

# THE DEVELOPING LEGAL STATUS OF THE ORGANISATION FOR SECURITY AND CO-OPERATION IN EUROPE

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## 1. INTRODUCTION

An issue not yet clearly defined in international law is the legal status of the Organisation for Security and Co-operation in Europe (OSCE)<sup>1</sup>. When dealing with that specific matter, positions of international scholars show a wide range of views. Peter Kooijmans provides a quite singular description of the organisation, expressing its statement in the following terms:

“To the community of international lawyers the OSCE is a little like a marshmallow: it may look enticing, but it is difficult to give it a good bite. For what can a lawyer do with an organisation which is not treaty-based and therefore has no international personality [...]?”<sup>2</sup>.

A quite more positive stand is taken by Schermers and Blokker, even if they use the example of the OSCE as a dubious case when they come to the

1. In the present article the acronym OSCE will be generally used. The Conference for Security and Cooperation in Europe (CSCE) changed its name in 1994. When documents or facts refer to the latter institution the appropriate acronym will be used.

2. KOOLMANS, P.: “The Code and International Law”, in DE NOOY, G. (ed.), *Cooperative Security, the OSCE, and its Code of Conduct*, The Hague/London/Boston, Kluwer Law International, 1996, p. 33.

definition of international organisations. The two authors, nevertheless, consider that the gradual “institutionalisation” of the CSCE since 1990, makes it an “organisation”, as sanctioned by the change of the official name (from Conference to Organisation) in 1994<sup>3</sup>.

More enthusiastic and convinced seems the conclusion of Sands and Klein when they affirm that the “OSCE now qualifies as a full-fledged international organisation”<sup>4</sup>, even if they do not provide any clear legal foundation supporting this assertion.

Far more confusing and filled with inconsistencies, at least from the legal perspective, is the definition to be found in the OSCE *Handbook*<sup>5</sup>, published by the organisation itself, to provide information on its history, structure, functioning, etc. In the first section titled “What is the OSCE?” the following statement is given, which is worthy of citing in its complete form:

“The OSCE has a unique status. On the one hand, it has no legal status under international law and all its decisions are politically but not legally binding. Nevertheless, it possesses most of the normal attributes of an international organization: standing decision-making bodies, permanent headquarters and institutions, permanent staff, regular financial resources and field offices. Most of its instruments, decisions and commitments are framed in legal language and their interpretation requires an understanding of the principles of international law and of the standard techniques of the law of treaties. Furthermore, the fact that OSCE commitments are not legally binding does not detract from their efficacy. Having been signed at the highest political level, they have an authority that is arguably as strong as any legal statute under international law”.

This complex expression of legal-political language is remarkable. First it says that the organisation has “no legal status under international law”, but despite this, it has “most of the normal attribution of an international organisation”. Secondly, it is affirmed that OSCE commitments are “not legally binding”, but after saying that they are “framed in legal language”, interpreted on

3. SCHERMERS, H. G. and BLOKKER, N. M.: *International Institutional Law*, 4th rev. ed., Boston, Leiden, Martinus Nijhoff, 2003, p. 23.

4. SANDS, P. and KLEIN, P.: *Bowett's Law of International Institutions*, 5th ed., London, Sweet & Maxwell, 2001, p. 201.

5. OSCE, *Handbook*, 3rd ed. (updated text, maps and statistics), Vienna, July 2002, available at <http://www.osce.org/publications/handbook/> (consulted 2 February 2005). See also SEIDL-HOHENVELDERN, I.: “The Attitude of States Towards the Proliferation of International Organisations”, in SCHERMERS, H. G. and BLOKKER, N. M., *Proliferation of International Organizations*, The Hague, Kluwer Law International, 2001, pp. 51-53.

the basis of “principles of international law” and of the “law of treaties”, it is concluded that they have “an authority that is arguably as strong as any legal statute under international law”. Therefore, the OSCE is not based on legal rules, it has no status under international law, it does not produce legal documents, but the commitments it produces should be regarded as strong as law!

The vague justification for this confusing statement is provided at the beginning of the mentioned paragraph and it should be based on the fact that the OSCE has a “unique status”. Actually, the definition provided by the OSCE itself seems quite confusing and shows the difficult position that it has in international law and the unclear legal consequences of its acts. Therefore is not surprising that international lawyers provide confusing and ambiguous definitions, and disagree on the legal status of the OSCE, as reported before. Even addressing the definition provided by the organisation itself, the legal question is not answered properly.

The problems related to the legal personality and the international status of the OSCE is not a merely academic dispute<sup>6</sup>. In fact, after the end of the Cold War, the OSCE has been foreseen as a possible key structure and institution designed to play an active role in the construction and management of a pan-European security system<sup>7</sup>. But it goes without saying that the organisation needs the appropriate legal standing and adequate tools to deal with complex security issues. Compared to other European organisations, such as the European Union (EU), the North Atlantic Treaty Organisation (NATO), and the Council of Europe (CoE), the OSCE presents legal problems that have not yet been solved, and may render the organisation not fully equipped to properly act in international relations. It should be able to develop forms of co-operation with other European organisations and with the United Nations (UN) in the broad area of international security, in particular under Chapter VIII of the UN Charter<sup>8</sup>. This is an issues recently addressed by the

6. See BERGER, C.: “OSCE and International Law” (1996) 24 *Int'l J. Legal Info.*, pp. 36-47.

7. WOUTERS, J. and NAERT, F.: “How Effective is the European Security Architecture? Lessons from Bosnia and Kosovo” (2001) 50(3) *I.C.L.Q.*, pp. 540-576; ANSTIS, Ch.: *Situation and Future of the European Security Architecture*, Commentary No. 51, Canadian Security Intelligence Service, February 1995, available at [http://www.csis-scrs.gc.ca/eng/comment/com51\\_e.html](http://www.csis-scrs.gc.ca/eng/comment/com51_e.html); VAN DIJK, P.: “The Final Act of Helsinki – Basis for a Pan-European System?” (1980) 11 *Netherlands Yearbook of International Law*, pp. 97-124. For an updated analysis of those issues see TRYBUS, M. and WHITE, N. D. (eds.), *European Security Law*, Oxford, Oxford University Press (forthcoming) 2007.

8. GOODBY, J. E.: “Collective Security in Europe After the Cold War” (1993) 46(2) *Journal of International Affairs*, p. 306; UN, GA: “A More Secure World: Our Shared Responsibility”, UN Doc. A/59/565, 2 December 2004, pp. 70-71 and 89-90

Panel of Eminent Persons for the reform of the OSCE<sup>9</sup>, which was established to provide suggestions to reinforce the legal position of the OSCE within the international system<sup>10</sup>.

But if the OSCE has a “unique status”, does this mean that it is not governed by international law? What does it make it “unique”?

The risk is that the OSCE, not being a proper international organisation with legal personality, would be in a sort of limbo, outside the realm of international law. It could be included in the category of “soft organisations” described by Klabbers<sup>11</sup>. The existence of these types of organisations would be justified by providing more flexibility to adapt to changing circumstances of international affairs. The same expression has been used in particular with reference to the European Communities first, and Union later, to justify a distinct entity not included in the traditional categories of international organisations. But international institutions, as subjects of international law, have both legal right and duties under international law. As far as they act in the international system, they cannot escape the legal regulations that apply to the subjects of that system. One of the main issues to be resolved is if and when international institutions are subjects of international law. This question implies some analysis of the definition of legal personality. Only when legal entities have legal personality they are subjects of a legal system. The issue of legal personality is also relevant as “Having international legal personality for an international organization means possessing rights, duties, powers and liabilities etc. as distinct from its members or its creators on the international plane and in international law”<sup>12</sup>.

As mentioned before, definitions provided by the OSCE do not help, while the legal doctrine seems inconsistent on this matter and leaves the legal issue unresolved. The recourse to a *sui generis* status, as suggested by the OSCE, does not help very much, and it leaves the organisation still in an unclear position under international law. International law is not immune from

9. OSCE, *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; see, ODELLO, M.: “Thirty Years After Helsinki: Proposals for OSCE’s Reform” (2005) 10(3) *Journal of Conflict and Security Law*, pp. 435-449.

10. For a recent decision see: OSCE, Ministerial Council, Decision No. 17/05, Strengthening the Effectiveness of the OSCE, MC.DEC/17/05, 6 December 2005.

11. KLABBERS, J.: “Institutional Ambivalence by Design: Soft Organizations in International Law” (2001) 70 *Nordic Journal of International Law*, pp. 403-421.

12. AMERASINGHE, C. F., *Principles of the Institutional Law of International Organizations*, Cambridge, Cambridge University Press, 1996, p. 78.

examples of entities which have a not clearly defined legal status<sup>13</sup>. There might be the possibility that an international organisation, as a state, may find itself in the condition of being *in statu nascendi*<sup>14</sup>. This concept, applied to statehood, could be applied also to international entities. It means that the entity presents all the main features of an organisation, and goes through a transitional status, before its recognition as an international subject. What the entity needs are some elements that provide the organisation with the international personality. It is therefore a relevant question to address some legal issues concerning the legal status of the OSCE in international law. We shall provide some possible solutions that will set the discussion on more solid legal basis, instead of leaving it in a “vacuum” of uncertainty.

In the present paper the analysis will be based on two sets of theoretical issues that need further attention from the legal point of view. First of all we shall address the distinction and relationship between existence, legal personality and legal capacity related to international organisations. Then we shall discuss the issue concerning the legal foundations of the OSCE. Due to the fact that the OSCE is not based on an international treaty, several problems arise from this fact that has further consequences for the legal personality of the organisation. In the second part of this article, we shall address how those issues can be applied to the OSCE. The criteria of existence and personality will be applied to the OSCE on the basis of its structure and activities. The first part will be more theoretical while the second part will concentrate on the structures and practice of the OSCE.

This analysis will be relevant not only for the definition of the legal status of the OSCE. It may be applied to any other international institution and organisation with an “anomalous” or uncertain legal status. In this context, it may provide useful tools for the study of the law of international organisations and the issue of international legal personality.

## 2. EXISTENCE, LEGAL PERSONALITY AND LEGAL CAPACITY OF INTERNATIONAL ORGANISATIONS

When addressing the study of international institutions, three different issues should be addressed: existence as an international organisation, legal

13. See generally BROWNIE, I., *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, chapter 3.

14. BROWNIE, *Principles of Public International Law*, *op. cit.*, pp. 77-78.

personality and legal capacity. These issues are strictly related among them, but they refer to different elements from the legal point of view. Most general works on international organisations do not seem to address those three issues in a separate way. They are usually analysed within the general discussion of legal personality, when elements for the existence of international organisations are mixed with issues of legal personality and powers.

Definitions of characteristics of international organisations are not uniform<sup>15</sup>. Authors provide different criteria and definitions for the identification of international organisations. One of the most complete definitions to determine the existence of a public international organisation is given by Amerasinghe who provides five criteria: “(i) establishment by some kind of international agreement among States; (ii) possession of what may be called a constitution; (iii) possession of organs separate from its members; (iv) establishment under international law; and (v) generally, but not always an exclusive membership of States or governments”<sup>16</sup>. The basic criteria singled out by Archer are: membership (two or more States), common aims defined by members, and “a formal structure of a continuous nature established by an agreement such as a treaty or constituent document”<sup>17</sup>. Schermers and Blokker also identify three criteria: an international agreement, a new legal person having at least an organ with a will of its own, and the requirement that the organisation must be established under international law<sup>18</sup>.

From the given examples it is evident that the existence of an international agreement that gives origin to an international organisation is then linked to the independent legal person, which implies some “separation” from its membership. But the criteria and conditions are not kept separated to establish different legal consequences. We shall address them in the following part, as their definition shall be useful for the later application to the study of the OSCE.

