

The Status of the OSCE under International Law - Current Status and Outlook

The Legal Character of the OSCE¹

At their Summit Meeting in Budapest in December 1994 the Heads of State or Government of CSCE participating States decided that from 1 January 1995 on the CSCE would be called the Organization for Security and Co-operation in Europe (OSCE). With regard to the status of the OSCE under international law, all that can be found in the Budapest Document is the statement that the "change in name from CSCE to OSCE alters neither the character of our CSCE commitments nor the status of the CSCE and its institutions".² How one answers the question that emerges from this open formulation - whether the OSCE is an international organization that is a subject of international law (i.e. with rights and duties of its own) and whether it can therefore make legally binding decisions against one or more of its participating States (say, in connection with the settlement of a dispute by one of its organs) - thus depends on how one views the legal character of the CSCE.

The Concept of the International Organization

By "international organization" we understand a long-term association between at least two sovereign states or other subjects of international law that pursues certain (not purely fiscal) objectives and has at least one organ that can develop a will of its own distinguishable from that of its members.³ It is a matter of dispute

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- 1 The observations in this chapter are based on the author's dissertation, *Möglichkeiten und Grenzen der Streitbeilegung ethnischer Konflikte durch die OSZE - dargestellt am Konflikt im ehemaligen Jugoslawien* [Possibilities and Limitations in the Settlement of Ethnic Conflicts by the OSCE - Illustrated by the Conflict in Former Yugoslavia], Berlin 1996.
 - 2 Budapest Document 1994, Budapest, 6 December 1994, Section I, No. 29, in: Arie Bloed (Ed.), *The Conference on Security and Co-operation in Europe, Basic Documents, 1993-1995*, The Hague/London/Boston, pp. 145-189, here p. 156.
 - 3 On the various definitions, which differ in their details, cf. Rudolf Bindschedler, *International Organizations, General Aspects*, in: Rudolf Bernhardt (Ed.), *Encyclopedia of Public International Law*, Vol. 2, Amsterdam 1995, pp. 1289ff.; Ignaz Seidl-Hohenveldern, *Völkerrecht* [International Law], Cologne 1994, margin Nos. 799ff.; Knut Ipsen, *Völkerrecht*, Munich 1990, § 6 margin Nos. 3ff.; Heribert Köck, *Internationale Organisationen* [International Organizations], in: *Staatslexikon*, Vol. 3, Freiburg 1987, pp. 150ff.; Rüdiger Wolfrum, *Internationale Organisationen* [International Organizations], in: Seidl-Hohenveldern (Ed.), *Lexikon des Rechts*, Bd. *Völkerrecht* [Encyclopedia of Law, vol. *International Law*], Neuwied 1985, pp. 127ff.; Werner Meng, *Das Recht der internationalen Organisationen, eine Entwicklungsstufe des Völkerrechts* [The Law of International Organizations, A Stage in the Development of International Law], Baden-Baden 1979, pp. 44ff.

whether the founding of such an organization invariably requires a written contract,⁴ whether agreement under international law reached in another form is sufficient⁵ or whether an international organization can simply come into being - as a matter of fact, so to speak - through the gradual institutionalization of meetings that take place periodically.⁶

Thus the concept of the international organization is made up of two components - a functional one (durability, purposefulness, having an organ with a will of its own) and a genetic one (founding event)⁷ - the latter in dispute as to its substance. An additional question, which must be investigated separately, is whether the international organization is also a subject of international law, i.e. whether it has been endowed by its members with its own rights and duties under international law so that the "will of its own" of the organ is not merely political in nature but has a legal character.

The Functional Component of the Organization Concept

During the first fifteen years of its existence the CSCE was a process of successive multilateral diplomatic conferences and expert meetings to review and expand the commitments undertaken through the Helsinki Final Act of 1975. Permanent institutions were first established by the Charter of Paris, which was adopted in November 1990 at an extraordinary CSCE Summit.⁸ To fulfil its responsibilities (promotion of human rights, democracy and the rule of law; expansion of economic co-operation; and creation of the greatest possible military security through disarmament and transparency) the CSCE now had decision-making bodies of its own (Council, Committee of Senior Officials/CSO), supporting institutions (Conflict Prevention Centre/CPC and the Office for Free Elections) and a CSCE Secretariat. Certain functions and responsibilities were assigned to these bodies, which worked in accordance with established rules.

With regard to the characteristic of "a will of its own distinguishable from that of its members" it might seem problematic that the members of the Council

4 Thus Bindschedler, cited above (Note 3), pp. 1289ff.; Ipsen, cited above (Note 3), § 27 margin No. 12.

5 Wolfrum's view, cited above (Note 3), p. 127.

6 Seidl-Hohenveldern's view, cited above (Note 3), margin No. 801; Ignaz Seidl-Hohenveldern/Gerhard Loibl, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften* [The Law of International Organizations, Including Supra-national Communities], Cologne 1996, margin No. 0402.

7 Thus Meng as well, cited above (Note 3) pp. 44ff.

8 Charter of Paris for a New Europe, Paris, 21 November 1990, in: Arie Bloed (Ed.), *The Conference on Security and Co-operation in Europe. Analysis and Basic Documents, 1972-1993*, Dordrecht/Boston/London 1993, pp. 537-566, here: Section "New Structures and Institutions of the CSCE Process", pp. 548-550; also: Supplementary Document to Give Effect to certain Provisions Contained in the Charter of Paris for a New Europe, *ibid.*, pp. 551-557.

