

# Revisiting Questions of Organisationhood, Legal Personality and Membership in the OSCE: The Interplay Between Law, Politics and Practice

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## 1. Introduction: The OSCE's Current Legal Status

More than forty years after the 1975 Helsinki Final Act was adopted by the Conference on Security and Co-operation in Europe (CSCE), and more than twenty years after transforming this conference system into the Organization for Security and Co-operation in Europe (OSCE), the OSCE still struggles with its legal status. Indeed, since the adoption of the so-called Budapest Declaration in 1994, there is no disagreement as to the fact that the OSCE is an international organisation (IO). In that Budapest Declaration, the participating States agreed to the following:

The new era of security and co-operation in Europe has led to a fundamental change in the CSCE and to a dramatic growth in its role in shaping our common security area. To reflect this the CSCE will henceforth be known as the Organization for Security and Co-operation in Europe (OSCE). The change in name will be effective on 1 January 1995. As of this date, all references to the CSCE will henceforth be considered as references to the OSCE.<sup>1</sup>

This decision was a logical consequence of an institutionalisation process that had already resulted in the creation of permanent organs.<sup>2</sup> As of 1995 these organs replaced the former institutional structure of the CSCE, which currently consists of: Summits (occasional meetings of Heads of State or Government of the fifty-seven OSCE participating States that set priorities at the highest political level); a Ministerial Council (convened, as a rule, to review OSCE activities and to make appropriate decisions in the years when no Summit takes place); a Permanent Council (the day-to-day decision-making body, convening on a weekly basis in Vienna). The OSCE structures furthermore include a Forum for Security Co-operation (to increase military security and stability in Europe; it covers some of the most fundamental politico-military

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<sup>1</sup> CSCE, *Towards A Genuine Partnership in A New Era*, Budapest Decisions attached to the Budapest Document, 21 December 1994, available at: [www.osce.org/mc/39554?download=true](http://www.osce.org/mc/39554?download=true).

<sup>2</sup> For more on this process, see, for instance, the introduction by Bloed, 'Two Decades of the CSCE Process' 1993, 1–117; Odello, 'The Developing Legal Status of the Organisation for Security and Co-operation in Europe' 2006, 351–393; Schlager, 'The Procedural Framework of the CSCE' 1991, 221–237; Szafarz, 'CSCE: An International Organization in Statu Nacsendi?' 1992, 15–21; Berger, 'OSCE and International Law' 1996, 37–47.

agreements of the OSCE participating States); and a Secretariat (to provide operational support to the Organization under the direction of the Secretary General; it is based in Vienna and assisted by the Office in Prague). Finally, there is the OSCE Parliamentary Assembly (an autonomous OSCE institution comprised of 323 parliamentarians headquartered in Copenhagen with its own Secretary General and International Secretariat; it provides a forum for parliamentary diplomacy and debate, leads election observation missions and strengthens international cooperation to uphold commitments on political, security, economic, environmental and human rights issues).

Furthermore, three special bodies ('institutions' or 'executive structures', in OSCE parlance) work in the area of human rights: the High Commissioner on National Minorities (HCNM) in The Hague, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) in Warsaw and the OSCE Representative on Freedom of the Media in Vienna. Despite its name, the OSCE Court of Conciliation and Arbitration is not formally part of the OSCE's institutional structure but based on a separate Convention.<sup>3</sup> The Court is a non-permanent body and creates conciliation commissions and arbitral tribunals on an ad hoc basis. In addition, a number of OSCE-related bodies are linked to the Organization.<sup>4</sup> The institutional structure of the OSCE is thus quite similar to other IOs: it has policy-making organs and a Secretariat (which forms the backbone of most IOs), as well as a number of other organs and bodies. The OSCE Chairmanship is held for one calendar year by the OSCE participating State designated as such by a decision of the Ministerial Council. The function of the Chairperson-in-Office (CiO) is exercised by the Minister of Foreign Affairs of that State.

However, while legal personality has been conferred onto nearly all IOs, either explicitly or implicitly, this is not the case for the OSCE. The 1994 Budapest Document was categorical: '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.'<sup>5</sup> This sentence was particularly important since no consensus could be reached on expressly granting international legal personality to the OSCE. In the 1993 Rome Decision, Ministers merely recommended that participating States grant (and harmonise) *national* legal capacities and privileges and immunities to particular institutions but not to the OSCE as such.<sup>6</sup> And fourteen years later, in 2007, a Convention drafted to regulate the *international* legal personality, legal capacity and privileges and immunities of the OSCE still proved a bridge too far.<sup>7</sup> When the Swiss Chairmanship revisited the issue in 2014, they noted the following:

While the general agreement on the contents of the 2007 Draft Convention has never been

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<sup>3</sup> Convention on Conciliation and Arbitration within the OSCE, adopted by the Council of Ministers at its meeting held on 15 December 1992 in Stockholm, as part of the Decision on Peaceful Settlement of Disputes, 15 December 1992, available at: [www.osce.org/cca/111409?download=true](http://www.osce.org/cca/111409?download=true).

<sup>4</sup> See OSCE, OSCE-related bodies, 2017, available at: [www.osce.org/who/108304](http://www.osce.org/who/108304).

<sup>5</sup> See CSCE, Budapest Decision, 1994 (n. 1), point 29.

<sup>6</sup> See CSCE, Fourth Meeting of the Council, CSCE and the New Europe – Our Security is Indivisible, Decisions of the Rome Council Meeting, no. CSCE/4-C/Dec.2, 1 December 1993.

<sup>7</sup> OSCE, Fifteenth Meeting of the Ministerial Council, 2007 draft Convention on the international legal personality, legal capacity, and privileges and immunities of the OSCE, Annex to MC.DD/28/07, 29 November 2007, 65–77.

challenged, the Convention has not been adopted because of three footnotes, inserted by some participating States, predicating the adoption of the draft on the conclusion of an OSCE Constituent Document. Since then it has become clear that for a number of participating States the adoption of the 2007 Draft Convention was linked to the issue of an OSCE Constituent Document, while the start of discussion on such an OSCE Constituent Document could not attain consensus.<sup>8</sup>

On the basis of a number of meetings of the so-called Informal Working Group on Strengthening the Legal Framework of the OSCE (IWG), the Swiss Chairmanship concluded that ‘the strengthening of the legal framework of the OSCE is a common goal shared by all participating States but divergences exist as to the way to achieve this goal’.<sup>9</sup> The main controversy (related to the footnotes referred to in the Swiss statement) centres around a disagreement between the Russian Federation and the United States of America.<sup>10</sup> The Russian Federation takes the view that the draft Convention can only be adopted if the OSCE is given a treaty basis – something the 1975 Helsinki Final Act was not meant to be. Or, as the opinion is referred to informally: *No convention without a charter*.<sup>11</sup> The Russian proposal is unacceptable to the USA, which was originally against the idea of elaborating a convention. In 2006, Washington finally accepted this idea but remains unwilling to go further and adopt more than just the Convention. By concluding a charter, as a constituent instrument of the OSCE, the USA fears that the Organization would lose its flexibility, which is regarded as the OSCE’s main strength.<sup>12</sup>

This leaves us with an international entity whose creators deliberately chose to move from a ‘conference’ to an ‘organisation’ but still cannot reach agreement on the Organization’s international legal status and continue to emphasise their being participating States of the OSCE and not member states. These participating States have agreed to give the OSCE legal capacities in their domestic legal orders but not at the international level. So far they have been unwilling to

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<sup>8</sup> OSCE, Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2014, OSCE Doc. MC.GAL/5/14, 2 December 2014, para. 1.

<sup>9</sup> *Ibid.*, para. 14.

<sup>10</sup> For a more extensive discussion on the views of the participating States on the Organization’s legal status, see the chapter by Helmut Tichy in this Volume; Tichy/Köhler, ‘Legal Personality or Not – The Recent Attempts to Improve the Status of the OSCE’ 2008, 455–478.

