



Making a credible case for a legal personality for the OSCE

Discussions on a convention setting out the OSCE's legal status and privileges and immunities began long before I joined the Legal Services section of the Office of the Secretary General in 2004. In 2001, a working group had prepared a draft on the Organization's legal capacity but had not managed to reach a consensus. The crucial question: Was there something broken that required fixing? Some participating States saw no need for repair and were concerned that a Convention would impair the flexibility of the OSCE, an organization noted for its rapid response to conflict.

BY SONYA BRANDER

I had actually been made aware of the absence of legal personality during my interview for the post of Senior Legal Adviser, and I quickly realized the daily practical legal implications of the Organization's lack of an internationally recognized legal personality, privileges and immunities.

Within my first few weeks on the job, I was asked to provide advice on the following:



OSCE/MIKHAIL LEVSTAFEV

The co-chairpersons of the informal Working Group that drew up a draft convention for the OSCE, Ambassador Ida van Veldhuizen-Rothenbücher, Head of the Delegation of the Netherlands to the OSCE (third from left) and Ambassador Helmut Tichy, Deputy Legal Adviser in the Austrian Foreign Ministry, with some of the Organization's Legal Services staff: Former Senior Legal Adviser Sonya Brander (left), Legal Officer María Amor Martín Estébanez and Legal Adviser Laura Noriega Martín (far right).

- A bank refuses to open an account for the OSCE unless it is presented with proof that the Organization is a legal entity that can be held liable for withdrawals and deposits.

- An OSCE official has responded to a subpoena to be a witness in a civil trial. The host country says he does not enjoy any immunity and he is being threatened with arrest. The trial is about to begin. Could I act as legal counsel on his behalf?

- A staff member has been shot at while on the job. The supervisor is concerned that he could be sued as a result. If so, will the OSCE indemnify him? Should he obtain insurance?

- A field project has been delayed. Who could be sued for damages? The OSCE official who signed the contract? The OSCE? Participating States? Would the OSCE insure the official? Perhaps, given the risks, another organization should implement the project instead?

I had been used to giving advice about responsibility and liability in treaty-based organizations where international legal personality and a regime of privileges and immunities were quite established. In contrast, here at the OSCE, the legal framework is not as certain. Lawyers have to be creative about looking for solutions to fill the gaps and managers have to be vigilant about assessing risks. Although we appear to be a house with a roof and some windows, we have no foundation. With the OSCE's expanding activities, cracks are beginning to show. When will the roof fall in? Fortunately for us, it hasn't so far.

But as the OSCE takes on increasingly complex activities — destroying surplus ammunition or setting up a computerized electoral system across a whole country or carrying out a project in a dangerous zone — a foundation would go a long way towards providing certainty in legal terms and a firm operational framework.

Some participating States, however, were concerned that a foundation would threaten the flexibility of the OSCE: Wouldn't carving rules in stone interfere with its rapid response system? Wouldn't rules be limiting, giving rise to constant warning signals such as: "You can't do that because..." or, "Isn't there a rule against that?"

Many recognize, however, that rules can offer certainty, consistency, clarity and a framework for activities. Those who work with you find it easier to cooperate with you. Those who want to work with you can rely on your status. And those who work for you understand their obligations towards you and your obligations towards them.

NEW IMPETUS

The issue of the consolidation of the OSCE's legal status was given new impetus when the Panel of Eminent Persons — which had been established by a Ministerial Decision in Sofia in 2004 — issued its report, *Common Purpose: Towards a More Effective OSCE*, in June 2005.

The seven-member panel recommended that participating States "devise a concise statute or charter of the OSCE containing its basic goals, principles and commitments, as well as the structure of its main decision-making bodies." The panel also recommended that participating States "agree on a convention recognizing the OSCE's legal capacity and granting privileges and immunities to the OSCE and its officials."

This led to the establishment of the Working Group on Strengthening the Effectiveness of the OSCE, led by Axel Berg, Head of the German Delegation to the OSCE. Its goal was to examine the possibility of providing the OSCE with legal status and granting privileges and immunities.

In May 2006, Ambassador Berg issued a paper identifying some of the problems faced by the OSCE and proposing terms of reference for a small group of legal experts which would be chaired by Helmut Tichy, Deputy Legal Adviser in the Austrian Foreign Ministry. The

Axel Berg was the Head of the German Delegation to the OSCE from August 2005 to July 2008. He is now the German Ambassador to Switzerland and Liechtenstein.