As international law is assumed to impose obligations and provide rights to its subjects, international organisations are also included in this system as subjects. But when we address the study of international organisations, we lack uniform criteria concerning their legal personality. In national legal systems specific rules define the conditions for the coming into existence and the

15. See ARCHER, C., *International Organizations*, 3rd ed., London and New York, Routledge, 2001, pp. 30-33.

16. AMERASINGHE, *Principles...*, *op. cit.*, p. 9.

17. ARCHER, *International Organizations*, p. 33.

18. SCHERMERS and BLOKKER, *International Institutional Law*, *op. cit.*, pp. 26-39.

attribution of legal personality of their subjects, but in international law we lack that level of specificity<sup>19</sup>. The absence of criteria is not limited to international organisations only. It is also the cause of difficult legal definitions of both old and new subject in international law, including States, national liberation movements, insurgents, peoples, etc.<sup>20</sup>. States are usually defined under the objective criteria of territory, independent government and population. But not very clear rules exist to identify the coming into existence of a state, in particular the controversial issue of state recognition<sup>21</sup>.

This is also the reason why different criteria and theories concerning the legal personality of international organisations are provided. Klabbers correctly affirms that “it is not up to the drafters to decide on legal personality: that is rather something to be decided by the legal system concerned”<sup>22</sup>. Even if we agree with this affirmation, still the solution is not easy to find because the international legal system does not provide the criteria to be applied. Therefore, we shall address the theoretical issues of existence, legal personality and legal capacity as the core elements that can help in our identification of legal personality of international organisations.

## 2.1. *Existence*

Existence of international subjects, including international organisations, can be considered as a matter of fact. The parallel debated question of state’s recognition and state’s creation provides a clear example of the unresolved issue of legal subjects in international law<sup>23</sup>. Theories of objective and subjective recognition of states have been the basis of long discussions. Nevertheless, it seems that for state’s existence the criterion of effective control over a territory is the most applied, based on the role of effectiveness in international law<sup>24</sup>. Recognition can have effects on the international relations between the new state and other members of the international community. But

19. CASSESE, A., *International Law*, Oxford, Oxford University Press, 2001, p. 47.

20. See *ibidem*, pp. 46-47.

21. *Ibidem*, pp. 48-52.

22. See KLABBERS: “Institutional Ambivalence by Design...”, *loc. cit.*, p. 415.

23. See CRAWFORD, J.: *The Creation of States in International Law*, 2nd ed., Oxford, Clarendon Press, 2006; HILLGRUBER, C.: ‘The Admission of New States to the International Community’ (1998) 9 *European Journal of International Law*, pp. 491-509; WARBRICK, C.: ‘States and Recognition in International Law’, in EVANS, M. D. (ed.), *International Law*, 2nd ed., Oxford, Oxford University Press, 2006, pp. 217-275.

24. CASSESE: *International Law*, *op. cit.*, pp. 12-13.

the coming into existence of a new state is fundamentally a matter of fact. This is also confirmed by obligations and rights that are foreseen for new entities, independently from any international recognition, as established by the rules concerning state's succession<sup>25</sup>.

The fact that a group of States considers that there is a need, for any given reason, to establish some form of co-operation among them, does not necessarily and automatically create an international organisation. There is a wide variety of ways by which States develop institutionalised forms of co-operation. States can decide forms of consultation, through periodic conferences, meetings, without proper and permanent structures. In fact, a group of individuals, as a group of States, can create some forms of aggregation that for the mere fact of existing do not have legal personality in the legal system where the aggregation is instituted. For example, in the first case we can mention private associations that are not recognised under national law. In the second case we can include loose forms of association such as the G7/8, or in the past the Concert of Europe, and the disputed case of the European Union<sup>26</sup>. In the case of Commonwealth, Brownlie considers that the organisation exists, but it lacks "the organs and objects necessary for legal personality"<sup>27</sup>. This means that an organisation may exist without international legal personality. This may create problems when we deal with the international responsibility of those organisations. If they do not have personality, under which law are they responsible? They might be organisations under national law. Therefore, they would be accountable under the law which regulates them, but they would not be proper international organisations.

On the other end, Amerasinghe considers a consequence of being an international organisation to possess international personality, as distinct from that of the member States, and treaty making capacity<sup>28</sup>. This seems to provide a sort of automatic recognition of personality once an organisation comes into existence.

Existence and personality, and therefore the legal capacity of international organisations, are not the same thing, even if they are strictly related.

25. *Ibidem*, pp. 52-54.

26. In favour of the international personality see KLABBERS, J.: "Presumptive Personality: The European Union in International Law", in KOSKENNIEMI, M. (ed.), *International Law Aspects of the European Union*, The Hague, Kluwer Law International, 1998; WESSEL, R. A.: "Revisiting the International Legal Status of the EU" (2000) 5 *European Foreign Affairs Review*, pp. 507-537.

27. BROWNLIE, *Principles of Public International Law*, *op. cit.*, p. 650.

28. AMERASINGHE, *Principles...*, *op. cit.*, p. 10.



States can use different tools to create new entities that also may come into existence under different forms, with different rights and obligations. Usually, international treaties constitute the basic norms of new international entities<sup>29</sup>, but other forms of agreement, such as memorandums of understandings, exchange of notes, and final acts can be envisaged. The different names used may be of little importance when dealing with the creation of an entity, but generally authors consider that an international agreement is required for the coming into existence of an international organisation. Therefore, organisations may come into existence on the basis of resolutions adopted by member States of other international organisations, as in the case of UNCTAD and UNIDO, created by resolutions of the UN General Assembly.

Finally, the will of states to provide an international organisation with international legal personality is an element that is taken into consideration, when dealing with the legal status of international organisations. In the case of the OSCE, which came into existence without an international treaty, this issue is particularly relevant, and deserves more attention. We shall discuss this issue under international law later on. In the next part the issue of international personality will be the main focus of our attention.

## 2.2. *Legal Personality*

A very complex issue within institutional law consists in the definition of the legal personality of international organisations<sup>30</sup>. When dealing with the issue of the legal status of international organisations, Schermers and Blokker use the OSCE as a problematic example<sup>31</sup>. International legal personality is a central question to be answered before addressing the rights, du-

29. See BETTATI, M.: "Création et personnalité juridique des organisations internationales", in DUPUY, R.-J. (ed.), *A Handbook on International Organizations*, 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1998, pp. 34-60.

30. On the issue of personality, see WHITE, N. D.: *The Law of International Organizations*, 2nd ed., Manchester and New York, Manchester University Press and Juris Publishing, 2005, Chapter 2; KLABBERS, J.: *An Introduction to International Institutional Law*, Cambridge University Press, Cambridge, 2002, pp. 52-57; SCHERMERS and BLOKKER, *International Institutional Law, op. cit.*, Chapter 11; BEDERMAN, D. J.: "The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel" (1996) 36 *Virginia Journal of International Law*, p. 275; RAMA-MONTALDO, M.: "International Legal Personality and Implied Powers of International Organizations" (1970) 44 *B.Y.B.I.L.*, p. 111. For an interesting theoretical analysis of theory on legal persons see: NAFFINE, N.: "Who are Law's Persons? From Cheshire Cats to Responsible Subjects" (2003) 66(3) *The Modern Law Review*, pp. 346-367.

31. SCHERMERS and BLOKKER, *International Institutional Law, op. cit.*, p. 991.

ties, and possible international action of an international organisation, generally defined as legal capacity. International legal personality is relevant to determine the possible limits of action of international organisations as independent subjects, and their accountability under international law. Legal personality is also relevant for other reasons. States or groups of states, in solidarity as members of the organisation, would be deemed responsible for the action of an institution without personality, and therefore they would be accountable under international law<sup>32</sup>. Even more dangerous would be the possibility for states to escape their international obligations and responsibility by acting through the means of an institution without clear legal status under international law.

Within national legal systems, the legal personality is the aptitude of the subjects of that system to be regulated by the norms governing that system. This is a distinct concept from legal capacity, which “is concerned with ‘what the entity is potentially entitled to do’”<sup>33</sup>. So the “[l]egal personality may be defined as the potential ability to exercise certain rights and to fulfil certain obligations”<sup>34</sup>. Legal capacity is the ability to make binding legal arrangements, sue and be sued and make other decisions of a legal nature. Legal capacity is not absolute, and there may be different levels of capacity depending on the nature of the subject. Private and public entities have legal personality and capacity regulated by national law. In the case of non-governmental organisations the Council of Europe has also adopted an international convention concerning their legal personality, to facilitate their international work with the organisation<sup>35</sup>.

There are many issues and elements linked to the international legal status of an organisation, such as the capacity to possess rights and obligations, as a separate entity from the states that constitute it<sup>36</sup> and specific competence that emanate from its constitution. Nevertheless, it is not always necessary to link the subjectivity to the existence of an international organisation. Brownlie points out that “an institution may lack the features of an ‘organi-

32. See WHITE, *The Law of International Organisations*, *op. cit.*, chapter 7; *Final Report of the ILA Committee on the Accountability of International Organizations* (Berlin Conference, April 2004).

33. WESSEL: “Revisiting the International Legal Status of the EU”, *loc. cit.*, p. 510.

34. *Ibidem*.

35. Council of Europe, *European Convention on the Legal Personality of International Non-Governmental Organisation*, Strasbourg, 24 April 1986, European Treaty Series No. 124, available at [http://www.osce.org/documents/odihr/2004/09/3664\\_en.pdf](http://www.osce.org/documents/odihr/2004/09/3664_en.pdf).

36. AMERASINGHE, *Principles...*, *op. cit.*, p. 68-70, 91-104.

sation' and yet have legal personality on the international plane", mentioning the example of the GATT<sup>37</sup>. This supports our idea that international subjects are to be defined by the international legal system, on the basis of criteria that do not necessarily depend on the will of the States that create each institution.

Since the *Reparation* case<sup>38</sup> before the International Court of Justice, the issue of personality of international organisations has been addressed using a mixture of "law and fact"<sup>39</sup>. This may be the reason why international legal personality has been considered "a nebulous concept in international law"<sup>40</sup>. As mentioned before, in international law there is not a given list of criteria to determine the personality of an international organisation, but several criteria have been identified by authors on the basis of the ICJ influential decision. The task is sometimes more difficult as international organisations usually do not provide clear statements on their international personality in their constituent documents<sup>41</sup>.

Our main assumption is that the *Reparation* case, despite its leading role in developing the law of international organisations, also contributed to the confused theoretical approach to legal personality, mixing up legal concepts with different meaning such as existence, legal personality, legal capacity, aims and powers of international organisations. In the next part we shall address some of these issues, trying to identify the theoretical framework for our future analysis.

### 2.2.1. *Traditional Theories on Personality*

The issue of legal personality of international organisations has been addressed in three main ways, all based on the doctrinal analysis of the *Reparation* case. They can, in short terms, be identified as the "subjective theory", the "objective approach", and the "inductive approach", or "implied pow-

37. BROWNLIE, *Principles of Public International Law*, *op. cit.*, p. 650. For further examples see SCHERMERS and BLOKKER, *International Institutional Law*, *op. cit.*, pp. 27-28.

38. ICJ Reports (1949), 174.

39. BROWNLIE, *Principles of Public International Law*, *op. cit.*, p. 649.

40. WHITE, N. D.: *The Law of International Organisations*, 1st ed., Manchester and New York, Manchester University Press, 1996, p. 27.