<sup>11</sup> Cf. Delegation of the Russian Federation to the OSCE, ‘Interpretative statement under Paragraph IV.1(A)6 of the OSCE Rules of Procedure to the Ministerial Council Decision No. 16/06 of December 2006’ (The decision established the informal working group that subsequently prepared the 2007 draft Convention), 5 December 2006, Attachment: ‘While it has joined the consensus on the Ministerial Council decision on the legal status and privileges and immunities of the OSCE, the Russian delegation continues to insist that the only way of settling this matter in accordance with the norms of international law is to devise a founding OSCE document in the form of a charter or statute. Without a charter, the OSCE cannot be regarded as a fully-fledged international organization. We believe it is necessary to proceed from the recommendation made in that connection in the report of the Panel of Eminent Persons, pursuant to which the participating States should devise a concise statute or charter of the OSCE containing its basic goals and principles along with reference to existing commitments and the structure of its main decision-making bodies. In any case, the entry into force of a convention on privileges and immunities, if and when there is agreement on a draft, will be possible only in conjunction with the entry into force of a statute or charter of the OSCE.’ Available at: [www.osce.org/mc/23203?download=true](http://www.osce.org/mc/23203?download=true).

<sup>12</sup> See, e.g., US Secretary of State Clinton, ‘Comment at the OSCE Ministerial Council First Plenary Session’, 6 December 2012, available at: [https://osce.usmission.gov/dec\\_6\\_12\\_dublin\\_mc1/](https://osce.usmission.gov/dec_6_12_dublin_mc1/).

endow the OSCE with the attributes normally associated with IOs and thereby deny it the benefits of what is sometimes termed ‘organisationhood’.<sup>13</sup>

An underlying question in the present chapter is to what extent the OSCE and its participating States can escape the application of international rules by simply using different terms (participating States, non-binding decisions<sup>14</sup>) and by denying the international legal existence of the Organization. Or, to put it bluntly: to what extent is the OSCE living in a fantasy world where using a certain terminology has become more important than facing legal realities? As we will see, part of the answer is found in the interplay between law, politics and practice. In this interplay, ‘law’ stands for a number of rules that simply cannot be ignored in the relations between the Organization and its founders, as well as with third states; ‘politics’ represents the policy choices related to what the majority of the participating States prefer the role of the OSCE to be; and ‘practice’ corresponds to the extent to which pragmatic choices sometimes have to be found to overcome those legal or political hurdles that prevent the Organization from functioning day-to-day.

The EU experienced something similar. While the legal personality of its predecessors, the European Communities, had never been an issue, in both the 1992 Maastricht and the 1997 Amsterdam Treaties member states could not reach an agreement on an express reference to the legal status of the EU. Yet, in time the EU was recognised by third states as a legal partner and simply began concluding international agreements.<sup>15</sup> Indeed, nothing bad came of it, which in turn paved the way for an acknowledgment of the Union’s legal personality in the 2007 Lisbon Treaty.<sup>16</sup>

As that Treaty also resulted in a full succession of the European Community by the EU, there was no way to escape the international legal personality of the EU. This is not to say that certain member states (the UK in particular) were not still nervous about this process, which resulted in the adoption of Declaration No. 24 (annexed to the Treaty of Lisbon): ‘The Conference confirms that the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties.’<sup>17</sup> While, legally, this Declaration adds nothing new to the existing provisions, it was politically important to underline that the acknowledgment of legal personality does not allow the EU to act beyond what the members had agreed on.<sup>18</sup> For the other member states this was a small price to pay.

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<sup>13</sup> See, e.g., Klabbers, *An Introduction to International Organizations Law* 2015, 12.

<sup>14</sup> Cf. ICJ, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment of 15 February 1995, ICJ Reports 1995, 6.

<sup>15</sup> Wessel, ‘The International Legal Status of the European Union’ 1997, 109–129; Wessel, ‘Revisiting the International Legal Status of the EU’ 2000, 507–537.

<sup>16</sup> See Art. 47 Treaty on European Union 7 February 1992, 1759 UNTS 3: ‘The Union shall have legal personality.’

<sup>17</sup> Declaration concerning the legal personality of the European Union (No. 24), Annexed to The Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007.

<sup>18</sup> See in particular Art. 5(2) Treaty on the Functioning of the European Union 13 December 2007, Official Journal of the European Union, C 202: ‘Under the principle of conferral, the Union shall act only

While explicit references to the international legal status of an IO in its constituent document are not necessary (the UN being a prime example), the acceptance of legal personality does make sense from both a conceptual and a practical perspective. Moreover, it is the practical functioning of an organisation that can suffer from a lack of legal clarity. As other chapters in this volume address these issues more extensively, suffice it to say that uncertainty in the legal status of the OSCE is hindering its effectiveness and efficiency, damaging efforts to fulfil its mandates, generating uncertainty in relation to its international responsibility and leading to additional expenditures and legal risk.<sup>19</sup>

The purpose of the present chapter is to revisit a number of the classical aspects of ‘organisationhood’, and to assess the extent to which the institutionalisation of international cooperation in the case of the OSCE has led to the creation of an international entity that should be understood as being distinct from the states participating in it.<sup>20</sup> In addition, it will point to the (often decisive) interplay between law, politics and practice in this context.

## 2. Criteria for ‘Organisationhood’

### 2.1 *The Constitutive Act*

Whether the OSCE really is an IO depends, of course, on one’s definitions. An authoritative definition of ‘international organisation’ comes from the UN International Law Commission’s (ILC) 2011 Articles on the Responsibility of International Organizations (ARIO): an IO is ‘an organisation established by a treaty or other instrument governed by international law and possessing its own international legal personality’.<sup>21</sup> Under this definition, the OSCE would not be an IO.<sup>22</sup> It was not established by a treaty or other instrument governed by international law,

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within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.’ To make sure no one would miss this, an additional Declaration (No. 18) was adopted, which simply repeated it: ‘The Conference underlines that, in accordance with the system of division of competences between the Union and the Member States as provided for in the Treaty on European Union and the Treaty on the Functioning of the European Union, competences not conferred upon the Union in the Treaties remain with the Member States.’

<sup>19</sup> See, in particular, the chapters by Lisa Tabassi, Lorenzo Gasbarri and Carolyn Moser in this volume.

<sup>20</sup> For those with knowledge of Dutch, see Dekker/Wessel, ‘Van CVSE naar OVSE’ 2002, 425–438.

<sup>21</sup> United Nations International Law Commission, Draft Articles on the Responsibility of International Organizations, A/66/10, 9 November 2011, para. 87. See also the special Forum on this topic in *International Organizations Law Review* 9 (2012), 1 et seq., as well as several other contributions to other issues of this journal.

<sup>22</sup> It is interesting to note that the OSCE objected to the reference made to the OSCE in the initial ILC comments on the definition of an IO (see United Nations General Assembly, Responsibility of International Organizations: Comments and observations received from international organizations A/CN.4/637 14 February 2011, 18: ‘the Commission appears to consider that OSCE, though not established by treaty, fulfils the two criteria provided for in draft article 2, subparagraph (a), defining international organizations. For the time being, there is no consensus among the OSCE participating States that OSCE should fulfil either of the two listed conditions: whether OSCE possesses its own legal personality, or whether the founding documents of OSCE (in the first place the Helsinki Final Act and the Charter of Paris for a New Europe) are governed by international law. These issues are currently

and there has been no agreement on its international legal personality (for the examination of this second criterion, see further below, Section 2.2). However, this ILC definition was only given for the purpose of these Responsibility Articles and does not claim to have any broader scope.

