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A study of the internal dispute resolution regime of the Organization for Security and Co-operation in Europe (OSCE): Applying the recommendations of the Redesign Panel on the United Nations system of administration of justice

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Jonathan Hazard

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LIST OF ABBREVIATIONS

ACHPR	African Court on Human and People's Rights
ACMF	Advisory Committee on Management and Finance
ACABQ	Advisory Committee on Administrative and Budgetary Questions
ADBAT	Asian Development Bank Administrative Tribunal
AfDBAT	African Development Bank Administrative Tribunal
AJIL	American Journal of International Law
ALU	Administrative Law Unit
Art	Article
ASIL	American Society of International Law
ATCE	Administrative Tribunal of the Council of Europe
ATU	Action Against Terrorism Unit, Transnational Threats Department, OSCE Secretariat
BiH	Bosnia and Herzegovina
BISAT	Administrative Tribunal of the Bank for International Settlements
BMSC	Border Management Staff College
BSMU	Border Security and Management Unit, OSCE Secretariat
CERN	European Organization for Nuclear Research
CFE	Conventional Armed Forces in Europe
CFREU	Charter of Fundamental Rights of the European Union
CiA	OSCE Centre in Ashgabat
CJEC	Court of Justice of the European Communities
CJEU	Court of Justice of the European Union
CLS	Conference and Language Services, OSCE Secretariat
CMLR	Common Market Law Review
CMT	Crisis Management Team, CPC, OSCE Secretariat
CoEAT	Administrative Tribunal of the Council of Europe
COMS	Communications and Media Relations Section, OSCE Secretariat
CORE	Centre for OSCE Research
CPC	Conflict Prevention Centre, OSCE Secretariat
CRMS	OSCE Common Regulatory Management System
CSBMs	Confidence- and Security-Building Measures
CSCE	Conference on Security and Co-operation in Europe
CSO	Committee of Senior Officials
CTBTO	The Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization
DC	Disciplinary Committee
DCiP	OSCE Documentation Centre in Prague, OSCE Secretariat
DHR	Department of Human Resources, OSCE Secretariat
DMF	Department of Management and Finance, OSCE Secretariat
D/OSG	Director of the Office of the OSCE Secretary General
EBRDAT	European Bank for Reconstruction and Development Administrative Tribunal
EC	European Community
ECHR	European Convention on Human Rights

ECtHR	European Court of Human Rights
EEC	European Economic Community
EHRR	European Human Rights Reports
ESA	European Space Agency
ESAAB	European Space Agency Appeals Board
ESMAT	European Stability Mechanism Administrative Tribunal
EU	European Union
EUMETSAT	Appeals Board of the European Organisation for the Exploitation of Meteorological Satellites;
EURO CONTROL	The European Organisation for the Safety of Air Navigation
FAO	Food and Agriculture Organization
FO	OSCE field operations
FYROM	The former Yugoslav Republic of Macedonia
GAOR	General Assembly Official Records
GA Res	General Assembly Resolution
HCNM	OSCE High Commissioner of National Minorities
HFA	Helsinki Final Act
HoM	Head of Mission
DHoM	Deputy Head of Mission
HR	Human Resources
HRC	United Nations Human Rights Committee
HRC	United Nations Human Rights Council
IACtHR	Inter-American Court of Human Rights
IAEA	International Atomic Energy Agency
IATs	International administrative tribunals
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICC	International Chamber of Commerce
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICJ Rep	International Court of Justice Reports
ICSC	International Civil Service Commission
ICSID	International Centre for Settlement of Investment Disputes
ICT	Information and Communications Technology
ICTY	International Criminal Tribunal for the former Yugoslavia
IDBAT	Inter-American Development Bank Administrative Tribunal
IDA	International Development Association
IDI	Institut de droit international
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
IFSH	Institute for Peace Research and Security Policy at the University of Hamburg
IIA	International Institute of Agriculture
ILC	International Law Commission

ILO	International Labour Organization
ILOAT	International Labour Organization Administrative Tribunal
IMF	International Monetary Fund
IMFAT	International Monetary Fund Administrative Tribunal
IMO	International Maritime Organization
ILR	International Law Reports
IOs	International organizations
IOM	International Organization for Migration
IPSAS	International Public Sector Accounting Standards
IRB	Internal Review Board
ISA	International Seabed Authority
ISBs	Informal Subsidiary Bodies
ISC	Information Security and Co-ordination
IT	Information Technology
ITC	International Trade Centre
ITLOS	International Tribunal for the Law of the Sea
IWGs	Informal Working Groups
IWG	Informal Working Group on Strengthening the Legal Framework of the OSCE
JABs	Joint Appeals Boards
JCG	Joint Consultative Group
JDCs	Joint Disciplinary Committees
JIL	Journal of International Law
JIU	United Nations Joint Inspection Unit
JUNAT	Judgments of the United Nations Administrative Tribunal
LONAT	League of Nations Administrative Tribunal
MC	OSCE Ministerial Council
MEU	Management Evaluation Unit
MIGA	Multilateral Investment Guarantee Agency
MOU	Memoranda of Understanding
MtMol	OSCE Mission to Moldova
MtMon	OSCE Mission to Montenegro
NATO	North Atlantic Treaty Organization
NATOAB	NATO Appeals Board
NATO AT	North Atlantic Treaty Organization Administrative Tribunal
NGO	non-governmental organization
OAJ	Office of Administration of Justice (United Nations)
OAS	Organization of American States
OASAT	Organization of American States Administrative Tribunal
OCEEA	Office of the Co-ordinator of OSCE Economic and Environmental Activities
ODIHR	Office for Democratic Institutions and Human Rights
OECD	Organization for Economic Co-operation and Development
OECDAT	Organization for Economic Co-operation and Development Administrative Tribunal
OHRM	Office of Human Resources Management

OIC	Organization of the Islamic Conference
OIO	OSCE Office of Internal Oversight
OM	OSCE Observer Mission at the Russian Checkpoints Gukovo and Donetsk
OMiK	OSCE Mission in Kosovo
OMiS	OSCE Mission to Serbia
OMtS	OSCE Mission to Skopje
OS	Operations Service, CPC, OSCE Secretariat
OSCC	Open Skies Consultative Commission
OSG	OSCE Office of the Secretary General
OSLA	Office of Staff Legal Assistance
OSCE	Organization for Security and Co-operation in Europe
OSCE OLA	Office of Legal Affairs, OSCE Secretariat
OSCE PA	Parliamentary Assembly of the Organization for Security and Co-operation in Europe
OSCE RoP	Rules of Procedure of the OSCE
OSR/CTHB	Office of the Special Representative/Co-ordinator for Combating Trafficking in Human Beings
Para	paragraph
PC	OSCE Permanent Council
PCU	OSCE Project Co-ordinator in Ukraine
PCUz	OSCE Project Co-ordinator in Uzbekistan
PESU	Programming and Evaluation Support Unit, CPC, OSCE Secretariat
PiA	OSCE Presence in Albania
PoA	OSCE Panel of Adjudicators
POiB	OSCE Programme Office in Bishkek
POiD	OSCE Programme Office in Dushanbe
POiN	OSCE Programme Office in Nur-Sultan
PrepCom	OSCE Preparatory Committee
PSS	Policy Support Service, CPC, OSCE Secretariat
REACT	Rapid Expert Assistance and Co-operation Teams
Reg	Regulation
RFOM	OSCE Representative on Freedom of the Media
RMU	Records Management Unit, OSCE Secretariat
RoP PoA	Rules of Procedure of the Panel of Adjudicators
SALW	Small Arms and Light Weapons
SG	OSCE Secretary General
SIC	Statement of Internal Control
SitRm	Situation/Communications Room, CPC, OSCE Secretariat
SMMU	OSCE Special Monitoring Mission in Ukraine
SPMU	Strategic Police Matters Unit, Transnational Threats Department, OSCE Secretariat;
SRSR	OSCE Staff Regulations and Staff Rules
SUEPO	Staff Union of the European Patent Office
TNTD	Transnational Threats Department, OSCE Secretariat
ToR PoA	Terms of Reference of the Panel of Adjudicators
UDHR	Universal Declaration of Human Rights

UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNDT	United Nations Dispute Tribunal
UNAT	United Nations Appeals Tribunal
UNAdT	United Nations Administrative Tribunal
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNIDO	United Nations Industrial Development Organization
UNJYB	The United Nations Juridical Yearbook
UNMIK	United Nations Mission in Kosovo
UNODC	United Nations Office on Drugs and Crime
UNOPS	United Nations Office for Project Services
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNSC	United Nations Security Council
UNWTO	World Tourism Organization
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
UNTS	United Nations Treaty Series
UNYB	United Nations Year Book
UPU	Universal Postal Union
US	United States of America
USCA	United States Code Annotated
USG UN	Under-Secretary-General of the United Nations
WBAT	World Bank Administrative Tribunal
WFP	World Food Programme
WEU	Western European Union
WHO	World Health Organization
WIPO	World Intellectual Property Organization
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (also named Heidelberg Journal of International Law)

PART 1

INTRODUCTION

1. Introduction

1.1. The CSCE/OSCE: Its Origin, Development, Basic Features and Legal Status

The Organization for Security and Co-operation in Europe (OSCE) is generally regarded as an international organization (IO)[1], although not in a full-fledged legal sense[2]. While its roots go back much further, the creation of the OSCE as a 'less structured form of international cooperation'[3] can be traced to the Cold War détente[4] of the early 1970s.

*** Views expressed in this thesis are strictly personal and do not reflect an official view of the OSCE.**

[1] See *Factsheet: What is the OSCE?* (Publisher: OSCE, 19 November 2019: https://www.osce.org/whatistheosce/factsheet?download=true. Last accessed on 2 January 2020. For the purpose of this thesis, an IO means a public (intergovernmental) organization. See also N. M. Blokker and R. A. Wessel., 'Revisiting Questions of Organizationhood, Legal Personality and Membership in the OSCE: The Interplay Between Law, Politics and Practice' Part III. Manifestations of the Legal Position under International Law, Chapter 7, in M. P. Steinbrück Platise, C. Moser, A. Peters (eds.), *The Legal Framework of the OSCE* (Cambridge, Cambridge University Press, May 2019), at p. 138. While there is no universally accepted definition of an IO, and '[l]eaving aside the [International Law Commission] definition [in the 2011 Articles on the Responsibility of [IOs]], both doctrine and practice generally regard the OSCE as an [IO], or at least something very close to it (as it lacks a basis in a founding treaty)'.

[2] Authors such as Klabbers qualify the OSCE as a 'soft' Organization, arguing that 'if an entity looks like an international organization, functions like one, and is treated by outsiders as one then it is pretty unlikely that it is, all appearances notwithstanding, something other than an organization.' J. Klabbers., 'Institutional Ambivalence by Design: Soft Organizations in International Law, *Nordic Journal of International Law,* 70, no. 3, (Kluwer Law International, 2001), at p. 405 and p. 415. However, Schweisfurth rejects the terminology of 'soft organization' or '*sui generis* organization.' Instead, he deems it more helpful to consider the OSCE as an IO in *statu nascendi,* while making a comparison to the early days of the Organization of American States. T. Schweisfurth., 'Die juristische Mutation der KSZE – Eine internationale Organisation in *statu nascendi*', in U. Beyerlin *et al.* (eds.), *Recht zwischen Umbruch und Bewahrung. Völkerrecht, Europarecht, Staatsrecht, Festschrift für Rudolf Bernhardt,* 213 (Berlin: Springer, 1995) at p. 228. A different view is taken by Sands, Klein, and Bowett., who note that 'one may take the view that the OSCE now qualifies as a full-fledged international organisation. It has been endowed with legal capacity in the various states hosting CSCE/OSCE institutions and has been vested–together with its officials–with some privileges and immunities; it also has permanent organs and is obviously able to undertake legal international commitments in its own name on the international plane.' P. Sands, P. Klein, and D. W. Bowett., (eds.), 'European Organizations', B. Organisations of Limited Competence, 3. Organization for Security and Cooperation in Europe (OSCE), Chapter 6, *Bowett's Law of International Institutions,* (Sweet & Maxwell/Thomson Reuters, 2009), at p. 203.

[3] See H. G. Schermers & N. M. Blokker (eds.)., 'Introduction', Chapter 1, in *International Institutional Law: Unity within Diversity,* Sixth Revised Edition, (Brill Nijhoff Publishers, 2018) at p. 36. See also E. Manton., 'The OSCE Human Dimension and Customary International Law Formation', Institute for Peace Research & Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook,* (Nomos, 2005), at pp. 197-198.

[4] According to Bloed, '[a]lthough the Conference on Security and Co-operation in Europe itself dates back to the beginning of the 1970s, its roots extend much further back…[…]. A direct link may be established with developments at the beginning of the 1950s. During this period, the Soviet Union made efforts to establish some kind of European collective security system […]. In the 1960s, the idea of a European security conference was again launched by the USSR, although formally the initiative was taken by the Warsaw Pact. In July 1966, the Political Consultative Committee, the supreme organ of the [Warsaw Pact Organization], issued the so-called Declaration of Bucharest. This extensive declaration proposed a great number of

Starting as a series of multilateral preparatory talks in 1972[5] for a Conference on Security and Co-operation in Europe (CSCE)[6], this set in motion a process of diplomatic negotiations[7], culminating in the CSCE's first Summit of 35 Heads of State or Government[8] and signing of the Final Act of the CSCE in Helsinki on 1 August, 1975, better known as the 'Helsinki Final Act'[9]. However, despite making 'the CSCE a permanent forum for political discourse and co-operation'[10], unlike nearly all other treaty-based IOs which have legal personality[11] under international law[12], it seems clear that this

measures for the strengthening of peace and security in Europe, *inter alia*, the convening of a European conference on security and co-operation. This was the green light for a protracted "communiqué dialogue between the [North Atlantic Treaty Organization] and the WPO in which East and West gradually grew towards each other.' See A. Bloed, ‚Two Decades of the CSCE Process: From Confrontation to Co-operation – An Introduction, in *The Conference on Security and Co-operation in Europe: Analysis and Basic Documents*, *1972-1993*, Part 1, (Martinus Nijhoff Publishers, 26 October 1993), at p. 5.

[5] Ibid, at p. 7. As noted by Bloed, the talks are ‚usually referred to as the Helsinki Consultations [and] were held to solve the numerous preparatory aspects connected with the organization of the Conference (date, place, agenda, participation, financial questions, rules of procedure etc). However the [talks] actually far exceeded the scope of a meeting with a purely preparatory function. Not only were the strictly organizational and procedural aspects of the CSCE established at the [talks], but also the main lines of the substantive issues which were to be discussed at the Conference'. It closed with ‚the adoption of the "Final Recommendations of the Helsinki Consultations" [is] usually referred to as the *Blue Book*'.

[6] Ibid, at p. 5. Bloed further stated that ‚[t]he final decision about the convening of a [CSCE] – which was agreed to be the official name of the conference – was taken in 1972 after the conclusion of the first [Strategic Arms Limitation Talks] SALT-agreement between the USA and the USSR (26 May)'."In light of these favourable developments, Ministers agreed to enter into multilateral conversations concerned with preparations for a [CSCE]'.

[7] Ibid, at p. 9. According to Bloed, the so-called Helsinki Process included ‚an official opening phase at the level of Foreign Ministers in Helsinki from 3 to 7 July 1973; a second stage at expert level in Geneva from 18 September 1973 until 21 July 1975; and a third concluding stage at summit level in Helsinki from 30 July until 1 August 1975 which resulted in the solemn signing of the Final Act of Helsinki'.

[8] All 33 European countries (except Albania, admitted in June 1991), plus the United States and Canada.

[9] CSCE Final Act (Helsinki, 1 August 1975), also known as the 'Helsinki Accords' or Helsinki Declaration'. See OSCE website: https://www.osce.org/helsinki-final-act?download=true. Last accessed on 1 December 2019. See also U. Fastenrath., 'The Legal Significance of CSCE/OSCE Documents', *OSCE Yearbook 1995/96,* at 414. See Centre for OSCE Research (CORE) website: https://ifsh.de/file-CORE/documents/yearbook/english/95_96/Fastenrath.pdf. Last accessed on 1 December 2019.

[10] See *OSCE Factsheet,* 'What is an OSCE Summit?' (Publisher: OSCE, 19 September 2019), at p. 1. See OSCE website: https://www.osce.org/home/71368. Last accessed on 23 November 2019.

[11] See N. M. Blokker., 'Preparing articles on responsibility of international organizations: Does the International Law Commission take international organizations seriously? A mid-term review', in J. Klabbers and Å. Wallendahl (eds), *Research Handbook on the Law of International Organizations* 33 (Edward Elgar, 2011), at p. 315: '[a]lmost all international organizations are international legal persons. There are only a few exceptional cases where international organizations have generally qualified as such while they do not have international legal personality'.

[12] In other words, to be recognized as a subject of international law and, as such, to have the capacity independently to have rights and obligations under international law, e.g., to be a party to a treaty.

'founding document'[13] was not intended to create legally binding obligations[14] upon the parties, but rather political commitments[15], as evidenced by the statements of delegations[16] during the Conference and in the concluding paragraphs of the Final Act that it was 'not eligible for registration [as a treaty][17] under Article 102 of the United Nations (UN) Charter[18]. Subsequent foundational CSCE documents[19] and all other CSCE/OSCE

[13] According to the OSCE website, '[t]he Helsinki Final Act (1975) is considered the Organization's founding document'. See OSCE website, 'CSCE/OSCE key documents': https://www.osce.org/resources/csce-osce-key-documents. Last accessed on 18 October 2019.

[14] Although the Helsinki Final Act and other CSCE/OSCE documents are not legally binding, it may be noted that they contain numerous provisions which can be traced to international agreements, specific treaties as well as principles guiding the relations among States, to which a great number or all OSCE participating States are bound.

[15] This meant that agreements of the OSCE did not require formal ratification in the respective participating State. According to Tomuschat, while the term 'political commitments' is 'widely open to interpretation […] the general understanding was that a possible breach of the obligations undertaken would not entail international responsibility in the classic sense, but would remain within the category of an unfriendly act'. C. Tomuschat, 'Legalization of the OSCE?, *Strengthening the Legal Framework of the OSCE Symposium*, (2016). See Völkerrechtsblog – International Law & International Legal Thought: https://voelkerrechtsblog.org/legalization-of-the-osce/. Last accessed on 17 January 2020.

[16] Statements by delegates during the Conference, notably by the United States and other Western delegations, expressed their understanding that the Final Act did not involve a 'legal' commitment and was not intended to be binding upon the signatory powers. There does not appear to be any evidence that the other signatory states disagreed with this understanding. See O. Schachter., 'The Twilight Existence of Non-Binding International Agreements', 71 *American Journal of International Law* (1977), at p. 296.

[17] Art. 2 (1) (a) of the Vienna Convention on the Law of Treaties, states that ,Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation […].' See UN website: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf. Last accessed on 17 January 2020.

[18] The concluding paragraphs of the Helsinki Final Act request the Government of Finland (the host Government) to transmit to the Secretary-General of the United Nations the text of the Act, 'which is *not* eligible for registration under Article 102 of the Charter of the United Nations' (emphasis added). Article 102(1) of the United Nations (UN) Charter provides that: 'every treaty and every international agreement entered into by any Member of the United Nations…shall as soon as possible be registered with the Secretariat and published by it'. See also M. Shaw., *International Law,* (Cambridge, Cambridge University Press, 5th ed, 2003), at p. 347.

[19] See final provisions of the *Charter of Paris for a New Europe,* Second CSCE Summit of Heads of State or Government, Paris, 19 - 21 November 1990, at p. 13. See OSCE website: https://www.osce.org/mc/39516?download=true. Last accessed on 17 January 2020; para. 46 of the Helsinki Document 1992: The Challenges of Change, Third CSCE Summit of Heads of State or Government, Helsinki, Helsinki Summit Declaration, 10-11 July 1992. See OSCE website: https://www.osce.org/mc/39530?download=true. Last accessed on 23 October 2019; CSCE Budapest Document 1994: Towards A Genuine Partnership in a New Era, Fourth CSCE Summit of Heads of State or Government, Budapest, 5-6 December 1994, para 22 of the Budapest Summit Declaration. See OSCE website: https://www.osce.org/mc/39554?download=true. Last accessed on 23 October 2019. All these foundational documents stipulate that: '[t]he Government of the French Republic is requested to transmit to the Secretary-General of the United Nations the text of the Charter of Paris for a New Europe which is not eligible for registration under Article 102 of the Charter of the United Nations, with a view to its circulation to all the members of the Organization as an official document of the United Nations.'

decisions and documents[20] have likewise unequivocally been referred to as politically but not legally binding[21]. Indeed, the CSCE States that signed the Helsinki Final Act were officially named 'participating (rather than member) States'[22] as they could agree to little more than continuing 'the multilateral process initiated by the Conference'[23] and the holding of follow-up meetings[24] every two or three years, as well as periodic specialized

[20] See C. Moser and A. Peters., 'Legal Uncertainty and Indeterminacy – Immutable Characteristics of the OSCE?, Part I. Introduction, Chapter 1, in M. P. Steinbrück Platise, C. Moser, A. Peters (eds.), *The Legal Framework of the OSCE* (Cambridge, Cambridge University Press, May 2019), at p. 8 ('As a matter of fact, the only two texts originating from the work of the OSCE having acquired the status of an international treaty are the Convention on Conciliation and Arbitration (1992) and the Treaty on Conventional Armed Forces (1990) – and neither of them is considered to be an OSCE document.').

[21] See OSCE Chairmanship, Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2015, (OSCE Doc: MC.GAL/4/15, 1 December 2015), at para. 2. ('The politically binding nature of the 1975 Helsinki Accords has been followed thereafter in the ensuing documents and decisions over the 40-year history of the CSCE/OSCE.' See OSCE website: https://www.osce.org/cio/205221?download=true. Last accessed on 23 October 2019. See further OSCE, Panel of Eminent Persons, 'Final Report and Recommendations of the Panel of Eminent Persons on Strengthening the Effectiveness of the OSCE, Common Purpose – Towards a More Effective OSCE', 27 June 2005, at 30. b) ('Participating States agree on a convention recognising the OSCE's legal capacity and granting privileges and immunities to the OSCE and its officials. Such a convention would not diminish in any way the *politically binding character of OSCE commitments* [emphasis added]'). See OSCE website: https://www.osce.org/cio/15805?download=true. Last accessed on 23 October 2019. See also L. Tabassi., 'The Role of the Organisation in Asserting Legal Personality: the Position of the OSCE Secretariat on the OSCE's Legal Status', Part II. The Quest for International Legal Personality, Chapter 3, in M. P. Steinbrück Platise, C. Moser, A. Peters (eds.), *The Legal Framework of the OSCE* (Cambridge, Cambridge University Press, May 2019), at p. 49. ('The core documents adopted by the CSCE-OSCE over a forty-year period reflect the consistent intention of OSCE participating States that the 'Organization will have a political constitution in international relations, not a legal constitution under international law.'). Other important OSCE instruments include the Document of the Stockholm Conference on Confidence and Security-Building Measures and Disarmament in Europe 1987, which stipulates that: 'the measures adopted in this document are politically binding' ILM (1987) 191, 195, para 101. The *OSCE Code of Conduct on Politico-Military Aspects of Security*, X paragraph 39 similarly stipulates that: '[t]he provisions adopted in this Code of Conduct are politically binding', and, accordingly, 'this Code is not eligible for registration under Article 102 of the Charter of the United Nations'. See Doc. FSC/1/95, 3 December 1994. See OSCE website: https://www.osce.org/fsc/41355?download=true. Last accessed on 1 December 2019. Paragraph II (A) 1. of the Rules of Procedure of the OSCE (2006), (OSCE Doc: MC.DOC/1/06, 1 November 2006) clearly stipulate that OSCE decisions and documents adopted by consensus by any OSCE decision-making body shall have *'a politically binding character for all the participating States* [emphasis added].' See OSCE website: https://www.osce.org/mc/22775?download=true. Last accessed on 17 October 2019.

[22] It may be noted that Article 1(e) of the *Agreement between the Republic of Austria and the Organization for Security and Co-operation in Europe (OSCE) regarding the Headquarters of the Organization for Security and Co-operation in Europe*, signed by the Secretaries-General of the Austrian Foreign Ministry and the OSCE on 14 June 2017, has defined a: 'participating State' as 'a State which has signed the 1975 *Helsinki Final Act* or has been recognized as such by an OSCE decision-making body'. See *Agreement* at Das Rechtsinformationssystem Des Bundes (RIS) website: https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2018_III_84/COO_2026_100_2_1531327.pdfsig . Last accessed on 1 December 2019.

[23] See paragraph, 2, Chapter on the Follow-up to the Conference, CSCE Final Act. See OSCE website: https://www.osce.org/helsinki-final-act?download=true. Last accessed on 1 December 2019.

[24] According to Bloed: '[f]rom the very beginning, the participating States did not aim to organize a single conference. In contrast, they aimed at a Conference which should be followed by a process. This follow-up

CSCE conferences and meetings on specific subjects[25]. In consequence, a defining feature of the early CSCE process was its 'remarkably light institutional structure'[26]; until 1990, the CSCE had no headquarters and such meetings were organized and hosted by one of the participating States, who provided only 'modest administrative support'[27]. But with the end of the Cold War, the CSCE was 'confronted with a number of new problems in the field of conflict prevention and conflict management as a consequence of the unexpected occurrence of a great number of ethnic-based conflicts in the CSCE area'[28], for which it 'was called on to help solve'[29]. Against this background, and not least due to the development of mechanisms and procedures all aimed at dealing with such problems[30], the

should deal with the implementation of the decisions to be achieved at the CSCE and with the further promotion of "the process of improving security and developing co-operation in Europe" […]'. See A. Bloed., *supra,* note 4, (Martinus Nijhoff Publishers, 26 October 1993), at p. 9. See also, M. Shapiro., 'The OSCE: An Essential Component of European Security', *American Society of International Law insights,* Volume: 2 Issue: 2, (24 March 1997).

[25] Ibid, A. Bloed, at p. 67. ‚On 17 January 1984, the first specialized conference on the basis of the Madrid Concluding Document was commenced in Stockholm: the Conference on Confidence- and Security-Building Measuresand Disarmament in Europe'.

[26] Ibid, A. Bloed., at p. 11. Bloed stated that ‚some of the basic institutional features of the CSCE process' are ‚the remarkebly light institutional structure of the CSCE; the strict equality of all [then] 53 participating States, most clearly reflected in the decision-making process: the (political) nature of CSCE commitments and dcouments: the pan-European and, since 1992, Eurasian character of the CSCE process; the interlinkage between the different main areas(‚baskets') of the CSCE process; and the involvement of private citizens and non-governmental organizations in the process'.

[27] Ibid, A. Bloed., at p. 6. See also J. Sizoo and R. Th. Jurrjens, CSCE Decision-Making: The Madrid Experience, (Springer, September, 1984), p. 66. ‚[...] each follow-up meeting acquires an *ad hoc* Executive Secretary appointed by the host country. The Rules of Procedure in the Blue Book grant him authority in only one instance when they designate him „responsible for the recruitment of his staff". The other relevant rules (74, 75, 76) do little else but limit his powers. „He is designated by the host country subject to agreement by the participating States". [...] He is conceived as fulfilling a neutral role as appears from his title „the Executive Secretary for technical matters" who is expected to work „under the authority of the conference". In practice the Executive Secretary has provided a service indispensible to the conference. In Geneva it had a staff of 350 (12) and in Madrid it started with 164, two thirds whom were language staff including a large number of interpreters and translators*. [...] The provision that the Executive Secretary is himself "responsible for the recruitment of his staff" worked very well in practice. As ‚a national of the host country" he was in a position to recruit his assistants from among his own compatriots [...]'.

[28] Ibid, A. Bloed., at p. 1.