41. Exceptions include, for example, the 1957 Treaty of Rome establishing the European Economic Community (Article 210), and the 1970 Statutes of the World Tourism Organisation (Article 31).

ers”<sup>42</sup>. The “subjective theory” is based on the will of the founders of the organisation, and takes into consideration the constitutional documents to define the existence of personality of the organisation. The problem with this theory is that not all constitutional documents provide much information concerning the legal personality of the organisation. This theory would not be useful in the case of OSCE as the original founders did not attribute legal personality to the new institution. The “objective theory”, based on Seyersted’s work<sup>43</sup>, provides a simpler way to determine the personality in international law. It is based on some objective criteria that would attribute legal personality to a specific organisation<sup>44</sup>. These criteria must be matched with the structure of the organisation and see if they constitute relevant elements to provide the organisation with international legal personality. The third theory is based on the assumption that international organisations are legal persons “either explicitly, or, if there is no constitutional attribution of this quality, *implicitly*”<sup>45</sup>. Klabbers suggests that “when an organisation performs acts which can be only explained on the basis of international legal personality, such organisation will be presumed to be in possession of international legal personality”<sup>46</sup>. But this “presumption” would lead to some possible inconsistencies, in particular with regard to the international responsibility of the organisation, or with reference to its international standing in the relationship with other international subject. Therefore, more stringent criteria should be applied.

In the *Reparation* case, the International Court of Justice applied an objective evaluation, but also elaborated on the organisation’s powers and aims.

42. RAMA-MONTALDO: “International Legal Personality and Implied Powers of International Organisations”, *loc. cit.*, p. 111. For an analysis of the different approaches, see White, *The Law of International Organisations*, *op. cit.*, Chapter 2; Klabbers: “Presumptive Personality...”, *loc. cit.*, pp. 231-253.

43. SEYERSTED, F., *International Personality of Intergovernmental Organizations: Do their Capacities Really Depend upon their Constitutions?* (1964) 4 *Indian Journal of International Law*, pp. 1-74.

44. The objective criteria can be summarised in the three requisites as defined by Brownlie: “1. a permanent association of states, with lawful objects, equipped with organs;

2. a distinction, in terms of legal powers and purposes, between the organisation and its member states;

3. the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states”, Brownlie, *Principles of Public International Law*, *op. cit.*, p. 649. See also Amerasinghe, *Principles...*, *op. cit.*, p. 83; Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Oxford, Clarendon Press, 1994, p. 460.

45. SCHERMERS and BLOKKER, *International Institutional Law*, *op. cit.*, p. 989.

46. KLABBERS, *An Introduction...*, *op. cit.*, pp. 55-56.

That means taking into consideration de “indirect” will of states from the purposes for which the UN was established to deduce implied powers of the organisation<sup>47</sup>. The UN was not expressly provided with international legal personality. From the powers and aims of the UN, the Court reached the conclusion that the organisation should be recognised as having legal personality. In this case it may be noted, against the subjective theory, that if the will of the founders should always be applied, the International Court of Justice could not have decided, as there was no mention of the legal personality of the United Nations in international law. Nevertheless, we consider that the decision of the Court was not sufficiently structured and started a confusion in the field of international personality of organisations. It tried to deduce the legal personality from the powers and aims of the UN, and linking the two issues, created confusion between legal personality and legal capacity. This is shown by the famous passage that:

“The subjects of law in any legal system are not necessarily identical in nature or in the extent of their rights, and their nature depends upon the needs of the community”<sup>48</sup>.

We agree with this statement, but it should be referred to the legal capacity and not to the legal personality. When the Court went further to discuss the powers of international organisations compared to states, it was mainly discussing issues of rights and duties which actually correspond to the legal capacity and not to the legal personality<sup>49</sup>. This confusion is further demonstrated by the fact that the Court, after analysing the structure, powers, and functions of the UN, concluded that:

“In the opinion of the Court, the Organization was intended to exercise and enjoy, and in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and capacity to operate upon an international plane”<sup>50</sup>.

The expression “a large measure of international personality” shows the overlapping of two concepts, personality and capacity. In fact, personality is the fact of being a subject of the legal system, and this fact cannot be measured. A legal or natural person is either a subject or it is not. It cannot have a

47. WESSEL: “Revisiting the International Legal Status of the EU”, *loc. cit.*, p. 522.

48. ICJ Reports 1949, p. 178.

49. ICJ Reports 1949, p. 179.

50. ICJ Reports 1949, p. 179.

“large” or a “small” amount of “subjectivity”. What can vary is the amount of legal capacity. Subjects in all legal system may have different rights and duties that depend on their legal capacity, but not on their legal personality.

The mentioned theories regarding the personality of international organisations derived mainly from the analysis of the *Reparation* case. The analysis of the *Reparation* case provides a sort of mixed solution, as the case argued on objective, subjective and inductive criteria. This may be the reason why, depending on the emphasis provided to each component, the three mentioned theories have emerged.

### 2.2.2. *New Approach to Personality*

A more interesting approach to the issue of personality has been provided by Wessel. Elaborating on the notion of legal institutions and the institutional theory of law, the author defines legal persons as “institutional legal facts since they exist by virtue of a constitutive legal rule that makes their creation possible”<sup>51</sup>. Once the institution comes into existence, it is a fact that provides the institution with legal personality. As simply but clearly pointed out “Legal personality is nothing more (or less) than independent existence within the international legal order”<sup>52</sup>. On the other hand, as mentioned before, legal capacity can vary, depending on the powers provided to the specific organisation. This should not lead to “the confusion between *being* a legal person and the *possession* of legal capacities”<sup>53</sup>. This analysis makes a clearer distinction between the two concepts of legal personality and legal capacity.

The central point of Wessel’s analysis for determining the existence of legal personality is based on the “autonomy” of the institution, with regard to member states<sup>54</sup>. This element is usually required by definitions of international organisations as provided by most authors as one of the characteristics of international organisations. Wessel elaborates more on the concept of “autonomous” or at least “separate” will of an international entity, as the core element of personality<sup>55</sup>. The author, building on Ruiter’s analysis of legal con-

51. WESSEL: “Revisiting the International Legal Status of the EU” (2000) 5 *European Foreign Affairs Review*, p. 514.

52. *Ibidem*, p. 510.

53. *Ibidem*, p. 514 (original italics).

54. See also DETTER, I., *Law Making by International Organizations*, Stockholm, P.A. Norstedt & Söners Förlag, 1965, pp. 19-23.

55. WESSEL: “Revisiting the International Legal Status of the EU”, *loc. cit.*, pp. 514-519 (emphasis original).

ditions required for institutions to act as legal persons, identifies three sub-systems of conditions: 1. existence of *decision-making processes*; 2. practices of institutions conceived as *external behaviour*; and 3. existence of *external behaviour* of other subjects towards the legal person<sup>56</sup>.

The mentioned conditions should be identified on the basis of legal documents, usually in the form of treaties, creating international organisations. The legal analysis of powers of the organisation exercised through its organ(s) would allow ascertaining the level of autonomy of the organisation in relationship to member states. The test should be based on legal powers and practice of the organisation. In this context, the research should take into consideration expressed, inherent and implied powers, to determine the level of autonomy of the organs of the organisation. In particular, when dealing with the OSCE it should be kept in mind that the organisation has not a written constitution. Different aspects, that imply the analysis of organs, decisions and external relations of an organisation with other subjects of international law, shall be explored with reference to the specific case of the OSCE in the following part of this article. But before dealing with the determination of the legal personality we should address the issue, mentioned before, of the basic commitments of states within the framework of the OSCE. The nature of legal obligations that are based on the original Conference for Security and Cooperation in Europe (CSCE) and later on the OSCE need some discussion.

### 3. THE CONSTITUTION OF THE OSCE

When dealing with international legal personality of international organisations, most authors mention their existence as one of the basic criteria to determine their legal personality. In most cases, the existence of the organisation or institution is deduced first of all by the document that States adopt and ratify under the form of a treaty. The fact that the OSCE operates in the international arena does not necessarily mean that it exists as a proper international organisation<sup>57</sup>. In the case of the OSCE a question may arise if the adoption of a treaty is a *conditio sine qua non* for the existence of an international organisation. Most authors require an international agreement, which

56. *Ibidem*, p. 516.

57. This seems a superfluous question, but for the non existence even of the "organisation" see BLOOM, E. T.: "Establishment of the Arctic Council", 93 (1999) *A.J.I.L.* 719 p. 721. See also Kooijmans, *loc. cit.*

“can” take the form of a treaty. But in some cases organisations are not created by a written treaty, such as the case of the Commonwealth<sup>58</sup> and the Group of Seven Industrialised Countries (the G7). This is a relevant issue when discussing the OSCE status, as this would be a case where no international treaty was adopted. It is necessary to identify if there may be other forms of agreement or other ways to bind states on the international plan. The CSCE was based on the 1975 Helsinki Final Act, which was not considered a treaty under international law by the signing states. But international courts consider that states can commit themselves only through law and not by other means<sup>59</sup>. Therefore the first issue that must be addressed is the nature of OSCE obligations.

### 3.1. *International Agreement: Is There a Constitution for the OSCE?*

The 1975 Helsinki Act was not, and still is not, defined as an international treaty. To underline the non-treaty nature of the Final Act, in the final part of the document it was stated that “the Government of the Republic of Finland is requested to transmit to the Secretary-General of the United Nations the text of this Final Act, which is not eligible for registration under Article 102 of the Charter of the United Nations”. Furthermore, the expression of “Final Act” was employed following the terminology of final conferences acts. The purpose was to avoid any legal obligation deriving from the adopted document. Our question here is if that initial purpose is sufficient to exclude the “constitutional” nature of the Final Act, and its present legally binding nature.

Aust considers that the 1975 Helsinki Final Act has the characteristics of a Memorandum of Understanding, as it was “not eligible for registration under Article 102 of the [UN] Charter”. Other fundamental OSCE documents are included in this category. The 1990 Charter of Paris also foresees non registration. The Document of the Stockholm Conference on Confidence, and Security-Building Measures and Disarmament in Europe of 1987 established that “The Measures adopted in this Document are politically binding’ (para. 101)”<sup>60</sup>. As a consequence, for the mentioned author, the basic documents of

58. DALE, W.: “Is the Commonwealth an International Organization?” (1982) 31 *I.C.L.Q.*, p. 451.

59. See ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), jurisdiction and admissibility, ICJ Reports (1994), p. 112.

60. AUST, A.: *Modern Treaty Law and Practice*, Cambridge, Cambridge University Press, 2000, p. 28.



the OSCE do not have a legal character, as they are not treaties and therefore they express merely political or moral commitments. On the other extreme, Klabbers considers that any “agreement” between states, with some form of normative nature, not subject to another system of law is a treaty<sup>61</sup>. This position may be considered too extreme and has been subject to severe critics<sup>62</sup>.

Before analysing the legal nature of the OSCE documents, it is necessary to remember here that registration, as foreseen by Article 80 of the 1969 Vienna Convention, does not invalidate international treaties. The only consequence, established in Article 102(2) of the UN Charter, being that they cannot be invoked before an organ of the United Nations, in particular the International Court of Justice<sup>63</sup>. Article 2(a) of the 1969 Vienna Convention on the Law of Treaties affirms that any agreement between states, in written form and governed by international law, can be considered a treaty despite its name. If we look at the wording, structure and types of commitment included in the relevant institutional documents, they could readily be defined as international agreements. They even include dates for the “entry into force”, such as the case of the 1994 Budapest Declaration, by which the CSCE changed its name into OSCE, which states that “The change in name will be effective on 1 January 1995”, but they do not imply ratification. Finally, the agreements and declarations adopted by states within the CSCE and OSCE framework were kept within the domain of international relations. They are not governed by any national law and therefore they should fall within the system of international law. But still the problem is not solved, as the founding states excluded the treaty nature of the commitments expressed in the Helsinki Final Act.

These preliminary statements were relevant to introduce the core issues of the legal value of agreements which states have adopted and to discuss the existence of international obligations and their nature in the context of the OSCE.

### 3.1.1. *Agreement*

Despite the two extreme positions provided by Aust and Klabbers, we consider that it might be futile, even misleading, to enter into the dispute on

61. KLABBERS, J., *The Concept of Treaty in International Law*, The Hague, Kluwer Law International, 1996.

62. See the following reviews of the book, I. Sinclair (1997) 91 *A.J.I.L.* pp. 748-750; Perry Keller (1998) 47 *I.C.L.Q.*, pp. 240-241.

