

ENSURING UNHINDERED NGO ACCESS TO OSCE EVENTS:

A Need for a Transparent, Predictable, and Rule-of-law Based Procedure for Implementing Paragraph 16

A discussion paper

(produced by the Working Group on reform of international organisations of the Civic Solidarity Platform)

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Problem description

The Civic Solidarity Platform, an OSCE-wide NGO coalition, continues to be committed to assisting OSCE participating States, executive bodies and institutions in developing an approach that would safeguard unhindered participation of civil society representatives in OSCE events. In the past, the Civic Solidarity Platform (CSP) has presented its position and views on this matter, in particular, in the statement “Safeguarding civil society participation in the Helsinki process - a matter of the OSCE’s *raison d’être*”¹ at the OSCE Parallel Civil Society Conference in Vienna in December 2017 and in the statement “Safeguarding NGO participation in OSCE events” at the Parallel Civil Society Conference in Milano in December 2018².

For more than four decades, civil society has played a crucial role in the OSCE work, including in such areas of human dimension as fundamental freedoms, rule of law, torture prevention, gender equality, tolerance and non-discrimination, access to justice, legislation, democratic institutions, and election observation; in cross-dimensional areas of comprehensive security, including conflict transformation and building sustainable peace; and in developing suggestions on strengthening OSCE instruments and processes³.

¹ “Safeguarding civil society participation in the Helsinki process - a matter of the OSCE’s *raison d’être*”, statement of the Civic Solidarity Platform; included in *Civil Society Recommendations the OSCE Executive and Political Bodies, Institutions, and Participating States*, adopted by the OSCE Parallel Civil Society Conference 2017 in Vienna, <http://civicsolidarity.org/article/1520/safeguarding-civil-society-participation-helsinki-process-matter-osces-raison-detre>

² “Safeguarding NGO participation in OSCE events”, statement of the Civic Solidarity Platform; included in *Civil Society Recommendations the OSCE Executive and Political Bodies, Institutions, and Participating States*, adopted by the OSCE Parallel Civil Society Conference 2018 in Milano, http://www.civicsolidarity.org/sites/default/files/milano_civil_society_recommendations_osce_parallel_cs_conference_december_2018.pdf, pp. 5-7.

³ See, for example, Natascha Cerny Ehtesham and Laurent Goetschel, “Civil Society in the OSCE: From Human Rights Advocacy to Peacebuilding”, in *OSCE Yearbook 2015*, Institut für Friedensforschung und Sicherheitspolitik an der Universität Hamburg, Baden-Baden, 2016, <https://ifsh.de/file-CORE/documents/yearbook/english/15/CernyGoetschel-en.pdf>, pp. 363-373

In recent years, NGO participation has become an issue of a heated debate, as some governments that restrict civil society space in their own countries are pushing for the adoption of new approaches and procedures aimed at limiting NGO access to OSCE events. They demand the right to veto NGO participation and a guarantee that NGOs they do not approve of will be denied access.

As has been widely reported, some states have prosecuted NGOs in their countries on the basis of vaguely worded anti-extremism and anti-terrorism legislation that does not meet the rule of law standards. This legislation is increasingly used to attack NGOs and activists who have nothing to do with violence and are targeted merely for exercising their fundamental rights in a peaceful and legitimate way and for their criticism of the government policies. These States are now using these same unfounded claims to justify restricting NGO access to the OSCE.

The OSCE has a responsibility to stand up for civil society organisations, especially those that are repressed at home, and to provide a platform for them to voice their positions and bring their information, which is all the more important since they lack direct channels of communication with their governments.

We reiterate our position: restricting NGO participation in OSCE events on an arbitrary and politically motivated basis would be a tremendous setback for the Helsinki process and a betrayal of the OSCE founding values. Any procedure that provides for state approval of NGOs would be contrary to the basic principle of unhindered and equal NGO participation in OSCE events and would open the door for arbitrary, selective, discriminatory and politically motivated decisions to limit access for organisations and individuals who criticise policies of their governments and address issues that are inconvenient to them.

