

# THE CSCE IN THE NEW EUROPE: FROM PROCESS TO REGIONAL ARRANGEMENT

A CASE-STUDY ON THE LEGAL ASPECTS  
OF THE TRANSFORMATION OF THE CONFERENCE  
ON SECURITY AND COOPERATION IN EUROPE  
FROM A POLITICAL PROCESS TO A REGIONAL ARRANGEMENT  
UNDER ARTICLE 52 OF THE UNITED NATIONS CHARTER

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## I. INTRODUCTION

*"You can lead a horse to water but you can't make him drink."*

The European continent is synonymous with war and peace. European history can be viewed as a perpetual resuscitation of force as a means of solving conflict; it can also be regarded as a quest for security. Traditionally, security has been closely linked to the concept of the nation-state.<sup>2</sup> Notwithstanding the strong development of international organizations and other forms of cooperation between states since 1945, the nation-state has remained the fundamental cornerstone of the international system.<sup>3</sup> Thus, security has long

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1. Heinz Gärtner, *The Future of Institutionalization: The CSCE Example*, in REDEFINING THE CSCE: CHALLENGES AND OPPORTUNITIES IN THE NEW EUROPE 252 (Ian M. Cuthbertson ed., 1992).

2. The concept of the nation-state has its legal foundations in the Peace of Westphalia (1648) which ended the Thirty Years' War and through its Treaties (involving France, Sweden, and the Holy Roman Empire) established a new (legal) order on the continent, based on the principles of sovereignty and territoriality. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 131, 242 (1988).

3. International (governmental) organizations exist by virtue of their founding Member-states. Indeed, the most fundamental legal document of the current international system, the Charter of the United Nations, is based on the concept of nation-states and sets forth in Article 2 the Principles according to which the Organization and its Members are to act in pursuit of the Purposes of Article 1. Sovereign equality of Member-states (Article 2(1)), the prohibition

been defined in terms of protection of the state against external aggression and threats to its territorial integrity.<sup>4</sup> Collective security arrangements have further strengthened this approach.<sup>5</sup>

The collapse of the Berlin Wall in 1989 seemed to mark the beginning of a new stage in Europe's struggle for stability. With the apparent disappearance of the traditional Cold War-division between East and West, confrontationist concepts of security required replacement by accommodationist approaches.<sup>6</sup> Hence, a scramble towards adaptation of existing institutions

of the use of force against the territorial integrity or political independence of any state (Article 2(4)), and the prohibition of intervention by the Organization in matters which are "essentially within the domestic jurisdiction" of any state (Article 2(7)) are the pillars upon which the international (legal) system rests. U.N. CHARTER, June 26, 1945, indexed at 59 Stat. 1031, T.S. No. 993.

4. U.N. CHARTER art. 2, ¶ 4. See also The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., 1883rd plen. mtg., Supp. No. 18, U.N. Doc. A/8018 (1970) [hereinafter *Declaration on Principles*]. *Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., 2319th plen. mtg., Annex, art. 1, Supp. No. 19, U.N. Doc. No. A/9619 and Corr. I (1974).

5. For the purpose of this discussion, the term "collective security arrangements" encompasses those relationships between states which serve the purpose of addressing what are perceived as common political or military threats to peace and stability. For a more theoretical approach, see Michael R. Lucas, *The Challenge of Helsinki II*, in Cuthbertson, *supra* note 1, at 259-62 (distinguishing military security, common security, collective security and comprehensive security arrangements). See also Charles A. Kupchan & Clifford A. Kupchan, *Concerts, Collective Security and the Future of Europe*, 16 INT'L SEC. 116-25 (Summer 1991). In legal terms, the North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243, which established the North Atlantic Treaty Organization (NATO), and the Warsaw Treaty, May 14, 1955, 219 U.N.T.S. 3, which created the Warsaw Treaty Organization (WTO, Warsaw Pact) are the two best-known European examples of collective security arrangements; their articles concerning mutual assistance (Articles V and 4, respectively), bear close resemblance to provisions included in other, non-European security arrangements, such as Article 3 of the Inter-American Treaty of Reciprocal Assistance, *opened for signature* Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838, 21 U.N.T.S. 77 [hereinafter *Rio Treaty*] and Article 24 and 25 of the Charter of the Organization of American States (OAS), Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3 [hereinafter *Charter of the OAS*].

6. The Berlin Wall "crumbled" in October 1989. The German Democratic Republic (GDR) ceased to exist on October 7, 1990, when German reunification became effective. Less than 18 months later, the dissolution of the former Eastern bloc was complete: the Soviet Union dissolved into the Commonwealth of Independent States (CIS); Poland, Hungary and Czechoslovakia formed the Visegrad Group; Rumania, Albania and Yugoslavia plunged into political chaos, turmoil and even (civil) war; and Bulgaria faced its share of political instability as well. Since 1991, extremely violent eruptions of ethnicism, nationalism, religious and historical animosity have caused further disintegration of former Soviet Republics (Georgia, Tajikistan, Moldova) and the former Yugoslav Republic. See Victoria Syme & Philip Payton, *Eastern*

and arrangements has resulted in an Alphabet Soup of acronyms.<sup>7</sup>

Acronyms, however, have not been a sufficient and satisfactory response to the fundamental challenges of the current European (dis)order. Indeed, it is the lack of a comprehensive philosophical, political and strategic vision rather than the lack of institutional reform which is key to the failure of existing institutions in addressing the challenges of resurgent aggressive nationalism, ethnic strife, human rights protection, the questions of minorities and self-determination, and to some extent even the (lack of) legitimacy of the nation-state itself.<sup>8</sup> In short, a rapidly changing perception of security,<sup>9</sup> in wake of the unraveling of political, social and economic structures, requires reconsideration of expectations and realities, objectives and instruments.

*Europe: Economic transition and ethnic tension, in EUROPEAN SECURITY-TOWARDS 2000* 86-103 (Michael C. Pugh ed., 1992); Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992); Robert L. Pfaltzgraff, Jr. et al., *The Atlantic Alliance and European Security in the 1990's*, 23 CORNELL INT'L L.J. 467, 478-85 (1990).

7. Currently, Europe can be seen as an "inter-institutional landscape." The European Union (created by the Treaty on Political Union, Dec. 13, 1991, Eur. Doc. No. 1750/1751 [hereinafter Treaty of Maastricht]), has been equipped with a Common Foreign and Security Policy (CFSP) in which the Western European Union (WEU) has been integrated. NATO has created the North Atlantic Cooperation Council (NACC, operative since December 20, 1991), the Partnership For Peace (PPF, approved at the NATO Summit in Brussels, January 10-11, 1994) and the Combined Joint Task Forces process (CJTF, also approved at the NATO Brussels Summit). The Conference on Security and Cooperation in Europe (CSCE, founded with the Helsinki Final Act (HFA) of 1975 (14 I.L.M. 1292 (1975))) has created three Institutions: the Conflict Prevention Centre (CPC), the Office for Democratic Institutions and Human Rights (ODIHR) and the Forum for Security Cooperation (FSC). The CSCE also created the Berlin Mechanism for Emergency Meetings (1991), the Human Dimension Mechanism (1989-1991), the Valletta Mechanism for Dispute Settlement (1991) and the Vienna Mechanism for Unusual Military Activities (1990-1992) for the specific purpose of "managing change." In addition, the CSCE's endorsement of the Stability Pact (a combined effort of French Prime Minister Balladur and French President Mitterand) may result in another forum on the European scene. Finally, the Council of Europe, the Central European Initiative (CEI, resulting from the former Hexagonale of Italy, Austria, Hungary, Yugoslavia, Czechoslovakia and Poland), the Visegrad Four, the Council of the Baltic Sea States, the Nordic Council, the Balkan Initiative and the Economic Cooperation Council (ECO) are all directly the result of recent initiatives or are adapting to the changes in the setting. See Andrew Marshall, *Acronyms galore ride on the merry-go-round of summits*, THE INDEPENDENT, June 11, 1993, at 10; *Policies for Peace*, THE TIMES, Nov. 30, 1993.

8. See Dominick McGoldrick, *The Development of the Conference on Security and Cooperation in Europe—From Process to Institution*, in LEGAL VISIONS OF THE NEW EUROPE 135 (Jackson & McGoldrick ed., 1993).

9. Security is no longer defined in terms of military security only; e.g., the CSCE concept of security includes economic, social, political, environmental/ecological and humanitarian elements. See Helsinki Summit Declaration, July 10, 1992, 31 I.L.M. 1385, 1392, at ¶ 21 (1992).

Such reconsideration has taken place, *inter alia*, within the Conference on Security and Cooperation in Europe (CSCE). Defined either in terms of its Cold War-origins or its moral aspirations,<sup>10</sup> the CSCE has been characterized by its flexibility and responsiveness to the post-Cold War shake-up of the "Old Order." From the Charter of Paris for a New Europe (1990) to the most recent meeting of the CSCE Council of Ministers (Rome, 1993),<sup>11</sup> the CSCE has consistently emphasized its awareness of the changes occurring within Europe and its resulting intention of not only providing a forum for assessment and dialogue, but also of becoming an operational and effective "manager of change."<sup>12</sup> However, this implies a radically different approach from the instrumentality and functional concept underlying the original CSCE.<sup>13</sup>

10. The CSCE has been termed a "child of the Cold War." Cuthbertson, *supra* note 1, at 2. Another commentator has defined the CSCE as the "established conscience of the continent." Peter Corterier, *Commentary: Grant CSCE Authority to Act; Forum Lacks Power to Manage Change in Europe*, DEF. NEWS, July 6-12, 1992, at 15.

11. The Charter of Paris for a New Europe was adopted at the First CSCE Summit in Paris, November 21, 1990. 30 I.L.M. 190 (1991) [hereinafter Charter of Paris]. The Charter of Paris proclaims that the "era of confrontation and division has ended," that "Europe is liberating itself from the legacy of the past and that a "new era of democracy, peace and unity in Europe" has arrived. Charter of Paris, pmbl., ¶¶ 1-2. The Charter is highly illustrative of the "New Europe" that the Participating States envisioned ("whole, united and free") and forms a necessary starting-point for any analysis of the (institutional) development(s) of the CSCE. The Fourth CSCE Council of Ministers Meeting in Rome, December 1-2, 1993, is the temporary culmination of efforts to transform the CSCE into an "operational" entity. See *CSCE and the New Europe—Our Security is Indivisible*, CSCE Doc. CSCE/4-C/Dec.2 (on file with author). See *infra* Part II.

12. See, e.g., Helsinki Summit Declaration, *supra* note 9, at ¶ 18.

13. The origins of the CSCE can be traced to the early 1950's, when the Soviet Union repeatedly proposed a conference to establish a European collective security system. This conference would serve the Soviet objectives of legitimizing the Soviet position within (Eastern) Europe, creating division between North America and Western Europe and providing fresh impetus to East-West economic development. The negative Western response changed near the end of the 1960's, when West Germany's Ostpolitik and resulting *Ostverträge* (with the GDR, Poland, Czechoslovakia and the USSR) contributed to a general relaxation in the East-West relationship, commonly referred to as "detente." Subsequent exchanges of communiqués and declaration between NATO and the Warsaw Pact, the conclusion of the Four-Power-Agreement on Berlin (1971), the conclusion of the first SALT agreement between the United States and the USSR (1972) and East-West agreement on the convening of the Mutual and Balanced Forces Reduction (MBFR) talks cleared the way for a Conference. As a result of the Multilateral Preparatory talks (MPT) from November 22, 1972 to June 8, 1973, the CSCE was set up as a forum for political dialogue and trade-off between East and West, thus becoming a policy instrument for both blocs. See ARIE BLOED, FROM HELSINKI TO VIENNA: BASIC DOCUMENTS OF THE HELSINKI PROCESS 2-4 (1990); STEFAN LEHNE, THE VIENNA MEETING OF THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE, 1986-1989: A TURNING POINT IN EAST-WEST RELATIONS 1-5 (1991); JAN SIZOO & RUDOLF JURRIJENS, CSCE DECISION-MAKING: THE MADRID EXPERIENCE 23-45 (1984). See also JOHN J. MARESCA, TO HELSINKI, THE

Moreover, it requires a thorough reassessment of the basic structures of the CSCE, its institutional development and its achievements thus far. In fact, what is called for is a virtually new entity, rather than a restructured and institutionalized process.

The Helsinki Summit Declaration of July 10, 1992, has generally been considered a new chapter in the CSCE process because of its recognition that reality no longer fits the definition of the "New Europe" envisaged in the Charter of Paris.<sup>14</sup> The practical implementation of this recognition, which has been embodied in the Helsinki Decisions, has paved the way for an "operational" CSCE.<sup>15</sup> Nevertheless, the Helsinki Decisions appear to be no more than a half-hearted attempt to provide the "old" CSCE with legitimacy for its continued presence on the list of (European) acronyms.

This thesis is aimed at contributing to the redefinition of the CSCE's position in a changing European security-architecture. Indeed, redefining the CSCE's role on the European continent appears to be one of the key issues worthy of concern to the Participating States at the upcoming Budapest Summit.<sup>16</sup> Despite its structural adjustments since 1990, the CSCE has become a quagmire of conflicting political and legal interests. As a result, the current CSCE structures have been the subject of review at both the Stockholm (1992) and Rome (1993) meetings of the CSCE Council of Ministers.<sup>17</sup> What has

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CONFERENCE ON SECURITY AND COOPERATION IN EUROPE, 1973-1975 (1985); LJUBIVOJE ACIMOVIC, PROBLEMS OF SECURITY AND COOPERATION IN EUROPE (1981).

14. The Declaration notes that "the legacy of the past remains strong. We are faced with challenges and opportunities, but also with serious difficulties and disappointments." Helsinki Summit Declaration, *supra* note 9, at 1390, ¶ 3. This statement can be interpreted as an implicit acknowledgement of the problems in the Republics of the former Soviet Union (notably the ongoing struggle for political and economic reforms in the Republics, the issue of Russian troops still remaining in other Republics, and the outbreak of new (ethnic) conflicts and the continuation of existing ones in, *inter alia*, the Caucasus and Moldova), the dissolution of Yugoslavia, and the failure of international efforts to provide adequate and effective solutions.

15. In this particular context, the term "operational" refers to the capacity of an entity such as the CSCE to actively exert its influence upon a situation. In more specific terms, it refers to the ability of the CSCE to engage as an entity in the prevention, management and solution of conflicts. Helsinki Decisions, 31 I.L.M. 1394, 1403 (1992).

16. The Third Summit of Heads of State or Government of the 53 Participating States of the CSCE was scheduled to take place December 5-6, 1994. The phenomenon of CSCE Summitry started with the Paris Summit of November 1990; the Helsinki Summit of July 1992 was the second one. With regard to the number of Participating States, it must be noted that the continued exclusion of Serbia/Montenegro will reduce the Summit attendance to 52 Participating States. In addition, Japan may attend the Budapest Summit on invitation. See Helsinki Decisions, *supra* note 15, at 1403, ¶ 10.

17. The Third Meeting of the CSCE Council of Ministers took place in Stockholm, Sweden, on December 14 and 15, 1992. See *CSCE Council Summary of Conclusions of the Stockholm Meeting*, 32 I.L.M. 603 (1993). See also ALEXIS HERACLIDES, HELSINKI II AND

resulted from these reviews and how they relate to the Helsinki Summit and its Decisions is considered in Part I, which deals with the legal aspects of the institutionalization of the CSCE. For a proper understanding of the significance of the Helsinki Decisions and its subsequent reviews, Part I includes a survey of the origins, characteristics and main achievements of the CSCE.

One of the most remarkable decisions of the Helsinki Summit concerned the regional arrangement status of the CSCE. Not considered an international organization *stricto sensu*, the CSCE was nevertheless declared a regional arrangement under Article 52 of the U.N. Charter.<sup>18</sup> This decision seems to be closely related to the transformation of the CSCE into an "operational" entity. The legal meaning, as well as the implications and significance of this status, is discussed in Part II. Accordingly, Part III sets out the conclusions which are to be drawn from the preceding analyses. Although Part III cannot provide the ultimate answer to the legal problems which currently beset the CSCE, at least it attempts to clarify issues of direct concern which ought to be the subject of consideration in future reviews of the CSCE. Only in this way may the result that the Helsinki, Stockholm and Rome meetings failed to achieve be accomplished: a CSCE that is relevant to the changing European architecture, and more than just another acronym of political ambivalence.

## PART I: FROM PROCESS TO INSTITUTION

### II. FROM HELSINKI TO BUDAPEST: A SURVEY OF CSCE DEVELOPMENTS

#### A. Introduction

The Conference on Security and Cooperation in Europe (CSCE) has been the mirror-image of the political changes that have transformed the European continent from a potential battlefield to a real theatre of war. From the normative character of the Helsinki Final Act (HFA) of 1975 to the pretentious nature of the Charter of Paris for a New Europe (hereinafter the "Charter of

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ITS AFTERMATH: THE MAKING OF THE CSCE INTO AN INTERNATIONAL ORGANISATION 184-85 (1993). The Fourth Meeting of the CSCE Council of Ministers took place in Rome, Italy, on December 1-2, 1993. See CSCE Doc. CSCE/4-C/Dec.2, *supra* note 11. See also Anthony Robinson, *CIS Peacekeeping tops CSCE agenda: The organisation seeking a new framework for Europe*, FIN. TIMES, Nov. 27, 1993, at 2; *CSCE Ministers still stumped on security structures*, AGENCE FRANCE PRESS, Dec. 1, 1993; *Roundup: European security meeting achieves little*, XINHUA NEWS AGENCY, GENERAL OVERSEAS NEWS SERVICE, Dec. 2, 1993.

18. See Helsinki Summit Declaration, *supra* note 9, at 1392, ¶ 25; Helsinki Decisions, *supra* note 15, at 1403, ¶ 2.

Paris") of 1990, the CSCE has resembled more of a debating society than an organizational entity.<sup>19</sup> Indeed, the CSCE has been a vehicle for dialogue rather than a platform for action. At the same time, the CSCE has been instrumental to a norm-creating process which has become the source of its reputation as the "conscience of the continent."<sup>20</sup>

Notwithstanding this reputation, the CSCE has been confronted by its inability to translate its "moral authority" into respect for its Principles. Since the Charter of Paris' proclamation of a New Europe,<sup>21</sup> reality has been a stark reminder of the highly idealist perspective which it purports. The implicit acknowledgement of misperception has been made in the Helsinki Summit Declaration of 1992.<sup>22</sup> Consequently, the Helsinki Decisions have resulted in an unconvincing attempt to equip the CSCE with the means to command respect from its Participating States for the fundamental norms of conduct of the HFA, which still hold unrelentless strength.

To understand the importance of the Helsinki Summit and to identify the failure of the Participating States to create a legal and political framework within which CSCE authority is derived from the power of credibility, therefore, requires an understanding of the development of the CSCE between 1975 and 1992. Through a short survey of its characteristics and its highlights and/or low points (such as review conferences, expert meetings, etc.), the image of mixed successes and failed promises may emerge. Though this does not deviate from the current CSCE image, it is important to note that there is a strong difference in the respective explanations. In short, the CSCE has moved from the restrictions of deliberate choice to the limitations of political opportunism.

19. See David Shorr, *Plenty of Work Ahead For a Beefed-Up CSCE*, THE CHRISTIAN SCIENCE MONITOR, July 14, 1992, at 18. For the text of the Helsinki Final Act, see 14 I.L.M. 1292 (1975); Charter of Paris, *supra* note 11; Supplementary Document to Give Effect to Certain Provisions Contained in the Charter of Paris for a New Europe, 30 I.L.M. 209 (1991) [hereinafter Supplementary Document]. See also *infra* Part III.

20. See Corterier, *supra* note 10.

21. See the Preamble titled "A New Era of Democracy, Peace And Unity," in particular ¶¶ 1-2, Charter of Paris *supra* note 11, at 193.

22. The Helsinki Summit Declaration holds several provisions which point at the reality of the day against the euphoria of the Paris Summit, including the acknowledgement that:

This is a time of promise but also a time of instability and insecurity. Economic decline, social tension, aggressive nationalism, intolerance, xenophobia and ethnic conflicts threaten stability in the CSCE area. Gross violations of CSCE commitments in the field of human rights and fundamental freedoms, including those related to national minorities, pose a special threat to the peaceful development of society, in particular in new democracies.

Helsinki Summit Declaration, *supra* note 9, at 1391, ¶ 12. Cf. Charter of Paris, *supra* note 11, at 193. The preamble of the Charter of Paris makes a euphoristic claim of respect, co-operation, democracy, peace and unity.

Thus, the apparent similarity between problems encountered by the CSCE before the Helsinki Decisions and those thereafter serves to disguise the seriousness of the change in premises on which the CSCE rests.

### B. *The Helsinki Final Act of 1975*

The signing of the Helsinki Final Act (HFA) on August 1, 1975, marked the end of the era of detente.<sup>23</sup> Despite a rapid deterioration in the East-West relationship, however, the HFA's "institutionalization" of detente through the adoption of a comprehensive code of conduct has assured the continuation of the CSCE. Designed to deal with questions relating to security in Europe,<sup>24</sup> cooperation in the fields of economics, science, technology and the environment,<sup>25</sup> and cooperation in humanitarian and other fields,<sup>26</sup> the CSCE

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23. A conventional and generally accepted definition of detente is a relaxation of tension between states, which does not change the underlying conflict between them. However, this definition is not absolute. The disagreement between East and West, as well as among the Western countries themselves, regarding the meaning of detente and the extent to which its application to their mutual relations should be reflected in visible results within the context of the CSCE became a serious obstacle in the initial years of the CSCE. See Ieuan G. John, *The Helsinki-Belgrade Connection*, 2 INT'L REL. 137, 138 (1977); LEHNE, *supra* note 13, at 13. The HFA was signed by the Heads of State and/or government of the 35 Participating States, which included 32 European countries, the United States and Canada, and the Holy See. These States could be "split" into three categories: the Eastern bloc countries (The Warsaw Pact), the Western bloc (NATO/EEC), and the group of Neutral and Non-aligned States (NNA).

24. Security issues are dealt with in Basket I of the HFA. Termed after the method used during the MPT to order the proposals for topics of consideration as submitted by the participating states, Basket I consists of two parts. The first part is the Declaration on Principles Guiding Relations between Participating States. The second part is the *Document on confidence-building measures and certain aspects of security and disarmament*. The *Declaration on Principles*, also known as the *Decalogue*, is the backbone of the CSCE process; the Document on CBM's was the first of its kind and has been strengthened by subsequent adoption of similar documents at several other occasions. See BLOED, *supra* note 13, at 5-6.

25. These issues are part of Basket II and are of major interest to the East European States. This basket has been the least controversial of the HFA's baskets and has been the source of relatively "easy" cooperation. The second basket deals with, inter alia, commercial exchanges; industrial co-operation and projects of common interest; provisions concerning trade and industrial co-operation; science and technology; environment; and cooperation in other areas (transport, tourism, migrant labour, training of personnel). For a variety of reasons, this basket has played a minor role in the CSCE, chief among them being the duplicative nature of the basket. In fact, the UN Economic Commission for Europe (ECE) holds a virtually identical mandate and is of almost identical composition. See LEHNE, *supra* note 13, at 8-9; John, *supra* note 23, at 141-46.



has provided a forum for political consultation between its Participating States.<sup>27</sup> The CSCE has been conditioned upon a Decalogue of Principles, which sets forth the standards guiding the relationships between the Participating States.<sup>28</sup> Being the backbone of the CSCE process and a source of contention

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26. The human rights issues are covered by Basket III and has become the trademark of the CSCE. This basket has been the most controversial element of the HFA and may indeed be regarded as the "Trojan Horse" of the CSCE. By specifying normative standards in the four areas of Human Contacts, Information, Culture and Education, the HFA effectively provided a catalyst for change: the standards were used by the "dissident" movements in the Eastern bloc (such as Charter 77 in Czechoslovakia) and the so-called Helsinki Monitor Committees to measure human rights practices in the East and bring them to the attention of the Western governments. They, in turn, regarded these standards a matter of principle: in their view, disregard of human rights threatened the stability of East-West relations and therefore endangered the security of Europe. Basket III has been supplemented by numerous instruments to achieve full implementation of the enumerated standards.

