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Interregional Norms Governing Migration Processes

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ABSTRACT

This article examines the international legal nature and regulatory significance of interregional norms governing migration processes, with particular emphasis on the commitments adopted within the Organization for Security and Co-operation in Europe (OSCE). Drawing on doctrinal analysis and comparative legal methodology, it explores the institutional and normative characteristics of the OSCE, the political rather than legally binding character of its human dimension commitments, and their interaction with international refugee law and the protection of migrant workers. Particular attention is paid to the 1951 Refugee Convention, the 1967 Protocol, UNHCR guidance on gender-related persecution, and the distinction between soft-law instruments and binding international legal obligations. The article compares OSCE approaches with the normative and monitoring frameworks of the United Nations and the International Labour Organization and considers their implications for national migration regulation, including that of Uzbekistan. It concludes that OSCE political commitments and treaty-based international standards perform complementary functions in shaping migration governance and safeguarding the rights of migrants, refugees and displaced persons.

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The protection of migrants' rights is also a matter of considerable importance within the European region, including for Uzbekistan, and within the framework of the Organization for Security and Co-operation in Europe (OSCE) [1]. E. Peters, M. Steinbrück and C. Moser observe that the OSCE possesses many features commonly associated with international organizations, including permanent structures such as a Secretariat. Nevertheless, it lacks a constituent instrument established under international law and a document defining its legal personality. Consequently, notwithstanding its name, the OSCE does not constitute an international organization in the strict technical sense of public international law. Its decisions are regarded as political commitments rather than legally binding obligations [2]. A. Saidov similarly argues that, although these instruments are not legally binding agreements, they embody political commitments agreed upon by participating States. Such commitments take effect upon adoption and may be invoked by citizens and governments in relations with other participating States. Rather than merely duplicating treaty obligations, OSCE commitments reinforce the implementation of international obligations in good faith [3].

In our view, the OSCE has a distinctive institutional and legal character. It does not have a conventional constituent treaty, and its instruments are predominantly adopted as political documents

through agreement among participating States. Nevertheless, decisions concerning migrants and migrant workers adopted at summit and ministerial levels serve as important instruments for guiding States in the regulation of these relations.

Armed conflicts in Europe during the 1990s contributed to the dissolution of certain States and generated significant displacement. As a result, OSCE human-dimension commitments increasingly addressed refugees, internally displaced persons, migrants and migrant workers. In particular, the disintegration of the former Yugoslavia and subsequent hostilities produced displacement from Kosovo and refugee movements towards neighbouring countries, including Albania. The source cited in the original article reports approximately 260,000 displaced persons, around 30,000 refugees and more than 17,000 arrivals in Albania [4].

Against this background, the OSCE adopted the Lisbon Summit Declaration in 1996. Paragraph 10 condemned policies of ethnic cleansing and mass expulsion, reaffirmed the need to create conditions consistent with international standards for the safe and dignified return of refugees and internally displaced persons, and emphasized their reintegration without discrimination. At the 2004 meeting of foreign ministers in Sofia, the participating States also addressed international protection in cases of gender-related persecution in the framework of the OSCE Action Plan for the Promotion of Gender Equality, annexed to Decision No. 14/04. States that had not established appropriate formal procedures for examining asylum applications submitted by women facing gender-related persecution were encouraged to adopt effective procedures under Article 1A(2) of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

Furthermore, the OSCE emphasized the introduction of specific practices reflecting the particular circumstances of women applying for refugee status and the careful, sensitive assessment of claims involving threats of gender-related persecution.

Research indicates that on 7 May 2002 the Office of the United Nations High Commissioner for Refugees (UNHCR) issued guidelines on international protection concerning gender-related persecution under Article 1A (2) of the 1951 Convention and its 1967 Protocol. These guidelines provide a detailed treatment of persecution related to gender. Although gender-related persecution is not an autonomous ground expressly enumerated in the refugee definition, it is highly relevant to refugee status determination. Article 1A(2) supplies the legal framework for interpreting the refugee definition from a gender-sensitive perspective. The guidelines distinguish socially and culturally constructed gender roles from biological sex.

