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The OSCE and Its Legal Status: Revisiting the Myth of Sisyphus

*International organizations are puzzling creatures, and have long created serious analytical problems for international lawyers.*¹

Introduction

The above assertion could undoubtedly apply to the issue of the legal status of the OSCE, which has been “an ordeal for the Organization over the years”² and has given rise to a never-ending internal political discussion and countless food-for-thought papers and proposals.

The OSCE is the world largest regional security organization. The Organization has been defined as a regional arrangement in the sense of Chapter VIII of the United Nations Charter,³ enabled “to play a cardinal role in meeting the challenges of the twenty-first century”⁴ and recognized “as a primary organization for the peaceful settlement of disputes within its region and as a key instrument for early warning, conflict prevention, crisis management and post-conflict rehabilitation”.⁵ Moreover, in accordance with the Platform for Co-operative Security, which was also adopted at the 1999 Istanbul Summit Meeting, it was characterized as a “forum for subregional co-operation”.⁶

Note: The views expressed in this article are those of the authors alone and do not necessarily reflect the official position of the OSCE and its participating States.

- 1 Jan Klabbbers, *Advanced Introduction to the Law of International Organizations*, Cheltenham 2015, p. 7.
- 2 Kurt P. Tudyka, The Greek OSCE Chairmanship 2009, in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 2010*, Baden-Baden 2011, pp. 327-336, here: p. 334.
- 3 Cf. Helsinki Summit Declaration, in: CSCE Helsinki Document 1992: The Challenges of Change, Helsinki, 10 July 1992, in: Arie Bloed (ed.), *The Conference on Security and Co-Operation in Europe. Analysis and Basic Documents, 1972-1993*, Dordrecht 1993, pp. 701-777, here: pp. 701-710, para. 25, also available at: <http://www.osce.org/mc/39530>.
- 4 Budapest Summit Declaration. Towards a Genuine Partnership in a New Era, in: Budapest Document 1994, Budapest, 6 December 1994, in: Arie Bloed (ed.), *The Conference on Security and Co-operation in Europe: Analysis and Basic Documents, 1993-1995*, The Hague 1997, pp. 145-189, here: pp. 145-149, para. 3, also available at: <http://www.osce.org/mc/39554>.
- 5 Charter for European Security, Istanbul, November 1999, in: Organization for Security and Co-operation in Europe, Istanbul Summit 1999, *Istanbul Document 1999*, Istanbul 1999, January 2000/Corr., pp. 1-45, here: pp. 2-3, part II, para. 7, at: <http://www.osce.org/node/39569>.
- 6 *Ibid.*, p. 4, part III, para. 13. Cf. also *Operational Document – the Platform for Co-operative Security*, in: *ibid.*, pp. 43-45. For a comment, cf. Sandra Sacchetti, The OSCE’s Platform for Co-operative Security: An opportunity for multilateral coherence, in: *Security and Human Rights* 1/2014, pp. 119-129. The UN and the CSCE defined a “Framework for Cooperation and Coordination” in May 1993 (United Nations General Assembly,

The OSCE possesses the essential criteria to enable it to be categorized as an intergovernmental organization. It has a stable organizational structure with permanent organs acting on behalf of the Organization, which doctrine regards as a clear manifestation by states of their intention to create an organization. This institutionalization of the OSCE, its widespread operational activities, its participation in international relations, and its co-operation with other international actors speak in favour of its being considered as an international organization.⁷

However, while the OSCE has managed to assert itself as an active and dynamic player on the international stage, it does not enjoy the attributes of an international organization. Its *sui generis* status, the result of a unique legal and political process, leaves it in an unclear position under international law, for three main reasons.

First of all, the OSCE does not meet the first criteria of an international organization defined by the International Law Commission (ILC) in 2011,⁸ as it has not been “established by a treaty or other instrument governed by international law”. Originally set up as a conference, the OSCE is based on a comprehensive concept of security that derives from commitments that bind the participating States politically, but not legally.⁹ The decision on

A/48/185, annexes I, II, 1 June 1993) and, on 13 October 1993, the UN General Assembly unanimously adopted a resolution inviting the CSCE to attend the sessions and participate in its work as an observer (United Nations General Assembly, A/RES/48/5, 13 October 1993).

7 Cf. Ioannis Stribis, The legal status of the OSCE: A view from the other side of the mirror, in: *Legal Services Newsletter* 8/2011, p. 4.

8 “‘International organization’ means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality”, United Nations, *Draft articles on the responsibility of international organizations*, adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/66/10, para. 87), Article 2(a). The case of the OSCE has inspired the ILC, which notes: “Most international organizations are established by treaties. [...] However, forms of international cooperation are sometimes established without a treaty. In certain cases, for instance with regard to the Nordic Council, a treaty was subsequently concluded. In other cases, although an implicit agreement may be held to exist, member States insisted that there was no treaty concluded to that effect, as for example in respect of the Organization for Security and Co-operation in Europe (OSCE)”, United Nations, *Report of the International Law Commission, Sixty-first session (4 May-5 June and 6 July-7 August 2009)*, General Assembly Official Records, Sixty-fourth Session, Supplement No. 10, 2009 (A/64/10), pp. 44-45.

9 Many scholars have emphasized that the concluding paragraphs of the Helsinki Final Act request the government of Finland (which was the host government) to transmit to the Secretary-General of the United Nations the text of the Act, “which is *not* eligible for registration under Article 102 of the Charter of the United Nations”, Final Act of Helsinki, Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1 August 1975, in: Bloed (ed.), cited above (Note 3), pp. 141-217, here: p. 210 (emphasis added). Article 102(1) of the UN Charter provides that “every treaty and every international agreement entered into by any Member of the United Nations [...] shall as soon as possible be registered with the Secretariat and published by it.” *Charter of the United Nations*, at: <http://www.un.org/en/charter-united-nations>. This means that the Helsinki Accords do not constitute a treaty or an international agreement which could be invoked be-

“Strengthening the CSCE” adopted at the Budapest Summit in 1994, which transformed the CSCE into an organization, did not modify the essential nature of the OSCE: “The change in name from CSCE to OSCE alters neither the character of our CSCE commitments nor the status of the CSCE and its institutions. In its organizational development the CSCE will remain flexible and dynamic.”¹⁰ Consequently, the OSCE is not grounded on “what may be called a constitution”, which Chittharanjan Amerasinghe sees as a precondition to act as an international organization.¹¹

Second, since the OSCE was not established by a constituent treaty, which would have contained general provisions about the Organization’s legal capacity, the OSCE does not possess “its own international legal personality”¹² distinct from that of its participating States, which is the second of the ILC’s criteria. Most constitutive documents of international organizations either provide the organization with the legal capacity necessary to exercise its functions,¹³ or with legal personality and the capacity to enter into contracts to acquire and dispose of immovable and movable property, and to institute legal proceedings, or both.¹⁴ For some organizations, such provisions

fore any organ of the United Nations, including the International Court of Justice. The 1990 Charter of Paris also foresees no registration.

- 10 Budapest Decisions, section I, Strengthening the CSCE, in *Budapest Document 1994*, cited above (Note 4), pp. 153-156, para. 29. Cf. also Miriam Sapiro, Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation, in: *The American Journal of International Law* 3/1995, pp. 631-637. “An attentive reading of the Budapest Summit Document suggests that they [the participating States] were purposely trying to avoid associating the renaming of the CSCE with any express recognition of its status as an international organization.” Sonya Brander/María Martín Estébanez, The OSCE matures: Time for legal status, in: *Helsinki Monitor* 1/2007, pp. 2-5, here: p. 3.
- 11 Cf. Chittharanjan F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd revised edition, Cambridge 2005, p. 10.
- 12 The legal capacity of an international organization is defined as its capacity to assume legal obligations and to have legal rights in national legal orders and at the international level. Concretely, it grounds its capacity to enter into contracts (e.g. for procurement) or agreements with States or other international organizations, to acquire and dispose of movable and immovable property, and to institute and participate in legal proceedings.
- 13 See, for instance, Article 104 of the UN Charter (“The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes”) and Article XV (A) of the statute of the International Atomic Energy Agency (IAEA) (“The Agency shall enjoy in the territory of each member such legal capacity and such privileges and immunities as are necessary for the exercise of its functions”), at: <https://www.iaea.org/about/statute>.
- 14 See, for instance, Articles 210 (“The Community shall have legal personality”) and 211 (“The Community shall in each of the Member States possess the most extensive legal capacity accorded to legal persons under their respective municipal law; it may, in particular, acquire or transfer movable and immovable property and may sue and be sued in its own name”) of the Treaty establishing the European Economic Community, at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Axy0023>, and Article 39 of the Constitution of the International Labour Organization (ILO) (“The International Labour Organization shall possess full juridical personality and in particular the capacity: (a) to contract; (b) to acquire and dispose of immovable and movable property; (c) to institute legal proceedings”), at: http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#A39.

have been included in separate treaties.¹⁵ Therefore, when it comes to the OSCE, the lawyer might keep Jan Klabbers' forthright assertion in mind: "Entities lacking personality cannot be held responsible, and this suggests rather strongly that entities devoid of personality are not proper international organizations at all."¹⁶

Finally, since the OSCE has no legal instrument such as a charter or a convention providing it with legal capacity, it also misses privileges and immunities, inviolability, exemption from taxation, and a number of other key elements essential to the smooth operation of an international organization. Unlike the OSCE, the United Nations Organization (UNO), for instance, is ensured that its staff and experts as well as representatives of its member states enjoy privileges and immunities throughout the territories of its member states.¹⁷ As for NATO, the Ottawa Agreement defines the immunities and privileges to be granted to the Organization, to the international staff (not full diplomatic immunity) and to the national missions established to the Alliance (full diplomatic immunity).¹⁸

Therefore, from the legal point of view, "the question as to whether the OSCE is indeed an international organization in the sense of an intergovernmental organization enjoying international legal personality has to be answered in the negative".¹⁹

Of course it can be argued that the OSCE enjoys de facto international legal personality, although this is not currently based in law. In its Advisory Opinion of 11 April 1949 on the "Reparation for injuries suffered in the ser-

15 See, for instance, the General Agreement on Privileges and Immunities of the Council of Europe, and notably its Article 1 ("The Council of Europe shall possess juridical personality. It shall have the capacity to conclude contracts, to acquire and dispose of movable and immovable property and to institute legal proceedings. In these matters the Secretary General shall act on behalf of the Council of Europe"), at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680063729>, and the Agreement on the status of the North Atlantic Treaty Organization, National Representatives and International Staff signed in Ottawa on 20 September 1951, which defines NATO as a legal entity under international law ("The Organization shall possess juridical personality; it shall have the capacity to conclude contracts, to acquire and dispose of movable and immovable property and to institute legal proceedings", Article IV; at: http://www.nato.int/cps/fr/natohq/official_texts_17248.htm?selectedLocale=en).

16 Klabbers, cited above (Note 1), p. 18.

17 Article 105(2) of the Charter of the UN provides that "Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." *Charter of the United Nations*, cited above (Note 9). This basic principle is supplemented by the 1946 Convention on the Privileges and Immunities of the United Nations.

18 See Agreement on the status of the North Atlantic Treaty Organization, National Representatives and International Staff signed in Ottawa, 20 September 1951, Articles XII-XVI; see also NATO Legal Deskbook, 2nd edition, 2010, p. 73, available at: <https://publicintelligence.net/nato-legal-deskbook>.

19 Helmut Tichy/Ulrike Köhler, Legal Personality or not – The Recent Attempts to Improve the Status of the OSCE, in: Isabelle Buffard et al. (eds), *International Law Between Universalism and Fragmentation*, Festschrift in honour of Gerhard Hafner, Leiden 2008, pp. 455-478, here: p. 459.

vice of the United Nations”, the International Court of Justice (ICJ) came to the conclusion that the UNO was an international person, a subject of international law, and capable of possessing international rights and duties.²⁰ The conclusions of the ICJ “can easily be assimilated word-for-word to the situation of the OSCE”.²¹ The fact that the OSCE operates in its relations with states, other international organizations, and civil society as if it enjoys the same standing as the treaty-based international organizations, and that the OSCE is treated as if it is equal to the treaty-based international organizations that are recognized as possessing international legal personality, supports the above reasoning by the Court, in terms equally applicable to the OSCE. So one can conclude with Marco Odello that the OSCE “matches the main criteria required by general international law related to international organisations”.²²

Having said that, “the OSCE has in effect come of age without a ‘legal’ birthright”.²³ It is still not, in 2016, a fully fledged international organization, unlike the United Nations, the Council of Europe, or NATO. It has “participating States” and not member states – a distinction that is more than just a matter of words. All in all, the Organization suffers from the vulnerability that a lack of adequate recognition, legal status, and enjoyment of privileges and immunities entails.

