

# Codification of the inviolability of frontiers principle in the Helsinki Final Act: Its purpose and implications for conflict resolution

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## Abstract

This article tests the proposition that there is inherent conflict between the principles of the Helsinki Final Act, specifically those related to equal rights and the self-determination of peoples, territorial integrity and the inviolability of frontiers. For this purpose the drafting history of the Helsinki Accords is revisited to shed light on how the participating States interpreted these principles and what meaning they attributed to them. It is argued that the overall purpose of the Final Act, which is to codify the stability of frontiers principle by prohibiting the use of force against frontiers as well as any unilateral, non-consensual actions as far as the territory of the participating States is concerned, should be kept in mind while interpreting these principles. The article concludes by reviewing the practice of States in interpreting the principles over the past two decades to show that changed political circumstances in Europe have not affected the interpretation of the relevant Helsinki Final Act provisions.

## Keywords

Helsinki Final Act principles; equal rights and the self-determination of peoples; territorial integrity and the inviolability of frontiers; protracted conflicts

## Introduction

The Organization for Security and Cooperation in Europe (OSCE) will be marking the fortieth anniversary of the Helsinki Final Act (hereinafter ‘the Final Act’) in 2015. In the period leading up to this benchmark event the OSCE participating States launched the ‘Helsinki + 40’ process in December 2012 to review progress in upholding the commitments of the participating

States and to seek ways to strengthen co-operation within the Organization.<sup>1</sup> There is growing concern among the participating States that the principles of the Final Act guiding inter-State relations (hereinafter ‘the Principles’) and the OSCE commitments are not being fully respected and implemented.<sup>2</sup> There is a broad understanding that streamlining the work of the OSCE will require more than just reaffirming the OSCE principles and will have to include identifying practical measures to ensure that participating States comply with all their commitments and observe these principles in practice.<sup>3</sup> However, this task is hardly accomplishable if the participating States fail to come to terms with each other on the key prerequisite for this - uniformity in their interpretation and unreserved application.<sup>4</sup> This is even more important in addressing the protracted conflicts in the OSCE area, in the context of which the Final Act principles are often referred to and where the divergence of interpretations has real-time implications for conflict resolution.<sup>5</sup>

Hence, without prejudice to other principles, in this article I will revisit the so-called territorial clauses of the Final Act that lay out guidelines for approaching the issues related to boundaries in Europe<sup>6</sup> and provide an overall framework for conflict resolution. It is the main premise of this article that today a different interpretation of the principles stems not from

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<sup>1</sup> See OSCE, ‘Ministerial Council decision on the OSCE Helsinki + 40 Process’, Dublin, Ireland, (December 2012). Retrieved 5 August 2013, <http://www.osce.org/mc/97974>.

<sup>2</sup> See e.g. OSCE, ‘Athens Ministerial Declaration on the OSCE Corfu Process: Reconfirm-Review-Reinvigorate Security and Co-operation from Vancouver to Vladivostok’, 2 December 2009, OSCE Doc. MC.DOC/1/09. Retrieved 5 August 2013, <http://www.osce.org/mc/67621>.

<sup>3</sup> See e.g. EU Statement in response to the Report on progress made under the Helsinki + 40 process, OSCE Doc. PC.DEL/722/13. ( 25 July 2013). Retrieved 16 August 2013, [http://eeas.europa.eu/delegations/vienna/documents/eu\\_osce/permanent\\_council/2013/pc\\_962\\_eu\\_on\\_helsinki\\_40.pdf](http://eeas.europa.eu/delegations/vienna/documents/eu_osce/permanent_council/2013/pc_962_eu_on_helsinki_40.pdf) ; US statement in response to the CIO Report on Helsinki + 40 Working Group, OSCE Doc. PC.DEL/708/13, (25 July 2013). Retrieved 5 August 2013, <http://www.osce.org/pc/103991>.

<sup>4</sup> See W. Zellner, ‘Cooperative Security - Principle and Reality’, *Security and Human Rights*, 2010, no. 21, p. 68.

<sup>5</sup> E.g. the OSCE participating States underscored that ‘[i]ncreased efforts should be made to resolve existing conflicts in the OSCE area in a peaceful and negotiated manner, within agreed formats, fully respecting the norms and principles of international law enshrined in the United Nations Charter, as well as the Helsinki Final Act’. See OSCE ‘Astana Commemorative Declaration: Towards a Security Community’, adopted at the OSCE Summit in Astana, Kazakhstan, (December 2010), Doc. SUM.DOC/1/10/Corr.1, para. 7, p. 3. Retrieved 11 September 2013, <http://www.osce.org/cio/74985>.

<sup>6</sup> These are the Principles of (I) Sovereign equality, respect for the rights inherent in sovereignty; (II) Refraining from the threat or use of force; (III) Inviolability of frontiers, (IV) Territorial integrity of States and (VIII) Equal rights and self-determination of peoples.

inherent conflict between these principles, but is largely a political issue based on divergent positions and objectives of the parties to the conflicts.<sup>7</sup> Some argue that there is a 'theoretical' contradiction within the Final Act, specifically between the principles of territorial integrity and self-determination.<sup>8</sup> Others argue that territorial integrity does not mean the inviolability of borders,<sup>9</sup> thus juxtaposing the foundational legal norm of territorial integrity and the consequential principle designed to protect this very norm.

In this 'chicken or the egg' type of discourse on the Final Act principles the purpose of this document is often disregarded. Yet, one cannot agree more with those who argue that the purpose of such international instruments is more important than their principles, because the latter is meant to execute the former.<sup>10</sup> Indeed, constructing the Final Act in such a way that would put the principles at odds with each other or would be in confrontation with the existing doctrine of international law would be an invitation to renewed conflict and is against the logic and purpose of the Final Act. In fact, when looking at the Final Act in its entirety, through the prism of the main thrust of the territorial clauses, which is to reinforce the stability of frontiers principle, this perceived contradiction diffuses.<sup>11</sup>

<sup>7</sup> See H. Heintze, 'Contradictory Principles in the Helsinki Final Act?', in IFSH (ed.), *OSCE Yearbook 2004*, Hamburg, 2004. Retrieved 10 October 2013, [http://www.core-hamburg.de/CORE\\_English/pub\\_osce\\_inh\\_04.htm](http://www.core-hamburg.de/CORE_English/pub_osce_inh_04.htm); S. Trifunovska, 'Multilateral Response to Ethnicity, Nationalism and Racism in Contemporary Europe', *Helsinki Monitor*, 1994, no. 5, p. 84; J. Summers, 'The Rhetoric and Practice of Self-Determination: A Right of All Peoples or Political Institutions?', *Nordic Journal of International Law*, 2004, no. 73.

<sup>8</sup> See e.g. R. Giragosian, 'The Organization for Security and Cooperation in Europe (OSCE) and the Nagorno Karabagh Conflict: A Compilation of Analyses', 2000. Retrieved 19 October 2013, [http://www.ancsf.org/files/essaysanalysis/OSCE\\_Karabagh.pdf](http://www.ancsf.org/files/essaysanalysis/OSCE_Karabagh.pdf).

<sup>9</sup> See the interview with the Armenian President S. Sargsyan published by the Russian News & Information Agency *RIA Novosti*, (21 May 2011). Retrieved 25 October 2013, <http://en.ria.ru/analysis/20110521/164145110.html>.

<sup>10</sup> See B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 2d. ed., Vol. I, New York, 2002, p. 49.

<sup>11</sup> See L. Hannikainen, 'The Declaration of Principles Guiding Relations between States of the European Security Conference from the Viewpoint of International Law', *Instant Research on Peace and Violence*, 1976, no. 6, p. 96; For a detailed account of this principle see M. Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today', *British Year Book of International Law*, 1996, no. 67, pp. 75, 81 *et seq.*; I. Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations', *Recueil Des Cours*, 1995, no. 255, pp. 68–72; See also ICJ judgment on the merits in the 'Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)', Merits, Judgment of 15 June 1962: ICJ Reports 1962, p. 34. Retrieved 30 October 2013, <http://www.icj-cij.org/docket/files/45/4871.pdf>.

A detailed legal analysis of these principles from the perspective of international law is beyond the scope of this article.<sup>12</sup> This is not to imply that the drafters were unaware of the sensitivities involved while elaborating the principle of self-determination and how it corresponds to the foundational norm of territorial integrity. On the contrary, the drafting history of the Final Act shows that this issue was subject to lengthy negotiations. What is often overlooked, though, is that the participating States were able to arrive at an important consensus on the correlation of these principles and in general on the issue of borders in Europe.