27. The use of the term "Participating States" implies that the CSCE is a process rather than a (legal) entity. This use is consistent with the accepted doctrine that the HFA is not a legally binding document. This, however, does not deprive the HFA of its binding force, nor does it deprive the HFA of its political authority. Van Dijk argues: "The conclusion that the Final Act is not a legally binding agreement does not mean that the matters agreed upon between the participating states, and laid down in the Final Act, should not be binding. A commitment does not have to be legally binding in order to have binding force; the distinction between legal and non-legal binding force resides in the legal consequences attached to the binding force." Pieter Van Dijk, *The Implementation of the Final Act of Helsinki: The Creation of New Structures or the Involvement of Existing Ones?*, 10 MICH. J. OF INT'L L. 110, 114 (1989). Furthermore, Bloed notes that "the HFA incorporates numerous clauses which can be traced to international agreements to which a great number of or all of the CSCE States are bound." BLOED, *supra* note 13, at 11. Indeed, the HFA contains references to the purposes and principles of the U.N. Charter, human rights instruments (such as the 1966 International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR)) and principles of international law. *Id.*

28. The *Declaration on Principles Guiding Relations between Participating States* contains ten fundamental principles, which are directly derived from, or closely related to, recognized principles of international law:

- 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
- V. Peaceful settlement of disputes
- VI. Non-intervention in internal affairs
- VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief
- VIII. Equal rights and self-determination of peoples
- IX. Co-operation among States
- X. Fulfillment in good faith of obligations under international law.

at the same time, the Decalogue has been balanced by the provision that "all the Principles set forth . . . are of primary significance and, accordingly, they will be equally and unreservedly applied, *each of them being interpreted taking into account the others.*"<sup>29</sup> In practice, this provision has been reflected in the linkage between the Baskets of the HFA. Thus, a requirement of balance between security issues, economic issues and human rights has become a characteristic of the CSCE, both in terms of process and substance.<sup>30</sup>

Linkage between the Baskets of the HFA has provided the CSCE with its own dynamics. Combined with provisions regarding the Follow-up to the Conference, the so-called Fourth Basket,<sup>31</sup> linkage has strengthened the implementation-review process and has provided legitimacy to the subsequent extension of the CSCE's indivisibility-of-security-concept into a variety of

*Cf. Declaration on Principles, supra* note 4; U.N. CHARTER art. 2, ¶¶ 1-4, 7; OAS Charter, *supra* note 5, art. 5; and Organisation of African Unity (OAU) Charter, May 25, 1963, 58 AM. J. INT'L L. 873 (1964) [hereinafter OAU Charter]. See Erika B. Schlager, *The Procedural Framework of the CSCE: From the Helsinki Consultations to the Paris Charter, 1972-1990*, 12 HUM. RTS. L. J. 221, 222 (1991).

29. See Schlager, *supra* note 28, at 222 (emphasis added). In fact, this formulation is not unique. The *Declaration concerning Friendly Relations among States, supra* note 4, at 340, contains an almost similar construction in its General Part, no. 2: "[I]n their interpretation and application the . . . principles are interrelated and each principle should be construed in the context of the other principle." In general terms, the Decalogue is illustrative of the trade-off between the objectives of both blocs: the East measured the success of the CSCE through Principles III (Inviolability of frontiers), IV (Territorial integrity) and VI (Non-intervention in internal affairs), whereas the West consistently pointed at the inclusion of Principle VII (Respect for human rights and fundamental freedoms) as the major achievement of the CSCE.

30. See Schlager, *supra* note 28, at 222.

31. Basket IV has been a source of controversy since the MPT. Conflicting views between the three "blocs" regarding the degree of institutionalization of the CSCE fuelled heated debates during the negotiations on the HFA (Geneva, September 18, 1973-July 21, 1975). Between the extremes of a permanent institution and no institution at all, agreement was reached on the basis of proposals submitted by the NNA. Thus, the compromise-result provided for meetings among representatives of the Participating States for the purpose of a

Thorough exchange of views, both on the implementation of the provisions of the Final Act and of the tasks defined by the Conference, as well as, in the context of the questions dealt with by the latter, on the deepening of their mutual relations, the improvement of security and the development of the process of detente in the future . . . .

Despite its tortuous wording, this provision simply combines the dislike of implementation-review on the part of the Eastern bloc countries with the caution on the part of the Western countries regarding any new commitments within the framework of the CSCE. See BLOED, *supra* note 13, at 8; LEHNE, *supra* note 13, at 11-12. See also *Institutional aspects of the "New" CSCE*, in LEGAL ASPECTS OF A NEW EUROPEAN INFRASTRUCTURE 3-4 (Arie Bloed & de Jonge eds., 1992); Schlager, *supra* note 28, at 222-23.

Mechanisms and Documents.<sup>32</sup> At the same time, linkage has been instrumental to the contentious nature of the Follow-up Conferences of Belgrade, Madrid and Vienna.<sup>33</sup>

### C. *The Follow-up Meetings: Belgrade, Madrid and Vienna*

The First CSCE Follow-up Conference in Belgrade (October 4, 1977-March 8, 1978) was dominated by the deterioration in East-West relations and a strongly confrontationalist approach of the U.S. delegation.<sup>34</sup> The Western position was countered by the Eastern response that Principle VI (Non-intervention in internal affairs) barred discussion and/or review of the implementation of human rights commitments within the CSCE framework. Accordingly, the Concluding Document<sup>35</sup> carried little substantive weight. Nevertheless, the Belgrade Conference was not a complete failure. Its Yellow Book, containing the "Decisions on the Preparatory Meeting to Organize the Belgrade Meeting,"<sup>36</sup> contributed to the "definition of the appropriate modalities for the holding of other meetings in conformity with the provisions of the chapter of the Final Act concerning the Follow-up to the Conference," thus reaffirming the undertaking of a continuation of the CSCE process into the

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32. See *supra* note 7, and accompanying text.

33. See Schlager, *supra* note 28, at 230-31.

34. The deterioration in East-West relations was mainly due to the harsh and repressive reactions of the Eastern bloc countries to the emergence of independent, domestic monitoring groups (e.g. Charter 77), which alerted the West to the lack of respect for human rights. Combined with the emphasis which the Carter Administration put on respect for human rights (staunch support for activist human rights policies became the cornerstone of U.S. foreign policy during the Carter years), the Western concerns led to a strongly confrontational climate. The U.S. delegation in particular took the Belgrade Conference as a "tribunal" on human rights abuses. The resulting (temporary) rift between the United States and its NATO allies was blamed on the "undiplomatic" posture of the U.S. delegation. See HERACLIDES, *supra* note 17, at 10; Geoffrey Edwards, *The Madrid Follow-up Meeting to the Conference on Security and Cooperation in Europe*, 8 INT'L REL. 49, 53 (1984); LEHNE, *supra* note 13, at 15-16; BLOED, *supra* note 13, at 13.

35. Concluding Document of the Belgrade Meeting 1977 of Representatives of the Participating States of the Conference on Security and Cooperation in Europe, Held on the Basis of the Provisions of the Final Act Relating to the Follow-up to the Conference, 17 I.L.M. 414 (1978).

36. The Yellow Book was named after the colour of its cover; similarly, the "Final Recommendations of the Helsinki Consultations" (June 8, 1973) became known as the Blue Book.

1980's.<sup>37</sup>

The setting for the Second Follow-up Conference in Madrid (November 11, 1980-September 9, 1983) was even worse than Belgrade's.<sup>38</sup> Against the background of heightened East-West tension, the Madrid Conference lasted longer than anyone envisaged.<sup>39</sup> Nevertheless, despite its extremely difficult proceedings, the Madrid Conference resulted in substantial achievements in the fields of security and human rights.<sup>40</sup> Among those, the agreement to convene in Stockholm for a multi-stage Conference on Confidence- and Security-Building Measures (CSBM's) and Disarmament in Europe (CDE) was heralded by the Eastern bloc countries as the key to Madrid's success.<sup>41</sup> The Western

37. Between the First Follow-up Conference (Belgrade) and the Second Follow-up Conference (Madrid), three other meetings were held under the auspices of the CSCE:

- \* The Montreux Meeting of Experts on Peaceful Settlement of Disputes (Oct.-Dec. 1978)
- \* The Valletta Meeting of Experts on the Mediterranean (Feb.-Mar. 1979)
- \* The Hamburg Scientific Forum (Feb.-Mar. 1980)

The Montreux and Hamburg Meetings had already been stipulated in the HFA; The Valletta Meeting, however, was a result of the Maltese "conditioned approval" of the Belgrade Concluding Document. See BLOED, *supra* note 13, at 14-15, 105-30; LEHNE, *supra* note 13, at 17.

38. The Soviet invasion of Afghanistan in December 1979; the extremely bad human rights record of the GDR, Czechoslovakia and the USSR; the American grain embargo against the USSR; and a widespread boycott of the Olympic games in Moscow set the stage for the Madrid Conference. It marked the beginning of one of the worst periods of East-West confrontation.

39. The Madrid Conference was plagued by external events which caused great obstacles to the continuation of the Conference itself. In December 1981, the NNA-proposed Draft Declaration became the victim of the declaration of martial law in Poland; subsequently, the Conference went into a seven-month recess (March-October 1982). Only after prolonged consultations among the NATO Allies did the Conference regain its momentum. The Siberian gas pipeline controversy between the United States and its Allies (notably the UK) which erupted during the summer of 1982 created further difficulties for the common position of the Western countries. In addition, the shoot-down of a South Korean civil airliner by Soviet fighter-jets on the final day of the Conference did little to improve the already tense East-West relations.

40. The Madrid Conference has become synonymous with the excesses of the consensus regime in its decision-making structure. The Preparatory Meeting could not be completed within the allotted time span and resulted in the "Stopped Clock" phenomenon. (Restarting a clock which was stopped by consensus again requires consensus.) In addition, the incidents regarding "the Polish Chairman" and the "Night of the Silences," as well as the Maltese attempt to live up to its reputation as "troublemaker" at the very end of the Conference, have provided the Madrid Conference with the qualification "never again." See SIZOO & JURRJENS, *supra* note 13, at 18, 194-97 (*Stopped Clock*), 197-203 (*Polish Chairman*), 203-08 (*Night of the Silences*) & 242-44 (*Malta Phase*); LEHNE, *supra* note 13, at 18-22; BLOED, *supra* note 13, at 15-17.

41. The CDE was of keen interest to the Soviet Union. In view of the strong reactions of the West European public towards the 1979 Montebello decision modernization of NATO's nuclear arsenal, the CDE was perceived as an opportunity to create further divergence of views

countries emphasized the progress made on humanitarian issues and the agreements pertaining to the Conference Follow-Up.<sup>42</sup> Indeed, the Madrid Meeting proved to be of vital importance in continuing the East-West "dialogue" and in stimulating further progress within the framework of the HFA.

Whereas the Follow-up Conferences of Belgrade and Madrid had been dominated by the confrontation between East and West, the Third Follow-up Conference in Vienna (November 4, 1986-January 19, 1989) signaled a "thaw" in East-West relations.<sup>43</sup> The duration of the Conference was to a large extent due to the changing nature of the traditional East-West confrontation. Moreover, the scope and implications of some proposals created a strong divergence of views among most participating States.<sup>44</sup> The Vienna Conference resulted

between the United States and its NATO Allies. The Soviet proposals for a CDE were strongly supported by France, which viewed the CDE as a replacement of the MBFR Talks, from which it was absent. Amended proposals ultimately resulted in a two-stage Conference to be held in Stockholm from early 1984 onwards. See Edwards, *supra* note 34, at 60-63; Geoffrey Edwards, *The Conference on Security and Cooperation in Europe After Ten Years*, 9 INT'L REL. 397, 401-02 (1985); HERACLIDES, *supra* note 17, at 11; LEHNE, *supra* note 13, at 19-20.

42. As a result of the Madrid Conference, six meetings were agreed upon:

- \* The first stage of the CDE (Jan. 17, 1984-Sept. 19, 1986)
- \* The Athens Meeting of Experts on Peaceful Settlement of Disputes (Mar. 21-Apr. 30, 1984)
- \* The Venice Seminar on the Mediterranean (Oct. 16-26, 1984)
- \* The Ottawa Meeting on Human Rights and Fundamental Freedoms (May 7-June 17, 1985)
- \* The Budapest Cultural Forum (Oct. 15-Nov. 25, 1985)
- \* The Bern Meeting on Human Contacts (Apr. 15-May 26, 1986)

The Stockholm Conference proved to be extremely successful. LEHNE, *supra* note 13, at 24-28. The Ottawa Meeting resulted in complete failure. BLOED, *supra* note 13, at 19-20. Finally, the Bern Meeting resulted in an American veto of the Concluding Document. LEHNE, *supra* note 13, at 31-33.

43. As a result of policy reforms initiated by the new Soviet leadership, East-West tension decreased significantly. Summits between President Reagan and Soviet leader Gorbachev ultimately resulted in the conclusion of the INF Treaty (1987), new consideration of conventional arms control talks (CDE II and CFE) and a breakthrough in human rights issues. Bloc-to-bloc confrontation also dissipated as a result of decreasing cohesiveness within both NATO and the Warsaw Pact. (Although the lack of cohesion was more visible within the Warsaw Pact, disagreements between the United States and some of its NATO partners influenced the progress made regarding issues in Basket I.) See McGoldrick, *supra* note 8, at 136; LEHNE, *supra* note 13, at 33-54, 58-67, 107-11, 140-49. See also HERACLIDES, *supra* note 17, at 12.

44. This divergence was most visible in the West's response to the "Moscow Proposal" on a meeting in Moscow regarding humanitarian (Basket III) issues which was launched in the opening speech of Soviet Foreign Minister Shevardnadze on November 5, 1986. See Eduard A. Shevardnadze, Soviet Minister of Foreign Affairs, Speech at the CSCE Review Meeting in Vienna (Nov. 5, 1986), Doc. CSCE/WT/VR.3, reprinted in VOJTECH MASTNY, THE HELSINKI PROCESS AND THE REINTEGRATION OF EUROPE, 1986-1991 88, 92 (1992). In addition, divergent

in the adoption of extremely important documents guiding new commitments in the areas of security and human rights.<sup>45</sup> In addition, the Vienna Concluding Document included the mandate and organizational/procedural modalities for future CSCE Meetings.<sup>46</sup> Thus, the Vienna Conference could be considered

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views emerged among NATO-Allies with regard to the linkage between the CSCE and conventional arms control talks (CFE). *Id.* at 13; LEHNE, *supra* note 13, at 63-64.

45. The Concluding Document of the Vienna Meeting 1986 includes a mandate for the Negotiation on Conventional Armed Forces in Europe (CFE talks) and the Negotiations on Confidence- and Security-Building Measures (CDE II) in Basket I, the enumeration of new substantive commitments (freedom of religion, freedom of movement, security of the person, National Minorities, the Rule of Law, Human Contacts and Information) in Basket III, and the agreement on a Conference on the Human Dimension (CHD), which consists of:

- (1) A supervisory mechanism for Basket III-implementation (The Moscow Mechanism),
- (2) A series of Conferences set up for the purposes of:

- \* Review of implementation
- \* Evaluation of the supervisory mechanism; and
- \* Development of new measures to enhance effectiveness of review and monitoring.

28 I.L.M. 527 (1989) [hereinafter Vienna Concluding Document]. These Conferences took place in Paris in 1989 (no Concluding Document), in Copenhagen in 1990, 29 I.L.M. 1305 (1990), and in Moscow in 1991, 30 I.L.M. 1670 (1991). *See* BLOED, *supra* note 13, at 21-25; LEHNE, *supra* note 13, at 135-84; McGoldrick, *supra* note 8, at 137-51. For an elaborative overview of the CHD, *see* THE HUMAN DIMENSION OF THE HELSINKI PROCESS: THE VIENNA FOLLOW-UP MEETING AND ITS AFTERMATH (Arie Bloed & Pieter Van Dijk eds., 1991); R. BRETT, THE DEVELOPMENT OF THE HUMAN DIMENSION MECHANISM OF THE CSCE (1992).

46. In the Vienna Concluding Document (VCD), provisions were made for:

- \* The London Information Forum (Apr. 18-May 12, 1989, Annex VIII, VCD)
- \* The Palma de Mallorca Meeting on the Mediterranean (Sept. 24-Oct. 19, 1990, Annex VII, VCD)
- \* The Valletta Meeting of Experts on Peaceful Settlement of Disputes (Jan. 15-Feb. 8, 1991, Annex I, VCD)
- \* The Cracow Symposium on Cultural Heritage (May 28-June 7, 1991, Annex IX, VCD)
- \* The Bonn Conference on Economic Co-operation (Mar. 19-Apr. 11, 1990, Annex V, VCD)
- \* The Sofia meeting on the Protection of the Environment (Oct. 16-Nov. 3, 1989, Annex VI, VCD; No Concluding Document)
- \* The Vienna Negotiations on Conventional Armed Forces in Europe (Mar. 9, 1989-Nov. 1990, Annex III and IV of the VCD)
- \* The Vienna Negotiations on Confidence- and Security-Building Measures (Mar. 9, 1989-Nov. 1990, Annex II of the VCD)
- \* The Paris Meeting of the CHD (May 30-June 23, 1989, Annex X, VCD; No Concluding Document)
- \* The Copenhagen Meeting of the CHD (June 5-29, 1990, Annex X, VCD)
- \* The Moscow Meeting of the CHD (Sept. 10-Oct. 4, 1991, Annex X, VCD)

Vienna Concluding Document, *supra* note 45.

the epilogue of Cold War traditions and the prologue of a new era.<sup>47</sup>

#### D. *Summitry: From Paris to Helsinki II*

The beginning of a new era was heralded at the First CSCE Summit, held in Paris, November 19-21, 1990.<sup>48</sup> Originating from a proposal made by Mr. Gorbachev and fully supported by French President Mitterand,<sup>49</sup> the Paris Summit was envisaged as the start of a "New Europe," based on respect for human rights, economic liberty, market economies, political pluralism, democracy and the rule of law. In fact, this "New Europe" appeared to be a blueprint of traditional western ideas and values.<sup>50</sup> This blueprint was baptized as the Charter of Paris for a New Europe.

Deceptive in its conceptual simplicities,<sup>51</sup> the Charter of Paris nevertheless marked a significant turning point in the CSCE process. Hailed as the "Magna Carta for Europe,"<sup>52</sup> the Charter effectively abandoned the premises of the HFA.<sup>53</sup> Unprecedented institutionalization and a lack of substantive commitments formed the thrust of the new direction into which the CSCE

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47. As Soviet Foreign Minister Shevardnadze stated: "The Vienna Meeting has shaken up the Iron Curtain, weakened its rusty supports, made new breaches in it and hastened its corrosion." CSCE Doc. CSCE/WT/VR.13, quoted in LEHNE, *supra* note 13, at 133.

48. The Concluding Document of the Paris Summit, the Charter of Paris for a New Europe stated: "The era of confrontation and division of Europe has ended. . . . [H]enceforth our relations will be founded on respect and cooperation. . . . [T]he power of the ideas of the Helsinki Final Act . . . opened a new era of democracy, peace and unity in Europe." Charter of Paris, *supra* note 19, pmb., at 193.

49. Mr. Gorbachev's calls for the convening of a Summit within the CSCE framework were initially met with cool responses from the West. Aimed at securing "damage control" opportunities in view of the threatening collapse of the Eastern bloc and the movement towards German reunification, Mr. Gorbachev's proposal was later regarded by the West as a convenient forum for reassessment of the "European Architecture" and the redesigning of the "European House." Strongly supported by the FRG and France, the Paris Summit proved to be the starting point for a dual process: the disintegration of existing political structures in Central and Eastern Europe (as well as the disintegration of the Soviet Union) vis-a-vis creation of new political institutions within the CSCE-framework. See MASTNY, *supra* note 44, at 24-26; McGoldrick, *supra* note 8, at 151-52.

50. McGoldrick, *supra* note 8, at 155.

51. MASTNY, *supra* note 44, at 38. Direct reference is made to the euphoric tone of the Charter and the simplicity of its assumptions regarding the spread of democracy, peace and unity in a New Europe.

52. See McGoldrick, *supra* note 8, at 135.

53. The premises of the HFA were, inter alia, a non-institutionalized forum for dialogue and a framework for the enumeration, implementation and review of substantive commitments in the areas of security, economics and human rights.

was being guided.<sup>54</sup> In short, this new direction pointed at regularized consultations at predetermined levels of participation, in conjunction with the establishment of three administrative bodies for the purpose of facilitating increased cooperation between the Participating States in particular areas.<sup>55</sup>

The Charter of Paris provided for the establishment of political organs and administrative bodies, the creation of a CSCE Parliamentary Assembly, and the enumeration of procedural and organizational modalities related to these provisions.<sup>56</sup> Detailed institutional arrangements were set out in the Charter of Paris' Supplementary Document.<sup>57</sup> Nevertheless, the degree of

54. See Schlager, *supra* note 28, at 234.

55. *Id.*

56. See the third part of the Charter of Paris, "New Structures and Institutions," *supra* note 19, at 206. In view of the Charter's objectives of promoting peace, democracy and unity in Europe, the requirements of a "new quality of political dialogue and co-operation" and an intensification of consultations among the Participating States lead to the decision to:

- \* Establish a permanent *CSCE Summit Meeting*, to be convened at the level of Heads of State or Government on the occasion of the Follow-up Meetings. These Follow-up Meetings are to be held, as a rule, every two years and serve the purpose of "taking stock" of developments, reviewing implementation of the commitments of the Participating States and considering "further steps" in the CSCE process.
- \* Establish a *CSCE Council*, to be formed by the Ministers of Foreign Affairs and meeting "regularly and at least once a year." The Council meetings serve as the "central forum" for political consultations within the CSCE.
- \* Establish a *CSCE Committee of Senior Officials* (CSO), which is tasked to prepare the Council meetings and to carry out its decisions.
- \* Consider the development of an Emergency Mechanism for convening the CSO in "emergency situations."
- \* Establish a *CSCE Secretariat* in Prague for the purpose of providing administrative support to increased consultations among the CSCE-States.
- \* Create a *Conflict Prevention Centre* (CPC) in Vienna to assist the Council in "reducing the risk of conflict."
- \* Establish an *Office for Free Elections* (OFE) in Warsaw to "facilitate contacts and the exchange of information on elections" within Participating States.
- \* Call for the creation of a *CSCE Parliamentary Assembly* to further the parliamentary involvement in the CSCE.
- \* Provide procedural and organizational modalities in a Supplementary Document to be adopted together with the Charter.

57. See Supplementary Document, *supra* note 19, at 209. Adopted by consensus, the provisions of the Document stipulate:

- \* The position, purpose and tasks of the CSCE Council of Ministers (Section A).
- \* The position, purpose and tasks of the CSO (Section B).
- \* The possibility of an Emergency-Mechanism (Section C).
- \* The frequency and duration of the Follow-up Meetings (Section D).
- \* The tasks and staffing of the CSCE Secretariat (Section E).
- \* The tasks and institutional structure of the CPC (Section F)



institutionalization emerging from this Document was more noteworthy for what was being excluded than for what it included.<sup>58</sup> Therefore, the rapid crumbling of the realities of the Charter shortly afterwards clearly necessitated a reconsideration of the exclusionary approach.<sup>59</sup>

Attempts to facilitate the political changes within the new CSCE structure

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- \* The tasks and staffing of the OFE (Section G).
  - \* The procedures and modalities concerning CSCE Institutions, which includes general staffing arrangements and costs (Section H).
  - \* The use of the CSCE communication network (Section I).
  - \* The application of CSCE Rules of Procedure (Section J).

The substantive elements of these provisions are incorporated in the analysis of Part III.

58. *Id.* The provisions of the Supplementary Document created a very loose institutional structure. The political organs were defined in relatively vague terms (e.g., the Council of Ministers was to "consider" issues "relevant" to the CSCE and take "appropriate" decisions); the CSCE Secretariat was small, subordinate to the Council and CSO, and functionally limited; the CPC was granted a limited mandate, subject to the supervision of the Council; the OFE was specifically tasked with fostering the implementation of provisions of the Document of the Copenhagen Meeting of the Conference on the Human Dimension, 29 I.L.M. 1305 (1990); and the procedures and modalities concerning CSCE institutions, in particular those relating to staffing arrangements and the position of the Institutions within the overall framework, appeared to be specifically worded to prohibit "institutional dynamics," i.e., the evolution of the Institutions into potent forces for self-sustaining development of the newly created institutional arrangements. See McGoldrick, *supra* note 8, at 152.

