

Chairmanship: Albania

**REPORT TO THE MINISTERIAL COUNCIL ON STRENGTHENING
THE LEGAL FRAMEWORK OF THE OSCE IN 2019-2020**

Introduction and background

1. The absence of a universally recognised international legal personality for the CSCE/OSCE led to various efforts to secure legal status and privileges and immunities for the Organization, its officials, and the representatives of its participating States across the region.
2. Meanwhile, various participating States granted legal status, privileges and immunities to the OSCE through national legislation or bilateral agreements/arrangements. Therefore, the OSCE is operating under a variety of legal measures resulting in a fragmentation of the legal framework of the OSCE. Against this background, operational problems illustrate the need for a uniform solution.
3. 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 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 that continue to be the subject of the meeting discussions.¹
4. A practice has arisen that the Chairmanship reports to the Ministerial Council in a form such as this on the developments concerning the efforts to strengthen the legal framework of the OSCE. The Albanian Chairmanship has been informed that there was no such report in 2019 on account of the inability of the Office of the Secretary General Office of Legal Affairs to produce such a draft report for the Chair of the IWG due to it labouring under a strenuous workload and an acute rate of vacancies in the period immediately preceding the 2019 Ministerial Council. Thus, the current Chairmanship presents this report covering both 2019 and 2020, the latter with the agreement of Slovakia, the participating State holding the Chairmanship in 2019.

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

Proceedings of the Informal Working Group in 2019 and 2020

5. In 2019, the IWG was convened by the Slovak Chairmanship three times and in 2020, due to the COVID-19 pandemic, it was convened once by the Albanian Chairmanship in blended format in the autumn of the year. Throughout this reporting period, the IWG was chaired by H.E. Ambassador Helmut Tichy. As reported in previous years² and as detailed in the Chairmanship invitations and draft agendas for the IWG meetings of 2019 and 2020³, the four options for consideration remained to be the following:
 - 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.
6. These options were discussed at all meetings during the reporting period but no progress was made towards either identifying a favoured option or eliminating options. Some participating States reiterated their long-standing position on the topic. No new initiatives were proposed by any participating State during this period.
7. In an effort to stimulate novel ways of viewing the options during this period of stalemate, the Chair of the IWG invited guest expert speakers to present on various aspects of the topic of legal personality for the OSCE at each of the meetings. A brief summary of these contributions in IWG meetings convened in 2019 and 2020 are recorded below.

Meeting 5 March 2019

Presentation by Dr Alexander Solntsev, Deputy Head of the Department of International Law, People’s Friendship University of Russia (RUDN), Moscow

8. Dr Solntsev presented an academic analysis of the creation and development of international organizations, in particular he gave an overview of the history of the development of intergovernmental organizations and their constituent documents. He presented the history of

² 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; MC.GAL/7/17/Rev.1 dated 13 March 2018; MC.GAL/10/18 dated 7 December 2018.

³ CIO.GAL/29/19 dated 22 February 2019; CIO.GAL/91/19 dated 25 June 2019; CIO.GAL/128/19 dated 23 September 2019; CIO.GAL/182/20 dated 7 October 2020.

different organizations, such as the Council of Europe, the Organization of the Black Sea Economic Cooperation, the Organization of American States, the Organization of the Islamic Conference, ASEAN, the Commonwealth of Independent States and the Shanghai Cooperation Organization. He underlined that, in most cases, a constituent document of the international organization preceded a convention on privileges and immunities being adopted for these organizations. However, he mentioned several international organizations that do not have such a constituent document. Among them the OSCE, but also the Nordic Council, Arctic Council, BRICS, G20 and G7. Dr Solntsev highlighted that 2020 would mark 45 years since the conclusion of the Helsinki Accords and 30 years since the adoption of the Paris Charter, thereby making the case that it is time to solve the problem of legal capacity for the Organization, in line with Option 2.

Presentation by the Office of the Secretary General Office of Legal Affairs on the operational consequences of the lack of a clear legal framework for the OSCE

9. To illustrate the risk to the Organization of operating in complex environments without an adequate legal basis, OLA presented a summary of the Administrative Tribunal of the International Labour Organization (ILOAT) case of *A. v International Criminal Court (ICC)* of 2018⁴. The case concerned a complainant who was detained while on an official mission in Libya. Following her release, the complainant submitted a request for compensation and/or other damages to the ICC and alleged that the ICC had acted with malice, reckless disregard for her safety and that that amounted to gross negligence. The ILOAT found that the complainant's ordeal was a direct result of the ICC's failure to put in place a sufficient legal basis for the mission. The Tribunal found in favour of the complainant and awarded moral damages amounting to €140,000. OLA suggested that this Judgment is illustrative of an evolution in the application of the principle of "duty of care" in international administrative law. OLA submitted that this case is relevant to the OSCE because it outlines the possible legal, financial and reputational risks of operating in states where the OSCE or its officials do not enjoy privileges and immunities or where the Organization operates with no legal framework whatsoever.