Leaving the ILC definition aside, doctrine generally regards the OSCE as an IO. One textbook even states: ‘the OSCE now qualifies as a full-fledged international organisation’.<sup>23</sup> While other textbooks also seem to regard the OSCE as an IO, some question whether it qualifies as a *full-fledged* organisation because it lacks a treaty basis and international legal personality. This is illustrated by the following references to the OSCE:

- ‘Organizations such as the Organization for Security and Co-operation in Europe (OSCE), Asia-Pacific Economic Cooperation (APEC), the Arctic Council and the Wassenaar Arrangement are based on some kind of document, but it remains unclear whether they are all to be regarded as full-blown organizations.’<sup>24</sup>
- The OSCE ‘n’est pas encore, dans son ensemble, personnifiée ou est fictivement tenue pour un sujet de droit international’.<sup>25</sup>
- ‘[W]ithout a treaty, establishing clearly the organisation’s legal autonomy from member States, it is difficult to ascribe to it international legal personality.’<sup>26</sup>
- ‘Irrespective of this complex institutional structure, which, in fact, resembles very much that of traditional International Organisations, the OSCE is still considered to lack international legal personality because it is not based on a legally binding international treaty. However, it is not inconceivable that the OSCE could acquire international legal personality if it acts in its own name and is respected as an independent actor by the international community.’<sup>27</sup>
- ‘Internationale Organisation aufgrund von soft law.’<sup>28</sup>
- An international organisation ‘dont l’acte constitutive n’est pas un traité’.<sup>29</sup>

In practice also the OSCE is generally seen as an IO, or indeed something very close to it. For all practical purposes, wherever the OSCE is present, states and IOs have usually been able to work out arrangements similar to those in place for other IOs. Examples include:

- A law adopted in the Netherlands in 2002 concerning the OSCE’s High Commissioner on National Minorities (based in The Hague): ‘For the purpose of this

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under discussion by the deliberative and decision-making bodies of OSCE, and the OSCE Secretariat stands ready to inform the International Law Commission on the progress or finalization of these deliberations.’ The reference to the OSCE was removed in the final text of the ILC Draft Articles on the Responsibility of International Organizations, 9 November 2011(n. 21), para. 74–75.

<sup>23</sup> Sands/Klein, *Bowett’s Law of International Institutions* 2009, 203.

<sup>24</sup> J. Klabbbers, *An Introduction to International Organizations Law* 2015, (n. 14), 12 (footnotes omitted).

<sup>25</sup> Lagrange/Sorel, *Droit des organisations internationales* 2013, 55. Translation by the authors: The OSCE ‘is not yet, as a whole, personified or is fictitiously held for a subject of international law’.

<sup>26</sup>White, *The Law of International Organisations* 2005, 53.

<sup>27</sup> Ruffert/Walter, *Institutionalised International Law* 2015, 217.

<sup>28</sup> Seidl-Hohenveldern, ‘Internationale Organisationen aufgrund von soft law’, 1995, 229–239. Translation by the authors: an ‘international organisation on the basis of soft law’.

<sup>29</sup> David, *Droit des Organisations Internationales* 2016, 30. Translation by the authors: An international organisation, despite the fact that the constitutive act is not a treaty.

law, the OSCE is regarded as equal to a public international organisation of which the High Commissioner is a part. The privileges and immunities included in this law will be applied in the same way as those given to other IOs based in the Netherlands.<sup>30</sup> The substance of this law is similar to the substance of headquarters agreements concluded with the more than thirty IOs based in the Netherlands.

- A number of IOs, such as the UN, the EU and the Council of Europe cooperate closely with the OSCE. The features of such cooperation are similar to those governing cooperation with other IOs.<sup>31</sup>

The question then is to what extent the OSCE remains unique. Indeed, there have been several other cases in which a transformation took place from a conference, or some other framework for cooperation, to an IO (with legal personality). A well-known example is the General Agreement on Tariffs and Trade (GATT). Created in 1947 as an executive agreement, the GATT went through a long process of institutionalisation. The question of it being an IO with legal personality was not deemed very important in practice. One of the former directors of the GATT's legal affairs division once observed: 'jurists may differ on the question whether the GATT is also an IO in a formal legal sense. The administrators of that institution are as fascinated by that issue as birds are by ornithology. The fact that counts for them is that the GATT has been acting consistently as an entity legally separate from its contracting parties and has been treated as having legal capacity.'<sup>32</sup> This will no doubt sound familiar to OSCE staff members who, regardless of legal academic debates, have no choice but to solve emerging legal issues on a pragmatic basis.<sup>33</sup> Nevertheless, in the 1990s it was deemed necessary to provide the GATT with an explicit legal footing and so it was transformed by a treaty into the World Trade Organization (WTO).<sup>34</sup>

A more recent and less well-known example relates to the International Commission on Missing Persons (ICMP), created in 1996 at the initiative of the USA to assist families in locating and identifying the many missing persons as a result of the war in the former Yugoslavia.<sup>35</sup> The ICMP was not at that time created as an IO. However, in practice, a gradual process of institutionalisation took place. In 1998, the ICMP concluded a headquarters agreement with Bosnia and Herzegovina, which refers to the Commission as something 'comparable to an international organisation'. Soon the ICMP's expertise, for instance on DNA, was also needed in other parts of the world when mass graves were unearthed or corpses had to be identified, as was the case in countries like Iraq and Libya, or in South East Asia after the December 2004 tsunami. But outside the region for which it was originally created, the ICMP experienced practical

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<sup>30</sup> Netherlands, Wet van 31 oktober 2002, houdende bepalingen inzake rechtspersoonlijkheid, privileges en immuniteten van de Hoge Commissaris inzake Nationale Minderheden (Wet HCNM), (translated from the original), 31 October 2002, Art. 2.2, available at: <http://wetten.overheid.nl/BWBR0014169/2003-01-01>.

<sup>31</sup> See also the chapter by Boisson de Chazournes & Gadkowski in this volume.

<sup>32</sup> Roessler, 'The Agreement Establishing the World Trade Organization' 1995, 69.

<sup>33</sup> See also the chapter by Lisa Tabassi in this volume.

<sup>34</sup> See Jackson, *Restructuring the GATT System* 1990; and Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS, 154.

<sup>35</sup> What follows relating to the ICMP is largely reproduced from Schermers/Blokker, *International Institutional Law* 2011, 34.

difficulties due to its lack of legal status. It could not open bank accounts and its staff could not get adequate legal protection. It took years of consultations to overcome resistance to reorganise it into a formal IO. In 2014, the Commission was finally transformed by an agreement into a formal organisation having legal personality.<sup>36</sup>

One may argue that in comparison to these and other examples, the OSCE is indeed unique in that it has so far not been possible to reach a consensus on its legal status. However, in other cases in which similar institutionalisation processes were discussed, it was deliberately decided that a particular conference or framework should not be transformed into an IO having legal personality. For example, a few years ago a discussion took place within the G20 about the creation of a permanent G20 Secretariat. This proposal was rejected in 2011. It was concluded that the G20 is ‘a Leader-led and informal group and it should remain so’.<sup>37</sup> A slightly different example is the Arctic Council. The idea to set it up as an IO was rejected in the 1990s. It is seen, instead, as a ‘Forum’. However, in recent years it has undergone a degree of institutionalisation: a permanent Secretariat has been created, based in Tromsø (Norway), and a headquarters agreement has been concluded between Norway and said Secretariat (2013).<sup>38</sup> Indeed, in the case of the OSCE, the situation has been largely left open. While the term ‘Organization’ became the formal denomination for the entity and though legal capacities and privileges and immunities have been regulated in many of the domestic legal orders of the participating States, the 2007 Convention is still awaiting adoption.

## 2.2 *International Legal Personality and the OSCE*

### 2.2.1 A Demystification of Legal Personality

As the express acknowledgment of legal personality seems to be the main obstacle in furthering the process within the OSCE to accept its separate legal status, this section will shortly revisit its key characteristics and perhaps ‘demystify’ the notion somewhat.<sup>39</sup> Does the acknowledgement of legal personality really lead to what has been termed the ‘Frankenstein problem’?<sup>40</sup> It is a truism that legal personality is a key notion in international institutional law and has been addressed abundantly in the relevant academic literature. The main purpose of the present section, therefore, is to remind us of its key characteristics.<sup>41</sup>

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<sup>36</sup> Agreement on the status and functions of the International Commission on Missing Persons, 15 December 2014, Tractatenblad (Dutch Treaty Series) 2014, No. 219.