59. The first signs of trouble emerged in relation to the implementation of the provisions of the Treaty on Conventional Armed Forces in Europe, 30 I.L.M. 1 (1991) [hereinafter CFE Treaty], which had been signed by the NATO and Warsaw Pact Member-States on the occasion of the Paris Summit. Disagreements regarding the reduction of forces and equipment led to violations of the letter and the spirit of the Treaty provisions by the Soviet Union, only to be resolved in April 1991 through the adoption of a Treaty on Conventional Armed Forces in Europe: Statement Regarding Obligations Assumed Outside the Framework of the Treaty and Certain Armaments and Equipment, 30 I.L.M. 1141 (1991). Soon thereafter, Slovenia and Croatia issued Declarations of Independence, thereby effectively dissolving Yugoslavia and sparking armed conflict with Serbia. In addition, a mass exodus of Albanians to Italy resulting from political and economic anarchy in Albania focused some attention on human rights concerns in the Balkans. The most dramatic changes came in the second half of 1991: the failed August coup in the USSR; the recognition of the independence of the Baltic Republics, and the subsequent disintegration of the USSR completely restructured the political landscape. The USSR was succeeded by the Russian Federation. The Commonwealth of Independent States (CIS) was created, the Warsaw Pact and COMECON were dissolved, and the CSCE grew from 35 to 38 Participating States (German Unification in October 1990 had reduced the number of States to 34; Albania was admitted in June 1991, and Lithuania, Latvia and Estonia were admitted on September 10, 1991). See McGoldrick, *supra* note 8, at 143-45; MASTNY, *supra* note 44, at 38-42; Weller, *supra* note 6, at 569-70. For the text of the CIS Agreement, see Council of Europe: Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 30 I.L.M. 148 (1991).

were made at numerous occasions, of which the Berlin Meeting of the Council of Ministers (June 1991) and the Moscow Meeting of the Conference on the Human Dimension (CHD, September 1991) were the most significant.<sup>60</sup> The Berlin Meeting marked the first occasion at which the Council of Ministers could initiate steps to clarify its own position within the CSCE structure. This was only partly achieved. The adoption of a Mechanism for Consultation and Co-operation With Regard to Emergency Situations, the admission of Albania as its 35th Participating State, and the endorsement of the Valletta Mechanism were the only significant decisions taken by the Council.<sup>61</sup> Matters relating to the further development of CSCE structures were relayed to the CSO, with a request for recommendations for the next Council Meeting.<sup>62</sup>

The Moscow Meeting of the CHD provided an additional opportunity

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60. Apart from these two meetings, the VCD had provided for, *inter alia*, a Meeting of Experts on the Peaceful Settlement of Disputes, to be held in Valletta, January 15-February 8, 1991. In addition, the Charter had set a Meeting of Experts on National Minorities, to be held in Geneva, July 1-19, 1991. The Valletta Meeting produced the so-called Valletta Mechanism, which was characterized by a compulsory dispute settlement procedure regarding the initiation of the Mechanism, as well as a safety-clause limitation on the applicability of compulsory initiation. The Geneva Meeting was illustrative for the deep division among CSCE States regarding minority rights. Illuminating the sharp differences between the individual rights approach and the collective group rights approach, the Meeting achieved little in terms of substantive elaboration of normative commitments. Nevertheless, it was considered to be important in view of the situations in Rumania and Kosovo. For the text of the Valletta Report, *see* Conference on Security and Co-operation in Europe: Report of the CSCE Meeting of Experts on Peaceful Settlement of Disputes, 30 I.L.M. 382 (1991). *See also* HERACLIDES, *supra* note 17, at 16; MASTNY, *supra* note 44, at 39. The text of the Geneva Report can be found at 30 I.L.M. 1692 (1991). *See also* MASTNY, *supra* note 44, at 42-43; HERACLIDES, *supra* note 17, at 17.

61. The adoption of an Emergency Mechanism had been impossible at the Paris Summit; the subsequent unraveling of the political foundations of the Charter not only necessitated such a Mechanism, it also provided the necessary political leverage for creating one. Thus, this so-called Berlin Mechanism appeared to be in direct response to the ominous developments on the Balkans. Apart from its political significance, the Mechanism marked a fundamental change in the CSCE decision-making procedures. Setting aside the sacrosanct principle of consensus, the Mechanism provides for its initiation by a limited number of States (12 or more). However, the Meeting thus convened can only discuss the crisis and possibly adopt recommendations (by consensus!) without acting upon them, or request the convening of a Meeting at ministerial level. Political sensitivities have already demonstrated the limitations of the Mechanism. *See* Summary of Conclusions of the Berlin Meeting of the Council, Including Arrangements for Consultation in Emergency Situations and Peaceful Settlement of Disputes, 30 I.L.M. 1348, 1353 (1991) [hereinafter Summary of Conclusions]; Robert Mauthner, *CSCE Crisis-Management Mechanism Scrapes Through*, FIN. TIMES, July 6, 1991.

62. The second Council Meeting was to be held in Prague on January 30-31, 1992. *See* Summary of Conclusions, *supra* note 61, at 1350-51, ¶¶ 13-14, 20.

to adapt the CSCE structures to the realities of the day.<sup>63</sup> The admission of the Baltic States to the CSCE constituted an implicit acknowledgement that the HFA's premise of territorial status quo had become obsolete and proved indicative of future expansion of the CSCE.<sup>64</sup> Moreover, the admission of the Baltic Republics signaled the necessity for a thorough review of decision-making procedures. With the increasing number of Participating States, the "classic" rule of consensus became proportionally cumbersome. The consensus rule provided a serious obstacle to the creation and functioning of an "effective" and "operational" CSCE and, therefore, became subject to review.

The departure from the rule of consensus was only slight, being strictly limited to the so-called Moscow Mechanism and specified for a few situations only.<sup>65</sup> Nevertheless, the Moscow Meeting revealed the changing views and attitudes of Participating States on the proper role for the CSCE and generated fresh debate on the eve of the second Meeting of the Council of Ministers.<sup>66</sup> This debate was closely related to the deteriorating situation in the former Yugoslavia and the inability of the international community

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63. The Moscow Meeting took place September 10-October 4, 1991, against the background of a fast-changing political scene in the USSR and Yugoslavia. See Moscow Report, 30 I.L.M. 1630 (1991).

64. The CSCE admitted ten States at the Prague Council Meeting in January 1992. All of them were former Soviet Republics: Armenia, Azerbaijan, Belarus, Kazakhstan, Kirgistan, Moldova, Tajikistan, Turkmenistan, Ukraine and Uzbekistan. In addition, Slovenia and Croatia were admitted as observers. In March 1992, the CSO admitted them as Participating States, together with Georgia. Bosnia-Herzegovina was admitted in April 1992. See HERACLIDES, *supra* note 17, at 42-44; MASTNY, *supra* note 44, at 44.

65. The Moscow Mechanism comprises three distinct processes, designed to deal with issues related to the Human Dimension of the CSCE:

- (a) A voluntary mechanism for assistance by a mission of experts;
- (b) A mandatory mechanism for initiation of a Rapporteurs mission, to be requested by at least six Participating States; and
- (c) A "Super"-mandatory mechanism for addressing "serious threats," to be requested by at least ten Participating States.

The Moscow Mechanism has been described as "cumbersome" and "baroque," and it has only been used a few times (Croatia and Estonia in 1992; Moldova in 1993). For a concise description of the Mechanism, see McGoldrick, *supra* note 8, at 149-51; H.J. Hazewinkel, *Paris, Copenhagen and Moscow*, in Bloed and Van Dijk, *supra* note 45, at 128-42; and BRETT, *supra* note 45.

66. One of the most striking examples of a changing attitude towards the CSCE was the German position. Its advocacy for international intervention on the basis of serious human rights concerns was sharply defined by Foreign Minister Genscher in his Opening Speech and went beyond the common position of the Twelve EC Member States. Germany's position was in line with Soviet views, but strongly divergent from the British, French and American views. See Opening Speech by Hans-Dietrich Genscher, FRG Minister of Foreign Affairs, on the occasion of the CSCE Conference on the Human Dimension, in Moscow (Sept. 10, 1991), reprinted in MASTNY, *supra* note 44, at 320-22.

to provide for a political solution to the conflict.<sup>67</sup>

In a larger perspective, the Moscow Meeting illustrated the need for rethinking the underlying premises of the Helsinki process. Its all-inclusiveness, both in terms of participation and areas of concern, had been its largest asset since the very beginning. By 1991, however, all-inclusiveness was either an illusion or an obstacle. Further institutionalization of the process could make it into a competitor with other entities (NATO, EC, ECE and the Council of Europe), or even worse, an irrelevant duplicator of sorts. On the other hand, no further institutionalization might condemn the CSCE to the backyard of the New Europe. The road not taken could thus become more than just an unexercised option. Indeed, it could very well become a faint glimpse of a viable future security concept. The answers were to be provided at the Second CSCE Summit in Helsinki, July 1992.

### III. FROM HELSINKI-II TO BUDAPEST: THE CSCE AS AN INSTITUTION

#### A. *Introduction*

The Prelude to the Helsinki-II Follow Up Meeting of July 1992, took place in Prague. The Second CSCE Council Meeting convened January 30-31, 1992, in order to set the guidelines for the Helsinki Preparatory Meeting which would precede the Helsinki Summit.<sup>68</sup> In hindsight, the Prague Council can be regarded as the testing ground for the Helsinki Summit. Several issues on which no agreement could be reached were to be of a similar obstructive character at the Helsinki Summit.<sup>69</sup> Other issues were dealt with at a

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67. The CSCE remained largely ineffective in the initial stages of the conflict between Slovenia, Croatia, and Serbia, despite efforts by the newly active CSO to provide for a good offices mission and to assist the European Community in its efforts to broker a cease-fire, and possibly a peace-agreement. Sharply worded declarations did not resort any effect at all. A year later, when Bosnia-Herzegovina became the scene of conflict, unabated and widespread violations of CSCE commitments by Bosnian Serb forces (strongly supported by the Serbian government), resulted in the indefinite suspension of the Federal Republic of Yugoslavia (i.e., Serbia-Montenegro). The legal basis for this unprecedented action was found in the Prague Document on Further Development of CSCE Institutions and Structures, 31 I.L.M. 976, 989-90, ¶ 16 (1992) [hereinafter Prague Document] (which authorizes "appropriate action" by the Council or CSO, if necessary "in the absence of consent of the State concerned," in cases of "clear, gross and uncorrected violations of relevant CSCE commitments"). For a very detailed overview of CSCE involvement in the Balkan conflict, see Weller, *supra* note 6, at 570-77, 596-600.

68. The Helsinki Preparatory Meeting took place March 10-24, 1992, and was set up for the preparation of the Fourth Follow-Up Meeting, to be held March 24-July 8, 1992.

69. E.g., the CSCE in peacekeeping and the creation of a Court of Arbitration and Conciliation. See HERACLIDES, *supra* note 17, at 29.

remarkable rate of progress.<sup>70</sup> Most important, however, seems to have been the stage-setting character of the Prague Council Meeting.

Convened against the background of a deteriorating situation in the Yugoslav conflict, the ongoing fighting over the enclave of Nagorno-Karabakh, the new position of Russia in the European security context and the growing anticipation of more ethnic, economic and political trouble to come, the Prague Council Meeting made decisions which seemed to abandon some of the premises of the HFA in favor of a more pragmatic approach. Through the admission of ten new Republics which had been part of the former Soviet Union,<sup>71</sup> as well as the admission of Croatia and Slovenia as observers, the CSCE appeared to let State succession and self-determination prevail over the Principle of inviolability of frontiers.<sup>72</sup> Moreover, it included at least several non-European participants for fear of creating a potential source of conflict if they were left out.<sup>73</sup>

The Prague Council also adopted a Document on the Further Strengthening of CSCE Institutions and Structures.<sup>74</sup> By doing so, it elaborated the mandates of the Committee of Senior Officials (CSO), the Conflict Prevention Centre (CPC), the Office for Free Elections (which was at the same time renamed into the Office for Democratic Institutions and Human Rights, ODIHR), adopted the Consensus-Minus-One principle,<sup>75</sup> created an Economic Forum<sup>76</sup> and set forth requests for further study on both the strengthening of the CSCE structure and the development of an operational capability.<sup>77</sup> The former will be discussed in this part, whereas the latter will be subject to scrutiny in Part II.

## B. *The Strengthening of CSCE Institutions and Structures*

### 1. *General Observations*

Several main trends emerged in the months between the Prague Council

70. E.g., the admission of new Participating States, the adoption of the Consensus-Minus-One Rule. *Id.*

71. The newly admitted States were Armenia, Azerbaijan, Belarus, Moldova, Ukraine, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan.

72. See HERACLIDES, *supra* note 17, at 28.

73. The Republics concerned (Kyrgyzstan, Tajikistan, Turkmenistan, Kazakhstan, Turkmenistan and Uzbekistan) were considered "easy prey" for Islamic fundamentalism from Iran. *Id.*

74. Prague Document, *supra* note 67, at 976.

75. *Id.* at 989-90, ¶ 16.

76. *Id.* at 990, ¶¶ 18-20.

77. *Id.* at 991, ¶¶ 21-25.

Meeting and the Helsinki Summit. Contrary to the earlier Follow-Up Meetings, there was no longer a strict bloc-to-bloc confrontation. Traditional East-West division was replaced with internal discord among the Western ranks, particularly among the E.C.<sup>78</sup> The disappearance of the bloc structure also led to the dissolution of the Warsaw Pact and the Non-Aligned "Caucuses."<sup>79</sup> In addition, new informal consultation groups surfaced, but they appeared to be much less influential than the traditional ones had been prior to the dissolution.<sup>80</sup>

Three major and fundamental differences in views surfaced during the Helsinki II negotiations. First, there was the "process" versus the "organization" approach. This related closely to a second difference between the legal and the quasi-legal line of development. Third, there was the fear of smaller Participating States that the granting of operational capability to the CSCE would render it effective to such an extent that the CSCE could establish itself *de facto* as a directorate of Great Powers, thereby in effect abandoning the CSCE Principle of sovereign equality.<sup>81</sup> In addition to intra-conference dynamics, a lack of leadership, internal discord and external distractions contributed to making the Helsinki Summit a mixed success. Indeed, shortly after the Helsinki Summit had been concluded and the United Kingdom had started its six-month shift in the Presidency of the European Community, there would be a reconsideration of the (lack of) achievements of the Helsinki Summit. Significant decisions left out at the Helsinki Summit would be made at the Stockholm Council Meeting (December 14-15, 1992) and the Rome Council Meeting (December 1-2, 1993).

On the basis of the Prague Document, the Helsinki Decisions have created a more coherent institutional framework. Nevertheless, what has emerged from the negotiations after three months of strenuous activity in the two bodies concerned with these issues, Working Group I (WG I) and the plenary Committee of the Whole (COW),<sup>82</sup> is neither a process nor a legal entity. Instead,

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78. Arie Bloed, *Helsinki-II: The Challenges of Change*, 3 HELSINKI MONITOR 37, 38 (1992). See also, HERACLIDES, *supra* note 17, at 33-37.

79. The meetings of NATO Member States and Warsaw Pact countries to coordinate their respective viewpoints initiated these caucuses; they were soon followed by the NNA's; the Member States of the European Communities coordinated their positions within the framework for European Political Cooperation.

80. New informal consultation groups were formed, *inter alia*, by the Visegrad Countries, between the Visegrad and Benelux States, and between the Pentagone / Hexagone countries. See Bloed, *supra* note 78, at 38.

81. For a detailed description of virtually every Participating State's position, see HERACLIDES, *supra* note 17, at 33-38, 45-62.

82. The Helsinki Preparatory Meeting set the framework for the negotiations on the Decisions. After considerable discussion, four Working Groups were set up to deal with a variety of tasks. Working Group I received a mandate for:

it appears to have been granted a hybrid character. To some extent, its institutional structure meets the characteristics of an intergovernmental international organization (IGO),<sup>83</sup> and to another extent, it remains a half-hearted attempt at creating a modern, flexible entity suited to the needs of its Participating States. A brief review of the organs and institutions will illustrate this point.

## 2. *Summits and Review Conferences*

The Helsinki Decisions have codified the CSCE's learning experience through Follow-Up Meetings and Review Conferences. The long duration of the Madrid and Vienna Meetings can be considered as the sparking flame for the provision that Review Conferences will be "operational and of short duration."<sup>84</sup> In practical terms, this requires a solid, comprehensive and manageable agenda, dedicated to a review of the entire range of activities within the CSCE (including a thorough implementation debate) and the preparation of a decision-oriented document to be adopted at the Meeting of the Heads of State or Government.<sup>85</sup> The Summit Meetings are to be held once every two years on the occasion of the Review Conferences.<sup>86</sup> Accordingly, these Summit Meetings will set priorities and provide orientation at the highest political level.<sup>87</sup> In practical terms, this means setting the guidelines for the political direction which the Council or the CSO is expected to take and leaving the actual decision-making to these political organs.

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Questions relating to the further development of CSCE institutions and structures, including the political consultation process, the decision-making process, mechanisms, crisis management and conflict prevention instruments, including peaceful settlement of disputes, legal, financial and administrative arrangements, relations with international organizations, relations with Non-Participating States, and the role of NGO's.

The Four Working Groups were to submit their draft texts to the plenary session, called the Committee of the Whole; its acronym COW subsequently became its trademark. *Id.* at 40-41.

83. It could be argued that a modern-day, full-fledged Intergovernmental Organization has an effective decision-making structure, a division of functions and tasks, political organs and administrative organs, policy-instruments and financial support. The CSCE meets most of these criteria. See Bryan Schwartz & Elliot Leven, *What Makes International Organizations Work?*, 30 CAN. Y.B. OF INT'L L. 165, 167 (1992).

84. Helsinki Decisions, *supra* note 15, at 1394, ch. 1, ¶ 4.

85. *Id.*

86. *Id.* ¶¶ 2-3.

87. *Id.*

### 3. *Political Organs*

#### a. *The CSCE Council*

The CSCE Council constitutes the central decision-making and governing body of the CSCE.<sup>88</sup> It is formed by the Ministers of Foreign Affairs, who are collectively endowed with the task of ensuring that the various CSCE activities relate closely to the central political goals of the CSCE.<sup>89</sup> As such, the Council acts as an intermediary between the political orientation provided by the Summit Meetings and the implementation of these guidelines by the CSO. The Council convenes at least once a year.<sup>90</sup> This seems extremely contradictory to its purported position within the decision-making framework, since its lack of regularity leaves much of the actual decision-making in the hands of the CSO. On the other hand, Ministers may have the opportunity to do CSCE business *en marge* of other consultations, or may initiate emergency meetings if deemed necessary. Thus, the lack of regularity in the Council meetings is not *per se* to the disadvantage of the CSCE.

#### b. *The Committee of Senior Officials*

The Committee of Senior Officials (CSO) carries responsibility for the overview, management and coordination of CSCE action between Council Meetings, and acts for all practical purposes as the Council's agent in making appropriate decisions.<sup>91</sup> The CSO serves its primary role in the context of crisis management.<sup>92</sup> In addition, it has a role in relation to the Coordinating Committee of the Conflict Prevention Centre (CC/CPC), or as Economic Forum.<sup>93</sup> It does not present a permanent forum for decision-making, although it is probably the component which meets the most frequently within the overall decision-making framework.<sup>94</sup> Though acting as an agent to the Council, the CSO has a significant margin of discretion, which allows it to play a prominent role within the political structure of the CSCE. In particular, its

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88. *Id.* ¶ 6.

89. *Id.* ¶ 7.

90. BLOED, *supra* note 13, at 40.

91. Helsinki Decisions, *supra* note 15, at 1394, ch. 1, ¶ 9.

92. *Id.* at 1399-1400, ch. 3, ¶¶ 6-11.

93. See BLOED, *supra* note 13, at 40.

94. Since its first meeting on January 28-29, 1991, the Committee of Senior Officials (CSO) has met 27 times. Its most recent meeting took place in Prague (seat of the CSCE Secretariat), June 13-15, 1994. See 27-CSO/Journal No. 3 (June 15, 1994), reprinted in 5 HELSINKI MONITOR 81 (1994). See also Arie Bloed, *CSCE Chronicle: CSO on Crises in CSCE Area*, 5 HELSINKI MONITOR 69 (1994).



role in conflict prevention and crisis management through the use of a range of instruments has become a focal point of attention.

c. *The Chairman-in-Office*

The Chairman-In-Office is modelled after the Presidency of the European Communities (the present European Union) and has been developed in practice to create better coordination between decisions of the CSO and actions by the Participating States.<sup>95</sup> With the Helsinki Decisions, its role has become more formalized and stronger. However, the CIO may be assisted in the performance of his tasks by:

- \* The preceding and succeeding Chairmen, operating together as a Troika
- \* Ad hoc steering groups
- \* Personal representatives, if necessary

The Troika concept is another element that has been taken from the experience of the European Communities through the European Political Cooperation. The assistance to be rendered by *ad hoc* steering groups is a novum to the CSCE, especially since they are closely related to the provisions on conflict prevention, crisis management and dispute resolution and may be established on a case-by-case basis.<sup>96</sup> Such an *ad hoc* steering group will be composed of a restricted number of Participating States, with the obligatory involvement of the Troika.<sup>97</sup> Furthermore, its size and composition will be decided based on the need for efficiency and impartiality.<sup>98</sup> In hierarchical terms, the *ad hoc* steering group will be under the supervision of the Council/CSO. The CIO is expected to report to the CSO, regularly and comprehensively, on the activities of the *ad hoc* steering group.<sup>99</sup>

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95. The first Chairman-in-Office (CIO) was Germany, in the person of then Foreign Minister Genscher. He held the position from November 1990 to January 1992. At the Prague Council Meeting, Czechoslovakia took over. Between the Third and Fourth CSCE Council Meeting, Sweden held the CIO. Since the Council Meeting of Rome (December 1993), Italy has been CIO. See BLOED, *supra* note 13.

96. Helsinki Decisions, *supra* note 15, at 1395, ch. 1, ¶¶ 16-21.

97. *Id.* ¶ 19.

98. *Id.*

99. *Id.* ¶ 21.

#### 4. *Decisions regarding Administrative Organs*

The major failure of the Helsinki Summit was its inability to create the function of Secretary-General, which had been proposed by Belgium.<sup>100</sup> Related to the general dislike of too much bureaucratization within the CSCE, proposals in this regard were rejected, only to be revived after the adoption of the Helsinki Decisions.<sup>101</sup> Indeed, even with regard to the existing administrative organs (strictly speaking only the CSCE Secretariat in Prague, but to some extent the CPC and ODIHR as well) no other decision could be taken but for a request to the CSO to study ways and means of enabling the three institutions to better accomplish their objectives.<sup>102</sup>

In this respect, the suggestion was offered to grant an internationally recognized status to the three organs.<sup>103</sup> At that stage, the three were simply legal entities under the domestic laws of the Host-States (Czech, Poland and Austria) for the purpose of their functions.<sup>104</sup> Decisions were taken however, in regard to the expansion of the roles of the CPC in the newly created Security Forum, and the ODIHR in the Human Dimension (including the Human Dimension Mechanism).<sup>105</sup>

#### 5. *Other Institutions and Structures*

##### a. *The CSCE High Commissioner On National Minorities*

The establishment of a High Commissioner on National Minorities (HCM) is closely related to the development of the CSCE's operational capability.<sup>106</sup> The HCM's primary task is to provide "early warning" and, as appropriate, "early action" at the earliest possible stage in regard to tensions involving minority issues that have the potential to develop into a conflict within the CSCE area, and to affect peace, stability, or relations between Participating

100. According to the Belgian proposal, the position of the CSCE Secretary-General (CSCE SG) would be closely modelled upon the position of the U.N. Secretary-General. As such, the CSCE SG would have the possibility to engage in political consultations. See HERACLIDES, *supra* note 17, at 36, 46 & 84.

