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REPORT TO THE MINISTERIAL COUNCIL ON STRENGTHENING THE LEGAL FRAMEWORK OF THE OSCE IN 2018

Introduction

1. The CSCE was originally conceived as a diplomatic conference convening to discuss the politically binding principles and commitments agreed at summit level in the 1975 Helsinki Final Act. The politically binding nature has been realised thereafter in the ensuing documents and decisions over the more than 40-year history of the CSCE/OSCE. The expanded institutionalisation of the CSCE/OSCE, including the deployment of field operations in the supervening years after the 1992 Helsinki Summit, have served to underscore that need and have made it critical.

2. The absence of a recognised international legal personality for the CSCE/OSCE led to various efforts, since at least 1993, to secure legal status, privileges and immunities for the Organization, its officials and the representatives of its participating States across the region. The CSCE Council in Rome considered the relevance of an agreement granting internationally recognised status to the CSCE institutions and noted the importance of providing appropriate treatment for the CSCE institutions and its personnel. It adopted model provisions for legal capacity, privileges and immunities, but left it to the discretion of each participating State to determine how to implement those provisions at the national level, subject to its constitutional and related requirements. The Rome Council Decision was adopted without prejudice to the treatment granted by the governments hosting the Secretariat, CPC and ODIHR, a treatment recognised by the CSCE Council as comparable to that granted by States to the United Nations.[1]

3. In the following year, the 1994 Budapest Summit decided to change the name from CSCE to the current OSCE: "The CSCE will review implementation of the Rome Decision on Legal Capacity and Privileges and Immunities and explore if necessary the possibility of further arrangements of a legal nature. Participating States will furthermore examine possible ways of incorporating their commitments into national legislation and, where appropriate, of concluding treaties."[2] In 2007, the concerted effort to reach a consensus text resulted in the *Draft Convention on the International Legal Personality, Legal Capacity and Privileges and*

[1] Rome Council Decision CSCE/4-C/Dec.2, dated 1 December 1993.
[2] Budapest Summit, Decision I on Strengthening the CSCE, dated 21 December 1994.

Immunities of the OSCE, agreed at expert level (2007 Draft Convention).[3] Adoption of the 2007 Draft Convention text remains pending, while discussions continue over whether a constituent document for the OSCE is a prerequisite.

4. Various participating States granted legal status, privileges and immunities through national legislation or bilateral agreements/arrangements to the OSCE. Currently, the OCSE is operating under a variety of legal measures. This resulted in a fragmentation of the legal framework of the OSCE. Against this background, operational problems illustrate the need for a uniform solution. The OSCE Staff Regulations and Staff Rules explicitly require the OSCE to ensure the protection of its officials (Staff Regulations 2.03 and 2.07). They also stipulate that the Secretary General, heads of institutions and missions, staff and mission members shall enjoy privileges and immunities. These form the framework of the OSCE's duty of care for its officials.

5. In 2009, the open-ended Informal Working Group on Strengthening the Legal Framework of the OSCE (IWG) was established to foster the necessary dialogue among participating States on this topic. It meets three times per year in an ongoing effort to achieve progress on legal protection for the OSCE and to reach a solution that would grant international legal personality in accordance with one of currently four options that continue to be the subject of the meeting discussions.[4] Convened by the Italian Chairmanship and chaired by Ambassador Helmut Tichy of Austria, the IWG resumed its work at the outset of 2018 with the four options tabled for consideration, as detailed in the Chairmanship invitation and draft agenda for the first IWG meeting of 2018.[5] As reported in previous years,[6] the four options are:

- 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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[3] Letter from the Chair of the Informal Working Group at Expert Level of the OSCE Spanish Chairmanship dated 22 October 2007, annexing the Final Document of the Informal Working Group Draft Convention on the International Legal Personality, Legal Capacity, and Privileges and Immunities of the OSCE (CIO.GAL/159/07).

[4] The documents relating to the four options were compiled in CIO.GAL/8/17/Rev.1 dated 25 January 2017.

[5] CIO.GAL/31/18 dated 11 April 2018.

[6] Reports to the Ministerial Council on Strengthening the Legal Framework of the OSCE, respectively MC.GAL/5/14/Corr.1 dated 3 December 2014; MC.GAL/4/15 dated 1 December 2015; MC.GAL/7/16 dated 9 December 2016.

