

Possible legal basis for an Implementation Support Unit (ISU) in Switzerland

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Introduction

The First Meeting of States Parties agreed that the first intersessional meeting under the CCM should consider implementation architecture and means to coordinate the work of the Convention, including the question of establishing a secretariat. Provided that such a ISU would be placed in Geneva, States Parties have several options regarding its possible institutional and legal framework. Swiss Law is very flexible when it comes to the establishment of such an entity, providing the States Parties with the opportunity to construct a model tailored to their needs. The Swiss 2007 Host State Act is meant to specifically facilitate the establishment of international entities and organisations in Switzerland, and provides a framework that enables the establishment and existence of any non-profit organisation within the sphere of international relations. Thus there are no legal impediments under Swiss law to establish a ISU, including as an independent secretariat answerable directly to the States Parties.

There appears to be three main “tracks” for the discussions on a ISU for the CCM:

- 1) The “UN track” – where the ISU would be placed within the UNODA,
- 2) The “GICHD track” – where the ISU would be placed within the Geneva International Center for Humanitarian Demining, and
- 3) The “independent track” – where the ISU would be established as an independent secretariat for the Convention.

There are many examples of Convention Secretariats within the UN system; for example, the UNODA has implementation support functions for the Biological Weapons Conventions and is about to set up implementation support for the CCW. The common secretariat for the Basel, Stockholm and Rotterdam Conventions on hazardous waste is emplaced within UNEP. The example of the “GICHD track” is the Implementation Support Unit (ISU) for the Mine Ban Convention, which is emplaced within the GICHD. There are many examples of the “independent track”, as mentioned in more detail below, ranging from the ICRC to FIFA.

Taking as a point of departure the consensus from the First Meeting of States Parties that there is a need for a secretariat that will report directly to the States Parties, this Memo will look into the legal framework pertaining to the third option.

Two options for the establishment of a ISU for the CCM

There are two main options for the establishment in Geneva of a ISU as an independent secretariat for the Convention on Cluster Munitions: 1) *Foundation*, and 2) *Association*.

Either status would accord the ISU legal personality under Swiss law.¹ Once established, an agreement with the Swiss Federal Council (« Conseil fédéral suisse ») will then enable the ISU to be recognised as an international institution (« institution internationale ») with international legal personality (as well as to obtain immunities from prosecution and obligations to pay taxes). This is the approach taken recently, for example, by GAVI (the Global Alliance for Vaccines and Immunisation), which was established as a non-profit foundation in Geneva in 2009.

Foundation

Swiss law on foundations is said to be “extremely flexible” with the result that there are some 3,000 foundations with either Swiss or international management active in the country. Foundations based in Geneva include GAVI, Geneva Call, the GICHD, the Global Fund to Fight Aids, Tuberculosis and Malaria (GFATM), and the Global Alliance for Improved Nutrition (GAIN).

A foundation is governed by Articles 80 to 89 of the Swiss Civil Code. The Swiss Supervisory Board of Authorities has oversight of foundations in Switzerland. However, this Supervisory Board does not intervene unless there are exceptional circumstances of wrongful acts, fraud or gross negligence.

A foundation must have a start capital of at least CHF 50,000. A foundation that pursues a public or non-profit purpose is tax-exempt with respect to profit and capital that is exclusively and irrevocably dedicated to such purposes. Such public interest may be pursued through activities in general charitable, humanitarian, human rights, scientific or cultural areas.

A foundation must have a Foundation Board (or Foundation Council), based on its Foundation Statutes (or Foundation Charter). Such a Board will normally consist of at least three natural persons (or legal entities, although it appears that it is disputed in Swiss law whether legal persons can be members of a Foundation Board).² Foundations with an international character must have at least one member of the Foundation Board who is a citizen of Switzerland or any member state of the European Union and resident in Switzerland.

Even if the Board members have to be natural persons, they do not have to be appointed on a personal basis. A Board member can typically be a representative from an organisation or a State, and it is up to that organisation or State to determine which person that will actually fill the post.

A foundation is incorporated by public deed, entered into the commercial registry (« registre de commerce ») based on the Foundation Statutes and indicating the members of the Foundation Board.

¹ For details of applicable law under the Swiss Civil Code (French only), see Articles 60–89, www.admin.ch/ch/f/rs/210/index1.html#id-1-2-2.

² Eidgenössische Stiftungsaufsicht (Fn 264). However, a minimum number of Board members is not legally required.

The Foundation Board is the highest organ within a foundation, and is responsible for the supervision of the foundation's business. The Foundation Board assumes all competences that are not expressly delegated to another body either in the Foundation Statutes or the respective regulations. The Foundation Board performs the following unalienable tasks:

- regulation of the powers to represent the foundation or to sign on its behalf;
- election of the Foundation Board and the auditors; and
- approval of the annual financial statements.

