

HELSINKI +40 PROJECT

Food-for-Thought Paper: The OSCE's Lack of an Agreed Legal Status – Challenges in Crisis Situations

CONTENTS

1. The question of the international legal personality of the OSCE
2. Legal issues arising in respect of OSCE rapid deployment to Ukraine
3. Contribution of the OSCE Parliamentary Assembly to strengthening the legal status of the OSCE
4. Options currently under consideration in the OSCE Informal Working Group
5. Conclusion

Annex: Measures taken by national parliaments

April 2015

1. The question of the international legal personality of the OSCE

The Organization for Security and Co-operation in Europe (OSCE) emerged from the 1975 Helsinki Final Act, a political arrangement. Under the subsequent 1990 Charter of Paris for a New Europe, another politically binding document, the then-Conference on Security and Co-operation in Europe (CSCE) participating States called for the establishment of a parliamentary assembly, established the Secretariat and began establishing the other executive structures. The Foreign Ministers of the participating States recognised, however, that the competence to make rules concerning the legal status and privileges and immunities rests with the legislature of each participating State. In order to assist in harmonizing the rules to be applied, in 1993 the Ministers in Rome adopted a Decision on the provisions concerning the legal capacity of the CSCE institutions and privileges and immunities. More than 20 years later, only a small number of participating States have adopted legislation or measures implementing the 1993 Rome Council Decision.

Under the national law of the respective host countries, the OSCE Secretariat, the OSCE Parliamentary Assembly (OSCE PA) and the three Institutions (Office for Democratic Institutions and Human Rights (ODIHR), High Commissioner on National Minorities (HCNM) and Representative on Freedom of the Media (RFOM)) enjoy legal personality, legal capacity and privileges and immunities at the level customarily enjoyed by the international organisations in the United Nations system. However, of the 18 OSCE field operations, only one enjoys treatment equivalent to that of the United Nations: the OSCE Mission in Kosovo (OMIK), which is a pillar of the United Nations Mission in Kosovo (UNMIK).

To remedy the persistent question, efforts were made to negotiate a Draft Convention on the International Legal Personality, Legal Capacity, and Privileges and Immunities of the OSCE. It was agreed in 2007 at expert group level but not adopted by participating States, mainly because of the position by one group of States that a legally binding statute of the OSCE must be adopted in advance or in parallel with the adoption of the Draft Convention. The issue has remained at an impasse since then, despite the efforts of the OSCE Informal Working Group on Strengthening the Legal Framework of the OSCE (IWG), established in 2009.

Consequently, the legal framework of the OSCE is unclear with regard to its legal personality, legal capacity and a uniform system of privileges and immunities. This state of affairs has had the consequence of creating a number of serious challenges for the OSCE on an operational level. The following list summarizes some of such challenges:

- Inability to conclude headquarters' agreements with States hosting OSCE executive structures;
- Uncertainties as to the full status as treaties under international law of the memoranda of understanding concluded with the States hosting OSCE field operations;
- Difficulty entering into agreements on cooperation with other international organizations and to receive application of the standard treatment granted between international organizations;
- Uncertainty as to the liability of the OSCE and its officials vis-à-vis third parties;

The OSCE's Lack of an Agreed Legal Status – Challenges in Crisis Situations

- Question as to the liability of personal representatives and envoys of the Chairperson-in-Office serving on special missions;
- Questions as to OSCE's capacity to request indemnification which other international organizations are routinely granted;
- Difficulty opening bank accounts in several participating States and registering vehicles in the OSCE's name;
- Difficulty authorizing the purchase of goods and services;
- Difficulty obtaining goods and services on a tax-free basis in several participating States;
- Inability of the OSCE to ensure effective insurance coverage;
- Failure to obtain accreditation for staff, both seconded and international;
- Failure or difficulties in asserting immunity in respect of lawsuits filed in national courts in relation to labour issues and commercial law issues;
- Differentiation between international and locally recruited OSCE officials, a distinction not recognised in the international civil service and causing a variety of legal consequences, including national taxation of the salaries paid by the OSCE to locally recruited staff; and
- Lack of clarity as to who is accountable and will be held liable in the event of an accident causing damage. This is an acute risk in view of the fact that the OSCE engages in high risk projects such as the destruction of ammunition, highly flammable rocket fuel, and assessment of uranium dumps.

