The International Law Dimension of the German Minorities Policy

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Abstract. Ethnic Germans have traditionally been living in a number of other European states as national minorities. These minorities can in accordance with international law count on the support of their mother country as a protective power. During the Cold War, such German initiatives were often seen in Eastern Europe as interference into internal affairs and accordingly rejected. After the end of the block confrontation a significant number of bilateral agreements have been concluded in which the rights of German minorities are addressed. In these treaties the CSCE/OSCE documents play an important role. Doubtless these documents have no legal force. In the light of the theory of law it seems of great interest that clauses concerning minority protection have been integrated into binding international treaties. The treaties between Germany and Central and Eastern European states are examples for the ongoing process of “legalising” politically binding norms. All include, in one way or another, a reference to the political CSCE/OSCE-agreements relevant for minority protection. The relevant regulations are not only confirmed as binding for the signatory states, but rather that they are, although to varying degrees, being declared as legally effective instruments in bilateral relations. This “upgrade” raises these political norms to norms of international law.

1. Introduction

Large groups of ethnic Germans have traditionally been living in a number of other European states as national minorities. Although there is no universally accepted definition of the term,¹ in East Central Europe and in Germany national minorities are commonly understood to be population groups whose ethnic kins are the titular nation of another state.² In contrast to other minority groups, national minorities can count on the support of their mother country as a protective power, as the case of South Tyrol and Austria demonstrates

¹ See J. Packer, “On the Content of Minority Rights”, in: J. Räikkä (ed.), Do We Need Minority Rights?, Martinus Nijhoff, The Hague, 1996, p. 126. This has also led to confusion concerning the German minorities several times in the fifties.

where Austria’s role has explicitly been defined in an international treaty.\(^3\) The Åland Islands solution is a similar one.\(^4\)

However, other cases – including that of German minorities in Eastern Europe after the Second World War – indicate the difficulty that mother countries face in committing themselves to protecting their kin groups in other states. Especially during the Cold War, such initiatives were often seen as interference into another state’s internal affairs and accordingly rejected or hindered. It were the documents of the CSCE and especially that of the Vienna CSCE Conference in 1986 which addressed the issue and accorded members of national minorities the right to have cross-border contacts with citizens of other states with whom they share common ethnicity or cultural traditions.\(^5\) This approach was taken up again at the 1991 CSCE expert meeting on national minorities in Geneva, when it was determined that “issues in relation to national minorities and the fulfillment of international obligations with respect to the rights of members of national minorities are a legitimate international concern and therefore not exclusively an internal affair of the respective state”.\(^6\)

This principle was confirmed, rather than introduced, by the 1990 Charter of Paris for a New Europe\(^7\) and had been the German policy approach \textit{vis-à-vis} host states of German minorities for a long time. Obviously, it was only after the collapse of communism in Eastern Europe that the respective opportunities arose more widely in former socialist countries as well. Building on the successful policy towards the German minority in Denmark, a number of bilateral agreements have been concluded in which the rights of German minorities are addressed. In many of these bilateral good neighbour- and friendship treaties the CSCE/OSCE documents play an important role. Doubtless these documents have no legal force. They have – at best – a soft law character, but they do indicate a possible direction for legal development.\(^8\) In the light of the theory of law it seems of great interest that some clauses concerning minority protection have been integrated into


\(^8\) D. Thürer, “National Minorities: A Global, European, and Swiss Perspective”, \textit{The Fletcher Forum of World Affairs} 19, 1995, 1, p. 60. See also the Panel Discussion of the Amer-
binding international treaties.\textsuperscript{9} The treaties between Germany and Central and Eastern European states are very good examples for that development.

2. The German Minority in Denmark

The Bonn-Copenhagen Declarations of 1955 were the first successful step to address the issue of German minorities after the Second World War. The purpose of the declarations was formally to ensure the best possible conditions for the minorities on both sides of the border. But the declarations also had another important function. They reflected the political recognition on the part of the two governments of legal rights of the two minorities and a common will to cooperate in solving the problems of the minorities.\textsuperscript{10} They managed to overcome the German-Danish national “conflict”\textsuperscript{11} and contributed to a popular attitude towards minorities that sees them as a cultural enrichment rather than as a threat.\textsuperscript{12} In view of the century-old “border struggle” between the two countries, this has been a remarkable success, and could well be of some model character for similar conflicts elsewhere.

