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**Chairpersonship: Sweden****REPORT TO THE MINISTERIAL COUNCIL ON STRENGTHENING  
THE LEGAL FRAMEWORK OF THE OSCE IN 2021****Introduction and background**

1. The absence of a universally recognised international legal personality for the OSCE continues to present operational challenges.
2. Over the years, various efforts to secure legal status, privileges and immunities for the Organization, its officials and the representatives of its participating States across the OSCE region were made, resulting in various participating States concluding bilateral agreements/arrangements or granting legal status, privileges and immunities to the OSCE through national legislation. However, this has resulted in a fragmented legal framework and a need for a uniform solution.
3. In this regard, an open-ended Informal Working Group on Strengthening the Legal Framework of the OSCE (IWG) was established in 2009 in order to advance the dialogue among the participating States, further to a Ministerial Council decision on this topic.<sup>1</sup> It generally meets two to three times per year in an ongoing effort to achieve progress on legal protection for the OSCE and its officials, and to reach a solution that would grant international legal personality in accordance with one of the currently four options.<sup>2</sup> As in recent years<sup>3</sup>, these four options remain as follows:
  - Option 1: Adoption of the 2007 Draft Convention;
  - Option 2: Adoption of a constituent document prior to, or in parallel with, adoption of the 2007 Draft Convention;
  - Option 3: Development of a “Convention Plus” (a hybrid solution consisting of elements of a constituent document incorporated into the 2007 Draft Convention);
  - Option 4: Implementation of the 1993 Rome Council Decision through signature and ratification of the 2007 Draft Convention by a group of interested participating States.

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<sup>1</sup> MC.DEC/4/08 dated 5 December 2008.

<sup>2</sup> The documents relating to the four options were compiled in CIO.GAL/8/17/Rev.1 dated 25 January 2017.

<sup>3</sup> Reports to the Ministerial Council on Strengthening the Legal Framework of the OSCE, respectively MC.GAL/4/15 dated 1 December 2015; MC.GAL/7/16 dated 9 December 2016; MC.GAL/7/17 dated 8 December 2017, MC.GAL/10/18 dated 7 December 2018, MC.GAL/3/20 dated 3 December 2020.

## Proceedings of the Informal Working Group in 2021

4. In 2021, the Swedish Chairpersonship convened two meetings of the IWG, chaired by H.E. Ambassador Helmut Tichy of Austria, both held in blended format due to continuing COVID-19 related restrictions. The agenda items included *inter alia* discussions on the feasibility of each of the options tabled for consideration, updates on the operational consequences of the lack of a clear legal status of the OSCE, and an update on the survey of national implementation measures.<sup>4</sup>

### First meeting: 31 May 2021

5. The Chairperson opened the meeting by inviting the participating States to comment on any developments regarding the four options. Some participating States reiterated their well-established positions on the options for consideration. No new initiative was proposed by any participating State.

### *Update on the operational consequences of the lack of a clear legal status of the OSCE*

6. Mr Stephen Walsh, Head of the Secretariat's Office of Legal Affairs, presented an overview of the operational consequences that the OSCE had recently faced due to the lack of a clear legal status. He recalled the note of caution that he had sounded at the previous IWG meeting on the possible exposure of the Organization during the COVID-19 pandemic. This included possible compensation claims exceeding the levels provided for under OSCE insurance policies and possible claims against the Organization and its senior management in the event that an official contracted the disease while discharging their official functions, leading to serious harm or death. Mr Walsh also informed the IWG that the new Secretary General had endorsed the 2017 Model Arrangement and Model Specific Arrangement<sup>5</sup>, which while not an alternative to the options before the IWG, could be considered by interested participating States for conclusion on a bilateral basis as a short-term stop-gap measure.
7. Mr. Walsh provided some illustrative examples of the current suboptimal legal situation. These included the outbreak of hostilities between two participating States, which led to extensive consultations between the relevant field operation and the Secretariat's Office of Legal Affairs on the OSCE's potential liability when conducting operations in the affected area, and the re-emergence of a criminal case against an OSCE official connected to the performance of their official functions in a mission-area where the Organization lacked the instruments to assert immunity of its staff.

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<sup>4</sup> CIO.GAL/108/21 dated 30 September 2021.

<sup>5</sup> SEC.GAL/44/21 dated 26 March 2021.

Second Meeting: 12 October 2021.