<sup>37</sup> G20 Information Centre, ‘Cannes Summit Final Declaration’, 2011, available at: [www.g20.utoronto.ca/2011/2011-cannes-declaration-111104-en.html](http://www.g20.utoronto.ca/2011/2011-cannes-declaration-111104-en.html), para. 91.

<sup>38</sup> See Takei, ‘The Role of the Arctic Council from an International Law Perspective’ 2015, 353–355; Takei, ‘Are the Polar Regions Converging?’ 2012, 363–378. For more in general about governance in the Arctic, see Jakobson/Melvin (eds), *The New Arctic Governance* 2016.

<sup>39</sup> This section is largely reproduced from Wessel, ‘Reparation for Injuries Suffered in the Service of the United Nations’ 2016, 11–18.

<sup>40</sup> Guzman, ‘International Organizations and the Frankenstein Problem’ 2013, 999–1025; the Frankenstein metaphor was previously used by others, in particular Klabbers, *An Introduction to International Organizations Law* 2015 (n.14), and Alvarez, *International Organizations as Law-makers* 2005, 585.

<sup>41</sup> For some examples (OF WHAT), see the subsequent references in this section. Cf. also the chapter by Cedric Ryngaert in this Volume.



In an international legal system that was set up around states, it is unsurprising that the question of the international legal status of IOs persists, both in legal doctrinal debates and in judicial proceedings. The question of the legal status of IOs is connected to their coming of age as autonomous legal subjects. After all, it is only by accepting the distinction between the organisation and its members that the rights and duties of IOs emerge.

At the same time, it is the very tension between the organisation and its members that seems to underlie most of the debates in international institutional law, and textbooks often refer to the Janus-faced nature of IOs: they are created by and composed of states, while at the same time require a certain autonomy;<sup>42</sup> in order for states to become *members*, there needs to be something for them to join; states make the rules from which IOs draw their competences, though in turn IOs may be created to make rules to limit the freedom of the self-same states. IOs, therefore, are both creations and creators. For some IOs it is true that they have found their place in global governance, and are even considered ‘autonomous actors’, following an agenda that is no longer fully defined by their member states (hence, the Frankenstein problem).<sup>43</sup> There should be no doubt that these elements play a role in – particularly US – hesitance to accept a separate legal status of the OSCE under international law.

Yet, the legal status question concerns an organisation’s subjectivity under international law; it has to do with the entity’s legal *existence* and does not necessarily define its concrete *legal capacities* or *political powers*. Once legal existence can be established, one may say that an IO enjoys legal personality: it can have legal rights and duties (or at least one right or duty) of its own. Literature on the legal personality of IOs is abundant and the classic debates never seem to reach a fully unified conclusion. Can IOs exist without legal personality, or is legal personality a (or perhaps *the*) feature that distinguishes them from a more loosely organised international conference? Can IOs have a ‘partial’ legal personality, or is their partiality related only to their competences? Perhaps the most pragmatic solution would be to follow Klabbers’ (somewhat circular) notion that ‘as soon as an organisation performs an act which can only be explained on the basis of international legal personality, such an organisation will be presumed to be in possession of international legal personality’.<sup>44</sup>

Indeed, accepting a separate legal status of IOs is a logical consequence of the fact that IOs were established as separate entities. In that sense legal personality is, indeed, an element of ‘organisationhood’. The states that created these organisations became members of these new entities and in that capacity willingly subjected themselves to their rules. The moment they take their ‘seat’ in the organs and bodies of the organisation they are in fact part of its institutional structure. Yet, both in a practical and a conceptual sense it is difficult to deny the fact that member states remain sovereign states. Allowing them to hide behind an institutional veil would not only imply a denial of their individual international legal responsibilities but also of political realities.

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<sup>42</sup> On the autonomy of the OSCE, see the chapter by Mateja Steinbrück Platise in this volume.

<sup>43</sup> White/Collins (eds), *International Organizations and the Idea of Autonomy* 2011.

<sup>44</sup> Klabbers, *An Introduction to International Institutional Law* 2015 (n.14), 50; and more extensively Klabbers, ‘Presumptive Personality: The European Union in International Law’ 1998, 231–253.

This was recognised already in the famous *Reparation for Injuries* Advisory Opinion.<sup>45</sup> Ever since the International Court of Justice (ICJ) delivered its opinion in 1949, the case has featured in most introductory lectures and leading textbooks on the law of IOs. Indeed, the relevance of the case can hardly be overestimated as it deals with the recognition of IOs (in this case the UN) as entities enjoying a legal position in the international legal order separate from their member states. The question of the legal status of IOs recurred in later opinions and judgments, but the ground rules were clearly laid down in the *Reparation* Advisory Opinion.<sup>46</sup> It underlines the idea that international personality is seen as a characteristic of IOs – something that was later confirmed by the ICJ in the *WHO–Egypt* case.<sup>47</sup> In this view it only makes sense to talk about an IO when it occupies a distinctive legal position vis-à-vis its founders, and it is this distinct legal position that is often equated with the possession of legal personality, or what amounts to the same thing: being a legal person. It is the latter narrative that seems to be dominant these days and the autonomy of IOs (and the related constitutional questions) has sparked new debates.<sup>48</sup> This reveals that legal personality is not just about the capacity to bring claims or to engage in other legal actions: it is part of the defining nature of IOs.

Since international legal personality was not explicitly mentioned by the founders of the UN in the UN Charter, it was instead derived from the organisation's (perceived) objectives ('it could not carry out the intentions of its founders if it was devoid of international personality'<sup>49</sup>) and from subsequent practice ('It is difficult to see how such a [concluded] convention could operate except upon the international plane and as between parties possessing international personality'<sup>50</sup>). The idea of legal personality as a threshold (the organisation cannot act legally when it is devoid of legal personality, so we first have to establish or construct it) has been contested ever since.<sup>51</sup>

The main point of criticism seems to be that IOs do indeed act and that these actions can, or should have, legal consequences irrespective of whether the legal personality problem has been solved. In a way, the approach of the ICJ in the *Reparation* case (let's look at what the organisation is supposed to do and what it is actually doing and derive legal personality from that) has become quite common in legal doctrinal approaches to the question of legal personality. In the case of the UN, any reference to legal personality in the Charter was also omitted. It was held that the

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<sup>45</sup> ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports 1949, 174; for a recent analysis, see Wessel, 'Reparation for Injuries Suffered in the Service of the United Nations' 2016 (n.39).

<sup>46</sup> Ibid., the Part on 'Legal Status (Personality)'.

<sup>47</sup> ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 6 June 1980, ICJ Reports 1980, 73.

<sup>48</sup> Cf. White/Collins (eds), *International Organizations and the Idea of Autonomy* 2011 (n. 43).

<sup>49</sup> ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports 1949, 174.

<sup>50</sup> Ibid.

<sup>51</sup> See, e.g., Klabbers, 'The Concept of Legal Personality' 2005, 35–66; for another conceptual approach to the different theories on legal personality, see Gazzini, 'Personality of International Organizations' 2011, 33–55.

international personality of the UN ‘will be determined implicitly from the provisions of the Charter taken as a whole’.<sup>52</sup>

All in all, we maintain that the concept of legal personality is first and foremost relevant to settling the separate status of the international entities within the international legal order. As a pragmatic solution, the OSCE’s participating States have agreed to give the OSCE legal capacities in their respective domestic legal orders without giving it international legal personality. While this seems to work in practice, it is problematic from a more conceptual perspective. We would argue that legal personality concerns a *quality*, whereas legal capacity is an *asset*.<sup>53</sup> Where legal personality means not much more than being a subject of a certain legal order, capacity is concerned with what the entity is potentially entitled to do (and where *implied powers* may come in). What is possible, however, is that an entity is recognised as a legal person in one legal order but not in another.

It follows from this approach that there is also not much sense in speaking of a ‘partial legal personality’ of IOs. Neither are we in favour of saying that a particular international entity possesses legal personality ‘to some extent’. The possession of legal personality (‘being a legal person’) is a binary phenomenon: you either have it or you do not.<sup>54</sup> Competences (and capacities based on them), on the other hand, seem to depend on what was attributed to the organisation, although a case could be made for the existence of competences inherent to the enjoyment of legal personality, such as the conclusion of certain international agreements or (at least in the eyes of the ICJ) bringing an international claim.