63. AUST: *Modern Treaty Law and Practice*, *op. cit.*, pp. 278-280.

the nature of memorandums and treaties. We may appeal to some other reasons to justify the legal nature of the CSCE/OSCE commitments and, as a consequence, the existence of a constitution, providing legal obligations, for the OSCE. This point has been partly addressed with the aim of excluding the fundamental requirement of an international treaty as the basis of an international organisation<sup>64</sup>.

Actually, the first and fourth criteria set out by Amerasinghe do not require a proper treaty. They need the establishment of an organisation “by some kind of international agreement among States [...] under international law”. On the same line Schermers and Blokker point out that “The most usual form of the agreement creating an organization is a treaty; the vast majority of international organizations are based on a multilateral treaty. But these agreements can also be expressed in other ways”<sup>65</sup>.

We mentioned before that a sort of agreement can be envisaged to match the requirement of an international organisation. But this is not enough. In fact, the agreement must be “under international law”. Schermers and Blokker provide quite limited help in this field. They state that “International agreements are normally concluded under international law. It can therefore be assumed that this requirement is fulfilled whenever there is an international agreement. Only when an international agreement clearly indicates that the organization is not established under international law, will it not be considered as an international organization”<sup>66</sup>.

For our purposes it is relevant to determine if the Final Act can be defined as a form of international agreement<sup>67</sup>. Looking at the text of the Final Act, the structuring and wording of the declarations and statements reflect the agreement among the participating States to create some forms of co-operation in the field of security in Europe. At least they agreed to establish future Summits that, as a matter of fact, were organised and held. It might be noted that the requirement can be fulfilled on the basis of at least two elements. First, OSCE documents define principles and rules that are purely international in character. Agreements under the form of declarations and other offi-

64. See BERTRAND, C.: “La Nature Juridique de l’Organisation pour la Sécurité et la Coopération en Europe (OSCE)” (1998) 102(2) *Revue Générale de Droit International Public*, pp. 395-405.

65. SCHERMERS and BLOKKER, *International Institutional Law*, *op. cit.*, pp. 27-28 for several examples.

66. *Ibidem*, p. 37.

67. On the concept of agreement and treaty see WIDDOWS, K.: “What is an Agreement in International Law?” (1979) *L.B.Y.B.I.L.*, pp. 117-149.

cial documents are framed in the language of international law and international relations, and they never make reference to national legal systems nor private law. Second, the aims and purposes of the organisation fit in the domain of international relations, including areas of international co-operation such as security, conflict-prevention, disarmament, human rights, minority rights, etc.

But if the treaty can be considered as a particular sub-species of international agreement, whose distinguishing character is based on the intention of the parties to be legally bound<sup>68</sup>, when we address the original text of the Helsinki Act, the intention of states clearly excluded legal obligations.

If the main documents adopted by Summits, despite their names (Final Act, Declaration, etc.), are not treaties in the proper sense defined by the 1969 Vienna Convention, could they be something else? And in particular, could they have some legal effect? One possibility could be the “quasi-legislative” nature of those acts, as defined by the *South West Africa* cases (Preliminary Objections)<sup>69</sup> concerning the nature of the Mandate given to South Africa. The Mandate was a resolution of the Council of the League, and it was not adopted as a treaty or a convention. Nevertheless, this may not be the best reply to our question, as the Council of the League, like many other international organs, could adopt international documents with legislative or “quasi-legislative” force. We consider that an answer to our question should be based on the concepts of soft-law and customary law. But before analysing this argument we shall discuss the topic of “political” and “legal” obligations, as a preliminary issue.

### 3.1.2. *Political and Legal Obligations*

The commitments defined in the 1975 Helsinki Final Act have been considered as having a political nature, not entailing legal obligations<sup>70</sup>. This is the reason why they did not give origin to a formal treaty, even if they were concluded in a written form. But the reasons behind this choice were based on differing visions of the future developments and obligations among states

68. WIDDOWS, K.: “What is an Agreement in International Law?” (1979) *L.B.Y.B.I.L.*, p. 136.

69. ICJ Reports (1962), 319.

70. RUSSELL, H. S.: “The Helsinki Declaration: Brobdingnag or Lilliput?” (1976) 70 (2) *A.J.I.L.*, pp. 248.

that at that time were potential enemies<sup>71</sup>. In the Cold War context, the Helsinki Final Act was supposed to be an instrument of political détente. Nevertheless, delegations of participating states had different positions concerning the legal content of the document. The legal nature of the Helsinki Act was considered as having an “original juridical force”, including at the same time a declaration and a programme, not based on “legal obligations”, but “expressing the intention” of participant states<sup>72</sup>.

Nevertheless, the final document was signed by heads of state and government of the participating states, which means by official representatives of state, who are also entitled to commit their state in international relations. This motivation is not meant to change the original non-treaty based document, as it would modify the original structure mentioned before. But we consider that because of this commitment at the highest political level, the Final Act can acquire new meaning in international law, in particular when we shall discuss the issue under customary law.

The meaning of political declarations have been analysed as part of the rules developing international law and establishing international commitments. An interesting possibility would be the classification of the Helsinki Declaration within the category of non-conventional concerted acts (*actes concertés non conventionnels*). These acts do not create legal obligations, but they are established to govern mutual relationships and the conduct of states<sup>73</sup>. The relationship between “political”, “moral” and “legal” obligations has been addressed as well<sup>74</sup>, and political obligations have been considered particularly useful to define commitments among states. Even if they “do not create legal obligations nevertheless formulate community or shared expectations of state behaviour”<sup>75</sup>. Therefore, there is a possibility that political obligations when receive a strong level of compliance can be seen as legal obligations. It is well known that legal commitments sometimes do not receive adequate application by states. In the case of OSCE’s experience, states have been quite

71. See GHEBALI, V.-Y.: “L’Acte Final de la Conférence sur la Sécurité et la Coopération en Europe et les Nations Unies”, 1975 *Annuaire Français de Droit International*, pp. 74-88.

72. See generally PREVOST, J.-F.: “Observations sur la Nature Juridique de l’Acte Final de la Conférence sur la Sécurité et la Coopération en Europe”, 1975 *Annuaire Français de Droit International*, in particular at pp. 142-153.

73. BERTRAND, C.: “La nature juridique de l’Organisation pour la Sécurité et de la Coopération en Europe (OSCE)” (1998) 98 *RGDIP*, pp. 388-391.

74. See REUS-SMIT, C.: “Politics and International Legal Obligations” (2003) 9(4) *European Journal of International Relations*, pp. 591-625.

75. BOTHE, M.: “Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?” (1980) XI *Netherlands Yearbook of International Law*, pp. 65-95, at p. 85.

meticulous in the application of the rules and commitments. One example may be useful: the case of suspension of Yugoslavia from 1992 to 2000<sup>76</sup>. During the conflict in the Balkans, Yugoslavia was excluded from participation in CSCE official meetings<sup>77</sup>. The suspension applied to governmental officials, but the state was still considered part of the CSCE, including its financial obligations. The reason for adopting the suspension was based on “clear violations of CSCE norms and principles”<sup>78</sup>. One of the distinctive differences between legal and political or moral obligations is that the violation of non-legally binding rules would not imply legal consequences. The justification for the measures adopted was based on violation of “norms and principles”, this presupposes that international commitments within the OSCE had acquired a stronger force, compared to mere good-will intentions expressed by states. This example may support the idea that a stronger force has been attached to the original Helsinki Act. We consider that other tools would support our classification of the legal obligations that would derive from the 1975 Helsinki Final Act until the present. These are the well-known concepts of soft-law and customary law.

### 3.1.3. *Soft-Law and Customary Law*

The best support to our reasoning can be found in the two concepts of soft-law and customary international law. Soft-law “usually refers to any international instrument other than a treaty containing principles, norms, standards, or other statements of expected behaviour”<sup>79</sup>. Documents adopted by Summits and Conferences developed within the OSCE may have the status of soft-law, as they are not based on a constituent treaty of the organisation<sup>80</sup>. Our analysis here will be focused on the documents adopted by summits of participating states. These are different from documents and decisions taken

76. On the issue see PERRY, V.: “The OSCE suspension of the Federal Republic of Yugoslavia” (1998) 4 *Helsinki Monitor*, pp. 44-54.

77. CSCE, Committee of Senior Officials, Second Emergency Meeting, *Journal Proceedings Annex*, 12 May 1992.

78. PERRY, V.: “The OSCE suspension of the Federal Republic of Yugoslavia” (1998) 4 *Helsinki Monitor*, p. 45.

79. SHELTON, D.: “International Law and ‘Relative Normativity’”, in EVANS, M. D. (ed.), *International Law*, Oxford, Oxford University Press, 2003, p. 166.

80. SEIDL-HOHENVELDERN, I.: “The Attitude of States Towards the Proliferation of International Organisations”, in BLOKKER and SCHERMERS, *Proliferation of International Organizations*, *op. cit.*, p. 52.

by organs of the OSCE that shall be analysed later to define the autonomous legal capacity of the organisation. The first set of documents contribute to the “constitutional” element of the organisation, the second type of documents derives its existence from that constitution, and develops new rules among participating states. Nevertheless, documents and practice developed by organs of the organisation can develop new soft-law and customary rules as well.

Customary law is also a useful tool that can support our analysis in this case, as already pointed out by international lawyers<sup>81</sup>. Declarations, statements, etc. adopted by states and international institutions, can be considered the starting point for setting rules and principles, that may evolve into hard-law, be it either treaty or customary law<sup>82</sup>. Keeping this in mind, if we analyse the main documents adopted within the CSCE/OSCE, it is possible to identify a repetition of some statements that are considered as the foundation of the co-operation and action among the states participating in the organisation. This idea has been already suggested by some authors, but mainly in relationship to the evolution of human rights standards<sup>83</sup>, and to the principle of a right to intervention in the internal affairs of a State, justified by the violation of those standards<sup>84</sup>. Our analysis will not focus on specific areas. It will relate to the “constitutive” evolution of the official documents. The point here is whether the repetition of statements, final declarations, acts, etc. adopted by the representatives of states in international conferences within the framework of the OSCE may contribute to the creation of customary rules. As it was already pointed out, with specific reference to the CSCE, “a non-treaty agreement cannot directly produce customary international law, but it can contribute to its creation as an emerging *opinio juris*”<sup>85</sup>.

The leading decision concerning the definition of customary law is the *North Sea Continental Shelf* case<sup>86</sup>. The fundamental rule is that state practice must be accompanied by the conviction of adhering to a rule of law. Nevertheless, the *opinio juris*, that means the state’s perception of conforming to a

81. See FRIEDMANN, *The Changing Structure of International Law*, New York, Columbia University Press, 1964, pp. 121-123.

82. CASSESE, A.: *International Law*, 2nd ed., Oxford, Oxford University Press, 2005, p. 196. Cassese considers the 1975 Helsinki Final Act as an example of soft-law.

83. MCGOLDRICK, D.: “The Principle of Non-Intervention”, in LOWE and WARBRICK, *The UN and the Principles of International Law*, 1994, p. 105.

84. PROVOST, R.: “Reciprocity in Human Rights and Humanitarian Law” (1994) LXV *B.Y.B.I.L.*, pp. 383-454, at 421.

85. HILLGENBERG, H.: “A Fresh Look at Soft Law” (1999) 10(3) *European Journal of International Law*, pp. 499-515, at 514.

