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The Question of Legal Status for the OSCE and Implications for Ukraine

1. Principle of independence

1.1 Legal status, privileges and immunities are granted to international organisations to ensure the independence necessary for the organisations to fulfil their mandates. Diplomatic privileges and immunities were granted to the staff of the earliest organisations in the 1800s.¹ For the first large scale international administration, the 1919 Covenant of the League of Nations provided that officials of the League and the representatives of its members would enjoy diplomatic privileges and immunities when engaged on the business of the League and the buildings would be inviolable.² Going further, the Charter of the United Nations provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes and that its officials and representatives of its members shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions.³ The 1946 Convention on the Privileges and Immunities of the United Nations codified the necessary privileges and immunities which have largely been followed by the Specialized Agencies of the United Nations as well as the more than 100 major international organisations in existence today. The rationale underlying the grant of privileges and immunities is to ensure that the Organisation, as an autonomous subject of international law, can carry out the mandate entrusted to it by treaty or by its organs, independent of the will of its individual Member States.

1.2 In 1949, the International Court of Justice (ICJ) concluded that *“To ensure the independence of the [international civil servant], and, consequently the independent action of the Organization itself, it is essential that in performing his duties he need not rely on any other protection than that of the Organization ... In particular, he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might as well be compromised...”*⁴

¹ E.g., 1804 General Administration for Access to Navigation on the Rhine

² Article 7(4) and (5) of the 1919 Covenant of the League of Nations.

³ Article 105 of the 1945 Charter of the United Nations.

⁴ ICJ Advisory Opinion, *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 ICJ Reports 174-192 at 183.

1.3 The Standards of Conduct of the International Civil Service provides that, *“If the impartiality of the international civil service is to be maintained, international civil servants must remain independent of any authority outside their organization.”*⁵

1.4 The Administrative Tribunal of the International Labour Organization (ILOAT) has declared that, *“the independence of international civil servants is an essential guarantee, not only for the civil servants themselves, but also for the proper functioning of international organizations.”*⁶

1.5 The OSCE Code of Conduct provides that *OSCE officials shall neither seek nor accept instructions regarding the performance of their duties, from any government or from any authority external to the OSCE.*⁷ OSCE Staff Regulation 2.03 stipulates that privileges and immunities shall be enjoyed by the OSCE officials. At the 1993 Rome Council session the Ministers adopted a decision recommending to participating States the appropriate treatment.⁸

2. The OSCE’s patchwork of privileges and immunities

2.1 As pointed out earlier during this evening’s Seminar, there is not yet consensus nor an instrument formally recognising the international legal personality of the OSCE or granting it the necessary privileges and immunities it and its officials need to function.

2.2 Rather, and uniquely in international practice, the legal capacity, privileges and immunities are granted to the OSCE and its officials solely through national legislation, ratified or unratified memoranda of understanding, and courtesy. That fact underscores the necessity to possess legal capacity, privileges and immunities – if they were not so needed, participating States would not take the time and make the considerable effort to grant them.

2.3 However, patchwork practice leaves gaps. Although in the 1993 Rome Council session, the Ministers adopted a decision recommending that participating States take the necessary measures at the national level to ensure that the OSCE, its officials and the representatives of participating States enjoy the legal capacity and protection they need to function efficiently and effectively across the OSCE region in a harmonised way, many have not done so.

2.4 Currently, there exist 24 separate entities in 23 different countries under a very broad variety of legal arrangements. This includes the Secretariat, the three Institutions, 18 field operations as well as the OSCE autonomous bodies: the Parliamentary Assembly and the Court of Conciliation and Arbitration.

3. The OSCE’s duty of care as an employer

3.1 The gaps in the legal framework impose upon the OSCE an additional burden to meet its obligations towards its officials. The OSCE’s duty of care as an employer has been explicitly incorporated into the Staff Regulations and Staff Rules. Staff Regulation 2.07 on Functional Protection provides as follows: *“OSCE officials shall be entitled to the protection of the OSCE in the performance of their duties within the limits specified in the Staff Rules.”*

3.2 It is thus incumbent upon the Organisation to ensure that such protection is afforded and is commensurate with the standards expected for the international civil service, in terms of health, safety and security, and a professional work environment enabling the independence and loyalty

⁵ Available at <http://icsc.un.org/resources/pdfs/general/standardsE.pdf>, paragraph 8.