6. The proceedings of the IWG meetings convened in 2018 are recorded below.

Proceedings of the Informal Working Group in 2018

First meeting: 20 April 2018

7. The April meeting of the IWG featured a panel of treaty law experts who were invited by the Chairmanship to discuss the feasibility of Option 4 under public international law.[7] Professor Dr. Niels Blokker (Leiden University Faculty of Law), Professor Dr. August Reinisch (University of Vienna), and Professor Dr. Alexander Solntsev (People's Friendship University of Russia, Moscow) engaged in an academic discussion on "The relationship of Option 4 to the OSCE: Is it legally feasible and operationally advisable?". They offered their views on the issue and examined the suitability of this option for the OSCE.

Discussion by Professor Dr. Niels Blokker, Leiden University Faculty of Law

8. Professor Dr. Blokker began by giving a brief overview of the ways in which an international legal person can come into being. Normally, this could occur either through an explicit clause in the same treaty that created the international organisation, or implicitly through the subsequent practice of member states. The OSCE does not have a constituent document, and there are some persistent disagreements whether "the [OSCE] was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights, which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane,"[8] Therefore, none of these methods are applicable to the OSCE. Hence the necessity to consider other approaches. Dr. Blokker explained that somewhat less frequently, there are also precedents for the establishment of legal personality of an international organisation through explicit provisions in a separate instrument.[9] Dr. Blokker emphasised that the best solution for the OSCE would be the adoption of the 2007 Draft Convention under Option 1. He argued that in the absence of such a move, a limited number of the OSCE participating states wishing to agree to a slightly modified text of the 2007 Draft Convention would be free to do so. Nations are entitled to establish a new legal person and there is no rule under international law or within the OSCE that removes or restricts such a right. He thus concluded that while it might be unusual to implement Option 4, it could not be considered unlawful. Yet he also stressed the

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7 CIO.GAL/31/18.

8 ICJ, *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion of 11 April 1949, ICJ Reports 1949, page 9.

9 For example, 1999 Agreement for the Recognition of the international legal personality of the International Potato Centre, 2009 Agreement Recognizing the International Legal Personality of the Partnerships in Environmental Management for the Seas of East Asia.

need for such a document to be attractive to other participating States, with the objective of ultimately achieving Option 1.

Discussion by Professor Dr. August Reinisch, University of Vienna

9. Professor Dr. Reinisch endorsed Dr. Blokker´s view, drawing an analogy to Article 41(1) of the 1969 Vienna Convention on the Law of Treaties (1969 VCLT). This was justified despite there clearly being no treaty as such, due to the fact that the current legal position of the OSCE would still be amended and the situation therefore resembled that described in the relevant clause. Article 41(1) of the 1969 VCLT lists the conditions under which "two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone." This would be satisfied if "the possibility of such a modification [would be] provided for by the treaty". The 1993 Rome Council Decision acknowledged that expanded operations necessitate legal capacity, privileges and immunities and recommended that appropriate treatment be granted by national legislatures to the organisation accordingly. Moreover, it was later reaffirmed in the 1994 Budapest Summit Decision that participating States should examine ways of complying with these commitments, including by concluding treaties. While this statement could be viewed as already envisaging a limited number of participating States as becoming contracting parties, this point remains subject to debate. Nevertheless, the 1969 VCLT holds as an alternative that an *inter-se* modification would also be permissible if "[this] is not prohibited by the treaty."

10. It was then considered by Dr. Reinisch whether the declaration in the 1994 Budapest Summit Decision that "the *change in name* from CSCE to OSCE alters neither the character of our CSCE commitments nor the status of the CSCE and its institutions" could be interpreted as a restriction. This was eventually rejected, due to the confinement to the name change itself in the clause, which neither addressed the question of privileges and immunities nor forbade their adoption. Additionally, under the 1969 VCLT *inter se* modification regime, it is clear that "[the modification must] not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations". Dr. Reinisch contended that this criterion appeared fulfilled, as an appropriately adapted 2007 Draft Convention would not prejudice reluctant participating States or add to their burden. Finally, "[the modification must] not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole". As conferral of privileges and immunities on the OSCE would not compromise the aims of the instruments establishing it, Option 4 seems compliant with international law. Dr. Reinisch thus reasoned that if the modification of a treaty as between certain parties would be allowed, the argument for the permissibility of progressing with Option 4 – in which case there is no actual treaty from which to deviate – would be even stronger.