With a view to our aim of demystifying the notion of legal personality, it is thus important to highlight that it is not so much the acknowledgement of legal personality that would cause inflexibility or allow an organisation to turn against its creators (to come back to the Frankenstein metaphor), but rather the capacities. And, in fact, these capacities can be of a very practical nature, allowing an organisation to act legally within the boundaries set by the participating States. At the present moment, the fear of granting the OSCE international legal personality seems to stand in the way of allowing it to facilitate its participating States in taking care of a number of practical tasks.

## 2.2.2 International Legal Personality and the Power of Practice

Yet, legal and political arguments are often intertwined and in that sense a more general development in international law and international relations does not seem to make it easier for the proponents of a clearer legal status for the OSCE. In the last two decades, a prevailing idea (or *zeitgeist*) has taken hold in which there is a certain reluctance to create new IOs enjoying legal personality. This is also reflected in a shift from formal to more informal forms of international

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<sup>52</sup> United Nations Conference on International Organizations, Report on Article 104 of the UN Charter, 13 U.N.C.I.O. Doc. 803, IV/2/A/7, 1945, 817. See further Reinisch/Bachmayer (eds), *The Conventions on the Privileges and Immunities of the United Nations and the Specialized Agencies* 2016, 49–56.

<sup>53</sup> For more on this distinction, see Bekker, *The Legal Position of Intergovernmental Organizations* 1994.

<sup>54</sup> We acknowledge the different view of the ICJ presented in the ICJ *Reparation for Injuries Suffered* case (n. 45) in this respect when it refers to the fact that the UN must have ‘a large measure of legal personality’.

cooperation that has been widely noticed in the academic literature.<sup>55</sup> Whereas during and after the Second World War many IOs were created almost automatically as soon as some new international problem was identified, almost the opposite is true today, as was experienced, for example, during the above-mentioned transformation of the ICMP into a formal IO.

This zeitgeist is part of the context in which discussions of the OSCE's legal personality take place. But there are also more specific contextual elements. Thus, discussions on the international legal personality of IOs are generally influenced by what we may safely call 'the politics of international legal personality'. The question of granting legal personality to an IO is often not only seen as a more or less technical, legal question but also (and perhaps above all) a sensitive political issue. The two most famous examples are the UN and the EU.

Regarding the UN, legal personality was certainly discussed during the 1945 San Francisco Conference establishing the UN Charter. Yet, the final agreement only contains an explicit provision in the Charter (Article 104) on the legal personality of the UN in the national legal orders of the member states. No provision on international legal personality was included. The reason for this omission can perhaps be found in the report by the US delegation prepared after the San Francisco Conference, which states: 'the Committee which discussed the matter was anxious to avoid any implication that the UN will be in any sense a "superstate"'.<sup>56</sup>

A few years later, in a more legal context, the ICJ considered it important to get back to this idea: 'the Court has come to the conclusion that the Organisation is an international person. That is not the same thing as saying that it is a state, which it certainly is not, or that its legal personality and rights and duties are the same as those of a state. Still less is it the same thing as saying that it is "a superstate", whatever that expression may mean.'<sup>57</sup> Indeed, political arguments do not always make sense to judges, though such arguments often define the outcome.

The second example relates to the EU. As we have seen, the 1992 Maastricht Treaty created the EU but did not contain any provision on its legal status. In the years after, negotiations on this issue began but no agreement was reached. The issue became a *Chefsache* and was put on the table of the European Council meeting that took place in Amsterdam on 17 June 1997. Again, no agreement was reached because the issue was a red line for the UK. Like in 1945 in San Francisco, providing international legal personality to the EU was associated with the creation of a superstate. The day after the European Council meeting, on 18 June, upon his return to the UK, Prime Minister Tony Blair proudly stated before the House of Commons: 'others wanted to give the EU explicit legal personality across all pillars. At our insistence, this was removed.'<sup>58</sup>

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<sup>55</sup> For further references, see, e.g., Pauwelyn/Wessel/Wouters, 'When Structures Become Shackles' 2014, 733–763; and Pauwelyn/Wessel/Wouters (eds), *Informal International Lawmaking* 2012.

<sup>56</sup> Department of State Publication 349, Conference Series 71 (quoted by Jenks, 'The Legal Personality of International Organizations' 1945, 269–270).

<sup>57</sup> ICJ, *Reparation for Injuries Suffered* (n. 45), 179.

<sup>58</sup> Hansard, HC 'column 314', 18 June 1997, available at: [www.publications.parliament.uk/pa/cm199798/cmhansrd/vo970618/debtext/70618-22.htm#70618-22\\_spmi6](http://www.publications.parliament.uk/pa/cm199798/cmhansrd/vo970618/debtext/70618-22.htm#70618-22_spmi6).

The decades-long debate within the OSCE reveals that it is indeed not so much the legal issues that form the obstacles but that legal choices are perceived as having undesirable political side-effects: while fears of an OSCE superstate are perhaps less relevant, an independent legal status is seen as potentially affecting the influence that participating States have over the Organization's activities (indeed, the Frankenstein problem again). Furthermore, the idea that the OSCE is merely a centre 'for harmonizing the actions of nations in the attainment of ... common ends' (to again use a quote from *Reparation*) remains dominant.<sup>59</sup>

However, it is not only 'the politics of international legal personality' that is interesting. Perhaps even more fascinating (and to a certain extent reassuring) is the fact that no matter how politically loaded the question of international legal personality might be, practice has sometimes proved more powerful than politics. This is the story of the UN after 1945 and the EU after the 1997 European Council meeting. In practice, it was generally agreed that these organisations needed to perform certain functions in their own name (for example, claiming reparations and concluding treaties), which could only be done if they were considered as international legal persons. The practical need to perform these functions outweighed the political reluctance to explicitly give them international legal personality.

Even though in 1945 there was a reluctance to view the UN as an international legal person, practice simply forced the UN to act as such in order to perform its functions. From the outset, agreements were concluded, such as the UN–US Headquarters Agreement. Furthermore, the UN needed to have the capacity to bring a claim against Israel after its mediator Count Bernadotte was killed there (see the 1949 *Reparation* Advisory Opinion referred to above). Less than four years after the founders of the UN had been unwilling to regulate the UN's legal personality in the Charter, they had to accept that practice gave them no other choice.

As we have seen, something similar happened to the EU in the years following the 1997 European Council meeting in Amsterdam. Not too long after Prime Minister Blair gave his victory speech to the House of Commons, practice revealed that the EU simply could not live up to the wishes of its members to remain legally inactive vis-à-vis third parties. In 2001, the EU concluded an agreement with Serbia as if Tony Blair had in fact lost his battle in Amsterdam.<sup>60</sup> As Council members, the member states took the decision that this agreement would be concluded by the EU and not by the member states. The only legal underpinning of the conclusion of this agreement by the EU was that it was within the EU's *implied* powers to conclude agreements, in line with the (good old) *Reparation* Advisory Opinion. The EU has since concluded many more agreements. Subsequently, the 2007 inclusion of a specific provision on legal personality in the

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<sup>59</sup> ICJ, *Reparation for Injuries Suffered* (n. 45), 178.

<sup>60</sup> Agreement concluded between the EU and Yugoslavia concerning the activities of the EU Monitoring Mission in Yugoslavia, OJ 2001, L 125/1. For a more extensive look (and for many references) on the conclusion of international agreements by the EU, see Wessel, 'The European Union as a Party to International Agreements: Shared Competences, Mixed Responsibilities' 2008, 145–180; and Wessel/Arribas, 'EU Agreements with Third Countries: Constitutional Reservations by Member States' 2008, 291–308. For possible earlier indications of the EU's legal personality, see 'Wessel, 'Revisiting the International Legal Status of the EU' 2000 (n. 16), 507–537.

Treaty on European Union was largely a formality, as it was confirming existing practice. The UK resisted no longer.