Nevertheless, the situation of the German minority in Denmark is different in a number of ways from that of other such minorities. Both the Danish and the German minorities in the region did not come into being because of migration, but because of the alteration of borders. Furthermore, the German response to their being a minority was very different from that of the Danes. While the former insisted on the \textit{objective} fact of (kin-) ethnicity and sought a bilateral agreement to secure their rights, the latter’s approach was informed by the \textit{subjective} declaration of their nationality, making the protection of a minority an internal affair of the respective host-state. Consequently, the two kin-states had a very different policy approach, too. Based on the concept of group rights, the state government of the “Land” (the Federal State) Schleswig-Holstein in Germany granted to the Danish minority certain rights in a unilateral declaration on 26 September 1949. The Danish government, in turn, was not prepared to do the same. In a statement of 27

\begin{thebibliography}{9}
\bibitem{9} A list of these treaties and agreements is included in the Pact of Stability. See for details F. Benoit-Rohmer, \textit{The Minority Question in Europe}, Council of Europe Publishing, Strasbourg, 1996, p. 30.
\bibitem{10} Ministry of Foreign Affairs, 40th Anniversary of the Copenhagen-Bonn Declarations, Copenhagen 1995, p. 5
\end{thebibliography}
October 1949 they merely guaranteed that all constitutional rights would, without any limitation, apply to the German minority as well, thus excluding any affirmative action or positive discrimination for the benefit of the minority as a whole. This, however, was changed in the context of Germany’s accession to NATO in 1955. One of the pre-conditions for that was that any bilateral problem potentially straining the internal relations of the alliance be eliminated, and this included the situation of the minorities in the German-Danish border region. The Danish refusal to sign an international treaty left only the possibility for a unilateral declaration by each government. In a joint ceremony in Bonn on 29 March 1955, Chancellor Adenauer signed a “Declaration by the Government of the Federal Republic of Germany” and the Danish Foreign Secretary Hansen signed a “Declaration by the Danish Government”. In addition, it was agreed in a concluding document on the negotiations that both governments would present their respective declarations to parliament for approval. This way, a procedure was chosen that was similar to the ratification process of international treaties without actually being one. Instead, two single legal acts had been produced that assure members of both minorities that constitutional rights and freedoms of their respective host-states apply to them without any limitation. In each declaration’s second paragraph, individuals are guaranteed the right to declare their nationality and their affinity to either German or Danish culture without the authorities being allowed to challenge this declaration in any way. Moreover, the use of the mother tongue must not be restricted. A guarantee of parliamentary representation, however, is not included in the declarations. The principle of reciprocity, on which both declarations are based, is the key difference between the German-Danish situation and a number of other minority conflicts involving German minorities. The existence of analogous minorities and the preparedness of each kin-state to be simultaneously a responsive and responsible host-state made it possible that concrete regulations in the 1955 declarations could be kept down to a minimum without endangering the spirit of the project. In addition, the process of European integration superseded the German-Danish minority problem. The membership of both states in the European Communities and later on in the European Union diminished the importance of borders and increased that of the region, thus putting minority policy in a new perspective, too.

3. The German Minority in Poland

According to Polish sources Poland hosts a German minority of nearly half a million persons. The German Federal government speaks of nearly one million Germans in Poland. The German minority undertook in the last years a process of reorganisation. This was possible due to the new Polish constitution of 2 April 1997 which guarantees minority protection and the participation of minorities in the local affairs. But the improvement of the situation of the German minority was also a consequence of the development of the bilateral relations between Germany and Poland. Especially the German-Polish treaty of 17 June 1991 has made a significant contribution to the calming and stabilisation of the situation of the German minority in Poland. In particular, the negotiations leading up to the treaty succeeded in overcoming the long-standing Polish position that there was no German minority in Poland at all. This position was maintained until the 1980s, and most profoundly expressed in a 1979 report of the then People’s Republic of Poland to the UN Human Rights Commission submitting no information on the situation of minorities at all.