AXEL BERG



Päivi Kaukoranta, Director of the Unit for EU and Treaty Law, Legal Services, Finnish Foreign Ministry

legal experts presented a report to the Belgian Chairman-in-Office in September 2006, which became the focus of discussions among participating States within the Working Group on Strengthening the Effectiveness of the OSCE.

This led to the adoption in 2006 of the Brussels Ministerial Decision on the Legal Status and Privileges and Immunities of the OSCE, stating that work on a draft convention would be continued on the basis of the text drafted in 2001. The Decision also established, under the Permanent Council, an informal Working Group at expert level. Its task would be to draw up a draft convention which would be submitted through the Permanent Council

for adoption by the Ministerial Council, “if possible, in 2007”.

The new Spanish Chairmanship then invited Ambassador Ida van Veldhuizen-Rothenbücher, Head of the Delegation of the Netherlands to the OSCE, to chair the informal Working Group, Ambassador Helmut Tichy becoming the Co-Chairperson. After difficult and lengthy negotiations at seven meetings between March and October 2007, an agreed text finally emerged.

SOME CONCERNS

Several participating States, however, maintained their view that the OSCE needed a statutory document setting out the main goals and principles of the Organization, its structure and the relationships within the OSCE in the form of a charter or statute. They argued that adoption of a convention in the absence of a charter did not help to solve the main issue of providing the OSCE with legal personality and legal capacity.

They based their view on legal practice of other international organizations, such as the United Nations, the Council of Europe and NATO, which have statutory documents and thus enjoy a “real full-fledged international legal status”. This group of countries stated that without such a charter or a statute, it would be impossible for them to ratify a convention.

While this was not a new proposal, such a document had not been envisaged as part of the Working Group’s mandate. Other participating States felt that the specific concerns arising from the lack of a charter were already addressed by the draft convention’s provisions. They believed that a participating State’s signing up to the text would, in itself, serve as the State’s recognition of the OSCE.

At its final meeting in October 2007, the Working Group reached consensus on the text of a draft convention, although three footnotes



Rome, 1 December 1993, Fourth Meeting of the Council of Ministers of the Conference on Security and Co-operation in Europe Left to right: Ambassador Nils G. Eliasson (Sweden), first Director of the CSCE Secretariat in Prague; Ambassador Wilhelm Hoeynck (Germany), first Secretary General of the CSCE/OSCE; Italian Foreign Minister Beniamino Andreatta (who died in 2007); and Ambassador Paolo Bruni, Head of the Italian delegation to the Committee of Senior Officials.

“The lack of a legal personality for the Conference on Security and Co-operation in Europe was a nightmare right from my first day in office as the first Secretary General of the CSCE/OSCE,” Ambassador Wilhelm Hoeynck told the *OSCE Magazine* recently. “As usual, the Austrians quickly and pragmatically helped out by promulgating a special law giving the CSCE a legal personality for activities within Austria. However, to illustrate the practical aspects of the problem, the Conflict Prevention Centre told me that, in 1992, when they were buying a car for the first long-term field missions to Kosovo, Sandjak and Vojvodina, the car dealer would not accept anything but cash.”

Historical timeline Towards a legal personality

Rome, 30 November-1 December 1993: Fourth Meeting of the Council of Ministers of the Conference on Security and Co-operation in Europe (CSCE). The Ministers adopt a decision on legal capacity and privileges and immunities after considering the report of an ad hoc Group of Legal and Other Experts on the relevance of an agreement granting internationally recognized status to the CSCE institutions. (Over the years, however, the “Rome Decision” was implemented by only a quarter of the participating States.)

Istanbul Summit, 18-19 November 1999. The Heads of State or Government of OSCE participating States task the Permanent Council, through an informal open-ended working group, to draw up a report to the next Meeting of the Ministerial Council, including recommendations on how to improve the situation.

Vienna, 2000-2001. The informal Working Group, chaired by Helmut Tichy (Austria), meets and works on a document containing provisions on the legal personality, privileges and immunities of the OSCE. However, the Group does not reach a consensus on the document’s precise legal character.

Vienna, 2002-2006. Occasional consultations and presentations about the problem of the legal personality of the OSCE take place.

Ljubljana, 27 June 2005. The OSCE Panel of Eminent Persons presents the Slovenian Chairman-in-Office, Foreign Minister Dimitrij Rupel, with a 32-page report on strengthening the effectiveness of the Organization. Among the Panel’s recommendations: “a concise Statute or Charter of the OSCE” and “a convention recognizing the OSCE’s legal capacity and granting privileges and immunities to the OSCE and its officials”.

referring to an OSCE charter were attached. Unfortunately, despite intense negotiations and the efforts of the Chairperson of the Working Group, no consensus on a final text was reached at the Meeting of the OSCE Ministerial Council in Madrid in 2007.