[29] Ibid, A. Bloed., at p. 2. See also P. Sands, P. Klein, and D. W. Bowett., (eds.), 'European Organizations', B. Organisations of Limited Competence, 3. Organization for Security and Cooperation in Europe (OSCE), Chapter 6, P. Sands, P. Klein, and D. W. Bowett., (eds.), *supra,* note 1, (Sweet & Maxwell/Thomson Reuters, 2009), at p. 204. ('The outbreak of regional conflicts in different parts of Europe in the first half of the 1990s led the CSCE to play – or attempt to play – an active role in the field. The institution thus became involved at an early stage in the Yugoslav conflict – before stepping aside owing to the increasing involvement of the E.C. and of the UN – and engaged in diplomatic missions, monitoring activities or peacekeeping operations in Nagorno-Karabakh, Georgia, Moldova and Tajikistan. Of course, CSCE (and now OSCE) peacekeeping operations may only take place within the framework of Chapter VIII of the Charter of the [UN]').

[30] Ibid, A. Bloed., at p. 2. For information on the main mechanisms and procedures available within the OSCE related to early warning, conflict prevention and crisis management, see *OSCE Mechanisms and Procedures:*

tranformation of the geographical scope of the CSCE[31], and a shift in emphasis in the CSCE from 'confrontation' to 'co-operation' between all CSCE States[32], participating States generally considered that the CSCE should be given a 'more firm institutional basis in order to meet the demands of the new epoch in Europe'[33]. Consistent with this stance, the *Charter of Paris for a New Europe*, adopted at the second Summit Meeting in Paris in November 1990, agreed on the establishment of new structures and institutions of the CSCE process: regularly convening political decision-making bodies[34], permanent administrative organs[35]

Summary/Compendium, (Publisher: OSCE, 14 September 2011). See OSCE website: https://www.osce.org/cpc/34427?download=true. Last accessed on 23 October 2019. See also A. Ackerman., 'OSCE Mechanisms and Procedures Related to Early Warning, Conflict Prevention, and Crisis Management', in Institute for Peace Research and Security Policy at the University of Hamburg (IFSH) (ed.) OSCE Yearbook 2009, (Nomos-Verlag, Baden-Baden, 2010), pp. 223-231. See Institut für Friedenssorschung und Sicherheitspolitik (IFSH) website: https://ifsh.de/file-CORE/documents/yearbook/english/09/Ackermann-en.pdf. Last ccessed on 20 October 2019.

[31] Ibid, A. Bloed., at p. 2. ('the number of CSCE States rose from dramatically from 35 in 1973 to 53 in 1993 […]. As a result, the CSCE was transformed from a predominantly Euro-Atlantic instutition to an Eurasian one.').

[32] Ibid, at p. 2.

[33] Ibid, at p. 12. No doubt the most important development associated with the Paris CSCE Summit was the *Charter of Paris for a New Europe* (at p. 13) that on behalf of all (then 34) CSCE participating States formally brought the Cold War to an end: ‚The era of confrontation and division of Europe [had] ended. We declare that henceforth our relations will be founded on respect and co-operation'. Also, as noted by the OSCE *Factsheet*, '[…] [w]ith the end of the Cold War, the Paris Summit of November 1990 set the CSCE on a new course. In the Charter of Paris for a New Europe, the CSCE was called upon to play its part in managing the historic change taking place in Europe and responding to the new challenges of the post-Cold War period'. OSCE *Factsheet, supra,* note 1.

[34] *The Charter of Paris for a New Europe* called for regular meetings of CSCE heads of state or government during CSCE follow-up meetings (approximately once every two years); and for meetings of CSCE foreign ministers, in the form of a newly created Council of Ministers for Foreign Affairs (renamed Ministerial Council), to take place at least once each year. To prepare the meetings of the Council (including current issues and making recommendations), the *Charter* created a Committee of Senior Officials (CSO) (formerly Senior Council and the Permanent Council of the OSCE has now taken up most of the work previously carried out by the CSO) which would also implement the Council's decisions. Two new political organs were created which convene at certain intervals (the Council of Ministers for Foreign Affairs of the CSCE and Committee of Senior Officials (CSO) and certain *ad hoc* meetings. Ibid, A. Bloed, at 9-12. As shall be seen, this new institutional structure of the CSCE was further elaborated in the coming years, which included the introduction of a Forum for Security Co-operation in Vienna. See also M. Sapiro, 'The OSCE: An Essential Component of European Security', *American Society of International Law Insights,* Volume: 2 Issue: 2, 24 March 1997.

[35] Thus, in the *Charter of Paris for a New Europe,* a specific chapter on ‚New Structures and institutions of the CSCE Process' was adopted, which led to the creation of a new institutional structure, consisting of three permanent administrative organs: a Secretariat in Prague for administrative support (later moved to Vienna), a Conflict Prevention Center (CPC) in Vienna, and an Office for Free Elections in Warsaw (this has since expanded to become the Office for Democratic Institutions and Human Rights (ODIHR), which monitors human rights and electoral practices throughout the OSCE region). Ibid, A. Bloed, at p. 15.

endowed with minimal staffing, high-ranking personalities[36], a parliamentary assembly[37] and *ad hoc* bodies, in particular the deployment of field operations in several trouble spots in the CSCE area. While functioning in large part through decisions made by participating States in political organs, at least as regards certain matters[38], it has been argued that the the CSCE 'necessarily began to exercise independence and a will [*volonté distincte*] of its own,'[39] separate from the will of the entirety of States that created the Conference. Nevertheless, the *Charter of Paris* did not clarify the legal basis of the CSCE's institutional structure; it merely limited the commitments given by the states hosting these permanent institutions, providing simply that they shall 'enable the insitutions to functions fully and enter into contractual and financial obligations'[40]. With regard more specifically to the principal lack of privileges and immunities[41], when it soon became clear that provisions of the *Charter of Paris* were inadequate to ensure equal treatment for all CSCE staff[42], in order to remedy these inconsistencies and to secure a safe and stable environment for the CSCE and its employees, including local officials, pursuant to the 1992 Helsinki Summit

[36] Ibid, at p. 16. The institutional structure of the CSCE was further elaborated at the Fourth Follow-up Meeting of the CSCE in Helsinki, which began on 24 March 1992, by the establishment of the CSCE High Commissioner on National Minorities (HCNM) as the first high-ranking personality within the CSCE process, followed by the creation of the post of Secretary General of the CSCE by the CSCE Council in December 1992.

[37] The *Charter of Paris* also expressed the desire to create a CSCE parliamentary body which, as shall be seen, was given concrete form at an inter-parliamentary meeting in the Spring of 1992.

[38] See L. Tabassi., *supra*, note 21*,* (Cambridge, Cambridge University Press, May 2019), at p. 50. ('Through mandates for election monitoring, ceasefire monitoring, arms control verification and quiet diplomacy […].').

[39] See L. Tabassi., 'The Role of the Organisation in Asserting Legal Personality: the Position of the OSCE Secretariat on the OSCE's Legal Status', Part II. The Quest for International Legal Personality, Chapter 3, in M. P. Steinbrück Platise, C. Moser, A. Peters (eds.), *The Legal Framework of the OSCE* (Cambridge, Cambridge University Press, May 2019), at p. 50.

[40] CSCE, Charter of Paris, 1990 (n. 4), supplementary document to give effect to certain provisions contained in the Charter of Paris for a New Europe, H 11.

[41] For full discussion, see I. Pingel., 'Privileges and Immunities of the Organization for Security and Co-operation in Europe (OSCE)', Part III. The Quest for International Legal Personality, Chapter 9, in M. P. Steinbrück Platise, C. Moser, A. Peters (eds.), *The Legal Framework of the OSCE* (Cambridge, Cambridge University Press, May 2019). Also available in I. Pingel., 'Privileges and Immunities of the Organization for Security and Co-operation in Europe (OSCE)', *Max Planck Institute for Comparative Public Law and International Law (MPIL) Research Paper Series*, No. 2018-37. See SSRN website: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300813. Last accessed on 11 September 2019.

[42] Although the CSCE was formed in 1975, it was the 1990 *Charter of Paris* that first briefly addressed the question of privileges and immunities. In a supplementary document appended to the Charter, the text provides under the chapter on 'Institutional Arrangements' that the states hosting the permanent institutions shall accord them 'appropriate dimplmatic status' and their staff 'will be accredited by the seconding State to the host country where they will enjoy full diplomatic status'. CSCE, *Charter of Paris*, 1990 (n. 4), supplementary document to give effect to certain provisions contained in the Charter of Paris for a New Europe, I H, paras. 11 and 9.

decision[43], the CSCE Council of Ministers[44] at its Fourth Meeting held in Rome in November/December 1993, considered the report of an ad hoc Group of Legal and Other Experts 'on the relevance of an agreement granting internationally recognized status to CSCE institutions'[45]; and crucially, the Rome Council Decision on legal capacity and privileges and immunities adopted on 1 December 1993[46], 'noted 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'[47]. However, rather than aiming at an internationally recognized status, the latter Decision limited itself to mere recommendations that participating States harmonise the applicable rules by implementing model provisions for

[43] See CSCE, Helsinki Document 1992: The Challenges of Change, Helsinki Summit Declaration, 1992 (n. 9), point I, para. 25 ('[to] consider the relevance of an agreement granting an internationally recognized status' [to the CSCE institutional structures]')

[44] The CSCE Budapest Document 1994 – Towards a Genuine Partnership in a New Era, Budapest, Corrected version: 21 December 1994, I. Strengthening the CSCE, para. 16, renamed it 'Ministerial Council'.

[45] Following the Third Meeting of the Council, Summary of Conclusions, Stockholm 1992 (OSCE Doc. 3STOCK92.e) paragraph 7, at p. 16, the then Committee of Senior Officials (Permanent Council) subsequently set up an ad hoc Group of CSCE Legal and Other Experts *'to consider the relevance of an agreement granting an internationally recognized status to the CSCE Secretariat, the Conflict Prevention Centre and the ODIHR'*. See OSCE website: https://www.osce.org/mc/40342?download=true. Last accessed on 1 December 2019. The Rome Decision on legal capacity and privileges and immunities is based on a report by the above-mentioned ad hoc Group of CSCE Legal and Other Experts. See also Fourth Meeting of the Council, CSCE and the New Europe - Our Security is Indivisible, 30 November 1993, paragraph VII/11. CSCE Structures and Operations. See OSCE website: https://www.osce.org/mc/40401?download=true. Last accessed on 1 December 2019.

[46] Decision VII. CSCE Structures and Operations' [11], Fourth Meeting of the Council, *CSCE and the New Europe – Our Security is Indivisible, Decisions of the Rome Council Meeting*. The Rome Decision on Legal Capacity and Privileges and Immunities is not contained in the final document of the Rome Ministerial Council, but in a separate document, no. CSCE/4-C//Dec.2, 1 December 1993. Decision VII. CSCE Structures and Operations' [11], summarized the decision by recommending 'implementation of the following three basic elements (CSCE/4-C/Dec.2): [t]he CSCE participating States will, subject to their constitutional, legislative and related requirements, confer legal capacity on CSCE institutions in accordance with the provisions adopted by the Ministers; The CSCE participating States will, subject to their constitutional, legislative and related requirements, confer privileges and immunities on CSCE institutions, permanent missions of the participating States, representatives of participating States, CSCE officials and members of CSCE missions in accordance with the provisions adopted by the Ministers; the CSCE may issue CSCE identity cards in accordance with the form adopted by the Ministers'. See also H. Tichy & U. Köhler., 'Legal Personality or not – The Recent Attempts to Improve the Status of the OSCE' in I. Buffard, J. Crawford, A. Pellet, & S. Wittich (eds.), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff Publishers, Leiden/Boston, September 2008) at p. 460-461.

[47] Ibid, CSCE/4-C//Dec.2, at para. 4.

legal capacities[48] to certain CSCE institutions[49] as well as *privileges and immunities* of CSCE institutions, permanent missions of participating States[50], and all three other categories of staff, namely representatives of participating States, CSCE officials and members of CSCE missions[51]. While the regime set out in the Rome Decision is comparable to those contained in other international instruments on privileges and immunities[52], the Rome Decision accorded participating States wide discretion when it came to conferring these rights at the national level 'subject to their constitutional, legislative and related requirements'[53]. A year later, in December 1994, at the Summit of Heads of State or Government in Budapest, the decision was taken to change the name of the Conference (CSCE) to 'Organization for Security and Co-operation in Europe' (OSCE)[54], reflecting both its evolution into a more established political structure and the

[48] Ibid. para 1, 'Provisions concerning the legal capacity of the CSCE institutions and privileges and immunities' of the Rome Decision. Legal capacity relates to the capacity of an organization to perform transactions of a private law character and to be liable for such operations under private law. In this regard, the Rome Decision recommended only granting 'the capacity for the Organization to contract, to acquire and dispose of movable and immovable property, and to initiate and participate in legal proceedings'.

[49] The legal capacity recommendation of the Rome Decision is related to certain CSCE institutions, namely the CSCE Secretariat (now in Vienna), the Office for Democratic Institutitons and Human Rights (ODIHR, Warsaw) and any other CSCE institution determined by the CSCE Council.

[50] Notably, pursuant to the CSCE, Rome Council, Rome Decision, 1993, para. 11. the Rome Decision provides that participating States in whose territory permanent missions to the CSCE are located will accord to the members of their missions ,diplomatic privileges and immunities in conformity with the Vienna Convention on Diplomatic Relations of 1961'. As a result, members of permanent missions to the CSCE are afforded maximum protection.

[51] See I. Pingel., *supra,* note 41, *(MPIL) Research Paper Series*, No. 2018-37, 3 – 4 ('These categories benefit from fewer privileges and immunities than those of members of permanent missions of participating States. That said, all three categories of staff are attributed immunity from legal process for acts performed in their official capacity and facilities in matters of immigration and foreign exchange.'). See also H. Tichy & U. Köhler., 'Legal Personality or not – The Recent Attempts to Improve the Status of the OSCE' in I. Buffard, J. Crawford, A. Pellet, & S. Wittich (eds.), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff Publishers, Leiden/Boston, September 2008), at p. 461. Tichy and Köhler noted that the 'CSCE missions in participating States were a notable exception to the list of beneficiaries of the decision: neither was there a recommendation to grant them legal capacity like the CSCE institutions not, as such, to grant them privileges and immunities (contrary to the privileges and immunities envisaged for the members of CSCE missions). This was one of the main weaknesses of the decision as well as an early incentive for its reform'.

[52] For example, the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946, 1 UNTS 15/90 UNTS 327 (corrigendum to vol. 1). See I. Pingel., *supra,* note 41, *(MPIL) Research Paper Series*, No. 2018-37, 3 – 4.

[53] Ibid, at p. 462. Importantly, '[b]eing a political decision, the Rome Decision was never intended to create legal obligations which could be applied or implemented like obligations deriving from a treaty'.

[54] CSCE Budapest Document 1994, Budapest Summit Declaration – *Towards A Genuine Partnership in a New Era*, (Budapest Decisions attached to the Budapest Document 1994), para. 3: '[t]he CSCE is the security structure embracing States from Vancouver to Vladivostok. We are determined to give a new political impetus to the CSCE, this enabling it to play a cardinal role in meeting the challenges of the twenty-first century. To reflect this determination, the CSCE will henceforth be known as the [OSCE]'. See OSCE

desire of the participating States to grant the OSCE a more prominent role in the security field within its geographic area. While this did not formally alter the legal status of the Organization or the political nature of the commitments of the participating States[55], it was decided at the Summit that implementation of the 1993 Rome Council Decision would be reviewed and reaffirmed that participating States would, furthermore, examine possible ways of incorporating their commitments into national legislation and, where appropriate, of concluding treaties[56]. At the OSCE Istanbul Summit in November 1999, the Heads of State or Government recognized 'that a large number of OSCE participating States [had] not been able to implement the 1993 [Rome Decision] and [highlighted the] difficulties [faced by the OSCE due to] the absence of a legal capacity of the Organization'[57], so directed 'the Permanent Council, through an informal open-ended working group to draw up a report to the next [or Eighth] Ministerial Council Meeting, including recommendations on how to improve the situation'[58]. Thus, since 2000, discussion focused on the concrete difficulties the OSCE faces by not having internationally recognized legal personality and the same privileges and immunities in all participating States[59]; and, significantly, in 2000-

website: https://www.osce.org/mc/39554?download=true. Last accessed on 1 December 2019. See also Budapest Decision I: Strengthening the CSCE', para. 1, *CSCE Budpaest Document 1994: Towards a Genuine Partnership in a New Era,* CSCE DOC.RC/1/95 (6 December 1994). The change of name became effective on 1 January 1995. See also M. Sapiro, 'Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation' (1995) 89 *American Journal of International Law*, 631-7.

[55] Ibid, 'Budapest Decision I: Strengthening the CSCE', para. 29: '[t]he change in name from CSCE to OSCE *alters neither the character of our CSCE commitments nor the status of the CSCE and its institutions*. In its organizational development the CSCE *will remain flexible and dynamic*…' [emphasis added]. As noted by Blokker and Wessel: 'this sentence was particularly important since no consensus could be reached on expressly granting international legal personality to the OSCE. See N. M. Blokker and R. A. Wessel, *supra,* note 1, (Cambridge, Cambridge University Press, May 2019), at p. 137.

[56] Ibid. Budapest Decision I.

[57] 'Charter for European Security', point 18, in OSCE, *Istanbul Document 1999*; 'Istanbul Summit Declaration' (19 November 1999), in OSCE, Istanbul Document 1999 (19 November 1999). See OSCE website: https://www.osce.org/mc/39569?download=true. Last accessed on 1 December 2019. As indicated by Tichy & U. Köhler, '[i]t became obvious that the non-implementation of the decision was not an issue which could eventually be solved by patience in the course of the years, since certain participating States, in particular the Russian Federation, indicated that their constitution did not allow them to grant legal capacity or privileges and immunities unless there were corresponding treaty obligations'. See H. Tichy & U. Köhler., *supra,* note 51, (Martinus Nijhoff Publishers, Leiden/Boston, September 2008), at p. 462.

[58] Ibid, 'Charter for European Security', point 34.

[59] See H. Tichy, 'Legal Personality of the OSCE – Past Developments, Status Quo and Future Ambitions', in M. P. Steinbrück Platise, C. Moser, A. Peters (eds.), Part II. The Quest for International Legal Personality, Chapter 4, *The Legal Framework of the OSCE* (Cambridge, Cambridge University Press, May 2019), at pp. 83-84. ('Concrete 'difficulties' discussed in this context relate to the inability of the OSCE to conclude treaties governed by international law, like headquarters, mission and cooperation agreements, to its lacking perception as an international organization , to its lack of legal capacity under the national laws of certain

2001, an open-ended informal working group (IWG) considered possible options for affording the OSCE privileges and immunities necessary for fulfillment of its functions, and elaborated a draft text for a convention on international legal personality, legal capacity and privileges and immunities of the OSCE and its officials[60]. However, no consensus emerged among the participating States and the discussions stalled in 2002[61] resulting in no progress being made on the status issue in general. While a Panel of Eminent Persons[62] considered possible steps to strengthen the Organization and in its final 2005 report recommended, *inter alia*, that the participating States 'devise a concise Statute or Charter of the OSCE'[63] and 'agree on a convention recognizing the OSCE's legal capacity and granting privileges and immunities to the OSCE and its officials'[64], it was not until the United States dropped its opposition in 2006 to the elaboration of a 'limited' convention on legal personality and privileges and immunities[65] (but not in the drafting of a Charter)

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participating States, to problems of legal standing before national (and possibly international) courts and to issues of responsibility and liability.')

[60] See S. Brander., 'Making a Credible Case for a Legal Personality for the OSCE', *OSCE Magazine* (March-April 2009), at p. 20. See OSCE website: https://www.osce.org/secretariat/36184?download=true. Last accessed on 28 October 2019.

[61] See ‚Letter from the Chairman of the Permanent Council Concerning the OSCE Legal Capacity and Privileges and Immunities', V. Reports to the Bucharest Ministerial Council Meeting, Ninth Meeting of the Ministerial Council 3 and 4 December 2001, OSCE Doc. MC.DOC/2/01 of 4 December 2001, at p. 73. The Letter states, inter alia, ‚[d]uring 2001, the Working Group continued its work, making considerable progress in the drafting of many technical provisions. The Chair of the Working Group has indicated, however, that there *still are a number of issues that need to be resolved at the political level* […]' [emphasis added]. See OSCE website: https://www.osce.org/mc/40515?download=true. Last accessed on 1 December 2019. As noted by Bloed, '[i]n particular, the USA has always blocked giving a legal status to the OSCE, as it preferred to keep its flexible political character, even though all the other OSCE participating States had gradually come to the conclusion that an international legal status for the organization is indispensible'. See A. Bloed, 'Legal Status of the OSCE in the making', *Helsinki Monitor (now Security and Human Rights),* (Brill/Nijhoff, 1 January 2007), 164 – 167, at p. 164.

[62] See OSCE Ministerial Council Decision No. 16/04 Establishment of a Panel of Eminent Persons on Strengthening the Effectiveness of the OSCE, Sofia, (OSCE Doc. MC.DEC/16/04 of 7 December 2004), at point I(1).

[63] See *Common Purpose – Towards a More Effective OSCE,* Final Report and Recommendations of the Panel of Eminent Persons On Strengthening the Effectiveness of the OSCE, (OSCE Doc. CIO.GAL/100/05 of 27 June 2005), at para. 30(a). See OSCE website at: https://www.osce.org/cio/15805?download=true. Last accessed on 28 October 2019. The OSCE Panel of Eminent Persons proposed at para. 28 that the OSCE's ‚development from a conference to a full-fledged international organization must now be completed, finally making „participating States" into „member states" [...].'

[64] Ibid, at para. 30(b). ('Such a convention would not diminish in any way the politically binding character of OSCE commitments.')

[65] See H. G. Schermers & N. M. Blokker (eds.)., *supra,* note 3, (Brill Nijhoff Publishers, 2018), at p. 1032. Schermers Blokker noted that '[f]or many years, the [US] in particular was opposed to concluding a convention in which the legal status, privilgeges and immunities of the OSCE were laid down. One of the reasons for its resistance to such a convention was the fear that this would change the nature of the OSCE from a flexible framework for cooperation into a more traditional [IO]. In 2006, the US gave up its resistance'.

that this paved the way for resuming work on the former. Following a decision of the Ministerial Council of the OSCE at its Fourteenth Meeting in Brussels in December 2006[66], an IWG at expert level was established in 2007 to continue work on a draft convention on the basis of the text drafted by the legal experts in 2001[67]. However, while a *Draft Convention on International Legal Personality, Legal Capacity and Privileges and Immunities of the OSCE*[68] was negotiated and agreed upon by all participating States at a technical level[69], it could not be adopted by the Ministerial Council of the OSCE, at its Fifteenth Meeting in Madrid in November 2007. Problems of adoption flowed from the fact that three footnotes were inserted during the elaboration of the *Draft Convention* at the request of the Russian Federation and Republic of Belarus, making the conclusion of the

See also H. Tichy., *supra,* note 59, (Cambridge, Cambridge University Press, May 2019), at p. 85. ('The EU member states, conversely, after some discussion signally an openness towards embarking on the drafting of a document that would serve the purpose of a founding treaty of the OSCE, provided that the existing structures of the OSCE would not be changed as a result of such a treaty.'). See also L. Tabassi., *supra*, note 21*,* (Cambridge, Cambridge University Press, May 2019), pp. 49-50. ('In practice, the absence of formal legal constraints and legal clearance processes for its decisions has resulted in an organization that is flexible and able to move remarkably quickly to respond to crises or other needs in its region, is relatively small in view of its broad mandates, it not overly bureaucratic and is cost-effective'. This flexibility is viewed by some as critical for the preservation of the effectiveness of the OSCE, and a formal alternation of the OSCE's legal basis pose a risk to that flexibility are juxtaposed against those who argue that international legal personality of an international organization can only be acquired on the basis of formal constitution.'). See also V-Y. Ghébali., '*Le rôle de l'OSCE en Eurasie, du sommet de Lisbonne au Conseil ministériel de Maastricht (1996-2003)*', 1re édition (DCAF, 2014), 57 – 60. The author similarly attributes the deadlock in the discussions to 'the negative attitude of a single country: the United States', 59.

[66] OSCE Ministerial Council Decision No. 16/06 Legal Status and Privileges and Immunities of the OSCE, 5 December 2006, (MC.DEC/16/06).

[67] Redistributed as OSCE Doc. CIO.GAL/188/06. In June 2006, on the initiative of the Belgium Chairmanship, a Group consisting of nine legal experts was set up to make recommendations. The Legal Experts Group recommended that the work on the draft convention on the international legal personality, legal capacity and privileges and immunities of the OSCE be continued on the basis of the text drafted in 2001, and that an open-ended informal working group be tasked to finalize a draft convention to be submitted through the OSCE Permanent Council to the Ministerial Council in 2007. Accordingly, the Brussels' Ministerial Council decided to establish an informal working group at expert level which should submit a draft to the Ministerial Council through the Permanent Council for adoption by the Ministerial Council, if possible, in 2007.

[68] For the text of this draft convention, see Annex to OSCE Doc. MC.DD/28/07 of 29 November 2007, Fifteenth Meeting of the Ministerial Council (Madrid, 2007), at 65–80. See OSCE website: https://www.osce.org/mc/33180?download=true. Last accessed on 1 December 2019.

[69] See I. Pingel., *supra,* note 41, *(MPIL) Research Paper Series*, No. 2018-37, at p. 5. ('Whereas the [Rome] Decision aims to achieve uniformity between the regimes of privileges and immunities granted under domestic legal systems, the draft, if adopted, would lead to the implementation of a single international regime to the benefit of the OSCE.'). See also H. Tichy., *supra,* note 59, (Cambridge, Cambridge University Press, May 2019), at p. 85. ('[A]part from the Charter footnote *problem, the Draft Convention now enjoys the suport, at least in principle, of all OSCE participating States, with a common understanding arrived at in Madrid in 2007 that the text ought not to be reopened* [emphasis added].')

Draft Convention conditional on the existence of an OSCE founding treaty, a 'Charter'[70]; and, concomitantly, this prerequisite was strongly opposed by the United States, concerned for the independence of the OSCE's structures[71] with the consequence that adoption of the *Draft Convention* remains pending. Nonetheless, there has been an ongoing effort of many succeeding OSCE chairmanships to achieve progress and find a solution to this stalemate situation[72], with various options[73] suggested for strengthening the legal framework of the

[70] See Delegation of the Russian Federation to the OSCE, 'Interpretative statement under Paragraph IV.1(A)6 of the OSCE Rules of Procedure to the Ministerial Council Decision No. 16/06 of December 2006' ('The decision established the informal working group that subsequently prepared the 2007 Draft Convention), 5 December 2006, Attachment: 'While it has joined the consensus on the Ministerial Council decision on the legal status and privileges and immunities of the OSCE, the Russian delegation continues to insist that the only way of settling this matter in accordance with the norms of international law is to devise a founding OSCE document in the form of a charter or statute. Without a charter, the OSCE cannot be regarded as a fully-fledged international organization. We believe it is necessary to proceed from the recommendation made in that connection in the report of the Panel of Eminent Persons, pursuant to which the participating States should devise a concise statute or charter of the OSCE containing its basic goals and principles along with reference to existing commitments and the structure of its main decision-making bodies. In any case, the entry into force of a convention on privileges and immunities, if and when there is agreement on a draft, will be possible only in conjunction with the entry into force of a statute or charter of the OSCE.' Interpretative Statement Under Paragraph IV.1(A) of the OSCE Rules of Procedure, OSCE Decision No. 16/06 Legal Status and Privileges and Immunities of the OSCE, OSCE Doc. MC.DEC/16/06, (Brussels, 5 December 2006) Attachment. See OSCE website https://www.osce.org/mc/23203?download=true. Last accessed on 7 October 2019. As noted by Blokker and Wessel, '[t]he main controversy [(related to the footnotes inserted in the *Draft Convention* at the request of two participating States centres around a disagreement between the Russian Federation and the United States of America. The Russian Federation takes the view that the draft Convention can only be adopted if the OSCE is given a treaty basis – something the 1975 Helsinki Final Act was not meant to be. Or, as the opinion is referred to normally: *No convention without a charter.* The Russian proposal is unacceptable to the USA, which was originally against the idea of elaborating a convention. In 2006, Washington finally accepted this idea but remains unwilling to go further and adopt more than just the Convention. By concluding a charter, as a constituent instrument of the OSCE, the USA fears that the Organization would lose its flexibility, which is regarded as the OSCE's main strength'. They also 'underline[d] that there are no *legal impediments* to the adoption of the 2007 draft convention. The objections by the two most powerful participating States are largely of a political nature' [emphasis added]. See N. M. Blokker and R. A. Wessel, *supra,* note 1, (Cambridge, Cambridge University Press, May 2019), at pp. 137-138.

