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STRENGTHENING THE LEGAL FRAMEWORK OF THE OSCE SYMPOSIUM

# Legalization of the OSCE?

CHRISTIAN TOMUSCHAT — 1 August, 2016





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Since its inception, the Organization for Security and Co-operation in Europe (OSCE), originally born as Conference for Security and Co-operation in Europe (CSCE), was kept apart from the realm of international law proper. In a famous

passage of the 1975 Final Act of Helsinki, the Participating States specified that the instrument they had adopted was "not eligible for registration under Article 102 of the Charter of the United Nations". This provison was intended to announce publicly that the CSCE was not founded on the general regime of public international law, the rights and duties enshrined in the Final Act being anchored in "political commitments", a term widely open to interpretation. However, the general understanding was that a possible breach of the obligations undertaken would not entail international responsibility in the classic sense, but would remain within the category of an unfriendly act. The reservation was consistently reiterated in later OSCE instruments.

Obviously, the architecture thus created was appropriate for a diplomatic conference which does not have any legal existence of its own, but is simply made up of national delegations. Difficulties arose as soon as the CSCE started solidifying itself, establishing headquarters and sending missions to participating States in the fulfilment of its tasks. In 1994, the name of the "entity" was changed from "Conference" to "Organization", but this purely semantic amendment did not touch upon substance and therefore did not alleviate the actual problems encountered in practice. In order to be able to discharge their functions effectively without any undue pressure, members of the OSCE personnel and members of OSCE missions sent abroad need some kind of diplomatic privileges and immunities, in particular immunity from criminal prosecution. Domestic courts and tribunals are unable to grant extraordinary treatment of such kind to a person if no specific legal rule so provides. To date, no such general regime has been established for the OSCE. Only ten countries have enacted

domestic statutes reserving for the OSCE and the persons acting on its behalf special rules closely resembling the relevant rules applicable to diplomatic intercourse. In another 17 States some specific OSCE structures and their members enjoy legal status, privileges and immunities. Amazingly, however, no less than 30 States have simply abstained from providing any legal assistance in that respect, which means that any mission related to their area of jurisdiction requires careful legal preparation, possibly the conclusion of special agreements.

**Legalization as key to existing problems?**

When in 1992 a CSCE Conference decided to establish the Court of Conciliation and Arbitration it was self-evident from the very outset that a genuine international treaty would be required for its effective functioning. Judgments meant to be binding cannot derive their authority from "political commitments". The Stockholm Convention resulting from that decision has by now received 34 ratifications, the last one from Montenegro only recently in April 2016. In spite of its perfect legal design, however, the Court has lain dormant for more than 20 years.

Many problems would be settled if the Participating States could agree on legalizing the status of the OSCE in general terms, providing it with an unchallengeable legal basis. In particular, the immunity issue would be resolved for good. In addition, if the legal personality of the OSCE were recognized, the OSCE could conclude treaties at the international level and would also acquire full capacity to act as a person under private law, thus getting rid of many bureaucratic difficulties. A full draft was presented by the

Irish chairmanship in 2012 – but has found little official interest although a working group continues its activity.

**The advantage of great flexibility**

No firm answer can be given as to the usefulness of a strategy to continue the search for a general overhaul of the soft-law foundations of the OSCE. One of its great advantages is its great flexibility, which sets almost no statutory limitations to its field of activity. Currently, as far as the breadth of its tasks is concerned, the OSCE resembles, at the European level, to a large extent the United Nations with its world-wide mandate – albeit with drastically reduced powers. Probably, some Participating States would seek to reduce its scope of competence before even considering consenting to the legalization sought. Inevitably, at the same time, discussion would have to be relaunched on the modalities of decision taking. Should the rule of consensus or consensus minus one then be formalized? No international organization proper operates under the rule of unanimity. If finally agreement should have been reached on a draft treaty, one would incur the risk of an endless ratification process, only a certain percentage of the Participating States depositing their instruments of ratification as expected while the others might simply wait for long years – or forever. How should the clause on the entry into force of the new instrument be framed, following the model of modern multilateral treaties that generally provide for a certain minimum level of ratifications, or should the consensus rule – or the strict rule of consent? – be chosen, conferring a right of veto to every single Participating State? Eventually, one might be faced with a split OSCE – the old politically based organization and a new shiny organization, but without the requisite support from the States parties, existing side by

side. Such a split organization would be a weakened actor from the very outset, incapable of performing its role as a mediator in European politics.

In sum, it appears that the full legalization of the OSCE might be a futile endeavour. The transformation process, if it is deemed worthwhile being pursued, should for the time being be confined to the issue of the immunities granted to the personnel and the missions of the OSCE where genuine needs have arisen. The Participating States have a legal and moral duty to protect those working on the OSCE's behalf, often risking their personal integrity.

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