

31. THE OSCE: A COMMITMENT TO HUMAN RIGHTS

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1. INTRODUCTION

This article analyses the reception of the Universal Declaration of Human Rights (hereinafter UDHR) into the Organisation for Security and Cooperation in Europe (hereinafter OSCE) human rights system. It sketches the origins of the Helsinki process and the manner and importance of its incorporation into the OSCE's normative framework and discusses the parallels between the creation of the UDHR and the normative framework of the OSCE. A red thread through its history, as with the history of the UDHR itself, has been the involvement of human rights defenders: those who take up the struggle to make the rights in documents such as the UDHR a reality.

2. ORIGINS AND NATURE OF THE CSCE PROCESS

Before analysing the relationship between the UDHR and the OSCE, it may be worthwhile to look back at how the Conference on Security and Cooperation in Europe (hereinafter CSCE) process evolved and became an international mechanism in support of human rights.

The CSCE process started in the early 1970s as a forum for dialogue between the East and the West. A series of conferences served to enumerate principles on which both Eastern (Warsaw-pact) states and Western states could agree. After two years of negotiations in a series of conferences in Geneva and Helsinki, the 'Helsinki Final Act' was concluded in 1975. Its 'Decalogue' set out the ten key principles, that all participating States could agree on, governing their actions towards their own citizens and towards each other. The key principles included respect for territorial integrity, peaceful resolution of disputes and, crucially, respect for human rights.

This process has continued ever since, with a major peak of activity around the fall of the Berlin Wall and the collapse of the Communist system, which resulted in the well-known Vienna (1989), Copenhagen (1990) and Moscow (1991) documents. It was in these documents that all OSCE participating States agreed that democratic government with the rule of law

and respect for human rights was the only acceptable form of government in the OSCE region, and elaborated key norms and principles required for this form of government in binding commitments. Crucially, they also acknowledged, in 1991, that commitments undertaken within the OSCE's 'human dimension' were matters of direct and legitimate concern to all participating States, rather than matters belonging exclusively to the internal affairs of the State, and promised to hold each other responsible for their implementation.

The result is a wide body of commitments on democratic government, human rights and the rule of law which may be referred to as the OSCE *acquis*, to which all participating States must agree upon joining the organisation. There are now 56 participating States in Europe, North America and Central Asia, the most recent member being Montenegro. One of the crucial characteristics of the CSCE and, subsequently, of the OSCE, has been the process approach: norms are gradually expanded upon and refined, with the norms already agreed upon remaining equally binding. While these commitments are not founded on a multilateral treaty and do not create direct legal obligations in themselves, they are considered to be "politically binding". This formulation has had the advantage of an OSCE-wide acceptance of standards without the need for the time-consuming and sometimes controversial process of formal ratification by each participating State.

The CSCE process, a series of more or less informal conferences, has over the years grown ever more structured. A number of different structures and bodies have been created. The CSCE evolved into a permanent organisation, the OSCE, with a permanent decision-making body, the Permanent Council. In the 1990s, several bodies were created to assist participating States in upholding their commitments. These include the Office for Free Elections, later renamed the Office for Democratic Institutions and Human Rights, which has moved from election observation into a wide variety of human rights-related areas, with programmes aiming at strengthening many different aspects of democratic government. Other important bodies include the High Commissioner on National Minorities, set up to assist states with minority issues through quiet diplomacy, and the Representative on the Freedom of the Media, who monitors and assists states in the area of press freedom. OSCE Missions, with widely differing mandates, also exist in many countries, mainly in Central Asia, Southern Caucasus and the former Yugoslavia.

3. THE STATUS OF THE UDHR IN THE OSCE SYSTEM

As a resolution of the UN General Assembly, the UDHR was not as such a binding instrument of international law to begin with. Its importance to the CSCE process and the development of the OSCE's normative framework can, however, not be overstated.