Although the Final Act was not meant to be a legally binding treaty, because of its purpose and normative content as well as the increasing prominence of such non-binding agreements among States,<sup>13</sup> this document is often placed on a par with treaties.<sup>14</sup> To this end, just like in the case of treaties, the context in which the Final Act was elaborated as well as its drafting history is an important means to interpret its provisions so as to better understand what these principles are and what they are not. If one follows the general rules of interpretation applicable to the treaties, then the provisions of the Final Act should be subject to objective interpretation, i.e. apart from the general context, subsequent developments regarding the interpretation of the principles and the practice of States should all be taken into account.<sup>15</sup> For this purpose, I will briefly overview the practice of the OSCE participating States in applying these principles over the past two decades and, specifically, in the context of conflicts in the OSCE area, to see if changed political circumstances in Europe after the end of the Cold War have affected the interpretation of the principles of the Final Act.

To analyze the course of negotiations and the individual positions of the participating States I will use CSCE *Verbatim Records* that contain

<sup>12</sup> For more on this see e.g. M. Shaw, 'Peoples, Territorialism and Boundaries', *European Journal of International Law*, 1997, no. 3. Retrieved 14 October 2013, <http://www.ejil.org/pdfs/8/3/1457.pdf>; M. Zacher, 'The Territorial Integrity Norm: International Boundaries and the Use of Force', *International Organization*, 2001, no. 55. Retrieved 14 October 2013 <http://byers.typepad.com/files/zacher-on-territorial-integrity-1.pdf>.

<sup>13</sup> See e.g. K. Raustiala, 'Form and Substance in International Agreements', *American Journal of International Law*, 2005, no. 99, p. 584.

<sup>14</sup> See O. Schachter (ed.) *International Law in Theory and Practice; General Course in Public International Law*, Dordrecht, 1985, p. 110.

<sup>15</sup> See Articles 31 and 32 on general rules of interpretation of the treaties, *Vienna Convention on the Law of Treaties*, 8 ILM 679 (1969). On this point see B. Simma et al. (eds.) *The Charter of the United Nations: A Commentary*, 2d. ed., Vol. I, New York, 2002, pp. 48–49.

statements and submitted draft proposals.<sup>16</sup> Since the proceedings of the Stage II Geneva working sessions were not transcribed,<sup>17</sup> in order to shed light on behind-closed-doors diplomacy in crafting the provisions of the Final Act, I will rely on the declassified diplomatic telegrams of the United States Government, Memoranda of Conversations with foreign government officials and other archived documents drawn from the records of the U.S. National Archives and Records Administration, covering the negotiation period of 1972–1975. I will also use the academic research over the past decades on the Helsinki Accords to substantiate my arguments.<sup>18</sup>

### Historical context

Although the idea to convene an All-European security conference had been floating around since 1954,<sup>19</sup> it was only given serious consideration when the benefits of détente in Europe outweighed the cost of continuing East-West confrontation. Although the East-West dichotomy and divergent perceptions of underlying motives for the Conference were there to stay, since both the Western European and Socialist countries were mindful of the devastating consequences of the wars fought on the European continent over the last two centuries,<sup>20</sup> they were united in preventing future

<sup>16</sup> See I. Kavass, et al. (eds.), *Human Rights, European Politics, and the Helsinki Accord: The Documentary Evolution of the Conference on Security and Co-Operation in Europe 1973–1975*, VI Vols., New York, 1981.

<sup>17</sup> J.P. Granier, 'Human Rights and the Helsinki Conference on Security and Cooperation in Europe: An Annotated Bibliography of United States Government Documents', in M.F. Dominick (ed.) *Human Rights and the Helsinki Accord: A Five Year Road to Madrid*, Buffalo, 1981, p. 285.

<sup>18</sup> See e.g. A. Bloed (ed.), *The Conference on Security and Cooperation in Europe: Analysis and Basic Documents 1972–1993*, Dordrecht, 1993; J. Maresca, *To Helsinki: The Conference on Security and Cooperation in Europe, 1973–1975*, Durham, 1985; L. Ferraris (ed.), *Report on a Negotiation: Helsinki-Geneva-Helsinki 1972–1975*, Geneva, 1979.

<sup>19</sup> See Memorandum for H. Kissinger from H. Sonnenfeldt 'US-Soviet Diplomacy on European Security', 8 January 1970, *Foreign Relations of the United States 1969–1976, European Security*, Vol. XXXIX, Doc. 17 p. 39. Retrieved 20 July 2013, <http://static.history.state.gov/frus/frus1969-76v39/pdf/frus1969-76v39.pdf>;

<sup>20</sup> For a comparison, 66 per cent of interstate wars fought in the world from 1815–1965 were among contiguous states, 42 per cent almost in the same period (1815–1945) were fought in Europe and most of them in this way or another were about territory. See John A. Vasquez, 'Why Do Neighbors Fight? Proximity, Interaction, or Territoriality', *Journal of Peace Research*, 1995, no. 32, pp. 278 and 281, Retrieved 17 September 2013 <http://www.jstor.org/stable/425665>; J. Levy and W. Thompson (eds.), *The Arc of War: Origins, Escalation and Transformation*, Chicago, 2011, p. 192.

conflicts emanating from violent attempts to redraw borders.<sup>21</sup> They recognized the stability of frontiers without exceptions and reservations as a basic prerequisite for the lasting peace in Europe.<sup>22</sup> There was complete consensus on the need to put the obligation to refrain from the threat or use of force against territorial integrity and internationally recognized borders at the core of the comprehensive concept of security to maintain peace in the OSCE area.

Bearing in mind that according to the Potsdam Agreement of 1945 the territorial questions related to Germany were to be determined at the final peace settlement, the Western countries resisted the surrogate World War II Peace Treaty that would recognize an unfavourable territorial *status quo* in Europe created as a result of war (or the use of force to use the terminology accepted under international law), namely the division of Germany and the Soviet annexation of the Baltic States.<sup>23</sup> They also did not want to subscribe to a document that could potentially hinder the integration process that they hoped would result one day in the establishment of the European Union.<sup>24</sup>

Hence, the Western European nations agreed to participate in the Conference based on the understanding that the final document would not be legally binding and that their agreement to the final document would not imply that present borders were 'immutable'.<sup>25</sup> This term is crucial in

<sup>21</sup> See *Supra* note 16, Poland, CSCE/I/PV.2 and CSCE/III/PV.3, German Democratic Republic, CSCE/I/RV.3 and CSCE/III/PV.2, Federal Republic of Germany, CSCE/I/RV.3 and CSCE/III/PV.2, France, CSCE/I/RV.3, Sweden, CSCE/I/PV.4, Canada, CSCE/I/PV.4, United States of America, CSCE/I/P.5 and CSCE/III/PV.5; United Kingdom, CSCE/III/PV.2, Greece, CSCE/III/PV.2, Bulgaria, CSCE/III/PV.2, Italy, CSCE/III/PV.2, Cyprus, CSCE/III/PV.3, Switzerland, CSCE/III/PV.2, Hungary, CSCE/III/PV.3.

<sup>22</sup> See A. Movchan, 'Problems of Boundaries and Security in the Helsinki Declaration', *Recueil des Cours*, 1977, no. 154, pp. 9–10.

<sup>23</sup> See National Security Study Memorandum 83, 'Current Issues of European Security' attached to the Memorandum for H. Kissinger from H. Sonnenfeldt, 'NSSM-83, European Security—May NATO Ministerial Meeting', 25 March 1970 and Memorandum for the President from H. Kissinger, 'Impact of European Security Conference on Baltic States' in *The Road to Helsinki. The Early steps to the CSCE*, Selected documents from the President G. Ford Library and the U.S. National Security Archive. H. Giusto, et al. (eds.), *Compilation of documents for the Machiavelli Center for Cold War Studies and the Cold War International History Project*, Woodrow Wilson International Center for Scholars, Florence, 29–30 September 2003, Retrieved 15 August 2013, <http://www.wilsoncenter.org/publication/the-road-to-helsinki>.

<sup>24</sup> See Memorandum of Conversation of Secretary H. Kissinger with German Foreign Minister H. Genscher, 11 June 1974, *Foreign Relations 1969–1976, European Security, Vol. XXXIX*, Doc.212 p. 645.