(now Ministerial Council), of the Committee of Senior Officials (now Senior Council) and of the later established Permanent Committee (now Permanent Council) were representatives of the participating States. But we can leave aside the question of whether it is possible for an organ to develop a "will of its own" in cases where there is a contractual requirement for consensus decisions⁹ because decisions of the Council, the CSO and the Permanent Committee - on the basis of the consensus-minus-one procedure adopted at the Council meeting in Prague - could under certain circumstances be taken without unanimity. Thus the "will" developed in the latter procedure could not be the will of all participating States. The Council's authority to make this exception to the consensus rule laid down in the Final Act is based on the provisions of the Charter of Paris that created the Council and gave it its mandate to "consider issues relevant to the Conference on Security and Co-operation in Europe and (to) take appropriate decisions".¹⁰

Moreover, the authority vested in the institution of the Chairman-in-Office (created later) to appoint a Personal Representative with a prescribed mandate¹¹ argues for the view that this institution has a "will of its own". And decisions of the High Commissioner on National Minorities/HCNM (created in 1992) to issue an early warning statement to the CSO or to recommend early action unquestionably represent "decisions of his own". A further indication of the CSCE's status as an independent organization was the fact that in 1992 it declared itself to be a "regional arrangement" in the sense of Chapter VIII of the Charter of the United Nations¹² and that in 1993 it was granted observer status to the General Assembly of the UN.¹³

The Genetic Component of the Organization Concept

The genetic component of the concept of an international organization is in principle an agreement under international law by two states or other subjects of international law to found an international organization.¹⁴ This agreement normally takes the form of a founding treaty in writing and requiring ratification but it can take other forms, e.g. co-ordinated parliamentary decisions.¹⁵

9 On this, see Meng, cited above (Note 3), p. 47.

10 Charter of Paris for a New Europe, cited above (Note 8), Supplementary Document, p. 551.

11 Cf. CSCE Helsinki Document 1992: The Challenges of Change, Helsinki, 10 July 1992, in: Bloed (Ed.), cited above (Note 8), pp. 701-777, here Section I, Nos. 12-14, p. 712, and in particular No. 22, p. 714.

12 Cf. *ibid.*, Section IV, No. 2, p. 731.

13 On this see CSCE Fourth Meeting of the Council, Rome, 30 November - 1 December 1993, in: Bloed (Ed.), cited above (Note 2), pp. 192-214, here: Section VI, No. 2, p. 206.

14 Cf. Wolfrum, cited above (Note 3), p. 127; Ipsen, cited above (Note 3), § 27 margin No. 12; Köck, cited above (Note 3), p. 151. Reservations expressed by Bindschedler, cited above (Note 3), p. 1289.

15 Cf. Wolfrum, cited above (Note 3), p. 127; Seidl-Hohenveldern/Loibl, cited above (Note 6), margin No. 0402; Meng, cited above (Note 3), pp. 44ff.; expressing reservations,

CSCE participating States have, since the Conference came into being, created a large number of documents but, with two exceptions (the Treaty on Conventional Armed Forces in Europe of 1990¹⁶ and the Convention on Conciliation and Arbitration within the CSCE¹⁷), none of them has a legally binding character.¹⁸ A founding treaty under international law and requiring ratification does not exist. The entire institutional structure of the CSCE rests on non-legal agreements. Nor did the CSCE participating States reach any other form of agreement on founding the CSCE or transforming it into an international organization until the decision about renaming was made at the end of 1994.

However, the status of GATT and ASEAN under international law has shown that an international organization can also "come into being when periodic meetings between the representatives of states are gradually institutionalized"¹⁹ - i.e. *de facto*. The creation of a Secretariat or the establishment of decision-making bodies is regarded as a sufficient basis for institutionalization.²⁰

If one assumes that the founding of an international organization and granting it the status of a subject of international law - i.e. fitting it out with its own rights and obligations under international law - are two separate processes then the founding of an international organization represents no more than the establishment of its institutional structure and of the rules of procedure to be observed there. Whether the act of establishment is based on a founding treaty under international law or, as in the case of the CSCE, only on political agreements, is unimportant in the sense that an organization cannot exercise any rights and duties of its own under international law simply by virtue of its character as an organization. The acknowledgement of an organization's *de facto* character, distinct from the assignment to it of the status of a subject of international law, therefore does not constitute intrusion into the sovereign rights of member states but (simply) makes clear the degree of institutionalization already attained by the international organization in question.

For that reason, the CSCE could already be described as an international organization during the period between the Charter of Paris in 1990 and its re-

Ipsen, cited above (Note 3), § 27 margin No. 12, and Bindschedler, cited above (Note 3), p. 120.

16 Treaty on Conventional Armed Forces in Europe, Paris, 19 November 1990, in: Bloed (Ed.), cited above (Note 8), pp. 1223-1253.

17 Stockholm Meeting of the CSCE Council, Stockholm, 15 December 1992, in: Bloed (Ed.), cited above (Note 8), pp. 845-899, Annex 2: Convention on Conciliation and Arbitration within the CSCE, *ibid.*, pp. 870-888.

18 On this, see: Fastenrath, The Legal Significance of CSCE/OSCE Documents, in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (Ed.), OSCE Yearbook 1995/1996, Baden-Baden 1997, pp. 411-427, Wenig, cited above (Note 1), pp. 58-77; and the Introduction in: Theodor Schweisfurth, assisted by Karin Oellers-Frahm, KSZE-Dokumente [CSCE Documents], Munich 1993, pp. XXXVII-XLVII.