The scholarly debate over the legal status of the OSCE has been ongoing for decades.²⁴ Henry Schermers and Niels Blokker use the OSCE as a “problematic example”.²⁵ Like other non-legally identified bodies such as the Asia-Pacific Economic Cooperation (APEC), the Arctic Council, or the Wassenaar Arrangement, it is, for Klabbers, the symbol of “a discernible recent tendency [...] to remain nebulous about intentions when creating international institutions. [...] with all of them it remains unclear whether they indeed have

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- 20 Reparation for injuries suffered in the service of the United Nations, Advisory Opinion of 11 April 1949, *I.C.J. Reports 1949*, pp. 178-179.
- 21 Lisa Tabassi, Update on the Operational Consequences of the Lack of a Clear Legal Status of the OSCE, Open-Ended Informal Working Group on Strengthening the Legal Framework of the OSCE, 29 April 2016, attached to SEC.GAL/67/16, 6 May 2016, para. 2.2, p. 3.
- 22 Marco Odello, The Developing Legal Status of the Organisation for Security and Co-operation in Europe, in: *Anuario de Derecho Internacional*, 2006, pp. 351-393, here: p. 393. Cf. also Christine Bertrand, La nature juridique de l’Organisation pour la sécurité et la coopération en Europe (OSCE) [The Legal Nature of the Organization for Security and Co-operation in Europe (OSCE)], in: *Revue Générale de Droit International Public* 2/1998, pp. 365-406, here: pp. 370f.
- 23 Brander/Martín Estébanez, cited above (Note 10), p. 4.
- 24 It has even been the topic of a doctoral thesis: Hélène Cadet, *Le statut juridique de l’Organisation pour la sécurité et la coopération en Europe* [The Legal Status of the Organization for Security and Co-operation in Europe], doctoral thesis submitted for the degree of doctor in international public law, University of Paris 1 – Panthéon-Sorbonne, 2012.
- 25 Henry G. Schermers/Niels M. Blokker, *International Institutional Law*, 4th revised edition, Leiden 2003, p. 991.

to be regarded as full-blown organizations rather than, say, framework for occasional diplomacy”.²⁶ Peter Kooijmans is even more outspoken:

To the community of international lawyers the OSCE is a little like a marshmallow: it may look enticing, but it is difficult to give it a good bite. For what can a lawyer do with an organization which is not treaty-based and therefore has no international personality.²⁷

In the Greek mythology, the gods had condemned Sisyphus, founder and king of Corinth, after he had challenged Death, to ceaselessly roll a huge rock to the top of a mountain, whence the stone would fall back of its own weight. Like Sisyphus, the OSCE Chairmanships, over the last 25 years, one after the other, have been tirelessly “rolling the stone” of the Organization’s legal status, supported by the OSCE Secretariat and its Legal Services unit, only to see it rolling down again.

Let us summarize the main steps of a discussion that can be traced back to the origins of the OSCE. We will then focus on the operational consequences of the OSCE’s lack of a clear legal status, which affects the Organization’s daily life, especially in the field. We will also try to analyse the main antagonistic political positions around the OSCE table. Finally, we will recall the five options that are currently being debated by the Informal Working Group on Strengthening the Legal Framework of the OSCE, none of them, unfortunately, raising hope of a breakthrough in the short term.

From Rome to Hamburg: 25 Years of Unsolved Debate

As Sonya Brander and María Martín Estébanez rightly recall, when states from both sides of the Iron Curtain gave birth to the Conference on Security and Co-operation in Europe (CSCE) 41 years ago, it was impossible for them to foresee its future development. The Western states wanted to avoid any implicit recognition of the territorial divisions in Europe that had followed World War II. For Eastern states, it was a matter of avoiding the assumption of legal obligations arising from the so-called “third basket”.²⁸ “We must therefore assume that the CSCE participating States had no desire to make the CSCE a subject of international law”, concludes Marcus Wenig.²⁹

26 Jan Klabbers, *An Introduction to International Institutional Law*, Cambridge 2002, pp. 11-12.

27 Peter Kooijmans, *The Code and International Law*, in: Gert De Nooy (ed.), *Cooperative Security, the OSCE, and its Code of Conduct*, The Hague 1996, pp. 33-40, here: p. 33.

28 Cf. Brander/Martín Estébanez, cited above (Note 10), p. 2.

29 Marcus Wenig, *The Status of the OSCE under International Law – Current Status and Outlook*, in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 1997*, Baden-Baden 1998, pp. 367-383, here: p. 372.

However, several members of the European Economic Community, led by France, had proposed during the negotiations leading to the 1992 Helsinki Summit that CSCE States conclude a treaty establishing the CSCE as an international organization with juridical personality. The Helsinki Summit indeed decided to “consider the relevance of an agreement granting an internationally recognized status” to the CSCE’s institutional arrangements.³⁰ At its inaugural session on 5 July 1992, the Parliamentary Assembly of the CSCE had previously expressed the wish “to transform the CSCE into a regional security organization [...] and to give it a legal base”.³¹ In implementation of the Helsinki Summit, on 15 December 1992, the CSCE Council instructed the Committee of Senior Officials (CSO) to establish an ad hoc Group of Legal and Other Experts, under the chairmanship of Ambassador Hans Corell (Sweden), to report through the Committee with the aim of presenting a draft decision for adoption at the Rome Council Meeting in 1993.

At this time, the CSCE had three institutions, nine missions, and fewer than fifty mission members. The states hosting CSCE institutions, namely Austria, the Czech Republic, and Poland, had within their territories already conferred, or would confer imminently, legal capacity on CSCE entities and privileges and immunities on them and their personnel. Although this system of ad hoc arrangements had worked well, given the CSCE’s expanding operations, the time seemed ripe to look for ways of enhancing the future effectiveness of CSCE institutions and activities.

The Group of Experts submitted its report on 17 November 1993.³² It also decided to forward through the CSO a draft decision for consideration by the CSCE Council in Rome.

The 1993 Rome Decision: The Unilateral Option and Its Shortfalls

At the Fourth Meeting of the Council of the CSCE in Rome, held on 30 November and 1 December 1993, the Ministers reaffirmed the importance of enhancing the ability of the institutions to better accomplish their functions, while preserving the flexibility and openness of the CSCE process. They agreed that, in order to help achieve a firmer basis for security and co-operation among all CSCE participating States, the CSCE would benefit from clearer administrative structures and a well-defined operational framework. In that view, the choice laid between two different methods of regulating the status of the CSCE institutional arrangements: either the elaboration of a binding, legal instrument to be ratified by the participating States or a recommendation by the CSCE Council to the participating States to enact the necessary national measures on a unilateral basis.

30 Helsinki Decisions, section I, Strengthening CSCE Institutions and Structures, in: *CSCE Helsinki Document 1992*, cited above (Note 3), pp. 711-715, para. 25.

31 *Budapest Declaration of the CSCE Parliamentary Assembly*, 5 July 1992, Chapter I, Security Questions, para. 10, at: <http://www.osce.org/pa/40732>.

32 Circulated as *CSCE Communication No. 311*, Prague, Rome, 27 November 1993.

The first possibility, proposed by the European Community, was a treaty. The ad hoc Group of Legal Experts had already considered the relevance of an agreement laying down a generally applicable legal framework for the activities of the CSCE's institutional arrangements.³³ A treaty, however, posed a dilemma. To be truly effective, it would require ratification by all participating States, which was unlikely to happen. On the other hand, a treaty that could have entered into force without all CSCE States being party to it would have been potentially divisive and difficult to implement. While a treaty might have been the preferred route for the CSCE at its formative stage, ultimately it did not appear to be a reasonable option: "Under present circumstances, the conclusion of a binding agreement would not, on its own, be a feasible solution."³⁴

The Group of Experts had also considered a solution involving both a political document and a treaty, i.e. a legally binding document on the issue at hand under the chapeau of a political declaration to be issued in the form of a decision by the CSCE Council.³⁵ The political commitment would have granted legal personality and privileges and immunities to CSCE institutions, to their officers, and to representatives of the participating States.³⁶ This alternative posed the same difficulties as a standalone treaty.

The group also considered "implementation solely by means of unilateral measures"³⁷ as admissible, as long as this choice, in opposition to the adoption of a legal instrument, was a matter of method, and not of content: "This solution would not prejudice the tradition of political commitments as part of a flexible CSCE process".³⁸ This last approach, which was supported by the United States, ultimately prevailed. The Decision on Legal Capacity and Privileges and Immunities adopted in Rome in December 1993³⁹ provided that states should, subject to their constitutional, legislative, and related requirements, confer on CSCE institutions (namely the CSCE Secretariat, the Office for Democratic Institutions and Human Rights [ODIHR], and any other CSCE institution determined by the CSCE Council) the legal capacity necessary for them to perform their functions. This would include the capacity to contract, to acquire and dispose of movable and immovable property, and to institute and participate in legal proceedings. The Rome decision further committed states to seek to provide CSCE institutions with the same

33 Cf. the draft "Agreement on legal personality for the CSCE institutions and privileges and immunities" attached to *CSCE Communication No. 254*, Prague, 21 September 1993, pp. 10-17.

34 CSCE Ad Hoc Group of Legal and Other Experts, Chairman's Working Paper No. 1, 17 September 1993, attached to *ibid.*, p. 3.

35 A draft "Decision on a legal basis for the CSCE institutions and on privileges and immunities for CSCE institutions, its officers and the representatives of the participating States" is attached to *ibid.*, pp. 8-9.

36 CSCE Ad Hoc Group of Legal and Other Experts, cited above (Note 34), p. 4.

37 *Ibid.*

38 *Ibid.*, p. 5.

39 Cf. *Decision on Legal Capacity and Privileges and Immunities*, CSCE/4-C/Dec.2 and its Annex 1, 1 December 1993.

immunity from legal process as is enjoyed by foreign states (for instance, inviolability of archives and exemption from customs and duties, inviolability of premises, ability to hold and transfer funds without financial restrictions, and exemption from all direct taxes). With respect to CSCE personnel, the participating States agreed to seek to confer certain immunities on representatives to the CSCE, CSCE officials, and members of CSCE Missions. These included immunity from legal process for official acts, exemption from immigration and alien registration requirements to the same extent as diplomatic agents, and the same privileges with regard to exchange facilities as are accorded to diplomatic agents. Moreover, members of CSCE Missions would enjoy personal inviolability while on official travel.

Nevertheless, the Rome decision, including the negotiations that led to it, made it clear that the CSCE and its institutions did not have, and were not being endowed with, international legal personality. The CSCE was not envisaged as a unitary actor: Neither the 1993 Rome Council decision nor national legislation foresaw or granted legal capacity to the CSCE as such, but only to its institutions, which would continue to enjoy legal status within participating States to the extent consistent with domestic law. Since the change in name from “Conference” to “Organization” at the Budapest Summit might have sent a different signal, it was important to clarify that the legal status of the CSCE and its institutions, and the political character of CSCE commitments, would remain unchanged.

Moreover, the Rome decision referred only to the Secretariat and ODIHR. Other CSCE institutions (the Office of the High Commissioner on National Minorities [HCNM] and the Office of the Representative on Freedom of the Media [RFOM]) would be covered as “determined by the CSCE Council”. The OSCE Missions were also not covered: Only mission members were granted privileges and immunities. The question of income tax on earnings received from the OSCE was not addressed in the Rome decision.

The Rome decision left it up to each participating State to determine the best means to meet its commitment. Concretely, over the years, only a few participating States (roughly a quarter) have implemented the 1993 Rome decision, and they did not take a uniform approach.⁴⁰ This has left the CSCE/OSCE with a fragmented and piecemeal situation, as most of the participating States find it legally impossible to grant privileges and immunities unilaterally.

