PART I

INTRODUCTION

1

Legal Uncertainty and Indeterminacy: Immutable Characteristics of the OSCE?

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1 NEW OPERATIONAL DYNAMISM FACING OLD LEGAL CONSTRAINTS: INSIGHTS FROM THE UKRAINE CRISIS

After having sat as a backbencher behind NATO and the EU for some years, the Ukraine crisis catapulted the Organization for Security and Co-operation in Europe (OSCE) again to the first row of European security players. When the crisis reached its height in early 2014, the OSCE seemed to be the forum of last resort for political dialogue, and the only entity capable of mediating between the conflict parties, including on the ground. In a remarkable decision of 21 March 2014, the Permanent Council – the principal decision-making body of the Organization for day-to-day business, comprising all fifty-seven participating States – agreed by consensus to launch a civilian Special Monitoring Mission (SMM) in Ukraine upon request of the Ukrainian government.[1] Under the principles of impartiality and transparency, the ongoing field operation in Ukraine is to contribute to 'reducing tensions and fostering peace, stability and security; and to monitoring and supporting the implementation of all OSCE principles and commitments'.[2] The operation's mandate underlines that, in the wake of the Ukraine crisis, the Organization has advanced from a supporting actor to one of the main players safeguarding European security.

Besides the field operation in Ukraine, which received much media attention, the OSCE covers a broad thematic and operational spectrum: from Vancouver to Vladivostok, the Organization's participating States work together on security issues, undertake joint economic and environmental efforts and develop common initiatives on human rights matters. Illustrative of the Organization's operational variety are selected field operations,

[1] OSCE, Permanent Council, Decision on Deployment of an OSCE Special Monitoring Mission to Ukraine, PC.DEC/1117, 21 March 2014.

[2] Ibid., para. 2.

programmes and projects. The ongoing OSCE Mission in Kosovo, for instance, is engaged in monitoring as well as in the promotion and support of human rights and democratic institutions, including training for police officers on curbing trafficking in human beings. Likewise, the OSCE Programme Offices in Astana (Kazakhstan) and Bishkek (Kyrgyzstan) both contribute to combatting corruption by organising, for example, workshops on law enforcement matters related to drug trafficking linked to the use of cryptocurrencies. Moreover, cyber security issues are discussed, inter alia during a sub-regional conference on the role of information and communication technologies in regional and international security in Tashkent (Uzbekistan). What is more, OSCE election observers regularly ensure that legislative processes and elections in participating States respect fundamental legal and democratic standards. One can add to this already impressive, but non-exhaustive, enumeration of OSCE activities the annually held Economic and Environmental Forum, last in September 2018 in Prague, dealing with 'Promoting economic progress and security in the OSCE area through innovation, human capital development, and good public and corporate governance'.

This multifaceted, pan-European OSCE cooperation, which is remarkable both in terms of geographic span and thematic breadth, started during the Cold War as a *détente*-effort. The aim was to build an East–West forum for political dialogue. Informal consultations paved the way for intensive exchanges of views in the framework of the Conference for Security and Co-operation in Europe (CSCE). At the end of two years of vivid debate and negotiation in Geneva, all thirty-five participating governments signed the final conference act, namely the Helsinki Final Act (1975).[3] The Act covered a large array of policy issues under so-called 'baskets': three substantive baskets addressed respectively politico-military affairs, economic and environmental issues and human rights matters, and the fourth basket dealt with follow-up meetings and implementation procedures. Indeed, regular diplomatic encounters succeeded the Helsinki meeting to uphold the East–West dialogue.[4] After the fall of the Berlin Wall, participating States decided to call a halt to this nomadic mode of functioning and endowed the CSCE with permanent structures when adopting the Charter of Paris (1990).[5] In particular, the Secretariat in Vienna was established as the bureaucratic

[3] CSCE, Helsinki Final Act, 1 August 1975, available at: www.osce.org/helsinki-final-act?download=true.

