

## **The High Commissioner on National Minorities: Origins and Background**

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In 2012, it was exactly 20 years since the then Conference on Security and Co-operation in Europe (CSCE),<sup>1</sup> now known as the Organization for Security and Co-operation in Europe (OSCE), achieved consensus on the establishment of a highly remarkable new institution: the High Commissioner on National Minorities (HCNM). At the time, it was a unique instrument for conflict prevention, unparalleled by any other international organization and that has not changed since then.

That the HCNM institution was (and is) a remarkable development is not only related to its mandate, but also to the organization which gave birth to it. The OSCE is known for its strict consensus rule, whereby the consent of all participating States is required for virtually all decisions taken by this international body. The establishment of the HCNM institution in 1992 constituted a remarkable exception to this rule, as the HCNM is allowed to function highly autonomously in one of the most sensitive areas of OSCE's agenda. Moreover, the HCNM mandate is remarkable, as it is far from clear and unambiguous, including the lack of a clear understanding of the concept of national minorities.

In this brief paper I intend to discuss a few issues that explain the background for the proposal to create a HCNM and the obstacles it encountered before consensus could be achieved after lengthy and complicated negotiations at the CSCE Helsinki

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Follow-up Meeting in Spring 1992 (final text laid down in Chapter II of the Helsinki 1992 Document *The Challenges of Change*<sup>2</sup>). These obstacles have left their mark on the mandate which will also be discussed, before answering the question whether the unavoidable compromises for reaching consensus have had a negative impact on the functioning of the HCNM.

### **1. The background and development of the HCNM mandate: a challenge of change**

The origin of the post of High Commissioner is, as always, directly related to the political circumstances of the time in the beginning of the 1990s. After the surprisingly peaceful collapse of the Berlin Wall and Communism, few people would have expected the tragedy that soon was to unfold in the heart of old “civilized” Europe, when the dramatic conflict in (the former) Yugoslavia escalated into an unprecedented bloodbath, while the international community clearly lacked the tools to intervene effectively. Although the CSCE had been recently enriched with some permanent bodies, including a minor Conflict Prevention Centre in Vienna, it became abundantly clear that the organization lacked almost any capacity to take action. The CSCE efforts to bring peace to the Federal Republic of Yugoslavia (FRY) failed miserably, and the EU and the UN didn’t fare much better. The result was that the euphoria of 1990 quickly had transformed into an atmosphere of despair and bewilderment, when the international community was clearly unable to address the almost unimaginable human tragedy in the centre of the old continent. Against this background, the Netherlands government developed the proposal to create a post of High Commissioner on National Minorities, which was designed in such a way that it could prevent the occurrence of similar dramas in the OSCE area. This proposal was one of the “hot” issues during the CSCE Follow-up Meeting in Helsinki from March to July 1992 and at the time few observers expected it to sail through.

The reasons for this skepticism were manifold. Apart from the above-mentioned sensitivity of the subject matter of ethnic minorities and the deviation from the sacrosanct consensus principle, the numerous obstacles raised by various delegations also should be mentioned. Skilful diplomacy by the Netherlands delegation, however, finally resulted in the adoption of a mandate for the HCNM, as it was clear to everyone that, in view of the ongoing tragedies in the former Yugoslavia,

“doing nothing” was not really an option. In other words, there was an urgently felt need to come up with a response to the international crises.

Between 1990 and 1992 the international community had learned a few painful lessons from the Yugoslav tragedy. A few are mentioned here. First, there was a serious lack of knowledge about the ethnic situation on the ground by the international mediators, which had hindered the international community to intervene effectively. At certain times the international community had even contributed to a worsening of the situation thanks to the lack of understanding of the real situation. Second, the Yugoslav drama could escalate so quickly also because the involvement of the international community came too late. It had become clear that intervention should come as early as possible in order to have a chance to deescalate tensions. Third, the international community lacked effective instruments that could have had a real impact on parties. This was also very clear for the CSCE which had just recently been transformed from a diplomatic conference into an operational body with embryonic institutions and powers. The organization badly needed more effective tools to be able to intervene in conflicts at an early stage. Finally, the international community had also come to learn that most (potential) conflicts in the world and in particular also in the CSCE area are related to questions involving national minorities, which often date back for centuries. This required new mechanisms and tools to address such conflicts effectively.