All these difficulties unnecessarily complicate the everyday operations of the OSCE and affect the effective delivery of its mandates. Transferring funds, purchasing services, ensuring the functional independence of staff as well as their equal treatment is more problematic and costly, because the legal status of the OSCE is unclear and varies from one participating State to another and takes time to establish. Although in some cases it has been possible to find pragmatic solutions to these problems, these are only ad hoc and do not provide for a reliable legal framework necessary for the smooth functioning of the OSCE. While these problems are mainly for the OSCE, these deficits also create problems for participating States which cannot conclude agreements with the OSCE, are unclear as to the liability of the Organization, 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.

2. Legal issues arising in respect of OSCE rapid deployment to Ukraine

The OSCE's ability to rapidly deploy is essential to effective conflict prevention, crisis management and post conflict rehabilitation. 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 Ukraine at the outset, which created the need to negotiate and agree upon the necessary status, privileges and immunities and pursue parliamentary approval to bring them into force.

The main legal issues arising due to rapid deployment and lack of agreed legal personality in Ukraine were:

- Security and protection of the mission members serving in the OSCE Special Monitoring Mission to Ukraine (SMM);
- Recognition of the immunity of the SMM Monitors outside Ukraine;
- Issues relating to locally recruited mission members (principally taxation and conscription into military service);
- Vehicles/custom clearance;
- Delivery of the mandate/ use of necessary technologies/ unarmed unmanned aerial vehicles (UAVs);
- Freedom of movement / access to military sites;
- Challenges to compliance with the established OSCE regulations and rules caused by the need for ad hoc solutions to problems;

3. Contribution of the OSCE Parliamentary Assembly to strengthening the legal status of the OSCE

From the outset, the CSCE/OSCE Parliamentary Assembly (OSCE PA) has been an active advocate of giving the OSCE legal personality as well as privileges and immunities in line with those of other international organisations. Already at its first formal session in July 1992 in Budapest, the Assembly called for giving the CSCE a legal basis. Since then, the Assembly has been regularly raising the topic, urging for greater parliamentary and ministerial action. Thus, the 1997 Warsaw Declaration called for “conferring real legal status on the OSCE” and the 1999 St. Petersburg Declaration recommended a “codification under international law of the OSCE's status as a regional organisation under Chapter VIII of the UN Charter”. Similar recommendations were included in the 2008 Astana and 2010 Oslo Declarations, with the 2011 Belgrade Declaration welcoming the decision of the Lithuanian Chairmanship to continue consultations on strengthening the legal framework of the OSCE and to discuss the possibility of preparing a constituent document. In its Resolution on Helsinki +40, the 2012 Monaco Declaration called on the participating States to tackle further important

reforms such as the question of a constituent document for the OSCE. The PA has also underlined that - as a first step in the process - the draft Convention needs speedy adoption.

However supportive of the idea of an OSCE constituent document, the OSCE Parliamentary Assembly pays close attention to the substance of any proposed text, so as to ensure that the PA's role, status and involvement in the OSCE's work are properly defined in line with the Charter of Paris, other basic documents and Assembly recommendations.

4. Options currently under consideration in the OSCE Informal Working Group

The forum for the consideration of all issues relating to the strengthening of the legal framework of the OSCE is the Informal Working Group on Strengthening the Legal Framework of the OSCE (IWG). The IWG is co-ordinated and chaired by a representative appointed by the Chairperson-in-Office to foster dialogue among the participating States. Since 2012 the IWG is chaired by Ambassador John Bernhard of Denmark. The IWG holds an average of three meetings annually.

The main tasks of the IWG are to review the developments and problems related to the issue of the OSCE's legal status and to discuss possible ways to strengthen the legal framework of the OSCE to afford the Organization and its staff with a common legal status and a uniform set of privileges and immunities.