This setback did not, however, dampen support for the text of the draft convention. Following discussions with delegations in Vienna, the Finnish Chairmanship organized an informal round-table meeting on the convention at the Hofburg on 22 October 2008. The discussions were chaired by Päivi Kaukoranta, Director of the Unit for EU and Treaty Law in the Finnish Foreign Ministry, and co-chaired by Ambassador van Veldhuizen.

The event served as a platform for an open dialogue on the convention, as presented by the informal Working Group. A large number of delegations took part and contributed to a constructive exchange of views.

Through the efforts of the Finnish Chairmanship and Ambassador van Veldhuizen, the torch has now been passed to the Greek Chairmanship, which will report to the Meeting of the Ministerial Council in Athens in 2009, as called for in a Ministerial Decision on strengthening the legal framework of the OSCE adopted in Helsinki this past December.

Would the text of the draft convention address the concerns of a legal nature that the OSCE faces

today? Much would depend on how each participating State implemented the convention upon ratification.

Politically, the convention would enhance the OSCE's international standing, placing it on the same institutional level with other international actors, such as the United Nations and NATO.

In practical terms, it will undoubtedly strengthen the security and legal protection of the OSCE personnel in the field, especially those working in "hard areas". It would help to limit risks connected with complicated technical projects involving the disposal of mélange or ammunition.

Implementation of the convention would remove the need to negotiate bilateral agreements with host States and the need to spell out privileges and immunities and legal personality. Since there is no agreed standard right now, these agreements are rarely the same and therefore do not provide the OSCE with the same status in each host State and with a uniform operating environment.

A convention would go a long way towards creating a more uniform system of rights and obligations among host countries, field operations, institutions and participating States.

Inequities in salaries, post-employment treatment and other benefits offered by the OSCE *vis-à-vis* other international organizations place the OSCE at a disadvantage in its ability to attract local staff. The OSCE's uneven tax status weakens its

The Legal Services section participates in the OSCE internship programme and accepts two interns every six months. Interested and qualified young people can apply to the Department of Human Resources by filling out a form, which can be accessed at www.osce.org/employment/13111.html.

Vienna, 2006. The issue of legal personality is placed on the reform agenda of the OSCE, under the responsibility of the Working Group on Strengthening the Effectiveness of the OSCE and under the leadership of Ambassador Axel Berg (Germany). As a result, a group of legal experts is established to review the implications of the OSCE's lack of international legal status and uniform privileges and immunities. With Helmut Tichy acting as chairperson, the group meets twice. It recommends that the work on a draft convention be continued on the basis of the text drafted in 2001 and that an open-ended working group finalize a draft convention and submit it, through the Permanent Council, to the Ministerial Council in 2007.

Brussels, 4-5 December 2006: Fourteenth Meeting of the OSCE Ministerial Council. A Decision by the Ministerial Council establishes an informal working group at expert level under the Permanent Council to draft a convention on the international legal personality, legal capacity, and privileges and immunities of the OSCE.

Vienna, March to October 2007. Under the chairmanship of Ambassador Ida van Veldhuizen-Rothenbücher (Netherlands) and the co-chairmanship of Ambassador Helmut Tichy, the informal Working Group holds seven meetings, discussing in detail all the provisions of the 2001 draft convention and amending the text where necessary.

Vienna, 18 September 2007. Armenia, Belarus, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan introduce a Draft Ministerial Council Decision on the Charter of the OSCE.

Vienna, 11 and 12 October 2007. The Working Group meets for the last time and reaches a consensus on a new text of the draft convention, but with three footnotes.

Madrid, 29-30 November 2007: Fifteenth Meeting of the OSCE Ministerial Council. Although no final consensus is reached on the text of a convention, the OSCE Chairman-in-Office, Spanish Foreign Minister Miguel Angel Moratinos, annexes the draft text by the Working Group to his closing statement "for practical purposes". He also refers to the possibility of drafting a charter or founding statute for the OSCE.

Helsinki, 2 June 2008. The "Quintet" of OSCE Chairmanships expresses support for a legal personality for the Organization.

