorities, *supra* note 92, it is not clear that African-Americans are national minority groups.

"persistent objector" defense if the issue were before an international court.²⁶⁶ The concept of the persistent objector finds expression in dicta from the *Asylum*²⁶⁷ and *Fisheries*²⁶⁸ cases. In both cases, the ICJ had already concluded that no customary rule existed but nonetheless suggested that the respondent's persistent objections would have exempted it from such a rule. A well-known formulation of the doctrine is that "a state that has persistently objected to a rule of customary international law during the course of the rule's emergence is not bound by the rule."²⁶⁹ While the persistent objector rule has rarely been invoked,²⁷⁰ there is strong doctrinal support for it.²⁷¹ The doctrinal support proceeds from a positivist understanding of international law and stresses that while a state might acquiesce to a new custom through its silence, it cannot be bound if it conspicuously rejects the emergent custom.²⁷²

The United States has been the most vocal state in maintaining the political/legal distinction in OSCE commitments. It has gone beyond relying on the language of OSCE documents and independently opposed the legalization of OSCE commitments.²⁷³ Even if a court were willing to find that OSCE commitments have become binding as custom because of the mandatory language of OSCE

266. See generally Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985) (describing doctrine of persistent objector); Adam Steinfeld, Note, *Nuclear Objections: The Persistent Objector and the Legality of the Use of Nuclear Weapons*, 62 BROOK. L. REV. 1635, 1646-58 (1996) (describing doctrine of persistent objector).

267. See *Asylum*, *supra* note 167, 277-78. "But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it." *Id.*

268. See *Fisheries* (U.K. v. Norway), 1951 I.C.J. 116, 131 (Dec. 18). Stating that "[c]onsequently, the ten-mile rule has not acquired the authority of a general rule of international law. In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast." *Id.*

269. See Stein, *supra* note 266, at 457.

270. See Stein, *supra* note 266, at 459-63.

271. See Stein, *supra* note 266, at 459; Steinfeld, *supra* note 266, at 1646.

272. See Stein, *supra* note 266, at 459.

273. See BASIC DOCUMENTS 1993-1995, *supra* note 69, at xix (noting that efforts by OSCE states to legalize OSCE commitments have failed because of opposition by United States).

documents, the U.S. could argue that it is exempt from that custom because it has persistently and independently stated that it will not be legally bound by those commitments. So few actual uses of the persistent objector rule have occurred that it is not clear how often and how clearly the United States must publicly state its intention not to be bound to preserve its objection.²⁷⁴ Trying to predict how an international court would treat the persistent objector rule, if a case actually turned on it, is mere speculation.

Due to the ambiguity surrounding the persistent objector doctrine, another problem arises: securing a forum to decide the issue. The OSCE has an adjudicative body, the treaty-based Court of Conciliation and Arbitration, but the U.S. has refused to ratify the Convention on Conciliation and Arbitration within the OSCE.²⁷⁵ The ICJ is also unavailable as a forum, in part because Native American groups cannot be parties before the International Court of Justice.²⁷⁶ Another state could try to raise the issue before the ICJ on behalf of a Native American tribe,²⁷⁷ but even then, the United States would have to consent to specific jurisdiction since the U.S. no longer recognizes the ICJ's compulsory jurisdiction. There are no easily available international forums that could resolve the legal status of OSCE rights.

Native American groups could be parties before U.S. courts, but US courts are unlikely to recognize the customary nature of OSCE commitments on their own initiative. The status of customary international law in U.S. courts remains an extremely complicated and ambiguous matter, but what follows is a brief look at some of the problems. As a matter of international law, custom and treaties have the same place in the hierarchy of sources of law, both

274. See Steinfeld, *supra* note 266, at 1651-53 (discussing persistence requirement of defense).

275. See BASIC DOCUMENTS 1993-1995, *supra* note 69, at xix (discussing reluctance of United States to ratify treaty because it would be step towards 'legalizing' OSCE commitments).

276. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 34, para. 1 (elucidating that "[o]nly states may be parties in cases before the Court").