<sup>25</sup> CSCE Background Paper, US Department of State, April 1975, p. 3. Retrieved 30 August 2013, <http://www.fordlibrarymuseum.gov/related/helsinki.asp>.

understanding the conceptual approach of the Western States to the issue of borders. It becomes obvious from reviewing the negotiation process that the CSCE participating States did not question the principle of the inviolability of State frontiers, which is a legal obligation under international law, but for the reasons cited above, they did not want to commit themselves to a notion that borders could not be changed under any circumstances.<sup>26</sup>

### The Charter of the United Nations as a source of the Principles

During the Multilateral Preparatory Talks (or the Helsinki Consultations as they are commonly referred to) that started in Dipoli, near Helsinki, in November 1972 with the mandate to sort out organizational and procedural issues concerning the future Conference, the participating States also discussed substantive issues such as what should constitute sources from which to derive the principles. The Charter of the United Nations was regarded by the majority of the participants as an authoritative source to be taken into consideration.<sup>27</sup> It is noteworthy that although the participating States were influenced by the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (1970)<sup>28</sup> (hereinafter ‘the Friendly Relations Declaration’), there was no consensus on officially establishing this Declaration as the source of the principles.<sup>29</sup> Instead, the ‘Final Recommendations of the Helsinki Consultations’ (also called the ‘Blue Book’) in the section on the questions related to security in Europe merely stated that the Committees ‘*shall take into account*’ the Friendly Relations

<sup>26</sup> See A. Romano, *From Détente in Europe to European Détente: How the West Shaped the Helsinki CSCE*, Brussels, 2009, p. 39; See also L. Ferraris (ed.), *Report on a Negotiation: Helsinki-Geneva-Helsinki 1972-1975*, Geneva, 1979, p. 117.

<sup>27</sup> US Embassy Helsinki telegram, ‘CSCE: Principles of Interstate Relations’, dated 5 May 1973. This and other diplomatic telegrams cited in this article were declassified/released by the U.S. Department of State as part of the EO Systematic Review in 2003-2006, the U.S. National Archives and Record Administration, Retrieved July-September 2013 <http://aad.archives.gov/aad/series-description.jsp?s=4073&cat=all&bc=sl>.

<sup>28</sup> U.N. GA Res. 2625 (XXV), 24 October 1970. Retrieved 17 October 2013, <http://www.un.org/documents/ga/res/25/ares25.htm>.

<sup>29</sup> The Western delegations sought to include this Declaration as a source mainly because it establishes a linkage between the principles of the non-use of force and the inviolability of frontiers and also contain a reference to self-determination. See US Embassy Bonn telegram 1973BONN03737, ‘CSCE: Security Mandate’, dated 14 March 1973; US Department of State telegram 1973STATE084343, ‘CSCE: Principles Mandate’, dated 4 May 1973.

Declaration.<sup>30</sup> Those opposing made it clear that acceding to a reference to the Friendly Relations Declaration was not meant to accept it as a source of the principles.<sup>31</sup> As a result, the Declaration was not included in the preamble to the Final Act and is mentioned only once in the section dealing with the development of good neighborly relations with the non-participating Mediterranean States.<sup>32</sup>

In sharp contrast, the Final Act explicitly states throughout the text that ‘the principles... are *in conformity* with the Charter of the United Nations’. It is generally accepted that the norms enshrined in the U.N. Charter are of fundamental importance and have a superior character (they correspond to the *jus cogens* rules). As such they are binding upon all members of the international community.<sup>33</sup> The Final Act reaffirms the obligations of States under international law through reaffirming these principles and referencing the purposes and principles of the U.N. Charter. The Final Act establishes an explicit linkage between the obligations of participating States under the Final Act and those ‘arising from the generally recognized principles and rules of international law’,<sup>34</sup> thus stipulating the requirement to interpret the provisions of this document taking into account the principles of international law. The wording of the Final Act led some scholars writing on the subject to contend that the principles reflect customary international law, have binding character and produce legal effects.<sup>35</sup> This makes the non-binding character of the Final Act irrelevant in the context of the applicability of the principles, since States had already undertaken the obligation to respect these principles under the U.N. Charter. This view

<sup>30</sup> See ‘Final Recommendations of the Helsinki Consultations’, 8 June 1973, Title 2 (I)(20). Retrieved 20 July 2013, [www.osce.org/mc/40213](http://www.osce.org/mc/40213). *Emphasis* here and throughout the article is added.

<sup>31</sup> US Embassy Helsinki telegram 1973HELSIN01416, ‘CSCE - May 21-25 discussion of principles’, dated 26 May 1973.

<sup>32</sup> See Doc. CSCE Journal No.337, p. 200.

<sup>33</sup> See e.g. K. Hossain, ‘The Concept of Jus Cogens and the Obligation under the U.N. Charter’, *Santa Clara Journal of International Law*, 2005, p. 3. Retrieved 11 October 2013 <http://digitalcommons.law.scu.edu/scujil/vol3/iss1/3>.

<sup>34</sup> See Principle X – ‘Fulfilment in good faith of obligations under international law’. Here and throughout the article quotes are from the Helsinki Final Act reproduced in 14 *ILM* (1975), 1292-1324.

<sup>35</sup> See I. Brownlie, ‘International Law at the Fiftieth Anniversary of the United Nations’, *Recueil Des Cours*, 1995, no. 255, p. 81; A. Kiss and M. Dominick, ‘The International Legal Significance of the Human Rights Provisions of the Helsinki Final Act’ in M. Dominick (ed.) *Human Rights and the Helsinki Accord: A Five Year Road to Madrid*, Buffalo, 1981, pp. 54, 58.



prevailed within the OSCE and the Final Act is now regarded as a ‘politically binding agreement.’<sup>36</sup>

### Codification of the inviolability of frontiers principle and its correlation with the non-use of force

The drafting history of the Helsinki Accords suggests that there was complete consensus among the participating States that the inviolability of frontiers and the renunciation of the use of force against them is an indispensable condition for peace and security in Europe.<sup>37</sup> This understanding is reflected in the fact that the Western European countries, which had high stakes in not legitimizing the postwar territorial *status quo*, were ready to recognize the existing borders as inviolable ‘irrespective of the legal status’.<sup>38</sup> For this purpose the participating States expanded Article 2(4) of the U.N. Charter that prohibits the threat or use of force against the territorial integrity of States and codified, in the Final Act, territorial integrity, the inviolability of frontiers and the non-use of force as separate, independent principles to emphasize the norm of territorial integrity.<sup>39</sup> It was for the first time that the inviolability of frontiers was formulated and enshrined in a multilateral instrument as an independent principle.<sup>40</sup>

As was pointed out above the only question that generated debate around this principle was related to the potential consequences this may have on the possibility of peacefully changing frontiers in the future. In an effort to avoid any language that would imply that changes of frontiers by peaceful means are forbidden, a number of Western delegations, with the FRG in the lead, emphasized that the inviolability of frontiers should be first of all

<sup>36</sup> See OSCE Secretariat Press Release ‘Helsinki Final Act signed twenty years ago today’, 1995. Retrieved 1 November 2013, <http://www.osce.org/secretariat/52566>.

<sup>37</sup> See A. Movchan, ‘Problems of Boundaries and Security in the Helsinki Declaration’, *Recueil des Cours*, 1977, no. 154, p. 18; See also statements by Yugoslavia, CSCE/III/PV.4, Spain, CSCE/III/PV.4, United Kingdom, CSCE/III/PV.2, Poland, CSCE/III/PV.3, Federal Republic of Germany, CSCE/III/PV.2, Bulgaria, CSCE/III/PV.2, Italy, CSCE/III/PV.2, Cyprus, CSCE/III/PV.3, Switzerland, CSCE/III/PV.2, Hungary, CSCE/III/PV.3.

<sup>38</sup> See Federal Republic of Germany, CSCE /II/A/3, France, CSCE/III/A/12.

<sup>39</sup> See L. Hannikainen, ‘The Declaration of Principles Guiding Relations between States of the European Security Conference from the Viewpoint of International Law’, *Instant Research on Peace and Violence*, 1976, no. 6, pp. 94, 96.

<sup>40</sup> See A. Movchan, ‘Problems of Boundaries and Security in the Helsinki Declaration’, *Recueil des Cours*, 1977, no 154, p. 13.

understood as the non-use of force against borders.<sup>41</sup> Furthermore, the FRG was insisting that these two principles should be linked sequentially in the Declaration of principles with the principle of the inviolability of frontiers coming after the principle of refraining from the threat or use of force (hereinafter the ‘non-use of force’) in order to establish a relationship of subordination between the two.<sup>42</sup>

After long deliberations the FRG had to drop its demand for an explicit connection between the non-use of force and the inviolability of frontiers principles and the relationship of subordination of the latter to the former.<sup>43</sup> In order to emphasize that this principle prohibits first and foremost the use of force against borders the West insisted on the operative verb ‘assaulting’ (‘participating States...will refrain now and in the future from assaulting... frontiers’) that has a connotation with the use of force. The compromise became possible after the Soviet Union and the Western delegations agreed that this term would be translated in the Russian text of the Final Act as ‘посягать’, which is best translated as ‘encroaching’.<sup>44</sup>

Because in the Moscow Treaty (1970) between the FRG and the Soviet Union refraining from the threat or use of force preceded the inviolability of frontiers and territorial integrity clause, at the insistence of the FRG the same sequence was retained in the Final Act.<sup>45</sup> Although the Final Act says nothing about any hierarchy of the principles, the fact that the Western delegations insisted that the non-use of force principle should precede the inviolability of frontiers does seem to indicate that a hierarchy did find some expression in the order of the principles. The descending order of the principles is also evident in the statement by the FRG delegation that the order ‘corresponds to the logical place the principles concerned occupy in international law.’<sup>46</sup> Thus, placing the non-use of force, inviolability of

<sup>41</sup> See Federal Republic of Germany, CSCE /II/A/3, Denmark, CSCE/I/PV.2, Luxembourg, CSCE/I/RV.3, France, CSCE/I/RV.3, Canada, CSCE/I/PV.4, Italy, CSCE/I/PV.6, Switzerland, CSCE/I/PV.6, Belgium, CSCE/I/PV.6, Ireland, CSCE/I/PV.6, Netherlands, CSCE/I/PV.7, United States of America, CSCE/I/PV.5, France, CSCE/II/A/15.

