SPECIAL ISSUE:
PUBLIC AUTHORITY & INTERNATIONAL INSTITUTIONS

Thematic Studies

Regulating Minority Issues through Standard-Setting and Mediation: The Case of the High Commissioner on National Minorities

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A. Introduction

On 17 February 2000 the OSCE High Commissioner on National Minorities (HCNM) submitted a recommendation to the Senate of the Babes-Bolyai University (BBU) in Romania. In this recommendation he formulated inter alia: "It is important for the staff of a University to reflect the University's multi-cultural character […] Therefore, an Equal Opportunity Commission should be established within the university to encourage the hiring of minority and female staff – on the basis of academic credentials – regulate guidelines on the recruitment and promotion of staff in this context and monitor performance against clear and transparent success/failure criteria."[1]

The following article describes the work of the HCNM as peace-building through standard-setting and mediation. We will see that the HCNM exercises public authority during the procedures, which govern his shaping activities as well as his monitoring activities.

The first chapter of this article will therefore outline the benefit of a perspective emphasizing the exercise of public authority with regard to the idiosyncrasies of the activities of the HCNM, explaining the political background, the aims and tools of the HCNM (B.). The second chapter of the article concerns the legal analysis of the activities of the HCNM. This includes a short introduction of the institutional framework in which the HCNM is embedded, a typology of the central instruments

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[1] Recommendation on Expanding the Concept of Multi-culturalism at the Babes-Bolyai University, Cluj-Napoca, Romania, 17 February 2000, available at: http://www.osce.org /documents/hcnm/2000/03/2745_en.pdf.

of the HCNM, and an exploration of the monitoring and enforcement mechanisms (C.). Against the background of this analysis, the last chapter will extrapolate principles of the HCNM's tasks and provide a criticism of the HCNM's work and procedures (D.).

B. Minority Protection as an Instrument for Security – an Introduction

I. Historical Background - Minority Protection after the Cold War

The HCNM was established in 1992 primarily against the background of the fall of the Iron Curtain and a myriad of evolving conflicts in the former Soviet States. The rising tensions in the former Republic of Yugoslavia, Georgia and South Ossetia as well as in Abkhazia caused well-founded fear of ethnic tensions and violent conflicts within and between the new states in Central and Eastern Europe.[2] Therefore, the logic in 1992 during the Helsinki Conference was to prevent minority related tensions within a participating state from escalating into an inter-state conflict, through the intervention of the HCNM at the "earliest possible stage."[3]

The general idea behind the establishment of the HCNM was that tensions between national minorities within one state could pose a threat to peace and stability between neighboring states, if they developed into a more violent conflict. The term "High Commissioner ***on*** National Minorities" is used instead of "High Commissioner ***of*** National Minorities." This reflects that the focus is on minority protection as a tool for guaranteeing peace and political stability within the OSCE area and not primarily as an independent value.[4]

II. Characteristics of the HCNM's Work – Peace-Building and Stability Through the Exercise of Public Authority in a Tense Political Area

The first characteristic of the HCNM's work is that he acts in the context of an international body, the OSCE, whose legal nature is still highly debatable. Even the legal nature of all OSCE-documents, on which the work of the HCNM is based, is still controversial. The categorizations vary between international treaties without

[2] CHRISTIANE HÖHN, ZWISCHEN MENSCHENRECHTEN UND KONFLIKTPRÄVENTION 292 (2005); WALTER A. KEMP, QUIET DIMPLOMACY IN ACTION 4 (2005).

[3] Para. 3 of the Mandate.

[4] KEMP (note 2), at 54-55; Rob Zaagman, *The CSCE High Commissioner on National Minorities: An analysis of the Mandate and the Institutional Context, in* THE CHALLENGE OF CHANGE: THE HELSINKI SUMMIT OF THE CSCE AND ITS AFTERMATH 113, 127, 140 (Arie Bloed ed., 1994).

the classical state responsibility and jurisdiction,[5] soft law with binding political effect,[6] and strictly non-binding political commitments.[7] The only thing which can be said with any certainty is that the OSCE-documents do not constitute international treaties in the classical and formal sense. Nevertheless, they are aimed at producing, at the very least, strong commitments and are in fact very effective.[8]

Against this background, the first High Commissioner has developed two instruments, which are central for the fulfillment of his tasks: general recommendations and country-specific recommendations. Both were not foreseen by his Mandate.

The general recommendations fulfill the function of developing general strategies and standards for the protection and political integration of national minorities in the participating states. They serve as standards – usually particularizing existing international obligations – for his expectations vis-à-vis the OSCE-states concerning a specific aspect of minority protection. The term standard in this context is understood as including all commitments and responsibilities below the level of formally binding rights and obligations.

The country-specific recommendations create concrete standards and requirements for each state and each situation. These standards are generated on the basis of the general standards developed by the HCNM, which form thematic compilations of international minority-related standards and rights.

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[5] JULIA MARQUIER, SOFT LAW: DAS BEISPIEL DES OSZE-PROZESSES 212, 219 (2004); JAN KLABBERS, THE CONCEPT OF TREATY IN INTERNATIONAL LAW 126 (1996).

[6] Ulrich Fastenrath, *The Legal Significance of CSCE/OSCE Documents, in* OSCE-YEARBOOK 1995/1996 411, 418; Theodor Schweisfurth, *Die juristische Mutation der KSZE, in* RECHT ZWISCHEN BEWAHRUNG UND UMBRUCH 213, 224 (Ulrich Beyerlin ed., 1995); Theodor Schweisfurth, *Zur Frage der Rechtsnatur, Verbindlichkeit und völkerrechtlichen Relevanz der KSZE-Schlussakte*, 36 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZaöRV) 681, 695 (1976); MARCUS WENIG, MÖGLICHKEITEN UND GRENZEN DER STREITBEILEGUNG ETHNISCHER KONFLIKTE DURCH DIE OSZE 59-64, 72 (1996); Rob Zaagman, *Focus on the Future,* 6 HELSINKI MONITOR 40, 42 (1995).

[7] KNUT IPSEN & VOLKER EPPING, VÖLKERRECHT 529-530 (5th ed., 2004).

[8] For a detailed analysis of the effectiveness *see* COMPARATIVE CASE STUDIES ON THE EFFECTIVENESS OF THE OSCE HIGH COMMISSIONER ON NATIONAL MINORITIES, CORE WORKING PAPERS 6, 7, 8 and 10 (Wolfgang Zellner, Randolf Oberschmidt & Claus Neukirch eds., 2002), available at: http://www.core-hamburg.de/CORE/pub_workingpapers.htm.

In this respect the HCNM exercises public authority in two ways also present in domestic administrative law:[9] firstly he acts as a *standard-setter* by particularizing international rights and standards, and secondly as a *monitoring-body* by supervising the compliance of the participating states with these standards.