Today the existence of a German minority in Poland is not disputed any more. This, however, was not only a success of German diplomacy and negotiation, but must also be attributed to the fact that the CSCE had taken up the topic of minority rights and minority protection during the 1980s so that internationally accepted legal standards were already existing. Furthermore, it was crucial for the success that the German government decided not to insist on addressing the issue of expulsion of the Germans after the Second

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World War, even though this was not without problems domestically. The course of negotiations leading up to the 1991 treaty confirms this as much as the Polish view that a breakthrough was eventually only achieved because of the possibility of relating the minority issue to CSCE standards. Yet it is not only the relation of the CSCE standards that makes this treaty important, but also the fact that it was the first document to be signed between the Federal Republic and a former east block state that included provisions in relation to German minorities.

The specific regulations in this respect are detailed in Articles 20 and 21. Based on the principle of reciprocity, members of the respective (German or Polish) minorities are guaranteed the right to express, maintain, and develop their identity individually or collectively and are assured protection from forced assimilation (Article 20/1). The treaty leaves it to the individual to determine his or her membership in the minority, independent of objective criteria of descent. Specific rights accorded in Article 20 No. 3 include the private and public use of the minority’s mother tongue, the foundation of organisations for the preservation of their identity, and the right to use their mother tongue as language of instruction in religion classes. In addition, cross-border contacts with members of their ethnic group are permitted and members of the minorities have the right to use their names in their native language. Poland has committed to protect the ethnic, cultural, linguistic, and religious identity of the minorities on its territory and to establish conditions in which the development of this identity can be promoted within the existing legal framework. Furthermore, it has been acknowledged in the treaty that constructive co-operation in this area is of particular importance as it strengthens the peaceful co-existence and good neighbourly relations between the German and Polish peoples while at the same time contributing to reconciliation and mutual understanding. Instruction in German, not affecting the need to learn the country’s official language, and the use of German by authorities will be provided for as far as necessary and possible within the framework of existing legal regulations in Poland. History and culture of the German minority will be considered more strongly in education. Minority members have the right to participate actively in public life, including in decisions affecting the protection and promotion of their identity. Necessary steps in this respect will only be taken after a consultation process according to the decision-making procedures of the respective state (Article 21).

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The German-Polish treaty is an effective instrument to solve the complicated problems that arose between the two states in the aftermath of the Second World War.\textsuperscript{25} It has also affected the situation of the German minority in Poland positively. The treaty demonstrates that comprehensive minority protection presupposes a democratic constitutional framework of the states involved. Aimed at German-Polish reconciliation and based on the principle of reciprocity, the treaty is fundamentally different from treaties concluded in the inter-war period under the League of Nations regime that tried to solve minority problems independently of the state of bilateral relations, thus making minorities a factor of political confrontation.\textsuperscript{26} A further important feature of this treaty is the fact that it does not constitute a specific bilateral arrangement, but rather that it is an application of standards set by international organisations, thus underlying the integration of both states into the European catalogue of norms.

4. The German Minority in Romania

The German-Romanian friendship treaty of 21 April 1992 is an important document with respect to the legal position of the German minority in Romania, as it provides a solid and comprehensive basis for a future of the minority in Romania. Nevertheless, the treaty was signed too late in order to relieve the emigration pressure caused by decades of suppression under communism. The lost trust in the state authorities could and can be rebuilt only gradually, despite the fact that the Romanian state is obviously interested in the minority staying in the country and has had some success over the past years to encourage members of the ethnic German community not to emigrate to Germany.\textsuperscript{27} The treaty has incorporated the most far-reaching minority regulations existing in international law, above all the 1990 Copenhagen Document on the Human Dimension of the CSCE. This and other relevant CSCE documents have been declared law in the bilateral relationship between German and Romania according to Article 15 of the treaty.\textsuperscript{28} Based on this, the treaty goes on to specify the rights of members of the German


\textsuperscript{28} H.-J. Heintze, “Die Nachbarschaftsverträge der Bundesrepublik Deutschland und die Verrechtlichung von OSZE/KSZE-Verpflichtungen”, in: Th. Schweisfurth, W. Poeppel and
minority in Romania, i.e., the rights Romanian citizens of ethnic German origin are accorded in addition to general human rights and liberties, which they can exercise without discrimination and in full legal equality with all other citizens. Thus, they are entitled, individually or collectively, to maintain, express, and develop their ethnic, cultural, linguistic, and religious identity. The Romanian state will refrain from all attempts of forceful assimilation. Members of the German minority have the right to participate actively in public affairs, including all matters relating to the protection and promotion of their identity. The belonging to the German minority in Romania is a private and individual matter which must not be used to the detriment of the respective individual.