All in all, the unilateral approach and the pre-eminence of the “constitutional, legislative and related requirements” of the participating States

40 The Food-for-Thought Paper *The OSCE's Lack of an Agreed Legal Status – Challenges in Crisis Situations*, issued by the OSCE Parliamentary Assembly and the Secretariat's Legal Services Unit in April 2015, provides a list of the countries that have passed parliamentary legislation or executive measures for the implementation of the 1993 Rome Council decision, and the references of the corresponding legislation, in: OSCE Parliamentary Assembly, *Helsinki +40 Project Working Papers, Compilation of experts' contributions and documents*, July 2015, pp. 61-62.

amounted to far less than the legal capacity granted under an international agreement (either multilaterally in the form of a convention or bilaterally under a headquarters agreement). The shortfalls of the Rome decision were quite pertinently summed up by the Russian Federation:

We regard the 1993 decisions concerning privileges and immunities [...] not as a solution to the problems but rather as political promises made by States to confer on the OSCE the international legal attributes required for it to operate effectively. As long as this is not done, the OSCE will remain a collection of political consultation processes between participating States, which whilst making it possible to achieve practical *modi vivendi* in each case, will clearly take place outside the framework of international law.⁴¹

*The 1999 Istanbul Summit and the Charter for European Security:
Unilateralism no Longer an Option*

The Russian Federation, as well as France⁴² and Italy, tried to re-open the agenda in 1998-1999 in the framework of the Charter for European Security.⁴³ Italy managed to insert a provision into the Istanbul Summit Declaration, noting “that a large number of participating States ha[d] not been able to implement the 1993 Rome Ministerial Council decision on legal capacity of the OSCE institutions”, calling for “a determined effort” and tasking “the Permanent Council, through an informal open-ended working group to draw up a report to the next Ministerial Council Meeting, including recommendations on how to improve the situation”.⁴⁴

At the working group, there was little support for a revision of the 1993 Rome decision without either a convention or a model agreement. Adopting a new ministerial decision to supersede the Rome Council decision and cover the issues not dealt with in it also presented some disadvantages; the risk of insufficient and non-harmonized implementation of the new decision would have been the same as for the Rome decision. Therefore, in 2000, the Chairperson-in-Office concluded that “the ‘unilateral action’ option, even with the

41 *Talking points on the statement by the representative of the Russian Federation at an informal open-ended working group on the legal capacity, privileges and immunities of OSCE Institutions*, PC.DEL/496/00, 22 September 2000.

42 At the Istanbul Summit, President Jacques Chirac said: “[...] to enable it [the OSCE] to carry out all of its tasks more effectively, I propose that it be accorded legal personality”, SUM.DEL/37/99, 18 November 1999.

43 Cf. Permanent Mission of the Russian Federation to the OSCE, *Statement on the strengthening of the OSCE at the meeting of the Security Model Committee*, 29 May 1998, PC.SMC/38/98, 29 May 1998; Permanent Representation of France and Permanent Representation of Italy, *Draft paragraph to be included in the Charter for European Security*, PC.SMC/168/99, 29 October 1999.

44 Istanbul Summit Declaration, in: *Istanbul Document 1999*, cited above (Note 5), pp. 46-54, here: p. 52, para. 34.

replacement of the Rome Council decision, could hardly be regarded as satisfactory".⁴⁵

The 2000 Austrian Chairmanship: Broadening the Scope of the Debate

In a spirit of pragmatism and in an attempt to overcome the impasse, the Austrian Chairmanship left the format open and looked at some compromise options, which were, in the words of Victor-Yves Ghebali, "as ingenious as they are complicated".⁴⁶

It was suggested that the participating States be bound by the same political obligations as those in the 1993 Rome Ministerial decision, with some extensions, and by a convention signed and ratified by those participating States wishing to do so, whose entry into force, however, would depend on the implementation of the political obligations by all participating States.⁴⁷ For the purpose of this alternative, amendments to the 1993 Rome Ministerial decision were proposed, as well as a short convention that contained the substance of both the Rome decision and the 1961 Vienna Convention on Diplomatic Relations.⁴⁸

These variants enjoyed the support of a substantial number of delegations, but could not obtain consensus either. The Russian Federation stressed that, without previous recognition of the OSCE's legal personality, they would make no sense, and that the only way for Russia to grant privileges and immunities to an international organization would be through a treaty. Although supported by the vast majority of the participating States, the multi-lateral option was rejected by the United States.

After Austria, the Romanian Chairmanship set up a new working group, whose work was again unsuccessful.⁴⁹ In 2002, the Porto Ministerial Council

45 The OSCE's Legal Capacity and Privileges and Immunities, Non-paper by the Chairperson-in-Office, 6 June 2000, CIO.GAL/42/00, 23 June 2000, in: Organization for Security and Co-operation in Europe, Permanent Council, *Decision No. 383, Report on OSCE Legal Capacity and on Privileges and Immunities to the Ministerial Council*, PC.DEC/383, 26 November 2000, Attachment 2 to Annex, p. 2, para. 9, at: <http://www.osce.org/pc/24379>.

46 Victor-Yves Ghebali, *Le rôle de l'OSCE en Eurasie, du sommet de Lisbonne au Conseil ministériel de Maastricht (1996-2003)* [The Role of the OSCE in Eurasia: From the Lisbon Summit to the Maastricht Ministerial Council], Brussels 2014, p. 58 (author's translation).

47 Cf. OSCE Legal Capacity and Privileges and Immunities, Report of the Permanent Council to the Ministerial Council, PC.DEC/383, 26 November 2000, Annex, p. 2, para. 6, in: PC.DEC/383, cited above (Note 45).

48 Cf. CIO.GAL/114/00, 1 November 2000, annex 1, in: PC.DEC/383, cited above (Note 45), Attachment 5 to Annex; and CIO.GAL/129/00, 22 November 2000, in: *ibid.*, Attachment 7 to Annex.

49 Cf. Decision No. 3, *Fostering the Role of the OSCE as a Forum for Political Dialogue*, MC(9).DEC/3, para. 2, in: Organization for Security and Co-operation in Europe, *Ninth Meeting of the Ministerial Council, 3 and 4 December 2001*, MC.DOC/2/01, Bucharest, 4 December 2001, pp. 25-27, here: p. 26, at: <http://www.osce.org/mc/40515>. Cf. also Letter from the Chairman of the Permanent Council Concerning the OSCE Legal Capacity and Privileges and Immunities, in: *ibid.*, p. 73.

failed to adopt a decision on the legal capacity of the OSCE tabled by the Portuguese Chairmanship.⁵⁰

The 2005 Panel of Eminent Persons: Refuelling the Discussion

The issue of the consolidation of the OSCE's legal status was given new impetus when the Panel of Eminent Persons on Strengthening the Effectiveness of the OSCE – which had been established by a Ministerial decision in Sofia in 2004 – presented the Slovenian Chairperson-in-Office with a 32-page report entitled “Common Purpose: Towards a More Effective OSCE” in June 2005. The seven-member panel argued that the OSCE's development from a conference to a fully fledged international organization had to be completed, finally making “participating States” into “member States”: “The OSCE's standing as an international organisation is handicapped by its lack of a legal personality”.⁵¹ In that regard, the Panel recommended that the participating States “devise a concise Statute or Charter of the OSCE containing its basic goals, principles and commitments, as well as the structure of its main decision-making bodies”.⁵² It also suggested that they “agree on a convention recognising the OSCE's legal capacity and granting privileges and immunities to the OSCE and its officials [... which] would not diminish in any way the politically binding character of OSCE commitments”.⁵³

Following this recommendation, Decision No. 17/05 on “Strengthening the Effectiveness of the OSCE”, adopted in Ljubljana on 6 December 2005, tasked the Permanent Council with continuing this work. This led to the establishment of the Working Group on Strengthening the Effectiveness of the OSCE, led by Ambassador Axel Berg, Head of the German Delegation to the OSCE, which was tasked with reviewing the implications of the lack of international legal status and uniform privileges and immunities of the OSCE at a technical level, and making recommendations for solutions to address these problems effectively.

In May 2006, Ambassador Berg issued the terms of reference for a small group of legal experts, which would be chaired by Ambassador Helmut Tichy, legal adviser of the Foreign Ministry of Austria. The legal experts presented a report to the Belgian Chairperson-in-Office in September 2006, which led to the adoption of the Brussels Ministerial decision on the legal

50 Cf. MC.DD/5/02, 6 November 2002. Cf. also Porto Ministerial Declaration, Responding to Change, para. 12, in: Organization for Security and Co-operation in Europe, *Tenth Meeting of the Ministerial Council, 6 and 7 December 2002*, MC.DOC/1/02, Porto, 7 December 2002, pp. 3-5, here: p.4, at: <http://www.osce.org/mc/40521>.

51 *Common Purpose: Towards a More Effective OSCE, Final Report and Recommendations of the Panel of Eminent Persons On Strengthening the Effectiveness of the OSCE*, 27 June 2005, paras 28 and 29, reprinted in: Institute for Peace Research and Security Policy at the University of Hamburg (ed.), *OSCE Yearbook 2005*, Baden-Baden 2006, pp. 359-379, here: p. 369.

52 *Ibid.*, para. 30.

53 *Ibid.*

status and privileges and immunities of the OSCE.⁵⁴ This decision stated that work on a draft convention would be continued on the basis of the text drafted in 2000. It also established an informal working group of experts under the Permanent Council, whose task would be to draw up a draft convention that would be submitted through the Permanent Council for adoption by the Ministerial Council, “if possible, in 2007”.

The 2007 Draft Convention: Missing the Target by a Hair's Breadth

The new Spanish Chairmanship invited Ambassador Ida van Veldhuizen-Rothenbücher, Head of the Delegation of the Netherlands to the OSCE, to chair the informal Working Group. On 11 and 12 October 2007, after lengthy and difficult negotiations, the Group reached consensus on the text of a Draft Convention (DC) comprising 25 articles at its final meeting,⁵⁵ although three footnotes were attached⁵⁶ at the request of certain participating States, making the conclusion of the 2007 DC conditional on the existence of a “Charter of the OSCE”. Therefore, no consensus on the final text prepared by the Spanish Chairmanship was reached at the meeting of the OSCE Fifteenth Ministerial Council in Madrid in 2007. However, the OSCE Chairperson-in-Office, Spanish Foreign Minister Miguel Ángel Moratinos, annexed the draft text of the Working Group to his closing statement “for practical purposes”.

This setback did not, however, dampen support for the text of the DC. In Helsinki, on 2 June 2008, the “Quintet” of OSCE Chairmanships expressed support for granting legal personality to the Organization. At an informal round-table meeting on the DC organized by the Finnish Chairmanship at the Vienna Hofburg on 22 October 2008, reference was made to a “universal agreement between delegations on the need to assign the OSCE with legal personality”.⁵⁷ In the Finnish capital city, at the Sixteenth Meeting of the OSCE Ministerial Council, Ministerial Decision No. 4/08 tasked the incoming Chairperson-in-Office to pursue a dialogue on strengthening the legal framework of the OSCE and to report to the meeting of the Ministerial Council in Athens in December 2009. The Personal Representative of the Greek Chairperson-in-Office for the Strengthening of the Legal Framework of the OSCE, Dr Zinovia Stavridi, again presented a draft decision for adop-

54 Cf. Decision No. 16/06, Legal Status and Privileges and Immunities of the OSCE, MC.DEC/16/06 of 5 December 2006, in: Organization for Security and Co-operation in Europe, *Fourteenth Meeting of the Ministerial Council, 4 and 5 December 2006*, Brussels, 5 December 2006, pp. 50-51, at: <http://www.osce.org/mc/25065>.

55 Draft Convention on the International Legal Personality, Legal Capacity, and Privileges and Immunities of the OSCE, Annex to MC.DD/28/07 of 29 November 2007, in: Organization for Security and Co-operation in Europe, *Fifteenth Meeting of the Ministerial Council, 29 and 30 November 2007*, Madrid, 30 November 2007, pp. 65-77. Since 2007, the DC is referred to using the reference CIO.GAL/48/07/Rev.6, 23 October 2007.