<sup>42</sup> See US Department of State telegram 1973STATE084507, ‘Inviolability of Borders in Connection with CSCE’, dated 5 May 1973; US Embassy Bonn telegram 1973BONN06568, ‘CSCE: Principles of Interstate Relations’, dated 8 May 1973.

<sup>43</sup> US Embassy Bonn telegram 1973BONN07047, ‘CSCE: Chancellor’s Briefing Paper for Brezhnev visit to Bonn’, dated 16 May 1973.

<sup>44</sup> See H. Russel, ‘The Helsinki Declaration: Brobdingnag or Lilliput?’, *American Journal of International Law*, 1976, no. 70, p. 251.

<sup>45</sup> Memorandum of Conversation, Meeting of H. Kissinger with A. Gromyko at Zavidovo, May 5–8, 1973, *Foreign Relations 1969–1976, Vol. XV, Soviet Union, June 1972–August 1974*, Doc. 107 pp. 376, 377.

<sup>46</sup> Federal Republic of Germany, CSCE/II/A/3.

frontiers and the territorial integrity among the first principles in the Final Act was meant to highlight their importance for peace and security in Europe.

In the final agreed text of the inviolability of frontiers principle the participating States ‘...regard as inviolable all one another’s frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.’ In the non-use of force principle they committed themselves to ‘...refrain in their mutual relations, as well as in their international relations in general, from the threat or use of force against the territorial integrity or political independence of any State...’.

Furthermore, the participating States significantly lowered the threshold of what constitutes illegal action against the territorial integrity of States by committing themselves to refrain from virtually any actions against another participating State, be it the threat of force or direct military action (i.e. assaulting frontiers, seizure, usurpation, military occupation of a part or all of the territory of any participating State)<sup>47</sup> or an ‘indirect’ measure of force, which was deliberately left unspecified to encompass a broad range of possible actions.<sup>48</sup>

The emerged consensus on these principles reflected a broad understanding among the participating States that the principle of the non-use of force is linked to the inadmissibility of changing the boundaries of States through violent means and implies a prohibition on the acquisition of territory by force. The participating States specifically pledged in the Final Act not to recognize as legal military occupation the acquisition of territory by force. The Final Act also mirrors the general recognition that these principles are consequential principles generated by the foundational norm of territorial integrity and are hence inextricably linked under international law.<sup>49</sup> The territorial integrity of states is protected by the international legal prohibition on the threat or use of force.

<sup>47</sup> US Mission Geneva telegram 1975GENEVA00881, ‘CSCE: Self-Determination Principle’, dated 11 February 1975. See also US Mission Geneva telegram 1975GENEVA00929, ‘CSCE policy: Romanian non-use of force proposal’, dated 12 February 1975; US Mission Geneva telegram 1975GENEVA01204, ‘CSCE: Stage II highlights-February 17–21’, dated 22 February 1975.

<sup>48</sup> The earlier French proposals to include in this principle refraining from ‘organizing or encouraging the organization of irregular forces or armed bands... with a view to incursions upon the territory of another participating State’ and ‘organizing and encouraging acts of civil war, participating in them, assisting them or tolerating on their territory activities organized with a view to perpetrating such acts’ indicate the broad range of actions that the participants intended to ban under this principle. See France, CSCE/II/A/114.

<sup>49</sup> J. Symonides, ‘The Inviolability of Frontiers and the Territorial Integrity in the Treaties between Poland and the GDR, Between Poland and the FRG and in the Final Act of the Helsinki Conference’, *Polish Yearbook of International Law*, 1981–1982, no. 11.

It is evident from the text of the inviolability of frontiers principle that it does not limit illegal actions against borders only to military assaults and includes also revisionist claims.<sup>50</sup> During the discussions the participating States specifically stressed the need to relinquish any territorial claims on each other's territory, which is reflected in the pledge that they '...will also refrain from any *demand for...* part or all of the territory of any participating State.'<sup>51</sup>

The participating States and specifically the U.S. wanted to prevent the non-use of force principle to imply a prohibition on the use of force under any circumstance. Since the U.N. Charter lays down the rule legally prohibiting the threat or use of force, the U.S. was particularly concerned that the reference to the U.N. Charter in the Final Act should 'not prejudice the legitimate uses of force...'.<sup>52</sup> The FRG also emphasized that a 'general and comprehensive prohibition of force embodied in [this principle] is not inconsistent with the continuance of the natural right of any State to individual or collective self-defence under Article 51 of the United Nations Charter'.<sup>53</sup>

Consequently, the non-use of force principle was framed in such a way that would not rule out the legitimate use of force by declaring that States are resolved to 'refrain from any use of armed forces...inconsistent with the purposes and principles of the Charter of the United Nations', implying that armed forces can be employed, if this is consistent with the purposes and principles of the Charter. To put it succinctly, the general prohibition of the use of force in this principle does not impair the inherent and undisputable right of States to self-defence.

### The peaceful change of frontiers concept

The question of the peaceful change of frontiers was exclusively raised in the context of the possible future reunification of Germany to reinforce the view that the inviolability of frontiers did not amount to excluding the possibility of a peaceful change of frontiers.<sup>54</sup> The FRG and other Western

<sup>50</sup> See A. Movchan, 'Problems of Boundaries and Security in the Helsinki Declaration', *Recueil des Cours*, 1977, no. 154, p. 21.

<sup>51</sup> See e.g. USSR/CSCE/I/PV. 2; Poland, CSCE/I/PV.2 and CSCE/III/PV.3; German Democratic Republic, CSCE/I/RV.3.

<sup>52</sup> US Mission Geneva telegram 1975GENEVA05342, 'CSCE: declaration principles-reference to United Nations Charter', dated 9 July 1975.

<sup>53</sup> Federal Republic of Germany, CSCE/II/A/3.

<sup>54</sup> See Memorandum From the President's Assistant for National Security Affairs (Kissinger) to President G. Ford, 14 November 1974, *Foreign Relations 1969-1976*, Vol. XVI, Soviet

delegations wanted this clause to be stipulated as a general rule and suggested to include the language on peaceful change and self-determination into the inviolability of frontiers or territorial integrity principles.<sup>55</sup> The FRG even proposed to insert a separate principle on peaceful change to balance the principle of the inviolability of frontiers.

The Warsaw Pact countries accepted the idea that a voluntary rectification of borders could take place in the exercise of the sovereign rights of the States concerned,<sup>56</sup> but were opposed to the idea of including this concept in the inviolability of frontiers principle.<sup>57</sup> The countries that were sensitive to this issue looked at it through the prism of historical territorial disputes and were fearful that linking peaceful change with the inviolability of frontiers would ‘...justify a revanchist political struggle in favor of a change of boundaries.’<sup>58</sup>

They insisted that a reference to ‘international law’, ‘peaceful means’ and ‘agreement’ be included in the peaceful change clause with equal emphasis on each to emphasize that frontiers can be changed, but strictly in accordance with international law and by the agreement of all concerned.<sup>59</sup> The Western delegations and specifically those which had territorial issues with neighbours did not object to a reference to ‘peaceful means’ and ‘by agreement’.<sup>60</sup> The sticking point was the reference to international law that was interpreted by some Western States as making a peaceful change of frontiers subject to conditions besides those concerning peaceful means and

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*Union, August 1974–December 1976*, Doc. 86 p. 301. Retrieved 30 October 2013 <http://static.history.state.gov/frus/frus1969-76v16/pdf/frus1969-76v16.pdf>.

<sup>55</sup> Federal Republic of Germany, CSCE /II/A/3. See also Memorandum from the President’s Assistant for National Security Affairs (Kissinger) to President Nixon, 10 July 1973, *Foreign Relations of the United States 1969–1976, European Security, Vol. XXXIX*, Doc. 169 p. 510;

<sup>56</sup> See Memorandum of Conversation, L. Brezhnev–H. Kissinger meeting, Moscow, 25 March 1974, *Foreign Relations 1969–1976, Vol. XV, Soviet Union, June 1972–August 1974*, Doc. 166, p. 736.