⁶ ILOAT, Judgment 2232 (2003), para. 16.

⁷ Section 2 of Appendix 1 to the OSCE Staff Regulations and Staff Rules.

⁸ Decision CSCE/4-C/Dec.2, adopted in Rome, 1 December 1993.

required of the OSCE official under the OSCE Code of Conduct.

4. The obligation to waive immunity so as not to impede the course of justice

4.1 Concomitant with the grant of privileges and immunities by a State, is the obligation of the organisation to waive the immunity so as not to impede the course of justice, when such waiver can be granted without prejudice to the interests of the organisation.

4.2 That is a standard practice articulated, developed and by now codified in the 1946 Convention on the Privileges and Immunities of the United Nations:

Section 20. Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary General, the Security Council shall have the right to waive immunity.

Section 21. The United Nations shall cooperate at all times with the appropriate authorities of Member to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this article.

5. OSCE and its deployment to the crisis in Ukraine

5.1 Let's turn now to Ukraine. The OSCE's efforts to bring peace to the conflict there has brought into sharp focus the operational problems which can and do arise for the OSCE due to the lack of formal clarity on its status, privileges and immunities.

5.2 Just over one year ago, to address the crisis in Ukraine, the Permanent Council adopted Decision No. 1117 of 21 March 2014, establishing a new OSCE field operation (the Special Monitoring Mission to Ukraine (SMM)). In that Decision, the Permanent Council tasked the Secretary General to deploy an advance team within 24 hours of the adoption of the Decision. He did so.

5.3 The Memorandum of Understanding (MOU) between the OSCE and the Government of Ukraine for the OSCE's already established field presence in Ukraine (the Project Co-ordinator in Ukraine) did not cover the new SMM. Consequently, it was immediately necessary to negotiate and conclude a new MOU to cover the mandate of the SMM (which is to monitor and report on the security situation in Ukraine in teams operating 24/7) and size of the SMM (an initial force of 100 civilian monitors, expandable to 500, and now 1000, beginning in February 2015, for monitoring and verification of the ceasefire and withdrawal of heavy equipment and weapons under the Minsk Agreements). Consistent with precedents, the MOU covers the status of the SMM, its employees and other persons providing services to the SMM, the legal capacity of the SMM, security arrangements and protection by the Host State, inviolability, privileges and immunities, custom clearance of equipment, visas, etc.

5.4 Negotiations between the Secretariat and Ukraine commenced even before the adoption of the Permanent Council Decision on 21 March 2014, the Memorandum of Understanding was signed on 14 April 2014 (providing for provisional application of its provisions except for privileges and immunities), was ratified by the Parliament of Ukraine on 29 May 2014; and subsequently entered into force on 13 June 2014. Start to finish the process took a total of 12 weeks from the date of deployment.

5.5 In terms of an international agreement of its nature, this is an exceptionally rapid achievement. Such host country arrangements ordinarily require extensive interagency consultations and parliamentary approval. In crisis situations negotiations of such agreements may become delayed due to other priorities of the government and the usual parliamentary processes may become disrupted or inoperative. The SMM MOU was truly an achievement and can be attributed to the co-operation and intensive efforts of the Ukrainian government and its officials.

5.6 Even so, for the first 3 weeks (from deployment on 22 March until signature on 14 April 2015), the SMM was operating with no formal legal status or capacity. And for the first 12 weeks (i.e., 22 March until entry into force of the MOU on 13 June 2014), the SMM monitors had no formal privileges or immunities covering their official activities nor the formal protection of the security guarantees by the Host State other than the courtesy extended to official visitors. It is important to note that, in the meantime, during those 12 weeks, the OSCE and the SMM were carrying out the mandated activities and were accountable and exposed to an uncertain liability for any damages caused or suffered by those monitors. During that period eight monitors were abducted and held incommunicado for a month by armed group(s).

5.7 Operating without formal legal protection exposes the OSCE and its staff/mission members to a certain degree of risk. The securing of global health and disability insurance coverage only partially mitigates that risk.