101. The issue sparked prominently on the agenda of the next Council Meeting in Stockholm. *Id.* at 180-85.

102. Helsinki Decisions, *supra* note 15, at 1395, ch. 1, ¶¶ 24-25.

103. *Id.* ¶ 25.

104. See HERACLIDES, *supra* note 17, at 113-14.

105. Helsinki Decisions, *supra* note 15, at 1404-13, chs. 5-6.

106. See Helsinki Decisions, *supra* note 15, at 1396-97, ch. 2, ¶¶ 2-7. See also BLOED, *supra* note 13, at 47-49; HERACLIDES, *supra* note 17, at 100-05, 220-25.

States.<sup>107</sup> The High Commissioner's mandate does not cover violations of CSCE commitments with regard to an *individual* person belonging to a national minority, but to a *situation* involving minorities.<sup>108</sup> The HCM works under the *aegis* of the CSO,<sup>109</sup> which implies a larger measure of discretion than being an agent of the CSO. The HCM can collect information from a variety of sources and can draw upon the facilities of the ODIHR in Warsaw.<sup>110</sup> The HCM has been in function since 1992.

b. *The CSCE Parliamentary Assembly*

The Parliamentary Assembly resulted from initiatives following the adoption of the Charter of Paris; it held its first meeting in Budapest, July 3-5, 1992. The resulting Document, the Budapest Declaration, appeared to embrace the efforts to strengthen the role of the CSCE and to give it a legal basis.<sup>111</sup> Its purpose is the encouragement of active dialogue with the Council, possibly through the assistance of the CIO.<sup>112</sup> The Parliamentary Assembly also created a permanent secretariat, to be temporarily located in Copenhagen.<sup>113</sup> Notwithstanding the initial positive reactions of the Participating States to the establishment of the Assembly,<sup>114</sup> its creation as well as its actual recommendations have become subject to strong criticism.<sup>115</sup>

C. *Decision-Making: Consensus-Minus-One and Consensus-Minus-Two*

From its earliest days, the CSCE has been synonymous with sacrosanctity

107. Helsinki Decisions, *supra* note 15, at 1396, ch. 2, ¶ 3.

108. *Id.* ¶ 5c.

109. *Id.* ¶ 2.

110. *Id.* ¶¶ 10, 23-26.

111. See BLOED, *supra* note 13, at 50. See also ARIE BLOED, THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE: ANALYSIS AND BASIC DOCUMENTS 1972-1993 116-18 (1993).

112. See Final Resolution Concerning The Establishment of the CSCE Parliamentary Assembly, 30 I.L.M. 1344 (1991). See also BLOED, *supra* note 13, at 50.

113. *Id.*

114. See Helsinki Summit Declaration, *supra* note 9, ¶ 41.

115. On the work of the Assembly, see T. Buschsbaum, *The 1993 Session of the CSCE Parliamentary Assembly*, 4 HELSINKI MONITOR 26 (1993). The criticism is directed at the Assembly's isolated position (no linkage to other, already existing European institutions) and its "irresponsibility" in tending to "decide hastily with hazardous majorities on fundamental issues." See Emmanuel Decaux, *CSCE Institutional Issues at the Budapest Conference*, 5 HELSINKI MONITOR 18, 20 (1994).

when it comes to its decision-making process.<sup>116</sup> Consistent with the view that the CSCE's primary function was to serve as a forum for political dialogue, without the legal restraints of institutionalization, the guiding principle on which the CSCE has rested since the adoption of the HFA has been the sovereign equality of the Participating States.<sup>117</sup> Accordingly, decision-making has always been premised on the rejection of (qualified) majority regimes.<sup>118</sup> Instead, the HFA has enshrined the principle of consensus as the basis for decision-making within the CSCE context.<sup>119</sup>

Until the adoption of the Charter of Paris, consensus remained generally unchallenged. With the sweeping changes in the political and security architecture of the European continent came the realization that the developments which required a change of vision also required a change in action. In other words, attempts to enhance the CSCE's role in the New Europe by gradually changing its character from a forum for dialogue to an active participant in

116. The CSCE's decision-making process has been viewed as the ultimate combination of three competing elements in the approach to international decision-making: the equalitarianism of traditional law, the majoritarianism of democratic philosophy, and the elitism of European Great Power diplomacy. As such, it is a "hybrid phenomenon of contemporary international diplomacy . . . primarily aimed at avoiding confrontations." See SIZOO & JURRJENS, *supra* note 13, at 41-42.

117. See Principle No. I of the *Declaration on Principles*, *supra* note 28.

118. One commentator stated at the outset of the CSCE process:

Majority decisions must be ruled out in view both of the nature of a conference and also of the numerical imbalance between the NATO and the Warsaw Pact countries. Decisions would therefore have to be reached by consensus or, if formal votes were to be held, by unanimity based on each country casting one vote: consensus would obviously be more flexible.

SIZOO & JURRJENS, *supra* note 13, at 41.

119. The rule of consensus has been stipulated in the Blue Book, Chapter VI, rule no. 69: "Decisions of the Conference shall be taken by consensus. Consensus shall be understood to mean the absence of any objection expressed by a Representative and submitted by him as constituting an obstacle to the taking of the decision in question." The specific formulation of this rule illustrates the advantage of consensus over unanimity; it excludes an outright power of veto, while at the same time safeguarding the possibility of objection. The consensus rule has been stretched to its limits by Malta during the first years of the CSCE's existence, and taken into the realm of ridicule at the Madrid Follow Up Meeting. However, the incidents mark the exception rather than the rule. Moreover, the effects of the consensus rule are mitigated by the provision of rule no. 79, which states: "Representatives of States participating in the Conference may ask for their formal reservations or interpretative statements concerning given decisions to be duly registered by the Executive Secretary and circulated to the Participating States. Such Statements must be submitted in writing to the Executive Secretary."

This possibility does not, however, exclude the concerned State from its responsibility to comply with a given decision. See SIZOO & JURRJENS, *supra* note 13, at 57-63. See also *supra* note 40.

the redefining of the European security structure had to be accompanied by a revision of the decision-making process if the attempts were to be successful. Thus, the Berlin Council Meeting considered suggestions for a change to the principle of consensus and came up with a strictly defined, extremely limited diversion from the consensus rule.<sup>120</sup>

Nevertheless, the adoption of this exception to the consensus principle marked a cautiously phrased turning point. The Moscow Meeting of the Conference on the Human Dimension later that year expanded the scope of the Berlin Council's decision to mandatory mechanisms within the Human Dimension.<sup>121</sup> The Prague Document on Further Development of the CSCE Institutions and Structures, however, signalled the real break with the consensus rule and a departure from its underlying premise of consistency with the Decalogue of Principles.<sup>122</sup> Partially enforced by the circumstances of the moment, the Prague Council Meeting set the stage for subsequent action by the CSO on the basis of this new Consensus-Minus-One rule.<sup>123</sup>

In view of the Helsinki Decisions and its aim of rendering the CSCE in an operational capacity, it has been interesting to observe recent trends related to this aspect. From a theoretical point of view, "operationalization" and "effectiveness" seem to be inconsistent with retaining the consensus-based decision-making structure. Yet this has been the case so far. The principle of consensus has remained in effect for initial decisions on CSCE actions, but the practical implementation of these decisions has become a matter of delegation.<sup>124</sup> Thus, the consensus rule is maintained for politically sensitive and substantive decisions for the sake of appearance, whereas it is circumvented on the practical level for the sake of effectiveness. Notwithstanding the relatively recent addition of the Consensus-Minus-Disputants rule, which has been qualified as the Consensus-Minus-Two rule, the practice of decision-making within the CSCE has thus far prevented a ride on the slippery slope to majority rule.<sup>125</sup>

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120. See *supra* note 61.

121. See McGoldrick, *supra* note 8, at 149-51.

122. *Id.* at 163.

123. Reference is made to the decisions taken by the CSO regarding the suspension of Serbia/Montenegro from the CSCE. See Arie Bloed, *Helsinki II: The Challenges to Change*, 3 HELSINKI MONITOR 37, 49 (1992); McGoldrick, *supra* note 8, at 161-62; HERACLIDES, *supra* note 17, at 84.

124. A clear example of this has been the establishment of the Minsk Group for the purpose of reaching a negotiated settlement in the conflict involving the CIS Republics of Armenia and Azerbaijan, which both became Participating States of the CSCE in January 1992. The Minsk group consists of the Participating States which make up the Troika, both Republics and six other CSCE States, including the United States and Russia. See HERACLIDES, *supra* note 17, at 43-44.

125. See McGoldrick, *supra* note 8, at 163; HERACLIDES, *supra* note 17, at 179-80.

#### D. *Further Institutionalization: Problems Ahead*

##### 1. *The Stockholm Council Meeting*

In the aftermath of the Helsinki Summit, only a few Member-States realized that, as a collective, the EC had lost the proper momentum to advance some long-term proposals on the institutionalization of the CSCE.<sup>126</sup> Thus, given the external developments that the Participating States were facing, and the more subjective perception of failure under the Portuguese Presidency, the British Presidency of the EC renewed the debate on further institutionalization.<sup>127</sup> It received surprising support from Poland with regard to many of its proposals.<sup>128</sup>

Noting three main obstacles to the effective functioning of the CSCE in crisis management, the United Kingdom launched a very detailed set of proposals to remedy each shortcoming in the Helsinki Decisions. With regard to the absence of a permanent political forum, suggestions were made for a Permanent Forum of Representatives or a European Security Council. The existence of a weak and divided secretariat provided the impetus for rehabilitation of the Belgian proposal of a Secretary-General and the call for unifying the Warsaw, Prague and Vienna-based organs into one entity with international legal status.<sup>129</sup> In addition, the continued applicability of the consensus rule for substantive decisions provoked a suggestion to alter the consensus rule. Finally, proposals were introduced for an Executive Committee (Super-steering committee) and for reassessment and restructuring of the CSCE's financial basis.<sup>130</sup>

Polish proposals further clarified the position of the Permanent Executive body as a subsidiary to the CSO and the position of the CSCE Secretary-General to reflect some of the features of the position of the U.N. Secretary-General. These suggestions were incorporated in the EC Draft text submitted to the Third CSCE Council Meeting in Stockholm, December 14-15, 1992. The single most important feature of the proposed Secretary-General position was the grant of political authority. It was suggested that the Secretary-General should be able to bring to the attention of the Council of the CSO (via the CIO) "any matter which in his opinion may threaten the maintenance of peace

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126. For a detailed review of the course of events leading up to the Stockholm Council Meeting, see HERACLIDES, *supra* note 17, at 180-85.

127. *Id.* at 181-82.

128. *Id.* at 183. The British proposals were first submitted to its EC Partners barely a month after the conclusion of the Helsinki Summit. The Polish proposals started circulating by mid-November and bore a striking resemblance to the EC approach.

129. *Id.* at 182.

130. *Id.*

and security in Europe."<sup>131</sup>

This position proved untenable at the Stockholm Meeting; the mandate for the Secretary-General was weakened substantially, and no permanent forum of Representatives was created.<sup>132</sup> On the other hand, the office of the Secretary-General itself was established; the CSCE and CPC Secretariat were joined in one organizational structure, and provisions were made for further strengthening of the Secretariats. The Secretary-General was appointed a few months later.<sup>133</sup>

## 2. *The Rome Council Meeting*

The Fourth CSCE Council Meeting in Rome on December 1-2, 1993, marked another stage in the institutional development of the CSCE. Based on recommendations submitted by the CSCE ad hoc Group of Legal and Other Experts to the CSO,<sup>134</sup> the Council adopted a decision on legal capacity and privileges and immunities in relation to the CSCE.<sup>135</sup> It recommended, inter alia, that CSCE Participating States confer legal capacity on CSCE Institutions in accordance with the provisions adopted by the Ministers, subject to respective nations' constitutional, legislative and related requirements. In similar terms, it suggested that privileges and immunities be conferred on CSCE Institutions, Permanent Missions of the Participating States, Representatives of the Participating States, CSCE Officials, and members of the CSCE Missions. Finally, the Council suggested that CSCE Identity cards may be issued.<sup>136</sup>

In general, the legal capacity conferred upon the CSCE Secretariat, the ODIHR, and any other CSCE institution determined by the Council is limited to the extent that it is functional.<sup>137</sup> As such, it is similar in legal capacity to any full-fledged international organization. In addition, the privileges and

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131. *Id.* at 184.

132. However, it should be noted that the Council instructed representatives of the CSCE Participating States to meet regularly in Vienna. This resulted in the creation of the CSO Vienna Group, which, as a rule, would meet weekly. BLOED, *supra* note 111, at 113.

133. HERACLIDES, *supra* note 17, at 184-85. *See also* CSCE Council Summary of Conclusions of the Stockholm Meeting, 32 I.L.M. 603 (1993).

134. These proposals were drafted as a result of a request submitted at the Stockholm Council Meeting. They were submitted to the CSO at its 24th Meeting.

135. *See CSCE and the New Europe—Our Security is Indivisible*, CSCE Doc. CSCE/4-C/Dec.2., 1993.

136. *Id.* Annex 1.

137. Legal capacity is conferred "as is necessary for the exercise of their functions, and in particular the capacity to contract, to acquire and dispose of movable and immovable property, and to institute and participate in legal proceedings." *Id.* Annex 1, ¶ 1.

immunities are closely modelled on the provisions of the U.N. General Convention on Privileges and Immunities (1946).<sup>138</sup> It may be claimed, therefore, that these provisions, taken together, appear to push the CSCE across the line from a non-legal entity to an International Organization *in statu nascendi*. The Council's decision to strengthen its organizational structure through the creation of a Permanent Council, which would be located in Vienna and serve as a permanent forum of consultation for representatives of the Participating States, closely fits this pattern of further institutionalization.<sup>139</sup>

### 3. *The "Joint Agenda For Budapest": New Initiatives and Old Proposals*

Although the decisions taken at the Rome Council Meeting may be indicative of the CSCE's change in character, some Participating States view the current organizational and decision-making structure as a main contributing factor to a perceived lack of credibility. Hence, The Netherlands and Germany drafted the Joint Agenda For Budapest.<sup>140</sup> With the stated purpose of enhancing the effectiveness of the CSCE in conflict prevention, the Agenda includes a set of remarkable proposals aimed at the organizational structure

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138. The General Provisions of the CSCE Document hold, *inter alia*, that privileges and immunities are accorded in the interests of the CSCE institutions, and for the safeguard of independent exercise of function in relation to individuals. A waiver of immunity can be granted by the Secretary-General in consultation with the CIO or by the CIO itself. The Government may waive immunities for its Representatives. The specific provisions include, *inter alia*, the stipulation that CSCE institutions, their property, and assets, will enjoy the same immunity from legal process as is enjoyed by Foreign States. This implies that the CSCE is perceived as an international organization. Its premises are inviolable (This would apply at least to the CPC in Vienna, the Secretariat in Prague, and the ODIHR in Warsaw), and its property and assets are to be immune from search, requisition, confiscation, and expropriation. Its archives are inviolable; there can be no restrictions on the CSCE funds and transfer of currency; there is to be a direct tax exemption; and in their official communications, CSCE institutions are to be accorded the same treatment as that accorded to diplomatic Missions. The document details the privileges and immunities to be accorded to Permanent Missions of the Participating States, Representatives of the Participating States, CSCE Officials (which are similar to diplomatic status) and Members of CSCE Missions (this could be any kind of Mission established by one of the CSCE's decision-making bodies) or Personal Representatives of the CIO. In addition, the CSCE may issue a CSCE Identity Card to persons on official duty travel for the CSCE. This is also modelled on U.N. practice. In all respects, these explicit stipulations suggest that the CSCE may be viewed as an Organization *in statu nascendi*. *Id.* Annex 1, at 1-8.

139. The Permanent Council has replaced the CSO Vienna Group.

140. The Joint Agenda For Budapest was presented by the Ministers of Foreign Affairs of both states at a meeting of the CSCE Permanent Committee on May 17, 1994. *See* Decaux, *supra* note 115, at 19.



and decision-making powers of some of the CSCE's organs.<sup>141</sup> An extension of the Consensus-Minus-Two rule also is suggested.<sup>142</sup>

The extraordinary character of these proposals revolves around their origin rather than their content. The suggestion of a broader mandate for the CSCE Secretary-General is similar to previous Polish proposals, which had been incorporated in the EC Draft text submitted to the 1992 Stockholm Council Meeting (and which failed to succeed!). The recommendation to extend the Consensus-Minus-Two rule to relevant issues of peacekeeping is further proof of the revival of earlier EC positions.

An explanation for this Joint Agenda initiative most likely can be found in a number of recent developments. These include the expansion of the number and size of CSCE Missions and the subsequent difficulties with their effectiveness in conflict areas, the Russian efforts aimed at tying the institutionalization of the CSCE hierarchically to other European institutions while obtaining a broad mandate for unilateral CIS peacekeeping operations in the Near Abroad, and the negative example of the NATO-U.N. relationship in Bosnia-Herzegovina.<sup>143</sup> Clearly, the Joint Agenda seeks to establish the CSCE in a tenable, effective and credible position that is consistent with its limited "operational capabilities." It will be left to the participants of the upcoming Budapest Summit to take notice of these developments and to clarify the Summit's position on these matters.

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141. Most prominent among these proposals is the following suggestion:

The Secretary-General of the CSCE, acting in close consultation with the Chairman-in-Office (CIO), should be given a broader mandate. He should be empowered to bring to the attention of the Council, the CSO or the Permanent Committee any matter which in his opinion may threaten peace and security in the CSCE area. To this effect, he should have the right to initiate reports and to dispatch fact-finding missions, drawing upon the resources of the CSCE Secretariat. In some instances, the Secretary-General or his representative could be given a role in chairing meetings.

*Cf.* U.N. CHARTER art 99. Through his right of initiative, the CSCE Secretary-General would in fact be granted political authority. Thus, the CSCE Secretary-General would become a prominent player in the political decision-making structure of the CSCE, while at the same time completely changing the role of the Secretariat. Furthermore, it should be noted that the CSCE Secretary-General would communicate directly with the other organs (and no longer through the CIO) and that the dispatch of fact-finding missions is a CSO-prerogative. *See* Decaux, *supra* note 115, at 19.

142. This rule would have to be extended to relevant issues of CSCE peacekeeping operations. This would include decisions to refer a matter to the U.N. Security Council in the absence of the consent of the state(s) directly involved in a crisis or a conflict situation. *See* A Joint Agenda For Budapest, point II.3, *cited in* Decaux, *supra* note 115, at 24.

143. *Id.*

## PART II: THE CSCE AS A REGIONAL ARRANGEMENT

IV. REGIONAL ARRANGEMENTS UNDER ARTICLE 52  
OF THE UNITED NATIONS CHARTERA. *Introduction*

The merits of regional arrangements have been an issue of debate since the early days of the League of Nations.<sup>144</sup> The explicit provision of Article 21 of the League's Covenant, that regional arrangements for maintaining peace were not to be considered incompatible with the provisions of the Covenant, was instrumental in the failure of the collective security system designed by the Covenant.<sup>145</sup> Indeed, the experience of the Interbellum has demonstrated the potential threat of autonomous regional arrangements to the effective functioning of a collective security mechanism like the Covenant.

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144. The League of Nations was created in the aftermath of the First World War and negotiations on the Covenant of the League were held within the framework of the Paris Peace Conference. The Covenant was signed as part of the Treaty of Versailles on June 28, 1919, and created a framework for the maintenance of peace on the basis of collective security. The League failed as a result of its inability to deal with a series of crises in the 1930's which rapidly undermined its initial successes, and ultimately its credibility. See D.W. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 15-16 (1963).

145. Article 21 of the Covenant was the result of a proposal made by President Wilson on April 10, 1919. Contrary to his earlier statement of September 27, 1918, that there could be no place for regional pacts, leagues, or alliances within the "family" of the League of Nations, and in clear opposition to the ideas of the majority of States involved, President Wilson advocated the incorporation of a provision granting explicit acknowledgement of the compatibility of regional arrangements with the provisions of the Covenant. However, no consideration was given to an explicit formulation of the relationship between the League and such regional arrangements in terms of primary responsibility or degree of autonomy. The desire of the majority of States to see the United States become a Member of the League, as well as their proper understanding that this was conditional upon the President's ability to convince the U.S. Senate that the Monroe Doctrine would still be the cornerstone of American foreign policy, prompted the acceptance of the proposal and its subsequent transformation into Article 21, which stated in full: "Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of Peace." Despite proposals to amend Article 21 in order to establish a supervisory relationship between the League and regional arrangements (with the stipulation that regional arrangements were subject to the approval of the League's Council and could also be negotiated under the auspices of the League's Council or Assembly), the turn of events in the 1930's ultimately exposed the weakness of the provision and the inability of the League to control the actions of regional (security) arrangements. See Hana Saba, *Les Accords Regionaux Dans La Charte de L'O.N.U.*, 80 R.C.A.D.I. 639, 649-59 (1952); J.M. Yepes, *Les Accords Régionaux et le Droit International*, 71 R.C.A.D.I. 246, 257-61 (1947).

The San Francisco Conference has marked the second stage of the debate on the merits of regionalism versus universalism.<sup>146</sup> While the outcome of the debate has resulted in the accommodation of regional arrangements within the framework of Chapter VIII of the U.N. Charter,<sup>147</sup> the concept of regional arrangements itself has been subject to scrutiny and criticisms directed at its underlying assumptions.<sup>148</sup>

Nevertheless, regional arrangements have become an established phenomenon. In the wake of recent events in the Middle East, Africa, Asia, Central America and Europe, the concept has revived old issues and generated new ones.<sup>149</sup> Thus, the debate within the CSCE is clearly part of a larger

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146. The United Nations Conference on International Organization (UNCIO) was held in San Francisco, April 25-June 26, 1945, and culminated in the signing of the Charter of the United Nations Conference. See *supra* note 2. The San Francisco Conference was premised on the *Dumbarton Oaks Proposals for the Establishment of a General International Organization* (hereinafter *Dumbarton Oaks Proposals*) of October 7, 1944. For the text of the *Dumbarton Oaks Proposals*, see Doc. 1 G/1, 3 U.N.C.I.O. Docs. 1. See also RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER* 398-400, 472-73 (1958); L. GOODRICH ET AL., *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 354-55 (3rd ed. 1969).

147. U.N. CHARTER arts. 52-54.

148. Prime Minister Churchill stressed the regional approach to the organization of international security because in his opinion "only the countries whose interests were directly affected by a dispute . . . could be expected to apply themselves with sufficient vigour to secure a settlement" (*quoted in* RUSSELL, *supra* note 137). His proposition that organized action would operate best within regional groupings was questioned some 20 years later by scholar Inis Claude, who pointed out that "interregional affinities may be offset by historically rooted intraregional animosities, and geographical proximity may pose dangers . . . rather than collaborative possibilities which [states] wish to exploit in regional privacy." In short, the effectiveness of regional arrangements in contributing to the maintenance of international security is conditioned upon the "capacity for organization" of the arrangement. This capacity is dependent upon a set of factors which includes the degree of internal cohesion and the distribution of (economic, military and political) power. See INIS L. CLAUDE, *SWORDS INTO PLOWSHARES* 104-05 (4th ed. 1971).

149. Since the end of the Cold War, regional organizations or arrangements have played a role in a variety of situations. In the Middle East, the Iraqi invasion of Kuwait led to the involvement of the Arab League and the Gulf Cooperation Council. In Africa, war-torn Liberia proved to be a catalyst for unprecedented action by the Economic Community of West African States (ECOWAS), which set up the ECOWAS Cease-fire Monitoring Group (ECOMOG) in 1990. Liberia has also been the focus of attention for the Organization of African Unity (OAU). In addition, the collapse of the political structures in Somalia has been of concern to the OAU, the Arab League and the Islamic Conference. Moreover, the OAU is currently reconsidering its proposal to create a Mission for the Protection and Restoration of Trust in Burundi (MIPROBU) in view of the recent events in Rwanda. In Asia, the Association of South East Asian Nations (ASEAN) has played a role in the Cambodian peace process. In Europe, the disintegration of Yugoslavia and ensuing violent conflicts between Croats, Serbs and Muslims has been the testing ground for the European Union and the CSCE. Finally, the experience

trend toward reconsideration of the position of regional arrangements within the framework of the U.N. Charter.