<sup>57</sup> US Mission Geneva telegram 1974GENEVA01571, ‘CSCE: Meeting with Soviet Delegation Head’, dated 9 March 1974.

<sup>58</sup> Memorandum of Conversation, Meeting of H. Kissinger with A. Gromyko at Zavidovo, 5–8 May 1973, *Foreign Relations 1969–1976, Vol. XV, Soviet Union, June 1972–August 1974*, Doc. 107 p. 377; US Mission Geneva telegram 1975GENEVA01668, ‘CSCE: peaceful change – Romanian position’, dated 12 March 1975.

<sup>59</sup> Memorandum of Conversation of Secretary H. Kissinger with J. Sauvagnargues, Minister of Foreign Affairs of France, 18 June 1974, *Foreign Relations of the United States 1969–1976, European Security, Vol. XXXIX*, Doc. 214 pp. 650–651.

<sup>60</sup> US Mission Geneva telegram, 1974GENEVA07589, ‘CSCE: UK Views on Peaceful Change of Frontiers’, dated 20 December 1974; US Department of State telegram 1975STATE013326, ‘CSCE – UK position on peaceful change’, dated 25 January 1975.

agreement.<sup>61</sup> Under the terms of a compromise agreement the concept of peaceful change was separated from the principle of the inviolability of frontiers<sup>62</sup> and was placed under the principle of sovereign equality.<sup>63</sup>

In the final reading of this clause the participating States ‘...consider that their frontiers can be changed, in accordance with international law, by peaceful means and by agreement.’ The last minute semantic edits did not change the substance of this formula that was watered down both conceptually and through less forceful phraseology. Because of the unambiguous wording of this paragraph, it is interpreted as excluding unilateral actions as far as borders are concerned.<sup>64</sup> Placing the peaceful change clause under the sovereign equality principle was specifically meant to reinforce the requirement for consent by the States concerned for any border modifications.<sup>65</sup> At the insistence of the delegations which expressed reservations with regard to this provision, the sovereign equality principle also contains an important safeguard by reaffirming that territorial integrity is the ‘the right of every State’, which is considered to be a right inherent in sovereignty.<sup>66</sup>

### Internal self-determination as an innovative feature of the Helsinki Final Act

As far as the principle of equal rights and the self-determination of peoples (hereinafter ‘self-determination’) is concerned several points need to be made here. First, self-determination was interpreted by the participating States as a right pertaining to the entire populations of States.<sup>67</sup> Second,

<sup>61</sup> US Embassy Bonn telegram 1974BONN09467, ‘CSCE and German Questions: Bonn Group Study’, dated 14 June 1974.

<sup>62</sup> See Doc. CSCE/II/A/126 and CSCE Journal No. 88 (1974), p. 95. See also Memorandum of Conversation, L. Brezhnev-H. Kissinger meeting, Moscow, 25 March 1974, *Foreign Relations 1969–1976, Volume XV, Soviet Union, June 1972–August 1974*, Doc. 166, p. 738.

<sup>63</sup> The United States of America, CSCE/II/A/30; CSCE Journal No. 327 (1975), p. 192.

<sup>64</sup> Memorandum of Conversation of Secretary H. Kissinger with E. Gierek, First Secretary of Central Committee of Polish United Workers’ Party, 8 October 1974, *Foreign Relations of the United States 1969–1976, European Security, Vol. XXXIX*, Doc. 256 pp. 746–747;

<sup>65</sup> See J. Summers (ed.) *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, Dordrecht, 2007, p. 237; See also See A. Movchan, ‘Problems of Boundaries and Security in the Helsinki Declaration’, *Recueil des Cours*, 1977, no. 154, p. 24.

<sup>66</sup> US Mission Geneva telegram 1975GENEVA05273, ‘CSCE: Peaceful Change of Frontiers - State of Play’, dated 8 July 1975.

<sup>67</sup> During the negotiations only four countries – the Soviet Union, Yugoslavia, France and the Netherlands - officially submitted proposals for this principle. See Doc. USSR, CSCE/II/3,

they viewed it as a permanent, continuing right of peoples to political and social change within societies, focusing on the internal aspect of self-determination.<sup>68</sup> Because this concept expands the definitions previously elaborated in the U.N. documents, it is this internal aspect of the realization of the right to self-determination that is considered to be an innovative part of the Final Act.<sup>69</sup>

Third, because the majority of the participating States, Western and Eastern European alike, had national minorities on their territories, their primary concern was how to ensure that this principle would not potentially endanger the unity and territorial integrity of States.<sup>70</sup> Canada expressed concerns with the French proposal to include a reference to self-determination within the principle of the inviolability of frontiers, citing not only 'internal considerations' (i.e. the question of Quebec), but also the implication of this text as encouragement for separatist movements in other countries.<sup>71</sup> Cyprus, Greece, Spain, Romania and Poland agreed to give their consent to the provisional registration of this principle on condition that a balancing provision would be later added thereto coupled with a 'satisfactory formulation' of the principle of the territorial integrity of States.<sup>72</sup> These countries also sought to reinforce this safeguard clause by establishing a clear interrelationship between all the principles of the Final Act.<sup>73</sup>

As a result this principle was approved with an unequivocal safeguard clause therein stating that the participating States will '...[act] at all times in conformity with the purposes and principles of the Charter of the United

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Netherlands, CSCE/II/A/8, France, CSCE/II/A/12, Yugoslavia, CSCE/I/28 and CSCE/II/A/5; Federal Republic of Germany Doc. CSCE/I/RV.3 and CSCE/III/PV.2.

<sup>68</sup> See A. Cassese, 'The Approach of the Helsinki Declaration to Human Rights', in M. Dominick (ed.) *Human Rights and the Helsinki Accord: A Five Year Road to Madrid*, Buffalo, 1981, p. 38; A. Cassese (ed.) *Self-Determination of Peoples. A Legal Reappraisal*, Cambridge, 1995, pp. 282, 283, 286 and 287; Yugoslavia, CSCE/III/PV.4.

<sup>69</sup> See A. Cassese, 'The Helsinki Declaration and Self-Determination' in T. Buergenthal (ed.) *Human Rights, International Law and the Helsinki Accord*, Montclair, 1977, p. 103.

<sup>70</sup> See Memorandum of Conversation between H. Sonnenfeldt, Counselor at the State Department and Mr. Guenther van Well, Assistant Secretary of State, Ministry of Foreign Affairs of FRG, 5 December 1974, *Foreign Relations of the United States 1969–1976, European Security, Vol. XXXIX*, Doc. 264, p. 772; See H. Russel, *Supra* note 44 at 269.

<sup>71</sup> US Mission NATO telegram 1973NATO04218, 'CSCE - Principles Guiding Relations among States', dated 7 September 1973.

<sup>72</sup> See CSCE Journal No. 240 (1975). See also US Mission Geneva telegram 1975GENEVA01143, 'CSCE: Provisional registration of self-determination principle', dated 20 February 1975.

<sup>73</sup> See statements by Cyprus and Romania, CSCE Journal No. 240 (1975). See also Ferraris, L.V. (ed.). *Report on a Negotiation: Helsinki-Geneva-Helsinki 1972-1975*, Geneva, 1979, pp. 142, 150.

Nations and with the relevant norms of international law, including those relating to territorial integrity of States.<sup>74</sup> The drafters balanced the external aspect of self-determination with other principles, including territorial integrity, the inviolability of frontiers, as well as the non-use of force and non-intervention.<sup>75</sup> Just like in other international instruments, this ‘balancing’ technique applied in the Final Act had the obvious intent to restrict the scope of self-determination.<sup>76</sup>

Fourth, the participating States borrowed the concept within the Covenant on Civil and Political Rights (1966) and deliberately excluded national minorities from the scope of application of the self-determination principle by drawing a distinction between ‘people’ (i.e. the entire population of States), who are seen as beneficiaries of this right under the Covenant, and national minorities.<sup>77</sup> Under the same construct for the protection of minority rights they designed a separate principle VII.<sup>78</sup>

It is noteworthy that in order to prevent any negative consequences that the protection of minority rights could have on the territorial integrity of States, the participating States pledged to respect ‘the right of *persons* belonging to ... minorities’, putting emphasis on the protection of the human rights of individuals, rather than groups as a whole.<sup>79</sup> Early on in the process of standard-setting for the protection of minority rights, therefore, the participating States saw this as a security issue (they discussed this issue in Basket I dealing with security aspects of the Helsinki Declaration)

<sup>74</sup> See CSCE/II/A/137.

<sup>75</sup> See J. Summers ‘Peoples and International Law’ *Supra* note 65, p. 237.

<sup>76</sup> *Ibid.*, p. 141.

