

ILIN Alexey

Master of International Affairs (Texas A&M University, 2015), Intern
with the Kennan Institute of Wilson Center

**ALIGNMENT WITH THE ICC:
A CASE TO ENFORCE HELSINKI DECISIONS**

In this essay, I make the case for establishing a mechanism to enforce the principles of the Helsinki Accords, effectively making them legally binding. I propose aligning the Organization for Security and Cooperation in Europe with the International Criminal Court, which will hold Eurasian leaders accountable for their actions and will help to prevent aggressive wars and gross human rights violations in the future.

The Helsinki Final Act of 1975 was a political breakthrough in Cold War Europe. Despite being hardline adversaries, the West and the Communist bloc managed to agree on common principles for the conduct of foreign and domestic policy. These principles included sovereign equality, refraining from the threat or use of force, and respect for human rights. The Helsinki Final Act helped European countries on both sides of the Iron Curtain to overcome their divide. After 1991, the CSCE/OSCE was the spearhead of post-Cold War settlement and democratization. By the end of the 20th century, it became the world's largest security-oriented organization. However, this was also the time when it faced a systemic and existential crisis.

Democratization and liberalization were relatively painless processes in Eastern Europe. However, former Yugoslavia, the Caucasus and Central Asia faced a more troubled transition. In these countries, OSCE observers frequently

found themselves in direct conflict with national leaders.¹ Moreover, the OSCE observation and diplomatic facilitation efforts proved unable to mitigate conflict, unless assisted by a hard-power-wielding third party, such as NATO. Furthermore, renewed confrontation with the Russian government effectively paralyzed the organization in the 2000s. Forty years after the Helsinki Accords, the OSCE grew powerless before the challenges of local conflicts, authoritarianism, and gross human rights violations. Symbols of the organization's weaknesses include: Russia's infringement on Ukraine's sovereignty in 2014-2015, Georgia's offensive against its Ossetian minority in 2008, Turkey's continued denial of the Armenian genocide, and the forced disappearance of opposition leaders in Belarus.

Most of the OSCE's failures come from its weak institutional design. First, the OSCE does not have a legal personality. The participating states' ministers have repeatedly attempted to establish the organization's legal personality since 1993, but this process has not gone any further than a draft Convention on the International Legal Personality, Legal Capacity, and Privileges and Immunities of the OSCE.²

Second, the organization does not have a binding normative basis. Despite a detailed description of the members' duties in the three main Charters (Helsinki, Paris, Istanbul), these documents are not treaties, and thus are not legally binding of signees.

Third, the OSCE does not have any legal recourse to compel participating states to shift policy in accordance with the organization's commonly accepted norms. Therefore, all of the OSCE's activities rest on a set of general principles

¹Peter Eicher, "Improving OSCE Election Observation," *Security and Human Rights*, 2009, Vol.20(4), p. 267.

² Brander S. Legal Personality of the OSCE: Strong Pro Arguments (Брандер С. Правосубъектность ОБСЕ: убедительные доводы «за») // OSCE Magazine, March-April 2009. P. 18-22. URL: <http://www.osce.org/ru/secretariat/36187?download=true>

and values, which have not been transformed into a definite and enforceable normative base.

The resolution of the first two problems is a key to increasing the organization's effectiveness and revitalizing the Euro-Atlantic security structure. Participating states must adopt an official OSCE Charter, which will define the organization's legal capacity and the members' rights and obligations. In 2008, Russian President Dmitry Medvedev proposed such a document, titled the European Security Treaty.³ The new Treaty would specify relations between members in a legally binding manner. In particular, Article 7 contained a collective security principle, similar to the Article 5 of NATO. In 2009, Foreign Minister Sergey Lavrov reinforced this proposal with the norms of arms control, nonproliferation, combating terrorism and human trafficking,⁴ and delivered it to the OSCE Annual Security Review Conference.

As we can see, the OSCE has already received a viable project for its improvement. The establishment of its legal existence and a solid normative basis is now a question of political will and mutual understanding. Therefore, I would like to address the third problem and propose a mechanism to enforce member-states' accountability.