Hence, while ‘the politics of international legal personality’ may at first have been the main reason for the difficulty to expressly acknowledge the international legal status of the UN and the EU, these examples equally underline that practice can be more powerful than politics. It was clear that these organisations would simply not be able to perform their functions if they were devoid of legal status under international law. Admittedly, a comparison with the UN is flawed on many points. To start with, the UN has a constituent instrument, the UN Charter, from which the ICJ could derive international legal personality. In addition, while the ICJ could partly rely on the existing practice of the UN, such practice is largely absent in the OSCE. Finally, the OSCE lacks a court that could do for it what the ICJ did for the UN in 1949.

Yet, parallels exist. It is largely for political reasons that no agreement has been reached thus far on the OSCE’s international legal status. The lesson learnt from the UN and the EU suggests that perhaps practice has not, or not yet, been sufficiently powerful to overcome the political hurdles. This is not to say that there is no practice. Other chapters in this volume testify to the existence of the international legal activities of the OSCE and we may also point to the example of the 1998 Agreement on the OSCE Kosovo Verification Mission, which was concluded between the Chairman-in-Office, on behalf of the OSCE, and the Foreign Minister of the Federal Republic of Yugoslavia.<sup>61</sup> The Chairmanship also represents the Organization in relations with third states and other IOs. The most recent examples are two treaties concluded with the OSCE in June 2017: the OSCE Headquarters Agreement with the Republic of Austria and the Arrangement between the OSCE and the Republic of Poland on the Status of the OSCE in the Republic of Poland.<sup>62</sup>

So far, however, too many statements by the Organization and its participating States indicate an unwillingness to accept the OSCE’s international legal personality. And as far as written law is concerned, the 2007 draft Convention on the international legal status of the OSCE is still a sleeping beauty waiting for the political prince to kiss it awake. As briefly mentioned above, it would make sense to not wait too long. Not only because the fears of a separate legal personality of IOs have so far not proved realistic, but also because in its daily activities the Organization struggles with its unclear legal situation. As an international legal person, the OSCE would be able to achieve more effectively and more efficiently what many participating States consider necessary, as successive OSCE legal advisers have emphasised. But perhaps most importantly, as illustrated by the Special Monitoring Mission in Ukraine, it is irresponsible if the OSCE and its staff, in the offices as well as in the field, are unable to perform their functions without having a reliable legal status that is normally in place for similar functions performed by other IOs and their staff. Currently, legal protection can only be given to OSCE personnel by their own national governments. This is fundamentally wrong and highly impractical since the people concerned do

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<sup>61</sup> Agreement on the OSCE Kosovo Verification Missions, 16 October 1998, CIO.GAL/65/98/Corr.1.

<sup>62</sup> On these two agreements, see See H. Tichy and C. Quidenus, ‘Consolidating the International Legal Personality of the OSCE: A Headquarters Agreement with Austria’, 14 *IOLR* (2017); J. Arsić-Dapo, ‘Another Brick in the Wall – Building up the OSCE as an International Organization One Agreement at a Time’, 14 *IOLR* (2017).

not perform tasks for their home country but for the OSCE, and because it is ineffective and inefficient if only indirect and fragmented legal protection can be offered.

The adoption of the 2007 Convention would make it much easier for the OSCE to arrange its legal status whenever missions are carried out, as is currently the case in East Ukraine. It would allow the OSCE to be responsible for what it is doing and offer the necessary protection to individuals who carry out its work in offices and in the field. To quote from the *Reparation Opinion* once more, to allow an individual working for the OSCE to ‘perform his duties satisfactorily, he must feel that this protection is assured to him by the Organisation, and that he may count on it’.<sup>63</sup> Finally, acknowledging the legal status of the OSCE would bring an end to the ad hoc solutions currently required to deal with political resistance, even though to a certain extent the Organization ‘is 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 the capacity to operate upon an international plane’.<sup>64</sup>

Against this background, it is important to underline that there are no legal impediments to the adoption of the 2007 draft Convention. The objections by the two most powerful participating States are largely of a political nature. The Russian resistance (‘no convention without a charter’) does not seem to relate to any insurmountable international legal problem, despite the fact that one of their arguments is of a domestic constitutional nature.<sup>65</sup> From a legal point of view, it would be perfectly possible to grant international legal personality to the OSCE without embedding this in a general constituent instrument, given the fact that the objectives and tasks of the Organization and its bodies are laid down in various constitutive documents and have been further developed in practice. This view was supported by all participants in the negotiations on the 2007 draft Convention, except the Russian Federation and Belarus. In addition, practice has revealed cases in which legal personality was expressly granted to an IO on the basis of a separate agreement. Thus, in 1999 an agreement was concluded for the sole purpose of bestowing international legal personality upon the International Potato Centre, as was the case in 2009 regarding PEMSEA, a sustainable development partnership in East Asia.<sup>66</sup> Obviously, it would be difficult to accept certain legal capacities and privileges and immunities when the mandate and competences of an IO is unclear, but, as the various chapters in this volume emphasise, over the many decades of its existence the OSCE has been active in taking decisions and engaging in activities on the basis of clear mandates.

Likewise, while the political argument of the USA may be clear (‘the OSCE would lose its flexibility if it were given a constituent instrument’), from a legal point of view there is no reason

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<sup>63</sup> ICJ, *Reparation for Injuries Suffered* (n. 45), 183.

<sup>64</sup> ICJ, *Reparation for Injuries Suffered* (n. 45), 179.

<sup>65</sup> See the chapter by Gleb Bogush in this volume.

<sup>66</sup> In 1999, an agreement was concluded for the sole purpose of bestowing international legal personality upon the International Potato Center: Agreement for the Recognition of the International Legal Personality of the International Potato Center (CIP), 26 November 1999, *Tractatenblad (Dutch Treaty Series) 2001No. 32*. For PEMSEA, which previously existed as a project-based arrangement without such status, see Art. I.1 of the Agreement recognizing the International Legal Personality of the Partnerships in Environmental Management for the Seas of East Asia, 1 November 2009, available at: <http://pemsea.org/sites/default/files/pemsea-legal-personality.pdf>.

why a charter would affect the flexible nature of cooperation within the OSCE. After all, a charter can be restricted to a few basic issues and does not have to be long – the constituent instrument of NATO, for example, contains only fourteen articles. In addition, the provisions could be inspired by those used in the 1994 Budapest Document when the CSCE was transformed into the OSCE (e.g., ‘The change in legal status of the OSCE does not alter the nature of cooperation within the Organization. In its organisational development, the CSCE will remain flexible and dynamic.’).<sup>67</sup> This way, a charter could simply be limited to codifying the existing institutional practice of the OSCE. Yet, political objections by the Russian Federation and the USA have so far outweighed the practical benefits that the OSCE and its participating States would reap by adopting the 2007 draft Convention. Apparently, the need to give international legal personality to the OSCE – on which there is a consensus – has not yet become sufficiently persuasive to overcome the stalemate created by the political objections of the two most powerful participating States.

### 3. Participation or Membership?

#### 3.1 *The Difference Between Participation and Membership*

Part and parcel of the debates within the OSCE is the choice to use the term ‘participating States’ rather than ‘member states’. Indeed, a certain unease may be detected within OSCE circles when the term member states is used accidentally. In international institutional law the notion of membership forms a central element, which is one reason why it features in the title of this chapter. Thus, one of the key questions flowing from recent debates on the responsibility of IOs and their member states is how to distinguish the one from the other. The question of the allocation of responsibilities is gaining in importance, also in the light of recent case law on the responsibility of states for acts performed in the framework of or by IOs. As underlined by one of the present authors: ‘The issue is the responsibility of States in their capacity as member states of international organizations. In this sentence, the word member is fundamental.’<sup>68</sup>

Although important from a practical perspective, the question of international responsibility is just one element in the debate on membership, which is more conceptual in nature. As with legal personality, the issue of membership within the OSCE seems to be surrounded by political considerations that from a legal perspective make little sense. Academic literature points to the fact that states do not lose their identity as states when they become a member state. It remains difficult to neglect the Janus-faced nature of IOs and it has been duly noted by Ryngaert and Freitas de Barros, for instance, that ‘[a]lthough the separate personality of an international organisation “establishes the will of the organization as a whole”, this does not mean that the various “member state wills” that led to it lose their relevance’.<sup>69</sup>

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<sup>67</sup> See CSCE, Budapest Decision, 1994 (n. 1), point 29.