[71] See, for example, US Secretary of State Clinton, 'Comment at the OSCE Ministerial Council First Plenary Session', 6 December 2012. See U.S. Mission to the OSCE website: https://osce.usmission.gov/dec_6_12_dublin_mc1/. Last accessed on 7 October 2019. See H. Tichy and C. Quidenus., 'Views from Practice: Consolidating the International Legal Personality of the OSCE: A Headquarters Agreement with Austria', *International Organizations Law Review* 14 (2017) 403-413, at p. 405.

[72] See L. Simonet and H. G. Lüber., 'The OSCE and Its Legal Status: Revisiting the Myth of Sisyphus' in Institute for Peace Research and Security Policy at the University of Hamburg (eds.), *OSCE Yearbook 2016*, (Baden-Baden: Nomos Verlagsgesellschaft, 2017), at pp. 289-290.

[73] Although, as indicated, several options have been discussed in the open-ended IWG on Strengthening the Legal Framework of the OSCE, at the end of 2014, it was decided that in order to render the work of the IWG more effective, the options under consideration should be reduced from six to four as these seemed to offer more potential for reaching a compromise (see para 20, (MC.GAL/4/15 of 1 December 2015). The four options retained for further consideration by the IWG are as follows: Option 1: Adoption of the 2007 *Draft Convention on International Legal Personality, Legal Capacity and Privileges and Immunities of the OSCE*;

OSCE. Since 2009, discussions within the Organization have taken place mainly in the format of an open-ended informal working group[74], convened (thrice yearly) and chaired by a special adviser to the OSCE Chairperson-in-Office[75], to revisit the main options tabled and to receive an operational upate on the impact of the lack of international legal personality or diverging privileges and immunities[76]. In addition to bilateral and multilateral consultations with OSCE delegations, preparation of non-papers[77] and other relevant documents[78], the issue has also been recently addressed by a broader international

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Option 2: Adoption of a constituent document (Charter) 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); and 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. On the various options, see, in particular, the latest *Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2018*, 7 December 2018 (MC.GAL/10/18), at paras. 5 & 39. See OSCE website: https://www.osce.org/chairmanship/407768?download=true. Last accessed on 1 December 2019.

[74] It has been noted that the 'main tasks of the IWG are to review the developments and problems related to the issue of the OSCE's legal status and to discuss possible ways to strengthen the legal framework of the OSCE to afford the Organization and its staff with a common legal status and a uniform set of privileges and immunities. See *Helsinki + 40 Project, Food-for-Thought Paper: The OSCE's Lack of an Agreed Legal Status – Challenges in Crisis Situations* (April, 2015), OSCE Parliamentary Assembly/Secretariat Legal Services (renamed Office of Legal Affairs in 2018), para. 4. See OSCE PA website: https://www.oscepa.org/documents/helsinki-40/seminar-4-diis/2814-helsinki-40-food-for-thought-paper-the-osce-s-lack-of-an-agreed-legal-status-challenges-in-crisis-situations/file. Last accessed on 21 November 2019.

[75] Since 2009, successive OSCE Chairmanships have attempted to address the stalemate through appointing Special Advisers to the OSCE Chairperson-in-Office on the issue of strengthening the legal framework of the OSCE. Special Advisers have included: Dr. Zinovia Stavridi (Greece) 2009; Ambassador Ida Van Veldhuizen-Rothenbücher (Netherlands) 2010-2011; Ambassador John Bernhard (Denmark) 2012-2016; and Ambassador Helmut Tichy (Austria) 2017- present).

[76] On the importance of the IWG, the *Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2018,* noted in its conclusion that '[i] 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.' *Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2018,* OSCE Doc. MC.GAL/10/18 of 7 December 2018, at para. 40. See OSCE website: https://www.osce.org/chairmanship/407768?download=true. Last accessed on 8 October 2019.

[77] See, in particular, Non-paper: 'Principles for a discussion on a constituent document for the OSCE (OSCE Doc. CIO.GAL/169/11); Draft Constituent Document, circulated by the Irish Chairmanship, CIO.GAL/68/12, 12 June 2012; Non-Paper: Proposal for further work on strengthening the legal framework of the OSCE in 2013, OSCE Doc. CIO.GAL/118/13, 26 July 2013; Chairmanship non-paper on a possible "Convention Plus" or "OSCE Statute", attached to OSCE Doc. CIO.GAL/173/14, 2 October 2014; Chairmanship non paper on a possible "Convention Plus or OSCE Statute", attached to OSCE Doc. CIO.GAL/173/14, 2 October 2014; Non-paper on the Option 6 (currently Option 4), attached to OSCE Doc. CIO.GAL/173/14, 2 October 2014. See H. Tichy., *supra,* note 59, (Cambridge, Cambridge University Press, May 2019), at pp. 85-86.

[78] For other relevant developments, the OSCE's lack of a clear, international legal status and the challenges that result for its personnel, particularly during crisis situations, was the topic of the OSCE Parliamentary Assembly's latest Helsinki +40 seminar, hosted by the Danish Parliament and in co-operation with the Danish Institute for International Studies (DIIS), was held on 27 April 2015 in Copenhagen. See OSCE PA website:

audience[79]. However, in spite of all these efforts, and the very real operational problems[80] that can arise from the OSCE legal framework, in particular when the Organization is mandated to perform high-risk tasks[81], divergences continue to exist within the OSCE itself. Although time will tell whether participating States find a way to achieve the 'common goal' of strengthening the legal framework of the OSCE[82], at least at the time of writing, the most recent *Report to the Ministerial Council* on this issue in 2018 concluded that: '[t]he four options for strengthening the legal framework of the OSCE remained tabled

https://www.oscepa.org/news-a-media/press-releases/press-2015/time-to-tackle-the-osce-s-lack-of-legal-status-say-participants-at-helsinki-40-seminar. Last accessed on 21 November 2019. In this regard, see also 'Helsinki +40 Project Food-for-Thought Paper: The OSCE's Lack of an Agreed Legal Status –Challenges in Crisis Situations', OSCE Secretariat, Legal Services (now Office of Legal Affairs) and OSCE PA International Secretariat, (April 2015). See OSCE PA website: https://www.oscepa.org/documents/helsinki-40/seminar-4-diis/2814-helsinki-40-food-for-thought-paper-the-osce-s-lack-of-an-agreed-legal-status-challenges-in-crisis-situations/file. Last accessed on 1 December 2019.

[79] See Max Planck Institute for Comparative Public Law and International Law, 'OSCE Legal Framework': https://www.mpil.de/en/pub/research/areas/public-international-law/the-osce-legal-framework.cfm. Last accessed on 12 August 2019. ('In early 2016, the Max Planck Institute for Comparative Public Law and International Law was invited by the OSCE Task Force of the German Foreign Office to conduct a project on the OSCE Legal Framework aimed at reviving and reframing the discussion on the legal framework of the OSCE at the occasion of Germany's OSCE Chairmanship in 2016. The project, consisting of an international academic conference and written scholarly work, seeks to examine legal and political implications that arise from the unsettled legal status for the Organization and its members of staff, for states as well as for individuals and peoples at large, who are affected by the Organization's acts. In order to provide for a new impetus to the debate, the Institute organized on 13 July 2016 an international conference entitled "*Between Aspirations and Realities: Strengthening the Legal Framework of the OSCE*". The conference took place in the Harnack-Haus of the Max Planck Society in Berlin and was convened by Mateja Steinbrück Platise, Carolyn Moser, and Anne Peters. 46 academics and practitioners (plus the three conveners) attended the conference and contributed to a lively discussion. Since in the past, the debate had primarily been framed by political considerations brought forward by the OSCE participating States at the high political level, the conference aimed to open up the debate to a broader international audience and to allow for an input by a larger community of scholars, practitioners and civil society representatives. By pursuing an open and discursive format of the conference, experts from legal, political and related fields, international scholars, practitioners and political representatives, civil society organizations and media representatives were all welcomed as speakers, engaged listeners and other conference participants.').

[80] With respect to the operational implications for the CSCE/OSCE, according to Schermers & N. M. Blokker, [t]his has created a number of practical and legal difficulties. For example, OSCE staff members do not have the necessary legal protection when on mission to countries that have not unilaterally granted privileges and immunities. The OSCE has no capacity to issue claims against states and has experienced difficulties on cooperation with other [IOs] (for example, in the Former Yugoslavia). Third parties can initiate legal proceedings against the OSCE staff and hamper the functioning of the organization. In the absence of treaty-making capacity organization, its participating States could not conclude proper seat agreements with the OSCE concerning the status, privileges and immunities of various of its organs, and national laws have been adopted to at least provide for some arrangements.' See H. G. Schermers & N. M. Blokker (eds.)., *supra,* note 3, (Brill Nijhoff Publishers, 2018), at p. 1032.

[81] For example, on the 'Weaknesses Made Visible in the OSCE Deployment to Ukraine', see L. Tabassi., *supra*, note 21*,* (Cambridge, Cambridge University Press, May 2019), at pp. 64-66.

[82] *Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2014,* OSCE Doc. MC.GAL/5/14 of 2 December 2014, at para. 14. See OSCE website: https://www.osce.org/cio/128916?download=true. Last accessed on 7 October 2019.

in 2018 *without perceptible progress towards consensus'*[83]. For the time being, therefore, the Organization, largely for political reasons continues to denied the benefits associated with 'formal organizationhood'[84] and its commonly adopted norms, standards and rules have remained soft law[85]. While debate over its lack of international legal personality has not prevented the OSCE from establishing agreed mandates and structures to carry out those mandates, concluding host agreements as 'OSCE' and responding in any dispute proceedings as 'OSCE'[86], the grant on a national basis legal status and privileges and immunities pursuant to the 1993 Rome Council Decision has 'resulted in the legal fragmentation of the already structurally fragmented OSCE'[87]. In this context, two aspects of the OSCE's separate structures may be considered, all of which 'operate under a very broad variety of national legal arrangements'[88]. First, while the host States of the four permanent structures of the OSCE (the Secretariat and three institutions) have granted privileges and immunities comparable to those granted to the UN, it is of note that 'the

[83] *Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2018,* OSCE Doc. MC.GAL/10/18, 7 December 2018, para. 39 (emphasis added). Notwithstanding the absence of consensus, the 2018 Report also stated in its conclusion that '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 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' [emphasis added]. See OSCE website: https://www.osce.org/chairmanship/407768?download=true. Last accessed on 7 Ocrober 2019.

[84] See e.g., J. Klabbers., *An Introduction to International Organizations Law,* (Cambridge University Press, 2015), (3rd ed.) at p. 12. For an overview of 'Criteria for 'Organisationhood', see N. M. Blokker and R. A. Wessel, *supra,* note 1, (Cambridge, Cambridge University Press, May 2019), at p. 138. As indicated, the OSCE was not established by a treaty or other instrument governed by international law, and so far, there has been no agreement on its international legal personality. For an overview until Spring 2009, see also S. Brander., 'Making a Credible Case for a Legal Personality for the OSCE', *OSCE Magazine* (March-April 2009), at pp. 18-22. See OSCE website: https://www.osce.org/secretariat/36184?download=true. Last accessed on 1 December 2019. For further details on discussions on the legal personality of the OSCE between 2000 and 2007, see also H. Tichy & U. Köhler., *supra,* note 51, (Martinus Nijhoff Publishers, Leiden/Boston, September 2008).

[85] For both domestic and international behaviour of the OSCE participating States, see J. Klabbers., A. Peter & G. Ulfstein, *The Constitutionalization of International Law,* (Oxford/New York: Oxford University Press, 2009), pp. 51-52. According to Klabbers *et al*, while 'such [soft law] instruments are not legally binding *per se,* they are nonetheless important expressions of State practice'.

[86] See L. Tabassi., *supra*, note 21*,* (Cambridge, Cambridge University Press, May 2019), pp. 51-52.

[87] Ibid, at p. 53. Tabassi also noted that nine participating States not hosting any OSCE structure that have adopted legislative or other national measures in line with the 1993 Rome Council Decision, but these 'vary as to scope and content', and include 'Germany, Hungary, Italy, Norway, Slovakia, Sweden, Switzerland, the United Kingdom and the United States'. Ibid, at p. 54.

[88] Ibid.

texts of the legislative acts adopted are […] not identical' [89]: Austria enacted federal legislation in 1995, which granted legal capacity to the OSCE insitutions headquartered in Austria and extended application of the UN headquarters agreement in Austria to OSCE institutions, *mutatis mutandis*, as well as privileges and immunities to OSCE institutions and all OSCE officials present in the Austria on official business[90]; the Czech Republic, as host state to the initial CSCE Secretariat, now known as the OSCE Documentation Centre in Prague (DCiP), adopted an Act in respect of the CSCE Secretariat and Institutions in 1992[91]; Poland, seat of designated CSCE/OSCE insitution, initially established as the CSCE Office for Free Elections (OFE) and renamed Office for Democratic Institutions and Human Rights (ODIHR), passed two governmental decisions in 1991[92] and 1992[93] which conferred on the ODIHR and its staff privileges and immunities specified in the 1946 *Convention on Privileges and Immunities of the United Nations*; and, in the case of the OSCE High Commissioner on National Minorities (HCNM)[94], the Dutch Parliament adopted an Act in 2002 granting legal personality and privileges and immunities to the HCNM, as well as privileges and immunities to all OSCE officials present in the

[89] See I. Pingel., *supra,* note 41, (Cambridge, Cambridge University Press, May 2019), at p. 189. ('[I]n particular the fiscal treatment of the relevant OSCE institution and its staff seems to vary from one country to another.') See also L. Tabassi., *supra*, note 21*,* (Cambridge, Cambridge University Press, May 2019), at p. 53.

[90] 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.

[91] Act No. 125/1992, in respect of the CSCE Secretariat and Insitutions.

[92] For history of the status of ODIHR in the Republic of Poland before 2017, see J. Arsić-Dapo, 'Another Brick in the Wall – Building up the OSCE as an International Organization One Agreement at a Time', *International Organizations Law Review,* 14 (Brill Nijhoff, 2017), pp. 417-418. ('[T]he Council of Ministers of the Republic of Poland on 2 May 1991 passed Decision No. 65.')

[93] Ibid, at p. 417. ('[O]n 5 June 1992, the Council of Ministers of the Republic of Poland passed Decision No. 62 (superseding the previous Decision No. 65.')). Ibid, at 418. ('This status was further confirmed by the Permanent Mission of the Republic of Poland ('Permanent Mission') in a Note Verbale in 1994.'). Ibid. ('Following adoption of a new *Constitution* by the Polish Parliament in 1997, effective as of 30 March 2001, Decision No. 62 of 5 June 1992 was repealed. This repeal, however, did not affect the the *de facto* status of the ODIHR in the Republic of Poland […]. The status of ODIHR was further endorsed in 2006 in a Note Verbale, in which the Foreign Ministry confirmed 'that the [ODIHR] and members of its personnel are entitled to immunities and privileges described in the *Charter of Paris for a New Europe*.'). The *Charter of Paris for a New Europe* provides that '9. Staff will be accredited by the seconding State to the host country where they will enjoy full diplomatic status […]11. The host countries undertake to enable the institutions to function fully and enter into contractual and financial obligations and to accord them appropriate diplomatic status.'

[94] In 2000, the Dutch parliament enacted the Act of 31 October 2002 granting legal personality, privileges and immunities to the High Commissioner on National Minorities (HCNM), as well as privileges and immunities to all OSCE officials present in the Netherlands on official business. (Wet van 31 Oktober 2002, houdende bepalingen inzake rechtspersonlijkheid, privileges en immuniteiteiten van der Hoge Commissaris inzake Nationale Minderheden (Wet HCNM), Staatsblad, Jaargang 2002 Nr 580.

Netherlands on official business. To host the OSCE Parliamentary Assembly, Denmark concluded a headquarters agreement with the Parliamentary Assembly in 1993. Secondly, by contrast, the situation in countries that host the OSCE's fifteen field operations is 'even less uniform'[95], since legal capacity and privileges and immunities have been agreed on an *ad hoc* basis by the conclusion of legally non-binding bilateral memoranda of understanding (MoUs) or other instruments with each particular structure[96], with one structure deriving 'status and privileges and immunities from a UN Security Council

[95] See I. Pingel., *supra,* note 41, *(MPIL) Research Paper Series*, No. 2018-37, at p. 5. See also I. Pingel., *supra,* note 41, (Cambridge, Cambridge University Press, May 2019), at p. 189. See also C. Tomuschat, 'Legalization of the OSCE?, *Strengthening the Legal Framework of the OSCE Symposium*, (1 August 2016). To date, '[…] [o]nly ten countries have enacted domestic statutes reserving for the OSCE and the persons acting on its behalf special rules closely resembling the relevant rules applicable to diplomatic intercourse. In another 17 States some specific OSCE structures and their members enjoy legal status, privileges and immunities. Amazingly, however, no less than 30 States have simply abstained from providing any legal assistance in that respect, which means that any mission related to their area of jurisdiction requires careful legal preparation, possibly the conclusion of special agreements […]'. See Völkerrechtsblog International Law & International Legal Thought website: https://voelkerrechtsblog.org/legalization-of-the-osce/. Last accessed on 1 December 2019. The practice in participating States of the OSCE not hosting any permanent OSCE institutions or field operations – is likewise diverse. While the following have passed parliamentary legislation for the implementation of the 1993 Rome Council Decision on legal capacity of OSCE/CSCE institutions and privileges and immunities: Hungary, Italy, Norway, Sweden, Switzerland, UK, US, it is also clear that most countries have not done so. See Annex – Measures taken by national parliaments (Compiled on the basis of information provided by participating States or the OSCE Secretariat's reading of national legislation on file), *Helsinki + 40 Project, Food-for-Thought Paper: The OSCE's Lack of an Agreed Legal Status – Challenges in Crisis Situations* (April, 2015), OSCE Parliamentary Assembly/Secretariat Legal Services (renamed Office of Legal Affairs in 2018), at IA, p. 8. See OSCE PA website: https://www.oscepa.org/documents/helsinki-40/seminar-4-diis/2814-helsinki-40-food-for-thought-paper-the-osce-s-lack-of-an-agreed-legal-status-challenges-in-crisis-situations/file. Last accessed on 12 September 2019.

[96] See L. Tabassi., *supra*, note 21*,* (Cambridge, Cambridge University Press, May 2019), at p. 55. ('Bilateral Memoranda of Understanding (MOU) or other instruments have been concluded by the OSCE with Armenia (ratified by parliament), Kazakhstan, Kyrgyzstan (ratified by parliament), Montenegro, Serbia, Tajikistan, Turkmenistan, two with Ukraine (both ratified by parliament) and Uzbekistan. In the early instances, the specific field operation itself concluded the instrument with the host government, i.e. with Albania, Bosnia and Herzegovina, Moldova and the former Yugoslav Republic of Macedonia.'). Ibid, at p. 73 ('The legal arrangements concluded between the OSCE and countries hosting OSCE structures are markedly similar to the treatment accorded to other regional and universal international organisations. A few of the agreements for the first field operations were concluded in the form of Exchanges of Letters or Articles of Understanding. Since then, however, a practice has developed that all of the later host country agreements bear the nomenclature of MOU, which in some legal systems would suggest that the instruments are politically, not legally binding. Nevertheless, the texts of these agreements are very similar in content to the usual host country agreements concluded as
treaties with treaty-based international organisations. This type of agreement is necessarily legally binding for the very reason that the provisions need to be enforceable under national law and often cannot be granted as a courtesy. As indicated in Section 3 above, some of the OSCE MOUs have been ratified by
the respective parliament of the host country in order to give effect to them within that national law, which suggests that they may qualify as treaties in the national legal order.')
See also *Helsinki + 40 Project, Food-for-Thought Paper*, *supra,* note 250, p 10.

resolution and subsidiary legislation'[97], and another enjoying 'nothing except a Cabinet decision ordering facilitation by relevant ministries'[98]. However, while these differences in form are exacerbated by the resulting broad differences in treatment accorded to OSCE structures and their officials[99], a legal development of some significance for the OSCE occurred in June 2017 when pursuant to a proposal by the OSCE Secretary General of a model standing arrangement between the OSCE and each participating State to address

[97] The OSCE Mission in Kosovo (OMIK) is a distinct component within the overall framework of the United Nations Interim Mission in Kosovo (UNMIK). UN Security Council Resolution 1244 of 10 June 1999, paragraph 10 ‚authorizes the Secretary-General, with the assistance of the relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia and which will provide transitional administration while establishing and overseeing the development of provisional democratic-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosvo. Paragraph 11 goes into further detail of what the main responsibilities of the international presence would be. The manner that this „insitutional presence" would take was set out in a report of the UN Secretary-General of 12 June 1999 (S/1999/672). It describes the overall structure of UNMIK and envisages the lead role in the area of insitution-building being assigned to the OSCE (paragraph 5 of the report). The OSCE Mission in Kosovo was then established by Decision No. 305 of the OSCE Permanent Council which draws explicit inspiration from the „United Nations Security Council Resolution 1244 of 10 June 1999 and to the report by the Secretary-General of the United Nations of 12 June 1999 (S/1999/672)". OSCE Permanent Council Decision No. 305 states that the OMIK's role if to contribute to the implementation of the UNSC Resolution 1244, in particular the relevant parts operative paragraph 11 of this Resolution. See OSCE website: https://www.osce.org/pc/28795?download=true. Last accessed on 6 January 2020. UNMIK subsequently promulgated legal instruments for the territory of Kosovo which set out the structure of its presence. UNMIK/REG/2000/47 of 18 August 2000 „On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo' describes OMIK as the ‚Institution-building component'. Thus, it is from this UNMIK Regulation that OMIK draws its immunity from legal process; and, notably, this Regulation is also the basis for the fact that any decision on OMIK's immunity must be taken by the UN and not the OSCE'. See UNMIK online: http://www.unmikonline.org/regulations/2000/reg47-00.htm. Last accessed on 6 January 2020.

[98] See L. Tabassi., *supra*, note 21, (Cambridge, Cambridge University Press, May 2019), at p. 55.

[99] Ibid. (‚When status has been granted solely to the particular structure and the officials serving there, other OSCE structures and their officials are unrecognised. When present on official business, they have no formal protection. This includes the Secretary General and heads of other structures who routinely travel throughout the OSCE region on OSCE internal business with no formal arrangements made with the host state i.e., as tourists. In most cases officials are travelling on ordinary passports and, depending on their nationality and the destination, with or without a visa. The Secretary General and various others entitled to do so by their state of nationality possess diplomatic passports issued by that state but, in the exercise of functional independence, are not accredited anywhere by that state. The Vienna Convention on Diplomatic Relations, which has been made applicable mutatis mutandis to the structure in most MOUs even though its purpose is to regulate interstate relations, does not cover this situation; it accords protection to diplomatic personnel only in the country of accreditation and in transit.') See also J. Arsić-Dapo., 'Another Brick in the Wall – Building up the OSCE as an International Organization One Agreement at a Time', *International Organizations Law Review,* 14 (Brill Nijhoff, 2017), at p. 420. ('The particular-structure-only-solutions' encountered in the various memoranda of understanding concluded with states hosting OSCE field operations have all failed to accord privileges and immunities to OSCE officials other than those appointed/assigned to that particular OSCE field operation. This results in situations that OSCE officials, including the highest ranking such as the Secretary General, effectively conduct their official functions on the territory of such participating State as tourists, and do not enjoy any formal recognition or legal protection rather than that based on diplomatic courtesy or customary law.').

duty of care towards OSCE officials and pursue the status, privileges, and immunities via national measures, through a separate track from the ongoing discussions at the IWG [100], Austria [101] and Poland [102] both concluded bilateral headquarters agreements with the

[100] See L. Tabassi., *supra*, note 21, (Cambridge, Cambridge University Press, May 2019), at p. 75. ('Since the Secretary General, as Chief Administrative Officer, is faced on a daily basis with the operational impact of the OSCE's current legal status, and given the fact that there is no apparent solution anticipated to emerge from the IWG in the near future, he initiated a short-term interim stop-gap measure: the model Standing Arrangement [Such a concept was originally developed by the Austrian Chairmanship and the Secretariat in 2000 and tabled in an open-ended working group on OSCE legal capacity. Initial provisions published as CIO.GAL/170/00 dated 22 August 2000 and developed further into a draft following meetings of the group in September and October (on file in the Secretariat). The 2015 model Standing Arrangement was published in OSCE document SEC.GAL/135/16, 8 September 2016. Its revised version has been issued in 2017 in SEC.GAL/117/17, 11 September 2017]. The model was proposed to all participating States in July 2015 and, if concluded by each of them, would recognise the legal status of the OSCE and its officials in national jurisdictions in a comprehensive and harmonised manner, filling in the patchwork of arrangements across in the OSCE region as envisaged by the 1993 Rome Council Decision. It is also consistent with Staff Regulation 2.03, which provides that OSCE officials 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. The text of the model Standing Arrangement is formulated to address the Secretary General's duty of care towards OSCE staff and his accountability to the Permanent Council for the sound management of the OSCE's assets. It is an interim solution, purely based on the serious operational need to protect OSCE officials and assets in states where no national measures in favour of the OSCE exist. It is a separate track from the political–legal discussions ongoing in the IWG.')

[101] In July 2016, representing an important step in the consolidation of the Organization and its legal status, the OSCE accepted an offer made by Austria in May 2007 to conclude a headquarters agreement with the OSCE. The *Agreement between the Republic of Austria and the Organization for Security and Co-operation in Europe (OSCE) regarding the Headquarters of the Organization for Security and Co-operation in Europe* was respectively signed by the Secretaries-General of the Austrian Foreign Ministry and the OSCE on 14 June 2017. The *Headquarters Agreement* entered into force in 2018 as Federal Law Gazette (Bundesgesetzblatt) III No. 84/2018, replacing the Austrian Federal Law on the headquarters of the OSCE: Austria 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. See Rechtsinformationssystem Des Bundes (RIS) website: https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2018_III_84/COO_2026_100_2_1531327.pdfsig . Last accessed on 1 December 2019. While the new headquarters agreement between the OSCE and Austria replaces the federal law, it does not substantively alter the treatment currently enjoyed by the OSCE and its officials in Austria. The agreement addresses the status of the OSCE as such and no longer the status of its individual insitutions. See *Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2017*. MC.GAL/7/17, 8 December 2017, paras. 28 – 30 on 'Further developments of relevance', *'Agreement between the OSCE and Austria regarding the Headquarters of the OSCE*'. Available at OSCE website: https://www.osce.org/chairmanship/361771?download=true. Last accessed on 1 December 2019. See also OSCE website 'Austrian Deputy Foreign Minister Linhart and OSCE Secretary General Zannier sign Headquarters Agreement regulating presence of OSCE in Austria', Vienna, 14 June 2017: https://www.osce.org/chairmanship/322916. Last accessed on 1 December 2019. For a recent analysis of the history of multilateral efforts to grant a clear legal status to the OSCE, the recognition by Austria that it considers the OSCE as having obtained international legal personality on the basis of customary international law by offering to conclude a Headquarters Agreement and its contents, see H. Tichy and C. Quidenus., *supra,* note 71, (2017), at 405-406.

