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The International Legal Significance of the Human Rights Provisions of the Helsinki Final Act

Alexandre C. Kiss

Mary F. Dominick

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*Alexandre Charles Kiss**
and
*Mary Frances Dominick***

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I. INTRODUCTION

The first Conference on Security and Cooperation in Europe convened in Helsinki, Finland, on July 3, 1973. A concluding document called the "Final Act"[1] was signed by high representatives of thirty-two European States, the Soviet Union, Canada, and the United States on August 1, 1975.[2] The Conference product was an

* Professor Kiss, Institut International Des Droits de L'Homme, Strasbourg, is Director of Research, Centre National de la Recherche Scientifique, France.

** Ms. Dominick, J.D. Candidate, Vanderbilt University, 1981, formerly served as a summer staff assistant for the United States Commission on Security and Cooperation in Europe.

1. *Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975*, 73 DEP'T STATE BULL. 323 (1975) [*hereinafter* cited as *Final Act*]; *reprinted in* 14 INT'L LEGAL MAT. 1292 (1975) and Appendix A *infra*.

2. Other signatories include: Austria, Belgium, Bulgaria, Cyprus, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, German Demo-

extremely comprehensive document approximately 40,000 words in length. It is divided into three topical areas, called "baskets," which deal primarily with military, economic, and humanitarian issues. Basket I contains, in addition to provisions on military matters, ten "Principles Guiding Relations between Participating States" which set general parameters for cooperation. The bulk of the remaining provisions of the Act seeks to establish or strengthen ties between East and West by promoting specific measures such as prior notification of military maneuvers, commercial exchanges, industrial, scientific, and technological cooperation, mutual protection and improvement of the environment, developments in transportation and tourism, and information and cultural exchanges. A final section entitled "Follow-up to the Conference" establishes a mechanism for review of signatories' compliance and for future negotiations.

The relatively short human rights provisions are found in Principle VII of Basket I and in the "Human Contacts" section of Basket III. Principle VII is a declaration by each signatory of its "Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief."[3] It in-

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cratic Republic, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Lichtenstein, Luxembourg, Malta, Monaco, The Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and Yugoslavia.

3. The text of this Principle is the following:

> The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.
>
> They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.
>
> Within this framework the participating States will recognize and respect the freedom of the individual to profess and practise, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience.
>
> The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.
>
> The participating States recognize the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development

cludes specific reference to the provisions of the Universal Declaration on Human Rights[4] and the International Covenants on Human Rights.[5] Basket III, entitled "Cooperation in Humanitarian and Other Fields," expresses signatories' intent to allow freer movement of people, information, and ideas. The objectives set forth in Basket III are much more specific than those found in Principle VII.

What status do these provisions hold in international law? It has been generally recognized that the character of the Final Act is ambiguous,[6] but does this ambiguity allow the argument that the agreement is more than a political statement? Resolution of these questions will shed light not only on the characteristics of the controversial Final Act, but also on the development of international human rights law and of international law in general. In searching for the answers, two initial problems should be solved:

(1) Is the Helsinki Final Act a legal instrument?
(2) If so, what is its nature?

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of friendly relations and co-operation among themselves as among all States.

They will constantly respect these rights and freedoms in their mutual relations and will endeavour jointly and separately, including in cooperation with the United Nations, to promote universal and effective respect for them.

They confirm the right of the individual to know and act upon his rights and duties in this field.

In 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 fulfill 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.

Final Act, supra note 1, at BASKET I, § 1, Principle VII.

4. G.A. Res. 217, U.N. Doc. A/810 (1948).

5. G.A. Res. 2200 A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).

6. *See* Prévost, *Observations sur la nature juridique de l'Acte final de la Conférence sur la Sécurité et la Coopération en Europe,* [1977] ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL (Centre National de la Recherche Scientifique) 130-37 [*hereinafter* cited as ANNUAIRE FRANÇAIS]; Russell, *The Helsinki Declaration: Brobdingnag or Lilliput?,* 70 AM. J.INT'L L. 242 (1976); and Schachter, *The Twilight Existence of Nonbinding International Agreements,* 71 AM. J. INT'L L. 296-98 (1977).

II. Is the Helsinki Final Act a Legal Instrument?

Some doubt may exist about the intent of the States participating in the Helsinki Conference to treat the Final Act as a binding agreement.[7] Upon signature of that document, however, the general consensus was to deny binding character to its provisions.[8]

A. *The Final Act Is Not a Treaty*

Various elements prove that the Helsinki Final Act is not a treaty. The text of the Act itself is rather explicit. Its last provisions request the Government of Finland to transmit to the Secretary General of the United Nations its text "which is not eligible for registration under Article 102 of the Charter of the United Nations."[9] The Conference participants intended only to circulate the Final Act to members of the world community "as an official document of the United Nations."[10] Since according to Article 102 *every* treaty and *every* international agreement entered into by any member of the United Nations should be registered with the Secretariat,[11] it is clearly indicated that the Final Act is not a treaty.[12] This point was reiterated in the Finnish Government's letter of transmittal on behalf of the Conference to the Secreta-

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7. The public Soviet posture during the negotiations seemed to tend to make the Final Act as binding as possible. For example, efforts by the Federal Republic of Germany to clarify the non-binding status of the Final Act, supported by the United States and the United Kingdom, were rejected by the Soviets on grounds "that it unnecessarily denigrated the status of the results of the Conference." Russell, *id.* at 247.

8. *See* Bastid, *The Special Significance of the Helsinki Final Act, in* Human Rights, International Law, and the Helsinki Accord 13 (T. Buergenthal ed. 1977); Prévost, *supra* note 6, at 141; Russell, *supra* note 6, at 246; Schachter, *supra* note 6, at 298.