<sup>68</sup> Blokker, ‘Member State Responsibility for Wrongdoings of International Organizations’ 2015, 319–332.

<sup>69</sup> Barros/Ryngaert, ‘The Position of Member States in (Autonomous) Institutional Decision-Making: Implications for the Establishment of Responsibility’, 2014. See also Blokker, ‘International Organizations and Their Members’ 2004, 139–161.



More generally, lawyers tend to point to the rules of the game that must be followed, and stress the fact that even plenary bodies are organs of an IO in which states function as member states once they occupy a seat. Indeed, the existence of elements such as an ‘organ’, ‘membership’ or a ‘decision’ all imply a distinction between the participating States and the international entity. In fact, there is a strong interlinkage between these elements. Organs act on behalf of the international entity, and are not to be equated with the (collectivity of) states, in which case the term conference would be more appropriate. The notion of membership (in contrast to participation) underlines a similar distinctiveness of the international entity. This seems to allow for the well-known view in international institutional law that for an international entity to be regarded as existing separately from its member states, the entity must have a decision-making organ that is able to produce a ‘corporate’ will, as opposed to a mere ‘aggregate’ of the wills of its member states.<sup>70</sup> The outcomes of collective decision-making processes must be ascribable to an international organ rather than to the collectivity of the participants (something that becomes particularly relevant in the context of establishing international responsibility in cases of wrongdoing).<sup>71</sup>

All in all, the notion of participation would fit the idea of a conference, whereas in the case of an IO the states would be members. Apart from this distinction, it is important to note that even as members of an organisation, states have different identities.<sup>72</sup> Therefore, as with legal personality, insistence on using the term ‘participating States’ rather than ‘members’ – even though the decision was taken to transform what was originally a conference into an IO – is largely explained by political considerations. Possible legal consequences would relate to the fact that the identity of the state would indeed be different: as outlined above, rather than a participant, the state would become a member, and hence a part of an organisation. Member states allow an organisation to take decisions rather than being contractual partners to agreements themselves. At the same time, the continued use of the term ‘participating States’ is mainly a *conceptual* problem, whereas acceptance of the OSCE’s legal personality is needed to solve a number of *practical* problems. Thus, while it makes sense for conceptual reasons, there is no practical legal need to change ‘participating States’ into ‘member states’ and neither is this change suggested in the 2007 draft Convention. However, and again mainly for reasons of conceptual sanity, we would advise accepting the role of states as members as this seems to be an inherent consequence of turning a conference into an organisation.

### 3.2 *Decision-Making and Monitoring Mechanisms in the OSCE*

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<sup>70</sup> Cf. also Brölman, *The Institutional Veil in Public International Law* 2007.

<sup>71</sup> Cf. Klabbers, ‘Presumptive Personality: The European Union in International Law’ 1998 (n. 44), 243; an older quote is also relevant in this context: ‘It is the existence of organs which makes it possible to distinguish international organizations from other looser associations of States like, for example, the British Commonwealth’, Rama-Montaldo, ‘International Legal Personality’ 1970, 145. For a more extensive look at the distinction between states and member states, see Wessel, ‘Revisiting the International Legal Status of the EU’ 2000 (n. 16), 507–537.

<sup>72</sup> See further Dekker/Wessel, ‘Identities of States in International Organizations’ 2015, 293–318.

Indeed, like many international institutions, the role of the OSCE seems to have developed beyond a ‘centre for harmonizing the actions of nations’ and underlines its separate existence. For IOs, decision-making takes place not only on the basis of well-defined procedures that involve institutional actors other than states but also on the basis of a sometimes dynamic interpretation of the original mandate of the organisation.<sup>73</sup> The outcome comes closer to decision-making *by* rather than *through* an IO.<sup>74</sup> As indicated in the Introduction to this chapter, the OSCE has organs, with the Permanent Council acting as the daily decision-making body.<sup>75</sup> The outcome of the decision-making process is indeed a ‘Decision’ – of which the Permanent Council has so far taken a total of 1273 (as of November 2017) – adopted at Meetings of the Heads of State or Government (Summit), the Ministerial Council and the Forum for Security Co-operation.<sup>76</sup> The various decisions often contain commitments that are to be followed up by the participating States.

Rules of procedure underline the institutionalisation of the decision-making process.<sup>77</sup> Decisions are taken by consensus, just like in other IOs, including NATO and the WTO. Consensus ‘shall be understood to mean the absence of any objection expressed by a representative and submitted by him as constituting an obstacle to the taking of the decision in question’.<sup>78</sup> In order to introduce a degree of flexibility into the consensus rule, ‘consensus minus one’ was introduced, whereby ‘appropriate action may be taken by the Council or Committee of Senior Officials, if necessary in the absence of the consent of the State concerned, in cases of clear, gross and uncorrected violations of relevant CSCE commitments’.<sup>79</sup> In addition, there is the possibility of a decision being taken in accordance with the rule of ‘consensus minus two’ with regard to the peaceful settlement of disputes. Thus, ‘the Council or the Committee of Senior Officials of the CSCE (now the OSCE Permanent Council) may direct any two participating States to seek conciliation to assist them in resolving a dispute that they have not been able to settle within a

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<sup>73</sup> ‘It is possible ... that the treaty provisions pertaining to the law-making powers of the organization will be construed in a different way than was originally intended by the drafting nations, as it proves very difficult to draft an instrument in such a manner as to effectively preclude any other possible interpretation’, Wouters/De Man, ‘International Organizations as Law-Makers’ 2011, 192.

<sup>74</sup> Wessel, ‘Institutional Law-Making: The Emergence of a Global Normative Web’ 2016, 179–199.

<sup>75</sup> See OSCE, Documents by the OSCE Decision-making bodies, available at: [www.osce.org/resources/documents/decision-making-bodies](http://www.osce.org/resources/documents/decision-making-bodies). The Summit, the Ministerial Council, the Forum for Security Co-Operation and the Chairperson-in-Office, but not the Permanent Council, are considered as ‘decision-making bodies’.

<sup>76</sup> See, e.g., OSCE, Permanent Council, Deployment of an OSCE Special Monitoring Mission to Ukraine, Decision No. 1117, PC.DEC/1117, 21 March 2014, in which the Permanent Council *inter alia* ‘Decides.... To deploy a special OSCE monitoring mission of international observers to Ukraine’, OSCE: Index of Permanent Council Decisions (Nos. 1–1236), available at: [www.osce.org/pc/70160](http://www.osce.org/pc/70160).

<sup>77</sup> See OSCE, Rules of Procedure of the Organization for Security and Co-operation in Europe, MC.DOC/1/06, 1 November 2006. Credits are due to [www.cvce.eu](http://www.cvce.eu), a research body located at the University of Luxembourg, for collecting the different existing procedures. CVCE, ‘The procedures and mechanisms of the OSCE’, 8 July 2016, available at: [www.cvce.eu/content/publication/2006/2/16/32a78695-6b86-46d0-98cc-e6db63fd4037/publishable\\_en.pdf](http://www.cvce.eu/content/publication/2006/2/16/32a78695-6b86-46d0-98cc-e6db63fd4037/publishable_en.pdf).

<sup>78</sup> Rule II(A) 2 of the OSCE Rules of Procedure.