The focus on the exercise of public authority through the HCNM's work allows a structuring of the institutional arrangement and the activities of the HCNM[10] and provides legal criteria to assess the principles governing the work of the HCNM.[11]

Of special interest is the exercise of public authority for tackling traditional international issues, such as conflict prevention in this specific case. This might inform us about the general effectiveness of the exercise of public authority for conflict prevention.[12]

C. Independent Standard-Setting and Mediative Monitoring Within the OSCE-Framework

The following chapter analyzes the legal framework of the HCNM's work. In the first section of this chapter, few comments as to the role of the HCNM in the OSCE-framework will be made. The second section of this chapter will deal with the question in how far the HCNM's work is directed by his Mandate. The third section of this chapter will illustrate a typology of the instruments of the HCNM: general recommendations and country-specific recommendations. The examination of the implementation and the monitoring-procedures will finally reveal several interesting multi-level aspects of the HCNM's work.

I. The Institutional Framework – An Independent Office within a Broader Context

The HCNM is an "instrument" of the OSCE,[13] possessing legal personality under Dutch law according to Section 2 para. 1of the Dutch HCNM Act.[14] The HCNM is

[9] RICHARD J. PIERCE, SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 285-308 (4th ed., 2004); HARTMUT MAURER, ALLGEMEINES VERWALTUNGSRECHT 6-9 (16th ed., 2006); Karsten Herzmann, *Monitoring als Verwaltungsaufgabe*, DEUTSCHES VERWALTUNGSBLATT (DVBl) 670-674 (2007); PAUL CRAIG, ADMINISTRATIVE LAW 398-405 (5th ed., 2003).

[10] Chapter C.

[11] Chapter D.

[12] Chapter D.

[13] Para. 2 of the Mandate.

[14] HCNM Wet, 31 October 2002, Staatsblad 2002, at 580.

on the one hand a bureaucracy comprising 25 staff members in The Hague (HCNM) and, on the other hand a person (the High Commmissioner), which is consensually appointed by the Permanent Council[15] for a period of three years.[16] Beside this appointment his role within the OSCE framework is characterized by its independence from the other institutions of the OSCE. This is emphasized by the fact that the High Commissioner has full discretion concerning the decision to intervene[17] and a formal consultation or request is rarely required by the Mandate.[18]

II. Programming an International Public Authority – Clear Objectives and Vague Competences

The main legal basis for the work of the HCNM is the Mandate as it was concluded in 1992 in Copenhagen by a consensus of the then participating states. The legality of OSCE–documents aside, the Mandate fulfills in fact the same function as any other founding document establishing an institution within an international organization. It is intended to be the legal basis of the HCNM's work, to define the aims and competences as well as the procedures he has to follow. Otherwise it would be of no value to establish rules regulating his work at all.

The provisions of the Mandate contain objectives as well as competences. The general objective of the HCNM is, according to said Mandate, to "provide 'early warning' and as appropriate 'early action' [...] in regard to tensions involving national minority issues which […] have the potential to develop into a conflict within the OSCE area, affecting peace, stability or relations between participating States […]."[19] Hence, the objective to provide an early warning mechanism is quite clear.

The field of application is defined negatively by exclusion of three specific situations: national minority issues in situations "involving organized acts of terrorism,"[20] purely inner-state conflicts[21] and violations of the Conference on

[15] The Mandate confers this power to the Committee of Senior Officials (CSO), which was followed by the Senior Council (SC) since the Charter of Paris 1990. Meanwhile this task shifted to the Permanent Council (PC).

[16] Para. 9 of the Mandate.

[17] Paras. 3, 13 of the Mandate.

[18] Paras. 7, 17 of the Mandate.

[19] Para. 3 of the Mandate.

[20] Para. 5 b of the Mandate.

Security and Co-operation in Europe (CSCE) commitments "with regard to an individual person belonging to a national minority."[22]

Conversely, concrete actions are described vaguely and at a very abstract level as the Mandate neither includes any concrete means which can or should be taken nor any procedural rules.[23] Therefore, it is the High Commissioner himself who developed concrete mechanisms and measures to reach his objectives, among those the two types of recommendations. These recommendations have been developed in a uniform structure and with certain reoccurring elements, which lead to a kind of standardization of the work of the HCNM not foreseen by the Mandate. In the next section this will be demonstrated with regard to the procedural and substantial regime of these two instruments.

III. Standard-Setting and the Emergence of a Pyramid of Norms – A Typology of the Instruments of Public Authority

This section aims at displaying a typology of the instruments of the HCNM in order to highlight their character as an exercise of public authority. A first section demonstrates that the work of the HCNM has generated a high level of standardization through unitary forms (1.) and procedures (2.). In the second section the substantive aspects regarding the regulatory instruments will be illuminated (3.). Pursuant to the special focus on the exercise of public authority it is of particular interest that the typology of instruments reveals a pyramid of norms, as to be disclosed in the third section (4.). Finally it will become clear that this is not just a political accident, but required for normative reasons (5.).

1. Standardization of the Form and the Development of the Central Instruments

The general recommendations and the country-specific recommendations can be qualified as the central instruments of the HCNM because they are the most effective instruments used for the implementation of minority protection standards in the participating states.[24] The country-specific recommendations were created by the first High Commissioner to address the states involved in certain situation

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[21] Para. 2 of the Mandate.

[22] Para. 5c of the Mandate.

[23] Para. 12 of the Mandate: The HCNM "*may* during as visit […] discuss the questions with the parties, and *where appropriate* promote dialogue […]" (emphasis added); Para 13: "*If* […] [the HCNM] concludes that that there is a prima facie risk […], he/she *may* issue an early warning." (emphasis added).

[24] *See* Zellner, Oberschmidt & Neukirch (note 8).

concerning the protection of minority rights. Their idea is to loosely replicate, what the High Commissioner had tried to convey to the parties during his visit. They suggest concrete steps for a solution.[25] At the same time they fulfill an informative function for other OSCE-organs, especially the Chairman-in-Office, to whom the High Commissioner submits the recommendations regularly.[26]

While the country-specific recommendations aim essentially at the solution of a concrete conflict, the general recommendations serve as guidelines for the standard required by the HCNM vis-à-vis the participating countries. They are directed to the participating states as they set standards for their behavior towards minorities within their territory. Their aim is to try to provide coherent political and legal concepts in a specific field of minority protection. As the general recommendations are elaborated by expert groups,[27] it is clear that they do not impose any obligations on the member states,[28] but can create standards in the sense defined above.[29]

In order to underline the suggestion of the of the exercise of public authority through the HCNM's work, the two types of recommendations will be analyzed first with special regard to the standardization of the form, before then examining the standardization of the procedure through which these instruments are decided upon. Standardization of the form is one of the main characteristics of administrative procedures and thus of the exercise of public authority. Despite, the Mandate itself does not prescribe any specific form for the general or for the country-specific recommendations.

a) The Form of the General Recommendations

To be a useful tool in the hands of the HCNM and to inform the OSCE-States about the minority related requirements concerning specific themes, general recommendations have a written form and are made public by the HCNM.

