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STRENGTHENING THE LEGAL FRAMEWORK OF THE OSCE SYMPOSIUM

OSCE: Do we really need an international legal personality and why?

GLEB BOGUSH — 15 August, 2016

As part of this symposium, the Völkerrechtsblog has published excellent contributions of Christian Tomuschat, Cedric Ryngaert and Isabelle Ley. All the three distinguished authors have looked at the multifaceted problem of legal [illegible]gles andhave provided rather helpful reflections on the current state of affairs. This contribution deals with the issue in a broader political context.

OSCE in a geopolitical turmoil: back to the initial mission?

The political reality in which the OSCE now operates reminds more and more of the time when the organisation (then – the CSCE) was created. The conflict in Georgia was seen in 2008 as the organization's "low point" in its inability to prevent an armed conflict between its two participating states. The events in Ukraine constitute a direct affront to the founding Helsinki principles.

It seems that the dream of a common space of security and rule of law from Vancouver to Vladivostok, as embodied by the OSCE documents of the 1990s, has faded away. The high aspirations clashed with the realities of authoritarianism and disregard to international commitments that continued to prevail in a growing number of participating states, and peaked with Russia's actions. The climate in the organization itself which transpires through harsh political statements and boycotts of official meetings is also certainly not a good sign for the "security and cooperation in Europe".

Of course, the comparison with the Cold War may be premature. The conflict between Russia and the West could be dramatic, but it is definitely not a war between the two ideological camps. However, it indeed presents strikingly different perspectives for the OSCE as compared to the 1990s.

Rather paradoxically, the recent deployment of the OSCE special monitoring mission in Ukraine is now seen by some observers as "regained political relevance" of the organization". The massive setback in the "East (Russia) –West" relations has unexpectedly revived the OSCE's original political mission as the organization offered the best and probably the only available framework for managing the crisis and avoiding further escalation of the conflict.

However, taken into account the OSCE consensus system, as well as a legal and political deadlock in Russia-Ukraine relations, even that "success" has its limits.

The current crisis has implications reaching far beyond Ukraine. Russia's entire western and southern neighborhoods from the Baltics to Central Asia could become the new hot spots. A significant number of states in the post-Soviet space such as Belarus and Kazakhstan now show greater interest in the OSCE than in the recent past. It seems that the geopolitical confrontation brings the organization to its initial role and presents the best natural environment for the functioning of its security forum and negotiations platform.

Benefits and Costs of the OSCE "Legalization"

Against this background, an interesting question arises – do we really need a "fully legalized" OSCE?

As Professor Tomuschat rightly noted, since its inception the organization has been kept apart from the realm of international law proper. This "softness" of the OSCE, however, makes it more flexible, and thus has also brought OSCE some benefits. In a way, OSCE is bringing international law, although in its rather soft form, to the European grey zones. This – often invisible – work should not be underestimated.

The States, however, are not willing to use even those OSCE legal instruments that are already available. The story of the OSCE Court of Conciliation and Arbitration (the only "properly" created organ of OSCE) is very telling in this regard. Notwithstanding all the efforts of the court, no state has ever brought a single dispute to it. The States regard it as (just/yet) another expensive arbitration in Genève. For

instance, the Court has not even been mentioned as a potential dispute settlement forum for Crimea, while both Russia and Ukraine are state parties to the Stockholm Convention. It appears that states are not willing to resort to OSCE international "legal" arrangements.

A "full" international legal personality would be able to transform OSCE in what should actually be called another classical interstate international organization. As "legalization" of the OSCE was at a certain point of time Russia's idea, a valid question arises: as a "fully equipped" international organization, could it have prevented the Ukrainian crisis?

It may be, however, that the OSCE legal personality project is a failure story from the very beginning. If consensus among the participating states would be reached at some stage, what would be its real benefit? On the other hand, the Council of Europe, – another huge pan-European organization, and especially its "political" part, – has also demonstrated its limited efficiency and inability to prevent major backlashes, such as the Ukrainian conflict or the current crackdown in Turkey.

From the outset, OSCE was a product of fear and hypocrisy. Its strengthening and "legalisation" may have implications reaching beyond its routine functions. By signing the Helsinki Act, the Soviet Union had committed to respect human rights and democratic freedoms – an obligation which it was not going to comply with. In the current realities, not only can OSCE create a dangerous illusion of the dialogue, but foster such illusion into international law. Such "institutionalization" of the confrontation would become a dangerous signal. Authoritarian States could see in a

"legalized" OSCE a "convenient" alternative to the Council of Europe.

This legal "strengthening" of the OSCE may also have a paradoxical effect in strengthening the confrontational element in Europe, the division of Europe into spheres of influence and geopolitical battle between "East" and "West". By compromising its founding principles, OSCE may in fact contribute to the general setback.

Probably the more realistic and more productive way would be just to continue with the core OSCE mission, and leave the OSCE as a forum for negotiations, while international lawyers will concentrate on the practical solutions for the OSCE on a national level (States may still rely on the old-fashioned Lotus-type discretion in dealing with immunity and other OSCE – related issues in domestic law).

As far as the principal issue is concerned, the real choice for the OSCE should not be overlooked. It seems that organization now has to decide whether to cling to common values established in the 1975 Helsinki Final Act and reaffirmed in Paris in 1990, thus risking to antagonize Russia and other authoritarian members, or to serve again, like during the Cold War, as an inclusive cooperative security dialogue forum for both democracies and authoritarian regimes.

Gleb Bogush is Associate Professor at the Faculty of Law, Lomonosov Moscow State University

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