2

Most OSCE participating States share this view. We are grateful for their continued support of civil society. However, some States continue pressuring other States and OSCE Chairmanships for adopting a state veto principle and blackmail them by blocking consensus-based decisions on other important matters and even boycott human dimension events. In this context, we appreciate the efforts of several Chairmanships and coordinators of the Ad Hoc Working Group of States on the issue of NGO participation, aimed at finding a solution to the problem that would be based on the Helsinki Accord principles, ensure unhindered civil society participation, and end the stalemate between States that negatively affects the OSCE's work.

The only OSCE document that outlines grounds for restricting NGO participation in OSCE events is the 1992 Helsinki Document, namely its Paragraph 16 (Chapter IV). It states that access to OSCE meetings will not be allowed for "persons or organizations which resort to the use of violence or publicly condone terrorism or the use of violence."⁴ No other reasons, arguments or claims can be invoked to demand that NGOs or their representatives be denied access or to justify such denial. This document was adopted by consensus of the heads of state or government of participating States at the 1992 Helsinki conference, and any document changing this principle may also be adopted only by consensus.

⁴ CSCE Helsinki Document 1992. The Challenges of Change. <https://www.osce.org/mc/39530?download=true>, p. 18

A difficult choice: keeping the status-quo or adopting a procedure?

There is no procedure for implementing Paragraph 16. Traditionally, it has fallen to the OSCE Chairmanship and/or ODIHR to take decisions in cases when a State raised an objection to the presence of a specific NGO or a person, claiming the provision of Paragraph 16. No requirements for justification of such objections exist, and consultations have often happened in the past in a non-transparent, ad hoc manner. In the past, some Chairmanships have given in to such pressure to avoid retaliation by states in other areas of the OSCE's consensus-based decisions. And indeed, some States have retaliated in the past when Chairmanships turned down their requests to deny NGO participation, and blocked adoption of institutions' budgets, calendar of human dimension events or their agenda.

We believe that the choice lies not between giving in to the pressure of those few States that demand a veto power and keeping things as they are. This is a false dichotomy. In our view, the choice should be made between maintaining the existing ad-hoc approach to dealing with the states' claims and developing an effective procedure for application of Paragraph 16. This is where pros and contras should be weighed in and a decision made. Procedurally, it would be relatively easy to simply continue rejecting demands for introduction of the veto power because any such change would require a decision by consensus. Luckily, consensus in favour of such negative change is impossible.

However, a political price for keeping the status quo may be too high. Experience tells us that the absence of a clear procedure to review States' requests to block participation of NGOs on the grounds of Paragraph 16 will likely further exacerbate tensions between States. The consensus-based nature of the OSCE decision-making means that its various operations will continue to be taken hostage to the will of those few States that insist on their demands regarding NGOs being met. Given growing divisions between States on other matters after 2014, the likelihood of blackmailing will only increase. Chairmanships may just not sustain such pressure and may be willing to sacrifice participation of a particular (possibly unpopular) NGO for the sake of saving a budget decision or another important matter. That would open a Pandora's box.

We are aware that some States that are true friends of civil society remain sceptical about the idea of adopting a procedure for the implementation of Paragraph 16, being wary of its possible abuse leading to critical civil society groups being disqualified and the principle of equal access of NGOs undermined. They seem to believe that NGOs would be better protected from abuse if things remain as they are, without any procedure.

We understand these concerns and very much respect this position. However, we believe that if a procedure is transparent, based on rule-of-law principles, predictable, time-bound and fair, it would provide strong guarantees for ensuring unhindered NGO participation and would have built-in safeguards against manipulation and abuse. Moreover, using such a procedure would reduce the likelihood of situations when "offended" States whose demands for blocking NGO participation were turned down through such a procedure, would retaliate in other areas of the OSCE decision-making. It would be much more difficult for them to claim that their objections are not given a fair treatment if a transparent

procedure with clear requirements, approved jointly by all States, has been observed. On the contrary, when a decision is made in an ad hoc and non-transparent manner, grounds for claims of unfair treatment are higher.

Finally, if a claim would indeed prove to be well substantiated, the procedure would prevent access of organisations and individuals which have been engaged in violence or terrorism or condone them. If all States were given a fair opportunity to lay down their claims and have them objectively reviewed, it would be difficult for any State that claims it fights the threat of terrorism to object against such a procedure. Democracy is not only about principles; it is also about procedures that put principles to work. Having an effective and clear procedure is preferable to addressing the situation in an ad hoc manner and putting Chairmanships in a vulnerable position under threats of blackmail and political pressure by States. Paragraph 16 should be “operationalised” to prevent arbitrariness and behind the door decisions.