This chapter provides an overview of the established principles guiding the relationship between the U.N. and the regional arrangements. In particular, attention is paid to the issues of definition, consistency and hierarchy. On the basis of these observations, the CSCE is subject to scrutiny in the next chapter. Finally, conclusions are drawn in view of the divergence between established principles and new realities.

## B. *The Definition of a Regional Arrangement*

### 3. *The Dumbarton Oaks Proposals and the San Francisco Conference*

In the Dumbarton Oaks Proposals, Chapter VIII, Section C, the term "regional arrangement" remained undefined. Still, from its place within the overall framework of the Proposals, it could be inferred that the concept of "regional arrangement" was related to Chapters VI (Peaceful Settlement of Disputes) and VII (Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression).<sup>150</sup> Thus, it was understood that the

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of the Contadora Group, which was capable of brokering the Nicaraguan peace process, set in motion by the Esquipilas II Agreements of August 7, 1987 and followed by general elections on February 25, 1990 (monitored jointly by the U.N. and the OAS), has been illustrative of the enhanced position of regional arrangements.

This does not imply, however, that the increased involvement of such regional organizations or arrangements is related to a proportional increase in effectiveness. With the exception of the ECOWAS and Contadora Group experiences, the U.N. has been or become involved in all the above situations precisely because of a lack of effectiveness of regional efforts. This has raised new debate on the relationship between the U.N. and regional efforts, the appropriateness of regional action and the changing nature of the security-concerns which both the U.N. and regional organizations or arrangements are formulating. See Benjamin Rivlin, *Regional Arrangements and the UN System for Collective Security and Conflict Resolution: A New Road Ahead?*, 16 INT'L REL. 95, 103-04 (1992).

150. The *Dumbarton Oaks Proposals* states in full:

1. Nothing in the Charter should preclude the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided such arrangements or agencies and their activities are consistent with the purposes and principles of the Organization. The Security Council should encourage settlement of local disputes through such regional arrangements or by such regional agencies, either on the initiative of the states concerned or by reference from the Security Council.
2. The Security Council should, where appropriate, utilize such arrangements or agencies for enforcement action under its authority, but no enforcement

concept of "regional arrangement" should be interpreted in functional terms. Nevertheless, various attempts were made at the San Francisco Conference to clarify this concept and to strictly define its limits.

The San Francisco Conference established a special committee on May 9, 1945, with a mandate to "analyse, classify and, if possible, amalgamate the Amendments submitted" with regard to the provisions of Chapter VIII, Section C.<sup>151</sup> Accordingly, amendments in relation to the lack of definition of the "regional arrangement" concept were submitted by Chili, Colombia, Costa Rica, Cuba, Ecuador, Egypt, New Zealand and Peru.<sup>152</sup> The Egyptian amendment contained the most explicit formulation of a "regional arrangement," the New Zealand amendment proposed a power of definition for the U.N. itself, and the Central and South American amendments contained various criteria for definition (such as duration, geographic proximity, economic relations and conformity of the arrangement to the Purposes and Principles of the U.N.).<sup>153</sup>

The Egyptian amendment became the subject of intense discussions since it stated that regional arrangements would be considered to consist of a permanent organization of States within a specified geographic area which:

By reason of their proximity, community of interests or cultural, linguistic, historical or spiritual affinities, make themselves jointly responsible for the peaceful settlement of any disputes which may arise between them and for the maintenance of peace and security

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action should be taken under regional arrangements or by regional agencies without the authorization of the Security Council.

3. The Security Council should at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

*Dumbarton Oaks Proposals*, *supra* note 146, ch. VIII, § C. Section C, paragraph 1, after amendment, has become Article 52 of the U.N. Charter; Section C, paragraph 2 has provided the basis for Article 53 of the Charter; and Section C, paragraph 3 has been incorporated, in an almost identical wording, in Article 54 of the Charter. From the references in Section C, paragraphs 1 and 2, it is clear that regional arrangements have a role to play both in the peaceful settlement of disputes and enforcement action. *See* L. GOODRICH & E. HAMBRO, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 310-11 (rev. ed. 1949).

151. This was Committee III/4, which divided its respective tasks among Subcommittees. Of these, Subcommittee III/4/A was tasked with the Amalgamation of Amendments. *See* GOODRICH & HAMBRO, *supra* note 150, at 310. *See also* Saba, *supra* note 145, at 674.

152. Saba, *supra* note 145, at 675, 677.

153. *Id.* The French text of the proposal submitted jointly by Chili, Colombia, Costa Rica, Ecuador, and Peru is reprinted in Yepes, *supra* note 145, at 274-75.

in their region, as well as for the safe-guarding of their interests and the development of their economic and cultural relations.<sup>154</sup>

Apart from setting forth the criteria which should be met by regional cooperation in order to be qualified as a "regional arrangement," the Egyptian amendment also introduced the idea that the "regional arrangement" concept should not be limited to its security-function.<sup>155</sup> Indeed, the Egyptian amendment was accompanied by the proposal that Section C be separated from the remainder of Chapter VIII, since it was held that the role of regional arrangements simply could not be strictly limited to the maintenance of peace and security.<sup>156</sup>

The Egyptian amendment was not submitted to a vote; while it "clearly defined obvious legitimate and eligible factors for a regional arrangement," it also failed to cover all the situations in which regional arrangements might become involved.<sup>157</sup> On the question of separation of Section C from the remainder of Chapter VIII, the Committee declined to formulate a decision,

154. See *Interim Report to Committee III/4 by Subcommittee III/4/A on the Amalgamation of Amendments*, Doc. 533, III/4/A/9, 12 U.N.C.I.O. Docs. 845. In comparison, the French text reads as follows:

Seront considérées comme ententes régionales, les organisations permanentes, groupant dans une région géographique déterminée, plusieurs pays qui, en raison de leur voisinage, de leur communauté d'intérêts ou leurs affinités linguistiques, historiques ou spirituelles, se solidarisent pour le règlement pacifique de tout différend pouvant survenir entre eux pour le maintien de la paix et de la sécurité dans leur région, comme pour la sauvegarde de leurs intérêts et le développement de leurs relations économiques et culturelles.

*Id.*

155. Saba, *supra* note 145, at 676.

156. According to the original Egyptian explanation of its definition of regional arrangements:

Il ne serait pas juste d'appliquer les termes d'arrangements régionaux employés au Chapitre VIII, Section C, des propositions, aux alliances d'ordre purement militaire entre deux ou plusieurs puissances. Les alliances militaires n'ont rien de commun avec les arrangements régionaux: elles résultent de circonstances fortuites et ne se fondent généralement pas sur les affinités qui leur servent de base. Ces alliances, essentiellement temporaires, même lorsqu'elles sont conclues pour de longues périodes, sont l'expression de l'ancien principe de l'équilibre des puissances. La nouvelle Organisation se propose de maintenir la paix au moyen de mesures collectives et d'abandonner l'ancien principe.

Doc. 533, III/4/A/9, 12 U.N.C.I.O. Docs. 817.

157. *Summary Report of the Fifth Meeting of Committee III/4*, Doc. 889, III/4/A/12, 12 U.N.C.I.O. Docs. 701 (1945). See also GOODRICH & HAMBRO, *supra* note 150, at 311; Saba, *supra* note 145, at 677.

since it considered the matter as being excluded from its competence.<sup>158</sup> The amendments of the Central and South American States were also rejected without vote. New Zealand's amendment, being the only amendment submitted to a vote, was rejected on the ground that the condition of approval of regional agreements by the U.N. before they could become operational as "regional arrangements" would cause unnecessary delay in the proper functioning of such arrangements.<sup>159</sup> In short, the Committee did not consider a definition of the term "regional arrangement" necessary for proper functioning of the concept and thus left Chapter VIII, Section C unchanged on this particular issue.

## 2. *The Practice of the Organs of the United Nations*

The lack of definition in the text of the Charter thus opened the door to interpretation of the term "regional arrangement" through the practice of the organs of the U.N, in particular the Security Council. Both the Security Council and the General Assembly abstained for a long time from firm efforts to define "regional arrangements and agencies."<sup>160</sup> Whereas the Organization of American States (OAS) and the League of Arab States (or Arab League) were the most clearly defined regional organizations which could likely pass the test of Article 52, paragraph 1 in the early days, the U.N. still refrained from making decisions which could be interpreted as an implicit acknowledgement of the respective positions of both the OAS and the Arab League.<sup>161</sup>

158. *Interim Report to Committee III/4 on the Work of Subcommittee III/4/A*, Doc. 335, III/4/A/5, 12 U.N.C.I.O. Docs. 833; *Summary of Report of the Third Meeting of Committee III/4*, Doc. 363, III/4/A/7, 12 U.N.C.I.O. Docs. 673 (1945). It should be noted that the Committee on Economic and Social Cooperation (Committee II/3), which did have competence on this question, decided against the regional approach in its areas of competence. *Summary Report of the Nineteenth Meeting of Committee II/3*, Doc. 780, II/3/53, 10 U.N.C.I.O. Docs. 196 (1945). See also GOODRICH & HAMBRO, *supra* note 150, at 311.

159. Saba, *supra* note 145, at 677.

160. GOODRICH ET AL., *supra* note 146, at 356.

161. E.g., the Charter of the OAS was signed at the Bogota Conference on April 30, 1948, and entered into force on December 13, 1951. Article 1 explicitly formulates the position of the OAS within the framework of the U.N.

The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, territorial integrity and their independence. *Within the United Nations, the Organization of American States is a regional agency.*

(Emphasis added.) In addition, Article 4 states unequivocally that its essential purposes result from its principles and the fulfillment of its "regional obligations." Its purposes include the

Thus, the General Assembly invited the chief administrative officers of the OAS and the Arab League (and later the Organization of African Unity (OAU)) to attend its meetings as observers, notwithstanding explicit reference to the fact that such invitations did not constitute recognition of a regional arrangement status.<sup>162</sup> In addition, the Israeli contention that the Arab League could not be a regional organization because it was not accessible to all members in the region and based on racial exclusiveness was also refuted.<sup>163</sup>

The practice of the Organs of the U.N., vis-à-vis existing regional arrangements, was rather insignificant during the Cold War.<sup>164</sup> The Security Council in particular was prevented from developing the close relationship with existing regional arrangements as envisaged by the Charter.<sup>165</sup> The

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strengthening of peace and security, the prevention of possible causes of difficulty and the pacific settlement of disputes between its Member States, common action in the event of aggression, the solution of political, juridical and economic problems among them, and the promotion, by cooperative action, of economic, social and cultural development. The Charter of the OAS reaffirms its fundamental principles (Chapter II) and the rights and duties of States (Chapter III), contains provisions for the pacific settlement of disputes (Chapter IV) and collective security (Chapter V), elaborates on economic standards (Chapter VI), social standards (Chapter VII) and cultural standards (Chapter VIII), establishes political and administrative Organs (Chapters X through XIII), anticipates the activities of Specialized Conferences and Specialized Organizations (Chapters XIV and XV) and contains provisions on the legal status and privileges and immunities of the OAS itself, its employees, the Representatives of Member-States in various organs and the Inter-American Specialized Organizations. Charter of the OAS, *supra* note 5, arts. 103-05; *cf.* U.N. CHARTER arts. 104-05. *See also* GOODRICH & HAMBRO, *supra* note 150, at 312-13. On the League of Arab States, based on the Pact of Cairo of March 22, 1945, *see* M. Khadduri, *The Arab League as a Regional Arrangement*, 40 AM. J. INT'L L. 756 (1946); Text of the Pact of the League of Arab States, DEP'T ST. BULL., May 1947, at 967-70.

162. For the discussions on the OAS, *see* U.N. GAOR, 6th Comm., 3d Sess., 70th & 71st mtgs. (1948). On the Arab League, *see* U.N. GAOR, 6th Comm., 5th Sess., 215th-217th mtgs. (1950); *Report of the Sixth Committee on Invitation to the Secretary-General of the League of Arab States*, U.N. GAOR, 6th Comm., 5th Sess., Annex 2, Agenda Item 58, at 6 (1950), in GOODRICH ET AL., *supra* note 146, at 356-57. *See also* REPERTORY OF PRACTICE OF UN ORGANS 442-43 (1955) [hereinafter REPERTORY].

163. *See* REPERTORY, *supra* note 162, at 446-47. *See also* Rivlin, *supra* note 149, at 100-01.

164. The only explicit recognition of a regional arrangement status granted by the Security Council during the Cold War came in relation to the violent decolonization process in the Congo during the early 1960's. Security Council Resolution 199 of December 30, 1964 (U.N. Doc. S/6128) encouraged the OAU to find a peaceful solution for the situation in the Congo. It recognized the OAU as a regional agency within the meaning of Article 52, paragraph 1 of the U.N. Charter. Despite its recognition of the geographical definition of a "regional arrangement," the Security Council did not establish any further criteria for definition. *See* GOODRICH ET AL., *supra* note 146, at 363.

165. *See* Rivlin, *supra* note 149, at 96.



paralyzation of the Security Council as a result of the veto right of the Permanent Members and the unwillingness of the two major antagonists of the Cold War, the United States and the U.S.S.R., to permit Security Council involvement in regional conflicts in which they were respectively implicated did little to improve the relationship between regional arrangements and the U.N.<sup>166</sup> Instead, regional arrangements were used by each superpower as instruments of hegemonic supremacy in a region.<sup>167</sup>

As a consequence of the Gulf War, renewed interest in the provisions of Chapter VIII prompted Secretary-General Perez de Cuellar to suggest, "[F]or dealing with new kinds of security challenges, regional arrangements or agencies can render assistance of great value," and he continued to state:

[T]his presupposes the existence of the relationship between the United Nations and regional arrangements envisaged in Chapter VIII of the Charter. The diffusion of tensions between States and the pacific settlement of local disputes are, in many cases, matters appropriate for regional action. The proviso, however, is that efforts of regional agencies should be in harmony with those of the United Nations and in accordance with the Charter. This applies equally to regional arrangements in all areas of the globe, including those which might emerge in Europe.<sup>168</sup>

Although this statement did not define the term "regional arrangements," it was clear from the wording that the Secretary-General used a functional concept. Efforts aimed at the "diffusion of tension" and pacific settlement of "local disputes" were considered legitimate for regional action, provided that the principles and purposes of the U.N. Charter would be observed. From this, it could be inferred that the Secretary-General considered peaceful dispute settlement, peacekeeping and U.N.-authorized enforcement action to be proper

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166. In the words of Inis Claude, regional arrangements were used as "Jurisdictional refuges, providing pretexts for keeping disputes out of UN hands." See Inis L. Claude, *Implications and Questions for the Future*, 16 INT'L ORG. 843 (1965). See also Rivlin, *supra* note 149, at 96.

167. For the United States, the OAS provided the regional forum for, *inter alia*, the cases brought to the attention of the U.N. Security Council regarding Guatemala in 1954, Cuba in 1960 and 1962, Haiti in 1963, Panama in 1964 and the Dominican Republic in 1965. Similarly, the U.S.S.R. blocked the Security Council from considering the situation in Hungary in 1956 and Czechoslovakia in 1968 on the ground that it was the proper concern of the "socialist community" bound together in the Warsaw Pact. See Rivlin, *supra* note 149, at 96; GOODRICH ET AL., *supra* note 146, at 360-64.

168. *Report of the Secretary-General on the Work of the Organization*, 1990, at 21. The Report was issued in September 1990 during the Gulf Crisis. 1990 SECRETARY GEN. REP. 21.

means for action on the part of regional arrangements.<sup>169</sup> Even more significant in the particular context of European security was the implicit assumption of the Secretary-General that a regional arrangement had yet to emerge within Europe.

Shortly afterwards, the Soviet Union presented a memorandum to the General Assembly and the Security Council in which it suggested that the proper long-term course of action would be to organize "all-round co-operation" between the U.N. and "regional organizations" for the purpose of establishing a "regional security structure" in which the U.N. would perform a central role.<sup>170</sup> Interestingly, the use of the term "organizations" suggested a more limited definition of "regional arrangement." Indeed, it could very well be interpreted as referring to regional cooperation on a firm legal basis within a well-defined legal entity.

The Soviet memorandum was followed more than a year later by a General Assembly resolution which requested the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization to consider the "proposal on the enhancement of co-operation between the United Nations and regional organizations, as well as other specific proposals relating to the maintenance of international peace and security."<sup>171</sup> The Soviet memorandum contributed directly to the renewed interest of Member-States in reviving the provisions of Chapter VIII. In addition, the Security Council Summit of January 31, 1992, produced a request to the Secretary-General for the preparation of recommendations on ways to strengthen the role of the U.N. in preventive diplomacy, peacemaking and peacekeeping, including the "contribution to be made by regional organizations in accordance with Chapter VIII of the U.N. in helping the work of the Council."<sup>172</sup> The

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169. This would be in accordance with the provisions of Articles 52 and 53 of the U.N. Charter, which will be discussed in Parts IV.C.3 and IV.C.4.

170. *The United Nations in the Post-Confrontation World*, U.N. Doc. A/45/626, S/21869 (1990).

171. The General Assembly Resolution was adopted on December 9, 1991. See U.N. Doc. A/RES/46/58 (1991).

172. The U.N. Security Council Summit took place in New York on January 31, 1992. It was the first of its kind and assembled the Heads of State and Government of the 15 Member-States which were represented in the Security Council. Whereas the Presidential Statement issued at the conclusion of the Summit referred in very general terms to the possibility of developing a closer relationship between the U.N. and regional organizations, one of the Summit's participants (Prime Minister Martens of Belgium) addressed the issue specifically and called for "systematic" involvement of regional organizations in the actions of the Security Council. The use of the term "organizations" is similar to the Soviet memorandum's approach and indicative of the assumption that a "regional arrangement" or "agency" can only be the equivalent of a legally defined, established and operational regional entity. See U.N. SCOR, 47th Sess., 3046 mtg. at 69, 144, U.N. Doc. S/PV.3046 (1992).

use of the term "organizations" appeared to pay tribute to the legalistic view suggested by the Soviet memorandum. Indeed, the limitation of the definition of "regional arrangements" to "regional organizations" would imply a legal rather than a political view of regional cooperation within the framework of Chapter VIII. This would also strengthen the argument for a hierarchical interpretation of the Chapter's substantive provisions.

The request of the Security Council Summit resulted in the ground-breaking Agenda For Peace report, which dealt with the issue of regional arrangements in Part VII, paragraphs 60-65.<sup>173</sup> Apart from stipulating that the report did not purport "to set forth any formal pattern of relationship between regional organizations and the United Nations, or to call for any specific division of labour," but rather pointed to the potential that regional arrangements or agencies possess in many of the situations covered by the report,<sup>174</sup> it also contained the following explicit acknowledgement:

The Charter deliberately provides no precise definition of regional arrangements and agencies, thus allowing useful flexibility for undertakings by a group of States to deal with a matter appropriate for regional action which also could contribute to the maintenance of international peace and security. Such associations or entities could include treaty-based organizations, whether created before or after the founding of the United Nations, regional organizations for mutual security and defence, organizations for general regional development or for cooperation on a particular economic topic or function, and groups created to deal with a specific political, economic or social issue of concern.<sup>175</sup>

Although, again, no precise definition of the term "regional arrangement" was given, this formulation has become the most specific contribution yet to the clarification of what the term *could* include. In short, the Secretary-General basically summarized a half-century of debates by enumerating all elements of contention and concluding that all sorts of regional undertakings between States could qualify as "regional arrangements or agencies," provided that "their activities are undertaken in a manner consistent with the Purposes and Principles of the Charter, and . . . their relationship with the United Nations,

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173. *An Agenda For Peace: Preventive Diplomacy, Peacemaking and Peacekeeping; Report of the Secretary-General pursuant to the Statement adopted by the Summit Meeting of the Security Council on January 31, 1992*, U.N. GAOR, 47th Sess., U.N. Doc. A/47/277 (1992) [hereinafter *An Agenda For Peace*], reprinted in 31 I.L.M. 953 (1992).

174. *Id.* at 971, ¶ 64.

175. *Id.* at 970, ¶ 61.

and particularly the Security Council, is governed by Chapter VIII."<sup>176</sup> Indeed, the current Secretary-General has been a strong protagonist of an increased role for regional arrangements and agencies in maintaining international peace and security, as well as strengthening cooperation and enhancing coordination between the U.N. and regional efforts.<sup>177</sup> In the words of the Secretary-General:

The Security Council has and will continue to have primary responsibility for maintaining international peace and security, but regional action as a matter of decentralization, delegation and cooperation with the United Nations efforts could not only lighten the burden of the Council but also contribute to a deeper sense of participation, consensus and democratization in international affairs.<sup>178</sup>

### 3. *Concluding Remarks*

The reliance of the Security Council on specific regional efforts in a number of recent situations has, in all likelihood, not been related to the noble objectives suggested by the Secretary-General. Instead, the inability and/or unwillingness of Members of the Security Council to deal credibly and effectively with situations in Liberia, Somalia, former Yugoslavia and a number of CIS Republics seems more to the point.<sup>179</sup> Nevertheless, the concern over definition has become a non-issue: pragmatic considerations have come to prevail over theoretical consistency. Thus, the legal approach to regional cooperation within the framework of Chapter VIII, advocated until as recently as early 1992, seems to have been abdicated by the Security Council in favor of a more politically-flavoured vision. In other words, a regional arrangement has become less of a legal entity than a political concept. In view of the overall purposes which regional arrangements are deemed to serve, this may very well create the politically desired flexibility for regional efforts. At the same time, though, this development proceeds at the expense of the legally desired clarity of a

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176. *Id.* at 970, ¶ 63.

177. See, e.g., *Message of the Secretary-General to the Council of the Conference on Security and Cooperation in Europe*, meeting in Rome on December 1-2, 1993, which states unequivocally: "My wish to encourage the emergence of regional organizations and arrangements with the capacity to deal with regional problems is well known." *Secretary-General Says Regional Cooperation Is Essential In Efforts To Contain Ethnic And Political Strife*, FED. NEWS SERVICE, Dec. 2, 1993 [hereinafter *Message to the CSCE Council Meeting in Rome*]. See also Rivlin, *supra* note 149, at 110.

178. *An Agenda For Peace*, *supra* note 173, at 971, ¶ 64.

179. See *supra* note 149.

conceptual approach to international and regional peace and security.

### C. *The Requirements of the Charter of the United Nations*

#### 1. *The General Framework*

Chapter VIII of the U.N. Charter consists of three Articles that set forth the general framework for the relationship between regional arrangements or agencies and the United Nations. Article 52 contains provisions on the general conditions that are attached to action undertaken by regional arrangements or agencies,<sup>180</sup> as well as the specific conditions that relate to the relationship between the Security Council and Member-States entering into such arrangements or constituting such agencies in matters pertaining to the peaceful settlement of local disputes.<sup>181</sup> In this context, Article 52 is closely related to the provisions of Chapter VI, and in particular the provisions of Articles 33, 34 and 35.<sup>182</sup>

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180. The general conditions are formulated in U.N. CHARTER art. 52, ¶ 1, which states: Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

The conditions of appropriateness and consistency were already incorporated in the *Dumbarton Oaks Proposals*, *supra* note 146, ch. VIII, § C, ¶ 1. The discussion regarding the condition of appropriateness was closely related to the question of autonomy versus supervision, as well as to the issues of peaceful settlement of disputes and enforcement action. In the first 20 years of the U.N.'s existence, the question came up a number of times. Starting with Guatemala's contention in 1954 that its complaint of aggression by Honduras was a matter of exclusive consideration for the Security Council, and not the OAS, through the Cuban claim in 1962 that the OAS was not at liberty to establish conditions of membership and active participation autonomously, to the claim of Member-States of the OAU in 1964 that the American and Belgian interference in the conflict in the Congo amounted to a violation of the Charter's provisions on the "autonomy of action" for regional arrangements, these incidents clarified the issue of appropriateness to the extent that it depends on the circumstances of the specific case. In addition, it could be recognized that regional arrangements or agencies can set their Membership and participation requirements independently (without violation of the Purposes and Principles of the Charter), and that regional action would not be appropriate in a matter involving a state not party to the regional arrangement. In view of the current efforts of the European Union, the CSCE and NATO to contribute to a solution for the conflict in Bosnia, this last requirement might no longer be on solid ground. See GOODRICH ET AL., *supra* note 146, at 357-59.