The major problem of today's Euro-Atlantic security is the impunity of certain states and government leaders, which violate the fundamental principles of the OSCE – refraining from the use of force, inviolability of borders, and respect for human rights. A state may conduct aggressive policy against its neighbors, oppress its own citizens, and still remain a voting member of the OSCE without any consequence. One may argue that the OSCE foundational documents are declaratory and do not create any accountability for their signatories. Nevertheless, history knows an opposite example. In order to

³The Draft of the European Security Treaty // Kremlin.ru, 29.11.2009. URL: <http://eng.kremlin.ru/news/275>

⁴Statement by Mr. Sergey Lavrov, OSCE Annual Security Review Conference // Vienna, 23.06.2009 (PC.DEL/480/09 ENGLISH, Original: RUSSIAN).

prosecute Nazi criminals for crimes against peace, the judges of the Nuremberg Trial referred to the Kellogg-Briand Pact, which was previously considered as “aspirational.” Moreover, the OSCE basic principles are not mere “abstract values.” They are norms of customary international law, which were established by the UN Charter and the Universal Declaration of Human Rights, and reiterated in the numerous subsequent conventions and regional treaties. Therefore, if a state declares its adherence to the principles of the Helsinki Final Act, it becomes accountable to these principles.

The next question is how the OSCE should implement its accountability mechanism. The organization may either rely on existing courts and trials, or create its own. The experience of trials on the former Yugoslavia and Rwanda suggests that starting a new international court from scratch may be very costly. Thus, we have three modern international courts to choose from: the International Court of Justice (ICJ), the European Court on Human Rights (ECHR) and the International Criminal Court (ICC).

Only states may be parties in cases before the ICJ,⁵ and both states must accept the ICJ jurisdiction.⁶ An alignment between the OSCE and the ICJ is practically meaningless, since the states that violate international law usually do not accept the ICJ’s jurisdiction. The ECHR is an integral body of the Council of Europe; it may examine state v. state, or citizen v. state cases, but its jurisdiction is limited to human rights issues. The only legal institution that can hold the OSCE government leaders accountable is the ICC.

The ICC exercises its jurisdiction over persons, not state entities, and deals with the most serious crimes of international concern. Worthy of note, the ICC can solve the problems previously unapproachable for the OSCE, such as punishing leaders of governments and non-state actors for acts of aggression

⁵Statute of the International Court of Justice, Article 34.1.

⁶*Ibid.*, Article 36.2.

and terror. The clause on refraining from the threat or use of force in the Helsinki Final Act is certainly compatible with the definition of aggression adopted by the ICC Conference in Kampala in 2010.⁷ In the same fashion, the renunciation of torture and other inhuman treatment by the Paris Charter⁸ is compatible with the definitions of crimes against humanity of the Rome Statute (1998).⁹

One may ask why the OSCE should extend the court's jurisdiction to all of its territory instead of letting its members decide on their own whether to ratify the Rome Statute or not. Comparing the maps of the Rome Statute ratification and the OSCE membership will help us to answer this question. We notice that the ICC's jurisdiction fully covers the territory of the European Union, while east to the EU border only Moldova, Georgia, Tajikistan and Mongolia are parties. At the same time, all of the recent violent conflicts and atrocities within the OSCE concern have taken place in the former Soviet Union area, while very little effort has been taken to punish the perpetrators of such crimes. Therefore, the OSCE should use its diplomatic power to translate the aspirational provisions of Helsinki into the binding power of the Rome Statute for all of its members.

The final question is how exactly the OSCE should align with the ICC. First, it should become a judicial entity by adopting its official Charter in order to conclude an agreement with another international institution. Second, it should state in its charter that all active members and approved candidates automatically accept the ICC jurisdiction. Of course, all of the participating states should ratify this new charter. Third, the ICC will have to amend the Rome Statute, in particular, Articles 11, 12, 13, and introduce a new article

⁷ Amendments to the Rome Statute of the International Criminal Court: Adoption of Amendments to the Crime of Aggression, 2010, Kampala, C.N.651.2010.TREATIES-8.

⁸Charter of Paris for a New Europe, 1990, pp. 3-4.

⁹ The Rome Statute of the International Criminal Court, A/CONF.183/9, Article 7.

about the rights and obligations of the OSCE as the court's associated partner. The amended articles should contain provisions that the court has jurisdiction with respect to the crimes committed on the territory of the OSCE, or by the nationals of the OSCE countries, and that the OSCE itself or its participating states may refer a situation when one or more crimes have been committed on their territory or by their nationals.

Most of the OSCE participants, which have previously hesitated, are likely to accept the ICC jurisdiction. However, the United States and Russia, which are generally opposed to the Court, will probably refuse to sacrifice their freedom of political maneuver, and thus may leave the Organization. Nevertheless, an alignment with the ICC will definitely strengthen the OSCE overall. A smaller regional organization with well-defined and properly enforced rules will be much more efficient than a patchy conglomerate of states, which is based on futile declarations and torn apart by political rivalry.