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[25] KEMP (note 2), at 56.

[26] *Id*. at 58. The OSCE Chairmanship is held by one participating State for one calendar year and is supposed to co-ordinate the decision-making process and to set priorities for the activities during that year. The Chairmanship is headed by the Chairman-in-Office (CiO), which is usually the Foreign Minister of the State concerned. His tasks are defined as the co-ordination and consultation on current OSCE business and he presides over Summits and the Ministerial Council, the two central decision-taking organs of the OSCE. For further information see the OSCE Handbook (2007), available at http://www.osce.org.

[27] The detailed procedural aspects will be explained under point III.2.

[28] Para. 34, sentence 2 of the Mandate.

[29] *See* B. II.

Another interesting aspect is the normative framework of international minority protection out of which the content of the general recommendations is formed. In the first four guidelines the HCNM has always referred to the international law provision on which he based his recommendations. In the last of his guidelines[30] he did not mention any standard or right with reference to minority issues any more. Instead he elaborated his standards more or less independently. This was criticized in the literature.[31] Apparently the lack of citation of concrete norms of international law is seen as a formal deficit affecting its success and usefulness.

This illustrates that through the development of the last four general recommendations the High Commissioner has also established formal standards for the elaboration of this instrument which were not only accepted but also expected by the different actors involved in minority issues. The procedural self-binding effect with regard to this new formal requirement reveals a first standard-setting function of the general recommendation.

b) The Form of the Country-Specific Recommendations

The country-specific recommendations usually take the form of a follow-up letter addressed to the foreign minister of the country concerned after a visit of the High Commissioner and after a process of dialog between him and the parties involved.[32] As the country-specific recommendations are not foreseen by the Mandate, there exist no requirements as to their form.

2. Standardization of the Procedure Regarding the Central Instruments

Not only the standardization of the form which instruments of public authority take, but as well the standardization of the procedure through which they are decided upon, is characteristic for any legal regulation of the exercise of public authority. Therefore it is telling to examine elements of standardization in the procedures regarding the two central instruments, through which the HCNM exercises public authority.

a) Procedure for the General Recommendations

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[30] Recommendation on Policing in Multi-Ethnic Societies, available at: http://www.osce.org/documents/hcnm/2006/02/17982_en.pdf.

[31] Arie Bloed, *Comments on the new set of Recommendations on Policing in Multi-Ethnic Societies*, 17 HELSINKI MONITOR 184, 187 (2006).

[32] *Id.*

The strong institutionalized influence of experts is of special interest regarding the procedure for making general recommendations. The Mandate prescribes in considerable detail the possible involvement of experts in the work of the HCNM. According to para. 31 of the Mandate the High Commissioner "may decide to request assistance from […] experts with relevant expertise in specific matters." For that purpose he will set "a clearly defined Mandate and time-frame for the activities of the experts."[33] Finally the High Commissioner "will be responsible for the activities and for the reports of the experts and will decide whether and in what form the advice and recommendations will be communicated to the states concerned."[34] In addition, the procedure concerning the elaboration of the general recommendations is regulated by para. 35 of the Mandate, which prescribes that the experts "will be selected by the High Commissioner with assistance of the Office for Democratic Institutions and Human Rights (ODIHR) from a resource list established at the ODIHR as laid down in the Document of the Moscow Meeting."

Despite the detailed procedural prescription, the reality of the HCNM's work is quite different. Until 1999 it was the Foundation on Inter-Ethnic Relations (FIER) that organized an international expert consultation on different themes. In spite its formally independent character, the FIER worked hand in glove with the High Commissioner and his office, which were located in the same building as the FIER in The Hague.[35] The first expert consultations on request of the High Commissioner lead to the elaboration of The Hague Recommendations Regarding Education Rights of National Minorities. After the dissolution of the FIER in 1999 and its incorporation in the office of the HCNM, it is now the High Commissioner himself who invites the expert group and who publishes the general recommendations. The draft recommendation of the expert group is edited by the High Commissioner and then "endorsed" through publication.

Regardless these differences between the wording of the Mandate and the de facto procedure, the reality of the elaboration of the general recommendations is highly standardized. All general recommendations have been elaborated by expert groups on a formal request of the High Commissioner who finally endorsed the general recommendations, after he had edited them.

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[33] Para. 32 of the Mandate.

[34] Para. 34 of the Mandate.

[35] KEMP (note 2), at 100; Kemp formulates that "its very *raison d'être* was to serve the High Commissioner", due to the fact that the FIER was founded on the initiative of the first HCNM, Max van der Stoel, who was also adviser to the Board of Directors of the FIER.

b) Procedure for the County-Specific Recommendation

The procedure for the specific recommendations developed by the High Commissioner also reveals differences in the formal procedure described in the Mandate. The High Commissioner has full discretion as to whether a situation might become a conflict situation and therefore needs his involvement. The procedure in para. 7 of the Mandate, prescribing the requirement of a formal request of the Senior Council in cases "when a particular national minority issue has been brought to the attention of the Council of Senior Officials (CSO),"[36] was never followed. The only two statements of the Senior Council - during a crisis in Estonia in 1993[37] and concerning the issue of Crimea in 1994[38] - were formulated as invitations for the involvement of the HCNM or as support for his activities. A formal mandate by the Senior Council or Permanent Council has never been a prerequisite to the involvement of the HCNM.[39]

In order to consider whether a situation requires his involvement or not, the HCNM receives "information regarding the situation of national minorities and the role of the parties involved from any source,"[40] including media and non-governmental organizations. He also receives specific reports from parties directly involved regarding developments concerning national minorities.[41] The latter can be governments, regional and local authorities as well as representatives of associations, non-governmental organizations, religious and other groups of national minorities directly concerned, which are authorized by the persons belonging to those national minorities to represent them.[42] Apart from the representatives of a concrete minority the most important non-governmental organizations involved in the work of the HCNM are the European Centre for Minority Issues (ECMI) in Flensburg and the Minority Rights Group (MRG) in London. The latter are frequently consulted and provide information and data for the HCNM.[43]

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[36] Now Senior Counsel.

[37] 22nd CSO Journal no. 2, annex 2, 30 June 1993.

[38] 27th CSO Journal no. 3, annex 2, 23 September 1993, the CSO expressed his support for "the continued activities of the High Commissioner on National Minorities in the Ukraine".

[39] Zaagman (note 4), at 170.

[40] Para. 23a of the Mandate.

[41] Para. 23b of the Mandate.

[42] Para. 26 of the Mandate.

[43] Interview with Krzysztof Drzewicki, Senior Legal Adviser of the HCNM, 29 May 2007 in The Hague.