56 To the Preamble and to Article 4.

57 Cited in: Helmut Tichy, Historical timeline – Towards a legal personality, in: *OSCE Magazine* 1/2009, pp. 20-21, here: p. 21.

tion at the Athens Ministerial Council.⁵⁸ When this draft was withdrawn at the last Preparatory Committee meeting on 1 December 2009, 23 participating States intervened to express regret that no consensus decision was possible at this point and stressed that this was still an important issue.

Though the 2007 DC continues to enjoy very broad support among participating States, its adoption and signature have not been possible for the past nine years. Under the Greek Chairmanship, it had indeed become clear that reaching consensus on a convention would require the clear separation, or the joint and simultaneous adoption, of a charter/constituent document and the DC.

The Charter/Constituent Document: The Elephant in the Room

The constituent document of an international organization, whatever its designation (constitution, charter, or statute), is defined as an agreement under international law (but not necessarily a treaty) concluded by several states or subjects of international law to found this organization. This legal instrument lays down the legal framework of the activities of the organization, defines the mandate/missions/activities of the organization, determines the prerogatives of the organization's different bodies, and usually contains a provision on legal capacity and privileges and immunities to be conferred to the organization by its member states. This option would have been the best legal solution at the time of the creation of the CSCE/OSCE.

It is worth noting that the option of a constituent treaty for the OSCE was already dismissed in 2000, largely on the grounds that its negotiation would be a long process involving debates on issues that have already been discussed and on which consensus has been reached, sometimes with difficulty; drafting and adopting a constituent treaty would certainly take more time than drafting and adopting a legal text with the purpose of addressing only the issue of the OSCE's legal personality/capacity and privileges and immunities.⁵⁹ Therefore, "it appears that at the stage reached by the OSCE, having recourse to the conclusion of a constituent treaty only in order to address the issue of the OSCE's legal capacity and privileges and immunities would be a disproportionate and inadequate solution", as the Austrian Chairmanship concluded.⁶⁰

However, several participating States maintained their view that the OSCE needed a statutory document setting out the main goals and principles of the Organization, its structure, and relationships within the OSCE in the form of a charter or statute. They argued that the adoption of a convention in the absence of a charter would not help to solve the main issue of providing

58 Draft decision circulated by the Greek Chairmanship on 12 November 2009 as MC.DD/15/09.

59 Cf. *The OSCE's Legal Capacity and Privileges and Immunities*, cited above (Note 45), para. 11.

60 *Ibid.*, para. 12.

the OSCE with legal personality and legal capacity. They based their view on the legal practice of other international organizations, such as the United Nations, the Council of Europe, and NATO, which have statutory documents and thus enjoy a fully fledged international legal status; hence, a constituent document would position the OSCE as an equal and reliable partner in the international community, capable of fully exercising its rights and assuming its responsibilities. This group of countries stated that without such a charter or a statute, it would be impossible for them to ratify a convention.

On 18 September 2007, Armenia, Belarus, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan, and Uzbekistan introduced a draft Ministerial Council decision on “a concise Charter of the OSCE containing its basic goals, principles and commitments, as well as the structure of its main decision-making bodies”.⁶¹ For its proponents, the draft Charter was not meant to lead to any changes in the substance or political, non-legally binding nature of CSCE/OSCE commitments.

Consequently, as mentioned above, three footnotes were introduced during the elaboration of the 2007 DC. The footnotes made reference to a “Charter”. However, subsequent developments indicate that what matters is the character and contents of such a document, not its name. Therefore the neutral term “constituent document” has been in use since 2011, without prejudice to the outcome of consultations.

At the Madrid Ministerial Council Meeting, Foreign Minister Moratinos observed that even greater impetus could be given “to debate in the Organization on questions related to its strengthening in the legal sphere, including the possibility of drafting a Charter or Founding Statute for the OSCE”, adding: “This should not, in itself, be a matter for concern in any delegation. What is important would be the content, not the format.”⁶²

In 2008, the passage “devising a concise statute or charter of the OSCE and finalizing the elaboration of a convention on legal personality, legal capacity and privileges and immunities of the OSCE, both documents to be adopted simultaneously”, was included in a draft Ministerial Council decision

61 *Draft Decision on the Charter of the OSCE*, PC.DEL/897/07, 18 September 2007. The text of the Charter had been previously introduced to the Permanent Council on 18 May 2007 (PC.DEL/444/07). The draft Charter is actually not that “concise”, as it contains seven chapters and 26 articles. Its chapter V deals with “Legal status, privileges and immunities” in the following way:

“Article 21

1) The OSCE shall possess international legal personality.

2) The OSCE shall possess on the territory of its Member States such legal capacity as is necessary for the exercise of its functions. This comprises, in particular, the capacity to contract, to acquire and dispose of movable and immovable property, to institute and participate in legal proceedings.

3) The privileges and immunities of the OSCE, its officials and of representatives of its Members shall be defined in a separate multilateral agreement. The Members shall undertake to enter as soon as possible into such an agreement.”

62 *Statement by the Chairman-in-Office of the OSCE at the Closing Session of the Fifteenth Meeting of the Ministerial Council, Madrid, 30 November 2007*, MC.DEL/67/07, 30 November 2007, p. 3, at: www.osce.org/mc/29417.

tabled by the Russian Federation and Belarus.⁶³ Since then, the link between a charter or a statute of the OSCE, on the one hand, and a convention on the international legal personality, legal capacity, and privileges and immunities of the OSCE, on the other, has been constantly emphasized by the Russian Federation and its allies.⁶⁴

After Kazakhstan in 2010⁶⁵ and Lithuania in 2011,⁶⁶ the 2012 Irish Chairmanship proposed that discussions on a constituent document could commence in parallel with steps being taken towards the adoption and ratification of the 2007 DC. Consequently, the Irish Chairmanship submitted a revised draft for the consideration of the participating States, which is still considered the most up-to-date version in 2016.⁶⁷

The draft constituent document has been updated over the years according to the wishes expressed by the delegations (including new provisions on reservations and denunciation). In order to facilitate further discussion, the Serbian Chairmanship in 2015 incorporated some of these proposals in a revised draft Document.

At the Ministerial Council in Hamburg, in December 2016, the German Chairmanship decided not to table any draft Ministerial Council Decision that would task the incoming Chairmanship to continue the efforts to strengthen the legal framework of the OSCE in consultation with the participating States, and limited itself to forwarding a report to the Council.⁶⁸

The Operational Consequences of the OSCE's Lack of a Clear Legal Status

The OSCE's legal status is not merely an academic question, nor is it only an end in itself, but also a means for the Organization to effectively and efficiently fulfil the mandates entrusted to it by the participating States and to facilitate its interaction with other international and national actors. Although the OSCE has in principle shown its ability to act with limited legal capacity and privileges and immunities, this handicap reduces the Organization's effectiveness and creates some very tangible problems and disadvantages.

63 *Draft Decision on "Further Measures to Strengthen the Effectiveness of the OSCE"*, PC.DEL/1043/08, 28 November 2008. In 2011, Russia and its allies again circulated a proposal on a draft Ministerial Council decision on strengthening the legal framework of the OSCE (PC.DEL/1153/11, 29 November 2011).

64 See, for instance, the statement by Heads of Delegations of the Republic of Armenia, Republic of Belarus, Republic of Kazakhstan, Kyrgyz Republic, the Russian Federation, and Republic of Tajikistan to the OSCE Parliamentary Assembly on the reform of the OSCE, PA.DEL/1/11, 20 July 2011.

65 Cf. CIO.GAL/103/10/Corr. 1, 6 July 2010.

66 Cf. *Principles for a discussion on a Constituent Document (CD) for the OSCE*, attached to CIO.GAL/169/11, 6 September 2011.

67 Cf. CIO.GAL/68/12, 12 June 2012.

68 Cf. *Report to the Ministerial Council on strengthening the legal framework of the OSCE*, MC.GAL/7/16, 9 December 2016.

A Patchwork of Legal Regimes ...

The OSCE is currently fragmented into 24 entities in 23 different participating States. The absence of a clear legal status has led to a situation where there is no uniform regime of privileges and immunities applicable throughout the OSCE area. On the contrary, the status and treatment of the OSCE and its staff varies widely from one participating State to another.

Under the national law of their respective host countries, the OSCE Secretariat, the OSCE Parliamentary Assembly (PA), and the three Institutions (ODIHR in Warsaw, the HCNM in The Hague, and the RFOM in Vienna) benefit from legal personality, legal capacity and privileges, and immunities at the level customarily enjoyed by the international organizations in the United Nations system.

Of the 17 OSCE field operations, 15 are the subject of bilateral agreements (Memoranda of Understanding, MoU) between the host state and the OSCE, some of which still require parliamentary ratification. Only one achieved its status through a UN Security Council Resolution and subsidiary UN legislation: the OSCE Mission in Kosovo (OMIK), which has been a pillar of the United Nations Mission in Kosovo (UNMIK). One enjoys nothing at all and cannot open a bank account, hire employees locally, or import property in its own name.⁶⁹

The rights these documents may confer, such as legal capacity; privileges and immunities; inviolability; and exemption from taxes, duties, and social security payments vary greatly, leading to a “variable geometry” in the level of protection. Moreover, seven states hosting field operations have signed but not ratified their MoU, which undermines their legal value and enforcement by local judicial authorities. The OSCE has issued a standard MoU,⁷⁰ but this is often ignored by participating States when it comes to negotiating the basis for an OSCE presence on their territory.

... Which Sometimes Leaves the OSCE and Its Staff Dependent on the Good Will of the Host Country ...

The use of MoU to establish the rights and obligations of field operations has considerably complicated the OSCE’s day-to-day work.

Although these memoranda provide a basis for the OSCE to carry out its work in the field, states parties often view them as nothing more than political statements, circumscribed by the Permanent Council decisions from which they derive their authority, as opposed to binding legal instruments. The partial and provisional remedies they offer can be compared to unilateral laws, applicable only within the territory of the host country and considered valid as long as they do not contradict local legislation. Very often, status of

69 Cf. Tabassi, cited above (Note 21), para. 3.2, p. 3.

70 Attached to CIO.GAL/173/06, 17 October 2006.

operation remains unclear and produces overreliance on “practice”, which often proves ineffective, varies over time, and results in conflicts with the OSCE regulatory framework, which, however, may not take precedence over national laws. For this reason, the re-negotiation of these MoU, when necessary, has always been a tricky process.⁷¹

The closure of the OSCE presence in Azerbaijan in 2015 has shown that legal status, privileges, and immunities granted on a bilateral basis can disappear overnight. In this specific case, the host state unilaterally and formally notified the OSCE that the MoU granting such status to the field operation was terminated with immediate effect, and the Organization was given one month to wind up its operations and repatriate its international members.

... and Affects the OSCE at the Operational Level ...

“The lack of a legal personality for the Conference on Security and Cooperation in Europe was a nightmare right from my first day in office as the first Secretary General of the CSCE/OSCE”, remembered Ambassador Wilhelm Höynck.⁷² In practical terms, the lack of clarity regarding the legal status of the OSCE has major administrative, financial, and reputational implications for the day-to-day work of the OSCE, its executive structures, field operations, and their staff. Estimates of the amount lost annually by the OSCE as a direct result of this unsolved situation range from 1.5 million to two million euros, amounting to over one per cent of the total budget.⁷³

First of all, there may be substantial doubts regarding the OSCE’s capacity to conclude treaties, headquarters agreements, MoU, or other instruments governed by international law, as even stated by the OSCE Chair itself.⁷⁴ The Organization’s legal capacity may be questioned by the other party a posteriori in case of a dispute relating to the application of the agreement. The OSCE’s capacity to file international claims against states may be similarly called into question. Participating States hosting the OSCE Secretariat and Institutions have sometimes used the Organization’s lack of legal personality as an argument for not concluding headquarters and host country agreements.

At the same level, the international standing of the OSCE might be hampered whenever access to international forums requires international legal personality or legal capacity. For instance, the OSCE failed to obtain a “.int” domain name from the International Computing Centre (ICC), as it had

71 Cf. OSCE Secretary General, *Working Paper on “Privileges and Immunities of the OSCE”*, SEC.GAL/203/05, 30 September 2005.