They address, among other matters, sexual and domestic violence, coercive family-planning measures, female genital mutilation, punishment for violating social norms and persecution linked to sexual orientation or gender identity. They also discuss procedural safeguards: women applicants should be able to be interviewed separately from male relatives; legal information and advice must be communicated in a language they understand; interviewers and interpreters should be sensitive to applicants' experiences and the subject matter; and interviews should take place in a confidential and supportive setting. Appropriate support should be available to survivors of physical and psychological violence. Evidence may be obtained from governmental and non-governmental sources. States are encouraged to incorporate gender-sensitive safeguards into national procedures. Accordingly, the guidelines provide an important interpretative and practical standard for fair and effective refugee status determination. They are not independently binding under international law, but have considerable persuasive authority as a form of soft law.

Through its institutional character and normative instruments, the OSCE establishes political commitments which are not legally enforceable in themselves but which function as practical standards for participating States. In the field of human rights protection, these commitments have a soft-law character and influence the development of domestic legal and policy approaches.

UNHCR, by contrast, develops interpretative guidance directly related to the determination of refugee status under the 1951 Convention and the 1967 Protocol. Its guidelines and legal commentaries promote a common interpretative approach for national authorities, although their legal force should not be equated with that of binding treaty provisions.

Thus, OSCE political commitments and UNHCR legal interpretations represent two different yet mutually reinforcing normative mechanisms for the protection of refugees and human rights under international law.

At the same time, the OSCE ministerial instruments, including the annex to Decision No. 14/04 on the 2004 Action Plan for the Promotion of Gender Equality, and the UNHCR guidelines do not comprehensively address all recent developments in migration governance, including environmentally induced mobility, economic pressures, global pandemics and digital technologies. A limitation of OSCE declarations is their emphasis on general political and ethical principles rather than directly enforceable legal duties [5].

In our view, this can restrict their effectiveness in responding to contemporary refugee protection needs and gender-related persecution. The adoption of a declaration does not automatically produce uniform legal cooperation or harmonized national standards: States act within their own legal systems, policy priorities, bilateral agreements, integration programmes and arrangements with international organizations. A. Abeytia, E. Brito and J. S. Ojo argue that polarization in domestic politics has intensified disagreements concerning migration across the OSCE region. Populist and radical-right movements have employed restrictive and xenophobic rhetoric, including in the United States, Poland, Spain and Hungary; public debate in Sweden also became more hostile towards asylum seekers during the 2015–2016 period [6].

Analysis suggests that OSCE instruments concerning refugees, displaced persons, migrants and migrant workers differ from instruments developed within the UN, ILO and EU frameworks in several respects: their predominantly consensual and politically binding rather than legally binding nature; the absence of a comparable compulsory enforcement mechanism; reliance on voluntary implementation; and their function of articulating political standards in human rights and security. In our view, OSCE commitments concerning freedom of movement, contacts between persons and family reunification have contributed to the broader normative environment in which family reunification has been addressed, including through Council Directive 2003/86/EC of 22 September 2003, Germany's Residence Act (Aufenthaltsgesetz), including Section 30 [7], and Austrian legislation concerning residence and access to the labour market.

Austrian arrangements involving the Red-White-Red Card Plus and residence permits for family members illustrate how family-related migration may be regulated by domestic law, including rules concerning spouses, registered partners and minor children.

In Ljubljana in 2005, the OSCE Ministerial Council adopted Decision No. 2/05 on Migration. The decision reaffirmed commitments concerning migration, particularly migrant workers, contained in the Helsinki Final Act (1975), Madrid Document (1983), Vienna Concluding Document (1989), Copenhagen Document (1990), Charter of Paris for a New Europe (1990), Moscow Document (1991), Helsinki Document (1992), Budapest Document (1994), and ministerial documents adopted in Maastricht (2003) and Sofia (2004). It recognized the growing importance of migration, its opportunities and challenges, and its increasingly diverse and complex nature. It also emphasized the need for coordinated approaches at national, regional and international levels.

The decision recognized that States should adopt effective domestic frameworks for migration management and that migration is inherently a transnational issue requiring inter-State cooperation. It further acknowledged the economic, social and humanitarian significance of migration for countries of origin and destination. Successful integration policies based on respect for cultural and religious diversity, human rights and fundamental freedoms were identified as important factors for social stability and cohesion.