The participating States in practice have constantly stressed the non-binding character of the Final Act. *See, e.g.*, First Semiannual Report by the President to the Commission on Security and Cooperation in Europe, *submitted to* House Committee on International Relations, 94th Cong., 2d Sess. 5 (1976) [*hereinafter* cited as First Semiannual Rep.]; Response to written questions by the French Minister for Foreign Affairs, Journal Officiel de la République Française [*hereinafter* cited as Journal Officiel], Assemblée Nationale, Jan. 28, 1977, at 456, May 14, 1977, at 931, July 16, 1977 at 4728.

9. *Final Act, supra* note 1, at Follow-up to the Conference, para. 7.

10. *Id.*

11. U.N. Charter, art. 102, para. 1.

12. *See* First Semiannual Rep., *supra* note 8, at 5; and Prévost, *supra* note 6, at 141.

riat. It states explicitly that the Final Act is not eligible "in whole or in part" for registration, "as would be the case were it a matter of a treaty or international agreement."[13]

The tenth principle of the "Declaration of Principles Guiding Relations between Participating States" also clearly distinguishes international legal obligations from the provisions of the Final Act. It declares that the participating States will "conform with their legal obligations under international law" and will "furthermore pay due regard to and implement the provisions of the Final Act."[14]

There are also several indications that a certain number of the participating States did not intend to adopt a binding text when drafting the Helsinki Final Act. This fact in itself is an obstacle to considering the document as a treaty.[15] During the Conference numerous delegates expressed their unwillingness to conclude a formal international treaty. In addition, provisions concerning treaty formalities, such as procedures for ratification, entry into force, and duration of the agreement, were omitted from the text. As a matter of course, an instrument of such importance would have been subject to ratification or some other form of approval under the constitutions of the various participating States. It would appear from the text of the Final Act that none of the signatories considered such formalities necessary.[16]

Some consideration has been given to use of the term "final act" which was selected to designate the document produced by

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13. *Final Act, supra* note 1, at FOLLOW-UP TO THE CONFERENCE, fn. 1. On the genesis of this letter, *see* Russell, *supra* note 6, at 247-48.

14. *Final Act, supra* note 1, at BASKET I, § 1, Principle X, para. 2. *See* Bastid, *supra* note 8, at 13; and Cohen-Jonathan and Jacqué, *Obligations Assumed by the Helsinki Signatories, in* HUMAN RIGHTS, INTERNATIONAL LAW, AND THE HELSINKI ACCORD 51 (T. Buergenthal ed. 1977).

15. Schachter, *supra* note 6, at 296. Mr. Schachter refers to an International Court of Justice Advisory Opinion on the International Status of South-West Africa, at fn. 7. The Court states: "An 'agreement' implies consent of the parties concerned . . . . The parties must be free to accept or reject the terms of a contemplated agreement. No party can impose its terms on the other party." [1950] I.C.J. 128 at 140.

16. It has been stressed by the French government, *inter alia,* that the Final Act has not been published in the JOURNAL OFFICIEL because it is not an international treaty; rather it appears in the state publication DOCUMENTATION FRANÇAIS in which official documents of various natures are printed. Response to written questions by the French Minister of Foreign Affairs, JOURNAL OFFICIEL, SÉNAT Dec. 13, 1975, *supra* note 8, at 4350.

the Helsinki Conference. In practice, the term may be applied to international instruments which "vary in effect according to the circumstances."[17] A final act may imply a simple *procès-verbal,* which authenticates the results of a conference.[18] It may, on the other hand, constitute an international treaty.[19] As far as the Helsinki Conference is concerned, it may be assumed that by choosing the term "Final Act" without specifying that the document contains treaty provisions, the participating States wished to elude the problem of characterization of the instrument.

B. *The Final Act Cannot Be Likened to a Resolution of an Intergovernmental Organization*

Resolutions of international organizations are a new category of sources of international law. They are not included in the very traditional definition of sources provided by the Statute of the International Court of Justice,[20] even though their legal nature may derive from the charters of the organizations adopting them. In comparing the Helsinki Act to such resolutions, the main difference between them is that the Conference on Security and Cooperation in Europe convened in classic diplomatic fashion—as a conference organized on the basis of the sovereignty of the partic-

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17. Bastid, *supra* note 8, at 13. *See* HARVARD RESEARCH IN INTERNATIONAL LAW: DRAFT CONVENTION ON THE LAW OF TREATIES, art. 4, comment, 29 AM. J. INT'L L. Supp. No. 4, at 720 (1935):

> In so far as a Final Act is merely a *procès-verbal,* that is, a record or summary of the conclusions of a conference or a reproduction of the texts of the instruments adopted, it can hardly be regarded as a treaty. It may, however, contain, in addition, stipulations creating obligations for the parties which would give it the force and effect of a treaty.

18. DRAFT CONVENTION, *id.* *See* Prévost, *supra* note 6, at 133. The author quotes Briggs, who wrote in 1955: "Of some forty Final Acts drawn up during the twentieth century, which have been examined by the writer, all have been of the *procès-verbal* type."

The United Kingdom delegation to the Helsinki Conference "took the view that in international practice a 'Final Act' is not normally a legal instrument." Russell, *supra* note 6, at 246. *See also,* FIRST SEMIANNUAL REP., *supra* note 8, at 5.

19. *See* Russell, *supra* note 6, at 246, fn. 20. The author cites as an example of a final act considered to be a legally binding instrument, Final Act of the Extraordinary Administrative Radio Conference to Allocate Frequency Bands for Space Radio Communication Purposes, Nov. 8, 1963, 14 U.S.T. 887, T.I.A.S. No. 5603.