This background explains why at the time there was more or less consensus in the international community that more effective conflict prevention tools were needed and the Netherlands government addressed this challenge by submitting its proposal for a HCNM. Two years earlier the Swedish government had made a somewhat similar proposal, when in 1990 it suggested to establish a Special Minority Representative. However, this new institution was supposed only to act as a fact-finding tool, so much less ambitious than the HCNM proposal by the Dutch.

## **2. Obstacles on the road to the HCNM mandate**

It should not be a surprise that the outcome of the negotiations in Helsinki resulted in a text which bears all signs of compromises and, therefore, is far from clear and unambiguous. But before touching the text of the mandate itself, first a brief overview of the main obstacles is warranted.<sup>3</sup>

A first objection to the Dutch proposal was the fear that a HCNM would stir up tensions: minorities would be “rewarded” by international attention if they would use more drastic or even violent means to have their problems addressed. As a matter of fact, this objection was very serious, as its proponents were of the opinion that the creation of a HCNM would result in the opposite effect, *i.e.* escalation instead of de-escalation of tensions. This objection finally was addressed in the mandate by the so-called “confidentiality” clause<sup>4</sup> as well as in the provision that HCNM should get involved in minority problems “at the earliest possible stage”.<sup>5</sup> Although practice over the past twenty years has shown that this fear was largely ungrounded, the argument is still being used sometimes as criticism of HCNM involvement. In 2012, for instance, some members of the Ukrainian parliament accused the HCNM of stirring up problems in the country through his recommendations on the language law.<sup>6</sup> Second, in Helsinki the CSCE participating States again did not succeed in finding consensus on a definition of what constitutes a “(national) minority”. This had kept parties divided already in 1991, when a CSCE expert meeting on national minorities took place in Geneva. The result was that the CSCE participating States decided to establish a High Commissioner on National Minorities without even the semblance of a definition. The differences between participating States were (and are) too large for a compromise. In this regard the C/OSCE is no exception in comparison with all other international organizations that are involved in national minority issues and none of which was able to achieve a legally-binding definition. Having no definition, however, allows the High Commissioner to act more flexibly than he would have been able to with a definition which would have been characterized by some serious limitations. So, from a point of view of conflict prevention, the lack of a definition is not necessarily a negative issue.

Another disagreement among participating States, closely connected with the previous issue, concerned the question whether the rights of national minorities are individual or group rights. Most States subscribed to the individual approach (reflected in “persons belonging to national minorities”), whereas the fear existed that the creation of a HCNM might lead to recognizing minority rights as group rights. In the text of the HCNM mandate the individual approach clearly prevailed, reflected in the terminology of “persons belong to national minorities” throughout the Helsinki Document. The disagreement also resulted in the strong exclusion of individual cases from the HCNM mandate: paragraph 5(c) of the HCNM mandate prohibits the High

Commissioner to ‘consider violations of CSCE commitments with regard to an individual person belonging to a national minority’.

The prohibition for HCNM to deal with individual cases was also connected to the fear among some participating States that s/he would become an “ombudsman” for the rights of national minorities. The aim was clearly to create a new conflict prevention tool, not to create a new human rights instrument. This finally also resulted in the formal name of the High Commissioner, namely a High Commissioner *on* National Minorities, not *for* minorities. And in the first paragraph of the HCNM mandate it is explicitly stated that the new instrument ‘will thus be an instrument of conflict prevention at the earliest possible stage’ (paragraph 2 of the HCNM mandate).

Another serious obstacle on the road to establishing a HCNM was the fear among several countries of involvement of the new High Commissioner in cases of terrorism. It was a nightmare scenario for countries like Spain, Turkey, and the UK that an independent international personality could potentially interfere in the ongoing violent problems in these States. The whole issue was highly controversial, as many States seriously opposed establishing a link between minorities and terrorism and they suspected some countries would be using this argument as a way to cover up their problems with national minorities by simply opposing the HCNM proposal. The final result was a compromise in the form of a clause that excludes “organized acts of terrorism” (paragraph 5(b)) from the HCNM mandate as well as the prohibition of communication with groups which practice or publicly condone terrorism or violence (paragraph 25). This has become a “useful” tool for several States to ban the HCNM from dealing with their minority problems, such as Turkey. Also the UK has resisted HCNM involvement at the time of the conflict in Northern Ireland.