72 Quoted in: Sonya Brander, Making a credible case for a legal personality for the OSCE, in: *OSCE Magazine* 1/2009, pp. 18-22, here: p. 20.

73 Cf. Chairmanship (Ireland) Food for Thought Paper, *Strengthening the Legal Framework of the OSCE*, CIO.GAL/63/12, 18 May 2012.

74 Cf. *Difficulties the OSCE has faced or may face due to the lack of international legal personality, legal capacity and privileges and immunities granted by all participating States*, SEC.GAL/71/00, 13 July 2000, p. 1.

no constituent treaty establishing its existence. Certain international organizations might have difficulties in entering into co-operation agreements with the OSCE, thus being prevented from carrying out joint actions and from funding specific OSCE activities. Observer status in international organizations could be denied. The OSCE could probably not appear before the ICJ or other international courts.

The liability of the Organization and its officials is subject to the same uncertainty. Although it is the view of international legal experts that the OSCE is a subject of international law in the sense that it can incur international responsibility for its acts, despite the lack of a clear legal status, it is unclear who in the Organization (the Secretary General? the Permanent Council? the participating States? the seconding state where a seconded staff member is involved?) should be accountable and be held liable, for example, in the event of an accident causing damage. Sonya Brander openly asks the question:

A field project has been delayed. Who could be sued for damages? The OSCE official who signed the contract? The OSCE? Participating States? Would the OSCE insure the official? Perhaps, given the risks, another organization should implement the project instead?⁷⁵

This issue of the Organization's legal responsibility was again pointedly highlighted by the Donbas hostage crisis in 2014.⁷⁶

On a more technical level, field operations have encountered difficulties opening bank accounts in several participating States, as banks would ask for proof that the OSCE is a legal entity that can be held liable for withdrawals and deposits. The lack of clarity on the status of missions has sometimes caused delays in the import of goods for missions while raising the cost of customs clearance. Taxes levied on miscellaneous goods and services also divert participating States' contributions away from OSCE activities; in the absence of a harmonized position on this issue, the situation varies greatly among the host countries of missions, and only a small number of states exempt the OSCE from customs duties and taxation, which increase the running costs of OSCE operations.⁷⁷ The lack of a uniform system of privileges and immunities affects the ability of OSCE officials and equipment to cross borders, as privileges and immunities established through bilateral agreements

75 Brander, cited above (Note 72), p. 19.

76 In May 2014, two groups of OSCE monitors were abducted on Ukrainian territory and detained for 31 and 26 days, respectively.

77 At its inaugural meeting, the Group of Legal Experts tasked with reviewing the implications of the lack of international legal status and uniform privileges and immunities of the OSCE acknowledged that approximately one per cent of the OSCE's total budget is used to pay fuel tax for OSCE vehicles; cf. *1st Meeting of the Group of Legal Experts tasked with reviewing the implications of the lack of international legal status and uniform privileges and immunities of the OSCE*, Vienna, 7 July 2006, attached to CIO.GAL/173/06, cited above (Note 70).

do not apply in third countries; this acquires particular relevance in view of the increase in OSCE activities with a “regional” character. Finally, it has also proven difficult at times to enter into contracts, to acquire and dispose of movable and immovable property, and to ensure effective insurance coverage.

Instituting and participating in legal proceedings have been additional problems. The lack of legal personality impedes the capacity of the OSCE to directly assert its rights before authorities; most of the time, the regular diplomatic channels offer the only possible way. The courts of some participating States have held that the OSCE did not enjoy immunity from jurisdiction and have often maintained that domestic legislation overrode OSCE Staff Regulations and Rules. It is not clear that an MoU establishing a field operation and providing it with privileges and immunities could be enforced, either through arbitration or in a domestic court, for instance, in case of interference with OSCE facilities and property⁷⁸ or in respect of lawsuits filed in relation to labour and commercial law issues. Regarding contracting and procurement, the OSCE may face legal difficulties in the event that a complaint is filed by a contracting company with a local court in a state that has not granted legal capacity and privileges and immunities to the OSCE. It has no real possibility of redress if it suffers financial damages or losses. In the absence of the OSCE’s legal recognition as an entity, it is unlikely that a party prosecuted by the OSCE would admit the Organization’s status to sue.

... *Particularly as far as Its Staff Are Concerned* ...

While the issue of classification of GATT was about as interesting to GATT officials as “ornithology is to birds”, a locally engaged OSCE official on mission being thrown to jail because of uncertainties of her legal status and that of the organization, turns out to pose entirely different questions.⁷⁹

As so often, the human factor sheds some raw light on the issue of the OSCE’s legal status.

The relationship between an international organization and its staff members is unique. The staff of an international organization are, to a large extent, excluded from any legal system and dependent on the internal procedures established by their organization. Furthermore, the members of international civil services face certain extraordinary threats and dangers such as crime and terrorism, which need to be taken into consideration in order to

78 On occasion, customs or police authorities of participating States have seized OSCE vehicles or documentation or entered OSCE premises to execute court orders.

79 Torfinn Rislåa Arntsen, Foreword in: Finn Seyersted, *Common Law of International Organizations*, Leiden 2008, pp. xi-xx, here: p. xvi. Some missions have indeed experienced cases of arrest and detention of local staff members while they were performing their official functions, and faced difficulties in obtaining their release.

prevent uncertainty and insecurity from arising. This is why it is so important that “OSCE officials shall be entitled to the protection of the OSCE in the performance of their duties”.⁸⁰

Regulation 2.03 of the OSCE Staff Regulations and Rules states that “the Secretary General, the heads of institution and heads of mission, as well as staff members and international mission members shall enjoy the privileges and immunities to which they may be entitled by national legislation or by virtue of bilateral agreements concluded by the OSCE relating to this matter”.⁸¹ But it leaves to the discretion of the state hosting institutions or fields operations to decide which privileges and immunities the staff should enjoy. That confronts the OSCE and its field operations with a series of problems.

First of all, as the MoU governing the work of the OSCE field presences are bilateral documents, their ambit is limited to the borders of the host country and they do not necessarily grant status to people such as experts and consultants, or to representatives of the OSCE Chairmanship-in-Office, the Secretariat (including the Secretary General himself), other field missions, institutions, or participating States who travel for official business to the territory of the host State (e.g. for regional or bilateral projects). As these individuals do not enjoy appropriate privileges and immunities by sole virtue of their position, they could be sued in their personal capacity for decisions taken or acts performed in the exercise of their functions, including in connection with injury or death. Certain staff members may have diplomatic passports issued by their national authorities, but this may not provide sufficient protection.

In many instances, the protection granted to the local staff of field operations, who are a vital asset for the OSCE missions (2,700 local staff members in 2000, 1,815 in 2015), is limited, if not non-existent. The Vienna Convention on Diplomatic Relations, to which most MoU refer, provides that local staff enjoy privileges and immunities only to the extent admitted by the receiving states. As a consequence of this lack of protection, for example, local staff may be summoned to provide evidence or testimony before local authorities even in respect of OSCE business; if they refuse to answer to summons as witnesses, they can be prosecuted (possibly facing fines and/or imprisonment). The OSCE has experienced cases in the past where exemption from legal process was not granted to local staff. National taxation of the salaries paid by the OSCE to locally recruited staff also places the OSCE in an uncompetitive position vis-à-vis other international organizations in terms of its ability to attract local staff, especially in areas where other organizations enjoy exemption. Finally, certain host countries consider local staff to

80 Organization for Security and Co-operation in Europe, *Staff Regulations and Staff Rules*, DOC.SEC/3/03, September 2003, Updated: 17 July 2014, Regulation 2.07, p. 9, at: <http://www.osce.org/employment/108871>.

81 *Ibid.*, Regulation 2.03 (a), p. 6.

remain outside the domestic social security regimes and therefore not entitled to benefits such as pensions and health insurance. In 2006, the Group of Legal Experts observed that many states have advised that if the OSCE had legal personality, local staff would enjoy immunities and be exempt from taxation.⁸²

Taxation of national staff is also a recurring problem that is addressed by the Permanent Council's Advisory Committee on Management and Finance every quarter and is the subject of frequent complaints by heads of OSCE field operations. Some participating States, in contravention of many international instruments that prohibit direct taxation,⁸³ tax their nationals for incomes paid by the OSCE. This poses several problems. First, there is inequality of treatment of OSCE international employees depending on their countries of origin. Second, by taxing OSCE salaries, the country indirectly recovers part of participating States' contributions to the OSCE budget, thus gaining an unfair advantage; "Some participating States profit financially from this situation", is the frank conclusion of Sonya Brander and Maria Martín Estébanez.⁸⁴ Furthermore, it prejudices the independence of the Organization.

The accreditation of staff, both seconded and international, has been the source of numerous operational problems. This limits the ability of missions to operate properly and has occasionally led to missions experiencing a shortage of international personnel for prolonged periods.

Because the OSCE as an entity does not enjoy legal personality, staff supervisors might also be left overexposed. In the event of an employment dispute, a local mission member could initiate legal proceedings against the OSCE official who signed their letter of appointment rather than against the OSCE. Similarly, the judicial and tax authorities could take legal and administrative measures against OSCE officials, viewing them as the employer and as such subject to domestic laws. Here again, Sonya Brander's views as a practitioner are useful:

A staff member has been shot at while on the job. The supervisor is concerned that he could be sued as a result. If so, will the OSCE indemnify him? Should he obtain insurance?⁸⁵

Other concerns include the lack of exemption from national service obligations, which can impair the operation of missions in times of conflict; the

82 Cf. *1st Meeting of the Group of Legal Experts*, cited above (Note 77).

83 Cf, for instance, *Convention on the Privileges and Immunities of the United Nations of 1946*, Article II, Section 7 (a); *Convention on the Privileges and Immunities of the Specialized Agencies of 1947*, Article III, Section 9 (a); *General Agreement on Privileges and Immunities of the Council of Europe of 1949*, Article 7; *Protocol on the Privileges and Immunities of the European Communities of 8 April 1965*, Article 3, at: https://www.ecb.europa.eu/ecb/legal/pdf/ppi_en.pdf.

84 Brander/Martín Estébanez, cited above (Note 10), p. 4.

85 Brander, cited above (Note 72), p. 19.

status of family members of OSCE members of staff; and the possibility that a state may expel an official (as a “*persona non grata*”).

... and in *Performing Increasingly Complex Activities*

Many missions, from their very nature, involve the agents in unusual dangers to which ordinary persons are not exposed.⁸⁶

The OSCE did not remain in the sphere of the merely politically binding, contrary to the intentions of its founders. On the contrary, it has taken on increasingly complex activities and “high-risk” projects, including destroying surplus ammunition, setting up a computerized electoral system across a whole country, and carrying out projects in dangerous areas.

The rapid deployment in Ukraine brought into sharp focus the legal and operational consequences of the lack of consensus on the international legal personality and the scope of privileges and immunities to be enjoyed by the OSCE, its structures, and officials.

On 21 March 2014, the Permanent Council adopted Decision No. 1117 establishing a new OSCE field operation, the Special Monitoring Mission (SMM) to Ukraine. In that decision, the Secretary General was tasked to deploy an advance team within 24 hours of its adoption, which he did, assessing the effectiveness, flexibility, and ability of the OSCE to react rapidly.

The existing MoU between the OSCE and Ukraine, dating from 13 July 1999,⁸⁷ only covered the established field mission, the OSCE Project Coordinator in Ukraine (PCU). Consequently, it was necessary to negotiate a new instrument covering the mandate and format of the SMM, an initial force of 100 civilian monitors, expandable to 500 and eventually 1,000, beginning in January 2015, and tasked to monitor and verify the ceasefire and withdrawal of heavy equipment and weapons under the Minsk Agreements, as well as addressing its status and that of its employees, its legal capacity, security arrangements, and protection by the host state, inviolability, privileges and immunities, custom clearance of equipment, visas, etc.⁸⁸

The MoU on the deployment of an OSCE special monitoring mission was signed on 14 April 2014, providing for provisional application of all its stipulations, except privileges and immunities. It was ratified by the Ukrainian *Verkhovna Rada* on 29 May 2014, and subsequently entered into force on 13 June 2014. The whole process thus took a total of twelve weeks from the date of deployment. For the first three weeks (from deployment on 22 March

86 *Reparation for injuries suffered in the service of the United Nations*, cited above (Note 20), p. 183.