20. I.C.J. STATUTE, art. 38, § 1 (1945).

ipating States—while the resolutions of international organizations are adopted within a preexisting framework. As Suzanne Bastid points out in an essay on *The Special Significance of the Helsinki Final Act,* such an international body,

> while obviously also composed of state representatives, has a constitution that binds the member states and a defined competence subordinate to the rules of conventional origin relating to the conditions pursuant to which the will of the Organization is expressed.[21]

Although the Final Act could be described as a declaration of the signatory States[22] similar in its legal effects to resolutions adopted by international organizations, it cannot be likened to them. The organizational frameworks in which such texts are drafted and adopted are too dissimilar.

C. *Does the Final Act Have a Legal Character?*

If the Helsinki Act is not a treaty and cannot be equated to a resolution of an international organization, does it still fall within the scope of international law? The First Semiannual Report by the President of the United States to the Commission on Security and Cooperation in Europe answers this question in the negative. In a section on the "Nonlegal Nature of the Final Act," President Ford explained that the Western participating States felt it "inappropriate" to produce a legally binding instrument "given the broad scope of the agenda and the desire to make clear that CSCE was to develop a framework for progress rather than to conclude World War II or ratify territorial dispositions."[23] He stated further that while the Soviet Union and its allies emphasized the "high political significance" of the Conference,[24]

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21. Bastid, *supra* note 8, at 13.

22. Prévost, *supra* note 8, at 141, 146. The author quotes a statement by Mr. Kieger, head of the Government of Liechtenstein, to the effect that the Final Act should be considered a binding declaration. *See also* Schachter, *supra* note 6, at 297; and Declaration by the French Minister for Foreign Affairs (Oct. 7, 1977) *quoted in* [1978] ANNUAIRE FRANÇAIS, *supra* note 6, at 1164.

23. FIRST SEMIANNUAL REP., *supra* note 8, at 5. Harold Russell, principal U.S. negotiator for the Helsinki Declaration of Principles, notes that after general acceptance of the Final Act provisions concerning non-eligibility for registration, "many delegations began talking to the press about the non-legal character of the document . . . ." Russell, *supra* note 6, at 248.

24. *See Final Act, supra* note 1, at FOLLOW-UP, para. 9.

> They saw advantage . . . in restricting the legal nature of their obligations, particularly with respect to Basket Three. As a result consensus was reached on a form and procedure which leaves no doubt that the various documents reflect expressions of political will but not legal obligation.[25]

One can hardly deny that as a nonbinding document the Final Act is "outside the basic rule of *pacta sunt servanda.*"[26] Most writers point out that it creates mainly moral and political obligations, obligations which are "not necessarily illusory."[27] Noncompliance by a signatory State with the provisions of the Final Act "would not be a ground for a claim for reparation or for judicial remedies,"[28] since it would not constitute an international *delict.*[29] One may wonder, however, whether the distinction between present legal obligations and political or moral commitments is valid. All public international law is in essence a public or moral commitment. In analytical terms suggested by Professor Louis Henkin,[30] the actual costs and benefits of violating a formal international agreement signed by nations' highest representatives are arguably the same whether it is deemed implicitly binding or non-binding by individual signatories.

Characterization of the Helsinki Final Act as a nonbinding document does not deprive it of legal implications or even of its legal effects. Several writers insist on the "estoppel effect" of the Final Act's Declaration of Guiding Principles, contending that signatory States are "precluded from challenging the validity of the content given those principles" by the Conference.[31] Others maintain that the CSCE participating States are authorized by virtue of their signatures to monitor each other's application of the Fi-

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25. FIRST SEMIANNUAL REP., *supra* note 8, at 5.

26. Schachter, *supra* note 6, at 301. A communique published by the French Government after a Cabinet meeting on August 6, 1975, commenting on the results of the Helsinki Conference, also stressed that the Final Act did not have the mandatory force implicit in a peace treaty.

27. Cohen-Jonathan and Jacqué, *supra* note 14, at 52-53.

28. Schachter, *supra* note 6, at 300.

29. Cassese, *The Helsinki Declaration and Self-Determination, in* HUMAN RIGHTS, INTERNATIONAL LAW, AND THE HELSINKI ACCORD 106 (T. Buergenthal ed. 1977).

30. L. HENKIN, HOW NATIONS BEHAVE 48 (1968) Professor Henkin states: "At bottom, all norms and obligations are 'political'; their observance or deliberate violation are political acts, considered as part of a nation's foreign policy and registering cost and advantage within that policy." *See also* 50-53 (2d ed. 1979).

31. Cassese, *supra* note 29, at 106-07. *See* Schachter, *supra* note 6, at 301.

nal Act; that is, they have "a special right to speak out concerning implementation" of its provisions.[32]

Most of the participating States have in fact spoken out on many occasions. President Carter stated in a February 1977 press conference that the United States has a "responsibility and a legal right to express . . . disapproval of violations of human rights."[33] In accordance with Public Law 94-304, he submits semiannual reports to the Commission on Security and Cooperation in Europe on implementation of the various provisions of the Final Act, particularly those relating to the humanitarian field.[34] In 1977, the Parliamentary Assembly of the Council of Europe debated reports by its various committees on implementation of the Final Act, including the Basket III provisions on "Cooperation in Humanitarian and Other Fields."[35]

Even the Soviet Union has protested noncompliance. In 1976, the United States Department of State's refusal to grant entry visas to three Soviet trade unionists was alleged to be a violation of the Final Act provisions on international contacts.[36] The most recent complaint stems, of course, from the boycott of the 1980 Olympic games in Moscow. The French Government, while recognizing that the CSCE participants did not establish formal machinery to control implementation of the Final Act,[37] clearly maintains that it has the right to manifest its opinion on the manner in which the Act has or has not been applied, particularly where serious violations of the provisions concerning respect for human rights have occurred.[38]

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32. Leary, *The Implementation of the Human Rights Provisions of the Helsinki Final Act, A Preliminary Assessment 1975-1977, in* HUMAN RIGHTS, INTERNATIONAL LAW, AND THE HELSINKI ACCORD 111 at 113. (T. Buergenthal ed. 1977).