Since the beginning of his work the HCNM has clearly avoided the need to reach the formal stage of early warning as it is foreseen in the Mandate by para. 13, 14 and 15 as well as the "early action" - procedure of para. 16. As the first High Commissioner Max van der Stoel thought that bringing a conflict into the stage of early warning would probably aggravate the tensions, as the topic would then be discussed publicly in the Permanent Council. He preferred to enlarge his spectrum of activities in the first stage before coming to a stage of warning.[44] Therefore conflict identification and fact finding constitute the most important area of activities of the HCNM nowadays.

Here the visits in a country of concern, according to para. 23, 24 of the Mandate, are of special importance in order to ascertain concrete problems and interests involved, to monitor the tensions and to analyze the structure of a specific conflict. The Mandate does not explicitly require any consent of the countries concerned, but requires a previous consultation of the Chairman-in-Office.[45] Practically the High Commissioner has often informed the Chairman-in-Office prior to his departure and sometimes even asked his opinion as to whether the HCNM should become involved in a situation. However, the main objective of this provision of the Mandate, namely that the Chairman would consult the involved parties on the basis of the information provided by the HCNM, has never been followed in this strict sense.[46] To gather more information about a conflict the High Commissioner sometimes uses the existing ODIHR missions in a country as his "eyes and ears."[47]

During the first visit the High Commissioner usually tries to uncover the roots causes of a conflict and to establish a permanent dialog between the parties concerned as well as to foster an atmosphere of understanding between the parties. Round tables and discussion groups are the main tools in this arena. This stage of fact finding and visits functions as a facilitator of dialog and participation. Here the High Commissioner tries to come to an acceptable solution for all parties involved, he tries to understand their interests as well as the technical and political obstacles to a solution of the conflict. Against this background his aim is to mediate a possible solution between the parties. These solutions are then laid down in the concrete recommendations.

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[44] KEMP (note 2), at 83-84.

[45] Paras. 27-30 of the Mandate.

[46] KEMP (note 2), at 91.

[47] *Id.* at 96; Margit Sarv, *Integration by Reframing Legislation*, *in* CORE WORKING PAPER 7 (note 8).

After the visit, the High Commissioner – in accordance with para. 18 of the Mandate – submits strictly confidential reports to the Chairman-in-Office. He provides information about his visit and his assessment of the situation as well as an overview of the positions of the different actors and parties involved. In this report he also provides the results of his confidential discussions with different actor as well as background information. In contrast to the diplomatic formulation of the recommendations, these reports are more open and combined with an honest political assessment of the situation concerned.[48]

Unlike these reports, the country-specific-recommendations are more carefully formulated and describe specific suggestions, which in his opinion might solve the conflict. These recommendations are exclusively addressed to the participating states involved. They are usually not sent to the minority group in question, but there have been occasions when the High Commissioner has asked the government to forward his recommendations to the minority representatives.[49] Due to the fact that the country-specific-recommendations are usually not sent to the minority party this mechanism is frequently described as "quiet diplomacy."[50]

The term "quiet diplomacy" also describes the fact that the recommendations are usually withheld from the public from the outset to ensure a time without public scrutiny and in which the parties could act in good-faith.[51] During this period of confidentiality quiet diplomacy activities can be pursued and the state has time to consider, react and already implement recommendations. The foreign minister of the country concerned always has the possibility to respond to the recommendation before they are made public.[52] Finally most letters until 2001 were made public in order to inform all interested parties about the opinions and recommendations of the High Commissioner and the government concerned.[53] This was originally rendered possible through a formal decision by the Permanent Council by which the letters became an official OSCE document. Later they were simply released into the public domain some time after the High Commissioner reported their contents

[48] KEMP (note 2), at 91.

[49] KEMP (note 2), at 56; (note 22).

[50] *Id.*

[51] JONATHAN COHEN, CONFLICT PREVENTION INSTRUMENTS IN THE OSCE: AN ASSESSMENT OF CAPACITIES 64 (1998); KEMP (note 2), at 59.

[52] This procedure follows the right to comment recommendations elaborated by experts as it is foreseen by para. 34 of the Mandate.

[53] Para. 34 of the Mandate.

to the Permanent Council.[54] Contrary to this practice the country-specific recommendations were withheld from the public under the second High Commissioner, Rolf Ekéus.

After the dialog in form of the country-specific recommendation and the follow-up letters of the foreign minister the High Commissioner decides, whether a successful solution has been found. Otherwise he can decide to continue the monitoring of the situation. In the worst case he deems that his scope for action is exhausted without success. In this case he has to inform the Permanent Council about this assessment.[55]

Here an even stronger standardization of the procedure takes place despite several deviations from the Mandate. The general idea of the vague provisions of the Mandate has been transformed into an effective detailed procedure by the High Commissioner. This procedure contains the unifying elements of fact finding, dialog and a suggestion for the solution of a tension.

c) Particularizing General Standards through a Mediative Approach

The elaboration-procedure of the country-specific recommendations is characterized by a cooperative and dialog-oriented process, which includes the parties directly involved. The idea is to adjust the international standard of minority protection to the country-specific situation by searching for a solution together with the parties involved. This includes tension-reducing projects such as workshops and round-tables.[56] The aim of this procedure is not primarily to end up with a shaming of the state acting contrary to international standards. Rather the focus of the procedure established by the High Commissioner is to find a solution for a specific conflict which respects the interests of both parties involved as far as possible– the state's as well as the minority's. The described procedure involves the conflicting parties from the beginning and the High Commissioner himself takes more the role of a moderator and mediator of a conflict who finally articulates his recommendations. To particularize norms is indeed a kind of mediative process by the High Commissioner in the sense that it aims at brokering two diverging positions with the help of a third actor, without the need for coercive measures. The process includes elements of communication, formulation and manipulation as

[54] *Id.*

[55] Para. 20 of the Mandate.

[56] KEMP (note 2), at 74-75.

they are characteristic of mediative procedures.[57] Nevertheless his activity differs from traditional mediation-theories as he simultaneously acts as a monitoring-body for the compliance with international standards and obligations.[58] The mediative character of the concretion of more general standards seems to be an appropriate approach to reach at the same time compliance with standards and the solution of a conflict.

d) Conclusion

The forms of the two central instruments as well as their procedures reveal a strong standardization. Standardization is a characteristic effect of administrative procedures and thus of the exercise of public authority. Nevertheless this is only a first formal indicator. To further corroborate the thesis of the recommendations as an exercise of public authority we take a closer look at the substantive law governing these instruments.

3. "Translation" of International Law – the Substantive Framework

As described above, all general recommendations usually refer to all the relevant rights and standards on an international or regional level. Out of these provisions the standards, aims, and policy guidelines concerning a specific topic of minority protection are developed. The general recommendations "translate"[59] different responsibilities and legal obligations out of a myriad of international and regional treaties and agreements as well as "best practices" on the national level in relation to minority issues into a concrete set of requirements concerning a specific topic. [60] It is crucial to bear in mind that even national arrangements or international rights which may not be directed to all OSCE-states – as they are for example not party to the cited treaty or agreement – are transformed through this mechanism into standards addressed to all OSCE participating states.[61]

For the country-specific recommendations the High Commissioner can in principle freely decide on which provision he will base his recommendations or warnings in

[57] Saadia Touval & Ira William Zartman, *Introduction: Mediation in Theory, in* INTERNATIONAL MEDIATION IN THEORY AND PRACTICE (Saadia Touval & Ira William Zartman eds., 1995).