Discussion by Dr. Alexander Solntsev, People's Friendship University, Moscow

11. Dr. Solntsev, on the other hand, took a different stance and warned that the OSCE should "try to avoid the creation of bad precedents or artificial international customs without sufficient state practice". He strongly advocated in favour of Option 2 and maintained that a constituent document would have to be concluded in advance of or at least simultaneously with the 2007 Draft Convention. This pattern had been followed in the establishment of ASEAN, the CoE, NATO, the CSTO, the OAS etc. and therefore appeared to have become part of the international custom in this field. Furthermore, Dr. Solntsev argued that proceeding with Option 4 would violate the principle of consensus at the core of the OSCE and risk the fragmentation of international law. Yet this was countered by Dr. Blokker, who rejected the relevance of the principle of consensus to a non-OSCE agreement and described Option 4 as harmonising some of the different national implementation measures currently in force.

12. The academic discussion was followed by a discussion between delegations and the panel of experts. To close the meeting, the Chairperson reiterated the need for political willingness in the IWG for it to achieve progress.

Second meeting: 29 June 2018

Italian legislation on the OSCE

13. At the invitation of the Italian Chairmanship,[10] Professor Ida Caracciolo from the University of Campania Luigi Vanvitelli delivered a presentation on Italy's legislation on the OSCE. Professor Caracciolo is an Expert Consultant for Legal Affairs, Diplomatic Disputes and International Agreements for the Italian Ministry of Foreign Affairs.

14. The presentation by Professor Caracciolo started with an introduction to the Italian Law No. 301, adopted 30 July 1998, which enacted a set of rules on the legal capacity of the OSCE in Italy and its related privileges and immunities. Notably, the law was passed by the Parliament fairly promptly. By 1998, the OSCE had developed into a sufficiently institutionalised international body. This may be due to the progressive evolution of the CSCE into the OSCE, primarily during the period beginning with the Charter of Paris of 1990 until the meeting of Budapest in 1994, when permanent executive organs and structures with specific competences were established. In 1993, the Council of Ministers in Rome recognized the "*expanded operations within CSCE participating States of CSCE institutions and their personnel and of CSCE missions, and the importance that all participating States provide for those institutions and individuals appropriate treatment*" and the need for participating States to, subject to their constitutional, legislative and related requirements, confer legal capacity on CSCE institutions in accordance with the provisions adopted by the Ministers.[11]

[10] CIO.GAL/70/18 dated 19 June 2018.

[11] 1993 Rome Council Decision 2, CSCE/4-C/Dec.2 of 1 December 1993.

15. In the case of Italy, the legal capacity of the OSCE has been recognised by Article 1 of the Law No. 301 directly and uniquely through an internal legislative act. This particularity of conferring legal capacity directly is due to the lack of a charter or statute of the organisation itself with respective provisions referring to domestic law. However, Article 1 neither provides an unlimited legal capacity, nor defines it in precise terms. The law confers the legal capacity to OSCE institutions only to the extent of exercising their functions, specifying the ability to contract, acquire and dispose of property and to participate in legal proceedings. There is considerable similarity to Article 104 of the UN Charter, which establishes that "*[t]he Organisation shall enjoy in the territory of each member such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes*." Consequently, acts that are unnecessary for the exercise of the organisation's functions would be *ultra vires,* and therefore null and void at the domestic level.

16. As a principle of international law, international organisations commonly derive their international personality from treaties. This implies the granting of privileges and jurisdictional immunities. However, in the case of the OSCE, the absence of a constituent treaty leads to the conclusion that privileges and immunities can only be located in domestic legislations. Article 2 of the Italian Law No. 301 grants immunity to OSCE institutions, the permanent missions, the representatives of the participating States, OSCE officials and mission members, and comprises immunity from both civil and criminal jurisdiction, and also inviolability of the organisation's premises, archives and documents, currency and fiscal privileges, as well as freedom of secure communication. However, when defining the scope of such, the direct comparison to State's immunities, especially its distinction between public and private or commercial and sovereign acts, proves to be insufficient, as the immunities of international organisations are solely based on the exercise of the organisation's "*functional necessity*". Thus, immunity is to be granted if the activity in question is to be considered necessary for the effective functioning and the interests of the organisation in carrying out its objectives.