33. President Carter, Press Conference, Feb. 23, 1977, *in* 13 WEEKLY COMP. OF PRES. DOC. 244 at 245 (Feb. 28, 1977).

34. 22 U.S.C. § 3001 (1976). The act established the Commission on Security on Cooperation in Europe, a joint Congressional-Executive agency mandated to monitor compliance with the Final Act.

35. EUR. PARLIA. ASS. DEB., 29TH SESS., at 93 (Apr. 27-29, 1977). *See* Leary, *supra* note 32, at 115.

36. FIRST SEMIANNUAL REP., *supra* note 8, at 46. *See* Leary, *supra* note 32, at 128-29.

37. Response to a written question by the French Minister for Foreign Affairs, JOURNAL OFFICIEL, SÉNAT Aug. 19, 1976, at 2447.

38. Statement of the State Secretary for Foreign Affairs before the Committee of Ministers of the Council of Europe, Nov. 24, 1977, *in* [1978] ANNUAIRE FRANÇAIS, *supra* note 6, at 1123.

Control of the implementation of provisions by States party to a treaty is normal and elementary. Even without having the character of a treaty, the Helsinki Final Act seems to produce similar consequences. One may thus conclude, as have many writers, that "[a] participant's raising with any other participant any of the issues dealt with in the Final Act can no longer be characterized as 'interference' in domestic affairs."[39]

The position that human rights issues are no longer solely matters of domestic concern is still controversial, however. Dispute was particularly evident at the Belgrade Review Meeting, held in 1978 as a follow-up to the Helsinki Conference. The Soviet Union and other European socialist States argued that Principle VI of the Declaration on Principles Guiding Relations between Participating States, which prohibits "any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State,"[40] precludes action by one State to promote respect for human rights by another. According to one French author who has expressed similar views, since Principle X declares that all the Principles are "of primary significance and, accordingly, they will be equally and unreservedly applied,"[41] violation of the Principle VII provisions concerning human rights does not justify foreign intervention in violation of Principle VI.[42] Intervention for humanitarian reasons is prohibited by Principle VI, even more so, he argues, because Principle VII confers on the participating States the task "to respect human rights and fundamental freedoms." This last point is easily rejected since most international obligations confer on participating States a duty to do or not to do certain things which are quite frequently within their national jurisdictions. Moreover, it can be argued that Principle VII is precisely intended to bring human rights matters to an international level.

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39. Russell, *supra* note 6, at 260. *See* Schachter, *supra* note 6, at 304. *See also,* Henkin, *Human Rights and Domestic Jurisdiction, in* HUMAN RIGHTS, INTERNATIONAL LAW, AND THE HELSINKI ACCORD 21 (T. Buergenthal ed. 1977); and Leary, *When Does the Implementation of International Human Rights Constitute Interference into the Essentially Domestic Affairs of a State? in* INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE (J. Tuttle ed. 1978).

40. *Final Act, supra* note 1, at BASKET I, § 1, Principle VI, para. 1.

41. *Id.* at Principle X, para. 4.

42. Mourgeon, *La conférence de Belgrade et les droits de l'homme;* [1978] ANNUAIRE FRANÇAIS, *supra* note 6, at 265, 270.

The exception of domestic jurisdiction can no longer be invoked by one signatory State against another which asks it to respect Principle VII. In the last paragraph of that Principle, the participating States committed themselves to

> act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights . . . [and to] fulfull 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.[43]

In addition to the Universal Declaration and International Covenants, cited only as examples of agreements which clearly establish obligations for the signatory States, one may be justified to include the provisions of the Helsinki Final Act itself which have at least a declaratory character. The very existence of an international legal obligation implies that the affected states accept international surveillance of the way they fulfill it. Performance of this monitoring function, either by an international organ designated for that purpose or by the other parties to the international agreement, cannot be deemed intervention in the domestic affairs of a state.

In conclusion, the Helsinki Act, which is not an international treaty, has no binding character; nor can it be likened to a resolution adopted by an international organization. It does produce legal effects, however, and in particular, allows monitoring of the implementation of its provisions by other signatory States, especially in the field of human rights. It will be necessary, therefore, to investigate the legal nature of the Final Act.

III. The Legal Nature of the Final Act: Elements of a Solution

Sources addressing the legal status of the Helsinki Final Act treat it as an indivisible document. The Act, however, has definite segments which contain language connoting different degrees of commitment assumed by the signatories.[44] These differences seem to have limited effect since, as mentioned above, the letter of transmittal to the Secretary General of the United Nations on behalf of the Conference instructed that the Final Act was not eligi-

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43. Principle VII, *supra* note 3, at para. 8.
44. *See* Harvard Research, *supra* note 17.

ble for registration "in whole or in part" under Article 102 of the United Nations Charter.[45] The conferees wished to reiterate the fact that no segment of the Final Act has the character of an international treaty. Within these limits, however, one may note that the stipulations of the different sections of the Final Act are not uniform, particularly as far as the two baskets containing human rights provisions are concerned.