Our recommendations on a possible procedure

We suggest that a procedure for implementation of the provisions of Paragraph 16 is based on certain principles. In particular, this procedure should be:

1. *transparent*
2. *predictable*
3. *rule-of-law based*
4. *time-bound*
5. *used in exceptional situations*
6. *having a final decision entrusted to an independent arbiter.*

More specifically, we recommend the following approach:

1. **Transparent** means that other States and all OSCE institutions and executive bodies are immediately informed about the objection of a concerned State; that the NGO in question is immediately notified of the objection and is provided with its content; that the NGO is given an opportunity to provide a response before the State’s claims are reviewed; that the NGO, other States, all OSCE institutions and executive bodies are informed about all stages of the process; and that the decision and its rationale are communicated to all the parties and participating States.

2. **Predictable** means that the procedure has clearly outlined successive stages such as application of all NGOs for registration for an event; submission of an objection by a State against access of a particular NGO; automatic registration of all other NGOs; submission of a response by the NGO in question; an expert review of the State’s claim, the NGO’s response, and other evidence and adoption of conclusions by the experts; study of the expert conclusions by an arbiter and holding its consultations with OSCE institutions and executive bodies; a decision by an arbiter to either register the NGO for the event or to deny the registration.

3. **Rule-of-law based** means that concerned States should outline precise, compelling and evidence-based claims that an NGO in question has “resorted to the use of violence or publicly condones terrorism or the use of violence”. Mere references to national “terrorist lists” or citing decisions by domestic courts should not be regarded as sufficient. The NGO in question should be given an opportunity to submit a response before the claims are reviewed. This approach would ensure application of the principles of presumption of innocence, legal certainty, and equality of arms that are essential to the rule of law and a fair process. If the matter concerns not only facts about the NGO’s activities or statements but its presumed views, a written statement by the NGO’s governing body confirming that it denounces violence and terrorism might be required. A review should engage internal and, where necessary, external experts who would make their conclusions based on clear and objective criteria. OSCE has the necessary in-house expertise such as the Anti-terrorism Unit at the Secretariat and the Advisor on Anti-Terrorism Issues at the ODIHR Human Rights Department. Possibly, ODIHR could maintain a roster of experts submitted by participating States. Obviously, the experts involved should not come from the State submitting an objection.

4. **Time-bound** means that the procedure should have a concrete and reasonable timeframe to both ensure predictability and allow the NGO in question to participate in the event in case a decision is made to reject the objection raised by a State. There have been cases in the past when decisions on this matter took too long, including after the event’s end. An ideal timeframe, in our mind, is two weeks for the whole procedure, in the case that the registration for the event ends a month before its beginning. That would leave two more weeks after the procedure for the NGO in question to make travel arrangements. If the registration deadline is announced later than one month, the procedure should be shortened, keeping two week before the event. Equally importantly, the time for submitting an objection by States should be very short, for example, within two days after the deadline for registration. That would allow all other NGOs to proceed with their normal travel arrangements and preparation for the event.

5. **Exceptional** means that the procedure should be invoked in extremely rare cases, not as a routine matter. Indeed, excluding an NGO from OSCE events can only be seen as “ultima ratio”, i.e. when an NGO’s activities and views directly contradict the OSCE’s goals of comprehensive security and sustainable peace.

6. **The final decision** should by no means be based on a consensus decision by all participating States (either “consensus in favour” or “consensus against”) which would be arbitrary and politicised, but instead entrusted to the organisation’s official mandate holders. After holding many consultations with interested parties, we believe that it is preferable that the role of an arbiter, responsible for taking a final decision on participation of a particular NGO, should be made by the OSCE Troika composed of the current, past, and incoming Chairmanships. This would allow sharing responsibility, taking the pressure off the current Chair-in-Office, and distributing the burden. We recommend that a decision be taken after reviewing the State’s claim, the NGO’s response and experts’ conclusions, and after holding consultations with OSCE institutions and executive bodies. Consensus among the Troika members appears to be the most reasonable mechanism of decision-making. A decision and its rationale should be communicated to all the parties and participating States. It cannot be contested or appealed. Denial of registration is not a ban for life; the NGO may apply for registration for further OSCE events. The State may submit a more well-grounded claim against its participation next time.