A careful reading of the wording of the OSCE commitments indicates that OSCE participating States have considered the UDHR a binding document from the inception of the Helsinki process. As participating States stated in the Helsinki Final Act's Decalogue, "[i]n the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfil their obligations as set forth in the international declarations and agreements in this field, including *inter alia* the International Covenants on Human Rights, by which they may be bound".

The importance of the UDHR was reaffirmed in the 1983 Madrid document, which also referred to the "particular significance" of the UDHR and the international Covenants on Human Rights and other relevant international instruments. Referring to their "joint and separate efforts to stimulate and develop universal respect for human rights and fundamental freedoms" all participating States were called on to act in conformity with those international instruments. Those participating States which had not yet done so were called on "to consider the possibility of acceding to the covenants".

That the UDHR is binding on OSCE participating States is not in doubt. What is the nature of this obligation? Upon the adoption of a wide variety of human rights in the 1989 Vienna document and 1990 Copenhagen document, participating States stated there that the UDHR was a body of international commitments, as opposed to the international Covenants (that is, the International Covenant on Civil and Political Rights, hereinafter referred to as ICCPR, and the International Covenant on Economic, Social and Cultural Rights, hereinafter referred to as ICESCR), which they described as an obligation under international law. Specifically, participating States promised they would ensure that the exercise of the human rights they had agreed to abide by in these documents would not be subject to any restrictions "except those which are provided by law and are consistent with their obligations under international law, in particular the [ICCPR], and with their international commitments, in particular the Universal Declaration of Human

Rights. These restrictions have the character of exceptions". Participating States also promised to ensure that these restrictions would not be abused and would not be applied in an arbitrary manner, "but in such a way that the effective exercise of these rights is ensured".¹

The UDHR has also been used in the OSCE commitments as a specific normative source. In the 1989 Vienna document, participating States promised to "facilitate the freer and wider dissemination of information of all kinds, to encourage co-operation in the field of information and to improve the working conditions for journalists", and referred in this connection to the need to act "in accordance with the [ICCPR], the Universal Declaration of Human Rights and their relevant international commitments concerning seeking, receiving and imparting information of all kinds", and promised to ensure that individuals can freely choose their sources of information. In this context they promised to ensure that radio services operating under the ITU Radio Regulations could be directly and normally received in their States; and that they would allow individuals, institutions and organisations, while respecting intellectual property rights, including copyright, to obtain, possess, reproduce and distribute information material of all kinds.²

Similarly, in the Sofia 2004 document, participating States promised to take action to ensure that the Internet remains an open and public forum for freedom of opinion and expression, "as enshrined in the Universal Declaration of Human Rights", and to foster access to the Internet both in homes and in schools.³

We may conclude from the above that the UDHR is regarded as a binding commitment engaged in by OSCE participating States which is on a par with their other, more specific commitments engaged in under the CSCE and OSCE process, and also that the UDHR serves as a normative reference point for participating States.

4. THE SIGNIFICANCE OF THE UDHR IN THE OSCE PROCESS AND SYSTEM

With the UDHR being a binding instrument for OSCE participating States, what does this mean for the functioning of the OSCE system as a whole?

¹ Vienna 1989, para. 21.

² Vienna 1989, para. 34.

³ Sofia 2004, para. 1.

What is the function and significance of the UDHR in the OSCE's normative framework?

There are a number of reasons for why the UDHR is important in the CSCE/OSCE context. First, during the Cold War, there were political challenges within the CSCE process in achieving agreement on norms, including human rights norms. The clashes on issues like economic, social and cultural rights 'favoured' by the communist bloc and the civil and political rights emphasised by the West reduced the possibility of coming to substantive agreements on many human rights issues. This meant that a large number of human rights did not make their way into the OSCE commitments directly. The effect of the UDHR in the CSCE process during the years between the adoption of the Helsinki document and the trypichon of the Vienna, Copenhagen and Moscow documents was therefore vital: without the reference to the UDHR, many of the values enshrined in the commitments, such as many of the civil and political rights like freedom of assembly and association, would not have been the subject of agreement. Without the reference to the UDHR, and the promise in the Helsinki Final Act that individuals would be allowed to know and act upon their rights, human rights defenders throughout the OSCE region would have had one less tool to use in their struggle to turn the human dimension commitments into a reality. And that civil society activists did see the value of human rights commitments is beyond doubt: organisations such as Charta 77 and many of the Helsinki organisations, including the organisation that would later become Human Rights Watch, all had their origin in the process of monitoring human rights in the CSCE framework.