Over the past few years several options have been submitted in the IWG to strengthen the legal framework of the OSCE. At the end of 2014 it was decided that in order to render the work of the IWG more effective, it was advisable to reduce the number of options, setting aside some in order to focus on the options that seemed to offer more potential for reaching a compromise. The four options retained for further consideration by the IWG in 2015 are as follows:

- **Adoption of the 2007 Draft Convention (2007 DC)**

As already stated, a draft Convention on international legal personality, legal capacity and privileges and immunities of the OSCE was drawn up in 2007 by an informal Working Group at expert level (2007 DC). Three footnotes were inserted during the elaboration of the 2007 DC at the request of certain participating States, making the conclusion of the 2007 DC conditional on the existence of a "Charter of the OSCE". Though the 2007 DC continues to enjoy very broad support among participating States, its adoption and signature have not been possible for the past seven years.

- **Adoption of an OSCE Constituent Document (CD) and the 2007 DC**

This option consists of the (parallel or consecutive) adoption of a Constituent Document for the OSCE (CD) and the 2007 DC. In 2012, the Irish Chairmanship of the OSCE submitted a draft CD to the participating States. The submitted draft text is a short, technical text which illustrates concisely the functions and structure of the OSCE in their present form. The draft CD does not change the character of the OSCE which has evolved over the decades by consensus, or the mandate and attributions of its various bodies.

- **“Convention Plus”/Statute (incorporating elements of an OSCE constituent document into the 2007 Draft Convention text)**

This option involves the reopening of the 2007 DC with a view to including therein provisions that are 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 OSCE) 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 2007 DC, including the consensus requirement for its entry into force. The working basis for this option is a draft circulated by the Swiss Chairmanship in 2014.

- **Implementation of commitments contained in the 1993 Rome Decision through signature and ratification of the 2007 Draft Convention by participating States ready to do so**

While articulating the legal status (legal capacity, privileges and immunities) of the CSCE/OSCE Institutions, the 1993 Rome Decision left it to each participating State to determine the best means for implementing the relevant commitments. This is an ongoing commitment for OSCE participating States and it could be implemented, inter alia through signature and ratification of the 2007 Draft Convention without the footnotes attached. In this option, the 2007 DC would serve as a multilateral agreement among the participating States who may wish to implement in this manner their commitments under the 1993 Rome Decision.

5. Conclusion

The risks that became so sharply apparent in the OSCE rapid deployment to Ukraine in 2014 could be substantially alleviated throughout the OSCE region if the legal status of the OSCE (its legal personality, capacity, and privileges and immunities) were recognised and confirmed through the adoption of a legally binding multilateral agreement by all 57 participating States. However, progress in reaching consensus on adopting the 2007 Draft Convention on the International Legal Personality, Legal Capacity, and Privileges and Immunities of the OSCE has remained at an impasse, despite the efforts of the OSCE Informal Working Group on Strengthening the Legal Framework of the OSCE (IWG) to reach consensus on that or one of the other options.

In most constitutional orders of the OSCE participating States, issues such as granting legal personality are within the exclusive remit of the national parliaments. The role of the Parliaments in the strengthening of the legal framework of the OSCE is crucial. The only agreed document on this issue, the 1993 Rome Council Decision, explicitly recognised:

“In most participating States the competence to make rules concerning the legal status of the OSCE institutions and privileges and immunities rests with the legislature.”

However, the number of national parliaments of OSCE participating States that have taken measures for strengthening the legal framework of the OSCE and removing uncertainties as to its legal personality capacity and privileges and immunities is very limited.

The OSCE's Lack of an Agreed Legal Status – Challenges in Crisis Situations

A significant step taken recently in this regard is the resolution adopted by the Netherlands Senate on 24 March 2015, which called upon the Netherlands Government to take the initiative in short order to achieve recognition of the international legal personality, privileges and immunities of the OSCE and to report back to the Senate on this matter this year.