<sup>77</sup> See General Comment 23, ‘The rights of minorities’ (Article 27), (Fiftieth session, 1994), U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994), Office of the High Commissioner for Human Rights, Retrieved 7 November 2013, <http://www.unhchr.ch/tbs/doc.nsf/o/fb7fb12c2fb8bb21c12563ed004df11>. See A. Cassese, ‘The Helsinki Declaration and Self-Determination’, *Supra* note 69, p. 102; A. Cassese, ‘Self-Determination of Peoples’, *Supra* note 68, pp. 283–285; Also *Ibid.*, Note 17 at 289; G. Arangio-Ruiz, ‘Human Rights and Non-Intervention in the Helsinki Final Act’, *Recueil des Cours*, 1977, no. 157, p. 220.

<sup>78</sup> See H. Russel, *Supra* note 44, pp. 269–270; A. Cassese, ‘The Helsinki Declaration and Self-Determination’, *Supra* note 69, pp. 101–102; See also J. Wright, ‘The OSCE and the Protection of Minority Rights’, *Human Rights Quarterly*, 1996, no. 18, pp. 193–196; H. Heintze, ‘Contradictory Principles in the Helsinki Final Act?’, in *OSCE Yearbook 2004*, p. 293; T. Buergenthal, ‘The CSCE Rights System’, *George Washington Journal of International Law and Economics*, 1991–1992, no. 25, pp. 342–343.

<sup>79</sup> Note that France was opposed to designating minority groups as a whole as beneficiaries of this right. See A. Akemark (ed.) *Justifications of Minority Protection in International Law*, (London, The Hague, Boston, 1997, p. 270; A. Heraclides, ‘The CSCE and Minorities: the Negotiations behind the Commitments, 1972–1992’, *Helsinki Monitor*, 1992, no. 3, pp. 6–8.



and as will be discussed below were mindful to ensure that minority protection does not infringe upon the territorial integrity of States.<sup>80</sup>

### Reinforcing the norm of territorial integrity

As was mentioned above a number of participating States wanted to balance the right to self-determination with the obligation of States ‘...to abstain from undertaking or encouraging any action likely to imperil or threaten, wholly or in part, the territorial integrity or national unity of any of the participating States.’<sup>81</sup> They sought to establish a balance between the rights and obligations of States by expressing territorial integrity in forceful terms and by inserting a clause on the interdependence of principles.<sup>82</sup> Canada and a number of other States wanted to have additional safeguards that referred to the possibility of a peaceful change of borders and self-determination as not undermining the territorial integrity of States and insisted on including in this principle a ban on actions against the ‘unity’ of participating States.<sup>83</sup> As a result, the Final Act reaffirms the obligation to respect the territorial integrity of States in every provision dealing with territorial issues.

Both the Western and East European delegations wanted to make sure that the territorial integrity principle was not confined to a general prohibition of the use of force against territorial integrity and was as broad as possible.<sup>84</sup> Consequently, this principle underlines that States ‘will refrain from any action ... against the territorial integrity...’

### In lieu of a conclusion: the general practice of States as an interpretation of the Final Act principles

A review of the drafting history of the Final Act does not support the proposition voiced by some that there is an inherent conflict within the Helsinki Accords. Despite the seemingly conflicting objectives of the rival blocs the

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<sup>80</sup> Petra Roter (Ed.), “Managing the ‘minority problem’ in Post-Cold War Europe within the Framework of a Multilayered Regime for the Protection of National Minorities”, *European Yearbook of Minority Issues*, 2001–2002, no. 1, pp. 87, 95–96.

<sup>81</sup> See e.g. Statement by Romania, CSCE Journal No. 240 (1975).

<sup>82</sup> *Ibid.*

<sup>83</sup> H. Russel, *Supra* note 44 at 265.

<sup>84</sup> Spain, CSCE/II/A/13, H. Russel, *Supra* note 44 at 253.

participating States were able to arrive at an important consensus as far as borders are concerned, because they shared a common goal of détente that was not possible without renouncing the threat or use of force against the territorial integrity of States and arbitrarily changing the boundaries of States through violent means. The focus of the negotiations was therefore not on the validity of the principles per se (nobody questioned the validity, under international law, of these principles, which are enshrined in the U.N. Charter and are binding upon all States), but on reconciling the inviolability of frontiers with the possibility for their peaceful change. This was achieved by placing the peaceful change of frontiers clause under the sovereign equality principle, underlining that the peaceful adjustment of frontiers is a matter pertaining to the sovereign prerogatives of States. The participating States agreed that this change is possible with due regard to international law and with the consent of the States concerned, thus ruling out unilateral, non-consensual actions.

The Final Act was constructed so that all principles are ‘equally and unreservedly applied, each of them being interpreted taking into account the others’ and to ‘...ensure to each participating State the benefits resulting from the respect and application of these principles by all.’ That said, not only the realization of the principle of self-determination should not violate the territorial integrity of States and the inviolability of their frontiers, but any exercise of this principle should not contradict the requirement of consent stipulated in the peaceful change clause.<sup>85</sup> Clearly, the drafters of the Final Act did not view the self-determination principle as granting a right of secession.<sup>86</sup> Moreover, this provision can hardly be interpreted as such, given that no international recognition of the right of secession existed under customary international law at the time when the Final Act was drafted.<sup>87</sup> A comparison of the self-determination text in the Final Act with that of the Friendly Relations Declaration reveals that the participating States purposefully chose less forceful terms in framing this

<sup>85</sup> J. Salo, ‘Self-Determination: An Overview of History and Present State with Emphasis on the CSCE Process’, 2 *Finnish Yearbook of International Law*, 1991, no. 2, p. 316.

<sup>86</sup> See A. Cassese, ‘The Helsinki Declaration and Self-Determination’, *Supra* note 69, pp. 84, 104; See also R. Emerson, ‘Self-Determination’, *The American Journal of International Law*, 1971, no. 65, p. 464; G. Arangio-Ruiz, ‘Human Rights and Non-Intervention in the Helsinki Final Act’, *Recueil des Cours*, 1977, no. 157, p. 223; H. Hazewinkel, ‘Self-determination, territorial integrity and the OSCE’, *Helsinki Monitor*, 2007, no. 18, p. 296.

<sup>87</sup> See L. Seshagiri, ‘Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law’, 51 *Harvard International Law Journal*, 2010, no. 51, p. 555.

principle in the Final Act, which supports the earlier conclusion.<sup>88</sup> The discussions during the drafting of the Final Act indicate that this was meant not to establish a linkage between the self-determination concept in the Friendly Relations Declaration<sup>89</sup> and the rather restrictive principle in the Final Act.

The decisions and documents adopted within the OSCE framework and the practice of States in applying the Helsinki Final Act principles over the past two decades suggest that this interpretation was not affected by the changed circumstances and political developments on the European continent. This principle is not interpreted as a right of secession forty years after the signing of the Final Act, specifically in the context of the protracted conflicts in the OSCE area.<sup>90</sup> On the contrary, the general view is that secession movements in the territory of the former Soviet Union and Yugoslavia have not created a secession right under customary international law.<sup>91</sup> The Final Act is still regarded as an instrument which further institutionalizes the stability of borders principle.<sup>92</sup>

<sup>88</sup> Т. Мусаев, 'Косово и Притязания Армении на Нагорно-Карабахский Регион Азербайджана: Сравнительный Правовой Анализ' (2013) (in Russian).

<sup>89</sup> Although the drafters of the Friendly Relations Declaration made it clear that the Self-determination principle does not grant a right to secede and should not result in a disruption of the territorial integrity of States, some scholars argue that an inverted reading of the safeguard clause in Principle V of the Declaration gives rise to the doctrine of remedial secession. See G. Bolton & G. Visoka, 'Recognizing Kosovo's Independence: Remedial Secession or Earned Sovereignty?' (2010), Occasional Paper, No. 11/10, St. Antony's College, University of Oxford, Retrieved 5 November 2013, <http://www.sant.ox.ac.uk/seesox/pdf/RecognizingKosovosindependence.pdf>. For the Official Records of the UN General Assembly drafting history of the Friendly Relations Declaration see Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, UN Doc. A/7326 (November 1968), para. 164, p. 61 and para. 189, p. 66; and Report UN Doc. A/8018, Supplement No. 18 (May 1970), para. 78, p. 51 and para. 108, p. 77, para. 279, p. 110.

<sup>90</sup> See Opinion Nos. 2 & 3 of the Arbitration Commission of the Conference on Yugoslavia (known as the Badinter Arbitration Committee) set up by the Council of Ministers of the European Economic Community in August 1991, published in the *European Journal of International Law*, 1992, no. 3. Retrieved 25 October 2013, <http://ejil.oxfordjournals.org/content/3/1/178.full.pdf+html>; See also I. Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations', *Recueil des Cours*, 1995, no. 255, pp. 55–61; T. Musayev, 'Advisory Opinion of the International Court of Justice on Kosovo and the Nagorno-Karabakh Conflict: Comparative Analysis', Baku, 2011.