17. Accordingly, in order to determine the granting of immunity, the status of a concerned employee, especially the tasks and activities belonging to his/her position, must be taken into consideration. In this context, current Italian jurisprudence makes it clear that with regard to Article 24(1) of the Italian Constitution which establishes the fundamental right that "*Anyone may bring cases before a court of law in order to protect their rights under civil administrative law*", the duty to offer an equivalent protection of an individual's rights is a precondition for immunity to be granted. This is also why the Law No. 301, in line with provisions in constuent treaties of other international organisations, allows the organ representing the organisation, namely the OSCE Secretary General in consultation with the Chairperson-in-Office, to waive immunity. The waiver for "*staff of the OSCE institutions and members of the OSCE missions*" is compulsory "*in any case where it (immunity) would impede the course of justice*". But as immunity in itself impedes the course of domestic justice to an extent, this provision is to be seen as an attempt to reconcile the need for justice and the obligation to waive with the need to ensure the proper exercise of the organisation's functions, and must be applied on a case-by-case basis. Professor Caracciolo indicated that

under the Italian legislation, the authority competent to determine whether functional immunity applies is the Italian judge, who determines whether the acts performed by an official fall within his/her official capacity. Being driven by this functional instead of personal logic, this protection regime is less extensive compared to that envisaged for diplomats, and cannot be perceived as granting privileges to the personal advantage of the official.

18. In the absence of provisions on the security of OSCE officials, staff and representatives on Italian territory, customary rules apply. They state that the national authorities are obliged to protect the organisation's personnel from any undue interference regarding their person and property as far as their activities are related to the exercise of their functions. This duty of protection is twofold. On the one hand, States shall refrain from imposing measures that could endanger the security of the organisation's officials and staff. On the other hand, States shall take necessary measures to prevent wrongful acts committed by third parties against OSCE personnel. Moreover, the inviolability of premises is provided for in Article 3 of the Law No. 301. It means that the authorities can neither enter the OSCE premises in Italy, nor accomplish any unauthorized functions therein, such as arrest, inspection, or seizure of goods in the premises. However, the applicable jurisdiction itself remains that of the host State. With regard to the inviolability of archives and documents, it is worth noting that it comprises any documents, regardless of format or illustration medium.

19. Finally, Professor Caracciolo addressed the issue of the legal force of the Law No. 301 within the Italian legal order. Article 117 of the Italian constitution establishes that "*Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations*". Accordingly, laws implementing international treaties constitutionally have a superior legal force compared to laws which were not adopted in connection with international obligations, and cannot be overruled by the latter. As the formal scope of the Law No. 301 is not to implement any international treaty but to provide rights and regulations directly to the OSCE, it remains questionable whether the Law has *de facto* an "international relevance" and is therefore to be recognized with special legal force or not.

20. Professor Caracciolo concluded that Italy's Law No. 301 has reached the equivalent goal that an agreement between the OSCE and Italy would have achieved. However, in order to ensure uniformity and consistency among international organisations in terms of guarantees deriving from the international legal order, a headquarters or constituent agreement would indeed also be reasonable.

Protection of OSCE assets and archives

21. Under the next agenda item, Ms. Jasna Arsić-Đapo and Ms. Shavonna Maxwell, Legal Advisers in the Office of Legal Affairs in the Secretariat, delivered a presentation on the protection of OSCE assets and archives. The purpose of the presentation was to report on the operational obstacles and associated legal and financial risks encountered by the

Organization with regard to the protection of its assets and archives as a result of the lack of universal recognition of legal capacity and privileges and immunities of the OSCE by participating States.

22. Ms. Arsić-Đapo began the presentation with recent examples of such challenges and the operational impairments that resulted from the legal and financial risks presented. The challenges are particularly acute in the areas of banking and high-value complex procurement. In the case of banking transactions, Ms. Arsić-Đapo explained that due to the cross-border nature of the financial sector, the OSCE cannot rely on bilateral agreements for specific executive structures where the Organization's vendors and commercial activities go beyond the borders of the participating State where an OSCE structure is located. The legal vacuum created by this situation directly impacts the Organization's ability to comply with the good governance requirements in the area of financial management which calls for diversified fund allocation. From an operational perspective, suitable banks that hold the Organization's funds need to be located in countries that have recognized the legal capacity of the OSCE and conferred the requisite privileges and immunities to ensure the protection of the Organization's financial assets from interference and the execution of judgements by third parties. As the legal capacity of the OSCE has not been recognized nor privileges and immunities were granted to it in all OSCE participating States, the number of countries where the OSCE may locate its funds is limited, i.e., less than ten. The Office of Legal Affairs advises against opening bank accounts in countries where the OSCE is not formally recognized and conferred privileges and immunities, even though it must be considered that the legal and financial risks may be overruled by political imperatives and operational needs consistent with a specific mandate.