The significance of the UDHR as a normative reference point did not cease with the fall of the Berlin Wall, however. For a variety of reasons, not all rights in the UDHR were or are enshrined in specific OSCE commitments, and not all States are parties to all international conventions. This makes the UDHR an important document, setting the normative baseline for all OSCE participating States, and allowing States to hold one another to account on the full spectrum of UDHR rights.

It should be noted that the UDHR — now often considered a norm of customary international law — was a controversial document and was not rapidly accepted as a binding obligation, requiring nearly two decades of negotiation to be turned into the two main human rights conventions, the ICCPR and the ICESCR. There are, indeed, still some rights it enshrines which are not explicitly contained in the conventions drafted under the UN system. The lacunae within the UN system and the slowness of the process of adoption of these instruments were and are to a large extent filled by organisations such as the Council of Europe, with its European Convention

on Human Rights and many other treaties and declarations, and the OSCE, which adopted many new and more specific human rights commitments.

5. PARALLELS BETWEEN THE OSCE PROCESS AND THE UDHR

This brings us to another point: though there are many differences between the approach of the UN, the Council of Europe and the OSCE, there are a number of parallels as well. Differences between the Council of Europe and the OSCE are mainly that the OSCE takes a comprehensive security approach to human rights issues, and the Council of Europe's approach is more based on setting legally binding standards. The main difference between the OSCE and the UN system is its relative flexibility: whereas it took many years to agree on binding agreements elaborating the UDHR in conventions, decision-making within the OSCE is much less cumbersome. The lack of enforceability in court of OSCE commitments might be seen as a weakness: what, after all, is a right without a court to enforce it in? Yet this apparent disadvantage is in fact a strength when combined with the binding nature of commitments: as already mentioned, it allows states to agree relatively quickly on binding norms without having to go into great detail and specifics which would be necessary in a legally enforceable treaty. An example of such flexibility would be the OSCE's reaction to the increase of violations of minority rights in the 1990s. The OSCE reacted first to these issues, drafting a comprehensive set of standards in the field of minority protection. Later, these political standards served as basis for the legally binding Council of Europe Framework Convention for the Protection of National Minorities.

This reveals the first parallel: the way the UDHR was adopted and the way the CSCE and later the OSCE system functions are somewhat similar. In contrast to the long process required to adopt the ICCPR and ICESCR, the UDHR, as a non-binding instrument, was explicitly designed as a statement of principles which would not be considered formally legally binding, and could therefore be adopted much more quickly and easily.

Another way in which principles from the UDHR have influenced the CSCE process and where we can thus speak of a parallel is the recognition very early on in the Helsinki process of the importance of respect for human rights as a key element of the maintenance of international peace and security. This principle is perhaps most clearly stated in the 1990 Copenhagen document, in which the OSCE participating States expressed their conviction

that “full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law are prerequisites for progress in setting up the lasting order of peace, security, justice and co-operation that they seek to establish in Europe”.⁴

This link between security and human rights forms the basis of the OSCE’s comprehensive concept of security, and is closely matched by the UDHR’s preamble which states: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.⁵ The recognition of the vital link between human rights and security is thus key to appreciating the commonalities between the UDHR and the founding documents of the OSCE.