19 Seidl-Hohenveldern/Loibl, cited above (Note 6) margin No. 0402 (translation). On ASEAN see Wenig, cited above (Note 1), pp. 82-83.

20 Seidl-Hohenveldern, cited above (Note 3), margin No. 801.

naming as the OSCE on 1 January 1995. But that says nothing about the character of the organization as a subject of international law during that period.

The Question of the CSCE as a Subject of International Law

Being a subject of international law means the capacity independently to have rights and obligations under international law. International organizations do have this character in principle, but it is not automatic.²¹ Whether an international organization has the character of a person under international law depends on whether its members, during the time of their membership, have given up the exercise of some part of their sovereign rights and endowed the organization with its own competencies so that it can exercise those rights in the name of its own. Thus the granting of an international organization's international legal personality and the continuation thereof depend on the will of its members.²² The extent and range of these rights and obligations emerge from the grants of authority expressly contained in the founding treaty or must be derived from it with the help of the "implied powers" doctrine.²³ Thus international legal personality is functionally limited to the powers of the organization. There can be no recognition of *de facto* international legal personality because a state's renunciation (in a permissible manner under international law) of the exercise of part of its sovereign rights, be it ever so small, can only happen with its agreement and not without - and certainly not against its will. A grant of international personality necessarily entails the transfer of legal personality for the area of domestic law.²⁴ Legal personality in accordance with domestic law makes it possible for international organizations to hold and dispose of property and to appear in court; thus it is a necessary condition for the operation of international organizations.²⁵

A founding treaty under international law which contains provisions that expressly establish international legal personality²⁶ or whose existence assumes

21 Cf. Seidl-Hohenveldern, cited above (Note 3), margin No. 808; Seidl-Hohenveldern/Loibl, cited above (Note 6), margin No. 0105; Wolfrum, cited above (Note 3), p. 127; Bindschedler, cited above (Note 3), p. 1299.

22 Seidl-Hohenveldern, cited above (Note 3), margin Nos. 808 and 811.

23 According to the "implied powers" doctrine there are, in addition to the expressly defined powers in the founding treaty, also such powers as are necessary for carrying out the contractually established responsibilities of the organization and are therefore inherent in these responsibilities as established under international law; cf. Ipsen, cited above (Note 3), § 6 margin No. 9. These derived powers are thus defined by the contractually established responsibilities and objectives of the organization: cf. (in lieu of many others): Wolfrum, cited above (Note 3), p. 128.

24 Cf. Seidl-Hohenveldern, cited above (Note 3), margin Nos. 808 and 610ff.

25 Cf. Wolfrum, cited above (Note 3), p. 128. Legal personality in national law finds its limits in the goals and responsibilities of the international organization; Bindschedler, cited above (Note 3), p. 130.

26 Thus, for example, Article 210 of the EC Treaty (Treaty establishing the European Community). The fact that the "legal personality" which the Community enjoys according to Article 210 ECT refers to international law arises from the comparability of this provision with that of Article 211 ECT regulating the Community's domestic legal personality.

international legal personality²⁷ does not exist in the CSCE framework. We must therefore assume that the CSCE participating States had no desire to make the CSCE a subject of international law. This circumstance became clear in the decisions at the Fourth Meeting of the CSCE Council, held at the end of 1993. After the Parliamentary Assembly of the CSCE, at its inaugural session on 5 July 1992, expressed the wish "to give it (the CSCE, M.W.) a legal base"²⁸ the representatives of the CSCE participating States, at the fourth CSCE follow-up meeting in the middle of the same month, instructed the CSO to "consider the relevance of an agreement granting an internationally recognized status to the CSCE Secretariat, the Conflict Prevention Centre (CPC) and the ODIHR"²⁹ (and not to the CSCE as such). On the basis of a report of a group of legal and other experts set up by the CSO, the Foreign Ministers of the CSCE participating States, at their Fourth Council Meeting at the beginning of December 1993, decided: "The CSCE participating States will, subject to their constitutional, legislative and related requirements, confer such legal capacity as is necessary for the exercise of their functions, and in particular the capacity to contract, to acquire and dispose of movable and immovable property, and to institute and participate in legal proceeding, on the following CSCE institutions: - The CSCE Secretariat, - The Office for Democratic Institutions and Human Rights (ODIHR), - Any other CSCE institution determined by the CSCE Council."³⁰

In view of the irritating wording of the summaries of the conclusions of the Council Meeting in Rome, according to which a "decision on CSCE legal capacity was taken",³¹ it is important to emphasize that the decision taken contains a commitment to give legal personality according to national and not international law and to give it to individual CSCE institutions and not to the CSCE as such. The objective of this legally non-binding commitment³² is to strengthen the CSCE's ability to function.

The various host countries had already granted private legal capacity to the CSCE institutions located in them but it is a matter of legal dispute whether this

27 For example, the power to conclude treaties under international law, which only a subject of international law has.

28 Budapest Declaration of the CSCE Parliamentary Assembly, Chap. I, No. 10, in: Bloed (Ed.), cited above (Note 8), pp. 1031-1044, here: p. 1034.

29 Helsinki Document, cited above (Note 11), Section I, No. 25.

30 Decision No. 2 of the 4th Council Meeting, Annex 1, No. 1, in: CSCE, Conference on Security and Co-operation in Europe, From Rome to Budapest, 1993-1994, CSCE Decisions, Reference Manual, Section I: Rome Council Meeting (30 November - 1 December 1993), pp 7-42, here: p. 37.