Similar to other treaties on good neighbourliness, the treaty with Romania includes a mechanism to resolve disputes arising in relation to the regulations of the treaty, which proves once more that both signatories are serious about the treaty’s implementation. According to this mechanism, both states are entitled to apply the relevant CSCE dispute resolution procedures in case of differences in relation to interpretation or implementation of all articles relating to minority rights. In the interest of the German minority and in order to promote mutual understanding, trust, and respect, both parties declared that neither of them would claim the inapplicability of any of these dispute resolution procedures.

Furthermore, Article 15 compels Romania to protect and support the identity of members of the German minority by concrete measures. Favourable conditions are to be provided for the operation of German schools and cultural institutions in areas where members of the minority live. Romania is to facilitate measures taken by the German government in support of the minority group. A German-Romanian governmental commission on minority-related issues is to meet on an annual basis, to discuss the situation, and to consult on future steps. Moreover, the signatories agreed to back up concrete programmes to secure the existence of the German minority in Romania and to support its social, cultural, and economic life. These measures, however, are to be taken in a way that they do not violate the rights of other Romanian citizens.

So far, the treaty has been implemented successfully and to mutual advantage. The German minority is organised in the Democratic Forum of Germans in Romania, which is based in Hermannstadt. The forum is an umbrella organisation of five regional branches with about 50,000 members in total. In


the Romanian parliament, the German minority is represented with one, constitutionally guaranteed member. The positive relationship between minority and authorities has been further enhanced by the inclusion of ethnic Germans in Romania in the restitution programme of land and property that was collectivised under communism. In contrast to these successes concerning the (very small) German minority the treaty with Hungary was the subject of considerable disagreement and unsolved differences between Romania and Hungary. The parties declared in the treaty that they shall apply the norms and political commitments laid down in, amongst other international documents, the Copenhagen Document of the CSCE and Recommendation 1201 (1993) of the Parliamentarian Assembly of the Council of Europe. In this way they declared these documents as binding law. This is much more than it is the case between Germany and Romania, because it includes also the very controversial Recommendation 1201. However, in an accompanying annex both parties agreed that Recommendation 1201 does not refer to collective rights, nor does it impose upon the obligation to grant to the concerned persons any right to a special status of territorial autonomy based on ethnical criteria.\footnote{R. Sardemann, “The Hungarian Approach to Minority Rights”, *Helsinki Monitor* 4, 1997, p. 66.} After a new government came into power in 1997 the inter-ethnic tensions – especially between ethnic Hungarians and ethnic Romanians in Romania have been greatly reduced since that time.

5. Ethnic German Minorities in the Former Soviet Union

5.1. The German-Soviet Treaty of 1990

The treaty on good neighbourly relations, partnership, and co-operation concluded between the Federal Republic of Germany and the then Soviet Union on 9 November 1990 defines the legal status of the German minority in Russia, where the treaty continues to be valid after the dissolution of the Soviet Union. In Article 15 the two signatories agreed to increase the opportunities for teaching and learning each other’s language in institutions of secondary and higher education in both countries, including the creation, where possible, of bilingual schools. Members of the German nationality in now Russia and Russian citizens residing permanently in Germany are guaranteed the right to develop their national, linguistic, and cultural identity.

In the course of the further implementation of the treaty, Germany and Russia signed a protocol on 10 July 1992 on “Co-operation for the Gradual Restitution of Statehood for Ethnic Germans in Russia”.\footnote{In: *Bulletin des Presse- und Informationamtes der Bundesregierung*, 45, 1992, p. 410.} In this protocol,
the Russian government committed itself to the recreation of the Volga Republic, given that this would not impede on the interests of the local Russian population. The two important dimensions of this part of the protocol are that the injustice of the dissolution of the Volga Republic under Stalin was to be corrected, and that a territorial centre for the representation of ethnic German interests in the Russian Federation would have been established.  