181. See *infra* Part IV.C.3.

182. *Id.*

Article 53 deals with the situation in which enforcement action is carried out. It establishes a clear hierarchical relationship between the Security Council and the regional arrangements or agencies. In addition, Article 53 contains a linkage to Article 107 through its provisions on enforcement measures taken against an enemy state.<sup>183</sup> Finally, Article 54 contains the explicit requirement that the Security Council at all times be kept fully informed of activities undertaken or contemplated by regional arrangements or agencies for the maintenance of international peace and security.<sup>184</sup>

During the San Francisco Conference, several elements of the Dumbarton Oaks Proposals were the source of a strong divergence of views. Apart from the desirability of an explicit definition of the "regional arrangement" concept itself, which has been discussed in the previous section, the elements of consistency and hierarchy proved to be major points of discussion. Therefore, each of these elements will be considered in more detail.

183. See *infra* Part IV.C.4.

184. Article 54 was, in substance, included in Chapter VIII, Section C, paragraph 3 of the *Dumbarton Oaks Proposals* and was adopted at the San Francisco Conference without dissent. Its obvious purpose is to provide the Security Council with the information necessary to fulfill its primary responsibility in the maintenance of international peace and security and to exercise the degree of control over regional efforts as envisaged in Articles 52 and 53. In short, the language of Article 54 seems to require full reporting by regional arrangements or agencies on current activities as well as those still under contemplation. Mention of this requirement is made only in Article 5 of the Rio Treaty, which provides:

[The] High Contracting Parties shall immediately send to the Security Council of the United Nations, in conformity with Articles 51 and 54 of the Charter of the United Nations, complete information concerning the activities undertaken or in contemplation in the exercise of the right of self-defense or for the purpose of maintaining inter-American peace and security.

Rio Treaty, *supra* note 5, art. 5. No such provision can be found in the Charters of the OAS or OAU, or in the Pact of the Arab League, nor in the constituent documents of mutual security assistance arrangements such as NATO and WEU (Instead, in both the Treaty of Washington (1949, NATO) and the Treaty of Brussels (1948, WEU), acknowledgement is made of the obligations of the Member-States under the U.N. Charter and the primary responsibility of the Security Council in the maintenance of international peace and security. See Article 7 (NATO) and Article 5 (WEU), respectively). The OAS has a solid record of compliance with the requirement of Article 54, and more recently the resurgence of regional arrangements has led to a new stream of information coming from, inter alia, the Chairman-in-Office of the CSCE and the Presidency of the European Union. See Saba, *supra* note 145, at 701-03, 707-08; GOODRICH ET AL., *supra* note 146, at 368-69; S.C. Res. 896, U.N. Doc. S/1994/96, ¶ 2 (1994) (which specifically acknowledges the cooperation between the U.N. and the CSCE on matters pertaining to observer missions in Georgia).

## 2. Consistency with the Purposes and Principles of the United Nations

According to the Dumbarton Oaks Proposals, consistency of the regional arrangements or agencies and their activities with the Purposes and Principles of the Organization was a *conditio sine qua non* for the existence of such arrangements or agencies.<sup>185</sup> Indeed, lack of consistency would therefore

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185. The Purposes and Principles of the Charter are enumerated in Articles 1 and 2, respectively. According to Article 1, the Purposes of the United Nations are:

1. The maintenance of international peace and security through the taking of collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and the adjustment of international disputes or situations which might lead to a breach of the peace through peaceful means.
2. The development of friendly relations among States based upon the respect for the principle of equal rights and self determination of peoples.
3. The achievement of international co-operation in solving international economic, social, cultural or humanitarian problems, and the promotion and encouragement of respect for human rights and the fundamental freedoms.
4. To be a centre for harmonizing the actions of States in the attainment of these common ends.

In pursuit of the Purposes of Article 1, the U.N. and its Members are to act in accordance with the Principles of Article 2, which include:

1. Sovereign equality of all Member-States.
2. Fulfillment in good faith of obligations assumed under the Charter.
3. Peaceful settlement of international disputes.
4. Refraining from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the U.N.
5. Rendering every assistance in any action taken by the U.N. in accordance with the Charter, and refraining from providing assistance to any State against which preventive or enforcement action is taken.
6. Ensuring that Non-Members act in accordance with these Principles in so far as may be necessary for the maintenance of international peace and security.
7. Non-intervention in matters essentially within the domestic jurisdiction of any State.

U.N. CHARTER, *supra* note 3.

The formulation of Chapter VIII, Section C, paragraph 1 of the *Dumbarton Oaks Proposals* that "[n]othing precludes the existence . . . provided that" it is ground for the claim of the consistency requirement being a condition sine qua non for the validity of regional arrangements. The claim fits the underlying reasoning of the Charter that regional cooperation should be compatible with the normative standards enumerated in Articles 1 and 2, since regional efforts are to be complementary to the efforts of the U.N. in maintaining international peace and security. See Saba, *supra* note 145, at 687; GOODRICH ET AL., *supra* note 146, at 359.

invalidate the arrangement or agency created.<sup>186</sup>

The San Francisco Conference adopted this provision after some discussion. The prime concern of the Latin American States and the United States was the recognition of the inter-American system as a regional arrangement, with the granting of as much autonomy of action as possible.<sup>187</sup> Similar concerns were shared by those States belonging to the Arab League.<sup>188</sup> Thus, the discussion regarding the requirement of consistency took place against the background of the themes of globalism versus regionalism and autonomy versus hierarchy, and within the context of determining the proper scope of action for regional arrangements or agencies.

The incorporation of the consistency requirement raised questions shortly afterwards. Whereas it was observed that the closely related provision of Article 103 established only a hierarchy of obligations resulting from international agreements, the consistency requirement went beyond that observation.<sup>189</sup> If it was to be considered as determinative of the validity of regional cooperation, then the question of deciding on this matter would have to be considered. Though it seemed obvious that this would be a matter for an organ of the U.N. rather than the arrangement itself, it was not clear which organ would (or should) be qualified and/or acceptable. Between pragmatic

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186. See Saba, *supra* note 145, at 687.

187. The Inter-American System was developed through a number of Pan-American Conferences (Havana, 1928; Montevideo, 1933; Buenos Aires, 1936; and Lima, 1938), in which the Monroe-Doctrine, the Good Neighbour policy and the hegemonial position of the United States within the Western Hemisphere figured prominently. Efforts to create a legal structure in which regional cooperation would be based on sovereign equality of States took until the Bogota Conference of 1948, at the conclusion of which the Charter of the OAS was signed. The Charter incorporated already existing structures for cooperation in the areas of security, economic, social and cultural matters. In the interval between the Dumbarton Oaks Conference of October 1944 and the San Francisco Conference of April 1945, the American States held a Conference on peace and security during February and March, 1945, in Chapultepec, Mexico. The resulting Act of Chapultepec created the basis for the strong common position of the American States during the discussions and drafting of the Charter at the San Francisco Conference. For a more detailed discussion, see Saba, *supra* note 145, at 664-67; Yepes, *supra* note 145, at 269-81. It is significant that the text of the amendment proposed jointly by Chile, Colombia, Costa Rica, Ecuador and Peru during the deliberations of Committee III/4 included the explicit stipulation that the Pan-American System was declared compatible with the goals, ends and objectives of the U.N. and that consequently it would continue to function autonomously. *Id.* at 275.

188. The Arab League was made up of Saudi Arabia, Trans-Jordan, Egypt, Iraq, Lebanon, Syria and Yemen. See Saba, *supra* note 145, at 667-70, 690.

189. Article 103 of the U.N. Charter states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. CHARTER art. 103.



pragmatic and normative considerations lay waste a multitude of options. Unilateral declarations issued by Latin American and Arab States regarding the consistency requirement provided a subjective solution to the issue.<sup>190</sup>

The consistency requirement surfaced again during the early years of the U.N.'s existence. On two occasions, this requirement fuelled claims of invalidity of the regional arrangement concerned. In the case of Israel's contention that the Arab League was based on the principle of racial exclusiveness and that its activities in relation to the Palestinian problem were directed against the U.N. and thus inconsistent with the Purposes and Principles of the U.N., the claim was refuted without much discussion.<sup>191</sup>

A decade later, Cuba contended that certain resolutions adopted by the Punta del Este Conference of the OAS were inconsistent with the Purposes and Principles of the Charter.<sup>192</sup> In particular, Cuba argued that the Principles of peaceful coexistence, non-intervention and sovereign equality contained in the U.N. Charter were violated by the Conference's adoption of a declaration that the principles of communism were inconsistent with those of the inter-American system, a recommendation of free elections for governments that fail to practice representative democracy, and a declaration that the government of Cuba had voluntarily placed itself outside the inter-American system.<sup>193</sup> The Cuban contentions found strong support from the USSR, yet both in the General Assembly and the Security Council the predominant view seemed to be that the OAS resolutions were in accordance with the OAS Charter and, therefore, consistent with the U.N. Charter (and thus in compliance with the requirement of Article 52, paragraph 1). No formal decision was taken, thus leaving the issue of the proper organ unsolved.<sup>194</sup>

Since the Charter does not stipulate explicitly which organ is to determine whether the consistency-requirement of Article 52, paragraph 1 is met by regional arrangements or agencies and their activities, it seems proper to rely

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190. See Saba, *supra* note 145, at 690.

191. The Israeli claim was made when the General Assembly considered a proposal in 1950 to invite the chief administrative officer of the Arab League as an observer to its meetings. See U.N. GAOR, 5th Sess., Annexes, Agenda Item 58, at 1-2, U.N. Doc. A/C.6/336, quoted in GOODRICH ET AL., *supra* note 146, at 359.

192. Cuba's claim was submitted to the General Assembly and the Security Council in 1961.

193. Cuba invoked the Principles enumerated in Article 2, paragraphs 3-4; Article 2, paragraph 7; and Article 2, paragraph 1, respectively. "Peaceful coexistence" can be understood as the combination of Article 2, paragraph 3 (peaceful settlement of disputes) and Article 2, paragraph 4 (refraining from threat or use of force) and became a widely used catch-all in the phraseology of the Communist bloc. U.N. CHARTER, *supra* note 3, art. 2, ¶¶ 1, 3-4, 7.

194. See e.g., U.N. GAOR 1st Comm., 16th Sess., 1230th-1243d mtgs. (1962); U.N. Doc. A/4882 (1961); U.N. Doc. A/5090 (1962); U.N. SCOR, 17th Sess., 991st-998th mtgs. (1962). See also GOODRICH ET AL., *supra* note 146, at 360.

on a teleological approach. Indeed, the Charter has been created as a framework for the maintenance of international peace and security; within that framework, primary responsibility is placed upon the Security Council.<sup>195</sup> Chapter VIII on regional arrangements contains provisions on the relationship between the Security Council and such arrangements or agencies in situations calling for peaceful settlement of local disputes and/or enforcement action. Therefore, it seems reasonable to assume that the consistency requirement, if it would be an issue of discussion, would be a matter proper for the Security Council.<sup>196</sup> This would also be in accordance with the more pragmatic observation that an effective coordination between the efforts of the U.N. and those of a regional nature in situations like Somalia, Bosnia or Georgia requires the determination of the Security Council regarding the feasibility of regional efforts and, therefore, indirectly the consideration of the consistency requirement.

### 3. *Priority of a Regional Arrangement in Peaceful Settlement of Disputes*

In the Dumbarton Oaks Proposals, reference was made to the role of regional arrangements or agencies in the settlement of local disputes. By stating: "The Security Council should encourage settlement of local disputes through such regional arrangements or by such regional agencies, either on the initiative of the States concerned or by reference from the Security Council," it was suggested that regional arrangements or agencies were appropriate fora for "local" dispute settlement, with a certain degree of autonomy in handling the case at hand.<sup>197</sup> From the text, it did not appear that the role of regional arrangements was subject to approval by the Security Council. Instead, the text seemed to suggest that the Security Council had the discretionary obligation to refer peaceful settlement of disputes to the appropriate regional arrangement or agency.<sup>198</sup> This would seem to be contradictory to the principle of prior

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195. Cf. U.N. CHARTER art. 24, ¶ 1, which states: "In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

196. Notwithstanding the practice of self-declared judgement on the consistency requirement of, *inter alia*, the OAS (Article 1 of OAS Charter unequivocally states that the OAS is a regional agency within the framework of the United Nations) and the CSCE (which is declared a regional arrangement in the Helsinki Summit Declaration, paragraph 25, and the Helsinki Decisions, Part IV, paragraph 2). See *supra* note 18 and accompanying text. See also *supra* note 161.

197. See *Dumbarton Oaks Proposals*, *supra* note 146, ch. VIII, § C, ¶ 1.

198. This interpretation can be derived from the use of the term "should."

consent required from the parties to the dispute.<sup>199</sup>

To avoid such an interpretation, the San Francisco Conference adopted a series of amendments which clarified the Dumbarton text and put it into a firm relationship with Articles 33, 34 and 35 of Chapter VI on the peaceful settlement of disputes. Thus, the provision of Article 52, paragraph 2 was added to clarify: "The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies *before referring them to the Security Council*."<sup>200</sup> In addition, incorporating the Dumbarton text as Article 52, paragraph 3, changing the term "should" into "shall," and adding Article 52, paragraph 4 on the unimpaired applicability of Articles 34 and 35 completed the provisions on the role of regional arrangements in local dispute settlement.<sup>201</sup> The

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199. *Id.* Since it is a well-established principle that peaceful settlement of disputes is conditional upon the consent of the parties to the dispute, it would seem rather strange if the Security Council could refer a dispute to regional arrangements or agencies *regardless* of the consent of the parties; indeed, under Article 33, paragraph 2 and Article 36, paragraph 1, the Security Council has only been granted the authority to *recommend* "appropriate procedures or methods of adjustment." Therefore, a more logical interpretation would be that the Security Council, if it has before it a local dispute which has been called to its attention under Article 35, paragraph 1 by a Member-State, or Article 35, paragraph 2 by a Non-Member-State, may refer the parties to the appropriate regional arrangement or agency on the basis of their mutual undertaking, and within the limits of action to which the arrangement or agency is empowered (by the agreement(s)) establishing it. See GOODRICH & HAMBRO, *supra* note 150, at 314-15.

200. Emphasis added.

201. The importance of Article 52, paragraph 4 is clear from the text of the Articles to which it refers. Article 34 states in full: "The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." This freedom of action fits the Security Council's responsibility under Article 24 of the Charter, and impairment of this provision by prohibiting the Security Council from investigating a dispute which may already have become the object of regional efforts would limit the Council's effective functioning in view of this responsibility.

Article 35 provides for a variety of situations by stating:

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.
2. A State which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.
3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles

linkage between Article 52, paragraph 2, and Article 33 was not far-fetched. Since Article 33, paragraph 1 provides that: "[T]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, *first of all*, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice," a clear picture emerged of the preferred division of labour between the Security Council and regional arrangements or agencies. The underlying assumption of the deference by the Security Council to regional agencies or arrangements in "local dispute-settlement" being that they were better suited to deal effectively with disputes of a local origin, the implicit understanding had to be that "local disputes" referred to disputes exclusively involving States which are parties to such agencies or arrangements.<sup>202</sup> Indeed, this interpretation would comply with Article 52, paragraph 4 on Articles 34 and 35 remaining unimpaired.<sup>203</sup>

Notwithstanding the requirement of the Charter that the settlement of local disputes be a matter for regional arrangements or agencies first, before being referred to the Security Council, it has become accepted that this role for regional arrangements or agencies does not derogate from the responsibility of the Security Council under Article 24. Indeed, in combination with the provisions of Article 33, paragraph 2; Article 34; and Article 35, paragraph 2, there appears to be a clear reversal of respective positions in situations where a Non-Member of the U.N and/or a Non-Member of the regional arrangement is party to the dispute, or in situations which, if continued, constitute a danger to the maintenance of international peace and security.<sup>204</sup>

On a number of occasions, the issue of priority for regional arrangements or agencies in the settlement of local disputes came to the attention of both the Security Council and the General Assembly. Within the OAS, this concerned cases brought by Guatemala in 1954,<sup>205</sup> Cuba in 1960,<sup>206</sup> and Haiti in

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#### 11 and 12.

This Article is particularly relevant in view of its provisions regarding Non-Member States and the applicability of the Charter in such situations, as well as its stipulation that a dispute may be called to the attention of both the Security Council *and* the General Assembly. U.N. CHARTER, *supra* note 3, arts. 34, 35, 52.

202. See GOODRICH & HAMBRO, *supra* note 150, at 314.

203. Cf. note 201.

204. See GOODRICH & HAMBRO, *supra* note 150, at 315.

205. Guatemala requested a meeting of the Security Council in accordance with the provisions of Articles 34 and 35 on the claim that aggression from Nicaragua and Honduras constituted a situation for consideration of the Security Council under Article 39. Despite strong Soviet support, the majority view was that the OAS was nevertheless in the best position to ascertain the facts and recommend appropriate measures. A draft resolution requesting urgent consideration and reporting by the OAS to the Security Council (introduced by Brazil and Colombia) was defeated by a Soviet veto. U.N. Doc. S/3236/Rev.1 (1954). The issue was

1963.<sup>207</sup> In addition, cases brought by Lebanon in 1958<sup>208</sup> and Somalia in 1964<sup>209</sup> were connected to the Arab League and the OAU, respectively. From the review of these cases, it could be concluded:

[T]here has been general agreement that a party to a regional arrangement has the right to have its complaint considered by the Security Council or the General Assembly; at the same time, there is general agreement that, consistent with the general philosophy of the Charter, an attempt should be made to achieve a settlement through regional arrangements and other means of the parties' own choice before appealing to the United Nations.<sup>210</sup>

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put to rest when the Council refused to place a renewed claim from Guatemala on its agenda. See REPERTORY, *supra* note 162, at 448-58.

206. In 1960, Cuba claimed that it had the right to submit a complaint concerning aggression on the part of the United States to the Security Council without resorting first to the regional organization. The United States held the view that the Security Council should only act as a last resort. The Security Council decided to adjourn consideration of the question pending a report from the OAS. See U.N. Doc. S/4395 (1960). It is stated that Members of the Council supported the decision on the grounds that the OAS already had the matter under consideration, the Charter provisions on the priority accorded to regional arrangement in the settlement of local disputes were mandatory, and the absence of complete information impaired substantive action by the Council. Contrary to this decision of the Security Council, the General Assembly adopted the position that the competent U.N. organ (*in casu* the Security Council) could take action without requiring that parties to the dispute first make use of regional arrangements or waiting for such arrangements to act. See G.A. Res. 1616, U.N. GAOR, 15th Sess., 995th plen. mtg., Agenda Item 90 (1961); for the debates, U.N. SCOR, 15th Sess., 874th-876th mtgs. (1960); U.N. GAOR, 1st Comm., 15th Sess., 1100th, 1106th-1107th mtgs. (1960); U.N. GAOR, 909th-910th plen. mtgs. (1960), *quoted in* GOODRICH ET AL., *supra* note 146, at 362.

207. The complaint of Haiti against the Dominican Republic was brought before the Security Council in May 1963. The prevailing view was that, while any Member of the OAS had the right to bring a controversy to the attention of the Security Council, action should be taken only when efforts to achieve a solution through the regional approach had failed. See U.N. SCOR, 18th Sess., 1035th, 1036th mtgs. (1963).

208. In 1958, Lebanon claimed intervention in its affairs by the United Arab Republic (Syria and Egypt); while it agreed to deferment to the Arab League, it reserved its right to request immediate convocation of the Security Council. See U.N. SCOR, 13th Sess., 818th mtg. (1958); U.N. Doc. S/4018 (1958); U.N. Doc. S/4023 (1958).

209. Somalia brought a complaint against Ethiopia to the attention of the Security Council in February, 1964. Like Lebanon, it agreed to defer consideration of the complaint to the regional level. The Security Council was later notified that the OAU had solved the dispute. U.N. Doc. S/5542 (1964); U.N. Docs. S/5557, S/5558 (1964).

210. See GOODRICH ET AL., *supra* note 146, at 363.

Indeed, on the balance between the priorities accorded to regional arrangements or agencies and the authority retained by the Security Council in matters pertaining to the peaceful settlement of disputes, it is suggested that the Security Council takes a position:

which will protect and guarantee the autonomy, the individuality, the structure, and the proper and effective working of regional agencies, so that they may deal with situations and disputes which are appropriate for regional action—provided there is no undermining of authority of the Security Council or of the Member States' right to appeal to it whenever they consider that the defense of their rights or interests requires such an appeal, or that a particular situation or dispute, even if appropriate for regional action, might endanger international peace and security.<sup>211</sup>

#### 4. *Priority of the Security Council in Enforcement Actions*

From the Dumbarton Oaks Proposals, it was clear that the negative experience of Article 21 of the Covenant of the League of Nations had been taken into account when drafting the relationship between regional arrangements and the Security Council in situations requiring enforcement action. Thus, Section C, paragraph 2, stated: "The Security Council should, where appropriate, utilize such arrangements or agencies for enforcement action under its authority, but no enforcement action should be taken under regional arrangements or by regional agencies without the authorization of the Security Council."<sup>212</sup> It reflected the widely accepted general principle that regional arrangements should only be used for enforcement action under the authority and under the authorization of the Security Council. This resulted from the view held by a majority of the Members that central Security Council control would be a *conditio sine qua non* for preventing the return of rival military alliances.<sup>213</sup>

The wording of Section C, paragraph 2, was incorporated in Article 53, paragraph 1, with the substitution of the term "should" for "shall" and the addition of a notable exception to the rule of Security Council monopoly of

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211. Statement made by the Representative of Ecuador on the occasion of the Security Council's consideration of economic measures ordered by the Ministers of Foreign Affairs of Member States of the OAS against the Dominican Republic in 1960. U.N. SCOR, 15th Sess., 893d mtg. ¶ 63 (1960), *quoted in* GOODRICH ET AL., *supra* note 146, at 363.

212. *Dumbarton Oaks Proposals*, *supra* note 146, ch. VIII, § C, ¶ 2.

213. This view was strongly held by, among others, the U.S. Secretary of State Cordell Hull. See GOODRICH ET AL., *supra* note 146, at 364.

force. Indeed, within the framework of the Charter, the wording of Article 53 appeared to be consistent with the provisions of Article 2, paragraph 4 (containing the prohibition of the threat or use of force by States), Article 24, paragraph 1, (on the primary responsibility of the Security Council for the maintenance of international peace and security), Articles 33, 34 and 35 on the peaceful settlement of disputes, and the general principles of the relationship between regional arrangements or agencies and the Security Council. In view of the collective security objective of the U.N. Charter, and the provision of Article 51 on the inherent right of collective self-defense of Member-States, the grant of authority to the Security Council in Article 53 seemed internally consistent.

Nevertheless, it was considered necessary to add an exception to the second sentence of Section C, paragraph 2; this exception in fact amounted to adding a whole category of arrangements to the framework of Chapter VIII.<sup>214</sup> Weaving the provision of Article 107<sup>215</sup> into the Dumbarton text resulted in Article 53, paragraphs 1-2, stating:

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the governments concerned,

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214. The exception was the result of extended and confused discussions during the San Francisco Conference. A split developed between States whose prime concern was the danger of renewed aggression (such as France and the Soviet Union) and States which had a prime interest in having an effective general security mechanism with provisions for autonomy of regional organization, and not treating the former enemy states as a lasting security problem. The Conference, in fact, adopted a provision which was inconsistent with the original intent of preventing the renewal of traditional military alliances. Indeed, a number of early postwar treaties invoked implicitly or explicitly the exception of "regional arrangements directed against renewal of enemy aggression." *See, e.g.*, the Treaty of Alliance and Mutual Assistance between the Soviet Union and France of December 10, 1944, DEP'T ST. BULL., Jan. 1945, at 39; the Treaty of Friendship and Alliance between France and the United Kingdom of March 4, 1947 (so-called Treaty of Dunkirk), 9 U.N.T.S 187. *See also*, RUSSELL, *supra* note 146, at 706-12.