Meeting 8 July 2019

Presentation by Outgoing Head of the Office of Legal Affairs, Ms Lisa Tabassi

10. Ms Lisa Tabassi, the then Head of the Office of Legal Affairs noted that in 2019 the IWG had reached its 10-year anniversary and in her presentation she reviewed its achievements. Some of the most significant include the number of options under consideration by the IWG being reduced from six to four in 2014; the strengthening and reissuing of the "OSCE Red Book" to OSCE officials, as authorized by the 1993 Rome Council Decision; several surveys conducted among participating States that have shed light on the scope of the existing legislation of

⁴ International Labour Organization Administrative Tribunal (ILOAT), *A. v. ICC*, 126th Session, Judgment No. 4003, 26 June 2018.

participating States that have granted legal status, privileges and immunities to the OSCE and its officials; various conferences and lectures held in co-operation with academia, and; the book published by Cambridge University Press on the Legal Framework of the OSCE.

11. Ms Tabassi gave an overview of the operational consequences that the OSCE was facing, including fragmentation of legal arrangements and the resulting gaps in treatment of the OSCE and its officials; the inability to open bank accounts, forcing the OSCE to operate in cash with all the risks that this entails; the inability of officials to receive visas recognizing privileged status, forcing them to carry out official functions with the status of a tourist; inability to conclude leases for premises or contracts with local individuals due to the lack of legal capacity; imposition of customs duties or restrictions on the import or export of OSCE property for official activities; imposition of income tax for locally recruited officials.

Meeting 15 October 2019

Presentation by Mr Tufan Höbek, Counsellor at the Embassy of the Republic of Turkey to the UAE, on his draft dissertation “Legal Personality of International Organizations in the Absence of a Constituent Legal Instrument - The Case of the OSCE

12. Mr Höbek presented the main theories regarding international personality of international organizations and a case study on the OSCE. He further elaborated on the main components of international legal personality, which are the privileges and immunities necessary for the international organization to function; the treaty-making capacity, and; the international responsibility of the international organization, which should be differentiated from that of the member states. In his concluding remarks, he recommended the adoption of the 2007 Draft Convention.

Update on the operational consequences of the lack of a clear legal framework for the OSCE

13. Mr Stephen Walsh, the Head of OLA, gave an overview of the operational consequences that the OSCE was facing, including: a secondee being unable to commence duty in a mission due to a visa issue; the difficulty in opening bank accounts and having to transfer funds in cash to one mission; and the ongoing attempts to attain basic protection such as the inviolability of archives in memoranda of understanding with some participating States.

Meeting 19 October 2020

Presentation of the book “The Legal Framework of the OSCE” published by Cambridge University Press

14. As the IWG meeting scheduled for May 2020 had to be cancelled due to the COVID-19 pandemic, the October 2020 meeting aimed at building on the discussions of the last IWG meeting of 15 October 2019. It featured a presentation by Dr Anne Peters, Dr Mateja Steinbrück Platise, and Dr Carolyn Moser of the Max Planck Institute for Comparative Public

Law and International Law (MPIL) in Heidelberg, Germany and editors of the book “*The Legal Framework of the OSCE*” published by Cambridge University Press.

15. The editors expressed their hope for the book in helping efforts to strengthen the legal framework of the OSCE. Subsequently, they emphasised how all sides of the debate - those who see the OSCE as a purely political instrument and those who consider it to be an integral part of the global order and governance - can benefit from the volume, both finding new arguments to maintain their position but also further reflecting on it. The editors indicated that granting international legal personality to the OSCE or adopting a charter could make the OSCE more effective. They suggested that the book offers food for thought for all the other options on the table.

Update on the operational consequences of the lack of a clear legal framework for the OSCE

16. Mr Stephen Walsh, the Head of the Office of Legal Affairs, gave an overview of the operational consequences that the OSCE faced in 2020, including the unprecedented challenges in light of the COVID-19 pandemic and how legal advice was sought on how to fulfil the OSCE’s mandate while discharging its duty of care; the risk that given the inconsistent level of privileges and immunities among the executive structures it cannot be excluded that affected persons might attempt suit against responsible official of the OSCE in their personal capacity; that the OSCE encountered difficulties persuading the relevant national authorities to grant the necessary protections to the OSCE, such as inviolability of OSCE premises, property and assets, freedom of movement and unrestricted communications when negotiations with three participating States on the terms of agreement for the hosting of OSCE field operations; how the lack of clear OSCE legal status resulted in sub-optimal contractual terms and conditions being offered to the OSCE receiving extra-budgetary funding.

Conclusion

17. The four options for strengthening the legal framework of the OSCE remained tabled in 2019 and in 2020 without any perceptible progress towards consensus. Nevertheless, the level of participation in the meetings, as well as the interest in the recent publication on the legal framework of the OSCE, continue 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 pursuing their functions. The diverse topics and operational challenges elaborated during the meetings of the IWG in 2019 and in 2020 underscored the multitude of aspects which are affected by the protracted pursuit of solutions.
18. Both in 2019 and 2020, the Informal Working Group on Strengthening the Legal Framework demonstrated that it continues to be the appropriate mechanism and a valuable forum for dialogue to discuss, co-ordinate and address this core aspect of the OSCE’s existence and operations.