THE HELSINKI ACT AND INTERNATIONAL LAW

par

J.E.S. FAWCETT

The Helsinki Act is a new kind of animal. It has the body of a treaty, the legs of a resolution, and the head of a declaration of intent. It is worth asking then how its provisions should be categorised in international law, not only because of the controversy that has arisen over its implications and effects, but also because it may show that the categories themselves must be modified or extended.

The Conference on Security and Cooperation in Europe, after meetings in Helsinki, Geneva and again Helsinki between July 1973 and August 1975 adopted a Final Act, signed by heads of government of thirty five countries, including four ministates — Holy See, Liechtenstein, Monaco and San Marino. All the remaining thirty-one are members of the UN except Switzerland, and include all the members of the Council of Europe and of the European Communities, and the United States and Canada, outside Europe. All parties to the Warsaw Pact were represented but eight countries were not members of NATO or parties to the Warsaw Pact (1). In face of the humanitarian provisions of the Final Act, it is notable that the International Covenants — Civil and Political Rights, and Economic Social and Cultural Rights — which came into force in 1976, have been ratified by the USSR and associated countries (2), but by only six members of the Council of Europe (3), and Canada.

The Final Act is divided into what have been called four « baskets ». Basket I — Questions relating to Security in Europe — sets out ten principles guiding state relations and means of giving effect to them, adding « confidence-building measures ». Basket II deals with Cooperation in Economics,

(1) Austria, Cyprus, Finland, Ireland, Malta, Spain, Sweden, Switzerland.

(2) Viz. in addition to Byelorussian SSR and Ukrainian SSR, Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Romania, Yugoslavia. Poland has not ratified them.

(3) Cyprus, Denmark, Federal Republic of Germany, Norway, Sweden and United Kingdom.

Science, Technology and Environment, including sections on commercial exchanges; industrial cooperation; trade and industrial cooperation; science and technology; environment; and cooperation on transport, tourism, migrant labour, and personnel training. Security and cooperation in the Mediterranean is given special attention. Basket III covers cooperation in Humanitarian and other fields : in particular, human contacts; information; cooperation and exchanges in the field of culture, and in education. Basket IV provides for the follow-up of the Conference.

The Final Act is not formally a treaty. This is shown in a number of places : for example, the Final Act is expressly described as « not eligible for registration under Article 102 » of the UN Charter; statements under Principle X (4) comprise, first, a declaration that « The participating states will fulfil (doivent s'acquitter. French text) in all good faith their obligations under international law, both those obligations arising from the generally recognised principles and rules of international law and those obligations arising from treaties or other agreements, in conformity with international law, to which they are parties », and then that « The participating states, paying due regard to the principles above and, in particular, to the first sentence of the tenth principles [just quoted] » ... note that the present Declaration does not affect their rights (n'affecte pas : French text) and obligations, nor the corresponding treaties and other agreements and arrangements. But they also in « Follow-up to the Conference » (Basket IV) (5) « Declare their resolve, in the period following the Conference, to pay due regard to and implement the provisions of the Final Act : (a) unilaterally, in all cases which lend themselves to such action; (b) bilaterally, by negotiations with other participating states; (c) multilaterally, by meetings of experts of the participating states, and also within the framework of existing international organisations... More particularly the ten Principles guiding Relations between Participating States are followed by a declaration by the participating States that « they are resolved to respect and carry out, in their relations with each other, *inter alia,* the following provisions which are in conformity with the Declaration on Principles... (6) The provisions are directed essentially to Principles II-V (refraining from the threat or use of force; inviolability of frontiers; territorial integrity of States; peaceful settlement of disputes) and IX (cooperation among States).

We have then undertakings to fulfil in good faith obligations under both customary and conventional international law, but the Final Act is not to « affect » those obligations; again there is a common resolve to implement the provisions of the Final Act, expressed in part in relation to Principles II-V and IX and in part in general terms, which must be taken to include Principles VII (respect for human rights and fundamental freedoms) and

(4) See *Questions relating to Security of Europe : 1 (a) Principle X.*

(5) See *Follow-up to the Conference : 1 (a) (b) (c).*

(6) See *Questions relating to the Security of Europe : 1 (b).*

VIII (equal rights and self-determination of peoples), since there is no express exclusion of them.

The undertakings in the Final Act do not therefore, as a matter of law, add to or modify the obligations of participating States under customary or conventional international law; their political implications are however a different matter to which we will return. The common resolve to implement the provisions of the Final Act calls for closer attention in respect of Principles VII and VIII. Principle VII does not appear to extend or interpret rights and freedoms as set out in the various international instruments, but recognizes « the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations among themselves as among all States ». The participating States therefore « will constantly respect these rights and freedoms in their mutual relations, and will endeavour jointly and separately, including in cooperation with the United Nations, to promote universal respect for them ». The emphasis is placed in these two propositions on the mutual relations of states, which are in fact the area of concern of the whole Helsinki-Belgrade enterprise; nevertheless, the first proposition does not escape the fact that the respect for, and protection of, human rights and freedoms is primarily a domestic matter in each country. But Principle VI states that « the participating States will refrain from any intervention, direct or indirect, individual or collective, in internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations ».