215. Article 107 of the U.N. Charter reads as follows: "Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action." U.N. CHARTER, *supra* note 3, art. 107.

be charged with the responsibility for preventing further aggression by such a state.

2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

Accordingly, the question arose of what was meant by "enforcement action" other than the action authorized under Article 107. In general, it was assumed that the term "enforcement action" in Article 53 referred to the measures taken under Articles 41 (measures not involving the use of armed force) and 42 (action by air, sea or land forces), thus reaffirming the link between Chapter VII actions and the priority accorded to the Security Council in Article 53.<sup>216</sup>

Through a series of practical developments, the term "enforcement action" has been granted a more limited interpretation. Similar to the cases concerning the peaceful settlement of disputes, the early 1960's proved to be the testing-ground for the interpretation of "enforcement action."<sup>217</sup> From the Soviet-requested Security Council meeting in relation to the economic measures against the Dominican Republic, adopted by the Foreign Ministers of the Member-States of the OAS in 1960,<sup>218</sup> through the previously discussed complaint of Cuba in relation to measures taken by the Punta del Este Conference,<sup>219</sup> to the

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216. See GOODRICH ET AL., *supra* note 146, at 365. See also *supra* note 158, 10 U.N.C.I.O. Docs. 507-08 (1945).

217. This observation is not surprising; consistent with the view of the two main antagonists of the Cold War, regional arrangements or agencies were considered instruments of hegemonial policy in their respective spheres of influence. Moreover, the gridlock in the Security Council as a result of the veto right made regional arrangements more than just an option by default. The attractiveness of acting through regional arrangements was very much related to the effectiveness of regional efforts. In the case of the OAS, this would ultimately result in a reversal of position for the United States (from strongly in favour of OAS action in the early 1960's to a strong dislike of OAS action in the 1980's).

218. The Soviet Union argued that the measures adopted by the Foreign Ministers of the OAS Member States required Security Council approval in order to acquire legal force and render it effective, since it concerned measures as indicated in Article 41, which was the exclusive domain of the Security Council. The Soviet position was countered with the arguments that "enforcement action" in Article 53 contemplated the exercise of force which would not be legitimate except with Security Council authorization, and that Article 53 did not apply to non-military measures as indicated in Article 41. See U.N. SCOR, 15th Sess., 893rd-895th mtgs., U.N. Doc. S/4491 (1960).

219. The Cuban complaint was initially refused for consideration by the Security Council. Later, the Cuban request for an advisory opinion of the International Court of Justice was denied by the Security Council on the grounds that it concerned a political question, that it had already been decided that economic measures did not fall under "enforcement action," and that the exclusion of participation from OAS meetings did not constitute enforcement action. See U.N.



establishment of the Inter-American Force by the OAS in relation to the Dominican crisis of May 1965,<sup>220</sup> the conclusion could be drawn that "enforcement action" under Article 53 does not entail economic measures indicated in Article 41 of the Charter, nor peacekeeping operations in the nature of UNEF and ONUC.<sup>221</sup>

### 5. *Concluding Remarks: Recent Trends*

In general, the development of peacekeeping as a Security Council instrument has been in accordance with the interpretation discussed in the previous section. Nevertheless, since the publication of the *Agenda For Peace* proposals for a more assertive posture of the U.N. (specifically equipping it with a wider range of options in the security spectrum), there has been a different trend in the development of this instrument.<sup>222</sup> The increasing

SCOR, 17th Sess., 991st mtg. at 28 (1968); U.N. Doc. S/5095 (1962); U.N. SCOR, 17th Sess., 9992d-998th mtgs. (1962).

220. The Dominican crisis developed during May and June, 1965. On May 6, 1965, the Meeting of Consultation of the Ministers of Foreign Affairs of the OAS decided to establish an Inter-American Force for the purpose of cooperating in the establishment of normal conditions in the Dominican Republic. U.N. Doc. S/6333 (1965). The Soviet claim that this constituted Article 53-type "enforcement action" was not shared by the majority, which pointed out that the force had a conciliatory purpose; therefore, Article 52 rather than Article 53 was deemed applicable. See *Statement of the Representative of Malaysia*, U.N. SCOR, 20th Sess., 1222d mtg. at 66-68 (1965). See also, GOODRICH ET AL., *supra* note 146, at 366.

221. The United Nations Emergency Force (UNEF) was set up in relation to the Suez-crisis of 1956. The United Nations Operation in the Congo (ONUC in French) was created in 1960. In both situations, claims were made by France and the Soviet Union that the expenses necessary for the Operations could not be those of the United Nations itself; this resulted in the *Certain Expenses of the United Nations* Advisory Opinion of the ICJ of July 20, 1962. After ample consideration, the ICJ concluded that neither in the case of UNEF nor of ONUC could there have been "enforcement action" under Article 53, since the mandates of both UNEF and ONUC made that clear. See *Certain Expenses* (Adv. Op.), 1962 I.C.J. at 164-65, 171, 177.

222. The trend resulting from the *Agenda For Peace* report is very closely related to the views of the Secretary-General in this particular matter. His strongly protagonist view on the role of regional arrangements in conflict resolution is based on a firm belief that local disputes are better solved in a local or regional framework. The desirable division of labour amounts to a peace-making role for the regional arrangement and a peacekeeping one for the U.N. In other words, the U.N. can delegate the implementation of sanctions against aggressors, as well as the pursuit of an effective political solution to a regional arrangement. In doing so, the U.N. prevents itself from becoming overburdened by its expanding involvement in conflict resolution. At the same time, the Secretary-General has been keen to note the difficulties associated with a larger role for regional arrangements. These consist, *inter alia*, of a lack of necessary structures and procedures, financial limitations, and, most important of all, a lack of experience. See

involvement of regional actors, combined with an increasing willingness of the Security Council to authorize the limited use of force,<sup>223</sup> has changed the character of the instrument significantly. Indeed, the synergy thus created between regional cooperation and the U.N. has been conducive to the development of the CSCE as a regional arrangement under Article 52 of the Charter. Whether this development is in conformity with the general requirements of the Charter's provisions will be addressed in Part V.

## V. THE CSCE AS A REGIONAL ARRANGEMENT

### A. Introduction

The rapid disintegration of the former Eastern bloc after 1989 and the subsequent unraveling of social, economic and political structures in the former Soviet Union and Yugoslavia between 1990 and 1992 resulted in a perception by the Western European countries that the wide array of problems arising from the unforeseen turn of events required solutions on a regional level. Security concerns have dominated the resulting attempts by Member States of the European Union and NATO to accommodate the changes in the political setting within a flood of newly-created institutional frameworks.<sup>224</sup> The

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U.N. Doc. SG/SM/4718 (1992); U.N. Doc. SG/SM/4727/Rev.1 (1992); Rivlin, *supra* note 149, at 110. See also *Message to the CSCE Council Meeting in Rome*, *supra* note 177.

223. See Rivlin, *supra* note 149. The most recent example has been the close cooperation between NATO and the U.N. regarding the sieges of Sarajevo and Gorazde. NATO traditionally has not been considered as a "regional arrangement" under Article 52, nor does it perceive itself as such. See Treaty of Washington, *supra* note 5, art. XII. But it fits the proposition of the Secretary-General description in paragraph 61 of the *Agenda For Peace* report. NATO's active involvement in the Bosnian crisis is illustrative for the Security Council's increasing reliance on regional efforts in support of decisions taken under Chapter VII.

224. The discussions regarding the proper changes to be made within the framework of the European Communities and NATO were initiated in 1991 during the negotiations on the Treaty on European Union, NATO's North Atlantic Council Meeting in Copenhagen (June) and the NATO Summit in Rome (November), and have continued since. Accordingly, changes have been implemented, the most recent of which related to the Conference on the European Stability Pact (held under the auspices of the European Union in Paris, May 26-27, 1994), the creation of the Partnership For Peace (PFP), and the initiation of the Common Joint Task Forces (CJTF) concept at the NATO Summit in Brussels, January 10-11, 1994. See *EC: Union Council Discusses Balladur Plan*, AGENCE EUROPE, Dec. 7, 1993; *EC: Council Decides On Joint Action For Launching Of Stability Pact*, AGENCE EUROPE, Dec. 31, 1993; *Progress Made On Common Action For European Stability Pact*, EUROPEAN INFORMATION SERVICE (Euro-East), No. 18, Jan. 27, 1994 (which includes the *Summary Report on the Stability Pact, Annex to the Conclusions of the European Council* (Brussels, Dec. 10-11, 1993)); and the *Concluding Document of the Inaugural Conference for a Pact on Stability in Europe*, May 27, 1994 (on

ongoing conflicts on the peripheries of the European continent,<sup>225</sup> as well as the ceaseless rage of intolerance and cruelty on the Balkans, are illustrative of the flawed assumption that institutionalization of cooperation equals expansion of the problem-solving capacity of the Organization itself.

Through the adoption of the Helsinki Decisions, the CSCE has become the third actor on the stage. With its artificially inserted, hollow-ringing assertiveness specifically directed at the growing security concerns of a number of its Participating States,<sup>226</sup> the CSCE has been equipped with a more institutionalized framework. It includes instruments for conflict prevention, crisis management and conflict resolution.<sup>227</sup> Furthermore, the CSCE has been declared a regional arrangement under Article 52 of the Charter of the United Nations in an apparent attempt to bolster the CSCE's credibility as an operational entity.<sup>228</sup> Thus, the self-declared status of a regional

file with author). On the Partnership For Peace, see *Declaration of the Heads of State and Government Pursuant to the North Atlantic Council Meeting in Brussels, Jan. 10-11, 1994*, 42 NATO REV. 30-33 (1994) [hereinafter *Brussels Summit Declaration*]; *Invitation to the Partnership For Peace*, *id.* at 28; and *Framework For The Partnership For Peace*, *id.* at 29-30. See also Lawrence T. DeRita, *Beyond the Partnership For Peace: An Action Plan for the NATO, Prague and Moscow Summits*, HERITAGE FOUNDATION BACKGROUNDER NO. 973, Jan. 7, 1994.

225. Currently, conflicts in Republics of the CIS exist in Moldova (separation of Trans-Dneistr-region), Tajikistan (insurgencies), Georgia (separation of South-Ossetia and Abkhazia-regions) and Azerbaijan (unification of enclave of Nagorno-Karabakh with Armenia). Russian forces have intervened in Moldova (Joint Moldovan-Dneistrian-Russian Operation, established in 1992, monitoring cease-fire), Georgia (Joint South-Ossetian-Georgian-Russian Operation, monitoring cease-fire since 1992; short-lived military intervention in Abkhazia during the siege and fall of Sukhumi and a Joint CIS Peacekeeping Force under Russian command since June 1994); and Tajikistan (Joint CIS Peacekeeping Force under Russian command). CIA Directorate of Intelligence, *Worldwide Peacekeeping Operations 1994*, EUR-94-10001, Feb. 1994. See also Maxim Shashenkov, *Russian Peacekeeping in the 'Near Abroad'*, 36 SURVIVAL 46, 51-56 (1994); John Lepingwell, *The Russian Military and Security Doctrine in the 'Near Abroad'*, 36 SURVIVAL 70, 75-77 (1994).

226. In particular, France, Russia, the United Kingdom, Hungary, Austria, Germany, and The Netherlands all took the lead in some area of the Helsinki Decisions relating to the new CSCE role in crisis management. See *infra* Part V.C.

227. See Helsinki Decisions, *supra* note 15, at 1396-99 (CSCE High Commissioner on National Minorities), 1399-1402 (Early Warning, Conflict Prevention and Crisis Management (Including Fact-Finding and Rapporteur Missions and CSCE Peacekeeping), Peaceful Settlement of Disputes).

228. See Helsinki Summit Declaration, *supra* note 9, at 1392, ¶ 25; Helsinki Decisions, *supra* note 15, at 1403, ¶ 2.

arrangement has prompted the CSCE into both vigorous debate and remarkable action.<sup>229</sup>

The debate within the CSCE regarding the implications of its regional arrangement status has been strongly flavoured with pragmatic considerations.<sup>230</sup> The restrictions of its new status on the scope of action which the CSCE could undertake have been defined in terms of political expediency rather than legal doctrine.<sup>231</sup> Moreover, action undertaken by the CSCE in relation to the conflict between Armenia and Azerbaijan over the enclave of Nagorno-Karabakh, the war in former Yugoslavia and the Russian intervention in a number of conflicts raging in neighbouring Republics has illustrated the practical limits of the CSCE's problem-solving capacity regardless of its regional arrangement status.<sup>232</sup>

This chapter deals with the legal implications of the CSCE's regional arrangement status. Set against the preceding chapter's observations on regional arrangements under Article 52 of the U.N. Charter, the thrust of the declaration in the Helsinki Decisions seems to fit the purposes for which regional arrangements in general were endorsed and incorporated within the framework of the U.N. The general principles pertaining to regional arrangements have

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229. Debates on the proper use of the newly created instruments have taken place both within the CSCE Council of Ministers and the Committee of Senior Officials (CSO), especially in view of the developments in the former Yugoslavia and the CIS Republics. Subsequent action taken by the CSCE has included the suspension of Yugoslavia's (Serbia and Montenegro) rights within the CSCE framework, the sending and/or permanent stationing of observer missions to various areas of conflict (Serbian regions, Macedonia, and CIS Republics) and consideration of Russian requests for CSCE endorsement of Russian peacekeeping operations in various CIS Republics. See *CSCE Council Summary of Conclusions of the Stockholm Meeting*, *supra* note 17; *CSCE and the New Europe—Our Security is Indivisible; Decisions of the Rome Council Meeting*, Dec. 1993, Doc. CSCE/4-C/Dec. 2; Robinson, *supra* note 17; *CSCE split over Russian peacekeeping*, AGENCE FRANCE PRESSE, Nov. 30, 1993; [Report on Remarks of] *Russian Minister on Nationalism, Peacekeeping and Nuclear Nonproliferation*, BBC Summary of World Broadcasts, SU/1862/S1, Dec. 3, 1993; *CSCE to Boost Presence in Breakaway Georgian Region*, AGENCE FRANCE PRESSE, Mar. 4, 1994; John J. Maresca, *Russia's Emerging European Policy*, WALL ST. J. EUR., Sept. 6, 1994. See also BLOED, *supra* note 123, at 49.

230. See also *infra* Part V.C.2.

231. One example of this divergence can be found in the provisions of the Helsinki Decisions relating to CSCE peacekeeping. In contrast to the legal interpretation of the framework of Chapter VIII of the U.N. Charter, the provisions of Chapter III, in particular paragraph 22, seem to limit the scope of CSCE peacekeeping on political grounds. Whereas under the provisions of Article 53, paragraph 1, of the Charter regional arrangements may be utilized for enforcement action under the authority of the Security Council, the CSCE is prohibited from entailing enforcement actions. See HERACLIDES, *supra* note 17, at 89-100; Gajus Scheltema, *CSCE Peacekeeping Operations*, 3 HELSINKI MONITOR 7 (1992); & Rob Siekmann, *Commentary: CSCE versus UN Peacekeeping*, 3 HELSINKI MONITOR 18, 19 (1992). See also *infra* Part V.C.

232. See *supra* notes 225, 229.

been set out in the previous chapter. This included the lack of definition of a regional arrangement, as well as a survey of the requirements of the U.N. Charter regarding the relationship between regional arrangements and the United Nations.

Specific application of these general principles to the position of the CSCE will be the subject of Part IV.C.5. Attention will be paid to the instruments with which the CSCE has been equipped to perform its functions as a regional arrangement. These include mechanisms for early warning, conflict prevention, crisis management (including fact-finding and rapporteur missions and peacekeeping), and peaceful settlement of disputes. Finally, Part V.C. will provide a Summary of Conclusions.

## B. *Helsinki II: Reversal of the Process*

### 1. *The Origins of the Reversal*

At the heart of the CSCE's regional arrangement status lies a debate which has been determinative of the changes the CSCE has gone through since the adoption of the HFA in 1975. The origins of the debate can be traced to the founding days of the CSCE, when various proposals were submitted for the institutional framework of an East-West dialogue on European security matters.<sup>233</sup> In short, these were illustrative of the recurring dilemmas between a legal or non-legal approach on the one hand, and a strong institutional framework versus a weaker version on the other. Combined with the options of an Alliance-based approach, a U.N.-linked concept or an independent variant, there was a multitude of alternatives available.<sup>234</sup> Among them was the

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233. On the political level, proposals from East and West were exchanged through a series of Declarations issued between 1966, when the Warsaw Pact published its *Declaration on Strengthening Peace and Security in Europe* [hereinafter the *Bucharest Declaration*], and 1972, when NATO's *Bonn Communiqué* was issued. At the same time, close scrutiny of these Declarations on the academic level resulted in a series of articles which included additional suggestions. In general, the level of institutionalization suggested in these articles went beyond the one emerging from the series of Declarations. See e.g. Zbigniew Brzezinski, *The Framework of East-West Reconciliation*, 46 *Foreign Affairs* 256 (1968); *America and Europe*, 49 *FOREIGN AFF.* 11 (1970); Benjamin S. Rosenthal, *America's Move*, 51 *FOREIGN AFF.* 380 (1973). For a detailed discussion of the various suggestions made on both levels, see SIZOO & JURJENS, *supra* note 13, at 24-41.

234. Specific proposals regarding the institutionalization of the East-West dialogue were reminiscent of an earlier approach taken by the British Labour Government in 1969 and could be discerned in suggestions for an organization based on the two military alliances (NATO and the Warsaw Pact), an institutional framework with organizational and procedural links to the U.N., or the same framework without the U.N. link. Within each variant, there was a

suggestion that the juridical embodiment of the proposed East-West dialogue would incorporate an organical link to the U.N. through the provisions of Chapter VIII of the Charter.<sup>235</sup> Clearly, this suggestion was disregarded promptly.

The non-legal, non-institutionalized approach incorporated in the HFA has gradually been replaced by a different view of the CSCE. Through the Charter of Paris (1990), the Berlin Emergency Mechanism (1991), the Moscow Mechanism (1991), the Prague Document of Further development of CSCE Institutions and Structures (1992), and the Helsinki Decisions (1992), a more institutionalized entity has emerged which can no longer be regarded as a process. At the same time, no clear legal entity has surfaced which could be defined as an international organization in the traditional sense. In fact, this strangely hybrid character of the CSCE has been the result of the balancing of the dilemmas referred to earlier.

The regional arrangement status of the CSCE has been a contentious issue since the Prague Council Meeting of January 1992.<sup>236</sup> Originating from proposals submitted by Malta<sup>237</sup> (with strong support from Germany), the regional arrangement status can be regarded as both a functional concept

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variety of options for the actual structure of the framework. *Id.*

235. Suggestions for a U.N.-linked approach were primarily made on the academic level, but had been anticipated to some extent on the political level. Indeed, the second paragraph of Article 11 of the Warsaw Treaty (1955) included an anticipatory provision on the establishment of a collective security system in Europe. The implicit assumption that this system had to be defined in terms of an organic link with the U.N. was noted by a Soviet commentator. He pointed at the collective measures provided for in the U.N. Charter, with the reminder that any formula for regional mutual assistance and enforcement sanctions required consistency with the provisions of the U.N. Charter and the prerogatives of the Security Council. This was perceived as a suggestion of an implied right of veto for the Permanent Members of the Security Council by Western commentators. Not surprisingly, their suggestions regarding the establishment of a link between a European security framework and the U.N. were less explicit and less defined. The most detailed suggestion consisted of the establishment of inter-agency and/or inter-secretariat agreements or arrangements, with an active participation of the U.N. in the proposed system through its organs and specialized agencies. It should be noted that even with the Helsinki Decisions in place, there is still a strong divergence between the proclaimed "operationalization" and the actual institutional implementation of decisions in this respect. See S.I. Beglov, *European Security System: Content and Ways of Ensuring It*, INT'L AFF., Nov. 1971, at 64-88; F.A.M. Alting von Geusau, *NATO and Security in the Seventies* 103 (1970), quoted in SIZOO & JURJENS, *supra* note 13, at 24-41.

236. At the Prague Council Meeting, the question of declaring the CSCE to be a regional arrangement under Article 52 of the U.N. Charter was closely intertwined with the proposals regarding a role for the CSCE in peacekeeping. Since these proposals were set aside until Helsinki-II, the decision on a regional arrangement status was also postponed. See HERACLIDES, *supra* note 17, at 29.

237. See CSCE Doc. CSCE/HM/WG1/7 (1992).

and a self-serving declaratory judgement of the CSCE's position within the realm of European security. As a functional concept, the regional arrangement status is closely intertwined with the "operationalization" of the CSCE. As a declaratory judgement, regional arrangement status has been instrumental to the political legitimization of growing CSCE-activity.<sup>238</sup> More important, however, is the fact that both views should be consistent with the requirements of the provisions of the U.N. Charter.<sup>239</sup>

## 2. *Implications of the Reversal*

Before there can be any determination of consistency with the requirements of the Charter, it needs to be established that the CSCE is, in fact, a regional arrangement in definitional terms. The most flexible definition has been provided by the U.N. Secretary General's enumeration in paragraph 61 of the Agenda For Peace report.<sup>240</sup> It includes treaty-based organizations (e.g., the OAS), regional organizations for mutual security and defense (e.g., NATO), organizations for general regional development or for cooperation on a particular economic topic or function (e.g., ECOWAS), and groups created to deal with a specific political, economic or social issue of current concern (e.g., the Contadora Group). Strictly speaking, the CSCE fits none of these descriptions.

At the same time, it has been observed that the U.N. Security Council has taken a pragmatic rather than a formal position with regard to regional cooperation.<sup>241</sup> Political expediency and opportunism have contributed to an increasing willingness of the Security Council to consider the advantages of mutual efforts. Thus, the Security Council has endorsed the ECOWAS peacekeeping operation in Liberia, despite the fact that the ECOWAS mandate is purely economic and therefore ought to exclude involvement in political

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238. Among the arguments articulated by Germany and Malta, there was one closely related to this perception. In their view, regional arrangement status would give the CSCE greater political clout and international prestige, which would support a stronger profile for the CSCE. Moreover, it would strengthen the claim that the CSCE was already *de facto* a regional arrangement. See HERACLIDES, *supra* note 17, at 112. The German support for the Maltese proposal was consistent with its protagonist position regarding a more assertive and active CSCE.

239. The German argument that for all practical purposes the CSCE was already a regional arrangement was necessarily premised on the view that the criteria of Chapter of the U.N. Charter VIII were clearly met.

240. See *An Agenda for Peace*, *supra* note 173, at 970, ¶ 61.

241. See *infra* Part IV.B.2.

conflict resolution.<sup>242</sup> Similar considerations have been held applicable regarding the involvement of the European Union and the CSCE in the conflicts in former Yugoslavia.<sup>243</sup>

If the implicit recognition of the CSCE as a regional arrangement through the actions of the Security Council is combined with the views, comments and practice of the Secretary-General, historical precedent, and the understanding that the definition of a regional arrangement is flexible provided that the requirements of the Charter (consistency and hierarchy) are met, then there appears to be a solid basis for the claim that the CSCE is, in fact if not in definition, a regional arrangement under Article 52 of the U.N. Charter. The unilateral statement of the Helsinki Summit Declaration and the Helsinki Decisions is not unprecedented and has not been regarded as contrary to the provisions of Chapter VIII of the U.N. Charter.<sup>244</sup> Moreover, the CSCE is firmly based upon its Decalogue of Principles, which is clearly in compliance with the consistency requirement.<sup>245</sup> Finally, the CSCE has been equipped with instruments which contribute to its problem-solving capacity.<sup>246</sup> In more concrete terms, the CSCE has been equipped with instruments of conflict-prevention, crisis-management and conflict-resolution to enable it to *function* as a regional arrangement.

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242. The legal rationale for the ECOWAS Operation (ECOMOG) has been met with varying degrees of skepticism and criticism, but nevertheless has been accepted as a political reality. In the words of one commentator, the ECOWAS action was an *ad hoc* response:

The two justifications were the protection of ECOWAS-country citizens and the protection of Liberians against Liberians. It was called peacekeeping, began more like an enforcement measure, then alternated between peacekeeping and enforcement. There was no consent of the Liberian State, because the State had disintegrated, but there was a process within ECOWAS which involved the Liberian parties.