[58] Ratner qualifies the HCNM as a "normative intermediary." Steven Ratner, *Does International Law Matter in Ethnic Conflicts?,* 32 NYU JOURNAL OF INTERNATIONAL LAW AND POLITICS 591, 668-684 (2000).

[59] HÖHN (note 2), at 324; Ratner (note 58), at 624.

[60] HÖHN (note 2), at 322-327.

[61] *Id.* at 349-352.

a concrete case. He chooses the particular standards or rights, which he considers being the most accepted by the involved parties.[62] This independence is a key factor for the success of the High Commissioner's work as it allows him to be sensitive to the needs of each actor involved. Furthermore it strengthens his credibility by avoiding a "one size fits all"-solution in the sensitive area of minority protection.

Two other aspects of the substantive standards governing the work of the High Commissioner contribute to an adequate method of dealing with crucial minority protection related issues: firstly he refers to the general recommendations while formulating concrete suggestions in the country-specific recommendation; secondly he refers to international obligations, e.g. to higher norms, while elaborating his thematic standards in the general recommendations.

In the practice of the HCNM one can observe a substantive standardization as the counterpart to the above described formal standardization. The standardization in these two aspects allows for a further classification of the exercise of public authority through the HCNM's activities as we will see in the next section.

4. The Pyramid of Norms in the Activities of the HCNM

If we consider on the one hand that there exists a certain flexibility in the applicable substantive law and that on the other hand the HCNM displays his activities in a mere political framework, one might ask why these instruments should represent anything more than mere politics. How can we conclude that the two types of recommendations can be conceived the exercise of public authority at all?

A first argument can be drawn out of the fact that the described typology and substantive standardization reveals a pyramid of norms, which is quite similar to the pyramids of norms governing the exercise of public authority at a domestic level.

Both types of recommendations refer to international obligations concerning minority protection. This includes all relevant OSCE Documents, the Framework Convention on National Minorities, Art. 27 International Covenant on Civil and Political Rights, the European Convention of Human Rights, documents of the United Nations (UN) concerning minorities etc. The notion "international standard" in the documents of the HCNM characterizes the *aquis* of the minority

[62] *Id.*

protection rights and standards existing on a regional and international level.[63] Therefore, we can state that the international obligations on minority protection constitute a first layer of substantive law.

The general recommendations translate the various international standards and rights involving minority related questions into concrete standards concerning one specific aspect of minority protection. This secondary law finally instructs the elaboration of concrete standards. The general recommendations form a quasi-secondary level law, set by the HCNM.

The country-specific recommendation particularizes the general recommendations, as it formulates concrete suggestions for the solution of a situation of tension. It differs from the exercise of public authority in the national context insofar as it is aimed rather at advising and enabling the parties to find a solution between them and forms in this respect part of a mediation process. Nevertheless the country-specific recommendation is the last step in the procedure particularizing a general norm, though which the latter is applied to a concrete situation.

Recalling the high level of formal standardization, we see that the instruments of the HCNM constitute a formalized concretion, as they transform general standards into concrete ones through a formally standardized procedure. They therefore fulfill an administrative function.[64] It is precisely the difference between politics and law that the latter allows for particularizing abstract requirements within a formalized procedure. Through the pyramid of norms and the standardization of form and procedure, we can qualify the two recommendations as the exercise of public authority.

5. Just Practice or Normative Points of Reference?

Hitherto it has only been outlined that a pyramid of norms exists in the practice of the HCNM, similar to domestic exercise of public authority. However, the idea of the exercise of public authority through the tools used by the HCNM still fragile as it does not answer the question whether this pyramid evolved accidentally due to the strategic ideas of the current High Commissioner. In other words, is there any normative reason why the High Commissioner is impeded to ignore the general recommendations while elaborating a specific one?

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[63] Ratner (note 58), at 591, 659.

[64] Max Weber, *Bürokratismus, in* IV WIRTSCHAFT UND GESELLSCHAFT 159, 186-189 (Edith Hanke ed., 2005); MAX WEBER, RECHTSSOZIOLOGIE 123-126 (Heinz Maus & Friedrich Fürstenberg eds., 1967); NIKLAS LUHMANN, LEGITIMATION DURCH VERFAHREN 204-207 (Heinz Maus & Friedrich Fürstenberg eds., 1969).

This is critical especially because of their explicit non-binding character as recommendations of experts, according to para. 34, sentence 2 of the Mandate. It is a core element of modern legal systems that standards are always modifiable through democratic procedures unless there is a hierarchy of standards, though which the higher standard determines the lower one.[65] Even if the specific recommendations are more detailed than the general ones, they normatively form part of the same rank of norms as they are both enacted by the High Commissioner on the basis of the Mandate. The Mandate does not prescribe any hierarchical relation between these two instruments nor include the general recommendations any instruction to elaborate specific ones. Consequently the *lex posterior*-rule, which applies in all cases of absence of a hierarchy,[66] would have to be applicable in this context.

Therefore, to assume a binding effect of the general recommendations, it is necessary to identify a normative argument for the primacy of the general over the specific recommendations.[67]

The recourse to the principle of sovereign equality as it is laid down in Art 2, no. 1 of the Charter of the United Nations and the principle of impartiality laid down in para. 4 and 8 of the Mandate allow arguing for a binding effect of a standard for the elaboration of others at the same rank. The principle of impartiality in the Mandate can be interpreted as a translation of the general principle of equality within the context of the HCNM. The ratio behind the principle of impartiality is not only that a neutral behavior of the High Commissioner is useful for his credibility vis-à-vis the participating states. In fact it is the idea that the participating states have agreed upon the OSCE-commitments as equal parties on the basis of sovereign equality. This premise for the agreement would be destroyed if unequal requirements were born out of these commitments though their application by the HCNM.

The general recommendations particularize the regulations in a variety of international treaties and the OSCE-commitments concerned with minority protection. They therefore constitute a tool for reviewing the compliance with international treaties and commitments. If the High Commissioner decides against this background to base a country-specific recommendation concerning one

[65] HANS KELSEN, REINE RECHTSLEHRE 228-230 (1960); ALF ROSS, THEORIE DER RECHTSQUELLEN 359-369 (1929); Adolf Merkl, *Prolegomena einer Theorie des rechtlichen Stufenbaus, in* GESELLSCHAFT, STAAT UND RECHT 252, 272-285 (Alfred Verdross ed., 1931).

[66] JÜRGEN BAST, GRUNDBEGRIFFE DER HANDLUNGSFORMEN DER EU 222 (2006).