In Basket I, the preamble to the Declaration on Principles uses language which sounds binding. Each Principle begins with an assertion that "the participating States will . . ." perform or refrain from committing certain acts. Some of the promises are fairly general,[46] while others are more specific.[47] Principle VII, the human rights provision, has both general and specific elements.[48]

On the whole, it could be argued that most of these Principles are a sort of restatement of existing rules. It has even been suggested that together they represent "a codification of interstate relations and commitments that is grounded in long-established principles of international law and in such basic documents as the U.N. Charter."[49] One writer expanded this notion and submitted that the Basket I Declaration on Principles does more than simply restate principles found in the United Nations Charter: "[It] also elaborates and refines those principles by adapting them to

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45. *Final Act, supra* note 1, at FOLLOW-UP TO THE CONFERENCE, fn. 1. *See* text accompanying note 13, *supra.*

46. *See, e.g.,* signatories' commitment to "respect each other's right to define and conduct as it wishes its relations with other States in accordance with international law and in the spirit of the present Declaration." *Final Act, supra* note 1, at BASKET I, § 1, Principle I, para. 2.

47. *See, e.g.,* the text of Principle III concerning the inviolability of frontiers:

> 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.
>
> Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State.

48. *See* Principle VII, *supra* note 3.

49. Statement on behalf of the United States Delegation to the Belgrade Review Conference by Ambassador Sherer, Oct. 19, 1977, *excerpted in* COMMISSION ON SECURITY AND COOPERATION IN EUROPE, 95th Cong., 2d Sess., THE BELGRADE FOLLOWUP MEETING TO THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE, A REPORT AND APPRAISAL 19 (Comm. Print 1978) [*hereinafter* cited as BELGRADE FOLLOWUP]. *See also* Ghebali, *L'Acte final de la Conférence sur la Sécurité et la coopération en Europe et les Nations Unies,* [1975] ANNUAIRE FRANÇAIS, *supra* note 6, at 74.

conditions obtaining in Europe."[50] Some commentators have emphasized the importance of Principle VII, stressing the provision which states that human rights and fundamental freedoms "derive from the inherent dignity of the human person."[51] According to Harold Russell, the United States negotiator for the Declaration on Principles, this phrase "expresses the Western concept that human rights are inherent in the human condition and [are] not just privileges extended by a government when it suits national policy."[52] One may add that the participating States' acknowledgment that the individual has a right "to know and act upon his rights and duties in this field"[53] is a contribution of fundamental importance to the definition and the implementation of human rights. In sum, Principle VII, which Mr. Russell felt included "some of the most innovative concepts contained in the Declaration,"[54] may be considered as more than a simple restatement of existing and generally recognized principles.

The character of Basket III is different from that of the Declaration of Guiding Principles. Its provisions make more explicit some of the consequences of the principles proclaimed in the Declaration. In each of the preambles to the four sections of that Basket, the negotiators carefully stipulated that signatories "express their intention" to implement specific promises. The "Human Contacts" section contains declaratory language, *i.e.*, that signatories "will favorably consider applications for travel . . . in order [to allow individuals] to visit members of their families"[55] and that they "will deal in a positive and humanitarian spirit with the applications of persons who wish to be reunited with members of their families."[56] It also includes more permissive declarations of intent, *e.g.*, that "the participating States intend to facilitate wider travel by their citizens[57] . . . to promote the development of tourism[58] . . . to further the development of contacts and exchanges among young people[59] . . . [and] to ex-

50. Cassese, *supra* note 29, at 105.
51. Principle VII, *supra* note 3, at para. 2.
52. Russell, *supra* note 6, at 269.
53. Principle VII, *supra* note 3, at para. 7.
54. *See* Russell, *supra* note 6, at 268.
55. *Final Act*, *supra* note 1, at BASKET III, § 1(a), para. 1.
56. *Id.* at (b), para. 1.
57. *Id.* at (d), para. 1.
58. *Id.* at (e), para. 1.
59. *Id.* at (f), para. 1.

pand existing links and cooperation in the field of sport."[60] Different official texts issued by the governments of the participating States after the Helsinki Conference was concluded confirm the view that signatories interpreted Basket III as containing declarations of specific intent.[61]

The Helsinki Final Act is thus composed of at least two sorts of provisions. On the one hand, it contains a restatement of principles of general international law. Although they are adapted to a given historical and geographical situation, which gives them a specific political dimension,[62] they are also universal in content. On the other hand, the Final Act includes declarations of intent by the participating States. On various occasions the question has been raised, especially by socialist countries, whether the differences in content and purpose of the Basket I Principles and the Basket III provisions allow discrimination in their implementation. As far as the Declaration on Guiding Principles is concerned, any such discrimination among the different Principles is explicitly prohibited by Principle X: "All the principles set forth above are of primary significance and, accordingly, they will be equally and unreservedly applied, each of them being interpreted taking into account the others."[63] Several States, especially Western ones, have also refused to distinguish between implementation of the Principles and the provisions contained in the other Baskets.[64] They consider all provisions of the Final Act in assessing

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60. *Id.* at (g).

61. "As a non-binding declaration of intentions (not a treaty), . . . [the Helsinki Final Act] could do no more than define aspirations and outline the manner in which they were to be met. The record of its implementation is the test of its impact." COMMISSION ON SECURITY AND COOPERATION IN EUROPE, 95th Cong., 1st Sess., IMPLEMENTATION OF THE FINAL ACT OF THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE: FINDINGS AND RECOMMENDATIONS TWO YEARS AFTER HELSINKI 4 (Comm. Print 1977) [*hereinafter* cited as TWO YEARS AFTER HELSINKI].

"Helsinki prescrit un code de conduite exprimé en déclarations d'intentions—certaines fort précises—qu'il s'agit maintenant de traduire dans la réalité." Speech by the French Minister for Foreign Affairs before the House of Representatives, JOURNAL OFFICIEL, ASSEMBLÉE NATIONALE, Oct. 30, 1975, *supra* note 8, at 7547. *See also* Prévost, *supra* note 6, at 148.

62. Cassese, *supra* note 6, at 106.

63. *Final Act, supra* note 1, at BASKET I, § 1, Principle X, para. 4.