<sup>79</sup> This was introduced by the OSCE, Final Document of the Second Meeting of the CSCE Council of Ministers, Prague, 30–31 January 1992, 31 January 1992, available at: [www.osce.org/mc/40270](http://www.osce.org/mc/40270).

reasonable period of time'.<sup>80</sup> Finally, a tacit (or silent) approval procedure makes it possible for a decision to be adopted within a specific timeframe, provided no objection is raised.<sup>81</sup> This procedure may also be used for the setting up of an ad hoc steering group on a proposal from the Chairman-in-Office.<sup>82</sup>

These relatively settled decision-making procedures even allow for an occasional (albeit largely theoretical) breaking of the consensus rule, indicating that decision-making within the OSCE consists not merely of deciding *through* but also *by* the OSCE. Furthermore, the OSCE has developed several mechanisms to monitor and control the implementation of OSCE commitments regarding both the human and the politico-military dimension. They are based principally on diplomatic consultations, exchanges of information, good offices and mediation, as well as the sending of observers and the drafting of reports. They demonstrate that over the decades the OSCE has been more than a forum for cooperation and has always been able to discuss and develop mechanisms to monitor commitments.

While it goes beyond the scope of this chapter to analyse in detail the OSCE mechanisms in relation to the so-called human dimension of the OSCE, they are relevant with respect to the monitoring competences. They include the *Vienna mechanism* (which allows for requests for information and bilateral meetings); the *Moscow mechanism* (which consolidated and further developed the Vienna mechanism in regard to time limits and introduced the possibility of using expert missions and rapporteurs); and *the possibility to send observers* to participating States in case of elections or when proceedings are brought before the courts.<sup>83</sup> In relation to the so-called military-politico dimension, we have seen the development of *Risk-reduction mechanisms* (in relation to confidence- and security-building measures (CSBMs)); *Emergency mechanisms* (including the so-called *Berlin mechanism* on a consultation and cooperation procedure concerning emergency situations that may arise from a violation of the OSCE principles or as a result of major disruptions endangering peace, security or stability); and *Early warning and preventive measures* (to enable the participating States to be rapidly alerted in cases where, within the OSCE area, situations have the potential to develop into crises, including armed conflicts). Finally, the *Valletta mechanism* and the *Convention on Conciliation and Arbitration* relate specifically to the peaceful settlement of disputes.

While the many mechanisms differ substantially in their objectives and functioning, they were all established to overcome the problem of having to decide on crisis situations or to monitor compliance (for instance through the sending of OSCE experts and rapporteurs) on the basis of

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<sup>80</sup> CSCE, Third Meeting of the Council Summary of Conclusions Decision on Peaceful Settlement of Disputes Stockholm 1992, 1992, available at: [www.osce.org/mc/40342?download=true](http://www.osce.org/mc/40342?download=true).

<sup>81</sup> This procedure has developed since the adoption of the CSCE, Charter of Paris for a New Europe, November 1990. Para. 14 of the Procedures and Modalities concerning CSCE Institutions stipulates that it be used for the appointment of the first Director of each institution, available at: [www.oscepa.org/documents/all-documents/documents-1/historical-documents-1/673-1990-charter-of-paris-for-a-new-europe/file](http://www.oscepa.org/documents/all-documents/documents-1/historical-documents-1/673-1990-charter-of-paris-for-a-new-europe/file).

<sup>82</sup> *Ibid.*, Chapter I, paragraph 18.

<sup>83</sup> See, for more details, the OSCE, Handbook, 3 December 2015, available at: [www.osce.org/files/documents/b/3/22624.pdf](http://www.osce.org/files/documents/b/3/22624.pdf), as well as CVCE, The procedures and mechanisms of the OSCE (n.74), and Bloed, 'Two Decades of the CSCE Process' 1993 (n.3).

a consensus among the fifty-seven participating States.<sup>84</sup> OSCE decision-making thus not only results in decisions with concrete rules that commit the participating States to act accordingly and, for instance, allow for the establishment of missions, but over the past decades the Organization has also developed several mechanisms to monitor and control the implementation of the agreed principles and adopted decisions. All of this supports the idea that the OSCE is indeed more than ‘a centre for harmonizing the actions of nations in the attainment of common ends’ and occupies a distinct position in relation to its participating States.

#### **4. Conclusion**

The lack of consensus among OSCE participating States has so far led the Organization to deny its international legal personality – despite the fact that certain OSCE organs, such as the Secretariat, seem to find workarounds leading to situations of de facto legal personality – and to this very day using the term ‘member states’ in the context of the OSCE continues to raise eyebrows. There is no doubt that, by now, OSCE legal advisors must experience some fatigue with academic debates and resort in practice to pragmatic solutions to combine political preferences and legal realities. Indeed, there is only so much lawyers can do when the politics of international legal personality prevail and legal arguments prove unable to reassure certain participating States.

In the meantime, OSCE practice – although perhaps not yet strong enough to create a new legal reality – seems close to how many other IOs function. Decisions are taken by decision-making bodies and participating States have their seats in the organs, which in turn function on the basis of detailed procedural rules and mechanisms developed to monitor compliance.

The various chapters in this present volume underline that the discussion is still as vivid today as it was twenty years ago. Not many new arguments have been developed and everything seems to have been said. In this situation our role as lawyers may indeed be to continue to highlight the importance of legal clarity – not just for states but also for individuals who have been confronted with OSCE activities – and at the same time to have solutions ready when the two most powerful participating States become more willing to water down their political wine and find a compromise. Or when the time comes that practice proves stronger than politics. First steps in this direction have been made in June 2017, when the OSCE concluded a headquarters agreement with Austria and an agreement on its status in Poland with that country (see above, Section 2.2.2.).

Outsiders would probably almost always see the OSCE as an IO. According to the ‘duck test’ (if it looks like a duck, swims like a duck, and quacks like a duck, it probably is a duck) this seems fully justified. While the OSCE started as a conference and at that time most probably could not qualify as an IO, its participating States gradually and deliberately developed it into an organisation and in 1994 also chose to name it as such. The OSCE is in almost every aspect

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<sup>84</sup> See, for details, Bloed, ‘Two Decades of the CSCE Process’ 1993 (n. 3), as well as the OSCE Handbook (n. 79).

similar to other IOs (especially regarding its institutional structure), bringing participating States together to perform a wide variety of functions in their common interest, taking decisions and performing monitoring tasks. Its headquarters and offices have also been given a status similar to that of other IOs.

As we have seen in Section 2, insiders also almost always regarded the OSCE as an IO. At the same time, they are aware of the issue surrounding the OSCE's legal personality, which has something pertinacious about it. Following the decision in 1994 to change the conference into an organisation without international legal personality, this issue has remained. Finally, the 2007 negotiations succeeded in bridging the long-standing differences of opinion and produced a draft Convention. These days, opposition to granting the OSCE international legal personality seems to have disappeared. However, the conditions imposed by the Russian Federation and the USA stand in the way of taking this final step. The only reason the draft Convention is still awaiting adoption is the difficulty of combining the Russian 'no convention without a charter' requirement with the American 'convention only' approach. Hence, the issue seems no longer centred around a disagreement on whether to grant the OSCE international legal personality but whether it is necessary to conclude a constituent instrument for the Organization.

In our view, breaking the current deadlock is essential. We have pointed to a number of not only conceptual but also practical problems – for instance, related to the privileges and immunities of the OSCE's missions staff. For the time being, in the absence of a formal agreement on the OSCE's international legal personality, there is no alternative but to rely on 'implied powers', following the reasoning in *Reparation*, whenever this is necessary. However, this does not really provide the necessary solutions, as we have seen, because a comparison with the UN is flawed on many points: the UN has a clear treaty basis and, not unimportant, a court to interpret it. Therefore, it is for the participating States themselves to break the impasse and for the Russian Federation and the USA to soften their prerequisites for the acceptance of the 2007 draft Convention. Practice may help in bringing politics more in line with legal realities, and – to return to our main question – as practice further develops it will be increasingly difficult for the OSCE to escape the application of international rules by simply using different terms (participating States, non-binding decisions) and by denying the international legal existence of the Organization. The OSCE does not operate in an international legal vacuum and pragmatic solutions and workarounds create legal effects and expectations by third parties. Other examples have revealed that at a certain moment the need for an organisation to function in practice and to achieve its objectives triggers an acceptance of its international legal status. And, perhaps more importantly, the same examples show that this has so far not at all been detrimental to an IO or to its member states.

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