8. The Chairperson opened the meeting by inviting the participating States to comment on any developments regarding the four-tabled options. Some participating States reiterated their well-established positions on the options for consideration. No new initiative was proposed by any participating State

*Presentation on the operational challenges given the lack of a clear legal status of the OSCE*

9. Ms Malgorzata Twardowska, Deputy Director for CPC/Operations Services and co-author of the recently published OSCE paper “A Peaceful presence – The First Five Years of the OSCE Special Monitoring Mission to Ukraine”, made a presentation on the issue from CPC’s perspective. She stated that despite the lack of a universally recognized legal personality, OSCE participating States have assigned the Organization with mandates for operations, including in the field and in conflict zones, thus expecting the OSCE to operate as any international organization enjoying the necessary level of privileges and immunities for its effective functioning. The OSCE’s peculiar legal situation, though not precluding the Organization from carrying out its mandates, has created complications, is time-consuming and gives rise to legal risks and uncertainties, bringing about additional complexity, administrative challenges and higher costs.
10. Ms. Twardowska focused on the rapid deployment of the SMM as an illustrative example in this regard, highlighting that in the first twelve weeks of its deployment, the Mission lacked formal legal capacity as a consequence of a lack of universally recognized legal personality for the OSCE itself. Although the MoU with the host country was signed not long after the SMM’s deployment, the ratification of the MoU took place some months later, and in this interim period, this situation prevented the SMM from entering contracts, opening bank accounts and purchasing necessary assets.
11. Additionally and reflecting the OSCE’s patchwork system of privileges and immunities, while the MoU ensures that SMM officials are now protected in the Ukraine, other OSCE officials, such as the Secretary General and Secretariat staff, enjoy no formal legal status, privileges, immunities or security guarantees in Ukraine. Thus, if they do not require a visa when undertaking duty travel, the Government will not be aware of their presence and will not owe them any special protection. Recalling the abduction of two groups of monitors in 2014, the health and wellbeing of OSCE staff is not a hypothetical scenario. Referring to the jurisprudence of the Administrative Tribunal of the International Labour Organisation, which held that international organisations have a duty of care to establish appropriate diplomatic arrangements with the host government before sending officials on duty travel, the presentation highlighted that resulting in harm to personnel could lead to profound financial liability for the organization

concerned.<sup>6</sup> Ms. Twardowska stressed that while most bilateral arrangements between the OSCE and host-states have made the 1961 Vienna Convention on Diplomatic Relations (VCDR) applicable to the field operation and its members, the VCDR was intended exclusively for bilateral missions. Such use of the VCDR limits the organization's capability to protect its staff and causes uncertainty for locally recruited officials in respect of their tax compliance, which in turn, affects the OSCE's ability to attract highly qualified staff.

12. Finally, Ms. Twardowska highlighted that the absence of a universally-recognised legal personality prevents some participating States from loaning vital equipment, thus resulting in higher costs by obtaining this equipment and related services on a commercial basis.

*Update on the operational consequences of the lack of a clear legal status of the OSCE*

13. Mr Walsh recalled his cautionary note about the potential exposure of the OSCE in a pandemic for want of a unified legal basis. To illustrate how the absence of a universally accepted legal personality affected the operations of the OSCE during such times, Mr Walsh relayed that the Secretary General had had to request that her country of origin issue a diplomatic note in order to enable her travel to a participating State on official business where, as an OSCE official, she was not be entitled to diplomatic exemption and would otherwise have been required to quarantine. Mr Walsh also referred to ongoing MoU negotiations with a participating State in which, due to the lack of a universally accepted legal personality, all elements of the draft MoU were up for discussion rather than having a solid basis already set out covering the fundamental aspects of the organisation's needs. He also cited the recent closure of one of the OSCE's Executive Structures, where smooth closure ensued thanks to the cooperative approach of the host country, as there was neither a MoU nor any national measures recognizing the OSCE's legal status in place in the host country.

*Update on the Survey of National Implementation Measures and the supplementary questionnaire on the Protection of OSCE Assets and Archives*

14. Mr Walsh informed the IWG of the reissuance of the National Implementation Measures Survey and the supplementary questionnaires, which were distributed as a CIO.GAL/108/21 on 30 September 2021 and expressed his gratitude to those participating States that had responded to the previous questionnaire. Mr. Walsh also highlighted that the more participating States responded to the questionnaire, the clearer the picture would be for the Secretariat and the IWG.

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<sup>6</sup> International Labour Organization Administrative Tribunal (ILOAT), A. v. ICC, 126<sup>th</sup> Session, Judgment 4003, 26 June 2018.

## **Conclusion**

15. The four options for strengthening the legal framework of the OSCE remained tabled in 2021 without any perceptible progress towards consensus. A notable feature of this year's discussions was the rather modest level of innovative or constructive discourse concerning the four options. Nevertheless, the level of participation in the IWG's meetings continues to demonstrate an interest in resolving the matter through appropriate legal means to protect the OSCE, its officials and the representatives of participating States while pursuing their functions. The diverse operational challenges illustrated during the meetings of the IWG in 2021 underscored the multitude of aspects that are affected by the protracted pursuit of solutions.
16. The IWG remains the only functioning mechanism for genuine dialogue to discuss, co-ordinate and address this core aspect of the OSCE's existence and protection of its operations and for this reason remains a valuable forum.