64. *See, e.g.*, SECOND SEMIANNUAL REPORT BY THE PRESIDENT TO THE COMMISSION ON SECURITY AND COOPERATION IN EUROPE, DEP'T STATE SPECIAL REP. No. 34 at 23 (June 1977):

signatories' record of implementation. At the same time, they refuse to admit the binding character of the document.

Such a situation might be considered paradoxical, even more so because although the Helsinki Final Act has no binding character, it seems to produce legal effects—effects which place it within the scope of international law. The only explanation for the discrepancy between the non-binding characterization and the legal effects of the Accord is that international law exists beyond those narrowly conceived sources represented by Article 38 of the Statute of the International Court of Justice.[65] As noted above, even the resolutions of international organizations are not actually included in this definition, although they may be considered binding in some cases. The argument that the legal nature of such resolutions derives from the charter of the organization which issues them is not quite convincing. It does not distinguish them from those sources of law explicitly mentioned in Article 38, for example, international judicial decisions.[66] One cannot ignore the tremendous transformation of international relations since 1945 when Article 38 was adopted, much less since 1920 when the Statute of its predecessor—the Permanent Court of International Justice—first codified the accepted sources of international law.[67] Since the end of the Second World War, about 160 intergovernmental organizations have been created and entirely new

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> While accepting the third basket at the Helsinki Summit, the Soviet Union and its allies have since tried to diminish the full extent of its obligation upon them. They have advanced arguments and interpretations which seek to blunt the purpose of basket three through token and selective implementation of its provisions.

In this report, the United States's outline of objectives for the Belgrade meeting stood in sharp contrast to the above description of Soviet performance: "We seek full implementation of all the commitments contained in the Helsinki Final Act. None can be called more binding, more vital, than others. All three of the so-called baskets are important." *Id.* at 1. The position of the French Government is similar to that of the United States. In response to a written question in the House of Representatives, it was stated that the Helsinki Final Act is to be considered "a whole, applicable in all its parts and all its stipulations." JOURNAL OFFICIEL, ASSEMBLÉE NATIONALE, Sept. 11, 1976, *supra* note 8, at 6039. *See also* Ghebali, *supra* note 49, at 110; Mourgeon, *supra* note 42, at 268; Cohen-Jonathan and Jacqué, *supra* note 14, at 49, 51.

65. I.C.J. STATUTE, art. 38, § 1 (1945).

66. *Id.* at (d).

67. The sources of law referred to in Article 38 of the Statute of the Permanent Court of International Justice (1920) were restated verbatim in Article 38 of the Statute of the International Court of Justice (1945).

fields—dealing with international protection of human rights, promotion of Third World development, cooperation in outer space, preservation of the environment, etc.—have required negotiation of international rules. These rules do not necessarily conform to the 1920 pattern, and in many cases the methods of establishing them are certainly very different from traditional ones.

It seems that the Helsinki Final Act represents one of the new forms of international legal instruments. It is a "program of action" drafted by thirty-five states with the intent to develop the process of detente. Quite a number of authorities insist on the fact that the Helsinki Final Act successfully constitutes such a program. For example, the United States Commission on Security and Cooperation in Europe states: "The Helsinki Accord is one important contributing factor to the long-term and complex process of East-West adjustment . . . . The Final Act is more than an agenda of talking points for continuing, cooperative relationships. It is also a set of aspirations to fulfill and solidify those relationships."[68] A common declaration adopted by the French and the Soviet Governments on October 17, 1975, is even more explicit:

> La France et l'Union soviétique considèrent les résultats de la Conférence sur la Sécurité et la Coopération en Europe comme un programme d'action Ca long terme couvrant de larges domaines des rapports entre les Etats et répondant aux intérêts des peuples et confirment leur volonté de donner une suite concrète aux dispositions de l'Acte final.[69]

The same concept of a "program of action" was stressed by the head of the French delegation to the Belgrade Review Conference in his speech during the closing ceremony on March 9, 1978:

> L'Acte final d'Helsinki, nous le considérons comme le principal programme à long terme de la détente, c'est-à-dire comme une ensemble d'indications, allant des plus générales aux plus concrètes, que nous devons tous suivre si nous voulons que la détente apporte quelque chose de plus que l'absence de conflit, qu'elle procure aux Etats un supplément de sécurité et aux personnes de nouvelles possibilités d'épanouissement.[70]

The term "program" has also been used by Irish Prime Minister

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68. TWO YEARS AFTER HELSINKI, *supra* note 61, at 7.
69. [1976] ANNUAIRE FRANÇAIS, *supra* note 6, at 1014.
70. [1978] ANNUAIRE FRANÇIAS, *supra* note 6, at 1165.

Cosgrave[71] and by several writers to describe the Final Act. One such author, Madame S. Bastid, suggests that the Helsinki Accord "appears to be a program of action whose terms are more or less defined, and which each state is called upon to implement on the domestic level or in its relations with third states."[72] Professors Cohen-Jonathan and Jacqué speak of a "common program which . . . contains some useful provisions concerning the general objective to be attained and the means to be employed to achieve it."[73] They also stress that citizens in the Eastern participating States consider the Final Act, particularly the human rights provisions of Basket III, a comprehensive program of great importance,[74] and add: "The attitude of the Western and neutral states also demonstrates a determination to consider the Final Act an overall program in which all the elements—including the free flow of ideas—are absolutely indivisible."[75]

Author Jean-François Prévost concluded his study of the legal nature of the Final Act of the Conference on Security and Cooperation in Europe with a statement that the Final Act is "a program defined by a number of fundamental principles and proposing a series of objectives . . . which should be achieved by legal acts."[76] M. Prévost insists on the fact that very precise indications have been given as to the acts required for implementation. This view is indeed justified by several provisions of the Basket III section entitled "Human Contacts." One may note, for example, a characteristic provision which promotes contacts and regular meetings on the basis of family ties:

> Applications for temporary visits to meet members of [individuals'] families will be dealt with without distinction as to the country of origin or destination: existing requirements for travel documents and visas will be applied in this spirit. The preparation and issue of such documents and visas will be effected within reasonable time limits; cases of urgent necessity—such as serious illness or death—will be given priority treatment. [The signatories] will take such steps as may be necessary to ensure that the fees for official travel documents and visas are acceptable.[77]

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71. *See* excerpt *in* Prévost, *supra* note 6, at 149.
72. Bastid, *supra* note 8, at 14.
73. Cohen-Jonathan and Jacqué, *supra* note 14, at 47.
74. *Id.* at 49.
75. *Id.*
76. Prévost, *supra* note 6, at 149-53.
77. *Final Act, supra* note 1, at BASKET III, § 1(a), para. 2.