87 *Memorandum of Understanding between the Government of Ukraine and the Organization for Security and Co-operation in Europe (OSCE) Concerning the Creation of a New Form of Co-operation*, Vienna, 13 July 1999, at: <http://www.osce.org/ukraine/37928>.

88 Cf. *The OSCE’s Lack of an Agreed Legal Status – Challenges in Crisis Situations*, cited above (Note 40), p. 57.

until signature on 14 April 2014), the SMM was therefore operating without formal legal status or capacity, as Lisa Tabassi, Head of the Secretariat's Legal Services, often points out. During this initial period of three weeks, the Mission was also hampered by its lack of formal legal capacity, which prevented it from being entitled to open bank accounts, enter into contracts, or import much-needed equipment and vehicles; these difficulties had to be resolved on an ad hoc basis. For the first twelve weeks (until the entry into force of the MoU on 13 June 2014), the SMM monitors had no formal privileges and immunities covering their official activities, nor could they enjoy security protection guaranteed by the host state, beyond the courtesy extended to official visitors.⁸⁹

All in all, the ability of the OSCE to react rapidly to the situation in Ukraine in 2014 was significantly impacted by the OSCE's lack of a formal legal status in the host state at the outset, as has been pointed out by the OSCE Parliamentary Assembly.⁹⁰

The MoU signed on 14 April has not solved everything: It does not cover the rest of the OSCE (ODIHR, HCNM, the Secretary General when he visits the country). It does not address, of course, difficulties inherent in the lack of legal status of the OSCE as a whole, which has, for instance, made secondment of monitors by some participating States more complicated. The use of new technologies (unarmed unmanned aerial vehicles, UAVs) has raised additional legal problems.

The deployment of formed police units under an OSCE mandate, to provide security for election monitoring in accordance with the Minsk Agreements, which the participating States started to discuss in 2016, would again confront the Organization with its lack of legal status. Beyond the OSCE's current experience in Ukraine, it might have implications for future OSCE field operations, in particular peacekeeping.⁹¹

The Disposition of Forces

"The issue of the OSCE's legal capacity itself remains deadlocked on grounds of political principle", summarized the Dutch Chairmanship of the

89 Cf. Lisa Tabassi, *The Question of Legal Status for the OSCE and Implications for Ukraine*, OSCE Parliamentary Assembly/Danish Institute for International Studies (DIIS), Helsinki +40 Supplementary Seminar: The OSCE's Lack of Legal Status – Challenges in Crisis Situations, Copenhagen, Danish Parliament, 27 April 2015, p. 4, para. 5.6, at: <https://www.oscepa.org/documents/all-documents/helsinki-40/seminar-4-diis/2919-presentation-by-lisa-tabassi-for-helsinki-40-seminar-27-april-2015/file>.

90 Cf. Organization for Security and Co-operation in Europe, Parliamentary Assembly, *Resolution on Helsinki +40: Building the OSCE of the Future*, adopted at its 24th Annual Session in Helsinki in July 2015, para. 8, at: <https://www.oscepa.org/meetings/annual-sessions/2015-annual-session-helsinki/2015-helsinki-final-declaration/2281-06>.

91 The 1992 Helsinki Document provides for eventual CSCE/OSCE civilian and/or military peacekeeping missions. Cf. Tabassi, cited above (Note 89), p.5, para. 7.3.

OSCE in 2003.⁹² Almost fifteen years later, the positions expressed by the participating States can be divided in three categories:

- One participating State, after objecting to any legal reinforcement of the OSCE for years, has supported the principle of a convention on the international legal personality, legal capacity, privileges, and immunities of the Organization since 2006, but also expresses the opinion that there is no need for a constituent document and that even a discussion on it might be counterproductive for the OSCE.
- One other participating State and its allies, having advocated in favour of granting the OSCE legal tools since the beginning, stresses that the adoption of the Draft Convention and the adoption of a constituent document must be parallel processes, and that no progress could be made on one without corresponding progress on the other.
- The majority of participating States, including the EU member states, continue to support the immediate adoption and opening for signature of the Draft Convention, without footnotes, and are also open to continuing discussions on a draft constituent document.

The United States: Keeping the OSCE Status to the Minimum Necessary

Up to 2006, the United States “always blocked giving a legal status to the OSCE, as it preferred to keep its flexible political character, even though all the other OSCE participating states had gradually come to the conclusion that an international legal status for the organization is indispensable in order to deal effectively with the many security challenges in the Eurasian area”.⁹³#

“I would emphasize that the document I will sign is neither a treaty nor is it legally binding on any participating state”, stated President Gerald Ford prior to attending the signing of the Helsinki Final Act.⁹⁴ The US might have been worried about the creation of an international legal system for European security parallel to the UN. Marcus Wenig’s opinion is also that legal status for the CSCE would, for the US, have weakened NATO as the “main player”, as Russia’s proposal from the early 1990s foresaw the transfer to the CSCE of the main responsibility for maintaining peace in Europe.⁹⁵

As mentioned above, the 1993 Rome decision was largely inspired by the US; Congress enacted the legislation necessary to implement it in April

92 Chairmanship’s Report on Reform Issues, MC.GAL/5/03/Rev.1, 27 November 2003, in: Organization for Security and Co-operation in Europe, *Eleventh Meeting of the Ministerial Council, 1 and 2 December 2003*, MC.DOC/1/03, Maastricht, 2 December 2003, pp. 148-152, here: p. 152, at: <http://www.osce.org/mc/40533>.

93 Arie Bloed, Legal status of the OSCE in the making, in: *Helsinki Monitor: Security and Human Rights 2/2007*, p. 164-167, here: p. 164.

94 Gerald R. Ford, *Text of Remarks at a Meeting With Representatives of Americans of Eastern European Background Concerning the Conference on Security and Cooperation in Europe*, 25 July 1975, at: <http://www.presidency.ucsb.edu/ws/?pid=5106>.

95 Cf. Wenig, cited above (Note 29), pp. 374 and 381.

1994. Later on, the US government fought successfully against efforts to provide CSCE institutions with broader privileges and immunities where there was no demonstrable need for them.⁹⁶

Victor-Yves Ghebali was fiercely critical of US obstruction; in his opinion, “The impasse was due to the negative attitude of a single country: The United States”, which was, for him, “the country most opposed to the ‘juridification’ of the OSCE”.⁹⁷ According to Ghebali, this position is rooted in the constitutional relationship between the executive and legislative powers in America: The lack of legal status would allow the US executive to operate freely at the OSCE while entirely bypassing Congress.⁹⁸

In 2002, however, an important change in the US stance began to emerge:

We appreciate the importance of legal status to many delegations. Because the most practical concern we face over legal issues is the legal status of our OSCE staff in the field, I am pleased to announce today that we are prepared to consider supporting a convention that would cover privileges and immunities and the authority to contract.⁹⁹

However, the same statement also contained the following:

Prior consultations with Congress and within the Administration, however, have revealed strong satisfaction with the unique character of OSCE and opposition to altering it in any fundamental way. Consequently, we will not be able to support [...] granting OSCE international legal personality.¹⁰⁰

This position remains the same today. The US supports maintaining the flexible, informal, and relatively unbureaucratic character of the OSCE and the promptness it offers in decision-making and crisis response, and therefore objects to a charter establishing the OSCE as an international organization with legal personality, which Washington believes would not enhance the OSCE’s effectiveness, but would on the contrary “misdirect our energies and political capital away from the OSCE’s substantive work”, undermine the Organization’s significance as a platform for political dialogue, and raise concerns as

96 Cf. Sapiro, cited above (Note 10), pp. 634-636.

97 Ghebali, cited above (Note 46), pp. 57 and 59 (author’s translation).

98 Since the US government’s sole obligation is to submit an annual report to the Commission on Security and Co-operation in Europe (the Helsinki Commission), a body created in 1976 to follow and encourage governmental and non-governmental initiatives aiming at promoting the objectives of the Final Act.

99 United States Mission to the OSCE, *Statement to the Permanent Reinforced Council*, delivered by John Schmidt, Director for European Regional Political-Military Issues, Bureau of European Affairs, Department of State, Vienna, June 28, 2002, PC.DEL/482/02/Corr.1, 1 July 2002, p. 5.

100 Ibid.

to the maintenance of the OSCE *acquis* and its sensitive internal power relations.¹⁰¹ At the same time, the US believes that the Draft Convention on privileges and immunities agreed in 2007 would provide the necessary basis for developing such a legal personality and removing the uncertainty and expense the OSCE has faced without it, and, since 2006, fully supports its adoption.¹⁰²

The Russian Federation: Building up a Fully Fledged International Organization

While the United States wants the OSCE to be a flexible ad hoc instrument, and fears it would become less controllable if it developed an institutional life of its own, the Russian Federation sees the Organization as the lead organization for European security.¹⁰³ Russia's stance can thus be categorized as favouring more concrete formalization of OSCE working bodies and procedures.¹⁰⁴

It is well known that the Russian Federation is the champion of transforming the OSCE into a full-fledged international organization meeting criteria that have become generally and universally accepted in the sphere of multilateral politics during the recent decades. [...] That is why we consistently stand up for laying down a normative, legal foundation for the functioning of the OSCE, for determining its structure and procedures, as well as rights and obligations of its participating States.¹⁰⁵

Early in the history of the CSCE, the Russian Federation had advocated in favour of a treaty. In its opinion, the tasks set out by the Rome Council in 1993 could not be accomplished through the conclusion of bilateral agree-

101 Cf. United States Mission to the OSCE, *Statement on the Purpose and Priorities of the OSCE*, as delivered by Principal Deputy Assistant Secretary Kurt Volker at the opening session of the High Level Consultations, PC.DEL/860/05, 12 September 2005. Cf. also *Response to Russian Foreign Minister Lavrov*, as delivered by Ambassador Julie Finley to the Permanent Council, FSC-PC.DEL/18/07, 23 May 2007.

102 Cf. United States Mission to the OSCE, *Opening Plenary Session, as delivered by Dr. Michael Haltzel, U.S. Head of Delegation, OSCE Review Conference, Vienna, October 18, 2010*, RC.DEL/190/10, 19 October 2010.

103 "The architecture of European security, in our opinion, should be based on the OSCE, the only European international organization that protects the interests of all its member states." Anatolii Kvashnin, *Main Security challenges: A Military Response*, in: *International Affairs: A Russian Journal* 1/2000, cited in: Randolph Oberschmidt/Wolfgang Zellner, *OSCE at the Crossroads*, CORE Working Paper 2, Hamburg 2001, p. 12.

104 Cf. Oberschmidt/Zellner, cited above (Note 103), p. 5.

105 Permanent Mission of the Russian Federation to the OSCE, *Statement on the strengthening of the OSCE at the meeting of the Security Model Committee, 29 May 1998*, PC.SMC/38/98, 29 May 1998.

ments between the OSCE and its participating States, which the domestic legislation of the Russian Federation would in any case forbid.¹⁰⁶

In accordance with that position, the Russian Federation supported the recommendations of the 2005 Panel of Eminent Persons on the importance of completing the process, begun in 1995, of transforming the OSCE from a consultative mechanism into a fully fledged modern international body in the sense of Chapter VIII of the UN Charter. The matter of the legal status should be settled in two stages: first, adopting a statute or charter that would set forth the main legal attributes of the OSCE as an international organization and thus would ensure that the OSCE possesses international legal personality, and second, agreeing on a convention that would deal with legal capacity, privileges and immunities of the Organization and its officials.¹⁰⁷

In any case, the entry into force of a convention on privileges and immunities, if and when there is agreement on a draft, will be possible only in conjunction with the entry into force of a statute or charter of the OSCE.¹⁰⁸

Russia's allies have closely aligned themselves around this position.¹⁰⁹

The European Union: The Honest Broker

The EU has always stated its wish to see the OSCE, as an international organization, granted legal personality and privileges and immunities. Its objectives have been:

106 “It should be pointed out that in the absence of an international legal document in which the OSCE is established as a subject of international law, the Russian Federation is unable to conclude a bilateral agreement with the OSCE concerning privileges and immunities, since it can enter into international agreements only with other subjects of international law.” *Talking points on the statement by the representative of the Russian Federation at an informal open-ended working group on the legal capacity, privileges and immunities of OSCE Institutions*, PC.DEL/496/00, 22 September 2000.