The protocol went on to declare the commitment of both governments to contribute to the preservation, expression, and development of the national and cultural identity of the German minority in Russia. The Russian government was supposed to develop a plan for the gradual implementation of the treaty and the protocol, to determine which transitional and additional arrangements would be necessary in this context, and to establish regulations that would enable ethnic Germans to enjoy the right of land property transactions. Furthermore, the status and competencies of future autonomous territorial units were to be drafted in accordance with the constitution and relevant simple legislation of the Russian Federation.  

With respect to cultural, social, and educational institutions, both governments committed their support – Russia took on the responsibility of providing the legal and organisational framework, Germany assured the supply of funds and personnel. Although the Russian government officially notified its German counterpart on 23 March 1993 that the protocol had been put into force, its implementation was seriously hampered by the opposition of the local Russian population, despite the international legal status of the document and the generous material support from Germany. The restoration of the Volga Republic, therefore, has more or less been abandoned. More successful was the creation of, and further support for, the German Rayons in Siberia. Because of their relative proximity to German settlement areas in Kazakhstan, they can offer for ethnic Germans migrating from there because of the emigration pressure they experience in this former Soviet republic.  

Nevertheless and despite the existing legal framework, the success of the German minority policy vis-à-vis Russia has been rather limited so far, extending only to a handful of villages and to the promotion of the German language.  

5.2. The Legal Status of German Minorities in Other CIS States

Kazakhstan is host to approximately 600,000 ethnic Germans who mostly live in the northern parts of the country. Many of them are still continuing to emigrate – either to Germany or to the German Rayons in Siberia. The

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Kazakh government has repeatedly emphasised its regret over the emigration of members of the German minority, primarily because of the drainage of skilled labour and of economic and professional resources. Supported by the German government, Kazakhstan has taken steps to improve the living conditions of ethnic Germans in the country. An inter-governmental conference has been in operation since 1992 and is co-ordinating these efforts, which, by 1997, had resulted in a decrease of emigrants. Given the territorial distribution of the minority, German support is focussed on the northern part of the country and on agricultural and humanitarian programmes.

The situation in the two other Central Asian countries with formerly strong German minorities is much worse. Of the 100,000 ethnic Germans in Kyrgyzstan in 1989, most have left the country, similarly to the about 30,000 members of the minority in Tajikistan in 1990. The small number of ethnic Germans who have so far resisted the nationalist emigration pressures are supported by the German government with humanitarian aid.34

A slightly larger group of ethnic Germans of about 40,000 lives in the Carpathian area in Ukraine. Their legal status had been unclear for a long time, because the Ukrainian government was not prepared to come to a settlement of the citizenship issue, which affected in particular those members of the minority who moved to Ukraine after 1992 but could not prove that they, or their ancestors, had been living there prior to the deportation of 1941. Even though the citizenship issue is still not completely resolved, a German-Ukrainian agreement, signed on 3 September 1996, regulates the status of all residents in Ukraine – citizens and non-citizens alike – who declare themselves for ethnic, cultural, linguistic, or religious reasons as members of the German national minority. Their identity is now being protected through the commitment of both signatories. Although the agreement does not explicitly state the legal validity of the accord, it reiterates the applicability of OSCE regulations in relation to minorities. In comparison with the German-Romanian friendship treaty this statement is obviously much weaker.

6. The German Minority in the Czech Republic, Slovakia and Hungary

Signed on 27 February 1992, the Treaty on Good Neighbourly and Friendly Relations between the Federal Republic of Germany and the Republic of Czechoslovakia regulates the status of the German minority in its article

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34 There are general problems concerning the protection of minority rights in Kyrgyzstan as shown by the activities of the OSCE-High Commissioner on National Minorities. See The Foundation on Inter-Ethnic Relations (ed.), The Role of the High Commissioner on National Minorities in OSCE Conflict Prevention, The Hague, 1997, p. 64.
twenty. Apart from the right to choose and declare their nationality freely, the members of the minority are accorded a catalogue of rights aimed at enabling them to preserve their specific identity. In this context it is of particular importance that, going beyond earlier agreements, the signatories accept political obligations of the CSCE process, especially the of Copenhagen document, as legally binding.