The OSCE Parliamentary Assembly and its national parliamentary delegations can clearly play a key role in raising awareness among their colleagues in national parliaments and in their respective governments on the challenges that the OSCE is facing. Those challenges arise due to the uncertainty of its legal status and the lack of corresponding privileges and immunities for its operations in general and in particular for cases of rapid deployment and/or operations in conflict and post-conflict areas. These issues require the active involvement of national parliaments as the necessary measures in most cases need legislative action.

Ultimately, the matter at issue is legal protection for human safety and security – both of the 4,000 individuals who are dedicated to delivering the OSCE's mandate as well as the one billion 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. A clear legal status of the OSCE is critical for enabling the OSCE to perform effectively and efficiently the mandates assigned to it by its participating States, ensuring its crucial role in the European security architecture.

* * *

Annex - Measures taken by national parliaments¹

I

A. From information notified by the respective authorities of the OSCE participating States, the following States have passed parliamentary legislation for the implementation of the 1993 Rome Council Decision:

- **Hungary:** Act LXXXV of 1994 on extension to institutions, officers and employees of the CSCE, representatives of participating States and members of CSCE missions of the privileges, exemptions and immunities granted under the 1961 Vienna Convention on Diplomatic Relations.
- **Italy:** Law no. 301 of 30 July 1998 on the provisions concerning the legal capacity of the institutions of the OSCE and the related privileges and immunities;
- **Norway:** Royal Decree of 7 January 2000 on regulations relating to immunities, privileges, etc., for persons attached to and property and assets connected with the OSCE and for persons conducting inspections and evaluations in accordance with the Vienna Document of 1994, issued pursuant to Section 1, third paragraph of Act No. 5 of 19 June 1947 relating to Immunities and Privileges for International Organisations, as amended by the Norwegian Parliament on 3 June 1994 to include international organisations and institutions for which no agreement binding under international law has been entered into by Norway.
- **Sweden:**
 - Lag (1976:661) om immunitet och privilegier i vissa fall (Act on Privileges and Immunities in Certain Cases), 2 b §, effective 1 July 1994 (applicable to the CSCE Secretariat and ODIHR);
 - Lag (1994:716) om rättslig ställning för institutioner inom Konferensen om säkerhet och samarbete i Europa (ESK) (Act on the Legal Capacity of CSCE Institutions), effective 9 June 1994 (applicable to the CSCE Secretariat and ODIHR).
- **Switzerland**
 - Convention on Special Missions adopted by the General Assembly of the UN on 8 December 1969; ratified by Switzerland on 3 November 1977 and entered into force for Switzerland on 21 June 1985.
Even before the 1993 Rome Council Decision, it has been Switzerland's policy to grant privileges and immunities to the OSCE, its officials and representatives by applying the 1969 Convention on Special Missions by analogy.
 - Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State of 22 June 2007. Entered into force on 1 January 2008. (RS 192.12).
- **United Kingdom of Great Britain and Northern Ireland:** International Organisations Act 2005, Chapter 20, Section 4 "The Organization for Security and Co-operation in Europe"
- **United States of America:** Section 422 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (Public Law 103-236);

¹ Compiled on the basis of information provided by participating States or the Secretariat's reading of national legislation on file. Corrections, amendments or additions are welcomed.

The OSCE's Lack of an Agreed Legal Status – Challenges in Crisis Situations

B. On the basis of the above legislative acts and/or in accordance with applicable constitutional or legislative provisions, in some participating States the executive branch has adopted measures for the implementation of the 1993 Rome Decision:

- **Denmark:** Denmark informed the OSCE that “the Danish Government is able to implement the provisions [of the Rome Council decision] by administrative measures on the basis of existing legislation” and specified that “in order to grant privileges and immunities to representatives of participating States, officials and members of missions, it is essential for the Government to receive adequate information prior to the arrival of delegations in Denmark”.
- **Germany:** Ordinance of 15 February 1996 on the Capacity and Immunities of the OSCE.
- **Switzerland:**
 - Ordinance to the Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State of 7 December 2007. Entered into force on 1 January 2008. (RS 192.121).
 - Administrative decision O.883.0-6-THM issued by the Ministry of Foreign Affairs extending application of Article 2, paragraph 1(h) of the Law on the Host State of 22 June 2007 (LEH, RS 192.12) as well as Article 23, paragraph 2(b) and Article 24, paragraph 3(b) of the Ordinance of the Host State of 7 December 2007 (OLEH, RS 192.121) and Article 2, paragraph 1(b) of the Directive of the Ministry of Foreign Affairs on the regulation of signature authority of the Host State (340-3), conferences organised in Switzerland under the aegis of the OSCE as well as specified participants shall enjoy specified privileges and immunities.
- **United States of America:** Executive Order 13029 of 3 December 1996 (Federal Register, vol. 61, No. 235 of 5 December 1996).