86. ICJ Reports 1969, p. 3, para. 77.

rule of law, is neither easily defined nor identified. It is well known that the two requirements, *opinio juris sive necessitatis*, the subjective, or mandatory, aspect of the rule, and *diuturnitas*, the objective, or temporal repetition of the act, have not received complete definition. Cassese has noted that “usually a practice evolves among certain States under the impulse of economic, political, or military demands” based on social and political needs (*opinio necessitatis*), and then when States increasingly accept or acquiesce in “a customary rule gradually crystallizes” (*opinio juris*)<sup>87</sup>. To determine the mental status of a state is not a very easy task. For this reason proposals have come to equate “practice” as “evidence” of the *opinion juris*<sup>88</sup>. This interpretation would in some way follow the wording of Article 38(b) of the Statute of the International Court of Justice which defines international custom “as evidence of a general practice accepted as law”.

The main issue under discussion here is linked to determine the will of states, and why states are complying with the rules of the OSCE. It is said that they comply under “moral” and “political” obligations. Are these obligations different from “legal rules”? As we mentioned before, it may be difficult to distinguish between “moral”, “political” and “legal” obligations. It may be affirmed that when obligations reach a certain level of commitment and develop mechanisms that make them enforceable, those “moral” and “political” principles acquire a different legal status.

For thirty years the participating states have followed the rules and principles established in the main OSCE documents. Furthermore, one of the alleged differences between “legal” and “non-legal” norms is usually the possible outcome in case of their violations. In this case, one relevant example that supports the idea that rules developed by OSCE have acquired a legal status is the “suspension” of Yugoslavia from participation in CSCE/OSCE meetings due to violation of fundamental principles of the organisation, already mentioned before<sup>89</sup>. Another example can include the obligation of financial contribution on participating states, as part of their obligations derived from the participation in the organisation. In case of rules of procedure, the general voting principle adopted by the OSCE is the rule of unanimity, generally expressed by consensus. But the rule has been “amended” by the “unanimity minus one” and “minus two” to exclude the participation in vot-

87. CASSESE, *International Law*, 2nd ed., *op. cit.*, p. 157.

88. THIRLWAY, H.: “The Sources of International Law”, in EVANS, M. D. (ed.), *International Law*, Oxford, Oxford University Press, 2003, p. 121.

89. See above notes 76 and 77.

ing by states involved in international disputes. This rule has not been rejected, therefore, it may be considered as part of customary law within the OSCE. Finally, one interesting example of the influence of OSCE documents in European legal developments can be considered the inclusion of OSCE principles into the German-Soviet Treaty on Good Neighbourly Relations, Partnership and Co-operation of 9 November 1990.

In the case of OSCE, the determination of most rules is facilitated by the fact that they are based on written texts adopted by its organs. Therefore, the content of the norms may result easier than in the case of traditional customary law, where state practice may be quite difficult to determine in its full content.

We would be in presence of a regional or local evolution of customary rules<sup>90</sup> which created an international organisation, and a set of fundamental rules which are part of its constitution. Even if these criteria should be applied with all the necessary caution, as stressed by the International Court of Justice in the *Asylum* case<sup>91</sup>, it seems that in the case of OSCE it would be difficult to deny the development of a regional customary rule, even if not “crystallised” at least “under formation”.

Customary international rules would be related to the institutional framework and to the aims and purposes of the organisation. This would allow defining the principles and rules established in the main CSCE/OSCE documents as customary law, and establish a constitution based on customary law. But there would be also some rules, such as the suspension of a state for widespread and persistent violations of OSCE principles, the rules of unanimity minus one and minus two, just to cite two mentioned examples.

It seems that the original documents reflected the positions of states at the 1975 Helsinki Conference that were worried about the creation of a European security international legal system parallel to the UN. This is the reason why states supported and included the principles of international law enshrined in the UN Charter. At the same time the OSCE was defined as a regional arrangement under Chapter VIII of the same Charter, as a way to reinforce the general rules of international law<sup>92</sup>.

90. CASSESE, *International Law*, 2nd ed., *op. cit.*, pp. 163-165.

91. ICJ, Reports (1950), p. 266.

92. See GHEBALI, V.-Y.: “L’Acte Final de la Conférence sur la Sécurité et la Coopération en Europe et les Nations Unies”, 1975 *Annuaire Français de Droit International*, pp. 75-76.



#### 3.1.4. *The Content of the Constitution*

If the main documents adopted by the CSCE/OSCE summits reach the status of customary law, we consider that quite a good number of rules might be taken into consideration. They are at least the so-called Decalogue<sup>93</sup>, which includes general customary law and general principles of international law. The ten principles are the following:

I. Sovereign equality, respect for the rights inherent in sovereignty; II. Refraining from the threat or use of force; III. Inviolability of frontiers; IV. Territorial integrity of States; V. Peaceful settlement of disputes; VI. Non-intervention in internal affairs; VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief; VIII. Equal rights and self-determination of peoples; IX. Co-operation among States; X. Fulfilment in good faith of obligations under international law.

Besides that, since the adoption of the Helsinki Final Act, participating States have generally expressed “their common adherence to the principles which are set forth below and are in conformity with the Charter of the United Nations, as well as their common will to act, in the application of these principles, in conformity with the purposes and principles of the Charter of the United Nations”<sup>94</sup>. The Declaration is followed by some specific measures that were envisaged to make those principles more effective. States reaffirm that “they will respect and give effect to refraining from the threat or use of force and convinced of the necessity to make it an effective norm of international life” establish a series of principles that develop the main purposes and principles of the UN Charter. They include for instance the provisions of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations<sup>95</sup>, the prohibition of different forms of use of force, including economic coercion, the promotion of disarmament, and “to seek, first of all, a solution through the peaceful means set forth in Article 33 of the United Nations Charter”.

These principles were then included in final documents of several following summits, usually in a shorter form. At least two are worthy of men-

93. The ten fundamental principles are contained in the *Declaration on Principles Guiding Relations between Participating States* of the 1975 Helsinki Final Act. For an analysis see GHEBALI, V.-Y.: “L’Acte Final de la Conférence sur la Sécurité et la Coopération en Europe et les Nations Unies”, 1975 *Annuaire Français de Droit International*, pp. 88-111.

94. CSCE, 1975 Helsinki Summit, *Declaration on Principles Guiding Relations between Participating States*.

95. UN, GA Res. 2625, UN doc. A/8082 (1970)

tion. In the 1990 Paris Charter for a New Europe, they were included in the section called Friendly Relations among Participating States. In the 1999 Istanbul Charter for European Security they were included in the section called Our Common Foundations. States referred to the basic rules and principles in the following terms:

“We reaffirm our full adherence to the Charter of the United Nations, and to the Helsinki Final Act, the Charter of Paris and all other OSCE documents to which we have agreed. These documents represent our common commitments and are the foundation for our work”<sup>96</sup>.

The mentioned principles could be identified as the aims and purposes of the organisation, and are not different from general aims and purposes of many other international organisations dealing with political and security co-operation.

Are there other specific rules that could be considered a part of the legal development of the OSCE? At least a couple of other issues have been included regularly in the main documents, and might deserve some reference. There are regular commitments which refer to the relationship with the UN and the solution of disputes. One is the reaffirmation of the OSCE “as a regional arrangement under Chapter VIII of the Charter of the United Nations”. Parallel to this statement, there are always two other principles. The first one is the recognition of the OSCE “as a primary organisation for the peaceful settlement of disputes within its region and as a key instrument for early warning, conflict prevention, crisis management and post-conflict rehabilitation”. The second one is the affirmation that the OSCE “is the inclusive and comprehensive organisation for consultation, decision-making and co-operation in its region”<sup>97</sup>. In the same area, States “recognise the primary responsibility of the United Nations Security Council for the maintenance of international peace and security and its crucial role in contributing to security and stability” of the region. Linked to this recognition of the UN, states also reaffirm their “rights and obligations under the Charter of the United Nations”, which include the non-use of force or the threat of force, and the “commitment to seek the peaceful resolution of disputes”.

The second wide area which has been included since the beginning of the OSCE, as a central issue within the organisation’s activities, and has been

96. OSCE, 1999 Istanbul Summit, *Charter for European Security*, Part II, Para. 7.

97. OSCE, 1999 Istanbul Summit, *Charter for European Security*, Part II, Para. 7

expanding over the years, is the so-called Human Dimension<sup>98</sup>, namely the broad area of human rights rules<sup>99</sup>. They include several institutions and activities which provide the OSCE a relevant set of tools for dealing with the promotion and supervision of state's behaviour in the fields of minority rights, freedom of expression, in particular through the media, etc.

A third element that is relevant in international organisations is the institutional framework conformed by organs of the organisation. Over the years, in particular since the end of the Cold War, the CSCE first, and the OSCE later, have been provided with organs that make the organisation work on the wide array of its areas of competence. The different organs, such as the ODIHR and the OHCNM were established by summits of heads of state and government. Once created, they acquire a sort of "autonomy" that will be discussed later. Also these organs can be considered as based on customary law, as states generally accomplish with their mandate, co-operate with them, and what is also more relevant, contribute regularly to their financial support.

So, at least we can identify a significant set of rules that could constitute the basic document, "some kind of international agreement", as required by Amerasinghe. The complex of the defined rules might be therefore defined as an "evolving constitution" based on a series of agreement of participating States. With the repetition of their "mandatory" nature as the "foundation" of the work of the organisation, they have reached the status at least of soft-law and in several cases of constitutional customary law. Furthermore, the 1999 Charter for European Security, in Paragraph 12 affirms that the "Principles [...] apply to any organisation or institution whose members individually and collectively decide to adhere to them". This might be interpreted as an alternative formula to oblige new participating members (individual States or organisations) to follow the established principles of the organisation, which could not be otherwise mandatory due to the lack of a foundational treaty to which other international subject might adhere, and to which they would be legally bound under international law.

98. The term 'human dimension' was introduced by the 1989 Vienna Concluding Document to refer to the human rights and humanitarian concerns included in the Principles and so-called 'Third Basket' of the 1975 Helsinki Final Act and in subsequent OSCE documents in this area.

99. On this issue there is a wide literature, see SHELTON, D.: "The Boundaries of Human Rights Jurisdiction in Europe" 13 *Duke J. Comp. & Int'l L.* (2003) 95, pp. 118-123.

## 4. THE OSCE AND THE ELEMENTS OF LEGAL PERSONALITY

The issue of the legal personality of the OSCE is the relevant element to be discussed in this part of the article, as it is our purpose to discern the existence of the organisation's legal status in international law<sup>100</sup>. The initial participating States at the CSCE signed the Final Act in Helsinki claiming that they were not creating an international organisation<sup>101</sup>. Still under the threat of the Cold War, in the complex context of East-West relations, and facing the policy of *détente*, States decided to keep the organisational structure in the form of periodical meetings. This procedure mainly developed a sort of periodical *forum*, called the "Helsinki Process". For this reason, there were not member States, but "participating States", adopting a terminology that is still used in contemporary OSCE. Nevertheless, from that initial stage, the CSCE moved from being a "process" to an "institution"<sup>102</sup>, and finally to an "organization" due to a reform process which took the form of Summit Declarations, but never by the adoption of a formal treaty<sup>103</sup>.

A possible relevant fact was the change of the name of the Conference into Organisation during the 1994 Budapest Summit. Did the new name change anything in the legal structure and personality of the organisation? Apparently, the reply should be in the negative. Paragraph 29 of the 1994 Budapest Summit affirmed 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". But it should be noted that the same paragraph included reference to the Rome Decision on Legal Capacity and Privileges and Immunities<sup>104</sup>, and underlying that participating States "will, furthermore, examine possible ways of

100. See BERTRAND, C.: "La nature juridique de l'Organisation pour la Sécurité et de la Coopération en Europe (OSCE)" (1998) 98 *R.G.D.I.P.*, pp. 365-406. The OSCE has started revising its status, in particular with reference to privileges and immunities that might be required to facilitate its activities; see OSCE, Permanent Council Decision 383, 26 November 2000.

101. On the negotiation and an early analysis of the legal nature of the Helsinki Final Act see Russell: "The Helsinki Declaration: Brobdingnag or Lilliput?", *loc. cit.*, pp. 244-249.