31 CSCE and the New Europe - Our Security is Indivisible, Journal No. 2 of the 4th Council Meeting, in: *ibid.*, pp. 14-18, p. 16.

32 On this see also the formulation in Decision No. 2 of the 4th Council Meeting, cited above (Note 30), No. 8, p. 37: "They (the Foreign Ministers, M.W.) *recommend* that participating States implement these provisions, subject to their constitutional and related requirements." (Emphasis by M.W.).

automatically provides a basis for the private legal personality of these institutions in the other CSCE participating States. Through the decisions of Rome, the CSCE participating States were now obligated to make appropriate decisions of their own, i.e. to pass implementation laws. Thus the point of the decisions of Rome was not to give the CSCE as an international organization legal capacity under international law but to grant individual CSCE institutions legal capacity in accordance with national law.

The fact that the grant of private legal capacity was not accomplished through a CSCE treaty binding under international law but only through the legally non-binding decisions of Rome shows how strong was the rejection among participating States of any transformation of the CSCE under international law. Even the option model developed in the "Convention on Conciliation and Arbitration within the CSCE", which leaves it up to the CSCE participating States whether to sign and ratify that international law treaty, proved unworkable owing to resistance from a number of participating States, especially the United States, because they feared that an international law treaty of that kind could be (mis)understood as a grant of international legal personality to the CSCE.³³ The CSCE participating States had always declared that the CSCE was a political process and should remain so for pragmatic reasons owing to its greater flexibility in comparison with a more legalistic form of co-operation. Thus the granting of international legal personality to it was rejected by all participating States.

The statement of CSCE participating States in 1992 in Helsinki that the CSCE was a "regional arrangement" in the sense of Chapter VIII of the UN Charter does not alter this situation in any way as this concept covers both affiliations between states that have legal personality under international law and those that do not.³⁴

In 1993 there was still unanimity on the future of the CSCE as a purely non-legal political arrangement but in advance of the Budapest CSCE Summit at the end of 1994 Russia proposed that the CSCE be transformed into an "organization for European security". The CSCE was to receive a Charter of its own in the form of a founding treaty under international law along with a central controlling authority, described as the "Executive Committee" and made up of ten

33 For the background of this refusal see Ingo Peters, Normen- und Institutionenbildung der KSZE im Widerstreit politischer Interessen: Die Durchsetzung des Gewaltverzichts als Prüfstein für die KSZE [Creating Norms and Building Institutions in the CSCE Amidst Conflicting Political Interests: the Passage of Renunciation of Force as a Touchstone for the CSCE], in: Bernard von Plate (Ed.), *Europa auf dem Weg zur kollektiven Sicherheit? [Europe on the Path to Collective Security?]*, Baden-Baden 1994, p. 174; Bernard von Plate, *Ost- und Mitteleuropa: Eine Herausforderung für KSZE und NATO [Eastern and Central Europe: A Challenge for the CSCE and NATO]*, in: *Ibid.*, p. 80.

34 Cf. Waldemar Hummer/Michael Schweitzer, in: Bruno Simma (Ed.), *Charta der Vereinten Nationen. Kommentar [The United Nations Charter. A Commentary]*, Munich 1991, Art. 52, margin No. 58.

participating States as permanent members, which would make legally binding decisions.³⁵

This proposal of Russia's for the transformation of the CSCE into an international organization with the character of a subject of international law was rejected by the other participating States because they were not seeking any legal status for the CSCE. In this, the United States concern that legal status for the CSCE would weaken NATO played a particular role; the Russian proposal, after all, foresaw the transfer to the CSCE of the main responsibility for maintaining peace in Europe, in which function it was to have controlling authority over NATO; that in turn would mean not only a Russian voice in the Alliance but also a veto right there. A further reason for rejecting the Russian proposal lay in the fact that the establishment of a central controlling authority would have contradicted the principle of the sovereign equality of the participating States in the sense that those not represented in this organ would have to follow its orders even though they did not participate in the underlying decisions. When the participating States, in the course of negotiations on the substance of the Budapest Document, met Russian wishes to the extent of stating in the Document that the CSCE would be renamed effective 1 January 1995 to make it an organization (OSCE), Moscow agreed to a declaration that this renaming would not change the status of the CSCE, thus giving up its original demand for a legally binding status for the CSCE.³⁶

As there was no determination on the part of all participating States to grant international legal personality to the CSCE, the Conference did not have it. On the other hand, it has, since the Charter of Paris in 1990, had the *de facto* status of an international organization by institutionalization - whose organs, however, could only make decisions of a politically binding character.

Conclusions Regarding the Legal Nature of the OSCE

Even before its renaming as OSCE, the CSCE was an international organization, although without international legal personality. The renaming on 1 January

35 On this see Horst Bacia. Die großen Pläne Rußlands für die internationale Aufwertung der KSZE [Russia's Big Plans for the International Upgrading of the CSCE], in: Frankfurter Allgemeine Zeitung of 5 December 1994, p. 2; Andrej Zagorski, Rußland und die OSZE - Erwartungen und Enttäuschungen [Russia and the OSCE - Expectations and Disappointments], in: Institut für Friedensforschung und Sicherheitspolitik an der Universität Hamburg [Institute for Peace Research and Security Policy at the University of Hamburg]/IFSH (Ed.), OSZE-Jahrbuch [OSCE Yearbook] 1995, Baden-Baden 1995, pp. 110-112. On the relationship of participating States to the OSCE generally, see: Kurt Tudyka. The Attitude of Participating States Toward the OSCE, in: OSCE Yearbook 1995/1996, cited above (Note 18), pp. 79-86.