II

In addition to the general measures adopted in pursuance of the 1993 Rome Decision (general applicability to OSCE or OSCE executive structures without distinction), some participating States hosting OSCE executive structures or entities have adopted measure(s) on the legal status and privileges and immunities of the OSCE executive structure(s) or entities they host. These measures are either national legislative acts regulating the treatment of the OSCE or national legislative acts for the ratification of the host country agreements (MoUs) concluded between the host country concerned and the OSCE in respect of particular executive structure(s).

A. National laws

- **Austria:** Federal Law on the Legal Status of OSCE Institutions in Austria, Federal Law Gazette No. 511/1993 as amended (in 1995 and 2002); effective as of 15 May 1993. (Applicable to OSCE Secretariat, OSCE Representative for the Freedom of Media as well as to the OSCE Parliamentary Assembly Liaison Office. Other OSCE officials present in Austria are accorded the status of Experts on Mission).
- **Czech Republic:** Law 125 of 5 March 1992 (for the OSCE Secretariat and in particular its Prague Office where the archives unit of the Secretariat is located).

The OSCE's Lack of an Agreed Legal Status – Challenges in Crisis Situations

- **Netherlands:**
 - Parliamentary Act of 31 October 2002 containing provisions concerning the legal personality, privileges and immunities of the High Commissioner on National Minorities (HCNM) (applicable to HCNM, OSCE officials and OSCE experts).

B. National laws ratifying host country agreements or memoranda of understanding (MoUs)

- **Azerbaijan:** MoU of 24 September 2014 relating to the OSCE Project Co-ordinator in Baku, ratified on 20 November 2014.
- **Denmark:** Agreement between the Government of Denmark and the Parliamentary Assembly of the CSCE relating to the Headquarters in Copenhagen of the Secretariat of the Parliamentary Assembly of the CSCE, signed on 15 January 1993 and entered into force on the same date.
- **Kyrgyzstan:** MoU of 3 December 1998 relating to the OSCE Centre in Bishkek, ratified on 22 September 1999 by the Law of the Kyrgyz Republic “On ratification of Memorandum of Understanding between the Kyrgyz Republic and Organization for Security and Co-operation in Europe on establishment of the OSCE Centre in Bishkek” [with reservation “excluding point b) paragraph three of article 8 of Memorandum”.]
- **Switzerland:** Agreement between the Swiss Federal Council and States Parties to the Convention on Conciliation and Arbitration within the OSCE of 17 November 1997 establishing the legal status in Switzerland of the Court of Conciliation and Arbitration within the OSCE, entered into force on 17 November 1997.
- **Ukraine**
 - MoU of 13 July 1999; ratified on 10 February 2000 by the Law of Ukraine “On ratification of the Memorandum of Understanding between the Government of Ukraine and Organization for Security and Co-operation in Europe (OSCE) on establishment of a new form of cooperation”;
 - MoU of 14 April 2014; ratified on 29 May 2014 by the Law of Ukraine “On ratification of Memorandum of Understanding between the Government of Ukraine and Organization for Security and Co-operation in Europe (OSCE) on the deployment of an OSCE special monitoring mission”.

III

Non-legislative resolutions by national Parliaments

- **The Netherlands:** First Chamber of the States-General (Dutch Senate), Resolution of 24 March 2015, calling upon the Government to pursue an initiative for the recognition of the international legal personality, privileges and immunities of the OSCE and support the exploration of a new treaty version of the objectives, tasks and structure of the OSCE.