[102] Dziennik Ustaw Rzeczypospolitej Polskiej, dnia 16 marca 2018 r., Poz. 560. See *Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2018,* (MC.GAL/10/18 of 7 December 2018, at para. 24: '[t]he Arrangement between the Republic of Poland and the [OSCE] was concluded in 2017 and entered into force in 2018, conferring legal personality and legal capacity upon the OSCE and its structures,

Organization that comprehensively covers all structures, as well as officers, representatives and officials[103]: the 2017 *Agreement between the Republic of Austria and the OSCE regarding the Headquarters of the OSCE*[104] and *Arrangement between the Republic of Poland on the Status of the OSCE in the Republic of Poland*[105]. Having both been ratified by their respective parliaments and entered into force 2018, it has been noted that '[r]egistration of both agreements is being pursed with the UN Secretariat under Article 102 of the UN Charter.'[106] With Austria[107] and Poland 'implicitly recogniz[ing] the OSCE

including the ODIHR with its headquarters in Warsaw'. For an analysis of the June *2017 Arrangement between the OSCE and the Republic of Poland on the Status of the OSCE in the Republic of Poland,* see J. Arsić-Dapo, 'Another Brick in the Wall – Building up the OSCE as an International Organization One Agreement at a Time', *International Organizations Law Review,* 14 (Brill Nijhoff, 2017), 414-429.

[103] See L. Tabassi., *supra*, note 21*,* (Cambridge, Cambridge University Press, May 2019), pp. 53-54.

[104] See *Agreement between the Republic of Austria and the Organization for Security and Co-operation in Europe (OSCE) Regarding the Headquarters of the Organization for Security and Co-operation in Europe*, BGBl. III - Ausgegeben am 4. Juni 2018 - Nr. 84. See, for example, Article II Legal Capacity Section 2, Article VI Immunity from Jurisdiction and other Actions Section 9. See Rechtsinformationssystem Des Bundes (RIS) website: https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2018_III_84/COO_2026_100_2_1531327.pdfsig . Last accessed on 12 September 2019.

[105] The Arrangement between Poland and the OSCE on 28 June 2017 is the first such treaty based on an initiative for a model standing arrangement text. See Ministry of Foreign Affairs Republic of Poland website: https://www.msz.gov.pl/en/news/agreement_on_osce_status_in_poland_signed;jsessionid=60987A375FBE27B006AA04C69C199EE9.cmsap6p. Last accessed on 12 September 2019. According to the *Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2017,* at para. 31, '[o]n 28 June 2017, Poland concluded the *Arrangement between the OSCE and the Republic of Poland regarding the Status of the OSCE in the Republic of Poland*. The provisions of the new Arrangement provide comprehensive treatment of the OSCE, its officials and the representatives to the OSCE, as well as additional provisions necessary to cover the hosting of the headquarters of ODIHR in Warsaw. Negotiations of the Arrangement were initiated in order to replace the earlier national measures taken in 1991 to host the CSCE Office of Free Elections in Warsaw and in 1992 in respect of the hosting of ODIHR. As referenced in the 1993 Rome Council Decision, the treatment granted by Poland was comparable to that accorded to the United Nations and its personnel and to the representatives to it. The same level of treatment has been maintained in the new Arrangement. At the time of writing the Arrangement was pending parliamentary approval'. The *Arrangement* is the first such bilateral treaty between the OSCE and a government based on a model Standing Arrangement text, with additional provisions to cover the hosting of the headquarters of ODIHR in Warsaw. For an analysis of the June *2017 Arrangement between the OSCE and the Republic of Poland on the Status of the OSCE in the Republic of Poland,* see J. Arsić-Dapo, 'Another Brick in the Wall – Building up the OSCE as an International Organization One Agreement at a Time', *International Organizations Law Review,* 14 (Brill Nijhoff, 2017) 414-429.

[106] See L. Tabassi., *supra*, note 21*,* (Cambridge, Cambridge University Press, May 2019), at pp. 1032-1033.

[107] Ibid, at p. 57. ('As stated by the Legal Adviser to the Austrian Foreign Ministry, such an agreement represents clear recognition by Austria tha it considers the OSCE to have obtained international legal personality on the basis of far-reaching – although not general – state practice accepted as law, that is, on the basis of customary international law.'). See also *Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2017,* (MC.GAL/7/17 of 8 December 2017), at para. 29: ‚[a]lthough the CSCE/OSCE was not founded on the basis of an agreement under international law, through the creation and development at and since the 1990 Paris Sumit of an institutional CSCE/OSCE structure including permanent institutions, Austria has noted that the OSCE now has its own decision-making apparatus separate from the participating States and concludes legally binding agreements with participating States. In Austria's view,

as an international legal person'[108] and the OSCE 'consider[ing] itself to have the necessary legal status to conclude such treaties'[109], this arguably marks a further step in the formal recognition of the OSCE as a 'unitary' [110] and 'fully fledged [IO] [111] possessing international legal personality', albeit 'agreement by agreement'.[112]

1.2. Immunity of the OSCE in national proceedings and the need for internal justice

Notwithstanding the 'fragmented legal framework'[113] of protection for the Organization and its officials and the resulting 'weaknesses in coverage and gaps' [114], the OSCE nevertheless shares certain aspects of practice with other IOs, namely those special rights of exemption from legal process[115] ,jurisdictional immunity, in the territories of its host

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this demonstrates that the OSCE has increasingly acquired the status of a legal entity under international law and that the participating States increasingly accept this. Austria therefore now found itself in a position to recognize the OSCE as a legal entity under international law and hence to conclude a headquarters agreement with it – as with the other international organizationswith headquarters in Vienna – to replace the OSCE Law'.

[108] See H. G. Schermers & N. M. Blokker (eds.)., *supra,* note 3, (Brill Nijhoff Publishers, 2018), at p. 1032.

[109] Ibid, at p. 1033.

[110] See L. Tabassi., *supra*, note 21*,* (Cambridge, Cambridge University Press, May 2019), at p. 57.

[111] See H. Tichy., *supra,* note 59, (Cambridge, Cambridge University Press, May 2019), at p. 91.

[112] See J. Arsić-Dapo., 'Another Brick in the Wall – Building up the OSCE as an International Organization One Agreement at a Time', *International Organizations Law Review,* 14 (Brill Nijhoff, 2017), at p. 429. See also H. G. Schermers & N. M. Blokker (eds.)., *supra,* note 3, (Brill Nijhoff Publishers, 2018), at p. 1033. According to Schermers & N. M. Blokker, [a]pparently there was no fundamental opposition to this from within the OSCE, in particular from the Russian Federation and the US. Other host states of the OSCE may follow in the footsteps of Austria and Poland, thus increasing the number of participating States that bilaterally recognize the OSCE as an international legal person. This will reduce significantly the surreal situation in which the OSCE has developed over the years: a situation in which participating States expected the organization to perform many functions that hardly could be carried out in a responsible way without the necessary international legal status. It may also remove some urgency to adopt the 2006 Draft Convention but perhaps at the same time make such adoption easier, as it would mostly confirm at a general, multilateral level a development that has already significantly advanced at a bilateral level'.

[113] See *Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2017,* (MC.GAL/7/17 of 8 December 2017), at para. 4.

[114] See L. Tabassi., *supra*, note 21*,* (Cambridge, Cambridge University Press, May 2019), at p. 56.

[115] See e.g., Art. II(2) of the 1946 Convention on the Privileges and Immunities of the [UN] (1946 General Convention), which establishes that: ,The [UN], its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity. It is, however, understood, that no waiver of immunity shall extend to any measure of execution'. For OSCE standard clause, see e.g., '2007 Draft Convention on OSCE legal personality, legal capacity and privileges and immunities, prepared by an informal working group of experts established by OSCE Ministerial Council Decision No. 16/06 of 5 December 2006, Brussels. While the 2007 Draft Convention has not yet been adopted by OSCE participating States, it may be noted that the Article 7(1) mirrors the provisions of the 1946 General Convention: 'The OSCE, its property and assets, wherever located and by whomsoever held, shall enjoy immunity from any form of legal process except in so far as in any particular case it has expressly waived its

countries[116]. With the ability to contract and hire employees, generally known as international civil servants'[117], to carry out its functions, the issue of the legal status of the OSCE is relevant to this thesis insofar as such immunities typically bar its officials and other non-staff personnel with employment-related grievances from obtaining redress in those same domestic courts[118]. Whereas, as shall be seen, immunity is granted on the assumption that an IO will make appropriate arrangements for settlement of disputes, including an internal dispute resolution mechanism, the CSCE did not appear to foresee the need for such a mechanism when it came into being[119]. However, after acquiring permanent structures and regular staff[120] in the early 1990s, including an increasing range and number of other structures, including the deployment of field operations, the newly renamed OSCE was confronted with the necessity of establishing an internal regulatory

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immunity. It is, however, understood that such waiver of immunity does not extend to any measure of execution, for which a separate waiver shall be necessary'.

[116] OSCE Staff Regulation 1.01 Terminology, Article I, General, SRSR; *Host Country is the* **'**Country where the Secretariat or an institution is established or where a mission operates according to its mandate as defined by the participating States'.

[117] In the *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 28 May 1949, the ICJ described an international civil servant as 'any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of an Organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts', [1949], ICJ Reports, 1949, 177. It should be noted that the words ‚officials', ‚staff', ‚personnel', as well as ‚international civil servants are used interchangeably throughout this thesis. In particular, OSCE Staff Regulation 2.01(a) emphasizes the status of OSCE officials as that of 'an international civil servant'.

[118] See also OSCE Staff Regulation 2.03(a) Privileges and Immunities, which provides that: 'The Secretary General, the heads of institution and heads of mission, as well as staff members and international 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. Local staff/mission members shall enjoy privileges and immunities only to the extent granted to them by the respective host State under *national legislation and relevant bilateral agreements* which may be concluded between a State and the OSCE'. [emphasis added]. OSCE Staff Regulations and Staff Rules, DOC.SEC/3/03, adopted in September 2003, and last updated in January 2017.

[119] In this regard, Amerasinghe stated that 'as a solution to the problems of legal relations within secretariats of international agencies there was a time when the legal system of the national State of the staff member was directly applied to control and regulate the employment relationship. See C. F. Amerasinghe., *The Law of the International Civil Service* (as Applied by International Administrative Tribunals) 2 vols (Oxford University Press, 2nd ed., 1994), at p. 4.

[120] See *OSCE Secretary General Annual Report 1995 on OSCE Activities*, 'VII. Administration and Finance 1. Organizational and Personnel Matters', (OSCE Doc. DOC.SEC/1/95 30 (November 1995), at p. 40. See OSCE website: https://www.osce.org/secretariat/14563?download=true. Last accessed on 31 January 2019. According to Bloed, '[t]he total number of OSCE staff continued to increase in 1995…some 155 persons, including interpreters, translators and conference typists, are employed by the three OSCE institutions. Around 120 of these work at the Secretariat (114 in Vienna and 6 in Prague), 25 at the ODIHR in Warsaw and 10 at the Office of the High Commissioner in The Hague'. A. Bloed (ed)., Annual Report of the Secretary-General 1995, VII. Administration and Finance, *The Conference on Security and Co-operation in Europe, Basic Documents, 1993-1995,* (Martinus Nijhoff Publishers, 1997), at p. 85.

framework to deal with staff disputes and provisions for arbitration to settle third party disputes. Accordingly, a concerted effort was made by the Organization to further develop its administrative and financial structures and procedures with a view to enhancing the effectiveness of related support services for the benefit of the OSCE's expanded operations mandated to it[121], and special attention was given to the preparation of comprehensive Staff Regulations and Rules in order to replace those approved in 1991[122]. In 1996, the OSCE Permanent Council approved the OSCE's Staff Regulations[123], marking the first concrete step in the establishment of an internal body of law applicable to the OSCE's employment relationship with its staff. New Staff Regulations and Staff Rules (SRSR)[124] were elaborated and later implemented in 2003 through their adoption by the OSCE Permanent Council, setting out the conditions of service and the basic duties, obligations and rights of OSCE officials, as well as separate informal and formal grievance procedures to which aggrieved staff/mission members might have recourse.[125]

[121] For example, the CSCE/OSCE Spillover Monitor Mission to Skopje in November 1992, and the CSCE/OSCE Mission to Moldova in February 1993. Arguably the turning point for the OSCE was the opening of the first large major mission in the former Yugoslavia, the OSCE Mission to Bosnia and Herzegovina in 1995. See OSCE website: https://www.osce.org/mission-to-bosnia-and-herzegovina. Last accessed on 31 January 2019.

[122] See A. Bloed (ed)., *supra,* note 120, (Martinus Nijhoff Publishers, 1997), at p. 51 and p. 85.

[123] Approval Decision No. 149 of the OSCE Permanent Council (PC.DEC/149) of 19 December 1996, para. 1, states that the 'Permanent Council […] [a]pproves the OSCE Staff Regulations as contained in DOC.PC/2/96', with para 2. 'Task[ing] the Secretary General with implementing these Staff Regulations as from 1 January 1997. Relevant provisions are: Article X Regulation 10.01 on Staff Relations; Regulation 10.02 on Staff Representation; Article XI Appeals Regulation 11.01 on Internal Appeals Processes; and Regulation 11.02 on External Appeals Procedures. It should be bourne in mind PC.DEC/149, para. 2, that the 'corresponding Staff Rules' had not yet been established at the time. See OSCE website: https://www.osce.org/pc/20504. Last accessed on 1 December 2019.

[124] OSCE Staff Regulations and Staff Rules, (OSCE Doc. DOC.SEC/3/03 of September 2003).

[125] For list of decisions specifically related to the OSCE Staff Regulations and Staff Rules, approved by the Permanent Council, including amendments (the last being on 30 August 2018 pursuant to Decision No. 1305 Amending OSCE Staff Regulations and Staff Rules, OSCE Doc. PC.DEC/1305), see Index of Decisions (Nos. 1 – 134) and Other Documents* Adopted by the Permanent Council, (OSCE Doc. SEC.GAL/3/19/Rev.1 of 14 August 2019), issued by Conference Services, at p. 37. See OSCE website: https://www.osce.org/permanent-council/70160?download=true. Last accessed on 27 November 2019. Reference will be made throughout this thesis to the latest updated version of the OSCE Staff Regulations and Staff Rules dated 6 July 2018, except where otherwise indicated, which is published on the OSCE's website. See OSCE website: https://jobs.osce.org/resources/document/osce-staff-regulations-and-staff-rules. Last accessed on 27 November 2019.

1.3. The reform of internal justice systems of IOs and the 'redesigned' UN system

While the rules that govern the relationship between IOs and their employees are not subject to any codified legal system and may vary from one organization to the other, this area of legal regulation, known variously as 'international administrative law'[126], 'internal law of IOs'[127], and increasingly the 'law of the international civil service'[128], has certain common features, with IOs facing similar problems in the context of their employment law, and who frequently rely on the proven experience of others. Today, the law of the international civil service can be construed as a single *corpus juris* affecting tens of thousands of persons employed at roughly 216 active IOs as of 2016, including the OSCE and its officials[129] With the evolution of IOs since the early twentieth century[130], the

[126] See K. Carlston., ,International Administrative Law: A Venture into Legal Theory', *Journal of Public Law* (1959) p. 329; C. F. Amerasinghe, ,The Future of International Administrative Law' 45:4 *International and Comparative Law Quarterly* (1996) p. 773.

[127] See V. I. Margiev., 'On Legal Nature of Internal Law of International Organisations', *Soviet Yearbook of International Law* (1980) pp. 99-110 (summary in English); M. B. Akehurst, *The Law Governing Employment in International Organizations,* (Cambridge University Press, 1967), at p. 151; C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, (Cambridge University Press, 2005), p. 279. See also C. F. Amerasinghe., *The Law of the International Civil Service, supra,* note 119, (Oxford University Press, 2nd ed., 1994), at p. 9.

[128] As noted by Dhinakaran, 'Amerasinghe's treatise on the subject is titled '*The Law of the International Civil Service*', *supra,* note. This can also be found in the decisions of IATs as has been pointed out by the World Bank Administrative Tribunal (WBAT) in *de Merode et al v. World Bank,* 5 June 1981, WBAT, *WBAT Reports 1981,* Decision No. I, p. 12. For instance, the International Labour Organization Administrative Tribunal (ILOAT) referred to the general principles that form part of the law of the international civil service *In re Neising (No. 2) et al,* 3 July 1991, ILOAT Judgment No. 1118, para. 9, 3 November 2010, which has been followed in a plethora of successive judgments'. See. also R. Dhinakaran, 'The Law of the International Civil Service: A Venture into Legal Theory', *International Organizations Law Review* 8 (Martinus Nijhoff Publishers, 2011) 137-174, at p. 140. See also ILOAT website: https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1118&p_language_code=EN. Last accessed on 1 December 2019.

[129] According to Villalpando, the law of the international civil service possesses certain common features and IOs tend to find comparable solutions to the employment issues they face. This is further supported by certain institutional mechanisms, such as the UN Common System which aims to ensure homogenous conditions of service within a pool of organizations and the International Civil Service Commission, established for the regulation and coordination of the conditions of service in the Common System and the UN Chief Executives Board for Coordination, which provides, *inter alia,* strategic advice for the management of human resources; the UN Joint Staff Pension Fund, which serves 23 organizations with respect to retirement benefits; and international admnistrative tribunals, which have been a significant unifying force in the law of the international civil service'. See S. Villalpando., 'Managing International Civil Servants', Part I Global Administrations, in S. Cassese., and S. Normale (eds.), *Research Handbook on Global Administrative Law,* (Edward Elgar Publishing, 2016), at p. 73. See also Union of International Associations, *Yearbook of International Organizations 2017 – 2018* (Brill, 2017). See website: https://ybio.brillonline.com/system/files/pdf/v5/2017/2_1.pdf. Last accessed on 18 February 2020.

[130] See D. Mihajlov., ,The Origin and the Early Development of International Civil Service' (2004), *Miskolc JIL,* 79-87.

multiplication of staff members and the increased complexity and diversity of employment relations, including the number of employed-related disputes between IOs and their staff[131], the internal justice mechanisms of such organizations have over the years become subject to closer and more intense 'scrutiny and possible reform'[132]. This has been particularly apparent since the 1990s, with considerable criticism coming from staff associations, legal practitioners and scholars[133], to challenge and scrutiny before some national courts. Of the different panels of experts that have addressed the effectiveness of the internal justice systems of IOs in recent years[134], arguably the most far-reaching to date has been the *Panel*

[131] As noted by Amerasinghe, ,[t]here is a great deal of activity in the field of employment relations. Appointments are made, whether by contract or otherwise, salaries are assigned or changed, benefits are awarded, decisions are taken regarding promotions and pensions, and the like, so that generally there is a need for the total employment relationship to be subjected to some system of legal regulation and control. The parties involved in the employment relationship, both administrations (managements) and employees, require a legal regime to determine their rights and obligations and to give them protection where it is needed'. C. F. Amerasinghe., *The Law of the International Civil Service, supra,* note 119, (Oxford University Press, 2nd ed., 1994), at p. 4. See also International Labour Office Governing Body, *Matters relating to the Administrative Tribunal of the ILO,* ILO Doc GB.325/PFA/9/1 (15 October 2015([7]; D. Petrović., 'Longest-existing International Administrative Tribunal: History, Main Characteristics and Current Challenges' in International Labour Office Governing Body (ed), *90 Years of Contribution of the Administrative Tribunal of the International Labour Organization to the creation of international civil service law* (ILO, 2017). See ILO website: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---trib/documents/meetingdocument/wcms_613944.pdf. Last accessed on 18 February 2020.

[132] See S. Villalpando., 'International Administrative Tribunals', *The Oxford Handbook of International Organizations,* J. Katz Cogan, I. Hurd and I. Johnstone (eds.) (Oxford University Press, 2016), at p. 1092.

[133] See e.g. A. Reinisch and U. Weber., 'In the Shadow of Waite and Kennedy – The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to Courts and Administrative Tribunals as Alternative Means of Dispute Settlement', *International Organizations Law Review* 1 (2004), 59; E.P. Flaherty, 'Legal Protection for Staff in International Organisations – a Practitioner's View', Paper presented at the Conference 'Accountability for Human Rights Violations by International Organizations', in Brussels 16-17 March 2007; R. Boryslawska, L. Martinez Lopez, and V. Skoric, 'Identifying The Actors Responsible For Human Rights Violations Committed Against Staff Members Of International Organizations: An Impossible Quest for Justice?' *Human Rights & International Legal Discourse* 1 (2007), 381.

[134] As noted by Reinisch and Knahr, '[a]lready in the late 1990s, reform proposals concerning the International Labour Organization Administrative Tribunal (ILOAT) were high on the agenda, however, they did not result in any concrete changes'. See A. Reinisch & C. Knahr., 'From the United Nations Administrative Tribunal to the United Nations Appeals Tribunal – Reform of the Administration of Justice System within the United Nations', in *Max Planck Yearbook of United Nations Law,* Vol. 12, 2008, at 448. See London Resolution of the ILO Staff Union, 28 September 2002. See ILO website, 'Staff Union': https://www.ilo.org/public/english/staffun/info/iloat/londonres.htm. Last accessed on 1 December 2019. See Opinion on ILOAT Reform prepared by I. Seiderman., 'Does the ILO Administrative Tribunal meet the standards of an independent and impartial judiciary?'. See ILO website, 'Staff Union: https://www.ilo.org/public/english/staffun/info/iloat/seiderman.htm. Last accessed on 21 November 2019. See Opinion prepared by Geoffrey Robertson Q.C., Doughty Street Chambers, London for the Information Meeting on the ILO Administrative Tribunal Reform and related matters. See ILO website, 'Staff Union': https://www.ilo.org/public/english/staffun/info/iloat/robertson.htm. Last accessed on 18 January 2020. See Opinion prepared by Louise Doswald-Beck, ILO: The right to a fair hearing Interpretation of international law. See ILO website, 'Staff Union': https://www.ilo.org/public/english/staffun/info/iloat/doswald.htm. Last accessed on 21 November 2019.

on the Redesign of the United Nations System of Administration of Justice ('*Redesign Panel'* as it was called by the UN General Assembly). The *Redesign Panel* itself was conceived in 2005 by UN General Assembly Resolution 59/283[135] as an active response to widespread and long-standing dissatisfaction with the system of administration of justice at the UN[136]. As the title suggests, the Resolution called for the UN Secretary-General to form a panel of external and independent experts[137] to consider 'redesigning the system of administration of justice'[138]. With detailed and wide-ranging terms of reference[139], the *Redesign Panel* examined the entire institutional structure for the implementation of internal rules relating to the international civil service at the UN – from the administrative tribunal to informal mechanisms for conflict resolution – and made recommendations on its improvement. This included consultations with the UN system staff[140] and managers and with numerous other stakeholders within and beyond the Organization, including

[135] UNGA. Res. 59/283., Administration of Justice at the United Nations, (UN Doc. A/RES/59/283 of 2 June 2005). See UN website: https://undocs.org/A/RES/59/283. Last accessed on 17 January 2020.
[136] See J. O.C. Jonah and A. S. Hill., 'The Secretariat: Independence and Reform', in (eds. T. G. Weiss and S. Daws), *The Oxford Handbook of the United Nations,* 2nd ed, (Oxford University Press, 2018), at p. 224.
[137] The *Redesign Panel* was composed of five members, including 'a pre-eminent judge or former judge with administrative law experience', and 'expert in alternative dispute resolution methods', a 'leading academic in international law', a person 'with senior management and administrative experience in an international organization' and a 'person with United Nations field experience'. See UNGA Res. 59/283, para. 47. The *Report of the Redesign Panel on the UN System of Administration of Justice*, submitted under UNGA document A/61/205 dated 28 July 2006. See UN website: https://undocs.org/A/61/205. Last accessed on 1 December 2019. The *Report* was signed by the following five members of the *Panel*: M. Gaudron (Australia); L. Otis (Canada); A. El-Kosheri (Egypt); D. Garcia-Sayan (Peru); and K. C. Moghalu (Nigeria); S. Basnayake (Sri Lanka) was the Executive Secretary.
[138] Ibid.
[139] Ibid, at para 1. The terms of reference included: consideration of alternative systems of organizational dispute resolution while bearing in mind the uniqueness of the UN system, consideration of peer review, identification of measures such as education and training to minimize the number of disputes, the examination of the possibility of an integrated two-layer judicial system and the legal representation of the Secretary-General. See also UNGA Res. 63/253 Administration of justice at the United Nations, (UN Doc. A/RES/63/253 of 17 March 2009). See UN website: https://undocs.org/en/A/RES/63/253. Last accessed on 21 November 2019.
[140] The *Redesign Panel* consulted with UN staff through the Staff-Management Consultation Committee.

experts and representatives of other tribunals[141]. In its final damning report[142] presented to the Secretary-General on 20 July 2006, the *Redesign Panel* found that the old UN system of internal justice was 'outmoded'[143] and dysfunctional'[144], being 'neither professional nor independent' [145], 'extremely slow, under-resourced, inefficient, and, thus ultimately ineffective'[146], and failed to meet 'many basic standards of due process established in international human rights instruments'[147]. The system that had been established half a century earlier for a much smaller organization and was based largely on peer review mechanisms has simply 'outlived its relevance'[148]. The most important bodies on the formal side in which the formal processes of the internal justice system were initiated, the Joint Disciplinary Committees (JDC) for disciplinary matters and the Joint Appeals Boards (JAB) did 'not meet the basic standards required for guaranteeing their independence'[149], with delays in the JABs being qualified as 'egregious'[150]. The structure of the formal system was also found to be 'fragmented and overcentralized'[151], 'slow, expensive and inefficient'[152] and 'failing to guarantee individual rights'[153]. As this system was deemed 'inconsistent with the principles and aspirations of the [UN]', it therefore carried 'enormous' financial, reputational and other costs[154]. Further, and significantly, the

[141] In terms of procedure, in order to form an opinion as to how and why some aspects of the system' functioned effectively while other aspects did not, the *Redesign Panel* 'consulted with and received and reviewed information from a wide range of stakeholders in and outside the administration of justice system: United Nations staff, staff unions, managers and relevant officials not only in the Secretariat but also in the funds and programmes, at Headquarters and in the field, the President of UNAT, members of the Administrative Tribunal of the World Bank, Member States, the International Bar Association for International Governmental Organizations, the Government Accountability project, officials of other judicial systems and external, independent experts'. The Panel also visited the United Nations Offices at Geneva, Vienna and Nairobi, the Economic Commission for Latin America and the Caribbean, the International Criminal Tribunal for Rwanda and the United Nations Stabilization Mission in Haiti, and consulted by video-conference several duty stations, including those of peacekeeping missions.

[142] Addressed to the UN Secretary General for transmission to the UN General Assembly. *Report of the Redesign Panel, supra,* note 137. See UN website: https://undocs.org/A/61/205. Last accessed on 21 November 2019.

[143] *Report of the Redesign Panel, supra,* note 137, Summary, para. 2 and XII. Conclusions, para. 150.

[144] Ibid.

[145] Ibid, II. Overview, para. 5.

[146] Ibid.

[147] Ibid.

[148] Ibid, para. 6.

[149] Ibid, Para. 11.

[150] Ibid, V. The formal system, para. 66.

[151] Ibid, para. 73.

[152] Ibid.

[153] Ibid.

[154] Ibid, Summary, para. 2.