23. To mitigate against these risks, prior to entering into such commercial contracts, the Office of Legal Affairs must ascertain whether the legal capacity of the OSCE is recognized in the country in question, and whether the Organization's archives and assets enjoy jurisdictional immunity. In the case of Austria, Ms. Arsić-Đapo mentioned that pursuant to the *Agreement between the Republic of Austria and the Organization for the Security and Co-operation of Europe (OSCE) regarding the Headquarters of the Organization for the Security and Co-operation of Europe*,[12] which was concluded in 2017 and entered into force in 2018, replacing the Austrian Federal Law on the headquarters of the OSCE in Austria,[13] the legal capacity of the OSCE as an international organisation is expressly recognised, as are the inviolability of its archives and documents wherever located, and the immunity of its assets and property from any form of search, seizure or other form of interference or judicial restraint.

24. Similarly, the *Arrangement between the Republic of Poland and the Organization for the Security and Co-operation of Europe regarding the Status of the Organization for the*

[12] Federal Law Gazette (Bundesgesetzblatt) III No. 84/2018 .

[13] Federal Act on the legal status of OSCE institutions in Austria, 30 July 1993 as amended 1995 and 2002, Federal Law Gazette (Bundesgesetzblatt) No. 511/1993.

Security and Co-operation of Europe in the Republic of Poland,[14] which was concluded in 2017 and entered into force in 2018, confers legal personality and legal capacity to the OSCE, as well as to its structures, including ODIHR which is headquartered in Warsaw. The Arrangement also explicitly provides for the protection of OSCE archives and immunity of OSCE assets from national jurisdiction and legal process within the territory of the Republic of Poland.

25. To address this issue in other participating States, the Secretary General, in his capacity of Chief Administrative Officer of the OSCE, has proposed a model Standing Arrangement as an interim measure executed on a bilateral basis. Such an arrangement explicitly recognises the legal capacity of the OSCE and that of its structures in the national jurisdiction in a comprehensive and harmonized manner, and confers privileges and immunities *inter alia* to the OSCE, protecting its premises and assets from any form of interference or judicial restraint.

26. In addition to risks arising in the financial sector, Ms. Maxwell highlighted further difficulties, namely in relation to complex and high-value procurements, including cloud services. Operational issues in this context generally arise when the OSCE seeks goods and services that require the contractor to hold assets, funds or other resources on behalf of the Organization. This may occur in the case of critical services such as insurance. In such cases, the Organization's duty of care obligations toward its officials may be implicated if the asset in question is being held on their behalf. In these situations, it must be determined whether the assets can be safely located in the country in question without the risk of attachment or other judicial restraint against the assets by a third party attempting to, *inter alia*, execute a judgement or take other legal action against the OSCE, any of its executive structures or any of its officials.

27. In respect of cloud services, Ms. Maxwell explained that, operationally, this presents a particularly challenging circumstance for the OSCE. Cloud services offer off-site storage of OSCE data, which continue to form and remain part of the Organization's archives wherever located and by whomsoever held. Therefore it is necessary to ensure that the cloud servers are located only in those countries that formally recognize the OSCE and have granted it privileges and immunities, thereby protecting the Organization's assets and archives from seizure or any other form of interference. As mentioned, currently less than 10 countries offer satisfactory protection for OSCE assets and archives. The commercial impact for the participating States is considerable, as the bids of contractors from countries which do not recognize the OSCE or confer upon it the privileges and immunities required for the effective execution of its operations may be rendered ineligible for such procurements. This also increases operational costs for the Organization as these limitations reduce the field of eligible bidders, and may impair the Organization's ability to secure the most competitive prices and highest level of services in the market in such cases.

[14] Dziennik Ustaw Rzeczypospolitej Polskiej, dnia 16 marca 2018 r., Poz. 560

28. The personal risks to OSCE officials engaged in commercial activities in participating States where the OSCE lacks formal legal capacity and privileges and immunities were also highlighted. In these situations, OSCE officials do not enjoy functional immunity and thus are not legally protected from possible civil and criminal jurisdiction in the course of carrying out their official functions, including commercial transactions, on behalf of the Organization.