Finally, a last obstacle has to be mentioned, although it definitely was not the main issue: the fear among some participating States that minority groups in the diaspora would gain unwanted influence by exerting pressure upon the HCNM. This obstacle could only be overcome by the clause on “parties directly concerned” (II.26, II.26a and II.26b of the mandate) which allows communication only with organizations ‘in the area of tension’.

Interestingly enough, the core mandate of the HCNM, as laid down in the Dutch proposal (“early warning”, “early action”, involvement in issues of vital importance to participating States, independence, etc.) caused less heated debates than

the above-mentioned issues. This is remarkable, as not without reason the adoption of the HCNM mandate in July 1992 has been described as ‘a major step forward in the development of what may be called “increasing intrusiveness”’ (Zaagman and Zaal, 1994: 98). This shows again how the circumstances of the time were seen as pressing for a solution, as at this time it would be politically impossible to get consensus on the mandate for an instrument such as the HCNM.

Therefore, at the Helsinki Summit meeting in July 1992, the HCNM core mandate was defined as follows:

The High Commissioner will provide “early warning” and, as appropriate, “early action” at the earliest possible stage in regard to tensions involving national minority issues which have not yet developed beyond an early warning stage, but, in the judgement of the High Commissioner, have the potential to develop into a conflict within the CSCE area, affecting peace, stability or relations between participating States, requiring the attention of and action by the Council or the CSO.<sup>7</sup> (paragraph 3 of the HCNM Mandate)

This mandate leads to many questions which remained unanswered in the text, such as: what exactly is “the earliest possible stage” or what are “tensions” or “national minority issues”. What does it mean that tensions “have not yet developed beyond an early warning stage” and what exactly is meant by “an early warning stage”?

### **3. The first years of HCNM practice**

In spite of the above-mentioned and other obstacles and problems, CSCE participating States managed to get consensus on the text of the mandate which, due to the large differences of opinion and the sensitivity of the subject area, bears all the signs of compromise. The result was a new conflict prevention instrument with far-reaching powers in what is one of the most sensitive areas of OSCE’s agenda, but without a clear and unambiguous mandate, including the lack of a clear understanding of the concept of national minorities. In principle this was a risky endeavour, as it could easily result in disputes with participating States about how to interpret these issues. Although the HCNM rather quickly developed into OSCE’s flagship of conflict prevention, in 1992 this was far from clear and many experts anticipated turmoil. This development was largely due to the most skilful way of operation of the first High Commissioner.

The issue of who should become the first High Commissioner has kept delegations busy from the beginning, including during the Helsinki negotiations. For a

long time during the negotiations there was the assumption that the then Dutch Foreign Minister Hans van den Broek was planning a new position for himself, but that was strongly denied by the Netherlands authorities and indeed it turned out to be “false alarm”. It was quite surprising that in the course of 1992 the name of another well-known Dutchman started being mentioned time and again, *i.e.* the former Foreign Minister and highly experienced diplomat Max van der Stoel. His authority within the international community was so high that his candidacy did not get any serious opposition and was formally confirmed at the CSCE meeting of Foreign Ministers in Stockholm in December 1992. He started his work immediately from a small office in The Hague, made available by the Dutch government, and with some seconded staff from the Dutch Foreign Ministry.

In view of the vagueness and delicacy of the HCNM mandate, some experts were quite surprised at the time that the aging and highly authoritative Van der Stoel was interested in the post at all, as some believed that it could only lead to serious problems in a landscape full of mines.<sup>8</sup> However, Van der Stoel managed to walk through the minefield through extremely careful maneuvering and great diplomacy, which soon earned him the highest esteem within the OSCE community. So, the miracle of the very establishment of the HCNM institution was followed by a second miracle in the form of the development of a conflict prevention instrument which generally is considered to have been highly successful and is usually seen as OSCE’s flagship of conflict prevention. This result was achieved by a very careful and diplomatic approach in which confidentiality, accountability and strict independence played a crucial role. Although the High Commissioner from the very beginning has been engaged in numerous country-visits (first of all to the Baltic States at their own invitation), a major part of his efforts was devoted to clarifying and defining his mandate. He started with inviting the best experts on minority rights and international law in order to discuss all the main issues of his mandate<sup>9</sup> and to develop practical guidelines for his functioning, including an overview of the main mediation and negotiation techniques. The Crisis Management Group of Harvard University played a prominent role in that regard.<sup>10</sup> The High Commissioner also prepared all his country-visits most carefully: whenever he was planning to visit an OSCE State for the first time, efforts were made to organize a one- or two-day workshop with leading experts in order to brief him and to prepare him for his visits. Although he strongly relied on his slowly expanding staff, he nevertheless kept the drafting of his

recommendations to governments, probably his most important task, firmly in his own hands.