102. MCGOLDRICK, D.: "The Conference on Security and Cooperation in Europe – From Process to Institution", in JACKSON, B. S. and MCGOLDRICK, D. (eds.), *Legal Visions of the New Europe*, London, Graham & Trotman, 1993, p. 159.

103. It could be envisaged that the Charter of Paris, adopted at the 1990 Paris Summit of Heads of State and of Government, which stated the "institutionalisation" process of the CSCE into the OSCE, could be used as a "codification document", reaffirming the documents and principles adopted by previous Summits and Conferences, see MCGOLDRICK: "The Conference on Security and Cooperation in Europe – From Process to Institution", p. 152.

104. CSCE, *Legal Capacity and Privileges and Immunities*, Fourth Meeting of the Council, Rome, Rome, 1 December 1993, Doc. CSCE/4-C/Dec.2.

incorporating their commitments into national legislation and, where appropriate, of concluding treaties". These statements show a willingness of treating the organisation as an international subject with its own privileges and immunities, including legal capacity to enter into treaties, as will be addressed later.

Some authors have resolved the issue of the legal personality on the basis of the recognition within the national legal systems of the diplomatic immunities of the OSCE institutions, and on the basis of the OSCE Procedure for Peaceful Settlement of Disputes, and by subsequent practice<sup>105</sup>. This means that the international personality should be the result of an inductive process, based on the empirical analysis of the facts that may show the existence of an international organisation. Actually, this might be a good justification, but we consider that other arguments can be used from the legal point of view to justify the existence of the legal personality of the OSCE.

As mentioned earlier, the fundamental element that must be taken into consideration to establish the legal personality of an international organisation is the existence of "at least one organ with a will of its own". The organ "should be formed by delegates of two or more members of the organisation and should e.g. not be dependent on any particular state"<sup>106</sup>. Wessel bases the existence of legal personality on the identification of expressions of autonomous will of the organisation. These expressions usually take the form of decisions. Our next analysis is devoted to establish if OSCE's organs and institutional structure match this requirement. The OSCE has been provided with several organs to deal with the conduct of the tasks endorsed to it in relevant documents. The analysis will try to identify two types of functions of the organisation that can prove the existence of autonomous will: (1) existence of decision-making processes; and (2) practices conceived as external behaviour in relation to other subjects of international law.

In the case of OSCE, due to the absence of a written constitution, it is necessary to identify practice and rules from the relevant documents and practice of the organisation.

#### 4.1. *Existence of Decision-making Processes*

To qualify an international organisation as an independent subject, with legal personality, it is relevant to identify the internal decision-making

105. SEIDL-HOHENVELDERN, I.: "The Attitude of States Towards the Proliferation of International Organisations", *loc. cit.*, p. 53.

106. SCHERMERS and BLOKKER, *International Institutional Law, op. cit.*, p. 35.

process as separate from member states. The criterion establishes “a distinction, in terms of legal powers and purposes, between the organisation and its member states”<sup>107</sup>. The existence of organs with their own powers shows a separation of will and independent action of the organisation itself, as we have already analysed above, and in part will also be addressed in this section.

At the beginning of its existence, the CSCE had not such capability, as its main documents were adopted in a series of meetings following the 1975 Helsinki Conference. The secretariat’s functions were limited to the organisation of intergovernmental meetings, called Summit, Follow-Up, and Inter-Sessional Meetings<sup>108</sup>. A loose structure was merely intended to keep the organisation of the collective events of the so-called “Helsinki Process”. The OSCE was taking decisions at political level through the form of meetings, but had not permanent organs for the implementation of its decisions and policies. In this early stage we can identify a conference-style process without autonomous decision making bodies. Since then, the organisation has developed several organs and institutions that perform the regular activities of the organisation. Therefore, forms of institutionalisation have been created since the Second Ministerial Council in January 1992, when participating States agreed on the Prague Document on Further Development of CSCE Institutions and Structures. A formal structure has been achieved in 1994 when the Budapest Summit reshaped the existing institutions and reinforced their capability to govern and manage the “organisation” of a permanent group of states<sup>109</sup>. This process led to the change in the name from “conference” to “organisation”, as mentioned before.

Despite the fact that the name should not change the nature of the organisation, we consider that the institutional framework that is the object of our analysis has in reality changed the nature of the organisation. In particular, has created organs that express the international personality of the organisation.

107. BROWNLIE, *Principles of Public International Law*, *op. cit.*, p. 649.

108. Summits were the most important meetings where new relevant commitment could be defined and adopted. A series of “follow-up meetings” took place in Belgrade (4 October 1977-8 March 1978), Madrid (11 November 1980-9 September 1983) and Vienna (4 November 1986-19 January 1989). Inter-sessional meetings were also held with the aim of maintaining momentum between follow-up meetings.

109. For Schermers and Blokker it seems that the gradual “institutionalisation” of the CSCE and the change of the name make it an organisation, at least since the 1994 Budapest Declaration, see SCHERMERS and BLOKKER, *International Institutional Law*, *op. cit.*, p. 23.

When we approach the study of the organs and their powers we face a problem. The organs of the OSCE are not envisaged in a comprehensive document, due to the non-treaty based nature of the organisation. Organs and institutions are created by decisions adopted by Summits of Heads of State and Government. Therefore, it is necessary to look at those documents to identify their powers and rules of procedure in the decision-making process. The information provided by the OSCE<sup>110</sup> identifies several organs and institutions divided into three main categories:

1. Negotiating and decision-making bodies<sup>111</sup>;
2. Operational structures and institutions<sup>112</sup>;
3. OSCE related bodies<sup>113</sup>.

Without entering into much detail, we can mention two kinds of organs. The first set of organs, more political, is made up of the representatives of States. The second set, more operational, is made up by officers working for the organisation itself. Among the first type of organs we can mention the Chairman in Office (CiO), the Permanent Council (PC), the Ministerial Council (MC), the Senior Council (SC)<sup>114</sup>, and the Forum for Security Co-operation (FSC). Among the second group of institutions, we can include the Secretary-General (SG), the Office for Democratic Institutions and Human Rights (ODIHR), the OSCE Representative on Freedom of the Media (RFM), the Co-ordinator of OSCE Economic and Environmental Activities, and the High Commissioner for National Minorities (HCNM). The second group of organs receives the mandate from the main political organs, the first group,

110. OSCE website at <http://www.osce.org/about/13509.html>.

111. Summits/Ministerial Councils; Permanent Council; Forum for Security Co-operation; Economic Forum.

112. Chairman-in-Office; Troika; Personal Representatives of the Chairman-in-Office; OSCE Parliamentary Assembly; Office for Democratic Institutions and Human Rights (ODIHR); High Commissioner on National Minorities (HCNM); OSCE Representative on Freedom of the Media; Secretariat; Action against Terrorism Unit (ATU); Anti-Trafficking Assistance Unit; Conflict Prevention Centre (CPC); Office of the Co-ordinator of OSCE Economic and Environmental Activities

External Co-operation; Strategic Police Matters Unit (SPMU); Training Section; High-Level Planning Group; OSCE Assistance in Implementation of Bilateral Agreements; The OSCE Representative to the Latvian-Russian Joint Commission on Military Pensioners; The OSCE Representative to the Estonian Expert Commission on Military Pensioners.

113. Court of Conciliation and Arbitration; Joint Consultative Group; Open Skies Consultative Commission.

114. Since July 2006 the Senior Council has been dissolved and most of its functions have been transferred to the Permanent Council, see: OSCE, Decision No. 4/06, *OSCE Senior Council*, MC.DEC/4/06, 26 July 2006.

and act on behalf of the organisation in different areas within the OSCE mandate. A Parliamentary Assembly (PA)<sup>115</sup> was established in 1992, made up by representations of national parliaments. OSCE related bodies are supposed not to depend on the OSCE, as they were established by different means, in particular by treaties. They include the Joint Consultative Group<sup>116</sup>, the Open Skies Consultative Commission<sup>117</sup>, and the Court of Conciliation and Arbitration.

Organs of the OSCE can also be divided into individual and collective organs. The first category includes the CiO, the SG, the ODIHR, the HCNM, and the RFM, and special representatives of the CiO and SG. All the other organs are collective ones.

The distinction provided by the OSCE does not always coincide with the powers and “autonomy” of the mentioned organs. From the analysis of the powers and decision-making capacity, the bodies identified as negotiating and decision-making are not the only ones entitled to take decisions. For instance, a body like the Economic Forum, included in the first category, seems to have less powers and decision-making capacity than the ODIHR, or the HCNM, institutions which can activate mechanisms based on their own mandate, or provided to them by international agreements.

Different rules are applied by OSCE organs to take decisions. The main rule in decision making applied by collegial organs of the OSCE has been the rule of unanimity, usually expressed by consensus. This is not a problem as far as decision-making rules in international organisations are concerned. It merely requires the common will of states when decisions are taken. This is how most decisions in OSCE’s collective bodies are taken. For instance, the SG is “appointed” by the Ministerial Council. Nevertheless, the rule of unanimity was amended in 1991. It was soon after applied for the first and only time during the Yugoslav crisis in 1991<sup>118</sup>.

In the area of human dimension, decisions can be taken without the vote of the involved state. They include the Vienna Mechanism<sup>119</sup> and the Moscow

115. The 1991 Madrid Declaration defined the basic rules of procedure, working methods, size, mandate and distribution of votes of the Assembly.

116. Established in 1990, it is a body based in Vienna and dealing with questions relating to compliance with the provisions of the Treaty on Conventional Armed Forces in Europe, signed in Paris on 19 November 1990.

117. The Commission is based on the Treaty on Open Skies that was signed on 24 March 1992 in Helsinki, Finland. It entered into force on 1 January 2002.

118. See above notes 76 and 77.

119. Established in the Vienna Concluding Document of 1989, *Human Dimension of the CSCE*, Para. 1 to 4.



Mechanism<sup>120</sup> which can be activated either by OSCE States towards another State, or by a State to ask for advice in specific areas of the Human Dimension. In the field of minority rights the Moscow mechanism was envisaged to deal with crisis within States. The mechanism provides the possibility of sending a mission of independent experts or a rapporteur to a participating State to investigate the human rights situation. This decision can be taken without the consent of the concerned State, applying the rule of consensus minus one.

The Parliamentary Assembly's Rules of Procedures include the decision-making processes within the main bodies of the Assembly<sup>121</sup>. Most decision-making activities are by majority vote<sup>122</sup>. Decision-making at meetings of the Bureau (Rule 6.4) and the three General Committees (Rule 34.5) takes place by majority vote. The Standing Committee functions by consensus minus one<sup>123</sup>. Decisions by the PA take the form of recommendations<sup>124</sup>. A Final Declaration and a number of resolutions and recommendations are adopted each year at the Annual Session recommending actions to the organs and states of the OSCE. The Parliamentary Assembly every year elects by majority vote a President to chair its regular meetings and act as its high representative<sup>125</sup>.

Individual organs, such as the CiO, the SG, the HCNM have the power to take decisions individually, therefore they clearly express a decision that is not taken by the collectivity of states. This can happen when the CiO appoints a Special Envoy or Representative, or when the HCNM addresses the Permanent Council to deal with minority issues. Sometimes, these powers are shared by several organs, and imply a co-decision process. For instance, the RFM is "appointed in accordance with OSCE procedures by the Ministerial

120. Established at the last meeting of the Conference on the Human Dimension in Moscow in 1991 (Par. 1 to 16) and amended by the Fourth Meeting of the Council, Rome 30 November-1 December 1993 (Decisions of the fourth Council Meeting, Chapter IV, par. 5).

121. OSCE, Parliamentary Assembly, Rules of Procedure, 24 February 2005, available at <http://www.oscepa.org/admin/getbinary.asp?FileID=845>.