Other related important issues on NGO participation

We are confident that the ongoing discussions should not only focus on the best ways to ensure unhindered and equal NGO access to OSCE events while preventing propaganda of terrorism and the use of violence, including the idea of operationalising the implementation of Paragraph 16. Equally importantly, discussions should also address the elaboration of effective ways to implement Paragraphs 14 and 15 of the 1992 Helsinki Document, which enshrine the commitment of participating States to ensure increased, more meaningful and effective involvement of NGOs in OSCE activities. Paragraph 16 should be seen in conjunction with Paragraphs 14 and 15.

Many of the specific measures suggested in these two Paragraphs have not been fully implemented to date, such as *opening other OSCE meetings to NGO participation* (in practical terms, this would apply to events in the first dimension, observation of the Permanent Council meetings and the Human Dimension Committee meetings, observation of all sessions of the Ministerial Council meetings rather than just the opening and the closing sessions, oral presentation of civil society recommendations to the Ministerial Council meetings, etc.); *designating an “NGO liaison person” in all OSCE institutions and executive bodies, Foreign Ministries and delegations of participating States; encouraging written presentations by NGOs to OSCE institutions and meetings; providing encouragement to NGOs organising seminars on OSCE-related issues; notifying NGOs of the dates and agenda of future OSCE meetings*, etc. We do not see why civil society participation and input should be limited only to the human dimension and partially the second dimension events, given equal importance of all the three dimensions of the OSCE, encompassing the comprehensive security concept.

In 2014-2019, the CSP has produced a number of documents on the issue of enhancing NGO participation in OSCE work, based on many years of experience of its members and including a range of specific recommendations to OSCE institutions, executive bodies and participating States. Some of them have been taken on board by various OSCE actors but the potential remains largely untapped. The latest CSP report on this subject was published in summer 2019 and was based on the outcomes of a series of CSP roundtable expert meetings with participation of representatives of interested participating States and OSCE institutions⁵. We call on OSCE participating States and institutions to review these recommendations and consider them for implementation or further discussions with the CSP. Putting them to work would take implementation of provisions of Paragraphs 14 and 15 forward.

We would like to highlight some of the proposals that require attention. They include requesting NGO input at the preparatory stage of OSCE meetings, in drafting documents and following up to events and reports; not only appointing NGO liaison persons in all OSCE institutions, structures and units as well as the Chairmanship Taskforce, but mandating them with disseminating information about the work of their

⁵ Strengthening OSCE Instruments in the Human Dimension: Reflections and Recommendations, report by the Civic Solidarity Platform and the Netherlands Helsinki Committee, July 2019, http://civicsolidarity.org/sites/default/files/strengthening_the_use_of_osce_human_dimension_instruments_csp_report_2019.pdf

respective entities to civil society and collecting information, networking and consulting with civil society in a regular and consistent manner; holding regular meetings with civil society by heads and representatives of OSCE institutions and bodies, including during their country visits; appointing an NGO liaison person in each field operation and their more active cooperation with independent civil society groups in the countries of presence, accepting and using their information and recommendations; meetings by Chairperson-in Office and his/her Special Representatives with civil society during their visits to participating States; holding consultations by incoming Chairmanships on their thematic priorities with civil society early on; appointment of a Special Representative of the Chair-in-Office on civil society; consistent and public expression by Chairmanships of their support for the protection of civil society space across the OSCE region and in the OSCE's work.

Other CSP recommendations on more systematic OSCE engagement with civil society include official distribution of civil society recommendations adopted at parallel conferences among all State delegations and other participants of Ministerial Council meetings; mainstreaming of the protection of civil society space in OSCE activities by OSCE institutions and executive bodies and their recognition of the role of civil society in their programs; development of a system of prompt and effective reaction to cases of persecution of NGOs and civil society activists and violence against them; designating entry points in crises situations where civil society can submit its information and proposals; in conflict management field, recognition by relevant OSCE bodies of the key role of civil society in monitoring the situation, collecting and analysing information and providing assistance to victims, and their close interaction with NGOs.

Additional consultations are also needed to look into making the procedures of NGO registration for OSCE events more efficient, transparent, and user-friendly, enabling unhindered and equal access for civil society.