Vienna, 22 October 2008. The Finnish Chairmanship organizes an informal round-table meeting on the convention, chaired by Päivi Kaukoranta, Director of the Unit for EU and Treaty Law in the Finnish Foreign Ministry and co-chaired by Dutch Ambassador van Veldhuizen. Reference is made to "universal agreement between delegations on the need to assign the OSCE with legal personality".

Helsinki, 4-5 December 2008: Sixteenth Meeting of the OSCE Ministerial Council. Ministerial Decision No.4/08 tasks the incoming Chairperson-in-Office to pursue a dialogue on strengthening the legal framework of the OSCE and to report to the Meeting of the Ministerial Council in Athens in December 2009.

Vienna, 15 January 2009: Launching of the Greek Chairmanship of the OSCE. The new Chairperson-in-Office, Greek Foreign Minister Dora Bakoyannis, recalls that the participating States have agreed on the need to enhance the legal status of the OSCE and expresses readiness to act on that without delay, stating Greece's commitment "to taking forward and finalizing the process".

— Ambassador Helmut Tichy, Deputy Legal Adviser in the Austrian Foreign Ministry

effectiveness, especially in areas where other international organizations enjoy exemption.

With a view to achieving consensus on the text of the draft convention, several articles provide States with flexibility regarding the taxation of national staff in the field. This is a recurring problem that is addressed by the Permanent Council's Advisory Committee on Management and Finance every quarter and is the subject of frequent complaints by heads of OSCE field operations.

Other concerns include the lack of exemption from national service obligations, which can impair the operation of missions in times of conflict, and taxes levied on miscellaneous goods and services, which divert participating States' contributions away from OSCE activities.

Although legal matters will inevitably remain part and parcel of any organizational agenda, there is no doubt that a convention granting the OSCE a legal personality, together with

privileges and immunities, would greatly benefit its operations.

We need to keep the draft text alive and remind participating States of the value that a convention would bring to the OSCE. The appointment of a Personal Representative on a Legal Status for the OSCE would help ensure that the dedicated efforts over the past decade finally *do* bear fruit.

Sonya Brander is a Canadian lawyer and was the Senior Legal Adviser to the OSCE from 2004 to early 2009. During this period, the Legal Services section has grown from a team of three to eight, including two assistants. A graduate of Dalhousie University in Halifax, Nova Scotia, Ms. Brander has recently joined the Organization's Office of Internal Oversight as Deputy Director and Head of Evaluation.

OSCE Legal Officer María Amor Martín Estébanez, who holds a DPhil in law, provided advice and assistance in preparing this special focus of the OSCE Magazine.

2008 "The Ministerial Council,
Guided by our common goal to
strengthen the legal framework of
the OSCE,

(...)

Tasks the Chairman-in-Office, in
consultation with the participating
States, to pursue a dialogue on
strengthening the legal framework
of the OSCE and to report to the
Ministerial Council Meeting in
Athens in 2009."

Helsinki Ministerial Council Decision No. 4/08: Strengthening the legal framework of the OSCE (excerpts)

2006 "The Ministerial Council
(...)
Decides:

1. That the work on a draft convention
on the international legal personality,
legal capacity, and privileges and
immunities of the OSCE will be continued
on the basis of the text drafted by the
legal experts in 2001 (redistributed as
document CIO.GAL/188/06);

2. To establish an informal Working
Group at expert level under the

Permanent Council tasked with finalizing
a draft convention on the international
legal personality, legal capacity, and
privileges and immunities of the OSCE.
The Working Group will submit this draft
convention to the Ministerial Council
through the Permanent Council for
adoption by the Ministerial Council, if
possible, in 2007."

Brussels Ministerial Council Decision No. 16/06: Legal status and privileges and immunities of the OSCE (excerpts)

2007 "There has been no agreement ... on
how to solve one of the most relevant and
practical problems confronting the OSCE,
namely recognition of the Organization's
legal personality in the international sphere.
I believe that these failures should not
discourage us — quite the contrary. We can
give even greater impetus to debate in the
Organization on questions related to its
strengthening in the legal sphere, including
the possibility of drafting a Charter or
Founding Statute for the OSCE. This should
not, in itself, be a matter for concern in any
delegation. What is important would be the
content, not the format. At the same time
I want to recognize and congratulate the
Working Group on its efforts, and I should
like to see the text produced by this Working
Group annexed to my Statement for practical
purposes."

**Madrid, 30 November 2007, Statement by the
Chairman-in-Office of the OSCE at the closing
session of the Fifteenth Meeting of the Ministerial Council (excerpts), page 3**

2005 "3. The Structural Response
(...)