[67] *Id.*

participating state on the requirements defined within the general recommendation, it is not possible for him to apply a different standard vis-à-vis another state. The general recommendations compile international standards of minority protection concerning a specific thematic aspect. As a compilation of the *aquis* in international minority protection they are addressed to all OSCE participating states. They serve as a guideline for the minority protection in each member state and set out the expectations of the HCNM. To apply a standard set out in the general recommendations in one case and a different and even contradictory standard in another case would constitute an unequal treatment of two states which expected that the benchmark for their activities in the field of minority protection would be these general recommendations.

There is no doubt that it is also possible to interpret the general recommendations as mere informative compilations for the protection of minorities, i.e. as pure policy guidelines. This interpretation nevertheless has to be abandoned as soon as the High Commissioner himself explicitly applies the standard set out by the general recommendations in order to review a state's behavior. In this case the principle of impartiality in the Mandate and the general principle of sovereign equality transform the general recommendations from mere informative instruments into self-binding ones. As long as the general recommendations are not formally amended by the High Commissioner he is then bound to apply the same benchmark in every case.

Due to these principles the High Commissioner is normatively bound by the general recommendations while elaborating a specific one. From this perspective the general recommendations are comparable to the communications of the European Commission.[68] They fulfill the function of a secondary level law, advancing a hierarchy of different levels of provisions within the framework of the HCNM as they create a new layer of law not provided by the Mandate but nevertheless applied by the HCNM.

IV. Effective Soft Law through a Manifold Monitoring System

After charting the main instruments of the HCNM with all their procedural and substantial aspects, it is now necessary to ascertain how useful these instruments are in legal practice and how a minimum of effectiveness is guaranteed. The recommendations – the specific as well as the general ones – are all non-binding instruments.[69] Their implementation is entirely dependent upon the discretion of

[68] LINDA SENDEN, SOFT LAW IN EUROPEAN COMMUNITY LAW 140, 143-145 (2004).

[69] Para. 34 of the Mandate.

the recipient state.[70] The transformation depends on national legal system and subjects concerned. Despite this explicit characterization as non-binding a remarkable debate nonetheless ensued surrounding the recommendation questioning the difference between hard law and soft law within the context of the OSCE, due to the enormous effectiveness of the recommendation.[71]

There already exists a wealth of scholarly literature testifying that the standards set by the HCNM are in fact at least as effective as hard law even if they remain in the sphere of standards, as provisions under the level of formal international law.[72] There is no need for reiteration here. Instead, it suffices to make a note of the effectiveness of the recommendations of the HCNM and to stress three aspects of specific interest for the focus on the exercise of public authority through the HCNM's work.

1. Enforcement of International Law

The first interesting aspect with regard to enforcement mechanisms of international bureaucracies is that the HCNM serves as a monitoring body for several international treaties containing provisions with regard to minority protection. The HCNM bases the general recommendations explicitly not only on the OSCE commitments but also on formal international law. By doing so he fulfills monitoring functions for international treaties external to his own international organization.

2. Implementation through Capacity Building

Already the elaboration of the country- specific recommendation illustrates that the High Commissioner is focused on the elimination of all practical and political obstacles to the effective enforcement of minority rights. During the fact-finding and mediation process the High Commissioner already tries to initiate round-tables and work-shops concerning the respect of minority protection rights. These activities sometimes also include policy training.[73] The HCNM furthermore tries to

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[70] KEMP (note 2), at 59.

[71] John Packer, *Making International Law Matter in Preventing Ethnic Conflicts*, 32 NYU JOURNAL OF INTERNATIONAL LAW & POLITICS 715-724 (2000); Ratner (note 58), at 659-668; HÖHN (note 2), at 205-231.

[72] Packer (note 71); Ratner (note 58); COHEN (note 51); Sarv (note 47); Volodymyr Kulyk, *Revisting A Success Story, in* CORE WORKING PAPER 7 (note 8), at 1-146; David Galbreath, *The Politics of European Integration and Minority Rights in Estonia and Latvia,* 4 PERSPECTIVES ON EUROPEAN POLITICS AND SOCIETY 36, 45 (2003).

[73] KEMP (note 2), at 74-75.

secure financial support for the establishment of infrastructure necessary for a continued institutional dialog and the guarantee of equal treatment of minorities in the social, political and economic spheres.[74] It is a characteristic of the HCNM's monitoring mechanism that it is based on capacity building taking into account the specific needs of each conflict situation.

3. Implementation though Multi-Level Cooperation

Finally, one of the motors for the effective implementation of the standards set by the HCNM is an alliance with other actors in the field of minority protection. In this sense the fruitful relations between the HCNM and the European Union (EU) is of particular importance. During the accession procedure the country-specific recommendations of the HCNM have found their way into the monitoring reports prepared annually by the European Commission for each of the candidate states.[75] They were also explicitly referred to in the strategy paper concerning the accession in 2000.[76] In this respect the HCNM plays a key role in the policy development of the EU's foreign and enlargement policies,[77] whereby the EU plays at the same time a major role for the effective enforcement of the HCNM's recommendations. Through this avenue he increasingly influences the emerging inner-EU-standards of the protection of national minorities through his guidelines and state recommendations.[78] The cooperation between the EU and the HCNM can be described as an instrumental cross-linkage, as the EU also uses the instruments developed by the HCNM.

Another example of a fruitful, though not unambiguous, cooperation is the relation between the HCNM and the Council of Europe (CoE) and his work in the field of minority protection. The two organizations mutually refer to their documents when assessing minority related conflicts. They also increased the practice of 'enhanced

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[74] Kemp describes the vivid example of the Crimean Conflict in the Ukraine, during which the HCNM organized for example a donor conference in 1996. KEMP (note 2), at 222-229.

[75] For the example of Estonia *see* Sarv (note 47), at 79-83, 108-110.

76 COM (2000) 704 final, Regular Report from the Commission on Estonias progress towards accession, at 18-20, COM (2000) 706 final, Regular Report from the Commission on Latvias progress towards accession, at 23.

[77] Galbreath (note 72), at 36-53, 45. For the latest development *see* Krzysztof Drzewicki, *National minority issues and the EU Reform Treaty. A Perspective of the OSCE High Commissioner on National Minorities*, 2 SECURITY AND HUMAN RIGHTS (SHR) 137-146 (2008).

[78] For the influence of external minority protection on the internal EU-standard of minority protection: EU Network of independent experts on fundamental rights, Thematic comment no. 3, available at: http://www.ec.europa.eu/justice_home/cfr_cdf/doc/thematic_comments_2005_en.pdf.

cooperation,'[79] a mechanism aimed a establishing a permanent dialog between the CoE organs and the HCNM through a coordination group and a regular consultation between the so called "focal points" of the OSCE and the CoE.[80] One striking example of this mutual influence is the development of minority protection in Estonia, where the desire to ease the country's entrance into the CoE enforced the implementation of the HCNM's requirements.[81] The risk of fragmentations because of overlapping activities of the HCNM and the CoE with diverging interpretations of minority protections standards can be at least reduced by these mechanisms. The cooperation in this case is not only instrumental, but at the same time institutional as the HCNM and the CoE established an own coordination group guaranteeing a regular dialog and exchange.