277. Canada is the most likely candidate since it has a sizable Native American population. *But see infra* note 296 and accompanying text.

being principle sources of international law.²⁷⁸ It is not clear from a textual interpretation of the United States' Constitution, however, that customs share the same position as treaties in U.S. law.²⁷⁹ The Constitution makes it clear that treaties are part of the "supreme Law of the Land,"²⁸⁰ but makes no mention of international custom in the Supremacy Clause.

Nevertheless, there are cases which conclude that international custom is part of the domestic law of the United States. In *The Paquete Habana*,²⁸¹ the Supreme Court held that an international custom was part of the law of the United States.²⁸² That very same case, however, raised doubts about the position of custom within the domestic legal hierarchy.²⁸³ In a more recent case, the Supreme Court noted in passing that "United States courts apply international law as a part of our own in appropriate circumstances,"²⁸⁴ while suggesting that courts could decline to render decisions on claims of customary international law because of the difficulty of ascertaining the content of international custom and the possibility of interfering in U.S. foreign policy.²⁸⁵

Despite the confusion, in *Filartiga v. Pena-Irala*,²⁸⁶ the Second Circuit found a customary norm of international

278. See VILLIGER, *supra* note 174, at 57-59, paras. 84-86; Michael Akehurst, *The Hierarchy of the Sources of International Law*, 47 BRIT. Y.B. INT'L L. 273, 275 (1974-75); Karol Wolfke, *Treaties and Custom: Aspects of Interrelation*, in ESSAYS ON THE LAW OF TREATIES 31, 36 (Jan Klabbers & Rene Lefebvre eds., 1998).

279. See Curtis A. Bradley & Jack L. Goldsmith III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 320-21 (1997) (discussing text of Constitution).

280. U.S. CONST. art. VI, cl. 2.

281. 175 U.S. 677 (1900).

282. See *id.* at 686-700 (holding that by "ancient usage among civilized nations" which had "gradually ripen[ed] into a rule of international law," coastal fishing vessels were exempt from capture as prizes of war).

283. See *id.* at 700 (stating that "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations"). *The Paquete Habana* relegates custom to a fallback source of law, only usable in the absence of a treaty or some domestic pronouncement. See *id.*

284. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (citing *The Paquete Habana* as authority).

285. See *id.* at 428.

286. 630 F.2d 876 (2d Cir. 1980).

law prohibiting state-sponsored torture,²⁸⁷ and concluded that federal courts have jurisdiction over violations of that norm under the Alien Tort Claims Act.²⁸⁸ As the Alien Tort Claims Act²⁸⁹ expressly contemplates a remedy for violations of "the law of nations," it remains unclear whether a U.S. court could suigenerously provide a remedy for a violation of customary international law. If a court were to follow *The Paquete Habana*, then a remedy might be available but only upon a showing that the issue has not been addressed by any treaty or domestic pronouncement.

The question of the status of customary international law in US courts remains an unresolved one, and the academic debate is both extensive and sharply divided.²⁹⁰ The issue is far too complicated to adequately address here. The complexity and uncertainty of the status of international custom in U.S. courts, combined with the hostility of those courts to claims based upon international human rights,²⁹¹ would make any attempt to bring alleged violations of OSCE minority rights a difficult, protracted and probably unsuccessful venture. Even if U.S. courts were willing to find a rule of customary international law and craft a remedy, the U.S. might raise the "persistent objector" defense.²⁹² The outlook for a legal determination of Native American rights under the OSCE, whether in an international or domestic forum, appears bleak.

287. *See id.* at 884.

288. *See id.* at 889.

289. 28 U.S.C. § 1350 (1994).

290. *See, e.g.,* Bradley & Goldsmith, *supra* note 279 (arguing that international human rights norms should not be treated as part of federal law); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997) (supporting decision in *Filartiga*); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997). These articles merely scratch the surface of the debate, and contain references to other articles.

291. *See generally* John Quigley, *Human Rights Defenses in US Courts*, 20 HUM. RTS. Q. 555 (1998) (discussing recent cases and concluding that U.S. courts have been extremely reluctant to give effect to even treaty-based human rights).

292. *See supra* notes 266-72 and accompanying text.