Redesign Panel noted the existence of a double standard whereby 'the standards of justice that are now generally recognized internationally and that the Organization pursues in its programmatic activities [were] not met within the Secretariat or funds and programmes themselves. These international standards include the right to a competent, independent and impartial tribunal in the determination of a person's rights, the right to appeal and the right to legal representation'[155]. The *Redesign Panel* considered that the fact 'that the administration of justice in the [UN] lag[ged] so far behind international human rights standards [was] a matter of urgent concern requiring immediate, adequate and effective remedial action'[156]. In consequence, the *Panel* found that UN staff members had 'very little or no confidence' at all in the system[157]. To be able to command the 'confidence of managers, staff members and other stakeholders'[158], however, and to guarantee 'the rule of law'[159] within the UN, any new system would have to be 'independent, professional and adequately resourced'[160] to sustain 'certainty and predictability'[161]. In the view of the *Redesign Panel*, simply trying to improve what was there was not enough and the entire internal justice system needed to be 'fundamentally redesigned'[162]. Most notably, it may be highlighted that the urgency of the UN General Assembly to implement this major piece of management reform reflected the presence of consensus and political will on the part of the Member States[163]. Within eight months after having received the largely positive reply of the UN Secretary-General to the *Redesign Panel's* report[164], also considered by the

[155] Ibid, II. Overview, para. 9.
[156] Ibid, para. 11.
[157] Ibid, II. Overview, para 5.
[158] Ibid, para. 8.
[159] Ibid, para. 13.
[160] Ibid, para. 8.
[161] Ibid.
[162] Ibid, para. 13.
[163] While there was a unanimous support for the need of an in-depth reform if the system of internal justice at the UN, as shall be seen, several speakers expressed their reservations or concern with regard to certain recommendations of the *Redesign Panel* or proposals of the Secretary-General, in particular: the *Redesign Panel's* recommendation to extend the scope and jurisdiction of the justice system to persons performing personal services under contract with the Organization, and the *Panel's* recommendation concerning the award of punitive damages as well as proposals to give power to the Dispute Tribunal to order specific performance and to allow staff associations to bring class actions on behalf of their members. See A. Megzari,'The Abolition of UNAT and its Replacement', *The Internal Justice of the United Nations A Critical History 1945-2015* (Leiden/Boston, Brill/Nijhoff, 2015), at 430-431.
[164] Report of the Secretary-General, Administration of justice (UN Doc. A/62/294 of 23 August 2007). See UN website: https://undocs.org/A/62/294. Last accessed on 17 January 2020.

Sixth[165] and Fifth[166] Committees, the UN General Assembly took all the basic decisions in its resolution 61/261[167] on the framework of the new system in a single resolution[168]. The new system of internal justice at the UN became operational on 1 July 2009. Five distinctive features of the reformed administration of justice system may be highlighted at this preliminary stage. First, widely considered to be the most important innovation is the abolishment of various so-called peer-review advisory boards: JABs and JDCs and the UN Administrative Tribunal (UNAdT), and their replacement with a two-tier formal system of justice, comprising of a first instance UN Dispute Tribunal (UNDT) and a UN Appeals Tribunal (UNAT)[169]. Secondly, an Internal Justice Council was appointed to '[monitor] the formal justice system and also [compile a list of…] persons eligible to be appointed to each judicial position'[170]. Thirdly, with particular emphasis on informal means to resolve conflicts in the workplace, in the institutional framework for informal conflict resolution,

[165] Fifth Committee, Letter dated 20 November 2007 from the President of the General Assembly to the Chairman of the Fifth Committee, (UN Doc. A/62/C.5/11 of 20 November 2007). See UN website: https://undocs.org/pdf?symbol=en/A/C.5/62/11. Last accessed on 17 January 2020.

[166] Report of the Fifth Committee, Administration of justice at the United Nations, (UN Doc. A/62/597 of 28 December 2007). See UN website: https://undocs.org/A/62/597. Last accessed on 17 January 2020.

[167] UNGA Res. 61/261. Administration of justice at the United Nations, (UN Doc. A/RES/61/261 of 30 April 2007). See UN website: https://undocs.org/en/A/RES/61/261. Last accessed on 17 January 2020. The General Assembly repeated its assessment that the current system of administration of justice at the UN was 'slow, cumbersome, ineffective and lacking in professionalism'. The Assembly further: decided 'to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike'; recognized informal resolution of conflict as a crucial element of the new system, and emphasized that 'all possible use should be made of the informal system in order to avoid unnecessary litigation'; decided to create a 'single integrated and decentralized Office of the Ombudsman for the secretariat and the funds and programmes' and affirmed mediation as an 'important component of an effective and efficient informal system' that should be available to any party to a conflict at any time before the final judgment of the matter; agreed that the future formal system – which was to replace the existing advisory bodies – should be two-tiered, comprising a decentralized first instance Dispute Tribunal and an appellate instance, the Appeals Tribunal; acknowledged the need for a process of efficient, effective and impartial process of management evaluation; and agreed to establish a new Office of Administration of Justice to ensure the overall coordination of the new system.

[168] UNGA Res. 62/228. Administration of justice at the United Nations, (UN Doc. A/RES/62/228 of 6 February 2008). See UN website: https://undocs.org/en/A/RES/62/228. Last accessed on 17 January 2020.

[169] By UNGA Res. 63/253. Administration of justice at the United Nations, (UN Doc. A/RES/63/253* of 17 March 2009, the UN General Assembly adopted the Statute of the UNDT and the Statute of the Appeals Tribunal (para. 26), abolished the old UNAdT as of 31 December 2009 (para. 43), and abolished the JDCs and JABs (para. 38). See UN website: https://undocs.org/en/A/RES/63/253. Last accessed on 17 January 2020.

[170] *Report of the Redesign Panel, supra,* note 137, XIII. Recommendations, paras. 122-131, particularly 127. See also UNGA Res. 62/228, para 37. For information on the tasks entrusted to the Internal Justice Council, see UN website: https://www.un.org/en/internaljustice/overview/internal-justice-council.shtml. Last accessed on 21 November 2019.

a 'single, integrated and decentralized' Office of the Ombudsman and Mediation Services (UNOMS) was created with a double role of informal dispute resolution and independent monitoring on cross-cutting issues regarding managerial practices and employment relations[171]. Fourthly, also instrumental to the implementation of the new system is the establishment of an independent Office of Administration of Justice (OAJ)[172], responsible for the 'overall coordination of the formal system of administration of justice'[173], contributing to its 'functioning in a fair, transparent and efficient manner'[174]. The OAJ provides 'substantive, technical and administrative support to the UNDT and the UNAT through their Registries, assists staff members and their representatives in pursuing claims and appeals through the Office of Staff Legal Assistance (OSLA), and also provides assistance, as appropriate to the Internal Justice Council.'[175] Finally, a centralized and independent Management Evaluation Unit (MEU)[176] in the Office of the Under-Secretary-General for Management[177] replaced the old process of administrative review as a first step in the formal system, for executive heads to hold managers accountable for their decisions'[178], including in cases an improper decision has been taken and give 'management an early opportunity to review a contested [administrative] decision'[179] through a process of evaluation seen as 'efficient, effective and impartial.'[180]

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[171] See *Office of the United Nations Ombudsman and Mediation Services, Mediation Principles and Gudelines*, 7 July 2010, para 7. For further information, see OMMS website: https://www.un.org/en/ombudsman/resource.shtml. Last accessed on 21 November 2019.

[172] *Report of the Redesign Panel, supra,* note 137, XIII. Recommendations, para 124. See also 'Organization and terms of reference of the Office of Administration of Justice', *Secretary-General' bulletin*, (UN Doc. ST/SGB/2010/3 of 7 April 210). See UN website: https://undocs.org/en/ST/SGB/2010/3. Last accessed on 21 November 2019.

[173] Ibid. Section 2.1.

[174] Ibid.

[175] Ibid. Section 3.

[176] For information on Management Evaluation of an administrative decision at the UN, see Administration of Justice at the UN website: https://www.un.org/en/internaljustice/undt/the-management-evaluation.shtml. Last accessed on 22 November 2019.

[177] UNGA Res. 61/228. Administration of justice at the United Nations (A/RES/61/228 of 5 February 2007), paras. 50-52. See UN website: https://undocs.org/en/A/RES/61/228. Last accessed on 3 January 2020.

[178] See Report of the Redesign Panel on the United Nations System of Administration of Justice: Note by the Secretary-General', (UN Doc. A/61/758 of 23 February 2007), paras. 29-30. See UN website: https://undocs.org/A/61/758. Last accessed on 21 November 2019.

[179] Ibid.

[180] UNGA Res. 61/228. Administration of justice at the United Nations (A/RES/61/228 of 5 February 2007), at para. 50. See UN website: https://undocs.org/en/A/RES/61/228. Last accessed on 3 January 2020.

1.4. The Internal justice system of the OSCE

With the UN's reform inextricably linked with providing enhanced guarantees of due process and respect for the rule of law, this provides an opportunity for other IOs to reassess the extent to which their own internal justice systems can be improved[181], with a view to becoming more professionalized and efficient to ensure, *inter alia*, transparency, participation, reasoned decisions and effective means of review. Despite the fact that the present internal dispute resolution mechanism at the OSCE has been in operation for over a decade, until very recently there appears to have been little treatment, let alone a transparent and comprehensive assessment, of the challenges posed by the management of internal employment disputes by the Organization. At this juncture, however, it is worth noting that in 2017, the OSCE issued a Statement of Internal Control, along with the Financial Statements for the year ending 31 December 2017[182], which noted that among 'the significant matters reported in previous years'[183] and 'which continue to be monitored and worked on include the *increased number of complaints and appeals cases submitted in 2017 by current or former OSCE officials*' [emphasis added][184]. While the OSCE Administration does not make publicly available data and statistics on the number of its complaints and appeal cases, parallels may nonetheless be drawn with old UN recourse system, which is referred to as the pre-reform system, insofar as the OSCE would appear to be also experiencing a growing number of appeals[185]; however, rather than requesting

[181] As affirmed by the UN General Assembly in its resolutions on Administration of justice at the United Nations 67/241 of 2012 (UN Doc. A/RES/67/241) and 68/254 of 2013 (UN Doc. A/RES/68/254).
[182] See *OSCE Financial Report and Financial Statements for the year ended 31 December 2017 and the Opinion of the External Auditor*, 11 July 2018. See OSCE website: https://www.osce.org/secretariat/387377?download=true. Last accessed on 22 November 2019. Paragraph 45 of the Report explains that the 'SIC is the means by which the Secretary General declares his approach to, and responsibility for, risk management, internal control and corporate governance'.
[183] Ibid, para. 46.
[184] Ibid.
[185] While the growing volume of internal complaints filed within the OSCE in 2017 may not be due to an increase in the staff/mission members being appointed or assigned by the Organization, as it still currently only employs some 3,603 officials, there are nonetheless serious questions as to the extent to which this has affected in a significant manner the capacity of *ad hoc* IRBs and the PoA to deal effectively with such cases, resulting in a backlog and delay in: (internal appeals) IRBs submitting their reports and recomendations (see Article V (7) Procedure of the Internal Review Board, Appendix 12, SRSR: '***sixty days*** upon receipt of the Secretary General or the resepctive head of institution/mission's reply to the appellant's request/or written statement.') and the Secretary General or the respective head of institution/mission taking a final decision (see Article VIII (1) Final Decision, Appendix 12, SRSR: '); and '***thirty days*** upon receipt of the report [by the Secretary-General or the respective head of institution/mission, in consultation with the Seceratry-

the appointment of an external, independent panel of experts at the Organization like the UN General Assembly, the task of redesigning the OSCE internal justice system appears to be entirely internally driven, using existing staff resources and knowledge to improve such processes. According to the Statement of Internal Control, the '[OSCE] Office of Legal Affairs (OLA), in a joint effort with the Department of Human Resources (DHR), has embarked on a review of the OSCE internal justice system with a view to proposing enhancements and other modifications to the current legal framework and fostering dispute prevention'[186]. As shall be seen, how far this 'reactive approach'[187] is in response to concerns about the increasing cost of administrative decisions or external pressures remains unclear, and, moreover, at a time of contracting financial resources in the Organization, it may be questioned whether change, if it comes[188], will merely be cosmetic, or it will embrace comprehensive reform of the type embodied in the *Redesign Panel*'s recommendations or piecemeal evolution. Again, since there appears to have been no independent, external evaluation of the OSCE's internal dispute resolution system to date, this thesis seeks not so much to fill a gap in IO accountability as to start the process of doing so. Despite this isolation from public scrutiny to shed some light on the global legitimacy and the adequacy of the legal protection the OSCE accords its officials, one notable external pressure which may have spurred the recent 'review' may be found in the *Internal Justice Systems of International Organizations Legitimacy Index (IJS Legitimacy*

General] by the Board.'); (in external appeals) and final adjudications decisions (see Article VIII Adjudication decisions, Appendix 2, SRSR): '[***t]o the extent possible, […] six months*** upon receipt of the application by the Chairperson of the Panel'). On up-to-date figures on OSCE staffing, see *Factsheet: What is the OSCE?* (Publisher: OSCE, 19 September 2019), at p. 8. See OSCE website: https://www.osce.org/whatistheosce/factsheet?download=true. Last accessed on 22 November 2019.

[186] See *OSCE Financial Report and Financial Statements (for the year ended 31 December 2017 and the Opinion of the External Auditor*, 11 July 2018, at para. 46.

[187] See E. Missoni, and D. Alesani., 'Management of IIs and INGOs', in *Management of International Institutions and NGOs: Frameworks, practices and Challenges* (Routledge, New York, 2014), at p. 354. 'Traditionally, UN system organizations had a reactive approach and lacked transparency over manegment of work-related disputes. Conflict prevention and management were not conceived as an institutional priority and the lack of a well-functioning system of internal justice failed to provide fair mechanisms to promptly resolve staff-mangement disputes'. According to the *Report of the Redesign Panel, supra,* note 137, at para 101: '[t]he number of cases in the formal system increased by 45 per cent in 2005, and the number in the informal systemdecreased by 4 per cent. In the same period, there was a 50.24 per cent increase in the number of cases taken to JAB and an increase of 172 per cent in the number of cases litigated at UNAT'.

[188] To date, no further information on this matter has been made publicly available, including the *OSCE Financial Report and Financial Statements (for the year ended 31 December 2018) and the Opinion of the External Auditor*. Published online on 9 July 2019. See OSCE website: https://www.osce.org/secretariat/425201?download=true. Last accessed on 22 November 2019.

Index). Published annually since 2014[189] by the International Administrative Law Centre of Excellence[190], and hosted on the Council of Europe's (CoE) website[191], the *IJS Legitimacy Index* is a ‚quantitative assessment tool' that 'scores and ranks [IOs (of various sizes[192], type and geography)] based on how compliant their internal justice systems are with criteria set by customary international human rights law'[193]. The index offers reliable and independent information for employees and staff representatives of IOs , member states of IOs, policy making organs of IOs, national, regional and international tribunals to:

- Assess adherence to the principles and standards of customary international human rights law by the internal justice systems of international organisations;
- Identify the strength and weaknesses of the internal justice system of an international organisation in comparison to other international organisations;
- Identify the areas of non-conformity requiring reform;
- Track changes over time[194].

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[189] The *IJS Legitimacy Index* has expanded from 23 IOs in 2014 to 35 in 2018, at p. 4. See *IJS Legitimacy Index 2018:* http://www.ialcoe.org/wp_site/wp-content/uploads/2018/10/ial_coe_legitimacy_index_2018.pdf. Last accessed on 22 November 2019. At the time of writing, the *IJS Legitimacy Index 2019* has not been published.

[190] The International Administrative Law Centre of Excellence is described as 'a community interest company' established by an International Chambers of Barristers, Bretton Woods Law, to assist in the global development and improvement of International Administrative Law'. See IAE CoE website: http://www.ialcoe.org/. Last accessed on 22 November 2019. The *IJS Legitimacy Index*, created and launched in 2014, uses four weighted indicators to reveal the extent to which international principles are being observed: 1. structure of the internal justice system. 2. applicable law and clarity. 3. first instance litigation. 4. second instance litigation.

[191] See Council of Europe website, 'Administrative Tribunal Commentaries / Articles': https://www.coe.int/en/web/tribunal. Last accessed on 22 November 2019.

[192] On the ‚number of employees per organization', in 2018, the OSCE is ranked 14 out of 35 organizations. See *IJS Legitimacy Index 2018*, *supra,* note 104, at p. 4.

[193] As explained by the *IJS Legitimacy Index 2018*, at 9 – 11, since ‚there is no fully developed theory on international procedural law and hence no universally accepted doctrine of international procedural principles', ‚fundametal principles of international law, including customary international human rights law (treated so, inter alia, by virtue of their homogenous presence in international and regional conventions) and the statutes and decisions of international tribunals, particularly the ICJ, serv[ed] as a founation of this exercise'. The following four ‚universal principles' which emerged includes: (1) Access to justice (a) the right to standing before a court of tribunal; (b) the right to a competent, independent and impartial court or tribunal in the determination of a person's rights (reflecting the principle *nemo judex in propia sua causa* – no one shall be a judge in his own cause); (c) the right to be heard in a fair and public trial with due process and; (d) the right to a reasoned and public decision. (2) Right to Appeal. (3) Equality of Arms (a) right to legal representation, including access to legal services; (b) the right to disclosure, i.e., the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed, and; (c) the right to summon, examine and cross-examine witnesses. (4) Clarity of law.

[194] See *IJS Legitimacy Index 2018*, *supra,* note 104, at p. 16.

In the *IJS Legitimacy Index*, IOs are rated on such weighted indicators (or factors)[195] as whether their internal justice system is a one-tier justice system with no room for appeal or provides for a two-tier system, including independent judicial review at both instances, whether the organization is bound by general principles of international law and customary international human rights law, as well as the clarity and accessibility of the applicable law to all those concerned, and most importantly, the extent to which access to justice is guaranteed at first and second instances[196]. Since 2015, when the OSCE first provided data on its ‚core internal laws'[197], ‚both substantial and procedural'[198], via questionnaire, the Organization has consistently ranked among the lowest IOs in the *IJS Legitimacy Index* ‚Final Ranking Overview': 23 out of 28 IOs in 2015[199], 29 out of 30 IOs in 2016[200], in 2017[201] and 2018[202], the OSCE trailed in last place out of 33 and 35 IOs respectively. Moreover, where IOs are scored according to individual factors in 2018 (the latest iteration at the time of writing), the OSCE is ranked in the bottom 5 in 3 out of the 4 ‚individual factor rankings'[203]. While successive *IJS Legitimacy Indexes* have thus far not included the detailed data sets provided by the IOs, these findings on the status of compliance with customary international human rights law standards by IOs nonetheless triggers serious

[195] Ibid. According to the *IJS Legitimacy Index 2018*, at. 11-12: ‚factors are broken down into fourteen specific sub-factors and each sub-factor (or factor, where there is no sub-factor) is further broken down into a set of questions reflecting the various elements of such sub-factor. These factors are...Factor 1: Structure of the internal justice system Factor 2 - Applicable law and clarity thereof; Factor 3 – First instance of litigation; 3.1 Locus Standi; 3.2 Cause of Action; 3.3 Form of Decision; 3.4 Nature and Powers; 3.5 Constitution, Membership and Functioning; 3.6 Practice and Procedure; 3.7 Equality of Arms; Factor 4 – Second Instance of litigation; 4.1 Locus Standi; 4.2 Cause of Action; 4.3 Form of Decision; 4.4 Nature and Powers; 4.5 Constitution, Membership and Functioning; 4.6 Practice and Procedure; 4.7 Equality of Arms.'

[196] Ibid, at p. 12-14.

[197] Ibid, at p. 15. Here, the *IJS Legitimacy Index 2018* emphasized in a footnote that the 'questionnaires are filled on the basis of the core internal laws of international organisations *that are made available publicly'* [emphasis added].

[198] Ibid, at p. 8.

[199] For *IJS Legitimacy Index 2015,* at p. 3, see IAL CoE website*:* http://www.ialcoe.org/wp_site/wp-content/uploads/2016/05/legitimacy_index_2015.pdf. Last accessed on 22 November 2019.

[200] For *IJS Legitimacy Index 2016*, see IAL CoE website: http://www.ialcoe.org/wp_site/wp-content/uploads/2016/11/COE_Legitimacy_Index_2016.pdf. Last accessed on 22 November 2019.

[201] For *IJS Legitimacy Index 2017*, at p. 5, see IAL CoE website: http://www.ialcoe.org/wp_site/wp-content/uploads/2017/10/6190BWL_CoE_Legitimacy_Index_2017.pdf. Last accessed on 22 November 2019.

[202] For *IJS Legitimacy Index 2018,* at p. 5, see IAL CoE website: http://www.ialcoe.org/wp_site/wp-content/uploads/2018/10/ial_coe_legitimacy_index_2018.pdf. Last accessed on 22 November 2019.

[203] Ibid, at 6. Factor 1. Structure of the Internal Justice System. 2. Applicable Law and Clarity Thereof. 3. First Instance of Litigation. 4. Second Instance of Litigation.

questions of the accountability and the adequacy of the internal dispute resolution processes at the OSCE. And the fact that the OSCE, as a global administrative body[204], may not be effecting internally what it preaches externally, namely the promotion of the rule of law and due process, raises legitimacy concerns about the extent the OSCE effectively protects the human rights of its own personnel, which, as shall be seen, could be a material factor in determining whether it should be granted immunity from domestic jurisdiction in an employment dispute[205]. These issues will be examined in detail below.

1.5. The methods employed

For the purposes of this thesis, reference will be made to the findings and recommendations of the *Redesign Panel* as the principal comparative focus, to critically evaluate whether the internal dispute resolution machinery that exists at present at the OSCE has developed progressively or needs to be strengthened. The reasons for this are twofold. First, the recommendations of the *Redesign Panel* mark a dramatic departure from the pre-reform UN justice system established half a century earlier for a much smaller organization, and

[204] See C. A. Feinäugle., 'The rule of law and its application to the United Nations, in C. May and A. Winchester (eds.), *Handbook on the Rule of Law,* (Edward Elgar Publishing, Cheltenham, UK, Northampton, MA, USA, 2018), at p. 208. According to Feinäugle, '[g]lobal administrative law can be understood as comprising the legal rules, principles, and institutional norms applicable to processes of 'administration' undertaken in ways that implicate more than intra-State structures of legal and political authority. The global order is seen as a plural order in the sense that it lacks unity and hierarchical structures. Global administrative bodies include, among others, national regulatory bodies, intergovernmental regulatory bodies, public-private partnerships, as well as some private regulatory bodies. The aim of the Global Administrative Law approach is to promote the accountability of global administrative bodies, in particular by ensuring that they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make as well as the principle of proportionality. Relating to the rule of law, the internal administration of justice in the UN would be a good example here since it triggers questions of the accountability and effective review the UN, as a global administrative body, would have to provide its staff. UN staff are subject to the authority of their superiors and ultimately of the Secretary-General. The lack of adequate remedies available to UN staff generated legitimacy concerns though […]; in particular, '[g]lobal administrative law tries to solve such legitimacy concerns regarding administrative tribunals by helping to define the criteria which best promote legitimacy, such as participation, transparency, due process, reason-giving, review mechanisms, accountabilityand respect for basic public law values including rule of law. Indicating a binding effect of the law of law, Sabino Cassese has stated that principles had developed which disciplined global administrative proceedings by means of the rule of law, specifically a right to a hearing, a duty to provide reasons and a duty to disclose information.

[205] See, e.g., the European Court of Human Rights' decision in Beer and Regan, Application No. 28934/95, 18 February 1999, European Court of Human Rights (1999) ECHR, p. 6; Waite and Kennedy, Application No. 26083/94, 18 February 1999, European Court of Human Rights, (1999) ECHR, p. 13; *Siedler v. Western European Union*, 17 September 2003, Brussels Labour Court of Appeal (4th chamber), (2004) Journal des Tribunaux, p. 617.

which now exercices jurisdiction over more than sixty IOs and well in excess of one hundred thousand international civil servants operating around the world[206]; and, secondly, they provide an interesting point of comparison with the OSCE which, along with most other IOs have a similar model to the pre-reform UN system. While the conclusions drawn in this thesis may thus apply equally to other internal justice systems as well, the periodic reforms of other international administrative regimes such as the North Atlantic Treaty Organization (NATO)[207] is beyond the scope of this paper. However, it must also be highlighted that while the twenty-six recommendations submitted by the *Redesign Panel* on both the informal and formal sides have to a large extent been implemented, some key recommendations were not carried forward[208]. These will feature when reviewing the internal justice regime at the OSCE.

1.6. Structure of the thesis

This thesis is divided into 6 parts. As seen, Part 1 consists of a general introduction and starts with a brief sketch of the origins of the CSCE/OSCE, its development and basic features, with specific reference to its unsettled legal status, through to the creation of its internal dispute resolution machinery. Part 2 provides an overview of the OSCE's internal and external spheres, with a primary focus on the institutional structure, its various components and functions, including the staffing and financing of the Organization. To a considerable degree, this section looks at the nature of the legal relationship between the OSCE and its officials, as well as the internal law governing the employment relationship between the OSCE and its officials. Attention is directed to certain aspects of international civil service law generally, including a brief discussion of immunities, as well as brief discussion of selected themes which arguably constitute some fundamental aspects of modern day public administration such as the rule of law and due process, transparency

[206] See 'Administration of Justice at the UN – UN Internal Justice System', website, 'Who Can Use The System': https://www.un.org/en/internaljustice/overview/who-can-use-the-system.shtml. Last accessed on 22 November 2019. See also *Report of the Secretary-General,* 'Composition of the Secretariat: staff demographics, (UN Doc. A/73/79 of 12 April 2018).
[207] See H. Dijkstra., 'Functionalism, multiple principals and the reform of the NATO secretariat after the Cold War' in *Cooperation and Conflict* (2015) Vol. 50(1), 128.
[208] See Note by the Secretary-General., 'Report of the Redesign Panel on the United Nations system of administration of justice', (UN Doc. A/61/758 of 23 February 2007).

and accountability and its application at the OSCE. As well as providing background, this helps contextualize the succeeding sections. Part 3 commences with an examination of the scope and jurisdiction of the informal and formal dispute resolution mechanisms at the OSCE. Part 4 will engage in an analysis of the dispute resolution processes at the OSCE from the very inception of a dispute. It will briefly address the manner in which the OSCE deals with resolving an employment-related dispute informally, with focus on the actors involved and how the system might be improved. As the main focus of this thesis, Part 5 will consider the formal mechanisms, with a section on the scope and meaning of an administrative decision. It will then proceed to examine and analyze disciplinary and so-called internal appeals procedures, which follow a purely administrative approach. Such discussion will concentrate on the OSCE's two peer-review advisory bodies: standing and *ad hoc* Disciplinary Committees (DCs) and *ad hoc* Internal Review Boards (IRBs) and assess whether they function as they are supposed to. Part 5 will also review and comment on the OSCE's own 'quasi-judical, arbitration instance'[209] – the so-called external appeals procedures, including the structure and organization[210] of the Panel of Adjudicators (PoA), and whether basic due process guarantees are accorded when delivering justice; Part 6 will then conclude with a summary of the findings as to the flaws of the OSCE's dispute resolution machinery, including observations on the need for structural reforms and their feasibility. Before considering these matters in greater depth, two preliminary points may be noted. First, any assessment of the dispute resolution processes at the OSCE is not a straightforward exercise, especially as principles of the rule of law, due process and managerial accountability [211] must be balanced against the uniqueness of the Organization[212], including, for example, the size of its personnel, the kinds of disputes

[209] As described by the European Court of Human Rights in *Kokashvili v. Georgia*, no. 21110/03, ECtHR (Fourth Section), Decision of 01.12.2015. See Paras. 25 and 37. See Eurocases website: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Kokashvili%20v.%20Georgia,%20no.%2021110/03%22],%22itemid%22:[%22001-159553%22]}. Last accessed on 22 November 2019.

[210] As shall be seen, since the PoA does not publish its adjudication decisions, it is not possible to address matters of substance, including the interpretation of the OSCE CRMS related to employment relations.

[211] Managerial accountability in IOs generally applies to international civil servants. At the UN, the principle is that managerial accountability is applicable to all levels of staff, from the executive heads such as the Secretary-General down to lower levels of managers/staff members. See S. Kuyama and M. Fowler., 'Introduction', in S. Kuyama and M. Fowler (eds.), *Envisioning Reform: Enhancing UN Accountability in the Twenty-first Century*, (Tokyo: United Nations University Press, 2009), at p. 5.