107 Cf. Republic of Armenia, Republic of Belarus, Kyrgyz Republic, Russian Federation, Republic of Tajikistan, Republic of Uzbekistan, *Food-for-thought Paper on the Legal Status of the OSCE*, PC.DEL/252/10/Corr. 3, 8 June 2010.

108 Interpretative Statement under Paragraph IV.1(A)6 of the OSCE Rules of Procedure by the delegation of the Russian Federation, attached to Organization for Security and Cooperation in Europe, Ministerial Council, *Decision No. 16/06, Legal Status and Privileges and Immunities of the OSCE*, MC.DEC/16/06, 5 December 2006, at: <http://www.osce.org/mc/23203>.

109 On Azerbaijan's position, see, for instance, PC.DEL/917/05, 20 September 2005 or PC.DEL/440/10, 25 May 2010; on Kazakhstan's position, see, for instance, FSC-PC.DEL/16/07, 23 May 2007 or PC.DEL/1096/07, 8 November 2007; on Tajikistan's position, see, for instance, MC.DEL/11/09, 1 December 2009 or PC.DEL/287/11, 31 March 2011.

- “internal and international recognition of the OSCE’s legal personality
- establishment of a consistent regime of immunities and privileges for all participating States
- protection of OSCE personnel, including mission members.”¹¹⁰

However, with the 2000 Vienna Ministerial Council approaching, the EU agreed to support the compromise text of a convention proposed by the Austrian Chair, even while pointing out that the text fell far short of its expectations, and invited the other participating States to support it as well.¹¹¹ After the failure to adopt the DC in Madrid in 2007, the EU expressed its regret, and remained “firmly committed to its approval which would give the OSCE the recognition as a full-fledged international organization”.¹¹²

Vis-à-vis a statute or charter for the OSCE, the EU saw merit in the approach and showed willingness to continue discussion, as expressed by Spain’s minister for foreign affairs and co-operation at the end of the Madrid Ministerial Council:

Some participating States plead for the approval of a founding charter or Statute for the OSCE. Spain believes that this charter would be beneficial if it had the effect of bringing the OSCE’s status into line with other multilateral organizations, and provided it did not serve as a pretext for reopening political questions long since resolved.¹¹³

For the EU, the priority nevertheless remains in the prompt adoption of the DC, without reservations and after the lifting of the footnotes.¹¹⁴

Helmut Tichy and Ulrike Köhler are right: The curse of the OSCE does not lie in the absence of a founding treaty, nor in the original intentions of its founders to establish political co-operation rather than an international organization, but in “the explicit opposition by two ‘persistent objectors’ to an informal acquisition of international organization status: the United States of

110 *Déclaration de l’Union Européenne sur la capacité juridique, réunion du 13 novembre 2000* [Declaration of the European Union on Juridical Capacity, meeting of 13 November 2000], PC.DEL/713/00, 13 November 2000 (author’s translation).

111 Cf. *ibid.* See also Markéta Molnárová, *Historical overview of legal personality at the OSCE – participating States’ opinions*, 28 December 2012, in which the author provides a useful overview of the various positions of the OSCE participating States, including many EU member States, vis-à-vis the draft convention and the constituent document, especially pp. 10-13.

112 *Closing Statement of the Portuguese Presidency of the Council of the European Union*, MC.DEL/73/07, 30 November 2007, at: <http://www.osce.org/mc/29431>.

113 *Statement by the Minister for Foreign Affairs and Co-operation of Spain, Chairman-in-Office of the OSCE, at the Fifteenth Meeting of the Ministerial Council*, Madrid, 29 November 2007, MC.DEL/12/07, p. 2-3, at: <http://www.osce.org/mc/29258>.

114 Cf. *EU Statement on the OSCE’s Legal Framework*, OSCE Review Conference, RC.DEL/320/10, 26 October 2010.

America and the Russian Federation, sometimes supported by a few other participating States”.¹¹⁵

The Four Options Tabled at the IWG in 2016 and the Initiative of the Secretary General

The Informal Working Group on Strengthening the Legal Framework of the OSCE (IWG), co-ordinated and chaired by a representative appointed by the Chairperson-in-Office (from 2012 until 2016, Ambassador John Bernhard of Denmark; since 2017, Ambassador Helmut Tichy of Austria, who had already played a prominent role on that issue a decade ago), holds an average of three meetings annually.

Although the number of options debated by the states had reached six in 2014, during the Swiss Chairmanship, the IWG agreed at its meeting of 15 April 2015 to focus its deliberations on a limited number of options that seemed to provide a more acceptable basis for further discussion and possible consensus. In addition to the four options on the agenda of the IWG in 2016,¹¹⁶ which are aimed at identifying a multilateral, permanent solution to the problem, the OSCE Secretary General has proposed in July 2015 a model Standing Arrangement between the OSCE and each participating State, to address the duty of care towards OSCE staff and pursue the status, privileges, and immunities via national measures, through a separate track from the ongoing discussions at the IWG.

Option 1: The Adoption of the 2007 Draft Convention

This first option consists of: a) removing the three footnotes from the 2007 DC; b) adopting the text; and c) opening it for signature to interested participating States. The Convention could be adopted by silence procedure either before or during the annual Ministerial Council and opened for signature immediately. Signatories would then be encouraged to ratify, accept, or approve the Convention, as laid out in Article 22(1), once the necessary domestic steps have been taken to ensure compliance with its terms.

Successive recent OSCE Chairmanships have suggested innovative proposals in an attempt to convince the participating States to adopt the 2007 DC and to establish a “lock” mechanism that would permit a smaller number of participating States to maintain a veto on the entry into force of the Convention.

115 Tichy/Köhler, cited above (Note 19), p. 460.

116 Cf. *Report of the German Chairmanship to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2016*, MC.GAL/7/16, 9 December 2016.

In 2012, the Irish Chairmanship proposed to increase the threshold for the Convention's entry into force,¹¹⁷ which would permit such a veto, while allowing for the removal of the footnotes; this particular proposal was taken over by the Ukrainian Chair in 2013 as a way of providing assurances to participating States that link the entry into force of the Convention to the adoption of a Constituent Document, despite some caveats.¹¹⁸ In addition, following the adoption of the Convention, certain participating States might wish to make a declaration concerning a link to a Constituent Document.¹¹⁹ This declaration could take the form of a statement that these participating States will not ratify, accept, or approve the Convention until a Constituent Document has been adopted. As foreseen by Article 23, the DC could be provisionally applied by individual participating States immediately or upon ratification, acceptance, or approval. Such provisional application would gradually lessen the disadvantages arising from the Convention's not having entered into force, and would allow the OSCE to enjoy privileges and immunities in these participating States prior to the Convention's formal entry into force.¹²⁰

One year later, the Ukrainian Chair put a "signing only" option on the table, which would have involved splitting up signing and ratification into distinct and separate stages, with a view to providing additional safeguards to those participating States that may wish to subject the conclusion of the 2007 DC to additional requirements to be further negotiated and agreed.¹²¹ This option was endorsed by the Swiss Chairmanship in 2014, which also connected it to raising the threshold for the entry into force, as suggested by Ireland two years earlier.¹²² After the removal of the footnotes and the revision of its final provisions, the 2007 DC could be adopted and opened for signature, with a decision on its opening for ratification left to be determined at a later date, possibly by a decision of a future Ministerial Council. In this way, the Convention text would have at least changed status from a mere draft to an adopted text. Moreover, according to international law, signature of the

117 Under its current provisions, the DC would come into force when it has been ratified by two-thirds of the participating States.

118 As Ukraine pointed out, however, this approach could entail a risk of unsettling the careful balance reached in 2007. In order to minimize the potential adverse consequences of a wider renegotiation of the text, the participating States should clearly define the scope of intervention into the text of the Draft Convention, which should be limited to the number of ratifications, cf. *Non-paper, Proposal for further work on strengthening the legal framework of the OSCE in 2013*, CIO.GAL/118/13, 26 July 2013, para. 7.

119 In 2013, the Ukrainian Chairperson-in-Office also suggested that the three footnotes could be replaced "by declarations or reservations, or by including them in the MC decision about adoption of the Convention, while also dealing with the linkage to the question of work on a Constituent Document", *ibid.*, para. 3.

120 Cf. *Chairmanship (Ireland) Food for Thought Paper*, cited above (Note 73).

121 Cf. Informal Helsinki +40 Working Group on Strengthening the OSCE Effectiveness and Efficiency, *Food-for-Thought on Strengthening the Legal Framework of the OSCE*, 16 July 2013, CIO.GAL/93/13, 9 July 2013, and *Non-paper, Proposal for further work on strengthening the legal framework of the OSCE in 2013*, cited above (Note 118), paras 4-5.

122 Cf. CIO.GAL/108/14, 30 June 2014.

Convention by a participating State would also create an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the agreement.¹²³ Splitting up the signing and the ratification of the Convention into different stages would have allowed certain participating States to prevent the Convention from being ratified until a Constituent Document was agreed upon. In addition, these participating States could have underlined this by making an interpretative statement or declaration upon adoption of the Convention, as explained above.

Consent would thus have been required from all participating States at two or three separate stages: for adopting and opening the Convention for signature; for opening the Convention for ratification at a later date; and for the entry into force of the Convention, if raising the threshold is added as a third element as proposed successively by Ireland and Ukraine.

All these variants would multiply the categories of participating States with different statuses vis-à-vis the Convention: Some would sign it with no reservations, some others with reservations related to the Constituent Document; some would ratify it, while some others would delay their ratification or make it conditional upon some other factor; a provisional application would make things even more confused. Already in 1993, the Group of Experts mandated by the CSCE Committee of Senior Officials had clearly foreseen the risk of a two-tier system, whereby the legal status would be comprehensively regulated among the parties to the treaty, but undefined in other States.¹²⁴ The case of the Treaty on Conventional Forces in Europe (CFE Treaty), which adapted version signed on 19 November 1999 in Istanbul has been ratified by the Russian Federation, Belarus, Kazakhstan, and Ukraine, but by none of the NATO allies, and has, since then, remained unimplemented, should indeed be carefully kept in mind.¹²⁵

In any case, the adoption and entry into force of the Convention cannot be seen in isolation from progress being achieved on a Constituent Document.

123 According to the Vienna Convention on the Law of Treaties of 23 May 1969, “a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty”. Article 18, in: United Nations, *Treaty Series*, 1980, document No. 18232, p. 336.

124 Cf. CSCE Ad Hoc Group of Legal and Other Experts, *Chairman's Working Paper No. 1*, 17 September 1993, attached to *CSCE Communication No. 254*, cited above (Note 33), p. 3. The Russian Federation also warned against “the threat of dividing the OSCE in two groups of Participating States”, *Statement by the legal expert of the Russian Federation at the 3rd meeting of the open-ended working group on the OSCE legal capacity*, PC.DEL/717/00, 14 November 2000.

125 Cf. Loïc Simonet, *Trois ans après la suspension du Traité sur les forces conventionnelles en Europe par la Fédération de Russie: Retour sur les fondements juridiques d'un acte controversé* [Three Years after the Suspension of the Treaty on Conventional Armed Forces in Europe by the Russian Federation: Return to the Legal Basis of a Controversial Act], in: *Revue générale de droit international public* 1/2011, pp. 157-173.

Option 2: The Two-Document Approach: Constituent Document and 2007 DC

This option, which can be traced back to the 2005 Report of the Panel of Eminent Persons, consists of the parallel (or consecutive) adoption of a constituent document for the OSCE and the 2007 DC.

