

‘The OSCE Representative on Freedom of the Media’ from the Helsinki Monitor

Caption: In an article published in 1998 in the quarterly publication Helsinki Monitor, the diplomat Anne Ruth Herkes describes the origins, the aims and the scope of the mandate for the post of OSCE Representative on Freedom of the Media, as defined in 1997.

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The OSCE Representative on Freedom of the Media

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1. Preliminary remarks

The OSCE's Ministerial Council at its Sixth Meeting on 18 and 19 December 1997, appointed Freimut Duve as its first Representative on Freedom of the Media. In the minds of many delegates to the OSCE in Vienna, the German Bundestag Member's rise to the position of the OSCE Representative on Freedom of the Media had been long anticipated. Freimut Duve, a journalist and editor throughout his professional life, a prominent member of the German Social-Democratic Party and until recently Chairman of the General Committee on Democracy, Human Rights and Humanitarian Questions of the OSCE's Parliamentary Assembly, had himself initiated the idea of such an institution within the OSCE.

Ever since the Helsinki Final Act the OSCE has devoted considerable attention to ways and means of strengthening the free flow of information in the OSCE area. Participating States have pledged to observe numerous commitments and principles designed to enhance the status of the free media and the safety of the journalistic profession. Since the signing of the Paris Charter, every summit document has included further provisions on freedom of the media. This emphasis on the importance of a free media in ensuring democracy and pluralism culminated in 1996, at the Lisbon Summit, in a mandate for an OSCE Representative on Freedom of the Media. This initiative stands as the most ambitious human dimension undertaking the OSCE has committed itself to since the establishment of the High Commissioner on National Minorities in 1992.

On 3 October 1996, the German Foreign Minister Dr. Klaus Kinkel, had introduced a formal proposal to elaborate a mandate for an OSCE Representative on Freedom of the Media, to the Permanent Council. The Lisbon Summit on 3 December 1996, tasked the Permanent Council to 'consider ways to increase the focus on implementation of OSCE commitments in the field of the media, as well as to elaborate a mandate for the appointment of an OSCE representative on freedom of the media ...' (paragraph 11). On 5 November 1997, the mandate was adopted at a special meeting of the Permanent Council. The office of the OSCE Representative on Freedom of the Media was established in the first weeks of this year in Vienna and has since started operations with two advisers, Dr. Beate Maeder-Metcalf (seconded by the German Government) and Stan Schragar (seconded by the U.S. Government).⁽¹⁾

Many months of both exciting and taxing negotiations in Vienna preceded the adoption of the mandate. The proposal to establish an OSCE Representative on Freedom of the Media has, in recent years, been the most intensely negotiated proposal made by a participating state. There were difficult passages during the negotiating process despite the unanimity among delegations of participating states that media freedom had been particularly suffering in the countries of the OSCE.

The quintessential example of such shortcomings, which demonstrated a frustrating lack of implementation of the OSCE commitments by participating states had been the curtailment of free media and the manipulation of the state-run media for the purpose of propagating ethnic hatred during the Yugoslav war and thereafter in Serbia and Bosnia-Herzegovina. Freimut Duve witnessed such shortcomings frequently, as he was the Bundestag's rapporteur on Bosnia in recent years. The call for an OSCE Representative on Freedom of the Media and the drafting of the mandate were therefore inspired by the recognition that the OSCE's capacities to follow through with its commitments had to be considerably strengthened.

2. Negotiating the mandate

The negotiating process lasted nearly eight months from March to November 1997, with only one small summer recess. The core negotiating group in Vienna consisted of the European Union, the countries associated with the European Union, the Baltic States, Malta and Turkey, representing the countries most interested in the negotiations. This group constituted about fifty percent of the 'votes' within the OSCE. Miraculously it was possible to swing the opinion among the associated countries gradually towards a strong and operational mandate. This shift of opinion occurred, arguably, as soon as these countries realized that it

would be to their advantage regarding their relations with the European Union in particular and with the Western world in general, to come out in favor of a substantive mandate advocating freedom of expression and freedom of the media, although they still wanted strings to be attached, in order to keep the institution well within the general order of OSCE institutions and not to see it rising above them.

Admittedly, countries further to the East, such as Ukraine, Moldova, Georgia, Armenia, Azerbaijan and the Central Asian states remained silent. While each one of them has a unique place within the OSCE, their national agenda had more urgent business to take care of. They were however, regularly briefed and did not object to the unfolding draft of the mandate. The direction of the mandate remained essentially open, as long as two key players, the Russian Federation and the United States, did not substantially engage in the negotiations. That, for a number of substantive and tactical reasons on the part of both countries, did not occur until after the summer recess.