[4] Conferences were held in Belgrade (1977–8), Madrid (1980–3), Stockholm (1984–6) and Vienna (1986–9).

[5] CSCE, Charter of Paris for a New Europe, 21 November 1990, available at www.osce.org/mc/39516?download=true.

centrepiece of the institution. Some years later, the CSCE was renamed as the OSCE in the Budapest decision of 1994 – the conference became an organisation, at least by name.[6]

Over the years, the Organization has come to be a polyvalent European security actor. The OSCE serves as an intergovernmental platform for political dialogue and constitutes a transnational expertise hub for rule of law and human right issues; simultaneously, the Organization performs early warning tasks and sends numerous peacekeeping and peacebuilding missions to crisis zones, such as the previously mentioned Special Monitoring Mission in Ukraine. These plentiful activities are prepared and implemented by a variety of actors. In addition to the Secretariat in Vienna, established in 1990, there are three further OSCE institutions, namely the Office for Democratic Institutions and Human Rights (ODIHR) located in Warsaw, the High Commissioner on National Minorities (HCNM) based in The Hague and the Representative on Freedom of the Media (equally situated in Vienna). All in all, some 3,500 staff currently work for the OSCE: approximately 600 persons are active in the Secretariat and the three OSCE institutions, and an additional 2,900 experts are deployed in the Organization's sixteen field operations in South-Eastern Europe, Eastern Europe, the South Caucasus and Central Asia.[7] Furthermore, the OSCE family includes the OSCE Parliamentary Assembly, an autonomous interparliamentary body whose secretariat is situated in Copenhagen, and the Geneva-based Court of Conciliation and Arbitration (which has, so far, not become active).[8]

This institutional edifice and operational dynamism of different OSCE entities rests on shaky legal foundations. The practical implications thereof became significant in the Ukrainian context. Backed up by the Permanent Council decision of March 2014, staff began to operate on the ground shortly thereafter – but outside a clear legal framework. Indeed, the Memorandum of Understanding between the OSCE and the government in Kiev, determining inter alia the mandate and legal status of the mission and the privileges as well as immunities granted to the mission and its members, took some time to be concluded and to enter into force.[9] In the meantime – a period of twelve

[6] CSCE, *Towards a Genuine Partnership in a New Era*, Budapest Decisions attached to the Budapest Document, 21 December 1994, available at: www.osce.org/mc/39554?download=true, point 29.

[7] OSCE, 'Factsheet: What Is the OSCE?', 21 September 2018, available at: www.osce.org/whatistheosce/factsheet.

[8] The Court was established in 1995 on the basis of the Convention on Conciliation and Arbitration within the OSCE of 15 December 1992, available at: www.osce.org/cca/111409.

[9] The Memorandum of Understanding was signed on 14 April 2014 and ratified by the Ukrainian parliament on 29 May 2014, before entering into force on 13 June 2014.

weeks – the mission and its members were exposed to legal uncertainty, especially as regards their privileges and immunities. Thus, the deployed individuals took up their functions at risk of lacking legal protection. Very soon, this precarious situation would become problematic when several OSCE observers were abducted and held hostage by armed insurgents.[10] What was the legal status of OSCE observers in Ukraine in the absence of a bilateral agreement with Kiev? Were they entitled to (functional) immunity without any concluded Memorandum of Understanding? And who would pay for possible damages or injuries? These pressing questions resuscitated an age-old debate regarding the unsettled legal status of the OSCE.

2 OPERATING WITHIN A PATCHY LEGAL ENVIRONMENT

The legal status debate relates to several intertwined issues. First, the *legal nature* of the Organization is debated. The OSCE considers itself a 'regional arrangement' in the sense of Chapter VIII of the United Nations Charter (UNC), that is a regional peace and security actor.[11] Yet, the precise nature of the OSCE under public international law is unclear.