29. To ensure sound management of OSCE assets and to properly assess the legal status of the OSCE in each participating State, the Office of Legal Affairs circulated a survey on 12 June 2018 (SEC.GAL/101/18/Restr.), which supplements the *2017 Survey of National Implementation Measures adopted by OSCE participating States in respect of OSCE Legal Capacity, Privileges and Immunities* (CIO.GAL/77/17). The survey requests the response of participating States to two questions: (1) "*Do OSCE property and assets (including financial assets) enjoy immunity from every form of legal process in the national jurisdiction?"*, and (2) "*Are the OSCE's archives, including any information stored, for example, in the "cloud" in the national jurisdiction inviolable?"* Delegations were also requested to provide the text of the relevant legal measures. The Office of Legal Affairs has received 13 responses to date. The questions are intended *inter alia* to help inform the operational decisions made by OSCE officials in conducting commercial activities in the participating States.

30. Ms. Maxwell concluded the presentation by expressing the Office of Legal Affairs' gratitude for the responses received from delegations so far and extended an invitation to those delegations which had not yet responded to submit their responses, and reiterated the Office of Legal Affair's willingness to answer any questions.

Third meeting: 17 October 2018

31. The third meeting of the IWG was held on 17 October 2018 upon invitation of the Chairmanship.[15] Three professors from, respectively, the Scuola Superiore Sant'Anna Pisa, University of Florence, and University of Turin were invited to hold an academic discussion on the topic of "Duty of Care in relation to the OSCE", with the purpose to define the extent of duty of care and the responsibility that an international organisation has towards its civilian personnel.

32. Professor Andrea de Guttry of the Scuola Superiore Sant'Anna explained that the duty of care refers to an established obligation incumbent on international organisations to adopt active, adequate, effective and reasonable measures to protect the life and well-being of personnel deployed in field missions. It is an obligation of means as it requires first and foremost prevention, in the form of the adoption of a risk-minimizing attitude, and is a policy aimed at protecting against reasonably foreseeable risks which does not require a guarantee of a specific final result. Emphasis was given to the fact that the budgetary, administrative or technical constraints, that sometimes make it difficult or impossible to swiftly implement

[15] CIO.GAL/123/18 dated 19 September 2018.

urgent and necessary measures despite efforts of the competent authorities, should not be ignored in such cases.

33. Professor de Guttry explained ten principles identified in the relevant jurisprudence with regard to the duty of care, as follows. International organisations:

- Have a duty to provide a working environment conducive to the health and safety of their personnel;

- Shall actively protect officers facing general and specific challenges and/or threats and make the necessary inquiries to arrive at a reasonable and careful assessment of the risks connected to employment, while taking into account the nature, context and specific requirements of the work to be performed. When using independent contractors, international organisations shall use reasonable care in selecting them and maintain close supervision to make ensure reasonable care is implemented;

- Have a duty to act with care and consideration with regard to their personnel's private property;

- Shall offer labour contracts which are fair and which take into due consideration the particular nature of the risks associated with the specific working context and with the personnel's specific tasks;

- Shall make adequate information available to personnel about the potential dangers they might face and about the specific situation in the country of destination;

- Shall treat the workforce in good faith, with due consideration, with no discrimination, to preserve their dignity and to avoid causing them unnecessary injury;

- Shall have in place sound internal administrative procedures, act in good faith and have proper functioning internal investigation mechanisms to address requests and complaints by their personnel within a reasonable time;

- Have a duty to provide effective medical services to personnel, especially in case of an emergency and afterwards, through an efficient insurance policy, and adopt the necessary measures to guarantee the well-being of the staff;

- Should exercise its functional protection towards its personnel in full respect of international law; and

- Shall provide their personnel with adequate training and the necessary equipment to carry out safely the tasks to be performed.

34. Professor Deborah Russo of the University of Florence continued by explaining the legal resources of the duty of care vis-à-vis the OSCE. These are: (1) rules of customary international law, including those on the responsibility of international organisations; (2) general principles of international law; (3) OSCE Staff Regulations and Staff Rules;[16] (4) OSCE Operational Guidelines for Working in a Potentially Hazardous Environment; and (5) the scope of application of the duty of care with respect to OSCE officials.[17]

35. Accordingly, the duty of care obligations include:

- *Providing a working environment conducive to the health and safety of personnel*; it was pointed out that the OSCE does not have a convention similar to the 1999 United Nations Convention for the Safety of United Nations Personnel and therefore follows a case by case approach that might lead to fragmentation;