36 See also Heinrich Schneider, Das Budapester Überprüfungstreffen und der Budapester Gipfel [The Budapest Review Meeting and the Budapest Summit], in: OSZE-Jahrbuch [OSCE Yearbook] 1995, cited above (Note 35), pp. 416-418; and Ortwin Hennig, Die KSZE/OSZE aus deutscher Sicht - Kein Wechsel der Unterstützung [The CSCE/OSCE as Seen by Germany - No Change in Support], in: *Ibid.*, p. 123.

1995 did nothing to change this situation. Owing to its exclusively political character (not binding under international law) the Budapest Document, in which the renaming was done, does not represent agreement under international law on the part of the participating States to found an international organization with international legal personality. The participating States' rejection of international legal personality for the CSCE is expressly extended to the OSCE by the statement that the change in name does nothing to alter the status of the CSCE.³⁷ Thus OSCE institutions have no more authority than did those of the CSCE to make legally binding decisions directed against one of the OSCE participating States, say, in connection with the settlement of a dispute. The renaming of the CSCE as OSCE on 1 January 1995 provides consistent declaratory confirmation of the organizational nature of the CSCE that had existed since 1990.

The OSCE as a "Regional Arrangement" in the Sense of Chapter VIII of the UN Charter

At their fourth CSCE Follow-up Meeting in Helsinki, the Heads of State or Government of the CSCE participating States decided that they, "reaffirming their commitments to the Charter of the United Nations as subscribed to by them, declare their understanding that the CSCE is a regional arrangement in the sense of Chapter VIII of the Charter of the United Nations and as such provides an important link between European and global security".³⁸ They continued with the statement that the "rights and responsibilities of the United Nations Security Council remain unaffected in their entirety".³⁹

The Conditions for a Regional Arrangement with a Particular View to the Founding Treaty and Their Existence in the Case of the OSCE

To represent a "regional arrangement" in the sense of Chapter VIII of the UN Charter⁴⁰ the OSCE must be a permanently established voluntary association between two states located near each other which has procedures of its own for dispute settlement and organs that the member states can call on in the event of a dispute; and it must deal, in a manner consistent with the Purposes and

37 Cf. Budapest Document, cited above (Note 2), Section I, No. 29.

38 Helsinki Document, cited above (Note 11), Section IV, No. 2.

39 Ibid.

40 On the reasons for the absence in the UN Charter of a clear definition of "regional arrangements or agencies" and on the need for such a definition see Hummer/Schweitzer, cited above (Note 34), Art. 52, margin Nos. 20ff.

Principles of the United Nations, with matters involving the maintenance of world peace and international security.⁴¹

The OSCE meets all of these conditions. All countries on the European continent - as well as the Central Asian republics of the former Soviet Union, Canada and the United States - belong to it. The responsibilities of the OSCE, which has been established as a permanent institution, include early warning, conflict prevention and crisis management in its region.⁴² For this purpose it has at its disposal a unique catalogue of procedures for dispute settlement ranging from requests for information, fact-finding and long-term missions, to conciliation and arbitration procedures before the OSCE Court of Conciliation and Arbitration.⁴³ In addition, the OSCE has its own institutions to which participating States can turn in the framework of its mechanisms for dispute settlement. The OSCE expressly acknowledges the overriding responsibility of the Security Council⁴⁴ and meets the requirement for providing information in Article 54 of the UN Charter.⁴⁵

Another characteristic required of a regional organization in the sense of Chapter VIII of the UN Charter is the existence of a founding treaty under international law.⁴⁶ Insofar as the regional organization is based (only) on a founding treaty, it represents a regional arrangement; if, in addition, rights of its own are granted to the organization in the founding treaty, if as an international organization that is a subject of international law it can thus act through its organs in a legally binding way, then it is a regional agency.⁴⁷ The latter does not hold true of the OSCE as it does not possess international legal personality. But in 1992, when the CSCE declared itself to be a regional arrangement, there was no founding treaty under international law either. This situation has not changed since it was renamed OSCE.

But it would appear that the United Nations gives a broad interpretation to the term "regional arrangement" when it comes to the CSCE. Even before the CSCE's declaration of 10 June 1992 in Helsinki that it was a regional arrangement, the UN Security Council, referring to Chapter VIII of the UN Charter,

41 On the various conditions, see: *Ibid.* margin Nos. 30ff.; Rüdiger Pernice, *Sicherung des Weltfriedens [Securing World Peace]*, Kiel 1992, pp. 21ff.

42 Cf. only: Budapest Document, cited above (Note 2), here Budapest Summit Declaration, No. 8, p. 146.

43 A description and evaluation of the various procedures can be found in Wenig, cited above (Note 1), pp. 98-168; on conciliation and arbitration procedures see also Dieter S. Lutz, *The OSCE Court of Conciliation and Arbitration*, in: *OSCE Yearbook 1995/1996*, cited above (Note 18), pp. 151-161; and, in the present volume, the article by Lucius Caflisch/Laurence Cuny.

44 Cf. Helsinki Document, cited above (Note 11), Section IV, No. 2: "The rights and responsibilities of the United Nations Security Council remain unaffected in their entirety."

45 *Ibid.*, Section III, No. 20: "The Chairman-in-Office will keep the United Nations Security Council fully informed of CSCE peacekeeping activities."