According to the treaty, members of the German minority have the right, individually or collectively, to express, preserve, and develop their ethnic, cultural, linguistic, and religious identity. They are legally protected from forced assimilation and their membership in the German minority must not be used at their disadvantage.

After the dissolution of Czechoslovakia, the treaty continued to be a valid legal document in both successor states. In the Czech Republic it fits in very well with the comprehensive framework of minority rights incorporated in the constitutional and other legislative frameworks. Members of minorities are generally allowed to form their own ethnic organisations and to disseminate and receive information in their native language. There is no official language in the Czech Republic, and local communities are entitled to create schools with special minority language classes, pending the approval of local education authorities. However, as the German minority is comparatively small (only 0.3% of the total population) and lives rather dispersed over the country, German is only taught as a foreign language in Czech schools.

In the Slovak Republic, the continued validity of the treaty was ensured by a declaration of the two governments on 24 March 1993. Although the Slovak state is committed to permit measures to support the German minority, the political practice of minority rights protection suffers from the contradiction between the internationally co-operative minority policy pursued by the Slovak government and the nationalist determinants of its domestic political process. Therefore Slovakia has been a state to which the OSCE-High Commissioner on National Minorities has paid considerable attention in the past. The reason for this has not been the treatment of the small German but of the large Hungarian minority. 35

Closely modelled along the lines of the German-Polish treaty, the treaty with Hungary signed on 6 February 1992 includes the farthest-reaching incorporation of international standards among any agreements signed by the German government since 1990. According to Article 19, the signatory states agree on the legally binding character of the Copenhagen and other CSCE/OSCE documents – a formulation that allows the interpretation that future agreements could be automatically incorporated as well. This is a rather

far-reaching formulation. In the light of the theory of international law one can have some doubts on the idea behind this concept to declare also future political norms as legally binding. In a certain way the German-Hungarian treaty reflects the excellent minority policy of Hungary. This policy is a consequence of the fact, that Hungary feels responsible for the important number of ethnic Hungarians living abroad and this issue forms a central element in the foreign policy of that state. One of the goals is to internationalise the problem of national minorities. Insofar there are some similarities between the interests of Germany and Hungary in that field. Therefore it is not surprising that the Good Neighbourhood treaty between both states contains very strong statements concerning the minority protection system of the OSCE.

7. Conclusion

The foremost contribution made by the treaties discussed above to the development of a mechanism of minority protection under international law is the fact that they all include, in one way or another, a reference to the political CSCE/OSCE-agreements relevant for minority protection. In this respect it is particularly interesting that these regulations are not only confirmed as binding for the signatory states, but rather that they are, although to varying degrees, being declared as legally effective instruments in bilateral relations. This “upgrade” raises these political norms to norms of international law.

Although the CSCE/OSCE regulations on minority protection include a number of elements of international customary law, the specific extent of the latter is still disputed. It is therefore all the more important that CSCE/OSCE norms are being incorporated into international contract law. The necessary legalisation of CSCE/OSCE norms in international treaties on the protection of minorities is served by the treaties Germany has concluded with a number of former socialist Countries in Central and Eastern Europe. Even though there are no reports so far on the legal importance and practical impact of the incorporation of these norms in the treaties, the contribution and significance of the latter has been emphasised in the Stability Pact for Europe of 20 March 1995. Aimed at a prevention of conflicts in Central and Eastern Europe, candidates for EU accession are asked to solve their (internal and bilateral) minority problems and to work towards transparent borders. Apart from the

37 R. Sardemann, op. cit., p. 63.
pioneering role the German treaties have played on the bilateral level, one ob-
vious, and in some ways even more important, political consequence of their
existence is that decades-long political tensions arising from the existence of
German minorities are now a matter of the past as the minorities have become
bridges in the relationship between Germany and its neighbours.