Generally, legal definitions of an international organisation – in the sense of a *public* international organisation – comprise two central elements. First, an international organisation is based on a constitutive act governed by international law concluded between one or more subjects of international law – usually states – which consciously decide to establish a forum of cooperation and coordination for a designated purpose. Secondly, an international organisation is vested with a functioning infrastructure – that is a seat, bodies (e.g. permanent secretariat, plenary and executive organs) and budgetary means – which are separate from the organisation's members.[12] Classic definitions additionally highlight that the entity must be capable of forming a will distinct from

[10] See, for instance, *BBC*, 'Ukraine Unrest: Abducted OSCE Observers Freed' (3 May 2014), available at: www.bbc.com/news/world-europe-27265927.

[11] Article 52(1) of the Charter of the United Nations, adopted 26 June 1945, 1 UNTS 16 (Chapter VIII) reads as follows: 'Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.' The Budapest Summit Declaration (CSCE, 1994) (n. 6) qualified the OSCE as a 'security structure' (paragraph 3) and, more precisely, as a 'regional arrangement under Chapter VII of the United Nations Charter' (paragraph 26 of Annex I to the Declaration).

[12] See, e.g., Ruffert and Walter, *Institutionalised International Law*, 5; Archer, *International Organizations*, 31.

that of its member states ('*volonté distincte*').[13] This latter element echoes the nineteenth century doctrine on moral (legal) persons. While it remains obscure what 'will' exactly means, it seems to be a placeholder for legal personality.[14] Along these lines, some contemporary legal texts qualify an entity as an international organisation in the proper (legal) sense only if it possesses international legal personality.[15] The International Law Commission's Articles on the responsibility of international organisations are a case in point.[16] The narrow conception of international organisation makes sense for the purpose of assigning legal rights, legal duties and legal responsibility. The OSCE as it stands would prima facie not be an international organisation in that narrow legal sense. However, most legal scholars seem to espouse a broader conception of international organisation, even for a legal context, which encompasses entities that do not enjoy international legal personality. In other words, there are two types of international organisations: those with and those without international legal personality.[17] From that perspective, the OSCE could potentially qualify as an international organisation.

While the OSCE possesses many of the attributes normally ascribed to an international organisation – permanent headquarters and decision-making bodies; standing implementation structures and staff; financial resources – it lacks a fundamental normative characteristic: the OSCE has no legal constitutive act under international law. This absence of a constitutive treaty is no coincidence. To the contrary, 'the institutional ambivalence is built-in design'.[18] Indeed, all major OSCE documents – namely the Helsinki Final Act (1975), the Charter of Paris (1990) and the Summit Documents of Helsinki (1992) as well as Budapest (1994) – explicitly exclude the said documents from being registered at the UN Secretariat as international treaties according to Article 102 UNC.[19] These foundational documents, which set out the

[13] Schermers and Blokker, *International Institutional Law*, 37; Charpentier and Sierpinski, *Institutions internationales*, 52; Schmalenbach, MPEPIL, para. 3; Klabbers, 'Formal Intergovernmental Organizations', 143–4.

[14] Cf. Akande, 'International Organizations', 250.

[15] Salmon, 'Organisation internationale gouvernementale', 793; Sands and Klein, *Bowett's Law of International Institutions*, 15.

[16] "The term "international organization" refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities' (Art. 2 lit. a ARIO, Yearbook of the International Law Commission [2011] vol. II, pt. 2).

[17] Lagrange, 'La catégorie "Organisation internationale"', para. 86; White, *International Organisations*, 9.

[18] Klabbers, 'Institutional Ambivalence by Design', 403, 408.