[212] See *Report of the Redesign Panel, supra,* note 137, 'Introduction', para. 1.

involved, the relations between management and officials, and the costs involved and the feasibility of establishing a streamlined system of justice[213]. At the same time, it has been noted that for all the differences among IOs, their internal dispute resolution mechanisms arguably have sufficient in common to make comparison between them meaningful[214]. Secondly, given its 'wide terms of reference', a comprehensive, in-depth comparative analysis of the implications of all the findings and recommendations raised in the *Report of the Redesign Panel* for the OSCE is beyond the scope[215] of this thesis. Instead, the internal dispute resolution processes at the OSCE are in large part considered by reference to key innovations indicated above. The methodology adopted consists of a review of textbooks, journals, studies, reports and online documents related to the OSCE dispute system and the law of the international civil service. This also includes key CSCE/OSCE documents such as decisions, statements, declarations, reports, SRSRs, and other types of documents, including international conventions and case law of international administrative tribunals (IATs). On this point, as with many other IOs on the scarcity of information on their daily workings, the lack of public access to basic OSCE documentation presents a major hurdle in providing a full picture of the OSCE's internal dispute resolution mechanisms, including the case law of the PoA[216]. In consequence, much of this thesis takes a theoretical approach and in some cases this tends to raise more questions than answers, so some caution may therefore be expressed when drawing up conclusions and recommendations.

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[213] See e.g., S. Villalpando., *supra*, note 132, (2016, Oxford University Press), at 1093 – 1094.

[214] See R. Lewis., ,The Effectiveness of International Administrative Law Compared to Some National Legal Systems', Part III: The Institutional Framework, (O. Elias eds.) in *The Development and Effectiveness of International Administrative Law On the Occasion of the Thirtieth Anniversary of the World Bank Administrative Tribunal*, (Martinus Nijhoff Publications, 2009), at p. 335.

[215] At the same time, difficulties also confront attempts to apply the procedure of the *Redesign Panel* to the OSCE context, as this would involve consulting with and receiving and reviewing information from a wide range of stakeholders in and outside the internal justice system of the OSCE: OSCE officials, the Staff Committee, managers and relevant officials not only in the Secretariat but also in the institutions and in the field, the Chairperson of the PoA, members of other IATs, the International Bar Association for International Governmental Organizations, officials of other judicial systems and external and independent experts' See *Report of the Redesign Panel, supra,* note 137, 'Introduction', paras. 3 and 4.

[216] See *Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2018,* (OSCE Doc. MC.GAL/10/18 of 7 December 2018). See OSCE website: https://www.osce.org/chairmanship/407768?download=true. Last accessed on 22 November 2019. Pointing to certain challenges regarding the implementation of the duty of care with respect to OSCE officials, Professor Russo noted at para. 35 that ,there is no public database of OSCE appeals decisions' and at para 36. 'there is no access to the panel's case law'.

P A R T 2

The OSCE: WHAT IT IS

2. The OSCE: internal and external spheres

2.1. Introduction

This section provides a brief overview of the OSCE, with a focus on the 'external sphere' of its activities[217]. Its principal objective, however, is to examine its 'internal sphere'[218], which is governed by the internal law of the Organization. Covering more than employment relations, it includes the indispensable requirements for the institutional functioning of the Organization.

2.2. Classification: OSCE as a closed regional Organization

Turning first to classification of the OSCE as a unitary institution, it has been seen to fall into the category of regional (closed) rather than a universal (open) organization[219]. At the Helsinki summit of July 1992, the OSCE declared itself a regional arrangement within the scope of Chapter VIII of the UN Charter[220], and in May 1993, the UN and the CSCE

[217] C. F. Amerasinghe., *supra,* note 127, (Cambridge University Press, 2005), pp. 272 – 273. ('An [IO] functions in two different spheres – the internal and the external. Of this dichotomy, it has been said: […] The external sphere of functioning covers activities which aim at exerting influence by an [IO] on its environment, that is, in the first place, on Member-States and their conduct in mutual relations.')

[218] Ibid. ('The internal sphere of functioning covers activities which aim at ensuring indispensable in a way 'a minimum' of conditions of survival, and the very existence of the system and the efficient functioning of the mechanisms of an [IO] […].')

[219] As noted by Akande, [u]niversal organizations are open to all States and examples include the UN and its specialized agencies […]. Closed organizations limit membership to those States fulfilling certain specified criteria. Examples of closed organizations include those whose membership is based on geographic criteria (eg regional organizations such as the Organization of American States (OAS) and the African Union (AU) or economic criteria (eg Organization of the Petroleum Exporting Countries (OPEC) and the Organization for Economic Cooperation and Development (OECD))'. See D. Akande., Chapter 9 'International Organizations' in (eds M. D. Evans) *International Law* (Fourth Edition) (Oxford University Press, 2014), at p. 250.

[220] The CSCE Helsinki Document 1992 formally proclaimed the Conference a 'regional arrangement' under Chapter VIII of the UN Charter with a view to strengthening its role in conflict prevention and crisis management. UN. 1945. *Charter of the United Nations, chapter VIII*. See 1992 Summit, CSCE Helsinki Document 1992, *Challenges of* Change, Helsinki Decisions, Helsinki, 10 July 1992, IV Relations with International Organizations, Relations with Non-Participating States, Role of Non-Governmental Organizations (NGOs), Relations with international organizations (2) ('The participating States, reaffirming their commitments to the Charter of the United Nations as subscribed to by them, declare their understanding that the CSCE is a regional arrangement in the sense of Chapter VIII of the Charter of the United Nations and as such provides an important link between European and global security. The rights and responsibilities of the United Nations Security Council remain unaffected in their entirety.') See OSCE website: https://www.osce.org/mc/39530?download=true. Last accessed on 22 November 2019. The Istanbul Summit

defined a 'Framework for Cooperation and Coordination'[221] and, on 13 October 1993, the UN General Assembly unanimously adopted a resolution inviting the CSCE to attend the sessions and participate in its work as an observer[222]. As such, the OSCE may be seen as the equivalent for Europe what the UN are on a global scale, providing an 'important link between European and global security'[223]. The OSCE is specifically recognized 'as a primary organization for the peaceful settlement of disputes within its region and as key instrument for early warning, conflict prevention, crisis management and post conflict

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Document 1999, *Charter for European* Security, Istanbul, November 1999, II. Our Common Foundations at 7. 'reaffirm[ed] the OSCE as regional arrangement under Chapter VIII of the Charter of the United Nations and as a primary organization for the peaceful settlement of disputes within its region and as a key instrument for early warning, conflict prevention, crisis management and post conflict rehabilitation.. The OSCE is the inclusive and comprehensive organization for consultation, decision-making and co-operation in its region.' See OSCE website: https://www.osce.org/mc/17502?download=true. Last accessed on 22 November 2019. Article 52 (2) of Chapter VIII of the Charter of the United Nations, requires that participating UN Member States 'make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council'. See also UN website, 'Charter of the United Nations, Chapter VIII: Regional Arrangements': https://www.un.org/en/sections/un-charter/chapter-viii/index.html. Last accessed on 22 November 2019. In the CSCE/OSCE context, it may also be noted that the UN Security Council has expressly referred to the CSCE in resolutions referring to Chapter VIII. Typically, resolutions such as Security Council resolution 713 (September 1991) state: '[r]ecalling the provisions of Chapter VIII of the Charter of the United Nations, commending the efforts undertaken […], with the suport of the States participating in the CSCE, to restore peace and dialogue in Yugoslavia'. See Search Engine For United Nations Security Council Resolutions: http://unscr.com/en/resolutions/doc/713. Last accessed on 22 November 2019.

[221] On the May 1993 Framework Agreement between the UN and the CSCE, see UN Doc. A/48/185, annexes I, II, 1 June 1993. See also A. Bloed., XII. Miscellaneous, Framework for Cooperation and Coordination between the United Nations Secretariat and the Conference on Security and Cooperation in Europe, in *The Conference on Security and Co-operation in Europe: Basic Documents*, *1993-1995*, (Martinus Nijhoff Publishers, the Hague/ London/Boston, 1997, Kluwer Law International), pp. 880-881. See also OSCE website, 'Partnerships, United Nations': https://www.osce.org/partnerships/111477. Last accessed on 22 November 2019.

[222] The then CSCE was granted the status of observer by UNGA Res. 48/5. Observer status for the Conference on Security and Cooperation in Europe in the General Assembly, at the plenary meeting on 13 October 1993 (UN Doc. A/RES/48/5 of 22 October 1993). See UN website: https://undocs.org/en/A/RES/48/5. Last accessed on 22 November 2019. See also OSCE website 'CSCE granted observer status in the UN General Assembly'. See OSCE website, 'CSCE granted observer status in the UN General Assembly': https://www.osce.org/ec/58544. Last accessed on 22 November 2019. As well as the OSCE having observer status in the UN General Assembly, the UN is invited to participate in OSCE Ministerial Council and Summit meetings. See OSCE website, 'Partnerships, United Nations': https://www.osce.org/partnerships/111477. Last accessed on 22 November 2019. And, more recently, in 2017, the UN Secretariat and the OSCE Secretariat concluded Letters of Understanding to deepen their collaboration in the areas of OSCE's access to the UN Systems Contracts, technical trainings arranged by the Department of Field Support and other areas, as may be expanded by mutual agreement. See OSCE Chairmanship: Austria, *Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2017,* (MC.GAL/7/17 of 8 December 2017), at para. 36. See OSCE website: https://www.osce.org/chairmanship/361771?download=true. Last accessed on 22 November 2019.

[223] CSCE Helsinki Document 1992 – *The Challenges of Change*, Helsinki, 10 July 1992, para. 25. See OSCE website: https://www.osce.org/mc/39530?download=true. Last accessed on 22 November 2019.

rehabilitation[224]. Moreover, it is characterized as a 'form for subregional co-operation.'[225] Despite restricting its participation to a limited group of States and its fragmented legal status, the OSCE is recognized as the world's largest regional security organization. It comprises 57 participating States[226] from Europe, North America and Asia, spanning a geographical area of more than a billion people from 'Vancouver to Vladivostok'[227].

2.3. Scope of OSCE-mandated activities

Since the Helsinki Final Act, the OSCE's approach to security issues in its region has been based on three concepts, all of which have been subsequently reaffirmed by participating States in the major CSCE/OSCE documents and decisions[228]. Taken together, these are viewed as 'complementary'[229], 'interconnected'[230], 'interdependent'[231] and equally essential to real, long-term security[232]. In terms of specialty, the first is a uniquely broad

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[224] Charter for European Security, Istanbul, November 1999, OSCE, Istanbul Summit 1999, Istanbul Document 1999, Istanbul 1999, (January 2000/Corr)., pp. 1-45: pp. 2-3, part II, para. 7. See OSCE website: https://www.osce.org/mc/39569?download=true. Last accessed on 3 January 2020. See also W. Zellner, 'Managing Change in Europe-Evaluation the OSCE and Its Future Role: Competencies, Capabilities, and Missions', *Centre for OSCE Research (CORE) Working Paper 13,* (Hamburg, 2005), at p. 7.

[225] Ibid., p. 4, part III, para. 13.

[226] 57 participating States: Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Holy See, Hungary, Iceland, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, The former Yugoslav Republic of Macedonia (FYROM), Malta, Moldova, Monaco, Mongolia, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, United Kingdom, United States of America (USA), Uzbekistan. This includes four out of the five permanent members of the UN Security Council, namely France, Russia, the United Kingdom, and the United States. In addition, the OSCE maintains special relations with eleven countries, known as Partners for Co-operation, in the Mediterranean region: Algeria, Egypt, Israel, Jordan, Morocco, Tunisia, and in Asia: Afghanistan, Australia, Japan, Republic of Korea, Thailand, as well as Australia, all of which are known as Partners for Co-operation and have observer status.

[227] There are several organizations that cover the Euro-Atlantic region in addition to the OSCE, such as the European Union (EU), North Atlantic Treaty Organization (NATO), and the Council of Europe (CoE).

[228] However, the context in which they have been applied has changed significantly over time. See ‚Introduction' *‚The OSCE Concept of Comprehensive and Co-operative Security: An Overview of Major Milestones",* OSCE Secretariat, Conflict Prevention Centre, Operations Service Vienna, OSCE Doc. SEC.GAL/100/09 of 17 June 2009, at p. 1-2. See OSCE website: https://www.osce.org/secretariat/37592?download=true. Last accessed on 22 November 2019.

[229] Ibid.

[230] Ibid.

[231] Ibid.

[232] Bloed stated that '[this] interlinkage was and remains not only important for tactical reasons, but it is also important in substantive terms. It has to be realized that the issues at stake in the Helsinki process often do have a close substantive relationship with each other. This may be illustrated by referring to questions of

and comprehensive'[233] approach to security, encompassing three dimensions (initially presented as three 'baskets' of the CSCE process[234]): (first) politico-military, (second) economic and environmental[235], and (third) human dimensions. Its mandated activities is broad and address a wide range of security-related issues, from traditional military aspects in the more narrow and traditional sense to 'soft' security issues in the somewhat broader sense such as domestic stability, human rights and democracy[236]. In the first dimension of security, a central element includes arms control, disarmament and developing confidence- and security-building[237] measures, countering terrorism, reform and co-operation in the security sector, border management, and policing activities. As indicated, the OSCE is also a key instrument for early warning, conflict prevention, crisis management, and post-conflict rehabilitation, also known as the 'conflict cycle'[238]. Security activities in the

security and protection of human rights. Both fields are closely interrelated as negative developments in one field will automatically have unfavourable effects on the other'. See A. Bloed., *supra,* note 4, (Martinus Nijhoff Publishers, 26 October 1993), at p. 27-28.

[233] Ibid.

[234] However, according to Bloed, ‚the Final Act of Helsinki consists of four baskets': Basket I. Questions relating to Security in Europe, which consists of two main parts. The first is the ‚Declaration on Principles Guiding Relations between Participating States'. It contains an elaboration of ten fundamental principles, focused on the European context. Those principles are the following: 1. Sovereign equality, respect for the rights inherent in sovereignty; 2. Refraining from the threat or use of force; 3. Inviolability of frontiers; 4. Territorial integrity of States; 5. Peaceful settlement of disputes; 6. Non-intervention in internal affairs; 7. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief; 8. Equal rights and self-determination of peoples; 9. Co-operation among States; 10. Fulfilment in good faith of obligations under international law. The second part is the ‚Document on confidence-building measures and certain aspects of security and disarmament'. Basket II. C-operation in the Field of Economics, of Science and Technology and of the Environment; Basket III. Co-operation in Humanitarian and other Fields. Basket IV: Follow-up to the Conference, which contains final agreements on the institutinal structure of the follow-up, which reflected a *‚weak structure'* [emphasis added]. See The CSCE Process from Helsinki to Vienna: An Introduction, in (A. Bloed, ed), *From Helsinki to Vienna: Basic Documents of the Helsinki Process,* Volume 2 (Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1990), at 5. The Final Act of Helsinki: A Short Survey', at p. 5 -8.

[235] It has been said that, while '[n]o one questions its relevance to the OSCE's core mandate', the second dimension is the 'least defined of the OSCE's three dimensions'. See T. Bjorvatn, *The OSCE'S Economic and Environmental Dimension: Enhancing relevance and impact,* NORDEM UiO: Norwegian Centre for Human Rights, University of Oslo, at p. 3.

[236] See B. Møller., 'European Security: The Roles of Regional Organizations', 1st Edition, (Ashgate Publishing (now Routledge), 2012), at p. 248.

[237] In the CSCE/OSCE, arms control has occupied a central position and includes a wide variety of measures (parties committed themselves to confidence-building measures (CBMs) confidence- and security- building measures (CSMBs) - first in the Helsinki Final Act, the Stockholm Document of 1986 and the Vienna documents of 1990 and 1999) and other instruments (arms control agreements such as the Treaty on Conventional Armed Forces in Europe (CFE) of 1990 and Treaty on Open Skies of 1992, were initially intended to further transparency, though neither are CSCE/OSCE documents in the formal sense.

[238] See OSCE website: https://www.osce.org/conflict-prevention-and-resolution. Last accessed on 12 September 2019.

second dimension include ‚*inter alia*, anti-money laundering, transport security, migration, developing more efficient border and customs policies, water management, controlling dangerous waste through to climate change, sustainable energy and involving the public in decisions affecting the environment. With other international partners, the OSCE is also a member of the Environment and Security Initiative[239]. And in the third dimension of security, the OSCE helps its participating States in several matters, including to strengthen democratic institutions, hold genuine and transparent democratic elections, promote gender equality, ensure respect for human rights and fundamental freedoms, media freedom, the rights of persons belonging to national minorities and the rule of law, and to promote tolerance and non-discrimination. The OSCE also addresses security challenges that pose a threat across borders, such as climate change, terrorism, radicalization and violent extremism, organized crime, cybercrime and trafficking in drugs, arms and human beings. In addition, the Organization promotes stronger ties and co-operation between states, creating partnerships between private and public sectors, and engaging civil society[240]. Secondly, another basic feature of OSCE activities, and closely related in this context, the OSCE has a cooperative approach to security in its region. This concept reflects the fact that all the States participating in OSCE activities are equal in status and decisions are taken by consensus on a politically, but not legally-binding basis[241]. Finally, underlying this latter theory of co-operative security is the assumption that security is indivisible. In the Helsinki Final Act, the participating States recognized the 'indivisibility of security in Europe'. While this meant that the security of each state of the OSCE region is inextricably linked with the security of every other state, some commentators have expressed doubts whether it is 'a common aspiration anymore'[242]. Nevertheless, the course of action available within the OSCE realm to respond to non-compliance by participating States is

[239] See OSCE website: https://www.osce.org/secretariat/eea. Last accessed on 12 September 2019.
[240] See OSCE website: https://www.osce.org/what-we-do. Last accessed on 12 September 2019.
[241] In accordance with paragraph II (A) 2. of the OSCE Rules of Procedure (RoP), (OSCE Doc. MC.DOC/1/06, 1 November 2006), '[d]ecisions of the OSCE decision-making bodies shall be adopted by *consensus*. *Consensus* shall be understood to mean the absence of any objection expressed by a participating State to the adoption of the decision in question [emphasis added].' See OSCE website: https://www.osce.org/mc/22775?download=true. Last accessed on 20 October 2019.
[242] C. Nünlist., ‚Reviving Dialogue and Trust in the OSCE in 2018', Center for Security Studies (CSS), Zürich, December 2017. See Center for Security Studies website: https://css.ethz.ch/en/services/digital-library/articles/article.html/5d1bd2ac-1928-4942-93e6-cd0cd044662f/pdf. Last accessed on 20 October 2019.

dispute resolution by political means, not legal proceedings.

2.4. Institutional structure of the OSCE

A major characteristic of the OSCE is that it operates as unitary institution by name, by function, but as noted, not by legal status. It would nonetheless appear to have similar institutional structures to treaty-based IOs[243]. In this context, the structures created to perform the operational functions mandated to it have grown more complex over time and the OSCE currently consists of several components: political decision-making bodies; permanent administrative organs; high ranking personalities; and *ad hoc* bodies.

2.4.1. Principal organs: OSCE political decision-making bodies

The Rules of Procedure of the OSCE, adopted by the Ministerial Council on 1 November 2006[244], representing a codification of relevant provisions of CSCE/OSCE documents and existing practices within the OSCE[245], identifies four principal organs of the Organization

[243] N. M. Blokker and R. A. Wessel, *supra,* note 1, (Cambridge, Cambridge University Press, May 2019), at p. 136. On 26 November 2000, during its 312th plenary meeting, the Permanent Council of the OSCE examined and endorsed a report containing a study and recommendations on the question of legal capacity of the OSCE and the granting of privileges and immunities to the Organization in the participating States. Relevant excerpts from the report read as follows at para. 36: '[t]he absence of a constituent treaty has not prevented participating States from endowing the OSCE over the years with the attributes usually regarded as those of an [IO] […]. The OSCE is no longer only a vehicle for meetings and the organization of co-operation between States; it acts as an organization with functions of its own entrusted to it by participating States'. OSCE Permanent Council Decision No. 383 Report on the OSCE Legal Capacity and on Privileges and Immunities to the Ministerial Council (OSCE Doc. PC.DEC/383 of 26 November 2000), Annex. See OSCE website: https://www.osce.org/pc/24379?download=true. Last accessed on 24 November 2019. For history of the OSCE, see OSCE website: https://www.osce.org/history. Last accessed on 24 November 2019. See also I. Ley., 'Legal Personality for the OSCE?, *Strengthening the Legal Framework of the OSCE Symposium*, (2016). See Völkerrechtsblog International Law & International Legal Thought website: https://voelkerrechtsblog.org/legal-personality-for-the-osce/. Last accessed on 24 November 2019. ('[…] the OSCE has a membership, organs, procedures, institutional structures, internal regulations, an internal justice system, an administrative head and has a will of its own.')

[244] See OSCE website, OSCE Rules of Procedure, (OSCE Doc. MC.DOC/1/06 of 1 November 2006). See OSCE website: https://www.osce.org/mc/22775?download=true. Last accessed on 3 October 2019.

[245] Under paragraph VII. 1 Final provisions, OSCE Rules of Procedure, it states that '[t]hese rules of procedure shall complement provisions of OSCE documents adopted earlier. In case of contradiction with OSCE documents adopted earlier, the rules of procedure contained in this document shall take precedence.'

in paragraph II (A) 1, 'as OSCE political decision-making bodies'[246]: Summits, the Ministerial Council (MC), the Permanent Council (PC), and the Forum for Security Co-operation (FSC). While the first three of these decision-making bodies have a hierarchical relationship to each other, leaving aside the FSC, all other bodies are regarded as 'informal bodies'[247]: informal subsidiary bodies (ISBs) and informal working groups (IWGs).

2.4.2. OSCE Summits

As the highest decision-making body in the OSCE, OSCE Summits is the Meeting of Heads

[246] Under the general provision at paragraph II (A) paragraph 1 of the OSCE Rules of Procedure, 'decision-making bodies' are 'official/formal bodies' established by the participating States of the OSCE, 'which are authorized to take decisions and adopt documents having a politically binding character for all the participating States or reflecting the agreed views of all the participating States'. See OSCE website, 'Documents by the OSCE decision-making bodies': https://www.osce.org/resources/documents/decision-making-bodies. Last accessed on 4 November 2019.

[247] In this context, the Rules of Procedure of the OSCE identifies two levels/types of informal bodies. First, paragraph II (A) 6 states that: '[e]ach decision-making body may set up [or dissolve] informal subsidiary working bodies, hereinafter referred to as informal subsidiary bodies (ISBs).' Such bodies have no 'decision-making capacity […] and shall be open to all participating States.'; under paragraph II (A) 7, '[e]ach ISB shall work in accordance with its terms of reference or mandate and shall be accountable and report to a decision-making body hereinafter referred to as the superior decision-making body of that ISB'. A number of ISBs operate in the OSCE. examples are: Security Committee, Economic and Environmental Committee and Human Dimension Committee, Preparatory Committee (PrepCom), Advisory Committee on Management and Finance (ACMF), and two Contact Groups with Partners for Co-operation. Following Ministerial Council Decision No. 17/06 on Improvement of the Consultative Process (OSCE Doc. MC.DEC/17/06, 5 December 2006), the ISBs of the Permanent Council are now structured for the purposes of having one committee for each of three dimensions of the OSCE: politico-military, economic and environmental, and human. See OSCE website, Ministerial Council Decision No. 17/06 (OSCE Doc. MC.DEC/17/06 of 5 December 2006). See OSCE website: https://www.osce.org/mc/23191?download=true. Last accessed on 24 November 2019. Secondly, paragraph II (A) 8 of the OSCE Rules of Procedure states that: '[t]he decision-making bodies, the Chairpersons of decision-making bodies, and the Chairpersons of ISBs in close consultation with their superior decision-making body, may set up or dissolve *ad hoc*/thematic open-ended informal working bodies, hereinafter referred to as informal working groups (IWGs), which shall not have a decision-making capacity […] and which shall be open to all the participating States.'; under paragraph II (A) 9, '[e]ach IWG […] work[s] in accordance with its terms of reference or mandate and shall be accountable and report to a decision-making body, the Chairperson of a decision-making body or the Chairperson of an ISB, hereinafter referred to as the superior authority of that IWG.' Some of the most prominent IWGs include: Informal 'Helsinki +40' Working Group, the Open-Ended Working Group on Scale of Contributions, the Open-Ended Informal Working Group on the Conflict Cycle, the Informal Working Group on Addendum to the 2004 OSCE Action Plan for the Promotion of Gender Equality and the (OSCE Doc. MC.DD/04/14/) on the Involvement of the Civil Society in the Work of the OSCE the Open-Ended Informal Working Group on Strengthening the Legal Framework of the OSCE, IWG on Confidence-building measures established by Permanent Council Decision No. 1039, the Open-Ended Working Group on Participation of International, Regional and Subregional Organizations at the Ministerial Council. Taken together, paragraph II (A) 10 provides that '[w]hen setting up an ISB or IWG, the establishing authority shall clearly define the terms of reference for that body and it may amend them whenever appropriate. When an ISB or an IWG is dissolved, the tasks of the dissolved body may be transferred to other ISBs or IWGs.'

of State or Government (known as a 'Summit Meeting') of its 57 participating States, which 'takes decisions, set priorities and provides orientation at the highest political level'[248]. As indicated, the first Summit of the CSCE took place in Helsinki from 30 July – 1 August 1975. The 'time and venue' of Summit Meetings are 'determined by the Ministerial Council or the PC'[249] and a Summit Meeting or the Ministerial Council 'may decide on the frequency of Summits.'[250] However, there are 'no general rules determining how often Summits take place'[251], since their biannual frequency was called into question in 1994. To date, there have been only three OSCE Summits: Lisbon in 1996, Istanbul in 1999, with the last one being in Nur-Sultan (formerly known as Astana until 2019) in 2010[252]. According to the Helsinki Summit Decision I(4), Summits are preceded by 'review conferences' (formerly 'follow-up meetings')[253], which are 'operational and of short duration'[254]. They 'review the entire range of activities within the CSCE, including a thorough implementation debate, and consider further steps to strengthen the CSCE

[248] *CSCE 1992 Summit Helsinki, CSCE Helsinki Document 1992 The Challenges of Change*, Helsinki Decisions (9 – 10 July 1992), I (3) Strengthening CSCE Instititions and Structures, Meetings of Head of State or Government, Helsinki, 10 July 1992. See Rules of Procedure of the OSCE (1 November 2006, OSCE Doc. MC.DOC/1/06), II. OSCE decision-making and informal bodies, B (2), Structure of the OSCE decision making bodies, at p. 3. See *OSCE Factsheet*, ‚What is an OSCE Summit?' (Publisher: OSCE, 21 September 2010). See OSCE website: https://www.osce.org/home/71368?download=true. Last accessed on 24 November 2019, at p. 1.

[249] Rules of Procedure of the OSCE, IV. 2 Specific rules (A) (1) Meetings of Heads of State or Government (OSCE Doc. MC.DOC/1/06 of 1 November 2006).

[250] Ibid.

[251] See OSCE website ‚Summits': https://www.osce.org/summits. Last accessed on 26 September 2019. See Rules of Procedure of the OSCE (1 November 2006, OSCE Doc. MC.DOC/1/06), IV. Rules of procedure for decision-making bodies, IV.2 Specific rules (A) 1. Meetings of Heads of State or Government, at p. 13. ('The time and venue of Meetings of Heads of State or Government shall be determined by the Ministerial Council or the PC. A Meeting of Heads of State or Government or the Ministerial Council may decide on the frequency of Summits.')

[252] According to the 1992 Helsinki Summit Decision, I (2) Strengthening CSCE Institutions and Structures ‚Meetings of Heads of State or Government [...] will take place, as a rule, every two years on the occasion of review conferences'. However, while the 1994 Budapest Summit decided that the 1996 Lisbon Summit would decide on the frequency of future Summit meetings, no decision was taken at this or in subsequent meetings of Heads of State or Government or the Ministerial Council. So far, there have been seven CSCE/OSCE Summits: Helsinki 1975, Paris 1990, Helsinki 1992, Budapest 1994, Lisbon 1996, Istanbul 1999 and Nur-Sultan (formerly Astana) 2010. See OSCE website ‚Summits': https://www.osce.org/summits. Last accessed on 26 September 2019.