How then are the principles of protection of human rights and of non-intervention to be reconciled in the European context ? It may be seen that Principle VI differs from Article 2 [7] of the UN Charter in two ways : first, it disallows intervention by individual states as well as collective intervention by international organisations or common action; and secondly, it does not qualify what is within domestic jurisdiction by such terms as essentially or solely, and therefore gives domestic jurisdiction its widest sense; even external affairs are seen as capable of falling within it. What then is intervention ? It is suggested, because the other paragraphs of Principle VI speak of armed intervention, forms of coercion by a State to secure some advantage by subordinating the interests of another State to its own, and assistance to subversive groups aiming at violent overthrow of a regime, as being expressly excluded by the principle of non-intervention, that it extends only to the use in some form of force or coercion. The same reasoning might well be applied to Article 2 [7] of the UN Charter. It might be said that, because enforcement measures under Chapter VII are expressly excluded from the rule, « intervene » in that paragraph is to be understood to mean interfere by force or coercion. The UN has at least by implication so interpreted it; for the General Assembly has, in treating the protection of human rights and freedoms as of international concern, adopted numerous Resolutions condemning or urging action against, their denial under particular regimes. In short, intervention by the UN in situations essentially within the domestic

jurisdiction of a State may, consistently with the UN Charter and apart from Chapter VII, take the form of public debate, admonition and recommendations by its principal organs where the protection or denial of human rights and freedoms is in issue.

However, Principle VI of the Helsinki Act is not to be understood in the same way. In the first place, what is of international concern — and it is now widely accepted that human rights protection is — falls naturally within the competence of the UN, but not of individual States, as far as intervention may go; and in any case intervention by individual States — as well for that matter as collective intervention — is expressly excluded by Principle VI. Secondly, an essential factor in UN intervention is publicity. What a General Assembly Resolution, on the state of human rights in a particular country, may achieve is to induce or compel it at least to protect the image of public authority as seen by other countries as well as its own people. It is this external influence in the management of domestic affairs that characterises intervention, as practised in the UN. It follows that even if it be said that Principle VI is concerned primarily with the use of force or coercion, the exercise of public pressure would still be intervention excluded by Principle VI. But it is an important corollary that private intervention is not excluded. So at least in respect of the United Kingdom, Ministers and senior officials take the opportunity of bilateral contacts with their opposite numbers in other countries to stress the concern, of government andd often the general public, over particular instances of denial of human rights.

However, the whole of the reasoning so far advanced might well be rejected on some political approaches to the implementation of the Helsinki Act. So it might be said that the denial of rights in — for example according to the speaker — Corsica, Ukraine or Northern Ireland, are fit occasions for public criticism and pressure at governmental level on the moral grounds that the protection of human rights is now an accepted principle of State policy or that the denials alleged are harsh and oppressive, or on the tactical ground that public pressure on the State responsible may induce a change of position, to the advantage of its critics, in negotiations on trade or defence; human rights, in short, can be an instrument in SALT. Such political approaches would be defended by the argument that the Helsinki Act is not itself a treaty imposing new or extended obligations on the participants, and that, within the UN Charter, States are free to make open criticism or condemnation of the conduct of others; or that Principle VII of the Helsinki Act may be given priority as a matter of moral obligation or tactical advantage. A legal adviser to government might point out in reply that the Helsinki Act itself expressly says that the stated Principles are « all of primary significance », and therefore Principle VI cannot be passed over by any other; that the purpose of the Helsinki Act must be a guide to its interpretation, as with other international instruments, and, since it is improved mutual relations and cooperation, this must prevail over surveillance and evaluation of domestic law and practices; and that in any case, there are limits to the international protection of human rights set even in the UN Covenants and European Convention, for the observance of which the Helsinki Act calls.

This apparent conflict between a legal interpretation of the Helsinki Act and political approaches to it could begin to be resolved, if the traditional categories of international law were enlarged. We have at present a dichotomy. Propositions in international form are divided into those described as binding, and those considered to be not binding, being recommendations, declarations of intent, or statements of policy. The first category is confined to propositions in treaties as described in the Vienna Convention (7), and generally accepted propositions of customary international law. The weakness of traditional international law is that these categories have no place for political obligation. The members of the community of nations have political obligations, analogous to the moral and social obligations of individuals. They take broadly two forms, as axioms on which the order of the international community rests, and as policy commitments, serving a common interest and so engaging reciprocity. The UN Charter and the Helsinki Act both enunciate as axioms of international order the peaceful settlement of disputes, the renunciation of the use of force, the territorial integrity and political independence of States, and the self-determination of peoples. The obligations implied for international relations do not depend on any rule of law; the rule of law itself depends on their observance as political obligations. Their formal conversion into legal obligations in the UN Charter — an « international agreement », which is « binding on the parties to it » and « governed by international law » (8) does not change their nature though it may strengthen their enforceability. The Helsinki Act is in part a restatement or implied interpretation, in the European context, of the UN Charter, corresponding to General Assembly Resolution 2625-XXV. It sets out in effect the political obligations necessary to « peace, justice and security » in Europe and elaborates them into a number of specific practical undertakings. Those who refer to the Act as the Helsinki Agreement are legally inexact but politically correct.

(7) Articles 2 (1) a and 26 : « Every treaty in force is binding upon the parties to it and must be performed by them in good faith ».

(8) The fact that the Vienna Convention is not retroactive in effect (Article 4) does not qualify the description.