D. Political Implementation

While the chances of a legal determination of OSCE rights remain small, non-legal implementation mechanisms exist within the OSCE which might benefit Native American groups. The Berlin Mechanism could be used to call an emergency session of the Senior Council to discuss the situation of Native Americans. The Moscow Mechanism could be activated to force the United States to accept a mission of rapporteurs to investigate and report on the implementation of national minority rights. Consensus Minus One would allow the condemnation of U.S. violations with or without the consent of the United States. All of these implementation mechanisms could bring the issue to the attention of other OSCE states and the public, thereby focusing public scrutiny on the United States' failure to live up to its OSCE commitments.

Unfortunately, none of these implementation mechanisms are likely to be employed against the United States. The major stumbling block is that they all need to be initiated by another OSCE state. National minority issues in the OSCE have been pushed primarily by "kin-states."²⁹³ Kin-states exist where the national minority in one OSCE state is the dominant majority in another OSCE state and that dominant majority seeks to protect the interests of its kin-minority. For instance, Hungary has followed the situation of the Hungarian minority in Slovakia, while Slovakia has followed the situation of the Slovakian minority in Hungary.²⁹⁴ Similar kin-state bonds can be seen in the correspondence between the HCNM and the governments of Greece and Albania.²⁹⁵ There is no Native American state that could promote the implementation of national minority rights in the United States. Mexico is not an OSCE state, and while Canada has a considerable Native American population, it does not have the same motivation to protect Native Americans in the United States as a kin-state would have.²⁹⁶ The reality is that the general human rights im-

293. See Estebanez, *supra* note 129, at 139-40 (describing role of kin-state bonds).

294. See *supra* note 69 and accompanying text.

295. See *supra* note 69 and accompanying text.

296. Indeed, because Canada has a sizable Native American minority of its

plementation mechanisms are unlikely to be activated to investigate U.S. compliance with its national minority rights commitments.

The High Commissioner, independent of OSCE states, can receive information from almost any source. This suggests that Native American groups, presenting evidence to the High Commissioner, would result in the use of the HCNM's travel and fact-finding powers in the United States. The High Commissioner can foreclose this possibility by mandate. The High Commissioner does not represent an express advocate of national minority rights but an "instrument of conflict prevention."²⁹⁷ The High Commissioner investigates the implementation of national minority rights as a method of conflict prevention, and no plausible argument exists that the United States' failure to fully implement national minority rights for Native Americans will lead to conflict. The HCNM will not intervene to investigate U.S. compliance.²⁹⁸

VII. CONCLUSION

This paper set out to determine whether OSCE national minority rights would benefit national minorities in the United States. As Part VI indicates, although OSCE minority rights will probably not be applied in the United States in the near future, the OSCE is not a failure. It contributed to the collapse of communism in Eastern Europe and made the difficult transition to a post-Cold War organization. In the last ten years, the OSCE has developed collective minority rights that go beyond the individual rights found in most human rights instruments. Notably, in addition to collective rights, the OSCE has developed several useful implementation mechanisms including the office of High Commissioner on National Minorities. The HCNM has been helpful in shaping national minority policy among

own, it may be reluctant to raise the legal status of OSCE national minority rights in North America. If OSCE minority rights are legally binding in the United States, then they would seem to be legally binding in Canada as well. Consequently, Canada may oppose any attempt to determine the legal status of OSCE minority rights in the United States.

297. See *supra* note 132 and accompanying text.

298. See *supra* notes 228-31 and accompanying text.

Eastern European states, and a general consensus seems to exist that the High Commissioner is a success.

Yet, it remains unlikely that OSCE minority rights will be applied in the United States. Rather than a failure, this is simply a consequence of the OSCE's purpose. The collapse of communism revealed ethnic tensions that had been suppressed under Soviet rule. When conflicts broke out across Eastern Europe, the OSCE changed from a Cold War security conference into an organization dedicated to conflict prevention and management. As part of that transition, the OSCE developed a body of minority rights. Minority rights in the OSCE are a means to an end, not an end in themselves. National minority rights are a method of preventing ethnic conflict. Although this is most apparent in the mandate of the High Commissioner on National Minorities, it permeates the entire OSCE. Until minority rights become an end in themselves, Western democracies are not likely to apply them vigorously.