122. See Rule 5 (Election of Officers); Rules 28-32.

123. Rule 33(6).

124. Usually they relate to assess the implementation of OSCE objectives by participating States; discuss subjects addressed during meetings of the Ministerial Council and summit meetings of OSCE Heads of State and Government; develop and promote mechanisms for the prevention and resolution of conflicts; support the strengthening and consolidation of democratic institutions in OSCE participating States; contribute to the development of OSCE institutional structures and of relations and co-operation between existing OSCE institutions.

125. The President is assisted by nine elected Vice-Presidents and an elected Treasurer.

Council upon the recommendation of the Chairman-in-Office after consultation with the participating States”<sup>126</sup>. In other cases, the CiO can appoint Personal Representatives, as it did in December 2004 when three Personal Representatives to promote tolerance and non-discrimination were appointed.

Collegial organs of the OSCE are the Meetings of Heads of State and Government. They meet every few years, and decide general policies of the organisation. The Ministerial Council is conformed by Ministers of Foreign Affairs of the participating states. It is the main body dealing with policies of the organisation, and it meets annually. The Permanent Council is the main political body and decision making organ, conformed by permanent representatives of the participating states, meeting regularly in Vienna. One of the interesting aspects of the Permanent Council is the adoption of the budget of the organisation. Financing of the organisation is also a relevant aspect that shows the independence of the organisation from states. The budget is approved by the Permanent Council in the form of a decision binding on states<sup>127</sup>.

The leading institutional organs in the area of Human Dimension are the Office for Democratic Institutions and Human Rights (ODIHR), created in 1991, and the High Commissioner for National Minorities (HCNM) in 1992<sup>128</sup>. The ODIHR deals with four main areas: assistance of democratic processes, monitoring the implementation of OSCE Human Dimension in participating States, co-operation with intergovernmental and non-governmental organisations, and integration of the Human Dimension into the security activities of the OSCE<sup>129</sup>. The ODIHR has been particularly active in the electoral process in Bosnia<sup>130</sup> where it was endowed with quite pervasive powers<sup>131</sup>. The OSCE Mission in Bosnia Herzegovina controlled the Provisional Electoral Commission in charge of regulating the conduct of elections.

126. OSCE, Permanent Council, Mandate of the OSCE Representation on Freedom of the Media, Decision No. 193, 5 November 1997, para. 12.

127. For the recent budget see OSCE, Permanent Council, Decision No. 672, 12 May 2005. The Permanent Council in Vienna approved a 168.6 million Euros budget.

128. CSCE, 1992 Helsinki Summit, *The Challenges of Change*, Helsinki, 10 July 1992, Decisions, Chapter II, Paragraph 1.

129. The mandate of the ODIHR is included in several documents, in particular the 1990 Charter of Paris for a New Europe, the 1992 Helsinki Follow-up Documents, the 1993 Rome Council Meeting, and the 1994 Budapest Review Conference.

130. The General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, Annex 3, available at [http://www.ohr.int/dpa/default.asp?content\\_id=371](http://www.ohr.int/dpa/default.asp?content_id=371).

131. See SICA, M.: “The Role of the OSCE in the Former Yugoslavia After the Dayton Peace Agreement”, in BOTHE, M., RONZITTI, N. and ROSAS, A. (eds.), *The OSCE in the Maintenance of Peace and Security*, The Hague/London/Boston, Kluwer Law International, 1997.

It established rules for the registration of political parties, eligibility of candidates and voters, and rules for the conduct of the campaign. The OSCE also established an Election Appeals Sub-Commission to adjudicate complaints about the electoral process<sup>132</sup>. These actions were taken by decisions of the Special Representative and they could be identified as decisions of the OSCE and not of member states. The ODIHR is also involved in supervision of electoral processes in participating countries, and has elaborated codes of practices for member states in the area of democratic elections<sup>133</sup>. In 2005 the ODIHR decided, in consultation with the CiO, to send a team of human rights experts to Kyrgyzstan to interview people who had left Uzbekistan and with the aim of monitoring violent events which took place in Andijan<sup>134</sup>.

In the field of national minorities, the main role of the HCNM is to provide “an instrument of conflict prevention at the earliest possible stage”<sup>135</sup>. As already mentioned, the express consent by a State to the HCNM involvement in minorities’ issues concerning that State is not required. The HCNM can make recommendations concerning governmental policies and programs, but the terms of the mandate are quite vague and undetermined<sup>136</sup>. The HCNM cannot use “forcible” measures, and its recommendations are not binding. It is the HCNM who acts on its own initiative, but the HCNM is not completely autonomous to carry on its tasks. At the early stage the procedure involves confidential activities and consultations between the HCNM and the CiO<sup>137</sup>. The High Commissioner presents his reports and recommendations to the State concerned and to the political organs of the OSCE. Once the Permanent Council, and in exceptional cases the Senior Council, are officially involved in a specific case concerning minorities, the HCNM’s activities depend on decisions taken by those organs<sup>138</sup>. Nevertheless, it is stressed that important elements for the working of the organ are independence and impartiality.

132. Cox, M.: “The Dayton Agreement in Bosnia and Herzegovina: A Study of Implementation Strategies” (1998) LXIX BYBIL, pp. 201-243, in particular pp. 219-225.

133. See OSCE, ODIHR, *Existing Commitments for Democratic Elections in OSCE Participating States*, Warsaw, 2003.

134. See OSCE, ODIHR, *Preliminary Findings on the Events in Andijan, Uzbekistan, 13 May 2005*, Warsaw, 20 June 2005, available at [http://www.osce.org/documents/odihtr/2005/06/15233\\_en.pdf](http://www.osce.org/documents/odihtr/2005/06/15233_en.pdf).

135. CSCE, 1992 Helsinki Summit, *supra*, Paragraphs 2 and 3.

136. The mandate of the HCNM is included in the *Declaration and Decisions* of the 1992 Helsinki Summit.

137. CSCE, 1992 Helsinki Summit, *supra*, Paragraphs 13-22.

138. CSCE, 1992 Helsinki Summit, *Decisions*, Chapter II, Paragraph 16.

These elements clearly identify a more “autonomous” body to deal with the controversial issues related to minorities in Europe.

The Court of Conciliation and Arbitration has a quite special status<sup>139</sup>, as it should be considered an OSCE-related body rather than an OSCE institution as such<sup>140</sup>. The Court was established by a treaty, and not all OSCE participating States are parties to it<sup>141</sup>. The Court is based in Geneva and has a quite broad competence. In fact, Article 18(1) of the Statute establishes that “Any State party to this Convention may submit to a Conciliation Commission any dispute with another State party which has not been settled within a reasonable period of time through negotiation”<sup>142</sup>. The Court can be considered an autonomous body, as for the adoption of decisions it cannot be linked to the will of states. The Court has not started working yet, but it would apply rules of international law, and would adopt decisions that are necessarily expression of the Court.

#### 4.2. OSCE's Practice in the International Context

A second condition for determining the legal personality is the existence of external practices between the OSCE and other international subjects. These practices “may be based on explicit as well on implied competences”<sup>143</sup>. In the latter case, they can be defined as “implied external capacities” which constitute implied legal powers<sup>144</sup>. The competence of concluding treaties and agreements with other international subjects cannot be found in relevant documents, but it is based on practice in different areas of activity of the OSCE. Nevertheless, many links and forms of co-operation with international institutions and states have been developed in recent years<sup>145</sup>.

139. CSCE, Third Meeting of the Council, Decision on Peaceful Settlement of Disputes, *Convention on Conciliation and Arbitration within the CSCE*, Stockholm, December 1992 (Annex 2).

140. On the Court see CAFLISCH, L.: “The OSCE Court of Conciliation and Arbitration: Some Facts and Issues”, in BOTHE, RONZITTI and ROSAS, *The OSCE in the Maintenance of Peace and Security*, *op. cit.*, pp. 381-408.

141. There are presently 33 Member States (October 2005).

142. CSCE, Third Meeting of the Council, Decision on Peaceful Settlement of Disputes, *Convention on Conciliation and Arbitration within the CSCE*, Stockholm, December 1992 (Annex 2).

143. WESSEL: “Revisiting the International Legal Status of the EU”, *loc. cit.*, p. 527.

144. *Ibidem*, p. 533; DASHWOOD, A.: “Implied External Competence of the EC”, in KOSKENNIEMI, M. (ed.), *International Law Aspects of the European Union*, The Hague, Kluwer Law International, 1998, pp. 113-123.

145. For recent developments see OSCE, *Annual Report on OSCE Activities 2003*, available at [http://www.osce.org/publications/osce/2004/10/10575\\_26\\_en.pdf](http://www.osce.org/publications/osce/2004/10/10575_26_en.pdf), pp. 166-179.

In relation to other international organisations, the OSCE started developing this issue in the 1994 Budapest Summit, through a series of documents<sup>146</sup> which identified a more detailed set of principles and forms of co-operation. They were better defined in the 1999 Istanbul Summit, which envisaged the co-operation with other international organisations<sup>147</sup>. The operational aspects of the institutional co-operation were included in the Operational Document of the Platform for Co-operative Security<sup>148</sup>. The identified organisations explicitly include the United Nations and its agencies, and also a general reference to sub-regional groupings in the area of OSCE<sup>149</sup>. But the documents do not make any reference to specific agreements or treaty provisions for the establishment of co-operation.

A first example of international activity can be considered the admission of new participating States to the OSCE. This terminological oddity, instead of the more common use of the expression “member states”, can be explained by the origin of the OSCE, where states participated in the conferences and meetings. Despite this anomalous terminology, procedures exist for the admission of new states in the organisation. The procedure, established by practice consists in a letter of request of admission by the candidate state to the OSCE<sup>150</sup>. The Permanent Council decides by unanimity on the admission. This was the practice since 1991 when new states<sup>151</sup> were allowed to join the meetings with the founding states. The issue of membership became quite complex in the case of the Former Republic of Yugoslavia. Its suspension, mentioned before<sup>152</sup>, could be justified by the membership to an organisation, as the state was not expelled, but simply governmental representatives were banned from participation to OSCE meetings. This issue was even more complicated by the disintegration of Yugoslavia. New political entities had to apply (Croatia, Slovenia, Bosnia and Herzegovina, Former Yugoslavia Repub-

146. 1996 Lisbon Summit; 1997 Copenhagen Ministerial Council; 1999 Istanbul Summit Meeting.

147. 1999 Istanbul Summit Meeting, Part III, Paragraphs 12 and 13.

148. 1999 Istanbul Summit Meeting, Part III, pp. 43-45.

149. The OSCE also co-operates with intergovernmental organisations on a sub-regional basis. They include the Central European Initiative (CEI), the Council of Baltic Sea States (CBSS), the Black Sea Economic Co-operation Council (BSEC) and the Southeast Co-operative Initiative (SECI).

150. For the last admission see: OSCE, Ministerial Council Decision No. 2/06, *Accession of Montenegro to the OSCE*, MC.DEC/2/06, 21 June 2006.

151. Albania, Estonia, Latvia and Lithuania joined in 1991. In 1992 new independent states, Croatia, Slovenia and Bosnia and Herzegovina, emerging from the dissolution of the Yugoslavia joined the CSCE.

152. See above notes 76 and 77.

lic of Macedonia), and the problem was resolved with a new application by the Former Republic of Yugoslavia (Serbia and Montenegro). The issue of admission was decided by the Permanent Council in 2000<sup>153</sup>. This activity shows that participation is not limited to original states, and that new states have to apply for participation, or admission, to the OSCE. This participation is not limited to attendance of international meetings. Further obligations derive from membership. New members have to sign all major documents, formulating a political statement of compliance with the principles and rules of the organisation, and also contribute financially to the regular budget of the organisation.