<sup>91</sup> L. Eastwood Jr., 'Secession: State Practice and International Law after the Dissolution of the Soviet Union and Yugoslavia', *Duke Journal of Comparative and International Law*, 1993, no. 3, p. 329. Retrieved 30 October 2013, <http://scholarship.law.duke.edu/djcil/vol3/iss2/2>; See also H. Hazewinkel, 'Self-determination, territorial integrity and the OSCE', *Helsinki Monitor*, 2007, no. 18, p. 300;

<sup>92</sup> See M. Zacher, 'The Territorial Integrity Norm: International Boundaries and the Use of Force', *International Organization*, 2001, no. 55, p. 237. Retrieved 15 October 2013, <http://byers.typepad.com/files/zacher-on-territorial-integrity-1.pdf>.

The Charter of Paris for a New Europe adopted by the CSCE in November 1990 as a response to the new political and territorial situation in Europe reaffirmed that '[i]n accordance with our obligations under the Charter of the United Nations and commitments under the Helsinki Final Act, we renew our pledge to refrain from the threat or use of force against the territorial integrity or political independence of any State, or from acting in any other manner inconsistent with the principles or purposes of those documents.'<sup>93</sup>

The wording self-determination in the Paris Charter also differs from principle VIII in the Final Act in a significant way. In the face of rising nationalism and territorial conflicts across the OSCE area the participating States deliberately omitted any reference to the internal and external aspects of this principle and its universal significance not to provide an incentive for interpreting the Final Act principles as justifying revisionist claims.<sup>94</sup>

This approach is also clearly visible in the policies of the OSCE countries vis-à-vis the newly emerged independent States and towards ethnic tensions and territorial conflicts in the OSCE area. This general policy is three-fold and includes the recognition of existing boundaries, the non-recognition of secessionist entities and the development of a framework to protect minority rights without jeopardizing the territorial integrity of States.

In December 1991 the European Council therefore adopted a declaration on the disintegration process in the Soviet Union, in which it underlined the importance of respecting the provisions of the Helsinki Final Act and recalled that '...according to these provisions, the frontiers of all States in Europe are inviolable and can only be changed by peaceful means and agreement.'<sup>95</sup> Later in its 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union', the European Council reiterated this approach as far as the borders of the newly emerged States of the former Soviet Union are concerned, and emphasized that '[t]he Community and its Member States will not recognize entities which are the result of aggression.'<sup>96</sup>

<sup>93</sup> See 'Charter of Paris for A New Europe', (1990), Retrieved, 10 November 2013, [www.osce.org/mc/39516](http://www.osce.org/mc/39516).

<sup>94</sup> See J. Summers (Ed.) *'Peoples and International Law'* *Supra* note 65, pp. 239–241.

<sup>95</sup> European Council Presidency Conclusions, EU Doc. 271/1/91, Maastricht, 9–10 December 1991. Retrieved 10 November 2013, [http://www.european-council.europa.eu/media/848626/1991\\_december\\_-\\_maastricht\\_eng.pdf](http://www.european-council.europa.eu/media/848626/1991_december_-_maastricht_eng.pdf).

<sup>96</sup> See EC Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union" (16 December 1991), reproduced in *European Journal of*

More recent practice of the OSCE participant States shows consistency in pursuing this policy. In order to reinforce the foundational principle of territorial integrity and to prevent the erosion of this norm in the wake of the declaration of independence by Kosovo, the European countries were quick to underscore that the Kosovo decision is a unique case and will not have implications for the interpretation of the Helsinki Final Act. Specifically, the European Council in its Conclusions on Kosovo in 2008 reiterated ‘...the EU’s adherence to the principles of the U.N. Charter and the Helsinki Final Act, *inter alia* the principles of sovereignty and territorial integrity and all UN Security Council resolutions’ and underlined its conviction that ‘...in view of the conflict of the 1990s and the extended period of international administration under SCR 1244, Kosovo constitutes a *sui generis* case which does not call into question these principles and resolutions.’<sup>97</sup>

The majority of States that submitted statements to the International Court of Justice (ICJ) with regard to the request by the U.N. General Assembly to render an advisory opinion on the unilateral declaration of independence by Kosovo, and even the authors of this declaration interpreted the primary significance of the Helsinki Final Act principles as prohibiting any forceful action against the territorial boundaries of States.<sup>98</sup> In its ruling the ICJ reaffirmed the obligation of States not to recognize as legal unilateral declarations of independence ‘...connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).’<sup>99</sup>

In response to the conflicts in the Balkans the participating States reiterated their ‘...determination...never to recognize any changes of borders, whether external or internal, brought about by force’.<sup>100</sup> For the same reason, the OSCE participating States and the international community at large do not recognize the separatist entities in the OSCE area, namely

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*International Law*, 1993, no. 4. Retrieved 10 November 2013, <http://ejil.oxfordjournals.org/content/4/1/66.full.pdf+html>.

<sup>97</sup> See Council of the European Union, Council conclusions on Kosovo (6496/08), 18 February 2008. Retrieved 10 October 2013, [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/gena/98818.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/98818.pdf).

<sup>98</sup> See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, *I.C.J. Reports* 2010. Retrieved 30 October 2013, <http://www.icj-cij.org/docket/files/141/15987.pdf>; For the individual statements by countries, <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=1>.

<sup>99</sup> Kosovo, Advisory Opinion, *I.C.J. Reports* 2010, para. 81, p. 437.

<sup>100</sup> See Third Additional Meeting of the Committee of Senior Officials, The Situation in Yugoslavia, Annex to Journal No. 11, Prague, 10 October 1991.

those in the Abkhazia and South Ossetia regions of Georgia, in the Nagorno-Karabakh region of Azerbaijan as well as the Transdnistria region of Moldova, and reaffirm the sovereignty and territorial integrity of these States.<sup>101</sup> For example, the EU in its statement on the Nagorno-Karabakh conflict of May 1992 condemned 'in particular as contrary to these [OSCE] principles and commitments any actions against territorial integrity or designed to achieve political goals by force, including the driving out of civilian populations.'<sup>102</sup> In its statement of November 1993 the EU called upon the Armenian forces to withdraw from the occupied territories of Azerbaijan and underlined that '[t]he European Union reiterates the importance it attaches to the territorial integrity and sovereignty of the Republic of Azerbaijan, in accordance with the principles of the CSCE.'<sup>103</sup> The OSCE Minsk Group Co-Chairs tasked to mediate between Armenia and Azerbaijan also reiterated that they '...reaffirm their support for the territorial integrity of Azerbaijan and thus do not recognize the independence of Nagorny Karabakh.'<sup>104</sup>

The Helsinki Final Act principles were interpreted in a similar way in the context of the conflicts in Georgia. For example, in its extraordinary meeting of September 2008 the European Council condemned Russia's unilateral decision to recognize the independence of Abkhazia and South Ossetia and recalled that '...a peaceful and lasting solution to the conflict in Georgia must be based on full respect for the principles of independence, sovereignty and territorial integrity recognized by international law, the Final

<sup>101</sup> See the UN Security Council Resolutions S/RES/822 (1993), S/RES/853 (1993), S/RES/874 (1993) and S/RES/884 (1993) as well as UN General Assembly Resolution A/RES/62/243 (2008) in the context of the Armenia-Azerbaijan conflict and S/RES/896 (1994), S/RES/906 (1994), S/RES/1752 (2007) in the context of Georgia; European Council Conclusions on the Republic of Moldova, 2950th General Affairs Council meeting, Luxembourg, (2009); See also NATO Summit Declaration, issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Chicago, 20 May 2012. Retrieved 15 September 2013, [http://www.nato.int/cps/en/natolive/official\\_texts\\_87593.htm](http://www.nato.int/cps/en/natolive/official_texts_87593.htm).

<sup>102</sup> See Statement on Nagorno-Karabakh, European Political Cooperation (EPC) press release, Brussels, 22 May 1992, published in the *European Political Cooperation Documentation Bulletin* (1992), Vol. 8, Doc. 92/201, p. 260. Retrieved 25 October 2013, <http://aei.pitt.edu/36872/1/A2881.pdf>.

<sup>103</sup> See Statement on Nagorno-Karabakh, European Political Cooperation (EPC) press release, Brussels, 9 November 1993, published in the *European Political Cooperation Documentation Bulletin* (1993), Vol. 9, Doc. 93/448, p. 532. Retrieved 25 October 2013, <http://aei.pitt.edu/36868/1/A2877.pdf>.

<sup>104</sup> See Verbatim Record of the 86th plenary meeting of the UNGA Sixty-second session, 14 March 2008, U.N. Doc. A/62/PV.86, available at <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/62/243&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/62/243&Lang=E)>.

