I. Introduction

The Conference on Security and Co-operation in Europe (CSCE), renamed Organization for Security and Co-operation in Europe (OSCE) by its Budapest Summit Declaration of 6 December 1994, has always been characteristically different from mainstream international organizations. Originally called a conference, not an organization, based on a series of politically, not legally binding documents, and in particular not on a founding treaty, it has made an important contribution to the end of the pre-1989 division of Europe, but it also offers a number of puzzling questions for international lawyers. In the course of its development and notwithstanding the intentions of its founders, the CSCE/OSCE did not manage to remain in the sphere of the merely politically binding; as its activities were gaining importance, permanent offices were opened, field missions were sent to difficult areas, it was confronted with legal questions and had to clarify its position vis-à-vis subjects of international law and even subjects of the national laws of the states participating in the OSCE. The result of this is a complicated but fascinating mixture of the non-legal and the legal, centring round the issue of the legal personality of the OSCE.

This article focuses on the question of the international legal personality of the OSCE, in particular the attempts made since 2000 to give the OSCE a clear international status. In the course of these efforts, the issue of the international legal personality has been discussed together with the issue of the privileges and immunities of the
OSCE in the context of a draft convention. Our focus in this article will be on the status issue; privileges and immunities will only occasionally be referred to so as to complete the picture. What we find most interesting in this discussion is the unique attempt which has been made to confer international legal personality by a convention dealing mainly with privileges and immunities to an international organization not based on a founding treaty. We also try to show that the non-legally binding OSCE commitments are only part of an extensive practice of non-legally binding obligations in international relations.

Our distinguished teacher and friend Gerhard Hafner has participated in many conferences and meetings of the CSCE/OSCE and witnessed the establishment of CSCE institutions in Vienna. He was an Alternate Member of the Bureau and continues to be a Conciliator at the Court of Conciliation and Arbitration of the CSCE/OSCE in Geneva. Writing about the current negotiations aimed at improving the status of the OSCE by granting it international legal personality, in which we have the pleasure to participate, we trust to deal with a subject which is closely related to Gerhard Hafner’s main interests as international lawyer.

II. Political Obligations vs. Legal Obligations

When dealing with the OSCE, one encounters very soon the expression ‘OSCE commitment’, and it is explained that ‘OSCE commitments’ are politically, not legally binding obligations. As political obligations they belong to the non-legal branch of international relations, and although they are ‘obligations’ in a broad sense, they differ from legal

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2 The first unit of the CSCE to be permanently based in Vienna was the Conflict Prevention Centre, established by the Paris Summit of Heads of State or Government of the CSCE on 21 November 1990 and opened on 18 March 1991. It is now a department of the OSCE Secretariat, which was moved to Vienna on 1 January 1994 in accordance with the decision of the Committee of Senior Officials of the CSCE of 29 November 1993. Today also the Permanent Council of the OSCE has its regular meetings in Vienna and Vienna is the seat of the Forum for Security Co-operation and the OSCE Representative on Freedom of the Media.

3 This court is based on the Convention on Conciliation and Arbitration within the CSCE of 15 December 1992, in OSCE circles referred to as the ‘Stockholm Convention’. Austria is one of the thirty-three parties to this convention, see Austrian Federal Law Gazette (BGBl.) No. 127/1996. The convention, a proper international treaty, is an example for an area where the CSCE/OSCE had to transcend the non-legal world, less because of objective needs but rather because of the urge of two of its most prominent participating states. For the genesis of the convention, see G. Hafner, ‘Das Streitbeilegungsübereinkommen der KSZE: Cui bono?’, in K. Ginther et al. (eds.), Völkerrecht zwischen normativem Anspruch und politischer Realität; Festschrift für Karl Zemanek zum 65. Geburtstag 115, at 116 et seq. (1994). Unfortunately, the convention, which was drafted with the active participation of Gerhard Hafner, does not figure on the list of OSCE success stories, notwithstanding the efforts of the Court to demonstrate its availability and cost-effectiveness.