46 Cf. only Hummer/Schweitzer, cited above (Note 34), margin No. 39; Pernice, cited above (Note 41), p. 20ff.

47 Cf. Hummer/Schweitzer, cited above (Note 34), margin No. 39.

had several times acknowledged the efforts of the European Community and its member states, with the support of the participating States of the Conference on Security and Co-operation in Europe, to help settle the conflict in former Yugoslavia.⁴⁸ One could point to the fact that these resolutions - in contrast to their express mention of the EC - did not refer to the CSCE as an organization but only to its "participating States". However, the statements of the Security Council President of 24 April and 12 May 1992 made direct reference to the CSCE. In them, the UN Security Council welcomed, with regard to the situation in Bosnia-Herzegovina, "the support given by the CSCE to the efforts of the European Community and the United Nations"⁴⁹ and the "members of the Security Council commend and support the efforts undertaken within the framework of the Conference on Security and Cooperation in Europe (CSCE)"⁵⁰ with regard to the conflict over Nagorno-Karabakh.

Just two weeks after the CSCE had declared itself to be a regional arrangement the Security Council asked "the European regional arrangements and agencies concerned, *particularly* the European Community, to enhance their cooperation with the Secretary-General in their efforts to help to resolve the conflicts that continue to rage in the former Yugoslavia"⁵¹, thus referring, although not expressly, to the CSCE as a regional arrangement.

On 28 October 1992 the UN General Assembly, in its Resolution 47/10 welcomed "the declaration by the heads of State or Government of the States participating in the Conference on Security and Cooperation in Europe of their understanding that the Conference is a regional arrangement in the sense of Chapter VIII of the Charter of the United Nations, and as such provides an important link between European and global security" and decided to concern itself with "(c)operation between the United Nations and the Conference on Security and Cooperation in Europe".⁵²

The Secretary-General of the United Nations, in his "Agenda for Peace", had already pointed out on 17 June 1992, that "(t)he Charter deliberately provides no precise definition of regional arrangements and agencies, thus allowing useful flexibility for undertakings by a group of States to deal with a matter appropriate for regional action which also could contribute to the maintenance of

48 Cf. Security Council Resolution 713 (1991), reprinted in: Yearbook of the United Nations 1991, Vol. 45, Dordrecht/Boston/London 1992, p. 215; 743 (1992), reprinted in: Yearbook of the United Nations 1992, Vol. 46, Dordrecht/Boston/London 1993, p. 333; 762 (1992), reprinted in: *ibid.*, p. 339; 764 (1992), reprinted in: *ibid.*, p. 362.

49 Statement of the President of the Security Council of 24 April 1992 (S/23842), in: Yearbook of the United Nations 1992, Vol. 46, Dordrecht/Boston/London 1993, pp. 347-348, p.348.

50 Statement of the President of the Security Council of 12 May 1992 (S/23904) in: *ibid.*, p. 389.

51 Statement of the President of the Security Council of 24 July 1992 (S/24346), in: *ibid.*, p. 364 (author's emphasis).

52 The text of the resolution is printed in: *ibid.*, p. 146.

international peace and security".⁵³ Associations of this kind, according to Boutros-Ghali, could include "treaty-based organizations" but could also simply be "groups" of states⁵⁴ - thus allowing consideration to be given to associations of states based on non-legal agreements. As a part of his acknowledgement of the steps undertaken by regional arrangements and agencies to secure the peace, the Secretary-General then emphasized the "central importance" of efforts "undertaken by the European Community and its member States, with the support of States participating in the Conference on Security and Cooperation in Europe (...) in dealing with the crisis in the Balkans and neighbouring areas".⁵⁵

At the end of January 1993 the UN Security Council, in the course of its review of the "Agenda for Peace" and with regard to the Secretary-General's statements on regional organizations, pointed out "the importance of the understanding reached at the Conference on Security and Cooperation in Europe to consider CSCE a regional arrangement in the sense of Chapter VIII of the United Nations Charter".⁵⁶

Thus the CSCE, now the OSCE, is regarded as a regional arrangement not only by its participating States but also by the United Nations, i.e. the Security Council, the General Assembly and the Secretary-General. No differing views from any UN member states have been noted.

This means that with regard to the CSCE/OSCE the politically relevant bodies of the UN have interpreted the concept of "regional arrangement" in such a way as to disregard the earlier requirement of a founding treaty under international law.

The background to this is doubtless the UN's concern - in the face of increasing burdens on the World Organization, especially the Security Council, since the end of the Cold War - to make more use of regional organizations for conflict prevention and the peaceful settlement of conflicts in their respective regions, thus putting local knowledge and the political influence of regional actors more directly in the service of securing peace and providing the United Nations with some relief in its task of maintaining international peace and security.⁵⁷ The

53 An Agenda for Peace. Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, 17 June 1992, in: Boutros Boutros-Ghali, *An Agenda for Peace* 1995, New York 1995, pp. 39-72, here No. 61, p. 63.

54 Cf. *ibid.*

55 *Ibid.*, No. 62, pp. 63-64, p.64.

56 Statement of the President of the Security Council of 28 January 1993 (S/23842), in: *Yearbook of the United Nations* 1993, Vol. 47, Dordrecht/Boston/London 1994, pp. 72-73, p.73.

57 Cf. in this connection Nos. 64 and 65 of the "Agenda for Peace", cited above (Note 53), pp. 64-65 which were noted "with appreciation" by the Security Council. Statement of the President of the Security Council of 28 January 1993 (S/23842), cited above (Note 56), p.72. See also Peter Schlotter, *Universalismus, Kapitel VIII: Die KSZE und die Vereinten Nationen* [Universalism, Regionalism, Chapter VIII: The CSCE and the United Nations], in: *Vereinte Nationen* 4/1993, pp. 137ff.; Herbert Honsowitz, "OSZE zuerst". Die Neugestaltung des Verhältnisses zwischen UN und OSZE ["OSCE First". The Reorganization of the Relationship Between the UN and the OSCE], in: *Vereinte Nationen* 2/1995, pp. 49ff.