Such language could be transferred without modification to a treaty of establishment, *i.e.*, a binding treaty. In the Final Act, this provision is only an aspiration, a goal to be achieved by the States. The precision of the text underlines its "programmatic" character, however.

Another point stressed by M. Prévost is that the portion of the Final Act entitled "Follow-up to the Conference" also has a "programmatic" character. In this text, the participating States "*[d]eclare their resolve,* in the period following the Conference, to pay due regard to and implement the provisions of the Final Act of the Conference: (a) unilaterally . . .; (b) bilaterally . . .; [and] (c) multilaterally . . . ."[78] They also commit themselves "to continue the multilateral process initiated by the Conference:

> (a) by proceeding to a thorough exchange of views on the implementation of the provisions of the Final Act . . . [and]
> (b) by organizing to these ends meetings among their representatives . . . ."[79]

As Madame Bastid notes, such a program is to be understood exclusively in terms of the process of détente:

> It has rightly been pointed out that this is not a precise program accompanied by a statement of the measures to be taken, or by time limits. But the combination of objectives and measures of implementation, as outlined in the Final Act, should in time permit an assessment of the extent to which the elements of this program have been acted upon, opening the way to go beyond "the abstract conceptions of détente."[80]

The Final Act itself insists on the progressive character of détente. One should note particularly the preambular paragraph of Basket I which stresses "the need to exert efforts to make détente both a continuing and an increasingly viable and comprehensive process, universal in scope . . .," and which adds that, "the implementation of the results of the Conference on Security and Cooperation in Europe will be a major contribution to this process."[81]

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78. *Id.* at FOLLOW-UP, para. 1.
79. *Id.* at para. 2.
80. Bastid, *supra* note 8, at 17.
81. *Final Act, supra* note 1, at BASKET I, preamble, para. 2. *See* Russell, *supra* note 6, at 260; and Prévost, *supra* note 6, at 138.

IV. International Programs: A New Method of Cooperation

Since the second half of the 1950's, a new perspective has gradually emerged in forms of international cooperation and, consequently, to a certain extent in international law. Traditionally, forms of international cooperation, and especially their legal aspects, have been interpreted as achievements. Once an international treaty was adopted or an international organization founded, the general feeling was that of a "happy end"—it was assumed that all the problems of cooperation were solved. The mid-1950's innovation was the introduction of a "time factor" into international instruments, consisting of not only provisions which were immediately binding after entry into force of the treaty, but also clauses which were intended to produce their effects progressively, strengthening the cooperation which was the object of the instrument.

The first important international agreement which established a process for growing cooperation was the Treaty of Rome.[82] The Treaty was not considered by its drafters as a goal attained, but rather as the beginning of the unification process. One of its most characteristic features is that quite a number of the provisions are designed to enter into force progressively. These progressive methods, established when the Common Market was formed by the original six member States, were later applied when the United Kingdom, Ireland, and Denmark joined the European Communities in 1973.[83] Provisions for staged or progressive measures, which can be considered a sort of program for development of European cooperation, are quite frequent in agreements relating to the EEC.

Since 1957, programs of activities have been drafted for use in other international organizations as well. On May 2, 1966, the Council of Europe, an intergovernmental organization composed solely of West European states, took a step unprecedented in the history of international organizations. It adopted an intergovernmental working program which lists the aims to be achieved by that body, the measures already taken, and the deadlines for

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82. Treaty Establishing the European Economic Community, Mar. 25, 1957, Office for Official Publications of the European Communities, 298 U.N.T.S. 11 (1958).

83. Act Concerning the Conditions of Accession and the Adjustments to the Treaties, Jan. 1, 1973, 16 O.J. Eur. Comm. (No. L 2) 1 (1973).

completion of various activities planned or already undertaken.[84] Similar working programs have been employed by the European Communities. On November 22, 1973, the Council of Ministers declared a "Program of Action of the European Communities on the Environment."[85] It may be noted that the structure of that program is similar to that of the Helsinki Final Act. It begins with a preamble establishing general objectives and is followed by a declaration on principles for a Community environmental policy. Specific measures to be adopted and implemented are then enumerated in the text. Because this Program of Action was effective only for a three-year period following its promulgation, during which time deadlines were specified for each action, a second five-year Program of Action on the Environment was adopted on May 17, 1977.[86] The structures of the two programs are comparable, the second comprising an introduction, a restatement of guiding principles established in the first program, and an enumeration of measures to be taken.

Within the framework of the United Nations, the two Decades for Development may also be considered "programs of action."[87] The United Nations Conference on the Human Environment, held in Stockholm in June 1972, is another example. Here again, using a method rather similar to that adopted by the Helsinki Conference, the text included a general introduction, a declaration proclaiming the guiding principles, and a detailed Plan of Action.