Clearly, the action taken by ECOWAS is questionable if strict adherence to the provisions of the Charter is considered proper; at the same time, the U.N. has been strongly supportive of the action taken on a regional level because of its political impact. *See Statement of the President of the Security Council*, U.N. Doc. S/22133 (1991); U.N. Doc. S/PV.2974 (1991). *See also* Rivlin, *supra* note 149, at 102.

243. In 1991, neither the European Community (through its European Political Co-operation mechanism, now the Common Foreign and Security Policy of the European Union) nor the CSCE were strictly speaking a regional arrangement or had a full-fledged political mandate. Still, the U.N. Security Council supported the contributions of both entities because it was unwilling to become involved itself. *See* Weller, *supra* note 6, at 577-81, 600-07.

244. *See* the unilateral statements of the OAS and Arab League, *supra* note 196, and Saba, *supra* note 145, at 676, respectively.

245. *See* the argument on the consistency of the OAS Charter's Principles of the Security Council in its decision on the Cuban claim to the contrary, *infra* Part IV.C.2.

246. *See* CLAUDE, *supra* note 148. *See also supra* note 224.



Despite these observations, there remains one thorny issue to be resolved. According to the Helsinki Decisions, the CSCE cannot engage in enforcement action, notwithstanding its status as a regional arrangement.<sup>247</sup> This appears to be contradictory to the stipulation of Article 53, paragraph 1, regarding the utilization of regional arrangements for enforcement action under the authority of the Security Council.<sup>248</sup> However, the wording of Article 53 seems to warrant a less rigid interpretation. The text of Article 53, paragraph 1, provides for utilization of such arrangements by the Security Council "where appropriate." The discretionary element incorporated in the text, therefore, does not seem to imply that regional arrangements are required *per se* to engage in enforcement action. In other words, engagement in enforcement action is no *conditio sine qua non* for possessing regional arrangement status. Therefore, it may be concluded that the CSCE can indeed be considered as a regional arrangement under Article 52 of the U.N. Charter. Accordingly, its instruments are of interest.

### C. *The CSCE Instruments: "Tools of Change"*

To provide the CSCE with a proper set of tools for the "management of change," the Helsinki Decisions have laid the groundwork for an elaborate scheme of action which has granted the CSCE an opportunity to strengthen its profile in the European security-context.<sup>249</sup> Despite the agreement achieved in Helsinki, the CSCE's management tools have not been prominent. On the other hand, the CSCE has been able to demonstrate the usefulness of some of its new instruments, at least to some extent.<sup>250</sup>

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247. See Helsinki Decisions, *supra* note 15, at 1400, ¶ 22.

248. See *infra* Part IV.C.4.

249. See Helsinki Decisions, *supra* note 15, at 1399-1402, ch. III.

250. Among the most notable features of the CSCE's new tool kit are the Observer Missions, which can be regarded as a variant of CSCE Peacekeeping, and the Rapporteur Missions. In 1993, eight Observer Missions were mounted in Serbia (for the regions of Kosovo, Sanjak and Vojvodina), Macedonia, Estonia, Latvia, Moldova, Georgia, Tajikistan and Nagorno-Karabakh. The Observer Mission to Serbia was expelled in retaliation for the expulsion of Yugoslavia (Serbia/Montenegro) from the CSCE. The Observer Mission in Georgia (which monitors a cease-fire agreement between rebel forces and government troops in the South Ossetia region) has recently been expanded. See *CSE to Boost Presence in Breakaway Georgian Region*, *supra* note 220. Rapporteur Missions within this framework are distinct from the Rapporteur Missions under the *Moscow Mechanism* and have been in use since the adoption of the *Prague Document*, *supra* note 67, at 986. See also, HERACLIDES, *supra* note 17, at 29. Outside of this framework, yet closely related to it, the CSCE High Commissioner on National Minorities has made an additional contribution through his visits to Estonia, Latvia, Lithuania, Albania and Rumania. See *Recommendations by the CSCE High Commissioner on National Minorities, Mr Max van*

The Helsinki Decisions' scheme has its origins in the institutionalization process set in motion by the Charter of Paris.<sup>251</sup> From the proposals forwarded at the Prague Council Meeting in January 1992, it could be inferred that there was a general perception among the Participating States that the existing Mechanisms were insufficient for dealing with the increasingly complex set of political, economic and social problems which had been sweeping the European continent.<sup>252</sup> Whereas these Mechanisms are premised on response and reaction, there appeared to be a need for anticipatory structures, as well as a preference for expansion of the action spectrum in view of the changing character of security threats.<sup>253</sup> Nevertheless, compromise has been the exclusive trademark of the CSCE's development in this respect.<sup>254</sup>

The heavy emphasis on procedures by some States has been consistent with their dislike of structural institutionalization of the CSCE.<sup>255</sup> Similarly, the strong emphasis of other States on the effectiveness of newly-provided instruments has been in accordance with views on a more substantive role

*der Stoel, upon his visits to Estonia, Latvia and Lithuania*, 14 HUM. RTS. L. J. 216 (1993). Regarding Albania and Rumania, *see id.* at 432-37.

251. *See supra* Part II.D.

252. The existing Berlin, Moscow, Vienna and Valletta Mechanisms (related to emergency situations, the human dimension mechanism, the CSBM regime with regard to unusual military activities, and peaceful settlement of disputes, respectively) were not sufficient to deal with the string of conflicts erupting shortly after the adoption of these mechanisms in 1991. Accordingly, the Prague Council Meeting became the setting for Proposals on Peacekeeping (suggested, *inter alia*, by Austria, the CSFR, Hungary, Poland, Canada and Norway), a Court for Arbitration and Conciliation (France), a High Commissioner for Minorities (The Netherlands), steering groups for crisis situations and consensus-minus-one (Germany), the role of the Conflict Prevention Centre (CPC) in relation to the Committee of Senior Officials (CSO) and regional arrangement status (Malta), an economic forum (the United States), and an expanded role for the Office for Free Elections (OFE) (Italy, the United States, Austria, Hungary and Poland). *See* Rob Siekmann, *Some Thoughts about the Development of CSCE Instruments in the Field of Peace and Security*, 3 Helsinki Monitor 10, 11-13 (1992); HERACLIDES, *supra* note 17, at 29. *See also* Prague Document, *supra* note 67, at 987-95.

253. *See* McGoldrick, *supra* note 8.

254. This is not surprising given the fact that decision-making within the CSCE is to a large extent still premised on consensus. Indeed, decision-making by consensus requires compromise.

255. E.g., Hungary and the United Kingdom. On institutional issues within the CSCE context, the United Kingdom has taken a position similar to the one it held during the negotiations on the Treaty on European Union. *See* Robert Wester, *The Intergovernmental Conference on Political Union: National Positions; United Kingdom*, in FRITZ LAURSEN & SOPHIE VANHOONACKER, *THE INTERGOVERNMENTAL CONFERENCE ON POLITICAL UNION: INSTITUTIONAL REFORMS, NEW POLICIES AND INTERNATIONAL IDENTITY OF THE EUROPEAN COMMUNITY* 189-205 (1992) [hereinafter INTERGOVERNMENTAL CONFERENCE]. *See also*, HERACLIDES, *supra* note 17, at 36.

for the new CSCE.<sup>256</sup> The resulting accommodation of both ends of the spectrum has resulted in provisions which bear semblance of this Great Compromise between appearance and effectiveness. As a result, some instruments have been rendered empty and ineffective.<sup>257</sup> Others have been made more practical and acceptable.<sup>258</sup>

The Helsinki Decisions contain an elaborate framework of provisions on Early Warning and Preventive Action,<sup>259</sup> the Political Management of

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256. E.g., Germany and France. The German position can be traced to the Moscow Conference on the Human Dimension of September 1991, when Foreign Minister Genscher strongly articulated the need for interventionism in regard of human rights violations. Germany has been in favor of a stronger, more assertive CSCE since. It does not, however, share the strong French desire for a full-fledged legal entity. The French view on a full legalization of the CSCE is closely related to its desire to provide new impetus to a "Pan-European Security Treaty," through which the CSCE could gain a dominant role in the European security spectrum at the expense of NATO. Similar to the position of the United Kingdom, the French and German positions are reminiscent of their views during the negotiations on the Maastricht Treaty. *Id.* at 34-35; INTERGOVERNMENTAL CONFERENCE, *supra* note 246, at 49-63, 115-27. *See also supra* notes 148, 224.

257. The current framework for mounting a CSCE peacekeeping operation contains criteria of such number and nature that it is at least questionable whether this instrument is a viable one. *See Helsinki Decisions, supra* note 15, at 1400-1402, ch. III, ¶¶ 17-55. *See also HERACLIDES, supra* note 17, at 172.

258. The provisions on Fact-Finding and Rapporteur Missions are an example of this. Originally submitted by Austria, Poland and Slovenia, the initial version was very ambitious, containing a clear and functional distinction between both types of missions. The Rapporteur Missions were to be equipped with a mandate set by the CSO, upon request of a Participating State and after a decision taken by consensus. In emergency situations, Fact-Finding Missions should be dispatched by the CIO upon the request of at least six Participating States in relation to a particularly serious threat to *any* CSCE commitment. These proposals were too detailed, too permissive of activation and therefore contrary to the interests of a number of Participating States. Ultimately, the watered-down version placed enough obstacles in the way of the effectiveness of such a Mission to make it acceptable to all Participating States. *See Helsinki Decisions, supra* note 15, at 1400, ch. III, ¶¶ 12-16. *See also HERACLIDES, supra* note 17, at 88-89.

259. The provisions on Early Warning and Preventive Action are closely related to the position of the HCM. They are a novum to the CSCE because of their anticipatory nature. Regular, in-depth political consultations "within the structures and institutions of the CSCE" between the Participating States, combined with the early warning provided by the HCM to the CIO and CSO, are envisaged to identify potential crises in their developing stage. This would enable the CSCE to take preventive action, rather than respond to a crisis. The CSO holds primary responsibility in this regard, and its attention may be drawn to such situations through the CIO, *inter alia*, by any State directly involved in the dispute; a group of 11 States not directly involved in the dispute; the HCM in situations he deems escalating or exceeding his scope of action; the CC/CPC following the use of the Vienna Mechanism; or by the use of the Moscow or Valletta Mechanisms. *See Helsinki Decisions, supra* note 15, at 1399, ch.

Crisis,<sup>260</sup> Instruments of Conflict Prevention and Crisis Management,<sup>261</sup> and the Peaceful Settlement of Disputes.<sup>262</sup> This framework is closely related

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III, ¶¶ 3-5.

260. The CSO has overall CSCE responsibility for managing a crisis with a view to its resolution. The CSO may initiate a variety of options, including the recommendation of steps to be taken by the State or States concerned, or the recommendation of other procedures and mechanisms to solve the dispute peacefully. Alternatively, the CSO may seek independent advice and counsel from experts, institutions and international organizations. It may even consider concerted action, which could entail, *inter alia*, a negotiated settlement, the dispatch of Fact-finding or Rapporteur missions, or the initiation and/or promotion of the exercise of good offices, mediation or conciliation. The CSO may delegate tasks to the CIO, the Troika, an *ad hoc* steering group of Participating States, the CC/CPC or such other institutions as it may determine appropriate (in practice, the newly-created Permanent Committee). The CSO will establish the precise mandate for action, including provisions for regular reporting and consultation. This leaves unaffected the freedom of the delegate to determine how to proceed, with whom to consult, and the nature of any recommendations to be made. In addition, it is explicitly stated that all Participating States concerned in the situation will fully co-operate with the CSO and the agents it has designated. Whether this is a binding obligation or a so-called "wishful thinking" provision is not clear. *See Helsinki Decisions, supra* note 15, at 1399-1400, ch. III, ¶¶ 6-11.

261. Crisis management lies at the heart of the "operationalization" process of the CSCE and is closely intertwined with its regional arrangement status. From a political point of view, the "presence on the ground" aspect of crisis management is consistent with the intention to make the CSCE an effective, credible and viable actor in the security scene. Nevertheless, for that same presence it is implicitly dependent on other actors (NATO, WEU, the CIS) rather than its Participating States in their individual, sovereign capacity. From a legal point of view, this has raised questions regarding out-of-area-operations and the relationship between U.N. peacekeeping and CSCE peacekeeping. The instruments for crisis management encompass Fact-finding Missions, Rapporteur Missions and CSCE Peacekeeping. With regard to the first two instruments, it should be noted that they are also considered as instruments for conflict prevention. Originally very ambitiously worded, the provisions regarding the dispatch of these missions have been subject to criticism because of their vagueness. Nevertheless, from these provisions it is clear that these missions are dispatched by the CSO or the CC/CPC on the basis of a consensus decision, that the mandate of the mission is set by either of these two organs, that the Participating State(s) will cooperate fully with the mission on its territory, that the report(s) of the mission will remain confidential until discussed, and that the expenses of the mission will be distributed over all Participating States, except where the mission is provided on a voluntary basis. *See Helsinki Decisions, supra* note 15, at 1400, ch. III, ¶¶ 12-16.

262. The peaceful settlement of disputes is of primary concern to the CSCE as a regional arrangement. Since the Prague Council Meeting, the idea of a Court of Conciliation and Arbitration has been strongly favored by France, consistent with its view on full-fledged legalization of the CSCE. Since no agreement could be reached in Helsinki, the Helsinki Decisions have provided guidance for subsequent negotiations. As a result, a legally binding document concerning the peaceful settlement of disputes has been adopted at the Stockholm Council Meeting of December, 1992. This so-called Stockholm Convention has not only introduced a Court of Conciliation and Arbitration within the CSCE ranks, it has also marked a remarkable reversal in the non-legal

to the provisions of Chapter I (the strengthening of CSCE institutions and structures), Chapter II (the CSCE High Commissioner on National Minorities, HCM), and Chapter IV (Relations with international Organizations, Non-Participating States and the Role of Non-Governmental Organizations). From this last Chapter, it can be discerned that Chapter III is governed by the understanding that the CSCE is a regional arrangement under Article 52 of the U.N. Charter.<sup>263</sup>

Since the CSCE has not been granted a political mandate to engage in enforcement action, the CSCE does not require prior authorization from the Security Council before taking action under Chapter III of the Helsinki Decisions. Indeed, according to the analysis of section IV.C.3., the CSCE has priority over the U.N. in the peaceful settlement of local disputes. However, in all likelihood this means in practical terms a relatively independent position for the CSCE with regard to all its instruments except peacekeeping. Because of the instrument itself, as well as the explicit formulation regarding assistance to be rendered by existing Organizations to a CSCE peacekeeping operation,<sup>264</sup>

character of dispute resolution. In addition, there has been an enhancement and simplification of the Valletta Mechanism, as well as the creation of the possibilities to resort to either directed conciliation by the Council or the CSO, or to reciprocal declarations of advanced acceptance of conciliation. Moreover, the CSCE procedural *grundnorm* of consensus has been further challenged by introducing the "minus-the-disputants" element in directed conciliation by the Council or CSO. See *Decision on Peaceful Settlement of Disputes, including the Stockholm Convention on Conciliation and Arbitration within the CSCE* (Dec. 15, 1992), CSCE Doc. CSCE/3-C/Dec.1, reprinted in 32 I.L.M. 551 (1993); McGoldrick, *supra* note 8, at 175; HERACLIDES, *supra* note 17, at 105-11, 176-79.

263. See Helsinki Decisions, *supra* note 15, at 1403, ch. IV, ¶ 2.

264. Under the subheading of *Co-operation with regional and transatlantic organizations*, the Helsinki Decisions' provisions on CSCE peacekeeping include the suggestion:

The CSCE may benefit from resources and possible experience and expertise of existing organizations such as the EC, NATO and the WEU, and could therefore request them to make their resources available in order to support it in carrying out peacekeeping activities. Other institutions and mechanisms, including the peacekeeping mechanism of the Commonwealth of Independent States (CIS), may also be asked by the CSCE to support peacekeeping in the CSCE region.

Helsinki Decisions, *supra* note 15, ch. III, ¶ 52. Decisions by the CSCE to seek such support would be made on a case-by-case basis, after prior consultations with the Participating States which belong to the organization concerned (paragraph 53). However, procedures for the establishment, conduct and command of CSCE peacekeeping operations would remain unaffected in such a case (paragraph 54). In other words, the political supervision would be a CSCE matter, whereas the operation itself might very well be carried out by NATO, WEU or the CIS. This last-minute compromise of the Helsinki Summit has already run afoul in its first test: so far, CIS peacekeeping under the guise of CSCE peacekeeping has been rejected by a majority of the Participating States. See *Press Briefing by Grigory Karasin, RF Foreign Ministry Spokesman*,

current practice suggests close coordination between the CSCE and the U.N., with ultimate responsibility in the Security Council.<sup>265</sup> This implies that Chapter III is limited to the extent that there remains a hierarchical relationship between the CSCE and the U.N. Security Council, which could become an obstacle to politically sensitive actions on the part of the CSCE.

CSCE Peacekeeping provides the CSCE with a major instrument for political conflict resolution. As such, it is analogous to modern-day U.N. peacekeeping operations.<sup>266</sup> A very detailed scheme sets forth the criteria for mounting a CSCE peacekeeping operation, and provides for the structure(s) of the operation, financial arrangements and cooperation between the CSCE and regional or transatlantic organizations. From these provisions, it is clear that the U.N. peacekeeping experience has been "codified" in the Helsinki Decisions.<sup>267</sup>

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OFFICIAL KREMLIN INT'L NEWS BROADCAST, FISC, Mar. 11, 1994; *CSCE to Boost Presence in Breakaway Georgian Region*, *supra* note 229.

265. *See supra* note 149.

266. U.N. peacekeeping operations have traditionally not been part of the political conflict resolution itself, but have served as a facilitating instrument to that end. Recently, the U.N. Security Council has demonstrated a greater willingness to adapt the mandates of peacekeeping operations according to the needs of a particular situation, including the authorization for use of force (e.g., the mandate for UNPROFOR in connection with military supervision of humanitarian operations in Bosnia). U.N. Doc. S/24540, ¶ 9 (1992).

267. The decision to dispatch a CSCE peacekeeping operation is taken by the Council or the CSO on the basis of consensus and upon the request of one or more of the Participating States. The mandate for such an operation is then set by the CSO. The operation can be set up for purposes of supervising and maintaining cease-fire agreements (e.g., in CIS Republics), monitoring troop withdrawals (e.g., in the Baltic States), supporting the maintenance of law and order (this has to be interpreted as *not* involving the use of force), assisting refugees and providing humanitarian and medical aid (e.g., in the Balkans). CSCE peacekeeping cannot entail enforcement action. Furthermore, it requires the consent of the parties concerned, is to be conducted impartially, cannot be a substitute for negotiated settlement and is therefore limited in time. An operation can only be mounted if certain conditions have been met; these include, *inter alia*, the establishment of an effective and durable cease-fire, an agreement on the necessary Memorandum of Understanding with the Parties concerned, guarantees for the safety at all times of all personnel involved, and a sound financial basis. The political control of the mission is the prerogative of the CSO. In turn, the CSO will assign overall operational guidance to the CIO assisted by an *ad hoc* group established at the CPC. The *ad hoc* group will provide the operational support for the mission and will monitor it. The operational command in the mission area will rest with a Head of Mission. *See Helsinki Decisions, supra* note 15, at 1400-02, ¶¶ 17-56. For a detailed overview of the negotiations, *see HERACLIDES, supra* note 17, at 89-100. In practice, the political control of the mission is exercised by the Permanent Committee, and a *Mission Support Section* at the CPC has replaced the *ad hoc* group mechanism. (The establishment of a permanent centre for operational support is more efficient than the creation of support units on an *ad hoc* basis). H.G. Scheltema & P.W. Gorissen, *CVSE, conflictpreventie*

In many ways, these provisions reflect an illusory approach. As a result of too many Participating States being in favor of CSCE peacekeeping with too little common agreement on how to construct a viable framework for it, CSCE peacekeeping has become hostage to practical realities. In fact, it has become almost a management task in itself, rather than a management tool. Moreover, the current framework raises pertinent questions with regard to the actual functioning of such an operation. Even more important, the recent trend emerging from U.N. Security Council decisions on peacekeeping operations equipped with a mandate to use force if prevented from the discharge of its duties renders CSCE peacekeeping at least questionable *prima facie*.

First, if a CSCE peacekeeping operation cannot be equipped with the same mandate, then it carries no advantage over U.N. peacekeeping. In fact, its favorable position on the regional level would carry no weight for lack of substantive meaning. Second, if strict adherence would be paid to the enumerated conditions for approval of an operation, it would be very unlikely that one could actually be established. In addition, even assuming that these conditions would be met, the "contracting out" possibility to NATO, WEU or the CIS may complicate the operation significantly both in political and legal terms. In short, the concept of CSCE peacekeeping may have met with verbal approval since the adoption of the Helsinki Decisions; in practice it has been more of a problem than a solution. Ultimately, this could indeed prove to be the symbolization of the predicament for the CSCE as a regional arrangement.

### PART III: CONCLUSIONS

War, peace and a quest for security have been the key words for the European continent since the collapse of the Berlin Wall in 1989. With the euphoria over the dawn of a new international order having faded and the Spirit of Paris having become a distant reminder of the simplicity of assumption, the European political architecture has become unpredictable and unstable, and therefore unreliable. This development has not only produced an "inter-institutional landscape" which entails a list of acronyms too long for its own viability, but also has marked the stepping stone to changes in a restless remnant of the Cold War.

For more than twenty years, the Conference on Security and Cooperation in Europe has been synonymous with political dialogue, normative standards

and bloc-to-bloc confrontation. Despite the odds, the CSCE has accommodated itself within the niches of a European security regime throughout periods of strong confrontation and little cooperation. Its comprehensive set of normative commitments has served as a beacon in troubled waters. In short, the CSCE has certainly made a normative, if not factual, contribution to the "Old Order."

The CSCE seems to have been less prepared for the "New Europe" than it envisioned itself to be in the Charter of Paris. It has been ill at ease with the recurring dilemmas that its conceptual definition of normative standards tends to create. Indeed, the long jubilated Decalogue of Principles has become subject to unprecedented discussion. Accordingly, the CSCE has gone through a process of gradual changes in its defining elements in order to redefine its position within the European security structure.

Through the adoption of the Berlin, Moscow, Valletta and Vienna Mechanisms, the CSCE has set a first step towards redefinition. The CSCE has changed its emphasis from dialogue and response to action and anticipation. The Prague Document attempted to clarify and strengthen the "New CSCE" in more explicit terms. Ultimately, this has resulted in the adoption of a framework for action incorporated in the Helsinki Decisions. Remarkable for what it left out rather than for what it included, the Helsinki Decisions have been regarded by some as a major turning point for the CSCE. Not only do they attempt to define the CSCE in organizational terms (instead of procedural terms), they also demonstrate a heretofore unknown eagerness to become a viable "manager of change" within the European security structure. In this respect, the CSCE has made an attempt to lift its position to a political level beyond its means.

The Helsinki Decisions have not been sufficient to firmly establish a prominent position for the CSCE in this respect. Accordingly, Decisions of the Stockholm and Rome Council Meetings have attempted to remedy the flaws in the organizational structure and to redefine its legal position. With a view to continuing challenges to its political conflict resolution capacity, the CSCE Participating States have demonstrated less resolve.

In sum, the CSCE has acquired a hybrid character which can no longer be defined as a process, yet is not a legal entity. Claims to the contrary notwithstanding, the CSCE seems suspended between developing into an international organization and remaining a non-legal or quasi-legal arrangement for security issues. Indeed, the regional arrangement status under Article 52 of the U.N. Charter does not provide the CSCE with a legal definition of itself. Instead, it confers legal authority under international law for the use of the Tools of Change. Thus, the regional arrangement status in itself is not sufficient to define the CSCE's legal position as an entity. The upcoming Budapest Summit may not be able or even willing to clarify this issue; at the same time, the Summit presents an opportunity for the Participating States to prevent the CSCE from drowning in the quagmire of Acronyms. Like a parent steering a child, the Participating States can also guide the CSCE into a new direction.



The Child of the Cold War, therefore, may become the Adolescent of the New Europe after all: still unsure of its direction, but mature enough to be aware of the unrelentless attraction emanating from its implied Promise.