The final negotiating stages, from September to November 1997, were devoted to meeting the central challenge of the drafting process: bridging the gap between the sceptical positions that wanted strings attached and the far-reaching constitutional provision on freedom of expression as exemplified by the First Amendment of the US Constitution. The art of the deal lay in spelling out the obvious: the Representative on Freedom of the Media would cooperate to the best of his/her abilities with all OSCE institutions, in particular with the Permanent Council and the Chairman-in-Office; the Representative on Freedom of the Media would, naturally, make it his or her business to vigorously pursue non-compliance of media principles and commitments, but at the same time, would assist each participating State, whose failure to comply was for reasons other than obstruction, to find ways to increase each one's compliance.

3. The mandate

The purpose of the mandate is to strengthen the observance of freedom of expression and freedom of the media in the participating states. The participating states commit themselves to fully cooperate with the OSCE Representative on Freedom of the Media to further free, independent and pluralistic media (paragraph 1). The mandate includes a basic provision that relates to the 'early warning' (of conflict) concept in the OSCE. It is considered that a seriously deteriorated situation of the media and the serious curtailment of freedom of expression in a given country are destabilizing factors and are indicative of a potentially dangerous situation of political instability. Hence the provision that the Representative on Freedom of the Media is to 'advocate and promote full compliance with OSCE principles and commitments regarding freedom of expression and free media' (paragraph 2). The mandate lists, inter alia, 'obstruction of media activities and unfavourable working conditions for journalists' as serious obstacles to freedom of expression and freedom of the media (paragraph 2).

Paragraph 3, the central provision of the operational section of the mandate, describes in detail the procedure in a case of serious non-compliance with the relevant principles and commitments: 'In the case of an allegation of serious non-compliance ..., the OSCE Representative on Freedom of the Media will seek direct contacts, in an appropriate manner, with the participating State and with other parties concerned, assess the facts, assist the participating State, and contribute to the resolution of the issue'.

Following the request of many delegations during the negotiating process, the mandate describes in great detail the core activities of the Representative on Freedom of the Media: While not operating as a clearing-house for media information (a function which remains with the Office for Democratic Institutions and Human Rights in Warsaw), the Representative on Freedom of the Media 'may at all times collect and receive information on the situation of the media from all bona fide sources. He or she will in particular draw on information and assessments provided by the ODIHR' (paragraph 5).

Furthermore, the Representative on Freedom of the Media 'may at all times collect and receive from participating states and other interested parties (e.g. from organizations and institutions, from media and their representatives, and from relevant NGOs) requests, suggestions and comments related to strengthening and further developing compliance with relevant OSCE principles and commitments...' (paragraph 6).

Despite the existence of many players in the field of the promotion of freedom of the media and freedom of expression it is the Representative on Freedom of the Media who is mandated to observe all 'relevant media developments in all participating states', and it is 'on this basis (that he/she will) [...] advocate and promote full compliance' with relevant OSCE principles and commitments (paragraph 2).

A cornerstone of this broad approach, fought hard for during negotiating the mandate, remains a last-minute addition, namely a somewhat convoluted description of the Representative's right to his own independent judgment. The relevant passage reads: 'In the performance of his or her duty the OSCE Representative on Freedom of the Media will be guided by his or her independent and objective assessment regarding the specific paragraphs composing this mandate' (paragraph 9).

Several sensitive aspects of the Media Representative's scope of activity are dealt with in paragraph 4 of the mandate. The mandate states that the Representative on Freedom of the Media has no juridical powers ('[...] does not exercise a juridical function, nor can his or her involvement (i.e. in a case of serious non-compliance) in any way prejudice national or international legal proceedings concerning alleged human rights violations').

The vast majority of OSCE participating States are also members of the Council of Europe, not to mention every State's UN membership, and therefore they sought clarity in the scope of and relationship among their various international obligations. The clarification that the Media Representative has no juridical powers, eliminated the apprehension, voiced in particular by the Council of Europe, that the involvement of the Representative on Freedom of the Media in an individual case (e.g. a case of harassment of a journalist) might preclude legal proceedings by the Council of Europe's Human Rights Commission.

Yet, on the other hand, paragraph 4, by way of a broad definition ('... national or international legal proceedings concerning alleged human rights violations will not necessarily preclude the performance of his or her tasks as outlined in this mandate') preserves an almost unrestricted right of the Representative on Freedom of the Media to take up individual cases in a human rights violation context.

In reality, given the small size of the Representative's budget and staff, the taking up of individual human rights cases that are well on their way to a successful resolution elsewhere seems unlikely. However, the flexibility of his mandate allows him to become engaged in cases that may already be under consideration in national or international proceedings where circumstances so warrant. This may be the case in a situation of gross, widespread, or systematic violation of rights or in cases of great urgency. The negotiations concluded that any advocate of freedom of expression and freedom of the media must be able to intervene in cases of harassment, otherwise he or she will damage his or her credibility in the media world.

The very task of the Representative on Freedom of the Media will be to work towards greater freedom of expression and freedom of the media and against threats to the same from whatever corner they may come. There was a suggestion that his mandate and activities extend to raising concern regarding 'hate speech' even where it is alleged that such speech is promoted by the media. Another compromise was required to bridge the gap between so many strong feelings in favor of or against such a provision. Serious concerns were raised by the US because of its belief in the almost unlimited right of freedom of expression as demonstrated by the First Amendment of the US Constitution.