All of the texts cited above are not binding on the governments which adopted them, yet all of them have legal effects just as the Helsinki Final Act. It is permissible to ask, therefore, whether these agreements constitute a new category of international legal acts, born of the necessity to find a new method of international

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84. *See* Kiss, *Une révolution: la planification des activités d'une organisation internationale,* REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 76 (1967).

85. 16 O.J. EUR. COMM. (No. C 112) 1 (1973).

86. 20 O.J. EUR. COMM. (No. C 139) 1 (1977).

87. G.A. Res. 2626, 25 U.N. GAOR, Supp. (No. 28) 42, U.N. Doc. A/8124 (1970); G.A. Res. 1715, 16 U.N. GAOR, Supp. (No. 17) 23, U.N. Doc. A/5058 (1961); G.A. Res. 1710, 16 U.N. GAOR, Supp. (No. 17) 17, U.N. Doc. A/5056 (1961). *See also,* Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202, 28 U.N. GAOR, Supp. (No. 1) 1, U.N. Doc. A/9556 (1974).

See Virally, *La deuxième décennie des Nations Unies pour le développement,* [1970] ANNUAIRE FRANÇAIS, *supra* note 6, at 9.

cooperation. More and more often, progressive action is required to achieve aims agreed upon by certain states. These goals could not be achieved simply by concluding treaties or by waiting for the emergence of a rule of customary international law. The same phenomenon is observed in states using texts of a non-obligatory but directive character to ensure progressive achievement of governmental objectives.

In light of these examples, one may conclude that the Helsinki Final Act has a specific legal nature as an internationally agreed upon program. It contains a non-binding understanding of specific aims as well as equally non-binding texts, of a directive character, on the way to achieve them. It implies that the participating States will develop the process of détente and that in so doing, they will implement the principles and specific proposals defined in the text. Détente is not an obligation. However, once a State has agreed to accept it as a goal, the Final Act indicates ways to accomplish it. Any refusal to implement the Helsinki Accord provisions may be regarded as a manifestation of an intent to abandon détente.

One may note that in at least one of the fields of cooperation addressed by the Helsinki Accord, recent developments indicate a serious commitment to implement the measures agreed upon by the participating States. For example, the United Nations Economic Commission for Europe, a regional organ of which most of the Final Act signatories are members, concluded a Convention on Long-Range Transboundary Air Pollution which was signed on November 13, 1979. Although the issues raised in the fields of the environment and human rights are very different, it is important for the development of the Helsinki process to note several characteristics of the Convention which may be applicable when considering other Final Act provisions. First, the initiative was strongly supported by the Soviet Union and other socialist countries in Europe which insisted that the measures adopted at Helsinki should be implemented in a non-political context. The instrument selected for implementing the Basket II environmental provisions was an international treaty. A more or less "neutral" and rather technical international body, the United Nations Economic Commission for Europe, was selected as the framework through which to implement the adopted measures. The provisions of this formal international treaty include not only precise obligations accepted by the contracting States, but also a general program for converging national actions enounced in a rather di-

rective fashion.[88]

These examples shed some light on the whole process of growing international cooperation in Europe and on potential implementation of the Helsinki Final Act. They also suggest methods which might be used to implement the human rights provisions, particularly those found in Basket III.

V. CONCLUSION

In summary, it may be submitted that the Helsinki Final Act is not a treaty, nor is it similar to resolutions of international organizations. In light of the language used in the text and the signatories' public expressions of intent, the human rights provisions must be deemed to have the same legal nature as the other provisions. The document as a whole falls within a special category of international legal instruments not anticipated by traditional def-

88. Article 9 of the Convention is particularly characteristic:

The Contracting Parties stress the need for the implementation of the existing "Co-operative programme for the monitoring and evaluation of the long-range transmission of air pollutants" . . . and, with regard to the further development of this programme, agree to emphasize:

(a) the desirability of Contracting Parties joining in and fully implementing the Co-operative programme for the monitoring and evaluation of the long-range transmission of air pollutants in Europe which, as a first step, is based on the monitoring of sulphur dioxide and related substances;

(b) the need to use comparable or standardized procedures for monitoring whenever possible;

(c) the desirability of basing the monitoring programme on the framework of both national and international programmes. The establishment of monitoring stations and the collection of data shall be carried out under the national jurisdiction of the country in which the monitoring stations are located;

(d) the desirability of establishing a framework for a cooperative environmental monitoring programme, based on and taking into account present and future national, subregional, regional and other international programmes;

(e) the need to exchange data on emissions at periods of time to be agreed upon, of agreed air pollutants . . .;

(f) their willingness to continue the exchange and periodic updating of national data on total emissions of agreed air pollutants . . .;

(g) the need to provide meteorological and physico-chemical data relating to processes during transmission;

(h) the need to monitor chemical components in other media such as water, soil and vegetation, as well as a similar monitoring programme to record effects on health and environment; . . . .

initions of the sources of international law—that is, non-binding, but directive texts which produce limited legal effects. Its foundation is agreement on a common objective: détente. Its provisions—not binding in themselves, though most enounce generally recognized principles of international law—cannot be separated from this primary objective.

Implementation of the Helsinki Final Act is a process, a series of progressive measures. These measures may eventually take the form of treaties which will impose specific legal obligations on the participating States. There is little doubt that the Helsinki process, embodied in its non-binding "program of action," will influence such agreements. Whether implementation of this "program" in the field of human rights will lead to the creation of customary international law is an open question.[89] The implementing measures do not have legal significance outside the system of détente as a whole. However, since customary law develops within a context of concrete needs and relationships, it is possible, though perhaps unlikely, that the Conference on Security and Cooperation in Europe may be the vehicle for formation of such law. No categorical answer can be given on this point.

89. *See* Cohen-Jonathan and Jacqué, *supra* note 14, at 53, 69, fn. 26; Cassese, *supra* note 29, at 107; and Russell, *supra* note 6, at 270.