[253] See also OSCE website, 'Review Conferences': https://www.osce.org/mc/43198. Last accessed on 26 September 2019.

[254] CSCE Helsinki Decision I. Strengthening CSCE Instutions and Structures, (4) Review conferences, Helsinki Decision, 10 July 1992, *CSCE Helsinki Document 1992 The Challenges of Change*, Helsinki. See OSCE website: https://www.osce.org/mc/39530?download=true. Last accessed on 30 October 2019.

process'[255]; as well as to 'prepare a decision-oriented document to be adopted at the meeting.'[256] Summit Meetings have a duration of not more than two days, and shall consist of several plenary sessions, including opening and closing plenary sessions[257]. The ceremony of signing a concluding document or declaration has only been used at the Summit Meetings in Helsinki (1975), Paris (1990), Istanbul (1999), and Astana (2010).

2.4.3. OSCE Ministerial Council

The 'central decision-making and governing body of the [OSCE]' between Summits[258] is the OSCE Ministerial Council (MC, *formerly the CSCE Council*[259]), established in 1990 by the *Charter of Paris for a New Europe*[260], which consists of 'ministers for foreign affairs of the participating states'.[261] The *CSCE Helsinki Document 1992: The Challenges of Change,* reaffirmed its role as the 'central decision-making and governing body of the [then] CSCE' (Helsinki Decisions, I (6) Strengthening CSCE Institutions and Structures, CSCE Council) and after being renamed MC in 1994, the CSCE Budapest Document fully confirmed its pivotal political role. The purpose of such meetings is to provide a central forum for regular political consultations[262] within the CSCE/OSCE, which may consider and take decisions on any issue relevant to the Organization[263]. The MC shall implement tasks defined and decisions taken by the Meetings of Heads of State or Government[264]. As

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[255] Ibid.

[256] Ibid. It may also be noted that under (5), preparation of review conferences, including the agenda and modalities, was to be carried out by the Committee of Senior Officials (CSO) [eventually replaced by the PC], which ‚may decide to organize a special preparatory meeting.'

[257] Rules of Procedure of the OSCE (OSCE Doc. MC.DOC/1/06 of 1 November 2006), IV. 2 Specific rules (A) (3) Meetings of Heads of State or Government.

[258] Rules of Procedure of the OSCE (OSCE Doc. MC.DOC/1/06 of 1 November 2006), II. OSCE decision-making and informal bodies, B(3), Structure of the OSCE decision making bodies.

[259] At the Budapest Summit Meeting (1994) OSCE organs were renamed. Thus, the previously named CSCE Council was named Ministerial Council.

[260] *Charter of Paris for a New Europe,* (New Structures and institutions of the CSCE Process) under the original name of 'Council of Ministers for Foreign Affairs'.

[261] Rules of Procedure of the OSCE, (B) 3. Structure of the OSCE decision-making bodies (OSCE Doc. MC.DOC/1/06 of 1 November 2006).

[262] *Supplementary document to give effect to certain provisions contained in the Charter of Paris for a New Europe*, chapter I. Institutional arrangements, paragaph A.1. The Council.

[263] Rules of Procedure of the OSCE, II. OSCE decision-making and informal bodies, (B) 3. Structure of the OSCE decision-making bodies (OSCE Doc. MC.DOC/1/06 of 1 November 2006).

[264] The OSCE participating States may decide to convene regular or *ad hoc* meetings of other ministers with decision-making capacity, but this has not been done in the past.

of November 2019, there have been twenty-five MC meetings[265], with the latest to convene in Bratislava, Slovakia, on 5-6 December 2019.[266] The Rules of Procedure of the OSCE provides that the time and venue of the MC meetings shall be determined by the MC or the PC, usually one year in advance[267]. The MC meets, as a rule, once a year, usually towards the end of a calendar year in the country holding the Chairmanship,[268] and is chaired by the CiO[269]. Meetings of the MC 'shall have a duration of not more than two days and shall consist of several plenary sessions, including opening and closing plenary sessions.[270] The Chairmanship draws up the draft agenda for MC meetings and provides this to the Chairperson of the MC by a separate PC decision[271]. The agenda is formally adopted at the

[265] No Ministerial Council Meetings took place in 1994, 1996, 1999, and 2010 – since these were the years that Summits were held. 25th OSCE Ministerial Council, Berlin: 6-7 December 2018; 24th OSCE Ministerial Council, Vienna: 7-8 December 2017; 23rd OSCE Ministerial Council, Hamburg: 8-9 December 2016; 22nd OSCE Ministerial Council, Belgrade: 3-4 December 2015; 21st OSCE Ministerial Council, Basel: 4-5 December 2014; 20th OSCE Ministerial Council, Kyiv: 5-6 December 2013; 19th Ministerial Council, Dublin: 6-7 December 2012; 18th Ministerial Council, Vilnius: 6-7 December 2011; 17th Ministerial Council, Athens: 1-2 December 2009; 16th Ministerial Council, Helsinki: 4-5 December 2008; 15th Ministerial Council, Madrid: 29-30 November 2007; 14th Ministerial Council, Brussels: 4-5 December 2006; 13th Ministerial Council, Ljubljana: 5-6 December 2005; 12th Ministerial Council, Sofia: 6-7 December 2004; 11th Ministerial Council, Maastricht: 1-2 December 2003; 10th Ministerial Council, Porto: 6-7 December 2002; 9th Ministerial Council, Bucharest: 3-4 December 2001; 8th Ministerial Council, Vienna: 27-28 November 2000; 7th Ministerial Council, Oslo: 2-3 December 1998; 6th Ministerial Council, Copenhagen: 18-19 December 1997; 5th Ministerial Council, Budapest: 7-8 December 1995; 4th Ministerial Council, Rome: 30 November - 1 December 1993; 3rd Ministerial Council, Stockholm: 14-15 December 1992; Additional Ministerial Council Meeting, Helsinki: 24 March 1992; 2nd Ministerial Council, Prague: 30-31 January 1992; Additional Ministerial Council Meeting, Moscow: 10 September 1991; 1st Ministerial Council, Berlin: 19-20 June 1991; Meeting of Foreign Ministers, New York: 1-2 October 1990; As indicated, the first meeting of Ministers of Foreign Affairs of the CSCE took place in Helsinki on 3-7 July 1973. See OSCE website, 'Ministerial Councils, History': https://www.osce.org/ministerial-councils. Last accessed on 25 November 2019.

[266] See OSCE website:, Events, 26th OSCE Ministerial Council': https://www.osce.org/event/mc_2019. Last accessed on 23 November 2019.

[267] Rules of Procedure of the OSCE IV.2 Specific rules (B) 1. Meetings of the Ministerial Council (OSCE Doc. MC.DOC/1/06 of 1 November 2006).

[268] Ibid, at (B) 1. ('[…] unless otherwise decided by the participating States.') Under (B) 3., '[t]he decision on the timetable and organizational modalities for each [MC] meeting shall be adopted by the PC not later than one month before the meeting.')

[269] Ibid, at (B) 4. ('The Chair at plenary sessions, other than opening and closing plenary sessions and those taking up agenda items which are subject to discussion and possible decision, may be delegated to the preceding and/or incoming Chairman-in-Office.') Under (B) 5. '[f]or ach meeting, the PC shall specify the list of international organizations, institutions and initiatives to be invited to attend and to make oral and/or written contributions.' Since 2008, it may be noted that the modalities of the MC meetings have invited the UN, the Council of Europe and NATO to attend the MC and make contributions.

[270] Ibid, at (B) 3. Under (B) 6., '[o]nly the opening and closing sessions shall be open to the press and the public, unless the meeting decides to make other sessions open. Unless otherwise decided, all sessions, except for those taking up agenda items which are subject to discussion and possible decision, shall be broadcast live in all the working languages to the media centre and NGO centre by closed-circuit television.'

[271] Rules of Procedure of the OSCE IV. Rules of procedure for decision-making bodies, IV.1 General Rules (C) 2. Conduct of meetings (OSCE Doc. MC.DOC/1/06 of 1 November 2006).

beginning of the meeting and appended to the journal of that meeting[272]. The final document (compendium of documents) of each MC meeting or Summit is compiled in a standard OSCE format as a separate volume, which contains the texts of all the documents adopted by the MC or Summit at the meeting; the texts of other documents annexed to its journal(s) and the texts of selected reports and letters submitted to that meeting. The final document shall be printed and issued in an electronic format in all working languages.[273]

2.4.4. OSCE Permanent Council

The OSCE Permanent Council (PC)[274], previously known as the Permanent Committee of the CSCE[275], was established through a decision of the Rome Meeting of the CSCE Council in 1993[276], and emerged from the need '[t]o ensure improved capabilities for day-to-day operational tasks of the CSCE', through the creation of 'a permanent body for political

[272] The agenda usually includes standard items, such as: formal opening, adoption of the agenda, addresses by representatives of the host country, the CiO, the President of the OSCE PA and the Secretary General; statements by the heads of delegation (items under which all participating States, Partners for Co-operation and selected international organizations are given the floor); adoption of of MC documents; any other business; and formal closure (statements by current and incoming CiO's). Additional items may also be placed on the agenda.

[273] Rules of Procedure of the OSCE IV. Rules of procedure for decision-making bodies, IV.1 General Rules (B) 10. Working languages and official records (OSCE Doc. MC.DOC/1/06 of 1 November 2006). Under (B) 1., it states that '[t]he working languages of the OSCE shall be: English, French, German, Italian, Russian and Spanish.' For more information on specific rules of procedure or modalities of Summit meetings, see Rules of Procedure of the OSCE and Index of Decisions (Nos. 1 – 1343) and Other Documents* Adopted by the Permanent Council [related to Summits issued by OSCE Conference Services] (OCE Doc. SEC.GAL/3/19/Rev.1 of 14 August 2019). See OSCE website: https://www.osce.org/permanent-council/70160?download=true. Last accessed on 27 November 2019.

[274] Permanent Committee of the CSCE was renamed 'Permanent Council' at the Budapest Meeting (December 1994) to consolidate its central role. See CSCE Budapest Document 1994, *Towards a Genuine Partnership in a New Era,* Budapest Decisions, I. Strengthening the CSCE (Corrected version 21 December 1994), para. 18.

[275] The Stockholm Ministerial in 1992 established a group of representatives of the participating States to meet in Vienna as needed to implement decisions taken at more senior levels. (*Third Meeting of the Council Summary of Conclusions Decision on Peaceful Settlement of Disputes*, Stockholm, 1992, (3STOCK92.e), 7. Evolution of CSCE structures and institutions. ('The Ministers also […] instructed representatives of the participating States to meet regularly in Vienna […].')

[276] The group representatives of the participating States established in 1992 became a permanent fixture in 1993, when Foreign Ministers met in Rome and created a permanent body for political consultation and decision-making '[i]n order to enhance the capacity of the CSCE to respond to challenges in the CSCE area'. *Fourth Meeting of the Council, CSCE and the New Europe – Our Security is Indivisible Decision of the Rome Council Meeting*, Rome, 1993, Decisions of the Rome Council Meeting, VII. CSCE Structures and Operations, para. 7.1.

consultations and decision-making in [one place,] Vienna'[277]. According to the Rules of Procedure of the OSCE, '[t]he [(PC)] is the principal decision-making body for regular political consultations and for governing the day-to-day operational work of the Organization between meetings of the Ministerial Council. It shall implement, within its area of competence, tasks defined and decisions taken by the Meetings of Heads of State or Government and the Ministerial Council.'[278] Today, all 57 participating States[279] are represented in the PC through the heads of the OSCE delegations and/or representations in Vienna[280]. In addition, the 11 OSCE Partners for Co-operation[281], representatives of the OSCE Parliamentary Assembly[282] and of OSCE executive structures may attend meetings of the decision-making bodies and make oral contributions at the invitation of the Chairperson of a meeting under an item under the agenda[283]. PC meetings are ,convened and chaired by the respective Chairperson or his/her representative.'[284] The Permanent Council meets, 'as a rule, once a week [on Thursdays] in Vienna'[285]. It may also convene

[277] See Fourth Meeting of the Council, *CSCE and the New Europe – Our Security is Indivisible*, Rome, 1993, Decisions of the Rome Council Meeting, VII. CSCE Structures and Operations, para 3.
[278] See Rules of Procedure of the OSCE, II. OSCE decision-making and informal bodies, B (4-6), Structure of the OSCE decision making bodies (OSCE Doc. MC.DOC/1/06 of 1 November 2006). See also Istanbul Summit, Istanbul Document 1999, IV. Our Common Instruments. Enhancing Our Dialogue, para. 35. ('The Permanent Council, being the regular body for political consultations and decision-making, will address the full range of conceptual issues as well as the day-to-day operational work of the Organization.'). See also OSCE website, 'Permanent Council': https://www.osce.org/permanent-council. Last accessed on 2 October 2019. See also J. Stefan-Bastl., 'The Importance of the OSCE Permanent Council', Institute for Peace Research and Security Policy at the University of Hamburg / IFSH (ed.) in *OSCE Yearbook 2002,* (Nomos Verlagsgesellschaft, Baden-Baden, 2003), 337-346.
[279] OSCE Partners for Co-operation, representatives of the OSCE Parliamentary Assembly and of the OSCE executive structures may also attend PC meetings.
[280] See OSCE website, 'Permanent Council': https://www.osce.org/permanent-council. Last accessed on 2 October 2019. ('A delegation to the Permanent Council consists of representatives of that participating State, under the leadership of an Ambassador appointed as Permanent Representative to the OSCE.').
[281] See Rules of Procedure of the OSCE, IV. Rules of procedure for decision-making bodies, IV.1 General rules, (D) 2. Other participants (OSCE Doc. MC.DOC/1/06 of 1 November 2006).
[282] Ibid, at (D) 1.
[283] Ibid. However, '[t]hey shall not participate in the drafting of documents, but may comment on drafts that directly concern them, at the invitation of the Chairperson.' Under (D) 5., 'Representatives of other international organizations, institutions and initiatives, as well as non-governmental organizations (NGOs), academia and business may be invited by the participating States, on a case-by-case basis, to attend certain meetings of decision-making bodies and make oral and/or written contributions.' See also Rules of Procedure of the OSCE, IV.2 Specific rules, (C) 4. Meetings of the PC and FSC (OSCE Doc. MC.DOC/1/06 of 1 November 2006) ('The Chairperson may invite high-level officials from the participating States and other international organizations, institutions and initiatives to address a meeting as a guest speaker.')
[284] Ibid. IV.2 Specific rules, (C) Meetings of the PC […] (1). There is no need for consensus to convene a PC meeting in Vienna or in the margins of MC meetings and Summits, including special or reinforced ones.
[285] See Rules of Procedure of the OSCE, IV.2 Specific rules, (C) 1. Meetings of the PC and FSC (OSCE Doc. MC.DOC/1/06 of 1 November 2006) ('They may also be held at the venue of the Ministerial Council

so-called 'reinforced PC meetings'[286] or 'special PC meetings'[287], and joint meetings of the PC and Forum for Security-Cooperation[288] 'may be convened by the Chairpersons of both bodies'[289] where necessary. PC meetings are conducted in accordance with an agenda. The PC keeps standing items on the agenda of its meetings such as 'review of current issues' and 'any other business', under which any issue may be raised by any participating State[290]. Titles of documents to be adopted at a meeting of the PC are included in the draft agenda as separate items or sub-items[291]. Draft PC agendas of the meetings of the PC are prepared and issued in advance (through Conference Services, as part of the Office of the OSCE Secretary General) by the Chairmanship, taking into account views expressed by participating States[292]. The Chairmanship shall announce the agenda at the beginning of the meeting.[293] Notably, nothing in the Rules of Procedure of the OSCE requires that the meetings of the PC be public and documents are only circulated among the delegations; however, ,[t]he participating States may decide to make certain meetings or sessions during meetings of decision-making bodies open to NGOs, the press and the public.'[294]

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meetings and Meetings of Heads of State or Government, or elsewhere, if so decided by the participating States.'). The Chairmanship may convene meetings on other days, provided a room and interpretation services are available. Under Under (C)2., before the beginning of the calendar year, the Chairmanship determines the exact dates for the winter, spring and summer recesses during which meetings shall not, as a rule, be held. Therefore, PC meetings held during these periods are called 'special'.

[286] Ibid, II. OSCE decision-making and informal bodies, B (5), Structure of the OSCE decision making bodies. ('[…] at the level of political directors or other senior officials from capitals in order to consider issues requiring such a level of representation and to adopt decisions.').

[287] Ibid. B (6). (, [...] in order to discuss matters of non-compliance with OSCE commitments and to decide on appropriate courses of action. Special PC meetings may also be convened for other purposes in the periods when regular PC meetings are not normally held or for the consideration of a particular issue/topic. Decisions adopted at reinforced or special meetings shall have the same force as other decisions of the PC.)

[288] See *2.5. Forum for Security-Cooperation* below.

[289] See Rules of Procedure of the OSCE, IV.2 Specific rules, (D) 1. Joint meetings of the PC and FSC (OSCE Doc. MC.DOC/1/06 of 1 November 2006).

[290] See Rules of Procedure of the OSCE, IV. Rules of procedure for decision-making bodies, IV.1 General rules, (C) 1. Conduct of meetings (OSCE Doc. MC.DOC/1/06 of 1 November 2006).

[291] Ibid.

[292] Ibid, at (C) 3.

[293] Ibid. ('[…] If a reservation is expressed by a participating State regarding a non-standing item of the draft agenda, the Chairperson shall decide on the agenda of that meeting as appropriate.') In addition to the above-mentioned items and meeting-specific items, draft agendas of regular PC meetings contain items such as the 'report on the activities of the CiO' and 'report of the Secretary General.

[294] Ibid. IV.2 Specific rules, (C)5 Meetings of the PC and FSC ('Unless otherwise decided by the participating States, the meetings shall be closed to the press and the public. The Chairperson may allow the presence of the press during presentations of guest speakers. He/she may allow the presence of a limited number of visitors upon request of a participating State or the Secretariat.'). See also IV. Rules of procedure for decision-making bodies, IV.1 General rules, (D) 6 Other participants.

2.4.5. Forum for Security-Cooperation and joint FSC-PC meetings

The Forum for Security-Cooperation (FSC), established by Decision V of the CSCE Helsinki Document 1992[295], is the main OSCE body for the politico-military dimension of security, with 'autonomous decision-making' capacity[296] and a 'mandate set in relevant decisions of [Summits] and the [MC]'[297]. The FSC reviews the implementation of OSCE commitments and negotiates measures in the fields of arms control and confidence- and security-building[298]. Within its area of competence, the FSC implements 'tasks defined and decisions taken by [Summits] and the [MC][299]. Most rules of procedure and working methods of the FSC are similar to the PC. Plenary meetings of the FSC take place, as a rule, once a week (usually on a Wednesday) in Vienna[300]. Like the PC, FSC meetings are

[295] *CSCE Helsinki Document 1992 The Challenges of Change,* 9 - 10 July 1992, Helsinki Decisions, V CSCE Forum for Security Co-operation (9) To carry out these tasks the participating States have decided to establish a new CSCE Forum for Security Co-operation […]'.

[296] See Rules of Procedure of the OSCE of 1 November 2006, MC.DOC//1/06, II. OSCE decision-making and informal bodies, (B)7. Structure of the OSCE decision making bodies. See OSCE website: https://www.osce.org/mc/22775?download=true. Last accessed on 30 October 2019.

[297] See Rules of Procedure of the OSCE, 1 November 2006, MC.DOC//1/06, II. OSCE decision-making and informal bodies, (B)7. Structure of the OSCE decision making bodies. According to Nünlist, 'the FSC began its work in Vienna on 22 September 1992.' C. Nünlist., 'The OSCE's Military Pillar: The Swiss FSC Chairmanship', in (F. Merz (ed.), *Center for Security Studies (CSS) Analyses in Security Policy*, ETH Zürich, No. 237, (December 2018) at p. 2. See CSS website: https://ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/CSSAnalyse237-EN.pdf. Last accessed on 30 October 2019. See also OSCE website, 'Forum for Security Co-operation, Mandate': https://www.osce.org/fsc/107448. Last accessed on 30 October 2019. ('The Forum for Security Co-operation is mandated to deal with a wide range of politico-military issues ranging from traditional security between and within states, to addressing transnational threats such as the trafficking of weapons, including weapons of mass destruction. Its main tasks include regular consultations and intensive co-operation on military security matters; negotiations on confidence and security building measures; further reduction of the risks of conflict, and implementing agreed measures.'

[298] Two important agreements negotiated by the FSC may be highlighted. First, the OSCE Document on Small Arms and Light Weapons (SALW), adopted on 24 November 2000, re-issued on 20 June 2012 (OSCE Doc. FSC.DOC/1/00/Rev.1). See OSCE website: https://www.osce.org/fsc/20783?download=true. Last accessed on 28 November 2019. Secondly, the OSCE Document on Stockpiles of Conventional Ammunition, adopted on 19 November 2003 (OSCE Doc. FSC.DOC/1/03/Rev.1). See OSCE website: https://www.osce.org/fsc/15792?download=true. Last accessed on 28 November 2019.

[299] See Rules of Procedure of the OSCE, II. OSCE decision-making and informal bodies, (B) 7. Structure of the OSCE decision-making bodies (OSCE Doc. MC.DOC/1/06 of 1 November 2006). The FSC contributes, within its area of competence to decisions/documents adopted by the MC or PC, for example, draft MC political declarations, PC decisions on SALW. The FSC also repares its own draft MC decisions/documents, which, after finalization in the FSC, are forwarded directly to the MC for adoption.

[300] Ibid, (C) 1. Meetings of the PC and FSC, IV.2 Specific rules, IV. Rules of Procedure for Decision-Making Bodies. Like the PC, (C)1. further provides that '[t]he meetings of [the FSC] may also be held at the venue of the [MC] meetings [Summits], or elsewhere, if so decided by the participating States.' Meetings of the FSC Working Groups A and B – informal subsidiary bodies of the FSC – are likewise held on Wednesdays.

usually convened and chaired by the respective Chairperson or his/her representative in which the 57 participating States, represented by diplomats and/or military advisers, raise and discuss security concerns and challenges, which regularly lead to initiatives and measures to strengthen politico-military security[301]. The FSC has its own Chairmanship, which rotates among the OSCE participating States, with each State holding the FSC Chairmanship for four months.[302] It is responsible on behalf of the FSC for co-ordination of and consultation on current FSC business[303]; and in performing its duties, the FSC Chairmanship acts in accordance with OSCE decisions, and is assisted by the preceding and succeeding FSC Chairmanships, operating together as an FSC Troika[304]. While retaining its autonomy and decision-making capacity, the FSC is closely connected with the overall OSCE work on current security issues[305] and, to this end, makes available its expert advice on issues of a politico-military nature[306]. In order to facilitate interaction between the the PC and FSC, the OSCE Chairmanship is represented at the FSC Troika meetings[307]. The FSC Chairmanship is also represented at the OSCE Troika meetings on matters of FSC concern[308]. Furthermore, joint FSC–PC Troika meetings are regularly

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Another informal subsidiary body of the FSC – the OSCE Communications Group – normally meets three times a year.

[301] See also *OSCE Factsheet,* 'What is the Forum for Security Co-operation?', (Publisher: OSCE, 13 May 2011), at p. 1. See OSCE website: https://www.osce.org/fsc/77535?download=true. Last accessed on 30 October 2019. It may also be noted that meetings of FSC Working Groups A and B – informal subsidiary bodies of the FSC – are also held. Another informal body of the FSC – the FSC Communications Group – normally meets three times a year.

[302] See Rules of Procedure of the OSCE, III. Chairmanship and Troika, 4. (OSCE Doc. MC.DOC/1/06 of 1 November 2006). ('The FSC Chairmanship shall be held for the period from the end of each recess (winter, spring, summer) to the end of the following recess by the participating States, succeeding each other in the French alphabetical order.') See also *OSCE Factsheet,* 'What is the Forum for Security Co-operation?', (Publisher: OSCE, 13 May 2011), at p. 1. See OSCE website: https://www.osce.org/fsc/77535?download=true. Last accessed on 30 October 2019.

[303] See Rules of Procedure of the OSCE, III. 4. Chairmanship and Troika (1 November 2006, MC.DOC/1/06).

[304] Ibid, III. 5. Chairmanship and Troika. It may also be noted that the FSC Chairmanship is supported by the the relevant executive structures of the OSCE (Secretariat, in particular FSC Support Section of the CPC) and FSC Co-ordinators appointed/confirmed by each Chairmanship.

[305] This is particularly relevant to those cross-dimensional issues/activities with politico-military aspects which concern both bodies.

[306] See Bucharest Ministerial Council Decision No. 3 of 2001, IV. 8.(b) Decisions of the Bucharest Ministerial Council Meeting, Ninth Meeting of the Ministerial Council, (OSCE Doc. MC.DOC/2/01, 4 December 2001), Bucharest, on fostering the role of the OSCE as a forum for political dialogue (MC(9).DEC/3), which, *inter alia,* enjoined the FSC to ,be more closely connected with the overall OSCE work on current security issues.' See OSCE website: https://www.osce.org/mc/40515?download=true. Last accessed on 30 October 2019.

[307] Ibid, IV. 9. Decisions of the Bucharest Ministerial Council Meeting.

[308] Ibid.

convened by both Chairmanships[309]. Joint PC and FSC meetings may be convened by the Chairpersons of both bodies meetings when necessary[310] and shall be co-chaired by both of them or their representatives[311] to consider issues[312] related to the competence of both bodies and adopt PC and/or FSC decisions[313]. The rules of procedure of PC and FSC meetings apply, *mutatis mutandis*, to joint FSC-PC meetings.[314]

2.5. Body occupying a unique place in the structure of the OSCE

2.5.1. OSCE Parliamentary Assembly

When work began to transform the CSCE into an Organization, the *Charter of Paris* of November 1990 '[r]ecogniz[ed] the important role parliamentarians can play in the CSCE process', and explicitly 'call[ed] for greater parliamentary involvement in the CSCE, in particular through the creation of a CSCE parliamentary assembly (PA), involving members of parliaments from all participating States'[315]. While no agreement was possible on its establishment at the Paris Summit[316], the issue was settled when the delegations from the parliaments of 34 CSCE States met in Madrid on 2 and 3 April 1991, which resulted in decisions laid down in the Final Resolution Concerning the Establishment of the CSCE PA[317], setting out its basic rules of procedure, working methods, size, mandate, and

[309] Usually one meeting per semester.
[310] This is normally two to three times a year. More frequent meetings may be be necessary in line with the mechanism for consultation and co-operation as regards unusual military activities outlined in Chapter III. Risk Reduction, at 16.3.1. ('The Permanent Council (PC) and the Forum for Security Co-operation (FSC) jointly will serve as the forum for such a meeting.'). See OSCE website: https://www.osce.org/fsc/86597?download=true. Last accessed on 28 November 2019.
[311] See Rules of Procedure of the OSCE, IV. Rules of Procedure for Decision-Making Bodies, IV.2 Specific rules, (D) 1. Joint meetings of the PC and FSC (OSCE Doc. MC.DOC/1/06 of 1 November 2006).
[312] PC-FSC co-operation (between the OSCE Chairmanship and the FSC Chair) is particularly relevant to those cross dimensional issues/activities with politico-military aspects which concern both bodies.
[313] See Rules of Procedure of the OSCE, IV. Rules of Procedure for Decision-Making Bodies, IV.2 Specific rules, (D) 3. Joint meetings of the PC and FSC (OSCE Doc. MC.DOC/1/06 of 1 November 2006).
[314] Ibid, (D) 2.
[315] *Charter of Paris for a New Europe,* Paris, 1990, New structures and institutions of the CSCE Process.
[316] According to Bloed, this was ‚due to disagreement about the possible role of the Parliamentary Assembly of the Council of Europe in relation to the new CSCE Assembly'. See A. Bloed., *supra,* note 4, (Martinus Nijhoff Publishers, 26 October 1993), at p. 116.
[317] See CSCE, Madrid Document, Final Resolution Concerning the Establishment of the CSCE Parliamentary Assembly Agreed at Madrid, 2nd and 3rd 3 April 1991. (‚Agree to establish within the framework of the

distribution of votes. Although formal links with the CSCE process may be said to have existed at the time of its establishment[318], the Rules of Procedure of the OSCE describe the PA as an 'autonomous OSCE body' that 'maintains close relationships with other OSCE institutions, [and] determines its own rules of procedure and working methods'[319]. The PA, which is now composed of 323 parliamentarians from across the 57-nation OSCE region[320], meets three times a year, having an annual session, 'for a period of not more than five days'[321], 'normally be held during the first week of July in the capital or in another city of a State participating in the CSCE[/OSCE]'[322]; and besides, the Assembly organizes two further meetings, one in Winter[323], one in Autumn[324]. As the largest event in the Assembly's calendar, the CiO usually addresses the Assembly's annual session. The first formal session of the Parliamentary Assembly was held in Budapest on 3-5 July 1992[325]. With respect to its composition and decision-making process, in contrast to existing CSCE/OSCE practices, it is of note that the parliaments of the CSCE states are represented

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Conference on Security and Cooperation in Europe a Parliamentary Assembly'. See OSCE website: https://www.osce.org/pa/40791?download=true. Last accessed on 18 September 2019.