The compromise found reads 'The OSCE Representative on Freedom of the Media may [...] collect and receive [...] requests, suggestions and comments related to strengthening and further developing compliance with relevant OSCE principles and commitments, including alleged serious instances of intolerance by participating States which utilize the media in violation of the principles referred to in the Budapest Document [...]' (paragraph 6). This language would permit the Representative on Freedom of the Media to become involved where hate speech is propagated by the OSCE participating State itself. The present office holder, Freimut Duve, appears convinced that dealing with hate speech will be a significant segment of his work.

4. Placing the OSCE Representative on Freedom of the Media within the OSCE and other

international organisations

Properly placing the Representative on Freedom of the Media to allow the office to become a powerful tool was difficult, as many apprehensions were voiced that the OSCE was creating, at the behest of the European Union (the German proposal had been formally endorsed by the European Union), another 'independent structure beyond the control of the Permanent Council'. Undeniably, the office of the Representative on Freedom of the Media had to become part of the regular structure of the OSCE and would be required to operate 'under the aegis of the Permanent Council' (paragraph 1).

The wording of the mandate carefully worked out that the OSCE Representative on Freedom of the Media will 'closely co-operate with the participating States, the Permanent Council, the Office for Democratic Institutions and Human Rights (ODIHR), the High Commissioner on National Minorities and, where appropriate, other OSCE bodies' (paragraph 2). The Representative on Freedom of the Media will 'keep the Chairman-in-Office informed about his or her activities and (will) report to the Permanent Council on their results, and on his or her observations and recommendations' (paragraph 3).

This exhaustive description facilitated consensus; more to the point, it made it possible to link the Representative on Freedom of the Media to the Chairman-in-Office and the Permanent Council without making him dependent on the Permanent Council for instructions. Where the Representative on Freedom of the Media was permitted to act only upon instructions from the Permanent Council, it would seriously tie his hands and undermine his potential effectiveness. Strong ties therefore link the Representative to the Chairman-in-Office and to the Permanent Council. Nearly an entire paragraph is devoted to describing that relationship (paragraph 7) further: 'The OSCE Representative on Freedom of the Media will also routinely consult with the Chairman-in-Office and report on a regular basis to the Permanent Council. He or she may be invited to the Permanent Council to present reports, within this mandate, on specific matters related to freedom of expression and free, independent and pluralistic media'.

Many States voiced strong concerns that their vital national interests might be jeopardized or targeted by the activity of the Media Representative, especially those States in which state-controlled media or restrictive media laws exist. These concerns were, in part, met by the stipulation that the office of the Representative should be located in Vienna. Prior to the consensus to establish the office in Vienna several ideas had been put on the table, including Warsaw, Vienna and a third location.

The reasoning behind the Vienna option was that at the OSCE's central location it would be much easier to follow the activities of the Representative and to lobby him, if necessary. The underlying observation in this context pointed to the experience, shared by many, that the Office of the High Commissioner on National Minorities was operating with great confidentiality (though in line with the respective mandate) and at considerable geographic distance from Vienna. That was not to be repeated! It also made much more sense, in times of scarcity of financial resources, much more sense to place the office in Vienna rather than at a third location.

Paragraph 11 of the mandate reflects only summarily, yet in clear terms, the co-operation of the OSCE Representative on Freedom of the Media with other international institutions. It is to be expected that in addressing non-compliance among participating States the Representative will seek advice and perhaps conduct, as necessity arises, joint activities with the Council of Europe's extensive media work.

5. A broad consensus

Brilliant leadership and a determination to win by the Danish Chairmanship led to the adoption of the mandate and the final success. The Danish delegation in Vienna was particularly skilful in building consensus around the mandate outside the Vienna OSCE diplomatic circles. The Chairmanship systematically reached out to the journalistic profession to seek advice and support. Thus a continued dialogue since the early stages of the drafting process was established with the International Federation of Journalists (Brussels), the International Press Institute (Vienna), the World Press Freedom Committee (Paris), and the regional branches of the International Federation of Journalists. Comments by those in the

journalistic profession proved invaluable to the negotiations, since they reflected instantly whether the drafting was pursuing the right track. The gradual acceptance by those in the media world that the creation of an OSCE Representative on Freedom of the Media was a worthwhile undertaking that greatly deserved their cooperation is perhaps the most valuable achievement of the Vienna negotiations.

6. Summary

The establishment of the OSCE Representative on Freedom of the Media has been associated with the expectation of an invigorated policy on the part of the OSCE for a substantially greater implementation of an OSCE free media and freedom of expression principles and commitments. This is, I trust, the guiding light for the office's present and future activities. Within the limits of the mandate, which is broad and flexible, the Representative on Freedom of the Media enjoys the freedom to choose his agenda and his tools.

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