Act of the Helsinki Conference on Security and Cooperation in Europe and United Nations Security Council resolutions.<sup>105</sup>

For these reasons the European States and institutions not only support the territorial integrity of Azerbaijan, Georgia and Moldova, but also reinforce the policy of the non-recognition of separatist entities by declaring all acts enacted by the separatists null and void. For example, in the context of the Armenia-Azerbaijan conflict the European Court of Human Rights in its admissibility decision in the *‘Elkhan Chiragov and Others v. Armenia’* case concluded that ‘...the “NKR” is not recognised as a State under international law by any countries or international organizations... [and] the invoked laws cannot be considered legally valid...’<sup>106</sup> Similarly, the EU consistently refuses to recognize as legitimate the ‘constitutional and legal framework’ of the mock elections held by the separatist regimes in the Nagorno-Karabakh region of Azerbaijan and in Abkhazia and South Ossetia in Georgia.<sup>107</sup>

Most recently, the Independent International Fact-Finding Mission on the Conflict in Georgia, which reviewed the applicable Helsinki Final Act principles in the context of this conflict, concluded that the realization of the self-determination principle beyond its internal aspect within the framework of a State will make the Helsinki Final Act principles incompatible.<sup>108</sup>

The overall purpose of the Final Act that codifies the stability of borders principle, the restricted scope of self-determination and, in general, the

<sup>105</sup> Presidency Conclusions, Extraordinary European Council Meeting, Brussels, 1 September 2008, EU Doc 12594/2/08 REV 2. Retrieved 5 November 2013, [www.consilium.europa.eu/uedocs/cms\\_Data/docs/.../en/ec/102545.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/.../en/ec/102545.pdf).

<sup>106</sup> See ECHR, Grand Chamber Decision on Application no. 13216/05 (*Elkhan Chiragov and Others against Armenia*), December 2011, para. 102, p. 25, Retrieved 19 October 2013, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108383>.

<sup>107</sup> See also Statement by High Representative Catherine Ashton on Nagorno-Karabakh, EU Doc A 333/12, 18 July 2012, Retrieved 10 October 2013, [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/131842.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131842.pdf); Statement by the spokesperson of EU High Representative Catherine Ashton on the elections in the breakaway region of South Ossetia in Georgia, 14 November 2011, EU Doc. A 453/11. Retrieved 10 October 2013, [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/126038.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/126038.pdf); Statement by the spokesperson of EU High Representative Catherine Ashton on the elections in the breakaway region of Abkhazia in Georgia, 27 August 2011, EU Doc. A 334/11. Retrieved 10 October 2013, [http://consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/124445.pdf](http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/124445.pdf);

<sup>108</sup> See the Report by the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG) based on the EU Council decision of 2 December 2008 (Council Decision 2008/901/CFSP), Vol. II, pp. 135–137. Retrieved 30 October 2013, <http://www.ceiig.ch/Report.html>.

ongoing debate on the scope of applicability of this principle, as was confirmed by the recent ICJ ruling on Kosovo,<sup>109</sup> prompted the OSCE participating States not to import this theoretical discourse into the interpretation of the Helsinki Final Act principles. Instead, they upheld the original construct within the Final Act and used certain tools, specifically those embedded in principle VII and dealing with the protection of minority rights, designed by the drafters specifically to address conflict-prone situations related to minorities. This explains why the protection of the rights of minorities and the development of international standards on their protection gained prominence within the OSCE and other European institutions over the past decades.<sup>110</sup>

These instruments reflect the general understanding that the scope of application of minority rights should not disrupt the unity and territorial integrity of States. For example, the OSCE in its major Copenhagen Document on the protection of minority rights underscored that '[n]one of these commitments [by the OSCE States] may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes and principles of the Charter of the United Nations, other obligations under international law or the provisions of the Final Act, including the principle of territorial integrity of States'.<sup>111</sup> The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities<sup>112</sup> and the Framework Convention for the Protection of National Minorities of the Council of Europe<sup>113</sup> also contain such restrictive clauses.

These international standards are increasingly used as a principal framework of analysis and as a tool to address tensions involving national

<sup>109</sup> See I.C.J. Reports 2010, para. 82, p. 438.

<sup>110</sup> A. Phillips, 'The Framework Convention for the Protection of National Minorities: A Policy Analysis', Minority Rights Group International Policy Paper, (September 2002). Retrieved 15 October 2013, [www.minorityrights.org](http://www.minorityrights.org). H. Heintze, 'Contradictory Principles in the Helsinki Final Act?', in IFSH (ed.), *OSCE Yearbook 2004*, Hamburg, 2004. Retrieved 10 October 2013, [http://www.core-hamburg.de/CORE\\_English/pub\\_osce\\_inh\\_04.htm](http://www.core-hamburg.de/CORE_English/pub_osce_inh_04.htm).

<sup>111</sup> See paragraph 37 of the 'Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE' (1990). Retrieved 29 October 2013, [www.osce.org/odihr/elections/14304](http://www.osce.org/odihr/elections/14304).

<sup>112</sup> See Article 8(4) of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), UNGA Doc. A/RES/47/135, Retrieved 29 October 2013, <http://www.un.org/documents/ga/res/47/a47r135.htm>.

<sup>113</sup> See preamble and Article 21 of the Framework Convention for the Protection of National Minorities of the Council of Europe, (1995). Retrieved 29 October 2013, <http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm>.



minorities in the OSCE area.<sup>114</sup> As a solution to potential conflicting situations the Copenhagen Document suggests establishing appropriate local or autonomous administrations, thus indicating that the OSCE favours a solution to these problems within the framework of the internationally recognized borders of States.<sup>115</sup> The OSCE High Commissioner on National Minorities further elaborated self-government and autonomy as tools for the integration of minorities into public life within the States.<sup>116</sup> Although the general view is that minorities do not enjoy the right to self-determination,<sup>117</sup> for the sake of reconciling the principles of self-determination and the territorial integrity of States, autonomy arrangements and self-governance are increasingly accepted as methods to realize the internal aspect of the right of self-determination and a resolution of conflicts.<sup>118</sup> This has found some practical application in the OSCE proposals to address the protracted conflicts.<sup>119</sup>

Any reinterpretation of the Final Act principles in contravention of its primary purpose will undoubtedly reopen them to renegotiation that would upset the hard-earned balance in the Final Act and would contradict the spirit of the Helsinki Accords. This explains why there seems to be a consensus within the OSCE that the principles are enduring and should be

<sup>114</sup> K. Huber & R. Zaagman, 'Towards the prevention of ethnic conflict in CSCE: The High Commissioner on National Minorities and Other Developments', *International Journal of Group Rights*, 1993, no. 1.

<sup>115</sup> See *Supra* note 111, para. 35, p. 20.

<sup>116</sup> See 'The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note' (1999), OSCE High Commissioner on National Minorities. Retrieved 5 November 2013, [www.osce.org/hcnm/30325](http://www.osce.org/hcnm/30325).

<sup>117</sup> See T.M. Franck *et al.*, 'The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty' (1992) in A. Bayefsky (ed.), *Self-Determination in International Law: Quebec and Lessons Learned*, The Hague, 2000, p. 294.

<sup>118</sup> G. Welhengama, 'The Legitimacy of Minorities Claim for Autonomy through the Right to Self-Determination', *Nordic Journal of International Law*, 1999, no. 68; S. Vasilev, 'The HCNM approach to Conflict Prevention', *Helsinki Monitor*, 1999, no. 10, pp. 56–57; H. Heintze, 'Contradictory Principles in the Helsinki Final Act?', in *OSCE Yearbook 2004*, pp. 295, 297–298; D. Turk, 'Towards a new security architecture in the OSCE area: How to include human rights?' in *Security and Human Rights*, 2010, no. 21, p. 57; J. Salo, 'Self-Determination: An Overview of History and Present State with Emphasis on the CSCE Process', *Finnish Yearbook of International Law*, 1991, no. 2, p. 320.

<sup>119</sup> See e.g. Statement by the OSCE Chairman-in-Office on the principles which should form part of the settlement of the Armenia-Azerbaijan Nagorno-Karabakh conflict, which call *inter alia* for '...an agreement based on self-determination which confers on Nagorno-Karabakh the highest degree of self-rule within Azerbaijan', Lisbon Document (1996), Retrieved 30 October 2013, <http://www.osce.org/mc/39539>.

left untouched.<sup>120</sup> If so, then the participating States should take advantage of the upcoming Final Act anniversary not only to reaffirm the principles, but to reconfirm their original meaning as designed some forty years ago. The choice is clear: to continue unhelpful and often destructive discourse on a perceived contradiction between the principles, thus contributing to the protracted nature of unresolved conflicts, or take the path of employing the tools built within the Final Act and developed over the past years to address conflicting situations without jeopardizing the unity and territorial integrity of States.

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<sup>120</sup> See e.g. Statements by the European Union and the US in response to the OSCE C/O Report on the progress made under the Helsinki + 40 process, *Supra* note 3.