**3.1 Strengthening the OSCE's
identity and profile
(...)**

28. The OSCE's development
from a conference to a full-fledged
international organization must
now be completed, finally making
'participating States' into 'member
States'.

29. The OSCE's standing as
an international organization
is handicapped by its lack of a
legal personality. The lack of a
clear status also affects OSCE
personnel when stationed in crisis
areas without the protection that
diplomatic recognition would give
them.

30. The Panel therefore
recommends that:

a) Participating States should devise
a concise Statute or Charter of
the OSCE containing its basic
goals, principles and commitments,
as well as the structure
of its main decision-making

bodies. This would help the OSCE
to become a full-scale regional
organization;

b) Participating States agree on
a convention recognizing the
OSCE's legal capacity and granting
privileges and immunities
to the OSCE and its officials.
Such a convention would not
diminish in any way the politically
binding character of OSCE
commitments.

c) The OSCE's profile among other
international organizations
would be raised by focusing more
clearly on a limited range of
priorities, giving a more public
and long-term face to its leadership,
and encouraging a stronger
sense of ownership among its
participants."

**"Common Purpose: Towards a More
Effective OSCE", Final Report and
Recommendations of the Panel
of Eminent Persons on Strengthening
the Effectiveness of the OSCE,
27 June 2005, pages 19-20
(excerpts)**

Legal personality of the OSCE: *Quo vadis?*

By Ambassador Ida van Veldhuizen-Rothenbücher

Ask this question in early 2009, and you will get the answer: “We don’t know”. After 15 years of reflection, presentations, consultations and negotiations, tangible progress has been made. But the goal — adoption of a “convention on the international legal personality, legal capacity, and privileges and immunities of the OSCE” — has not yet been reached.

The year 2007 had marked a breakthrough in the process: The completion of the task of drafting the text of the convention, albeit with three footnotes referring to a (non-existent) OSCE charter.

How was this significant milestone reached? Between March and October 2007, and in a spirit of goodwill and transparency, legal experts from various capitals gathered in Vienna for a series of seven two-day informal Working Group sessions with representatives of Permanent Missions to the OSCE.

Through hard work and excellent co-operation, they demonstrated that, in the OSCE framework and within a short period, they could come up with a product that everyone could be proud of: a text of the convention comprising 25 articles, ready to be presented to the Spanish Chairman-in-Office in October 2007. But, although many participating States were looking forward to adopting the text at the OSCE Ministerial Council Meeting in Madrid in December 2007, this did not occur.

The Finnish Chairmanship kept the issue of legal personality alive by organizing a round-table meeting in October 2008. It was clear during the discussions in and around the Hofburg, that the need for an international legal personality for the OSCE had the support of all the participating States.

It also became even more evident that the OSCE urgently needed to have a legal personality conferred

on it. This was for the sake of the Organization’s international standing, its status as an employer of more than 3,000 people, its legal relationship with the Secretariat’s host country and with countries hosting OSCE institutions and field operations, and its ability to deliver on its wide-ranging project commitments effectively and efficiently.

So how should we proceed now, in light of the fact that some participating States believe that the Organization needs a charter while some do not?

In December 2008, at the Ministerial Council Meeting in Helsinki, the incoming Greek Chairmanship was given the task of pursuing a dialogue on strengthening the legal framework of the OSCE in consultation with participating States, with a report to be presented to the Ministerial Council Meeting in Athens in 2009. I look forward to the proposals of the Greek Chairman-in-Office that will show the way ahead.

In the meantime let us hope that the lack of a legal personality will not cause the Organization any harm.



Ida van Veldhuizen served as the Chairperson of the informal Working Group tasked with finalizing a draft convention for the OSCE. She has been the Permanent Representative of the Netherlands to the OSCE since 2006. Earlier, she served as bilateral Ambassador of the Netherlands to Croatia, and then to the Czech Republic. In the 1990s, she served as Political Adviser in her country’s Permanent Mission to NATO. Ambassador van Veldhuizen studied international law and notarial law at Leiden University.



Because of the OSCE’s lack of legal personality, the Netherlands had to adopt a national law in 2002 to extend the necessary status, privileges and immunities to the High Commissioner on National Minorities, an important OSCE institution.



Helsinki Ministerial Council Meeting, 5 December 2008.

The foreign ministers of the OSCE participating States tasked the incoming Greek Chairmanship with pursuing a dialogue on strengthening the Organization’s legal framework and with reporting to the Meeting of the Ministerial Council in Athens in 2009.