This time-consuming and careful process for the newly-appointed HCNM to consider the various options and bring clarity required an enormous wisdom and a good political antenna. In this way Max van der Stoep turned the many risky parts of his mandate into opportunities for successful operations: practical requirements and political expedience resulted in a way of operation that soon acquired wide-spread support within the OSCE community, even though at times HCNM practice deviated substantially from the rules, as agreed upon in Helsinki. In this way the ambiguities and vagueness of his mandate became an element of strength for the new High Commissioner on which his successors heavily relied. In this sense the vaguely and broadly formulated mandate turned out to be a key element of an institution: in other words, the many “open clues” in his official mandate allowed the High Commissioner to develop his policy in the best way as he saw fit. In this sense the establishment and functioning of the HCNM has turned out to be a real “Challenge of Change”, as referred to in the Document with that name adopted by the 1992 Helsinki Summit.<sup>11</sup>

### **Concluding observations**

The decision to establish a High Commissioner on National Minorities in July 1992 was a highly remarkable development, as it constituted a major deviation from the leading principle of consensus within the OSCE precisely in one of the most sensitive areas of international disagreements, *i.e.* the area of national minority problems. The agreed upon mandate was the result of many compromises and, therefore, contained a large number of loopholes that could have become a trap for the first HCNM.

However, instead of the feared disputes between the new HCNM and OSCE participating States, the new institution very quickly acquired an enormous prestige within the organization and is generally seen as the biggest success story on conflict prevention within the OSCE. This is certainly in part due to the vagueness and ambiguity within the official mandate, which allowed the skilful hands of the first HCNM and his successors to mold the mandate into a form that allowed for the best outcome.

At the same time it has to be noted that participating States were only too happy that the many highly controversial issues on national minorities were dealt with skillfully outside the venues of the Permanent Council meetings. It would have been a

nightmare if all these highly sensitive issues would have landed as issues on the regular PC agenda, where the consensus principle would make progress in most cases virtually impossible. In this way such issues were basically “parked away” with the new HCNM institution.

Twenty years have passed since the first HCNM opened his modest office in The Hague. Even though at the present time there would certainly not be the political will to agree upon a similar mandate, it is clear that the institution of the HCNM has gained widespread support both within and outside the OSCE.

### Notes

1. In 1992 the OSCE was still called the Conference on Security and Co-operation in Europe (CSCE). In December 1994, the participating States decided to change the name of the Conference into the OSCE.
2. The full text can be found in Bloed (1993). It is also available at: <http://www.osce.org/mc/39530?download=true>.
3. Good overviews of the negotiation process can be found in Heraclides (1993) and Zaagman and Zaal (1994). These three authors also participated in the delegations of their countries, *i.e.* Greece and the Netherlands, respectively.
4. See paragraph 2 of chapter II of the CSCE Helsinki Document 1992 ‘Challenges of Change’ in ‘Within the mandate, based on CSCE principles and commitments, the High Commissioner will work in confidence and will act independently of all parties directly involved in the tensions’.
5. See paragraph 11(b) of the same document.
6. For the involvement of the HCNM in this issue in Ukraine, *see e.g.* his press release of July 26, 2012 at: <http://www.osce.org/hcnm/92418>.
7. The Committee of Senior Officials (CSO) no longer exists; its functions are now being performed by the weekly meeting Permanent Council of the OSCE in Vienna.
8. *See e.g.* various contributions in: *Security and Human Rights – Special Issue – A Tribute to Max van der Stoep* 22(3) (2011) (special edition of the OSCE quarterly SHR, published after the passing away of Max van der Stoep in 2011, containing many contributions from persons who have worked with him over the years).
9. An interesting discussion of the various aspects is presented by the first policy assistant of the HCNM: Zaagman (1994).
10. *See e.g.*: Conflict Management Group (1992), *Early Warning and Preventive Action in the CSCE: Defining the Role of the High Commissioner on National Minorities*. A Report of the CSCE Devising Session, Harvard Negotiation Project. Cambridge, MA: Harvard Law School, October 19, 1992.
11. See the document “Challenges of Change”, adopted at the Helsinki Summit of the CSCE in July 1992. See note 2.

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