- *Protecting officers facing general and specific challenges and/or threats;*

- *Protecting private property and the obligation to offer fair labour contracts*; in the case of the OSCE, there is an insurance scheme in place;

- *Making adequate information about the risks*, which includes the principle of informed consent, i.e. delivering a "security briefing" on the security situation in the country to all personnel prior to deployment and also on arrival, including information on gender, sexual orientation, access to medical care, and the right to withdraw from particularly dangerous activities;

- *Having sound administrative procedures;* in the case of the OSCE, there is no Administrative Tribunal in place; the role and involvement of the Office of Internal Oversight is not clear on that point; and there is no public database of OSCE appeals decisions. Taking into consideration Staff Regulation 2.03[18] and all of the aforementioned, there is a risk of denial of justice;

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[16] Staff Regulation 2.07 on Functional Protection provides as follows: "OSCE officials shall be entitled to the protection of the OSCE in the performance of their duties within the limits specified in the Staff Rules."

[17] OSCE officials means under Staff Regulation 1.01 "any person subject to the Staff Regulations in accordance with Regulation 1.03, including the Secretary General, the heads of institutions and the heads of mission and all international or local staff, contracted or seconded, fixed-term and short-term staff/mission members", and Staff Regulation 1.03 "Applicability": These regulations shall apply to: (a) The Secretary General, the heads of institutions and the heads of mission as specified herein and in their letter of appointment or terms of assignment. (b) Staff members and mission members, excluding those employed on an hourly or daily basis.

[18] Staff Regulation 2.03 "Privileges and immunities": The Secretary General, the heads of institution and the heads of mission members shall enjoy the privileges and immunities to which they may be entitled by national legislation or by virtue of bilateral agreements concluded by the OSCE relating to this matter.

- *Exercising functional protection;*[19] this was successfully exercised in 2014 when eight abducted OSCE officials were released, and in 2017 when the OSCE made arrangements to conduct a forensic investigation into the landmine explosion which resulted in the death of a member of an OSCE mission; and
- *Providing adequate training.*[20]

36. Professor Russo pointed to certain challenges regarding the implementation of the duty of care. Firstly, in the cases of violations, OSCE officials may be entitled to compensation.[21] The OSCE has a two-tier disciplinary procedure; however, the second tier, namely the appeal to the Panel of Adjudicators, is restricted to fixed-term contracted officials and there is no access to the panel's case law. Secondly, she noted that in the Advisory Opinion of the International Court of Justice in the Reparations case,[22] "the international personality of an international organisation must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice." In the case of the OSCE, conclusion of agreements by the OSCE fall within this context, implying that the OSCE has international legal capacity for such purposes. However, she argued that there is still a need to adopt measures such as the 2007 Draft Convention to grant general and uniform recognition of international legal personality.

37. Professor Eduardo Greppi of the University of Turin explained the role of international human rights law in the context of the duty of care obligations, in particular: the duty of care as a corollary of human rights obligations of the organisations; extraterritorial application of human rights and the protection of civilian personnel abroad; the rights of victims to seek reparation from the organisation; and the duty to exercise functional protection.

38. To close the meeting, the Chair took note of the panelists' views that on many different occasions it has become evident that the OSCE enjoys legal capacity and international legal personality, and consequently, should not encounter any obstacles when fulfilling its mandate.

Conclusion

39. The four options for strengthening the legal framework of the OSCE remained tabled in 2018 without perceptible progress towards consensus. Nevertheless, the level of participation in the meetings, including from capitals, continued to demonstrate the strong interest in resolving the matter with the appropriate legal means to protect the OSCE, its officials and the representatives of participating States while they pursue their functions. The

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19 Staff Regulation 2.07 "Functional Protection."

20 For example, pre-mission training by participating States in partnership with national training institutions; the 5-day General Orientation (GO) Programme by the OSCE Secretariat; training programmes within each structure under the responsibility of the head of Institution or head of mission.

21 Staff Regulation 2.06.

22 ICJ, *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion of 11 April 1949, ICJ Reports 1949, 183 et seq.

diverse topics elaborated and discussed during the meetings of the IWG in 2018 underscored the multitude of aspects which are impacted by the protracted pursuit of solutions.

40. In 2018, the Informal Working Group on Strengthening the Legal Framework demonstrated that it continues to be an appropriate mechanism and a valuable forum for dialogue to discuss, co-ordinate and address this core aspect of the OSCE's existence and protection of its operations.