5.8 Furthermore, on the practical operational level, the Mission's effective operation was initially hampered in the first three weeks by its lack of formal legal capacity, preventing it from being entitled to open bank accounts, enter into contracts or import much-needed equipment and vehicles, especially armoured vehicles, to enable it to travel throughout Ukraine. Additionally, in the OSCE's existing patchwork system of granting privileges and immunities on a limited case-by-case basis, while the MOU ensures that the SMM monitors are now protected in Ukraine, other OSCE officials, such as the Secretary General and Secretariat staff, who regularly undertake duty travel to Ukraine, or ODIHR election monitors or other field operation members who provide support to SMM in Ukraine on an urgent basis, continue to enjoy no formal, official legal status, privileges, immunities or security guarantees in Ukraine. When present in Ukraine they essentially have the status of tourists or official visitors at the courtesy of the Host State (when formally notified in advance). Consequently, to a certain extent a legal risk continues to persist, even after a MoU is concluded and brought into force by parliamentary ratification.

5.9 To this we would add the case of the newest field operation – the Deployment of OSCE Observers to Two Russian Checkpoints on the Russian-Ukrainian Border (Observer Mission or OM). For that mission there is no MOU despite the tasking by the Permanent Council to the Secretary General “to immediately finalize with the Russian Federation the practical modalities regarding the deployment of the observers, including the capacities, privileges and immunities, security and safety of the Observer Mission and its members.”⁹ The Observer Mission functions at the invitation of the Government and on the basis of courtesy. A Cabinet decision instructs the relevant governmental agencies to assist the Observers. The Observer Mission, however, lacks legal capacity in the Russian Federation and must accommodate its operations accordingly.

6. Accountability

6.1 One of the elements of the duty of care is that an employer must provide adequate protection to its employees. As stated by the International Court of Justice (ICJ) in the 1949 Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations* (Reparations Case),

⁹ PC decision 1130 of 24 July 2014, operative paragraph 9.

“the Organization may find it necessary, and has in fact found it necessary, to entrust its agents with important missions to be performed in disturbed parts of the world. Many missions, from their very nature, involve the agents in unusual dangers to which ordinary persons are not exposed ... Both to ensure the efficient and independent performance of these missions and to afford effective support to its agents, the Organization must provide them with adequate protection...”

6.2 OSCE officials may be injured, detained or suffer in many ways. A lack of status, protection and security guarantees raises financial and legal risks and overall may impede and limit the OSCE’s ability to resolve crisis situations. Taking into account that in May 2014 two groups of OSCE monitors were abducted on the territory of Ukraine and were respectively detained for 31 and 26 days, the risk to the health and well-being of the OSCE staff is not a hypothetical or academic scenario. Therefore, the decision to undertake risky activities must be accompanied by the decision to establish the formal legal protections enabling such a decision to be implemented in a customarily established manner, including taking into account the duty of care, protection and security.

6.3 A clear legal status also enables a clear line of accountability and liability. When the legal status is ambiguous, it is also unclear who will be held responsible in the case of injury or damages. In the case of the OSCE, where most international staff are seconded by participating States, a triangular employment relationship exists which thus may engage the liability of the seconding State if there is a failure of protection causing injury and the OSCE’s status is unclear. Within the secondment relationship the legal situation is also not entirely clear and will vary from State to State since the employment relationship between seconding States and their secondees varies.

7. Implications for future operations, in particular peacekeeping

7.1 Aside from the immediate operational consequences that have emerged in Ukraine, there are additional aspects that may indicate implications for future OSCE field operations, in particular peacekeeping.

7.2 In midsummer 2014, it was considered that the SMM would enhance its effectiveness if it could have visibility of the area it was monitoring from the air. Offers from participating States to provide the equipment and technological capacity were received. However, legal obstacles prevented the offers from going forward as such equipment and experts of the potentially contributing States belonged to the military which could not loan them to an entity which did not enjoy international legal personality as there could be no assurances of the proper immunity at the international level. Consequently the SMM has had to obtain such services through a commercial contractor, at significant expense. We would also note here that the Minsk Agreements of September 2014 and February 2015 envisage that the OSCE will carry out effective monitoring and verification of the ceasefire regime and the withdrawal of heavy weapons with the use of all necessary technical means, including satellites, unmanned unarmed aerial vehicles, radar systems and so on. It is not yet entirely clear to what extent or by what means the OSCE will be able to obtain all those technological capacities.

7.3 The Helsinki Document adopted by participating States in 1992 provides for eventual OSCE civilian and/or military peacekeeping missions. The OSCE Minsk Group (dedicated to resolving the Nagorno-Karabakh conflict) has been tasked with developing a solution involving peacekeeping. However, the OSCE experience in Ukraine has revealed that such a scenario may not yet legally be possible with the OSCE’s present legal framework.