[19] All documents stipulate that '[t]he Government of the [country hosting the respective conference or event] is requested to transmit to the Secretary-General of the United Nations the

institutional landscape and regulate the operational realities of the Organization, are referred to as politically but not legally binding.[20] And the same holds true for decisions and documents emanating from the OSCE: regardless of their addressee(s) being internal or external, they are regarded as political commitments deprived of legal bindingness. The Rules of Procedure of the Organization clearly stipulate that OSCE decisions and documents adopted by consensus by any OSCE decision-making body shall have a politically – in contrast to legally – binding character for the participating States.[21] As a matter of fact, the only two texts originating from the work of the OSCE having acquired the status of an international treaty are the Convention on Conciliation and Arbitration (1992) and the Treaty on Conventional Armed Forces (1990) – and neither of them is considered to be an OSCE document.[22] This intricate and ambivalent legal situation leads some legal scholars to conclude that the OSCE is a fully fledged international organisation,[23] while others describe the OSCE as an international organisation *in statu nascendi*[24] – in a perpetuated *statu nascendi*, one could add. Different authors again qualify the Organization as a 'soft organisation', meaning that it is based on soft law.[25] Finally, the OSCE is often regarded as a loose cooperation framework based on political commitments.[26] The Organization's international legal nature and status is thus controversial.

text of this [document], which is not eligible for registration under Article 102 of the Charter of the United Nations, with a view to its circulation to all the members of the Organization as an official document of the United Nations'. See the final provisions of the Helsinki Final Act 1 August 1975 (n. 3); final provisions of the Charter of Paris, 1990 (n. 5); para. 46 of the Helsinki Document 1992: The Challenges of Change, Helsinki Summit Declaration, 10–11 July 1992; para. 22 of the Budapest Summit Declaration, 1994 (n. 6).

[20] OSCE, Chairmanship, Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2015, 1 December 2015, available at: www.osce.org/cio/205221, para. 2. See further OSCE, Panel of Eminent Persons, 'Final Report and Recommendations of the Panel of Eminent Persons on the Strengthening the Effectiveness of the OSCE, Common Purpose – Towards a More Effective OSCE', 27 June 2005, available at: https://www.osce.org/cio/15805, 30.b.

[21] OSCE, Ministerial Council, Rules of Procedure of the Organization for Security and Co-operation in Europe, MC.DOC/1/06, 1 November 2006, pt. II (A) paras. 1 and 3.

[22] See Fastenrath and Weigelt, 'Organization for Security and Co-operation in Europe (OSCE)', para. 35.

[23] Sands and Klein, *Bowett's Law of International Institutions*, 203.

[24] Schweisfurth, 'Die juristische Mutation der KSZE', 228.

[25] Klabbers, 'Institutional Ambivalence by Design', 405; Seidl-Hohenveldern, 'Internationale Organisationen aufgrund von soft law', 239.

[26] Manton, 'The OSCE Human Dimension and Customary International Law Formation', 197–8.

3 THE TRIAD OF INTERNATIONAL LEGAL PERSONALITY, DOMESTIC LEGAL CAPACITY AND PRIVILEGES AND IMMUNITIES

Closely tied to the open issue of the OSCE's legal–institutional nature is the conceptual triad regarding the Organization's international legal personality, domestic legal capacity and its privileges and immunities. This triad forms the title of the 'Draft Convention on the International Legal Personality, Legal Capacity, and Privileges and Immunities of the OSCE' of 2007.[27] As the OSCE-related documents have since 2000 conceptualised the issues along this triad, we shall briefly examine the three concepts.[28]

3.1 *International Legal Personality*

In international law, the concept of international legal personality is messy,[29] and the classifications and distinctions employed by legal scholars are not uniform.[30] In this chapter, we use the term 'international (legal) person' synonymously and interchangeably with 'subject of international law', in line with the case law of the International Court of Justice (ICJ).[31] By international legal personality (subjecthood) we understand the potential of an actor (e.g. the OSCE) to be a holder of international rights and duties. International legal personality precedes the ownership of rights and duties. Put differently, the attribution of a concrete right (e.g. arising from a treaty) or of an obligation to an actor implies as a precondition that the actor has international legal personality in the first place. While procedural powers and

[27] Draft Convention on the International Legal Personality, Legal Capacity, and Privileges and Immunities of the OSCE, Annex to MC.DD/28/07, 29 November 2007.