Yet the proposal for discussing the substance of a draft constituent document has not achieved consensus. As already discussed, the main concern expressed relates to the loss of flexibility that might result from the adoption of an OSCE constituent document, an argument that was deemed irrelevant early on, as a majority of participating States have unequivocally stated that any constituent document should not alter the current status of the OSCE and the nature of its political commitments, nor affect the flexibility of the Organization or the autonomy and functioning of the OSCE executive structures.¹²⁶ The US has questioned whether the IWG has a mandate to discuss the draft constituent document, although the principles for a discussion on a constituent document for the OSCE, issued in 2011, clearly state that “discussions should be conducted by a technical working group consisting of legal experts” and that “the results should be brought to the attention of the Informal Working Group [...]”.¹²⁷

All in all, the topic of a constituent document “has become overly politicised”, underlined the Irish Chair in 2012.¹²⁸

Option 3: “Convention Plus”/Statute

This option involves the reopening of the 2007 DC with a view to including within it provisions of statutory/constitutional character for the OSCE, so that the new document (colloquially called “Convention Plus”) would contain provisions of a statute for the OSCE (e.g. functions and structure of the Organization) in addition to the provisions on privileges and immunities of the 2007 DC. The elaboration of the “Convention Plus” would also necessitate some amendments to the final provisions of the DC, including the consensus requirement for its entry into force.

In order to minimize the potentially adverse consequences of a wider reopening of the DC, the participating States have been advised to clearly define the scope of intervention in the text of 2007 by indicating that only amendments or additions necessary for its transformation into a statute would be subject to further negotiations.¹²⁹

126 “It is worth adding that the argument put forward in the past, according to which a constituent treaty recognizing the intergovernmental character of the OSCE would result in depriving it of its flexibility, is not regarded as relevant: it is not the legal instrument as such that confers flexibility to an entity, but the mandate attributed to this entity and the means given to it for the performance of its activities that make it flexible or not”, *The OSCE’s Legal Capacity and Privileges and Immunities*, cited above (Note 45), para. 11.

127 *Principles for a discussion on a Constituent Document*, cited above (Note 66).

128 *Chairmanship (Ireland) Food for Thought Paper*, cited above (Note 73).

129 Cf. CIO.GAL/46/15, 8 April 2015.

On 2 October 2014, the Swiss Chairmanship circulated a draft “Convention Plus/Statute”,¹³⁰ which was slightly amended in 2015 at the request of the OSCE Parliamentary Assembly.

Option 4: Implementation of the 1993 Rome Decision through Signature and Ratification of the 2007 Draft Convention

In this option, participating States would sign and ratify the DC as a means of implementing the commitments made in the 1993 Rome Ministerial Decision without the need for a further Ministerial decision, an option that was already foreseen by the Austrian Chairmanship in 2000.¹³¹ Those participating States that find the DC problematic – for whatever reason – are of course under no compulsion to become a party and remain free to meet their 1993 commitment in some other fashion.

This option was summarized by the Swiss Chairmanship in a non-paper circulated on 2 October 2014. Previously, Switzerland had suggested, as an “interim” step meant to bridge uncertainties of the legal status of the OSCE and its Institutions pending a comprehensive resolution of this issue, updating the 1993 Rome decision to take into account the significant level of transformation that the OSCE had undergone during the previous two decades.¹³² As a follow-up to the meeting of the IWG held on 11 July 2014, the Swiss Chairmanship has also conducted a survey among participating States to see which national measures have been taken to implement the Rome decision and which participating States have undertaken to provisionally or de facto apply the 2007 DC.¹³³

The Secretary General’s Initiative: The Model Standing Arrangement

In 2000, the Austrian Chair had suggested the adoption by the Ministerial Council of a model bilateral agreement between the OSCE and each participating State, conferring legal capacity and privileges and immunities on the Organization.¹³⁴ Provisions contained in the model agreement could be adjusted according to the privileges and immunities to be granted by the participating State, depending on whether or not it hosted an institution or a mission.

This solution presents several advantages. The “bilateral” approach would be a compromise between unilateral action (by granting legal capacity and privileges and immunities under domestic law) and multilateral action

130 Attached to CIO.GAL/173/14, 2 October 2014.

131 Cf. *OSCE Legal Capacity and Privileges and Immunities, Report of the Permanent Council to the Ministerial Council*, Annex to PC.DD/50/00, 23 November 2000, para. 6.

132 Cf. CIO.GAL/108/14, cited above (Note 122), and CIO.GAL/173/14, cited above (Note 130).

133 Cf. CIO.GAL/152/14, 29 August 2014.

134 Cf. CIO.GAL/114/00, cited above (Note 48), annex 2.

(by ratifying a convention on legal capacity and privileges and immunities). By concluding such an agreement with the OSCE, the participating State concerned would implicitly recognize that the Organization has the capacity to conclude it. This would be a de facto implicit recognition of the OSCE's legal personality under international law, which could also be explicitly provided for in the agreement. As a party to the bilateral agreement, the OSCE would be in a stronger position to request its due application.¹³⁵

In 2015, Secretary General Lamberto Zannier who, as Chief Administrative Officer faces the operational impact of the OSCE's current legal status on a daily basis, proactively introduced a model bilateral Standing Arrangement, bringing the status of the OSCE to the bare minimum needed to carry on its missions. The model was proposed to the participating States in Vienna in July 2015. It provides an interim solution, based purely on the serious operational need to protect OSCE officials and assets in states where no national measures have been adopted in favour of the OSCE. It is a separate track from the ongoing political/legal discussions in the Informal Working Group.

The text of the Standing Arrangement¹³⁶ grants, among other things: legal capacity to the OSCE, inviolability of its premises and archives, immunity from jurisdiction and tax and customs exemptions, as well as privileges and immunities to representatives of participating States attending OSCE meetings, to members of the Parliamentary Assembly and officials of its Secretariat, to experts on mission, and to OSCE officials without distinction as to nationality. Once the Standing Arrangement was concluded and in force, it would cover the OSCE and any of its activities on the territory of the host state, including project implementation, meetings, election monitoring, etc.

At the meeting of the IWG on 29 April 2016, Poland indicated it would accelerate talks about an agreement on the status of the OSCE, including ODIHR in Warsaw, based on the draft Standing Arrangement proposed by the Secretary General. However, beyond this specific case, this creative option might, unfortunately, face the same reservations as the DC. Some delegations had already rejected this option in 2000, as they considered that international establishment of the legal personality of the OSCE was a precondition for the conclusion of bilateral agreements.¹³⁷ At the meeting of the IWG on 29 April 2016, the Russian Federation stated once again that the OSCE's legal personality should be subject of a collective agreement, and that it did not see the Standing Arrangement as part of the solution.

135 Cf. *The OSCE's Legal Capacity and Privileges and Immunities*, cited above, (Note 45), para. 23.

136 The text can be found under SEC.GAL/135/16, 8 September 2016.

137 Cf. *OSCE Legal Capacity and Privileges and Immunities, Report of the Permanent Council to the Ministerial Council*, cited above (Note 131), para. 4.

Conclusion: The OSCE Needs Rules

“The case of the OSCE is not a success story in terms of transforming a political entity into a legal one.”¹³⁸

Despite long-lasting attempts to formalize its institutional structure, the OSCE’s legal status remains an open issue. More than 40 years after the Helsinki Accords, the OSCE is still “in a sort of limbo, outside the realm of international law”.¹³⁹ The issue might well be seen as an element of an “identity crisis” regarding the “nature” of the Organization.¹⁴⁰

The uniqueness of the OSCE does not lie in its incomplete legal status, which is something shared by several other international organizations. It is a result of the fact that the participating States themselves (or at least some of them) deny the OSCE, for political reasons, the character of an international organization and hold it in a state of “legal minority”. As the International Law Commission rightly underlined, “[OSCE] member States *insisted* that there was no treaty concluded to that effect”.¹⁴¹ This makes the OSCE unique, as other international organizations have managed to overcome their initial lack of a legal foundation and evolved towards more solidity and efficiency, even if it took decades. At a time where new types of threat weigh on the security of the Euro-Atlantic region, purposely depriving a useful forum from common and clear rules about status, privileges, and immunities should be seen as “clearly unacceptable”.¹⁴²

The lack of legal personality causes damage to the OSCE’s reputation, since other regional or international organizations may fail to take the OSCE seriously as a proper organization or, in some cases, may be unable to deal with the OSCE as a partner. In a context of increased competition and overlap among the memberships, mandates, and capacities of the international and regional organizations acting in the Euro-Atlantic region, it creates uncertainties regarding the OSCE’s ability to implement projects, as compared with other organizations.¹⁴³ While these problems mainly affect the OSCE itself, they also create problems for the participating States, which cannot conclude agreements with the OSCE, are unclear as to the liability of the Or-

138 Cf. Tufan Höbek, *Legal Attributes of International Organizations in the Absence of a Constituent Legal Document. The Case of the OSCE*, dissertation proposal (“exposé”), University of Vienna, 2011, p. 2.

139 Odello, cited above (Note 22), p. 354.

140 Cf. Alexander Matveev, *The OSCE Identity Crisis*, in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 1999*, Baden-Baden 2000, pp. 59-78, here: p. 59.

141 United Nations, *Report of the International Law Commission, Sixty-first session*, cited above (Note 8), p. 45. Emphasis added.

142 Ambassador John Bernhard, Special Advisor of the OSCE Chairperson-in-Office on the Legal Framework, at the OSCE Parliamentary Assembly’s seminar on “The OSCE’s Lack of Legal Status”, held on 27 April 2015 in Copenhagen, cited in: OSCE, Press Release, *Time to tackle the OSCE’s lack of legal status, say participants at Helsinki +40 seminar*, Copenhagen, 28 April 2015, at: <http://www.osce.org/pa/154186>.

143 Cf. *1st Meeting of the Group of Legal Experts*, cited above (Note 77).

ganization, encounter difficulties ensuring the necessary allocations in their national budgets for an organization whose legal status is contested, and have difficulty granting privileges and immunities to such an organization.

A de jure recognition of the OSCE's legal personality would go a long way towards enabling the Organization to perform effectively and efficiently the mandates assigned to it by its participating States, solidifying its crucial role in the European security architecture. It would create a more uniform operating environment, remove the current need to negotiate bilateral agreements with individual participating States and spell out privileges and immunities. It would undoubtedly strengthen the security and legal protection of OSCE personnel in the field, especially those working in "difficult areas", and help to limit risks connected with complicated technical projects. It would erase any doubts that may remain as to the role and work of the OSCE as a regional security organization under Chapter VIII of the UN Charter; allow for proper risk assessment and the limitation of potential liabilities that participating States or OSCE officials could face; and enhance the OSCE's standing and facilitate smoother co-operation with other international organizations.

Rules can offer certainty, consistency, clarity and a framework for activities. Those who work with you find it easier to co-operate with you. Those who want to work with you can rely on your status. And those who work for you understand their obligations towards you and your obligations towards them.¹⁴⁴

Ultimately, the matter at issue is legal protection for human safety and security – both of the 3,000 individuals who are dedicated to delivering the OSCE's mandate and of the several million individuals who are hoping to be the beneficiaries of the OSCE principles and commitments: peace and security across the OSCE region – from Vancouver to Vladivostok – economic development, environmental protection, democracy, and human rights. "The OSCE owes it to all of its staff to resolve the question of its legal personality", as rightly underlined by the Panel of Eminent Persons on European Security as a Common Project.¹⁴⁵

On 13 July 2016, the Max Planck Institute for Comparative Public Law and International Law convened a one-day international conference in Berlin. Under the heading "Between Aspirations and Realities: Strengthening the Legal Framework of the OSCE", the conference aimed to provide a new impetus to the debate on strengthening the legal framework of the OSCE. Contrary to Sisyphus, who must struggle perpetually and without hope of suc-

144 Brander, cited above (Note 72), p. 19.

145 *Lessons Learned for the OSCE from Its Engagement in Ukraine*, Interim Report and Recommendations of the Panel of Eminent Persons on European Security as a Common Project, June 2015, p. 11, at: <http://www.osce.org/networks/164561>.

cess, such ongoing discussion and reflection prove there is still momentum and an opportunity for the OSCE to become a truly international organization, with the status and privileges it deserves. But “we need a political shock in the OSCE right now, particularly if we are to finally resolve the legal question. Otherwise, we could very well become irrelevant”.¹⁴⁶

146 Project Chair João Soares (MP, Portugal) at the opening of the OSCE Parliamentary Assembly’s seminar on “The OSCE’s Lack of Legal Status”, held on 27 April 2015 in Copenhagen, cited in: *Time to tackle the OSCE’s lack of legal status, say participants at Helsinki +40 seminar*, cited above (Note 142).