Foundation Board members are trustees and may be legally liable for using that “trust” position for personal gain. If there is a general legal claim against a foundation, the liability is limited to the foundation's assets. If a foundation is granted international organisation status under the 2007 Host State Act (see below), its assets and Board members will be covered by privileges and immunities thus protecting them from Swiss legal liability.

A ISU for the CCM could be established as a Foundation, where for example the members of the Board would be representatives of the States participating in the formal and informal structures and working groups of the Convention.

Association

A “not-for-profit” association (« association sans but économique ») is a grouping of persons not for financial gain. An association is governed by Articles 60 to 79 of the Swiss Civil Code. Associations based in Geneva include the International Committee of the Red Cross (ICRC), the International Air Transport Association (IATA), and the Fédération Internationale de Football Association (FIFA). There is no formal oversight body for associations in Switzerland.

The General Assembly of members is the supreme governing body of the association. Associations are typically “open”. Any individual or organization meeting the membership requirements (e.g., to pay dues) may join and each is given the right to vote on Association matters. In practice, associations typically delegate operational decisions to an executive or management committee to implement the General Assembly's decisions.

Association members are not “trustees” over the association assets. If there is a general legal claim against an association, the liability of each association member to pay its share (as in any “partnership”) may be limited to the amount of any membership fee paid in. However, members of an association's executive committee may not benefit from the same limitation of liability since they have a duty to carry out the General Assembly's decisions and may not misdirect association assets for personal purposes or gain.

If an association is granted international organisation status under the 2007 Host State Act, its assets and individuals serving as members will be covered by privileges and immunities thus protecting them from Swiss legal liability.

One could imagine, for example, that the ISU for the CCM was to be established as an association with the Meetings of the States Parties as its General Assembly, and where one also establish a Board where relevant States would be represented.

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There appears to be more specific legal requirements pertaining to foundations than to associations. For example, there is no requirement of a specific sum as start capital for an association. It also would appear that the requirements for internal structures are more flexible when it comes to associations. In reality, however, one can largely set up any organisation one wants within both categories.

International institution

Whether a foundation or an association, a ISU for the CCM would qualify as an international institution and thus fall within the scope of the Swiss Host State Act from 2007 (« Loi sur l'Etat hôte, du 22 juin 2007 »). This act was adopted specifically to further facilitate the establishment of international institutions in Switzerland. Article 2 of this act lists the beneficiaries of privileges, immunities and facilities as inter alia “secretariats or other bodies established under an international treaty”. Notwithstanding that the CCM itself does not explicitly establish a ISU, such an organ would be established “under” the Convention through its Meetings of States Parties which are mandated to make such decisions. In any event, Article 2 of the Host State Act provides immunities etc. also to “international institutions” in general as well as and “other international bodies”.

Requirements for being granted immunities, privileges and facilities according to Article 6 of the Host State Act are, inter alia, that “the purposes are not for profit and are of international utility”. This clearly applies to a ISU of the CCM.

According to Article 7 of the Host State Act, an international institution can benefit from privileges, immunities, and facilities if it has structures similar to those of an intergovernmental organization; it performs tasks usually attributed to a state or intergovernmental organization; or if it has international recognition as an international legal entity, including through international treaty, a resolution of an intergovernmental organization, or a policy document approved by a group of States. A ISU to the Convention on Cluster Munitions clearly falls within this scope.

A ISU as a non-profit Foundation or Association

In order to establish a ISU for the CCM as a non-profit Association or Foundation, it would, as a minimum, be necessary to draw up Statutes and establish a Board and other bodies.

Such Statutes would constitute the formal basis for the ISU and would have to be elaborated within the relevant organs of the Convention, such as in the Friends’ meetings,

at the intersessional meetings and finally to be adopted at the Second Meeting of the States Parties.

At a minimum, the Statutes would have to include provisions on the tasks and mandate of the ISU, on the purpose of the Foundation or Association, on its financial means and possible funding sources, on its organisation, including its Board and Auditors, on the composition and appointment of Board Members on its organisation, decision-making and function of the Board and other bodies, as well as provisions pertaining to representation, signature, liability, and amendment of the Statutes.

Assuming that the Statutes were to be adopted at the Second MSP in 2011, the draft Statutes would have to be elaborated and consulted widely among States Parties (and States having ratified or acceded to the Convention) within the coming months.

Conclusion

There are no legal impediments under Swiss law to establishing a ISU for the CCM as an independent secretariat answerable directly to the States Parties. On the contrary, the 2007 Host State Act is meant to specifically make it easier for organisations to establish themselves in Switzerland, and provides a very flexible framework that enables the establishment and existence of any non-profit organisation within the sphere of international relations as long as it has its headquarters or a branch in Switzerland.