CSCE in particular seemed a logical candidate not only because of its geographic expanse (which includes the conflict regions of the former Soviet Union and Yugoslavia) and its respected tradition as a forum for consultation⁵⁸ but also owing to its varied procedures for conflict settlement which to some extent have already been put into practice in regions of conflict and which, in the case of the conciliation and arbitration procedures of the OSCE Court, even rest on a basis of international law. Recognizing the CSCE as a regional arrangement made it possible to expand the earlier parallel existence of the CSCE and the United Nations gradually into a closely interwoven relationship between regional and universal organization⁵⁹ that contributes to more effective prevention and solution of conflicts.

Doing without a founding treaty based on international law as a basis for a group of countries to be considered as a "regional arrangement" in the sense of Chapter VIII of the UN Charter thus turns out in the case of the CSCE to be a utilitarian and teleological interpretation of the UN Charter by its main organs - Security Council, General Assembly and Secretary-General. As a result, the OSCE, even without a founding treaty, is a "regional arrangement" in the sense of Chapter VIII of the UN Charter and may fulfil such responsibilities as it has by virtue of this Chapter; it may also, when necessary, be called upon by the Security Council to take enforcement action under the Security Council's authority.⁶⁰

The Outlook for International Law Status for the OSCE in View of the Discussion of a European Security Charter

Security Model and European Security Charter

At their Summit Meeting in early December 1996 the Heads of State or Government of the OSCE participating States adopted the "Lisbon Declaration on a Common and Comprehensive Security Model for Europe for the Twenty-first

58 On this, see the comments of Honsowitz, cited above (Note 57), p. 52.

59 On institutional co-operation between CSCE and UN see Honsowitz, cited above (Note 57), pp. 51ff. and Emmanuel Decaux, La CSCE au lendemain du Conseil de Rome: un bilan de la transition institutionnelle, in: *European Journal of International Law* 5/1994, p. 270; Ralf Roloff, Die OSZE und das Verhältnis zu den Vereinten Nationen - Im Wandel von Kooperation, Konkurrenz und Subsidiarität [The OSCE and its Relationship to the United Nations - Between Co-operation, Competition and Subsidiarity], in: *OSZE-Jahrbuch 1995*, cited above (Note 35), pp. 375-383; and Ingo Peters, The Relations of the OSCE to Other International Organizations, in: *OSCE Yearbook 1995/1996*, cited above (Note 18), pp. 385-399.

60 Article 53, Para. 1 of the UN Charter.

Century"⁶¹ In that Declaration they decided to use the work on the Security Model as the basis on which they "will consider developing a Charter on European Security".⁶² In connection with the discussion of this Charter, consideration is presently⁶³ being given to the question of whether the OSCE should be put on a basis of international law, i.e. whether the OSCE Charter in question should constitute an international law document and which particular areas of the OSCE should be given legal status. In what follows we will discuss the various possibilities for legal status, including their advantages and disadvantages.

A Treaty Under International Law which Summarizes the Responsibilities of the OSCE Institutions

In contrast to other organizations the OSCE has never had a document summarizing the responsibilities of its institutions. The reason for this is the progressive institutionalization of the CSCE that has been going on since the Charter of Paris. The institutions have been in some cases substantially modified in the intervening time by decisions taken on successive Summit Meetings, meetings of the Council or Ministerial Council, and meetings of the CSO or the Senior Council. And these meetings also created additional institutions whose competencies were expanded by later meetings. Even when the CSCE was renamed OSCE it was decided to forego a summary of responsibilities.

Thus the authority of the various OSCE institutions to act is not dealt with in a single document but must be sought by reviewing the institutional rules and regulations scattered in a large number of CSCE/OSCE documents. For this reason - and particularly in view of the OSCE's growing responsibilities in international matters - an up-to-date summary of these rules and regulations in a single OSCE document would not only be useful but is indeed urgently needed in order to ensure the clear understanding of OSCE decision-making processes and possibilities of action that is required for effective co-operation with other international organizations.⁶⁴

However, an international law treaty is not required for such a summary because the granting to the OSCE of rights under international law to be exercised by its organs - which would call for such a treaty - is not at issue here; what is rather meant is a comprehensive list of the only politically binding responsibilities of the various OSCE institutions. Therefore, a politically binding Charter such as the Charter of Paris would be adequate and indeed preferable to an international

61 OSCE Lisbon Document 1996. Lisbon Declaration on a Common and Comprehensive Security Model for Europe for the Twenty-first Century, reprinted in this volume, pp. 426-430, see also the articles by Heinrich Schneider and Shannon Kile/Adam Daniel Rotfeld in the present volume.

62 Lisbon Declaration, cited above (Note 61) No. 11, last paragraph, p. 429.

63 May 1997.

64 A list of the responsibilities of OSCE institutions can be found in Wenig, cited above (Note 1), pp. 34-58.

law treaty owing to its more flexible character in regard to entry into force and significant future changes of responsibilities (no time-consuming national ratification processes).