Apart from the headquarters in Vienna and institutional offices in Copenhagen, Geneva, The Hague, Prague and Warsaw, the OSCE has several missions and country offices mainly in Eastern and Asian countries. Some of these offices have the structure of a diplomatic mission, while in the case of temporary missions –fact-finding and long-term– they work in the field for the application of the rules regarding the human dimension and the peaceful settlement of disputes. This was the case, for instance of the “Mission of Long Duration” established through a Memorandum of Understanding signed between the CSCE and the Federal Republic of Yugoslavia on 28 October 1992, for an initial period of six months. Similar action was taken by the so-called “OSCE Assistance Group” to Chechnya in March 1995. Furthermore, the organisation has participated in joint missions, such as the case of the Sanctions Assistance Missions (SAMs), with the EU, in the countries neighbouring Yugoslavia to supervise the applications of economic sanctions<sup>154</sup>.

The OSCE has also worked with other international organisations, such as in the peace mission in Bosnia and Herzegovina, where NATO, OSCE, UN and EU were involved under the Dayton Agreement and the London Peace Implementation Conference. In particular, under the Dayton Agreement, Annex 3, the OSCE was provided with the powers. Apart from adopting and implementing an election program for Bosnia, these measures included the 1996 negotiations for the resignation of the indicted war-criminal Radovan Karadzic from the chairmanship of the principal Serb party, the SDS<sup>155</sup>. In the

153. OSCE, Permanent Council, Decision No. 380, 10 November 2000.

154. UN, Letter from the Chairman of the Security Council Committee established pursuant to Resolution 724 (1991) concerning Yugoslavia addressed to the President of the Security Council, UN doc. S/1996/776, 24 September 1996.

155. OSCE, Permanent Council, Decision No. 380, 10 November 2000.

1996 Mission to the Republic of Croatia, both the ODIHR and the HCNM were asked by the Permanent Council to supervise the mission and to co-operate with other international organisations and non-governmental organisations<sup>156</sup>. Since 2003, the OSCE, with the United Nations Environment Programme (UNEP), the United Nations Development Programme (UNDP), and the North Atlantic Treaty Organisation (NATO), is a member of an international initiative on Environment and Security (ENVSEC)<sup>157</sup>.

A quite interesting issue, that cannot be further developed here, concerns the relationship between the EU and the OSCE. The European Commission took part in the negotiations of the Helsinki Final Act, even if it is not considered as a participating institution. At the time of ratification of the 1975 Helsinki Final Act, the Italian Prime Minister, Aldo Moro, issued a declaration by which he was signing the Act on its double function, as representative of the Italian government, and as President of the European Council, in the name of the European Communities<sup>158</sup>. Presidents of the Commission have also signed other documents, such as the Charter of Paris for a New Europe and the Charter for European Security. It is not clear if the EU should be a party to the Final Act, or if the signature only implied a political move to endorse and international support the new European institution<sup>159</sup>. In particular, the EU financially supports several OSCE programs, in particular election monitoring and human rights activities of the OSCE in Central and Eastern Europe<sup>160</sup>. Further contacts include representations in the respective headquarters, and regular meetings of high level representatives.

In Kosovo, on the basis of UN Security Council resolution 1244 of 1999<sup>161</sup>, an OSCE Mission in Kosovo was established, as a distinct component within the overall framework of the UN Interim Administration Mission in Kosovo (UNMIK). The OSCE Mission has taken the lead role in matters relating to institution, and democracy-building and human rights. Similar forms of OSCE/UN co-operation exist in Tajikistan and Georgia.

156. OSCE, Permanent Council, Decision, 65th Plenary Meeting, 18 April, 1996.

157. See <http://www.envsec.org/>.

158. Déclaration du Président en exercice du Conseil, M. Moro, faite le 30 juillet 1975, [http://europa.eu.int/comm/external\\_relations/osce/aldo\\_moro.pdf](http://europa.eu.int/comm/external_relations/osce/aldo_moro.pdf).

159. On the treaty-making capacity of the EU see Wessel: "Revisiting the International Legal Status of the EU", *loc. cit.*, pp. 527-533 and the cited literature.

160. See for instance EU, Council, *Joint Action of 30 April 1998 adopted by the Council on the basis of Article J.3 of the Treaty on European Union, concerning support for the electoral process in Bosnia and Herzegovina (98/302/CFSP)*, *Official Journal of the European Communities*, 9 May 1998.

161. UN SC Resolution 1244, 10 June 1999.

Forms of international representation should also be mentioned as a form of recognition of the international status of the OSCE. One of these forms includes its admission under the status of observer to the United Nations<sup>162</sup>. The UN and the OSCE have also defined a “Framework for Cooperation and Coordination” in May 1993<sup>163</sup>. The OSCE is involved in other forms of inter-institutional co-operation, such as the Tripartite High-Level Meetings between the respective Chairmen and Secretaries General of the OSCE and the Council of Europe, and the Director of the United Nations Office at Geneva, and the Bilateral (“2 + 2”) High-level Meetings held annually (since 1993) between the respective Chairmen and Secretaries General of the OSCE and the Council of Europe. Since 2003, the OSCE also takes part in the Security Council meetings with other regional organizations. Similarly, there are Council of Europe–OSCE meeting at senior official level. Meetings are also organised at the level of respective Parliamentary Assemblies.

Many international activities are endowed to a sort of diarchy conformed by the SG and the CiO. The SG derives his authority from the collective decisions of the participating States, and mainly deals with the administrative management of the organisation, but he acts under the guidance of the Chairman-in-Office (CiO). This last organ is mainly a political one, as it is rotated annually among the Ministers of Foreign Affairs of each participating country. In this division of powers, it is the CiO who actually represents the OSCE in the international arena.

The Environment and Security Initiative (ENVSEC) was set up in 2002 by OSCE, UNEP and UNDP with the aim of identifying, together with governmental representatives and NGOs, environmental issues that are a threat to stability and peace. Since 2004, NATO has become associated with ENVSEC. ENVSEC is governed by a Management Board, which consists of representatives of the four partner agencies.

Most of these structure and institutions act on the basis of a mandate, and develop their activities separated by States that endorsed them. These organs employ permanent international staff, amounting to about one thousand people recruited internationally<sup>164</sup>. Therefore, it is reasonable to conclude that a general structure with internationally recruited personnel exists. From the variety of examples mentioned, it should be clear that the OSCE has a quite

162. UN GA Resolution 48/5, 22 October 1993.

163. UN Doc. A/48/185, 26 May 1993.

164. See OSCE, *Annual Report on OSCE Activities 2003*, p. 182 available online at [http://www.osce.org/documents/sg/2004/05/2677\\_en.pdf](http://www.osce.org/documents/sg/2004/05/2677_en.pdf).



relevant set of organs and institutions that make the organisation work on a regular basis, and that can take decisions without calling for a meeting of the participating States whenever a decision should be taken.

In September 2005, the OSCE broke new ground when, for the first time in its history, the Organization sent an election team to one of its Partners for Co-operation, Afghanistan.

#### 4.3. *Privileges and Immunities*

One of the main problems concerns the international position of the OSCE as an institution and its personnel. This is not a secondary issue, and it is strictly related to the problems under discussion in this article. Schermers and Blokker affirm that “In the absence of treaty making capacity of the organisation, its members could not conclude proper seat agreements with the OSCE concerning the status, privileges and immunities of several of its organs, and national laws have been adopted to at least provide for some arrangement”<sup>165</sup>. But this solution may be not adequate for an organisation that acts internationally, in particular in situations of tension and danger, where its personnel are sent to deal with cease-fire and negotiation purposes. OSCE staff has not the legal protection that is generally attributed to international officers when on missions, unless they are operating in those countries that have unilaterally granted such privileges and immunities. Despite the fact that host States of OSCE institutions have granted immunities to the OSCE, they are based on national legal systems, and therefore, are not applicable when officers are engaged in international missions.

In 1993 the Council adopted a decision regarding legal capacity, immunities, and privileges of the organisation and its officers<sup>166</sup>. The 1993 Ministerial Council meeting in Rome on the issue of privileges and immunities concluded that “legal capacity and privileges and immunities should be granted to the OSCE institutions, though, not through a treaty, but under national law subject to the constitutional requirements of each participating State” (see the 1993 Rome Council decision-Annex A). Between 1994 and 1998, only fourteen participating States replied to the question as to whether they had implemented or intended to implement the Rome Council decision,

165. SCHERMERS and BLOKKER, *International Institutional Law, op. cit.*, pp. 991-992.

166. CSCE, *Legal Capacity and Privileges and Immunities.*, *loc. cit.*, above note 104 and documents cited there.

and only ten participating States have granted privileges and immunities to the CSCE/OSCE institutions<sup>167</sup>.

The discussion went on to propose a Convention or a Model Bilateral Agreement on the Legal Capacity and Privileges and Immunities of the OSCE. As a possible alternative, a short convention was proposed including the relevant provisions of the 1993 Rome Ministerial decision with some extensions, and which would be ratified or accepted either by all or by a certain number of participating States<sup>168</sup>. If we look at the proposal, it is actually drafted on the basis of the 1961 Vienna Convention on the Diplomatic Relations, and the content of the privileges and immunities defined follows the same wording. For instance, OSCE official would enjoy immunity from personal arrest or detention and from legal process, in respect of all acts performed by them in the exercise of their functions, even after the termination of their mission; inviolability for all papers and documents; exemption from national service obligations; exemption in respect of themselves and their spouses and relatives dependent on them from immigration restrictions and aliens registration formalities as accorded to diplomatic agents of foreign States; etc.

## 5. CONCLUSIONS

In the present analysis we have tried to present a possible solution to the complex and unsettled definition concerning the legal nature and international status of the OSCE. We consider that the application of the two concepts of soft-law and customary law, jointly used, could provide a very powerful tool for the assessment of the legal status of the OSCE in the international legal system.

Based on the actual activity and structure of the OSCE, the present Article has shown that the organisation matches the main criteria required by

167. Four are host countries of OSCE institutions: Austria, the Czech Republic, Netherlands, and Poland. The six other are: Denmark, Germany, Hungary, Italy, Sweden, and the United States. Three participating States replied to the request in the negative: Belgium, Finland and the United Kingdom. See OSCE, Permanent Council, *Report on OSCE Legal Capacity and on Privileges and Immunities to the Ministerial Council*, Decision No. 383, PC.JOUR/383, 26 November 2000.

168. For a draft text of the convention see OSCE, *Convention on the Legal Capacity of the OSCE and its Privileges and Immunities*, Doc. CIO.GAL/129/00, 22 November 2000, available at <http://www.osce.org/docs/english/pc/2000/decision/pced383.htm#Anchor-60111> (consulted on 2 February 2005).

general international law related to international organisations. Under the rules of international customary law the constitution of the OSCE would be conformed by the relevant provisions contained in the basic documents adopted by participating States in Summits. This conclusion implies that the OSCE would be a proper international organisation<sup>169</sup>, with international legal personality, subject of and to international law<sup>170</sup>. This conclusion may have several relevant consequences. The organisation and its organs are bound by general international law, can act under international law and, what may be relevant, may be responsible internationally. The proposed conclusion might have positive outcomes not only in the legal domain, but also in the general activity of the OSCE is facing to act properly in the international scenario, providing privileges and immunities to its organs and officers. Furthermore, it would put the OSCE on the same international legal footing of other international organisations, such as the EU and NATO, which are in some way eroding specific areas of OSCE's competence, using their legally binding founding instruments, and developing new ones. The OSCE could also more easily enter into agreements with other States and international organisations, such as the UN, facilitating and improving the role and the activities that the organisation deserves in the broad area of security in the pan-European context.

169. On the same position see Sands and Klein, *Bowett's Law of International Institutions*, *op. cit.*, p. 201.

170. Peter Kooijmans rejects this conclusion considering that the OSCE "is not treaty-based and therefore has no international personality", KOOLJMAN: "The Code and International Law", *loc. cit.*, p. 33.