8. Conclusion

8.1 Of course even if perfect legal arrangements were agreed and in force, it does not guarantee perfect implementation. The SMM MOU provides for freedom of movement and travel without advance notice within the whole territory of Ukraine. Nevertheless, as the SMM Daily Reports show, throughout the entire period, there are isolated incidents reported of monitors detained, access delayed, access denied, passports checked and scanned, monitors questioned and photographed, vehicles searched, mobile phones seized, warning shots fired, and documents seized. These incidents have occurred during encounters with the various parties on the ground.

8.2 The reality is that a mission of the nature of the SMM necessarily entails risks. The rapid deployment in Ukraine brought a sharp focus to 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 executive structures and entities.

8.3 The Ukraine experience, however, is not unique nor is it an anomaly. Although not as dramatic, similar consequences are experienced routinely in the daily operations of the OSCE in its other executive structures, including the Secretariat and the Institutions and the other field operations. For example:

- Inability of the OSCE to assert a status equal to other international organisations operating in the field;
- Need to negotiate the status of the OSCE on an *ad hoc* basis with each country hosting an executive structure or project;
- *Ad hoc* and incomplete legal capacity, privileges and immunities provided for in the 1993 Rome Council Decision, leaving the OSCE as the object of national legislation and the OSCE in a weak negotiating position;
- Differentiation between foreign OSCE officials and those holding the nationality of the host State -- a distinction not recognised in the international civil service – leading to various legal consequences, including denial of most privileges and immunities, national taxation of OSCE salaries paid to locally recruited mission members, conscription;
- the lack of legal capacity under national law to open bank accounts, purchase goods and services, register vehicles in its own name, pursue its legal interests, demand the standard indemnification from third parties in contractual relationships, etc.;
- the inability to conclude standard co-operation agreements with other international organisations for joint projects and to receive the application of standard treatment granted between sister organisations; and
- the 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 issue in view of the fact that the OSCE engages in risky projects such as the destruction of ammunition, disposal of highly flammable rocket fuel, and assessment of uranium dumps.

8.4 The OSCE's 57 participating States, through consensus-based political arrangements, have created an international organisation, assigned it functions and mandates, dispatched it into conflict zones, and has seconded its citizens to staff it. While there may be a lack of clarity on the formal

legal status, privileges and immunities of the OSCE and its officials, there is full clarity on the operational activities it is expected to perform as an international entity, carrying out its activities as if it enjoyed the privileges and immunities that the treaty-based international organisations normally need and are formally granted.

8.5 The commemoration of the 40 years since the signature of the Helsinki Final Act, the founding document of the OSCE, could be well-timed for achieving progress on the issue of strengthening the legal framework of the OSCE. Politically, however, consensus may be more elusive than ever. Nevertheless, a clear legal status of the OSCE is essential for enabling the OSCE to perform effectively and efficiently the mandates assigned to it by its decision-making bodies in a legally responsible manner, ensuring the centrality of its role in the European security architecture.

8.6 The need to do so was underscored recently by the Netherlands Senate which adopted a Resolution calling upon the Government to take initiatives in the short term to have the international legal personality, privileges and immunities for the OSCE acknowledged, and to explore the basis for putting the objectives, tasks and structure of the OSCE on a treaty level.¹⁰

8.7 Marvellously, miraculously or almost magically, the OSCE has adapted to its ambiguous status over the decades. The adaptability of the OSCE has been well-proven since its inception in the Helsinki Final Act through all its transmutations up to the present. What is being discussed here is an internal argument – externally there is very little, or possibly no, perception among the public that the OSCE possesses anything less than other international organisations.

8.8 While a clear legal status would not necessarily hamper the flexibility and operational advantages of the OSCE, its lack comes clearly at a cost. In the recent meeting of the Panel of Eminent Persons, one participant likened the OSCE to the renowned magician Houdini, who was tied up in ropes and chains and thrown into a tank of water and watched in the struggle to break free and swim to the top. Others have said that the OSCE has been made to walk on water. While this may be a matter of light conversation or a question of some academic interest, let us not forget that what we are speaking of here is legal protection for human safety and security – both of the 4000 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.

Thank you.

¹⁰ Motion of Senator Schrijver, adopted by the First Chamber of the *Staten-Generaal* on 24 March 2015.