At its Madrid meeting in 2007, the OSCE Ministerial Council adopted Decision No. 8/07 on Combating Trafficking in Human Beings for Labour Exploitation. Paragraph 20 encouraged participating States that had not yet ratified ILO Convention No. 182 of 17 June 1999 concerning the Worst Forms of Child Labour to consider ratification and implementation. The source cited in the article indicates that all 187 ILO member States subsequently ratified this Convention [8].

Discussing the particular legal nature of OSCE instruments, Russian scholar I. Astapchuk emphasizes that, unlike certain other human-rights instruments, OSCE human-dimension commitments are political rather than legally binding obligations [9].

The OSCE occupies a distinctive position, raising the question whether its acts can be regarded as sources of international law. Russian scholar R. Garipov notes the continuing academic debate over this issue. The list of sources in Article 38 of the Statute of the International Court of Justice is not necessarily exhaustive, and documents adopted at international conferences and by international organizations may influence the development of international law. This discussion has contributed to the concept of soft law, which encompasses non-binding normative instruments, including the OSCE's political commitments [10].

Analysis of the OSCE instruments considered above suggests that they contribute to the development of international soft-law standards for the protection of migrants' rights. Scholarly approaches distinguish between, first, norms that formulate objectives or standards of conduct without establishing precise, directly enforceable rights and duties, often using expressions such as 'strive to achieve' or 'take necessary measures'; and, second, non-binding normative provisions contained in resolutions, joint statements and communiqués. Such instruments may shape expectations and guide the subsequent development of legally binding norms [11]. In this sense, the OSCE documents examined here may appropriately be classified as international soft-law instruments.

Czech scholar Eric Manton similarly draws attention to the OSCE's distinctive legal status and the predominantly political, non-binding character of its decisions [12].

A comparison of OSCE instruments concerning refugees, displaced persons, migrants and migrant workers with United Nations instruments reveals several significant differences.

UN and ILO instruments relevant to refugees, displaced persons and migrant workers may comprise both hard law and soft law. Conventions and treaties establish defined legal obligations for their parties, while declarations and recommendations generally provide political guidance and normative orientation. Treaty-monitoring and supervisory mechanisms may enable the assessment of States' compliance with the obligations they have undertaken.

OSCE instruments are more flexible and primarily operate through soft law. Through declarations, decisions and recommendations, the organization articulates political and ethical commitments that may nevertheless exert practical influence. Human-rights missions, monitoring visits and advisory activities [13] contribute to oversight, awareness and political engagement. Accordingly, UN and OSCE instruments can be viewed as complementary, although their legal effects and implementation mechanisms differ. Binding treaties create formal international obligations, whereas OSCE political mechanisms may mobilize States and public opinion and encourage innovative policy responses. Together, these approaches can promote coherence between legislation and migration policy.

A comparison with ILO international instruments concerning migrant workers reveals the following distinctions. ILO instruments include both hard-law conventions and soft-law recommendations and guidance. Conventions establish obligations for ratifying States and are adopted through the ILO's tripartite structure involving governments, employers and workers. Relevant expert and supervisory bodies develop recommendations, guidance and assessments, and ratifying States are subject to reporting requirements. OSCE instruments, by contrast, generate political, ethical and diplomatic commitments without the same compulsory enforcement, sanctions or judicial accountability mechanisms.

The Republic of Uzbekistan has been an OSCE participating State since 26 February 1992. Declarations and decisions adopted within the OSCE framework have served as political and legal reference points for improving national legislation. For example, OSCE ministerial decisions against trafficking in human beings for labour exploitation encouraged ratification of ILO Convention No. 182 on the Worst Forms of Child Labour. Uzbekistan ratified that Convention through Law No. ZRU-144 of 8 April 2008. Another example of the incorporation of international standards into domestic legislation is the Electoral Code of the Republic of Uzbekistan adopted on 26 June 2019, which contains provisions concerning the inclusion of Uzbek citizens residing abroad in voter lists [14].

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