In this light the monitoring mechanisms used by the HCNM's work can be characterized by cooperation, mediation and recourse to international norms.

D. Confidentiality and Mediation as Two Sides of One Coin – Principles and Perspectives

This last chapter will outline principles which can be identified in the activities of the HCNM as described above. The function and consequences of these principles are to be assessed. Thereby their ambivalent character regarding efficiency on the one and legitimacy and transparency on the other hand is demonstrated. Finally suggestions for lessons to be drawn out of the use of these tools in a political context concerning effective conflict prevention will be presented.

I. Structuring Axes of Conflict Prevention though Minority Protection – Four Principles

The activities of the HCNM are governed by four principles which are derived from the Mandate and the function of the HCNM as prescribed by it. These principles are not all named explicitly in the Mandate, but are widely accepted in the literature. For the purpose of this contribution principles should be comprehended as characteristics based on norms within the Mandate.

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[79] Krzysztof Drzewicki & Vincent de Graaf, *The Activities of the OSCE High Commissioner on National Minorities: July 2004-June 2005*, 4 EUROPEAN YEARBOOK OF MINORITY ISSUES (EYMI) 595-613, 600, 601 (2004/2005).

[80] For the OSCE this is the High Commissioner.

[81] Sarv (note 47), at 33.

https://doi.org/10.1017/S2071832200000547 Published online by Cambridge University Press

1. Principle of Impartiality

The first principle is the principle of impartiality which is indispensable for the High Commissioner to act as a credible mediator. Para. 4 of the Mandate explicitly states that the High Commissioner "will act independently of all parties directly involved in the tensions" and para. 8 of the Mandate declares that the he will be a personality "from whom an impartial performance of the function may be expected."

2. Principle of Independence

The second principle is related to the first and can be described as the principle of independence of his work. While the principle of impartiality concerns the distance from the parties of a conflict, the principle of independence stresses the independence of all other OSCE- institutions and -organs. Despite the fact that the HCNM acts "under the aegis of the Senior Council" according to para. 2 of the Mandate, and despite the obligations to report and to cooperate, which have been described above with regard to the recommendations-mechanism, the HCNM is in general independent from the political influence of all other OSCE–organs.

3. Principle of Confidentiality

The third principle is the principle of confidentiality, which is aimed at avoiding a loss of face by one of the parties during the mediation process. This approach becomes evident in the requirement of a strictly confidential report of the High Commissioner to the Chairman-in-Office in para. 18 of the Mandate. It is reflected in the confidential character of the consultation of the participating states concerned by the Chairman-in-Office in para. 19 of the Mandate. Finally the explicit requirement and recognition of confidentiality in para. 22 of the Mandate, with regard to information provided to the implementation meetings on Human Dimension issues, illustrates the principle of confidentiality.

4. Principle of Participation and Dialog

The fourth and final principle is the principle of participation and dialog. It is based on numerous provisions of the Mandate according to which the High Commissioner is bound to take into account the views, assessments and positions of different actors. The most important aspect is that he has to receive information form non-governmental organizations, especially form minority representatives as well as from the governments of the states involved and from local authorities.[82]

[82] Paras. 11a, 23, 26 of the Mandate.

I. The Ambivalence of the Principles – Effectiveness through In-Transparency

All of the above mentioned principles bare an ambivalent character, if compared to the principles governing national procedures in the exercise of public authority. The ambivalence is caused by the fact that the HCNM acts as a political advisor and a legal monitoring body at the same time.

1. Principle of Impartiality

Public authorities as well as all instances destined to solve conflicts are obliged to act unbiased. The credibility of the instances executing or applying law in specific situations depends to a great extent on the impartiality of their actions.[83] At least if impartiality is not required for a decision-making body, an impartial review process is required.[84] Furthermore, impartiality of decision-making is always required, if a public authority acts in the field of adjudication,[85] as the HCNM does through his country- specific recommendations. As there is no judicial review of the HCNM's activities, the HCNM as a decision-making body has to act impartial.

Despite this principle the political context of his activities reveals some inconsistencies concerning this principle. Until 2001 the activities of the HCNM were in practice limited to fourteen eastern participating states of the OSCE.[86] It was only recently that the HCNM became involved in the conflict concerning the Kurds in Turkey. On the contrary nearly all minority related problems in the eastern participating states have been addressed by the HCNM regardless of the violent quality of the tensions. The vagueness of the term of "terrorism" in para. 5, b) of the Mandate allows for a very vague demarcation between conflicts in and outside the scope of the HCNM. This raises the risk of a "double standard" applied by the HCNM.[87] Be it only imagined or real, the double standard poses a serious

[83] ADMINISTRATIVE LAW 292, 327, 328 (Mark Elliot, Jack Beatson & Martin H. Metthews eds., 3rd ed. 2005); Zhiyong Lan, *A Conflict Resolution Approach to Public Administration, in* PUBLIC ADMINISTRATION LAW 189, 197-198 (Julia Beckett & Heidi O. Koenig eds., 2005); JEAN-FRANCOIS LACHAUME, DROIT ADMINISTRATIVE 604-605 (13th ed. 2002); RENÉ CHAPUS, DROIT ADMINISTRATIVE GENERAL 98, 1111 (15th ed. 2001); Peter Badura, *Das Verwaltungsverfahren, in* ALLGEMEINES VERWALTUNGSRECHT 511-512 (Hans-Uwe Erichsen ed., 13th ed. 2006).

[84] CRAIG (note 9), at 469; Lachaume (note 83), at 122.

[85] PIERCE, SHAPIRO & VERKUIL (note 9), at 474-783; CRAIG (note 9), at 98-103.

[86] *See* country recommendations at: http://www.osce.org/hcnm.

[87] Ratner (note 58), at 684.

threat to the credibility of the HCNM and as a result also to the efficiency of his work.

2. Principle of Independence

The autonomy of public authorities is a principle known especially in the context of the administrative law in the USA concerning the Independent Agencies as well as in the UK with respect to the Non-Departmental Public Bodies.[88] These administrative bodies are usually afforded with certain autonomy from other organs and the involved parties in its decision-making and enforcement-procedures. Independent agencies are characterized by the appointment of their members by a higher authority and by the deliberative character of their decision-making process.[89] Against this background it is consistent that the High Commissioner acts in an independent manner, while exercising public authority. He acts independently from other organs and elaborates his general recommendations together with expert groups in a deliberative process. Besides, the political character of his work and the lack of judicial enforcement results in a strong political dependence on other OSCE-organs as well as on other international actors like the EU and the CoE.