6. THE MORAL FORCE OF THE UDHR AND HUMAN RIGHTS DEFENDERS

One key issue recognised early on in the OSCE framework was that rights may be formally granted and recognised, but can only be made real from below. As the Helsinki Final Act puts it, the individual has the right to know and act upon his rights.⁶

In this connection, it is perhaps of interest to note a document adopted at the last major anniversary of the UDHR, its fiftieth birthday. To celebrate this occasion, the General Assembly passed the Declaration on Human Rights Defenders, recognising that without protecting the organisations and individuals who stand up for human rights, there can be no lasting progress in this area. The OSCE has also recognised these principles, and enshrined them in various relevant commitments.⁷ Under OSCE commitments, all individuals

⁴ Copenhagen 1990, Preamble.

⁵ UDHR, Preamble.

⁶ Helsinki 1975 (Questions Relating to Security in Europe: 1.(a) Declaration on Principles Guiding Relations between Participating States) Principle VII.

⁷ See in particular Budapest 1994, paragraph 18: “The participating States ... emphasize the need for protection of human rights defenders and look forward to the completion and adoption, in the framework of the United Nations, of the draft declaration on the ‘Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms’”. For a further overview of relevant commitments, see OSCE/ODIHR, OSCE Human Dimension Commitments (Vol. 1-Thematic Compilation), 2nd ed. (Warsaw, 2005). The issue of human rights defenders has been a controversial one in the OSCE in recent years, with several proposals for more specific commitments being rejected at successive Ministerial Council meetings.

have the freedom of assembly, the freedom of association, the right to receive funding from abroad, the right to help others protect their rights and many other rights required for the defence of human rights and the operation of human rights NGOs.

Many of these rights, of course, can also be found in the UDHR itself, but the UDHR lacks specifics on these 'implementation' issues. This was in fact something for which it was criticised by some states at the time. With the Defenders Declaration, the UDHR was crowned with at least the principal means by which its implementation could be achieved. Based on existing commitments, the OSCE has since taken up the cause of protecting the rights of human rights defenders, which are currently being challenged in a variety of ways.⁸

Another parallel between the UDHR and the Helsinki Final Act is their moral force and encouragement for the civil society. Just as organisations throughout the world still cite the UDHR as a morally binding instrument, so too did many civil society organisations in the former Eastern bloc start to invoke the rights they had been promised in the document. Needless to say, the UDHR, cited in the Helsinki Final Act itself, formed a key and integral part of this process. Helsinki Organisations played a vital part in fostering change in society and bringing down the systems of oppression in the former Eastern bloc. As mentioned above, without the Helsinki Final Act, they would not have had a politically binding document to cite, and without the UDHR, they would not have had a clear moral and normative compass to turn to within the Helsinki Final Act.

Today, the OSCE's commitment to civil society is also demonstrated in the constant dialogue with non-governmental organisations, which was recognised by the OSCE early on and is still today practised in the OSCE process. For many years, the OSCE has held an annual review conference in Warsaw, now known as the Human Dimension Implementation Meeting, to review the process of implementation of commitments. Many NGOs are represented at these meetings at the same level as governments, which form a vital 'reality check' for OSCE participating States to see to what extent those under their jurisdiction have actually benefitted from the high-minded documents adopted in their name. These conferences are open to all civil society organisations which do not condone or commit terrorism or violence, and the conferences serve as a vital means of holding governments to account. In addition, major OSCE conferences and meetings have come to be

⁸ OSCE/ODIHR, *Our Collective Conscience-Human Rights Defenders in the OSCE Region* (Warsaw, 2007).

preceded by preparatory NGO meetings, with key recommendations on how implementation can be improved emerging from these fora for civil society.

All this would not have been possible without the UDHR, the normative binding documents based upon it, and the inspiration offered by this most simple yet visionary historical document. It is in the work of human rights defenders that we see its daily practical significance, and a daily inspiration to help them make the rights it enshrines a reality for all individuals in the OSCE region and throughout the world.