An International Law Treaty which makes the OSCE a Subject of International Law

Such a treaty would mean that the OSCE would become an international organization with international legal personality. Its organs would be able to exercise in a legally binding way the rights that had been granted to the Organization by the participating States. Thus they could conclude treaties with participating States, third countries or international organizations. The present custom of drawing up a Memorandum of Understanding with the country hosting an OSCE mission or of negotiating politically binding agreements with other international organizations could be replaced by conclusion of legally binding treaties. This would be advantageous for the Organization in cases where damage claims of members of OSCE missions or the granting of their immunities and privileges are at issue.⁶⁵

It should not be forgotten, on the other hand, that an international law treaty of that kind would entail a lengthy ratification process in the participating States. Moreover, a number of participating States are vehemently opposed to international legal personality in any form for the OSCE because, as they see it, this would amount ultimately to making the OSCE the leading security organization in Europe at NATO's expense.

Another question is what areas of the OSCE might be granted international legal personality. A limited grant, e.g. one limited to aspects related to peacekeeping operations, could easily turn out to be unworkable in practice. Furthermore, international law competencies initially limited to a specific area could be expanded on the basis of the "implied powers" doctrine⁶⁶ to include other areas in which the OSCE could be held responsible under international law for its actions.

An International Law Treaty that Provides a Legally Binding Interpretation of the Principles of the Helsinki Final Act

A comprehensive and legally binding interpretation of the Helsinki principles in an international law treaty, which would create specific international law pertaining between the participating States, is desirable from a legal standpoint in

65 The current obligation to grant privileges and immunities for mission members (cf. Decision No. 2 of the 4th Council Meeting, cited above (Note 30), No. 8 and Annex 1, No. 11 and 15) is only political in nature and therefore not actionable.

66 On the content of this doctrine see Note 23.

view of changing interpretations and the controversial relationship of some principles to each other.

An example is that the Socialist states of Eastern Europe, until the end of the eighties, used their socialist doctrine of international law to condemn calls for the observance of human rights as impermissible intervention in their internal affairs under the terms of the non-intervention principle (Helsinki principle no. VI), whereas the Moscow Document of 1991, on which they collaborated, states that "issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern (...)".⁶⁷ Then, in the very next sentence, the CSCE participating States (thus including the former Socialist countries) state "categorically and irrevocably that the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned".⁶⁸ If a treaty of the kind described above were concluded, this reinterpretation of the non-intervention principle could be transformed into specifically applicable international law.

On the other hand, a binding interpretation of all Helsinki principles appears for political reasons to be hard to achieve as some participating States reject a debate over well established principles and others have varying interpretations of the relationship between individual principles. This is especially true of the politically very explosive issue of reconciling the principle of the territorial integrity of States (Helsinki principle no. IV) and the right of self-determination of peoples (Helsinki principle no. VIII).⁶⁹

An International Law Treaty through Which Existing CSCE/OSCE Documents are Made Binding under International Law

With just two exceptions the entire OSCE network of norms rests at the present time on non-legal political agreements. The participating States deliberately chose norms of this kind so that they could at least agree in non-legal form on matters for which they were not (yet) prepared to create norms based on treaty.⁷⁰ This was and still is particularly true with regard to the areas of human rights and minority issues. In this sense, the non-legal agreements are a kind of

67 Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE: Moscow, 3 October 1991, in: Bloed (ed.), cited above (Note 8), pp. 605-629, here p. 606.

68 Ibid.

69 On this and related questions, see Wenig, cited above (Note 1), pp. 323-339.

70 Cf. Wilhelm Höynck, KSZE und Sicherheitskooperation [CSCE and Security Co-operation], in: Lennart Souchon, Völkerrecht und Sicherheit [International Law and Security], Berlin 1994, p. 90; Thomas Buergenthal, The CSCE Rights System, in: The George Washington Journal of International Law and Economics 1/1991, pp. 384ff.; Fastenrath, cited above (Note 18), pp.420-427.

substitute.⁷¹ A number of participating States have agreed in bilateral treaties on the legally binding character of certain OSCE norms between themselves but a number of participating States continue to have reservations about turning the political commitments that have been agreed on into international law. Thus a treaty giving the binding character of international law to OSCE documents that have so far been worked out is not to be expected.

An International Law Treaty through Which Future OSCE Documents Would Have to be Drawn up as Treaties under International Law

The non-legal character of OSCE documents means that their provisions cannot be obtained by legal action but on the other hand it enables the States to establish norms on matters that they are not yet ready to settle by treaty. Another reason for choosing non-legal agreements is the cumbersomeness of creating law on the international level owing to the involvement of internal bodies of the states.⁷² Matters that need to be settled can be handled more quickly this way, although the result is only politically binding. In addition, it makes it possible to test individual norms as to their suitability in practice before they are "cast in the form of a treaty".⁷³ All of these advantages, which in fact constitute the uniqueness and success of the OSCE, would be lost in an agreement of the kind described above. Thus it is also not to be expected that the participating States will agree to an obligation under international law to regulate future matters only in legally binding treaty form.

Summation

We shall have to wait and see what emerges from the discussion on a European Security Charter. A grant of international legal personality to the OSCE is not to be expected, however, owing to political considerations in a number of participating States - notwithstanding the advantages it would have for co-operation with other subjects of international law.

71 Wolfgang Heusel, "Weiches" Völkerrecht ["Soft" International Law], Baden-Baden 1991, pp. 309ff.

72 On the question of whether using non-legal forms of agreement to evade national approval procedures is constitutionally permissible, see Heusel, cited above (Note 70), p. 311.

73 Alfred Verdross/Bruno Simma, *Universelles Völkerrecht* [Universal International Law], Berlin 1984, § 655 (translation).