3. Principle of Confidentiality

Contrary to the principle of confidentiality, which governs the work of the HCNM, the exercise of public authority on the domestic level – especially through administrative procedures – is often characterized by the principle of transparency and access to documents.[90] The general idea behind free access to such documents is that persons concerned by activity of a particular authority should be able to follow the procedure and the reasoning of a decision in detail in order to be able to initiate a well-founded review of the decision.[91] The principle of transparency is

[88] PIERCE, SHAPIRO & VERKUIL (note 9), at 95-97.

[89] *Id.*

[90] Art. 255 TEC; Sweden: Chapter 1, § 3 Constitution of Sweden (1.1.1975); USA: Freedom of Information Act (FOIA), 5 U.S.C.A. § 552, Pub. L. 89-554, 6 September 1966, 80 Stat. 383; Canada: Access to Information Act, Bill C-43, R.S. 1985 Chapter A-1, 1 July 1983; Australia: Freedom of Information Act, A 1989-46, Gazette 1989 No S 164, 10 May 1989; for a more detailed overview: PUBLIC ACCESS TO GOVERNMENT-HELD INFORMATION: A COMPARATIVE SYMPOSIUM (Norman S. Marsh ed., 1987); ÖFFENTLICHKEIT VON UMWELTINFORMATIONEN. EUROPÄISCHE UND NORDAMERIKANISCHE RECHTE UND ERFAHRUNGEN (Gerd Winter ed., 1990).

[91] Rolf Gröschner, *Transparente Verwaltung: Konturen eines Informationsverwaltungsrechts*, 63 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER (VVDStRL) 346, 355 (2004);

necessary to guarantee the rule of law, in particular the binding effect of statues on public authorities. It is also useful to guarantee an effective participation of the persons concerned in the administrative procedure.[92]

There is no equivalent for the general principle of transparency in domestic administrative procedures even if we take into account possible restrictions[93] to this principle in a national context. The principle of confidentiality in the context of the HCNM has the rationale to increase compliance with the standards of minority protection set or compiled by the HCNM and there is no regulation at all requesting a transparent procedure by the HCNM. The need for confidentiality in order to foster compliance is caused by the specific political field in which the activities of the HCNM take place. The public access to documents, namely the country-specific recommendations, would constitute an instrument of "naming and shaming." While this might be an efficient instrument to enforce the compliance with concrete legal standards in the monitoring mechanisms of human rights treaties, it is doubtful in the context where the aim is the prevention or solution of a concrete conflict. Here the parties involved have to find solutions which not only comply with the standards referred to by the HCNM, but which are indeed acceptable to both sides in order to find a sustainable solution.[94] The aim of the activities of the HCNM is to find a solution together with the parties involved and therefore the door for remarkable commitments and compromises has to remain open, which is achieved through strict confidentiality.

However, even if this specific context explains the need for confidentiality in the context of the HCNM, it is both, eligible and possible to improve the balance between confidentiality and transparency. With regard to the functions of the principle of transparency it would at least be important to inform the minority party concerned about the content of the recommendations and not to leave the decision about information of the latter to the discretion of the state authorities. This would also produce a stronger compliance with the principle of impartiality as mentioned above.

Johannes Masing, *Transparente Verwaltung: Konturen eines Informationsverwaltungsrechts*, 63 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER (VVDStRL) 379-441 (2004).

[92] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001, regarding public access to European Parliament, Council and Commission documents, recital (2).

[93] Art. 4(3) Regulation (EC) No 1049/2001; Masing (note 91), 385; Matthias Jestaedt, *Das Geheimnis im Staat der Öffentlichkeit,* 126 ARCHIV DES ÖFFENTLICHEN RECHTS 204, 225 (2001).

[94] ROB ZAAGMAN, CONFLICT PREVENTION IN THE BALTIC STATES: THE HIGH COMMISSIONER ON NATIONAL MINORITIES IN ESTONIA, LATVIA AND LITHUANIA 10 (1999).

4. Principle of Participation and Dialog

Participation of the persons concerned in the decision-making process occurs in domestic administrative procedures, thus in procedures regulating the exercise of public authority.[95] Participation is an instrument to legitimate the decision from an in-put perspective.[96] The principle of participation and dialog in the context of the HCNM fulfills a similar function as it takes into account the views and requirements of the specific minority concerned and hence legitimates the solution to be found in the recommendations. Nevertheless, there are two major differences to be identified. Firstly, the participation in the context of the activities of the HCNM is by no means justiciable by the minority whereas this is usually the case with regard to domestic exercise of public authority. Secondly, the principle of dialog and participation in the context of the HCNM fulfills more a mediating function than a simple participatory function as national procedures do. This mediating function has only recently been sparsely introduced into national procedures regulating the exercise of public authority.[97] Here the domestic administrative law can benefit from the experiences of the HCNM in the use of mediation as part of the exercise of public authority.

Despite the success of this cooperative and mediative approach of the HCNM it remains problematic that there is no formal procedural provision enabling the parties concerned to achieve the inclusion of their interests in the process of conflict solution. Furthermore the fact that the formal procedures for the selection of experts in the Mandate has never been followed and the lack of any judicial review makes it hard to prove the impartiality of the experts involved and poses a threat to the credibility of the HCNM in the eyes of the parties.

5. Conclusion

The comparative analysis of the principles characterizing the work of the HCNM with procedures regulating the exercise of public authority at the domestic level – namely administrative procedures – indicates a tension between efficiency of the used instruments with regard to the aim of stable conflict prevention on the one hand and a lack of certainty and control on the other hand. It is doubtful whether

[95] CRAIG (note 9), at 101; GEORGES DUPUIS, MARIE-JOSÉ GUÉDON & PATRICE CHRÉTIEN, DROIT ADMINISTRATIF 469-472 (10th ed. 2007); FRANZ-JOSEPH PEINE, ALLGEMEINES VERWALTUNGSRECHT 192 (6th ed., 2002).

[96] *Id.*

[97] Sophie Boyron, *Mediation in Administrative Law*, 13 EUROPEAN PUBLIC LAW 263, 266 (2007); CHRISTOPH A. STUMPF, ALTERNATIVE STREITBEILEGUNG IM VERWALTUNGSRECHT 289-290 (2006).

the tension can be solved and whether it would be even wishful to adjust the HCNM's procedure to domestic administrative principles in all respects.

Nevertheless two suggestions should be made to work fruitful with these results in the future.

The HCNM's work provides a vivid example for the use of mediation processes in cases were the exercise of public authority has to take into account multiple interests. This encourages and informs the introduction of mediative elements in international administrative procedures.

At the same time the work of the HCNM illustrates the usefulness of tools known in the domestic regulation of the exercise of public authority for the purpose of a right based approach to conflict prevention. The monitoring of international obligations is enforced through international jurisdiction. The example of the HCNM chooses a combination of monitoring on the one hand and specific mediative solutions on the other. It is for this combination that the standardized concretion of norms through as the exercise of public authority can be used very effectual in the field of conflict prevention. It allows a comprehensive approach, taking into account the idiosyncrasies of every specific tension in order to generate more sustainable solutions to conflicts.