[28] See, for the shift of focus of codification proposals from the concepts 2 and 3 (domestic legal capacity and privileges and immunities) to concept 1 (international legal personality) in the reform debate, below text with note 51.

[29] See for an excellent analysis Portmann, *Legal Personality in International Law*.

[30] Other contributions to the book partly apply slightly differing terms, and these are explained by each author. For example, Blokker and Wessel put forward that 'legal personality concerns a *quality*, whereas legal capacity is an *asset*'. See Chapter 7 by Blokker and Wessel, 'Revisiting Questions of Organisationhood, Legal Personality and Membership in the OSCE: The Interplay between Law, Politics and Practice', in this Volume.

[31] In its *Reparation for Injuries* Advisory Opinion, the ICJ equated the terms 'international person' and 'subject of international law' (ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, 179). In contrast, older literature frequently distinguished between international legal subject and international legal personality (legal person). 'Legal person' was often used to designate a broader group of entities, while the quality of being an international legal subject was defined more narrowly and was limited to States.

lawmaking powers do not automatically flow from international legal personality, they cannot exist without the latter. In that way, the international legal personality (or subjecthood) of an actor is an empty legal vessel which is however the basis and legal precondition for acting under international law.[32]

What does the above imply for the OSCE and international legal personality? The Organization lacks an established international legal personality: it is nowhere explicitly qualified by its participating States as an international legal person (subject). There is also no authoritative decision which would have, in the style of the ICJ's Advisory Opinion *Reparations for Injuries* on the UN,[33] recognised an implied international legal personality of the OSCE. Therefore, the OSCE does not exist under international law as an entity which is *legally* distinct from (the sum) of its participating States, or which enjoys rights and is saddled with duties.

International legal personality does not say much about the real legal position of a concrete entity, for various reasons. First, the recognition of international legal personality does not automatically generate specific, concrete rights (e.g. a right to enter into diplomatic relations). Put differently, the personality must be filled by specific rights and/or duties, but is not constituted by them.[34] Secondly, we need to distinguish between having substantive rights and possessing the legal power to vindicate those rights before an

[32] A. Peters, *Beyond Human Rights*, 58–9. See for a similar understanding Blokker and Wessel, 'Revisiting Questions of Organisationhood, Legal Personality and Membership in the OSCE', Chapter 7 in this Volume; Steinbrück Platise, 'Legitimate Governance as a Privilege and Price for the Autonomy of International Organisations', Chapter 14 in this Volume. In contrast, some authors claim that typical substantive rights (or what they sometimes call 'capacities') can be *derived* from international legal personality, especially the right to conclude treaties, the right to establish diplomatic missions, legal liability, and the right to participate in international organisations (e.g., Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations', 116, 139–44). The same result emerges from the analytically converse strategy of other authors who qualify only those entities as international legal persons (subjects) that have certain rights or powers (capacities), e.g., the capacity to be held liable, the capacity to enjoy international privileges and immunities, and especially the capacity to conclude treaties (e.g. Dominicé, 'L'émergence de l'individu en droit international public', 122; Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 160). Independently of whether international legal personality defined in this way is considered as a precondition or as a consequence of the enumerated powers or substantive rights, both approaches associate international legal personality with a minimum set of rights or powers.

[33] ICJ, *Reparation for Injuries* (n. 31), 179.

[34] This is not to say that a person or entity not vested with international legal personality is not required to respect international law or governance standards. See Moser, 'Conceptualising Accountability in the Legal and Institutional Framework of the OSCE', Chapter 13 in this Volume, and Steinbrück Platise, 'Legitimate Governance as a Privilege and Price for the Autonomy of International Organisations', Chapter 14 in this Volume.