[318] See A. Bloed., *supra,* note 4, (Martinus Nijhoff Publishers, 26 October 1993), at p. 17, footnote 29. ('This is reflected, *inter alia*, in statements about meetings of the CSCE Assembly by the CSCE Council and in the concluding document of the Helsinki Summit in 1992.')

[319] See *Rules of Procedure of the OSCE* (MC.DOC/1/06 of 1 November 2006), (C) Other structures and institutions, para. 3. See OSCE website: https://www.osce.org/mc/22775?download=true. Last accessed on 27 November 2019.

[320] See OSCE website, CSCE Parliamentary Assembly set up: https://www.osce.org/who/timeline/1990s/03. Accessed on 10 March 2019. See also OSCE website: ‚The OSCE Parliamentary Assembly': https://www.osce.org/pa/260596?download=true. Last accessed on 27 November 2019.

[321] See also See Rule 11 (1) *Annual Sessions,* OSCE Rules of Procedure of the Assembly (23 March 2019). (‚The Assembly shall meet once a year in an Annual Session for no more than five days during the first ten days of July.')
See OSCE PA website: https://www.oscepa.org/documents/rules-of-procedure/1832-rules-of-procedure-english/file. Last accessed on 18 September 2019.

[322] See Madrid Document, Final Resolution Concerning the Establishment of the CSCE Parliamentary Assembly Agreed at Madrid, 2nd and 3rd 3 April 1991, at para. 2. See OSCE website: https://www.osce.org/pa/40791?download=true. Last accessed on 27 November 2019.

[323] See Rule 11 (1) *Winter Meetings,* OSCE Rules of Procedure of the Assembly (23 March 2019) ('The Assembly shall meet once a year in a Winter Meeting for no more than three days during the first two months of the year.').

[324] See also See Rule 13 (1) *Autumn Meetings,* OSCE Rules of Procedure of the Assembly (23 March 2019). (‚The Assembly shall hold its Autumn Meeting once a year for no more than three days.'). It may also be noted that Pursuant to Rule 14, the Assembly holds a 'Mediterranean Forum once a year, preferably in conjunction with one of the other statutory meetings of the Assembly'; and pursuant to Rule 15, '[t]he Assembly may be convened in Extraordinary Session by the President at the request of two-thirds of the Members of the Standing Committee.'

[325] Most recently, the OSCE Parliamentary Assembly met for its 28th Annual Session in Luxembourg on 4-8 July 2019. See OSCE website: https://www.osce.org/parliamentary-assembly/422675. Last accessed on 24 September 2019.

according to the size of their states[326] and decisions of the Assembly may be taken by majority vote of its full membership[327]. Each year the Assembly elects a President by majority vote[328] to act as its highest political representative and to chair its primary meetings[329]. The President regularly participates in the work of the OSCE at the Ministerial level, including Troika meetings and MC. The OSCE Summit in Istanbul in 1999 described the PA as 'one of the most important OSCE institutions continuously providing new ideas and proposals'[330]. At its inaugural session in Budapest from 3 to 5 July 1992, the Assembly decided, *inter alia,* to create a permanent International Secretariat[331], with its own Secretary General, [332] which is located in Copenhagen, Denmark[333]; and, on 13 January 2003, the PA opened a liaison office in Vienna, Austria, headed by a Special Representative[334]. Like all other 19 staff members in Copenhagen and Vienna[335], the Secretary General of the

[326] Ibid, at p. 116. See also Rule 1 (2) *Composition of the Assembly,* OSCE Rules of Procedure of the Assembly.
[327] Ibid, para. 5.
[328] See Rule 5 (1) *Election of Officers,* OSCE Rules of Procedure of the Assembly. George Tsereteli (Georgia) has served as President of the OSCE Parliamentary Assembly since November 2017. Former Presidents include: Christine Muttonen (Austria) (2016-2017); Ikka Kanerva (Finland) (2014-2016); Ranko Krivokapic (Montenegro) (2013-2014); Wolfgang Grossruck (Austria) (2013); Riccardo Migliori (Italy) (2012-13); Petros Efthymiou (2010-2012); Joao Soares (Portugal) (2008-2010); Goran Lennmarker (Sweden) (2006-2008); Alcee L. Hastings (USA) (2004-2006); Bruce George (United Kingdom) (2002-2004); Adrian Severin (Romania) (2000-2002); Helle Degn (Denmark) (1998-2000); Javier Ruperez (Spain) (1996-1998); Frank Swaelen (Belgium) (1994-1996); Ilkka Suominen (Finland) (1992-1994).
[329] Ibid, Rule 7 (1) *President*.
[330] See Istanbul Summit, Istanbul Document 1999, (January 2000/Corr.), *Charter for European Security*, III. Our Common Response, Our Institutions, para. 17.
[331] See Madrid Document, Final Resolution Concerning the Eastablishment of the CSCE Parliamentary Assembly Agreed at Madrid, 2nd and 3rd 3 April 1991, at para. 7 (‚The Assembly will have a small permanent secretariat.'). A headquarters agreement was signed between the Parliamentary Assembly and the Danish Government, providing the Parliamentary Assembly and its staff full international diplomatic status, privileges and immunities in Denmark. (see para. 3, sections 1 and 2 of the Federal Law on the Legal Status of OSCE Institutions in Austria, Österreiches Bundesgesetzblatt (BGBl.) No. 511/1993). The Liaison Office connects the OSCE's parliamentary dimension to the Organization's executive structures.
[332] See Rule 40 (1) *Secretariat* OSCE PA Rules of Procedure. (‚The Secretary General shall be elected, on the proposal of the Bureau, by the Standing Committee by a two-thirds majority of the votes cast by secret ballot. The election shall be for five years and may be renewable twice by a majority of the votes cast by secret ballot in the Standing Committee.'). As the PA's governing body, the Standing Committee of Heads of Delegations decided in 1995 to provide for a five-year term for the Secretary General. At that time R. Spencer Oliver (USA) was unanimously re-elected and was subsequently re-elected three times for five-year terms. He stepped down from his post at the end of 2015. In the 2019 Annual Session, OSCE PA Standing Committee voted by majority for the reappointment of incumbent Secretary General Roberto Montella for a second five-year term in office.
[333] See Rule 40 (5) *Secretariat,* OSCE Rules of Procedure of the Assembly.
[334] See OSCE website, ‚OSCE Parliamentary Assembly opens liaison office in Vienna': https://www.osce.org/pa/65583. Last accessed on 25 September 2019.
[335] See OSCE Parliamentary Assembly website, 'About the International Secretariat': https://www.oscepa.org/about-osce-pa/international-secretariat/about-the-international-secretariat/about-

International Secretariat is an international civil servant, who is 'elected, on the proposal of the Bureau[336], by the Standing Committee[337] by a two-thirds majority of the votes'[338]; and serves a five-year term of office which may be renewed twice by a majority decision of the Standing Committee. Over and above its chief responsibility to promote greater involvement in the OSCE by national parliaments in participating States, Rule 2 of the Rules of Procedure of the Assembly also lists other responsibilities: to assess the implementation of the objectives of the OSCE[339]; to discuss subjects addressed during meetings of the Ministerial Council and summits of Heads of State or Government[340]; develop and promote mechanisms for the prevention and resolution of conflicts[341]; support the strengthening and consolidation of democratic institutions in the OSCE participating States[342]; contribute to the development of the institutional structures of the OSCE and of relations and co-operation between the existing OSCE institutions[343]. PA activities in pursuance of these objectives are channelled into the three OSCE dimensions through three General Committees[344]: (a) the General Committee on Political Affairs and Security; (b) the General Committee on Economic Affairs, Science, Technology and Environment; and

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the-international-secretariat. Last accessed on 25 September 2019. ('The Secretariat organizes the meetings of the Assembly, including the Annual Session, meetings of the Standing Committee and the Bureau. The Secretariat also does preparatory work for election monitoring projects, special missions and Presidential visits. Its work is carried out in co-operation with other OSCE Institutions and other International Parliamentary Organizations.').

[336] See Rule 6 (1) *Bureau,* OSCE Rules of Procedure of the Assembly. ('The Bureau shall consist of the President, the Vice-Presidents and the Treasurer, the Officers of the three General Committees and the President Emeritus. The President Emeritus shall, ex officio, be a non-voting Member of the Bureau.')

[337] See Rule 35 (1) *Standing Committee,* OSCE Rules of Procedure of the Assembly. ('There shall be a Standing Committee consisting of the President of the Assembly, the Vice-Presidents, the Treasurer, the Officers of the General Committees and the Heads of National Delegations. Members of the Bureau may not vote unless they are acting in the capacity of the Head of a Delegation.')

[338] See Rule 40 (1) *Secretariat,* OSCE Rules of Procedure of the Assembly.

[339] See Rule 2 (a) *Responsibilities and objectives of the Assembly*, OSCE Rules of Procedure of the Assembly. See also *OSCE Commemorative book: 40th anniversary of the Helsinki Final Act* (Publisher: OSCE, 1 December 2015), at p. 28. See OSCE website: https://www.osce.org/h40commemorativebook?download=true. Last accessed on 27 November 2019.

[340] Ibid, Rule 2 (b), OSCE Rules of Procedure of the Assembly.

[341] Ibid, Rule 2 (c), OSCE Rules of Procedure of the Assembly.

[342] Ibid, Rule 2 (d), OSCE Rules of Procedure of the Assembly.

[343] Ibid, Rule 2 (e), OSCE Rules of Procedure of the Assembly.

[344] Ibid, Rule 36 (1), *General Committees,* OSCE Rules of Procedure of the Assembly.
See also OSCE PA website, 'General Committees': https://www.oscepa.org/activities/general-committees/. Last accessed on 27 November 2019. ('The First General Committee focuses on the politico-military aspects of security, principles guiding relations among participating States, as well as military confidence-building measures. The Second General Committee examines economic and environmental security threats, as well as exploring opportunities for co-operation within these and related fields. The Third General Committee addresses humanitarian and human rights-related threats to security.')

(c) the General Committee on Democracy, Human Rights and Humanitarian Questions. The committees work on the preparation of a draft declaration and a number of resolutions and recommendations that are adopted each year at the Annual Session, which guides the Organization's priorities and future activities. The PA provides political leadership to OSCE election observation, engages in parliamentary diplomacy and has been actively involved in the Helsinki +40 process, organizing a series of seminars examining the past, present and future of the Organization in partnership with prominent think tanks[345].

2.6. OSCE structures and institutions

As has been seen, in the process of its institutionalization following the Paris Summit in 1990, the CSCE/OSCE has developed several permanent administrative organs to help the Organization implement its mandate, which in OSCE jargon are typically referred to as 'structures and institutions'[346]. In this context, six warrant specific mention.

2.6.1. OSCE Chairmanship, Personal Representatives of the CiO, The Troika

First, a key element in the structure of the OSCE is the institution of the Chairmanship and the role of the Chairman-in-Office (Chairperson-in-Office or CiO)[347], which together with the Secretary General, form part of a dual leadership system in the Organization[348]. Until the late 1980s, when the CSCE only consisted of *ad hoc* follow-up meetings, specialized

[345] See *OSCE Commemorative book: 40th anniversary of the Helsinki Final Act* (Publisher: OSCE, 1 December 2015), at p. 29. See OSCE website: https://www.osce.org/h40commemorativebook?download=true. Last accessed on 27 November 2019.
[346] See OSCE website ‚Institutions and Structures': https://www.osce.org/institutions-and-structures. Last accessed on 27 November 2019.
[347] See Rules of Procedure of the OSCE of 1 November 2006, OSCE Doc. MC.DOC/1/06, III. OSCE Chairmanship and Troika, 1- 3.
[348] As observed by Vandewoude, ‚when compared to other international organizations the ‚institution' of the CiO may be labelled ‚sui generis.' The majority of international organizations are chaired solely by a ‚Secretary General' who in his/her turn is supported by a Secretariat'. See C. Vandewoude., ‚The OSCE Chairmanship-in-Office's election procedure: is there a need for formalized criteria?', *Journal of Security and Human Rights,* 2011, Vol. 22: Issue No. 1, at p. 52. See Security and Human Rights Monitor website: https://www.shrmonitor.org/assets/uploads/2017/09/08-final-Cecile-Vandewoude.pdf. Last accessed on 4 October 2019.

conferences and expert meetings, the chair at inaugural and closing plenary meetings of each meeting was taken by a representative of the host state[349], and at other plenary meetings, working bodies and draft groups, the chairman rotated on a daily basis[350]. Notwithstanding this initial version, the origin of the Chairmanship as an institution can be traced to the *Charter of Paris for a New Europe* of 1990[351], but it was not until the adoption of the *CSCE Helsinki Summit Document 1992: The Challenges of Change*, two years later, as part of the decision of the participating States to further develop the CSCE structures and institutions, that this function was formally institutionalized and the entity of the CiO created[352]. Today, the mandate of the OSCE Chairmanship is reflected in the Porto MC Decision No. 8[353], when the participating States adopted guidelines for its activities. Arguably the most important rule of procedure of the OSCE[354] is that the Chairmanship rotates annually among the OSCE participating States and is designated by a decision of the Summit Meeting or MC, as a rule two years before its term of office starts. In 1991 Germany held the first Chair[355] and this task was most recently transferred to Albania at

[349] See *Final Recommendations of the Helsinki Consultations (1973),* para. 70. See OSCE website: https://www.osce.org/mc/40213?download=true. Last accessed on 5 January 2020. In addition, the inaugural meetings of the working bodies was also exercised by a representative of the host state. Ibid, para. 71.

[350] Ibid, para. 70(a). ' […] country by country before the end of the Helsinki consultations […]'. Para. 71(a) 'The Chairman of the co-ordinating Committee and the chairmen of the Committees shall be designated on a basis of daily rotation, in French alphabetical order, starting from a letter drawn by lot […]'. Ibid, para. 71(b) 'The Chairmen of Sub-Committees and of other subsidiary bodies of the Conference shall be desginated on the basis of rotation in accordance with practical arrangements to be established at the appropriate time by the bodies in question'.

[351] In the *Charter of Paris for a New Europe,* the Chairmanship as such was not among the first permanent institutions. Indeed, there are in Supplementary document to give effect to certain provisions contained in the Charter of Paris, only two provisions referring to the Chairmanship: under I. *Institutional arrangements*: A. The Council (as indicated, in 1994, it became the MC) 5. The Chair throughout each meeting of the Council will be taken by the representative of the host country. B. The committee of senior officials. (the Committee of Senior Officials (CSO) was the CSCE's regular consultative body from 1990 to 1992 and when the CSCE was renamed to the OSCE in 1994 the CSO became the Senior Council. In 2006, the Senior Council was officially dissolved and most of ist functions were transferred to the PC) 4. Each meeting of the Committee will be chaired by a representative of the State whose Foreign Minister had been Chairman at the preceding Council meeting. Meetings will be convened by the Chairman of the Committee after consultation with the participating States.

[352] See *CSCE Helsinki Document 1992, The Challenges of Change*, 9 – 10 July 1992, Decisions I Strengthening CSCE Institutions and Structures, Chairman-in-Office, paragraphs 12 – 22.

[353] OSCE Ministerial Council Decision No. 8, Role of the OSCE Chairmanship-in-Office (MC(10).DEC/8) of 7 December 2004.

[354] Ibid, para 1. See also Rules of Procedure of the OSCE of 1 November 2006, MC.DOC/1/06, III(1). OSCE Chairmanship and Troika.

[355] In 1991 Germany held the first CSCE Chair, followed by Czechoslovakia in 1992; 1993: (Sweden); 1994: (Italy); 1995: (Hungary); 1996: (Switzerland); 1997: (Denmark); 1998: (Poland); 1999: (Norway); 2000: (Austria); 2001: (Romania); 2002: (Portugal); 2003: (The Netherlands); 2004: (Bulgaria); 2005: (Slovenia);

the meeting of the 26th OSCE Ministerial Council in Bratislava[356] which took place last December 2019.[357] The CiO may be considered the OSCE's 'super-co-ordinator'[358]: he/she 'shall be responsible on behalf of the [MC] and the PC for co-ordination of and consultation on current OSCE business.[359] The functions of the Chairmanship shall be exercised by the minister of foreign affairs of the designated participating State holding the Chairmanship, together with his/her staff, including a permanent representative, who is the Chairperson of the PC.[360] The Chairmanship co-ordinates the decision-making process, and as the political leadership of the Organization, sets its own thematic priorities for the activities of the OSCE during its year in office[361]. That said, the Chairmanship must ensure 'that its actions are not inconsistent with positions agreed by all the participating States'[362]. The activities of the Chairmanship include presiding over three of the four OSCE decision-making bodies[363]: chairing Summits and the MC; and as indicated, a member of the Chairmanship, generally the Permanent Representative, chairs the PC, as well as their

2006: (Belgium); 2007: (Spain); 2008: (Finland); 2009: (Greece); 2010: (Kazakhstan); 2011: (Lithuania); 2012: (Ireland); 2013: (Ukraine); 2014: (Switzerland); 2015: (Serbia); 2016: (Germany); 2017: (Austria); 2018: (Italy); 2019: (Slovakia).

[356] See OSCE website, 26th Ministerial Council': https://www.osce.org/event/mc_2019. Last accessed on 28 November 2019. (When: 5 December 2019 (All day) – 6 December 2019 (All day).')

[357] See Ministerial Council Decision No. 1/18 OSCE Chairmanship in the Year 2020 (OSCE Doc. MC.DEC/1/18/Corr.1 of 5 December 2018). See OSCE website: https://www.osce.org/chairmanship/405689?download=true. Last accessed on 28 November 2019.

[358] See A. Bloed., *supra,* note 4, (Martinus Nijhoff Publishers, 26 October 1993), at p. 14.

[359] See Rules of Procedure of the OSCE, III. 2. Chairmanship and Troika (OSCE Doc. MC.DOC/1/06 of 1 November 2006).

[360] Ibid. See also OSCE Ministerial Council Decision No. 8, Role of the OSCE Chairmanship-in-Office (OSCE Doc. MC(10).DEC/8 of 7 December 2004), para. 1.

[361] According to Liechtenstein, the 'problem with [this] model is that Chairmanship priorities differ greatly from one year to the next, especially since they often reflect issues relevant to a State's domestic auidence or that are simply in line with the country's national interest. This yearly changing, state-driven agenda gives the impression of an unfocused OSCE agenda'. See S. Liechtenstein., 'OSCE selects new Secretary General', *Security and Human Rights Monitor*, 14 March 2017. See Security and Human Rights Monitor website: https://www.shrmonitor.org/osce-selects-new-secretary-general/. Last accessed on 27 November 2019.

[362] Ibid, para. 2. This was the context where Kemp stated that the '[t]he Chairman's political power is largely a myth. The Chairmanship seldom takes a political decision on its own: decisions within the OSCE are taken by consensus'. See W. Kemp., 'The OSCE Chairmanship: Captain or Figurehead?', *Security and Human Rights Journal,* Volume 20, Issue 1, 2009. See Security and Human Rights Monitor website: https://www.shrmonitor.org/assets/uploads/2017/09/3-Kemp.pdf. Last accessed on 27 November 2019.

[363] The FSC has a separate Chairmanship, which is responsible on behalf of the FSC for co-ordination of and consultation on current FSC issues. It rotates every four months (for the period from the end of each recess (winter, spring, summer) to the end of the following recesss by the participating State succeeding each other, in the French alphabetical order).

subsidiary bodies[364]. As also seen, this includes 'co-ordination of, and consultation on, current OSCE business'[365], in particular regular briefings by the CiO on its activities; providing the PC with required drafts, reports and overviews for its consideration[366]; providing the PC with recommendations on specific issues requiring particular attention or decisions[367]; communicating views and decisions of Summits, the MC to the Secretariat, institutions, and field operations[368]; representing the OSCE externally, in consultation with participating States and with the assistance of the Secretary General[369]; appointing personal representatives and heads of field operations[370]. To provide work continuity and effectiveness, since the Helsinki Summit in 1992, the CiO may also be assisted in 'carrying out entrusted tasks'[371] by 'the preceding and succeeding Chairm[anships]', operating together as a [so-called OSCE] Troika'[372].

2.7. Central executive structures

2.7.1. OSCE Secretariat

[364] OSCE Ministerial Council Decision No. 8, Role of the OSCE Chairmanship-in-Office (MC(10).DEC/8) of 7 December 2004, para. 2(a).
[365] Ibid, para. 2(b).
[366] Ibid, para. 2(c).
[367] Ibid, para. 2(d)
[368] Ibid, para. 2(e).
[369] Ibid, para. 2(g).
[370] Ibid, para. 2(f). See also OSCE website, 'Chairperson-in-Office Representatives': https://www.osce.org/chairmanship/chairperson-in-office-representatives. Last accessed on 30 October 2019. ('The Chairperson-in-Office takes a lead in conflict prevention, resolution and rehabilitation in the OSCE region, taking up direct contact with parties concerned and arranging or conducting settlement negotiations. In order to deal with crises or ensure better co-ordination of participatign States' efforts in specific areas, the Chair may appoint personal or special representatives. Personal representatives have a clear and precise mandate which outlines the tasks they are expected to undertake.')
[371] See Rules of Procedure of the OSCE, III. 3. Chairmanship and Troika (OSCE Doc. MC.DOC/1/06 of 1 November 2006). ('In performing its duties, the Chairmanship shall act in accordance with OSCE decisions, and shall be assisted by the preceding and succeding Chairmanships, operating together as a Troika. The Chairmanship shall be supported by the executive structures of the OSCE.')
[372] See *CSCE Helsinki Document 1992, The Challenges of Change*, 9 – 10 July 1992, Decisions I Strengthening CSCE Institutions and Structures, Chairman-in-Office, para. 14. See OSCE website: https://www.osce.org/mc/39530?download=true. Last accessed on 27 November 2019. See also OSCE Ministerial Council Decision No. 8, Role of the OSCE Chairmanship-in-Office (MC(10).DEC/8 of 7 December 2004), para 3. See also Rules of Procedure of the OSCE, III. 3. Chairmanship and Troika (OSCE Doc. MC.DOC/1/06 of 1 November 2006). It may be noted that regular co-ordination is ensured by weekly Troika meetings at Ambassadorial level. In addition, the Troika meets at Ministerial level twice a year.

As part of the initial steps to institutionalize the CSCE, it will be recalled that the *Charter of Paris for a New Europe* in 1990[373] provided for the establishment of a Secretariat headquarters, first located in Prague, Czech Republic,[374] in 1991, before moving its seat to Vienna, Austria, in 1994[375], but with an office, the OSCE Documentation Centre[376], remaining in Prague (DCiP). As a ‚single organizational structure', the OSCE Secretariat is composed of the Secretary General and staff, in accordance with paragraph E.3 of the *Charter of Paris,* Supplementary Document[377]. While the *Charter of Paris* and subsequent documents of the OSCE are largely silent as to the specific functions of the Secretariat[378],

[373] See *Charter of Paris for a New Europe*, Paris, 19-21 November 1990, at E. The CSCE Secretariat 1 – 3.
[374] The CSCE Secretariat in Prague was under the leadership of a director and skeleton staff of three to four officers seconded by national administrations. However, at the Stockholm Council Meeting, '(t)o increase the efficiency of the work of the CSCE, the Ministers decided to establish for the Secretariats in Prague and Vienna a single organizational structure under the direction of the Secretary General. The Ministers decided that the CSO should agree the financial and administrative implications of this decision and should adjust staffing, budgets and procedures accordingly.' See *Third Meeting of the Council Summary of Conclusions Decision on Peaceful Settlement of Disputes*, Stockholm, 1992, (3STOCK92.e), Decisions, 7. Evolution of CSCE structures and institutions.
[375] The 1993 Rome Ministerial Council Decision decided to move the CSCE Secretariat from Prague to Vienna, as a ‚step towards the further efficiency in administrative and secretarial support services', where it took up operation on 1 January 1994. See *Fourth Meeting of the Council, CSCE and the New Europe – Our Security is Indivisible Decisions of the Rome Council Meeting*, Rome, 1993, VII. CSCE Structures and Operations, para. 5. See OSCE website: https://www.osce.org/mc/40401?download=true. Last accessed on 27 November 2019.
[376] This was formely known as the Prague Office of the OSCE Secretariat. The OSCE Documentation in Prague 'holds the permanent records of the OSCE, documenting its history since the early 1970s. It is the trusted repository for the OSCE's archives and those of its predecessor, the CSCE (Conference on Security and Co-operation in Europe). The Centre is the custodian of the OSCE's institutional memory. It engages with a wide range of people to promote the use of its extensive record holdings and to share information on OSCE themes.' See OSCE website, 'OSCE Documentation Centre in Prague': https://www.osce.org/documentation-centre-in-prague. Last accessed on 27 November 2019.
[377] *Charter of Paris for a New Europe,* Paris, 1990, Supplementary Document to give effect to certain provisions contained in the Charter of Paris for a New Europe, I. *Institutional Arrangements,* E.1 The CSCE Secretariat. See OSCE website: https://www.osce.org/mc/39516?download=true. Last accessed on 27 November 2019.
[378] *Charter of Paris for a New Europe,* Paris, 1990, Supplementary Document to give effect to certain provisions contained in the Charter of Paris for a New Europe, I. *Institutional Arrangements,* E.1 The CSCE Secretariat: ('The Secretariat will - provide administrative support to the meetings of the Council and of the Committee of Senior Officials; - maintain an archive of CSCE documentation and circulate documents as requested by the participating States; - provide information in the public domain regarding the CSCE to individuals, NGOs, international organizations and non-participating States; - provide support as appropriate to the Executive Secretaries of CSCE summit meetings, follow-up meetings and inter-sessional meetings. 2. The Secretariat will carry out other tasks assigned to it by the Council or the Committee of Senior Officials. 3. In order to carry out the tasks specified above, the Secretariat will consist of the following staff - a Director, responsible to the Council through the Committee of Senior Officials - three Officers who will be in charge of organization of meetings (including protocol and security), documentation and information, financial and administrative matters. In addition to these functions, the Director may assign other duties within the framework of the tasks of the Secretariat; - administrative and technical personnel, recruited by the Director.').

in practice its functions derive from its role in supporting the organs of the Organization under the direction of the Secretary General. A large proportion of the Secretariat's work is directed to providing operational and administrative support to the Organization. In addition to assisting the OSCE Chairmanship in its activities[379], the Secretariat 'provides support to the permanent negotiating and decision-making bodies in Vienna, as well as to field operations, and, as appropriate to other institutions'[380]; and it also maintains contacts with international and non-governmental organizations, and provides 'conference, language, administrative, financial, personnel and information technology services.'[381] Apart from administrative support functions assigned to the Secretariat, it also engages in tasks related to the substantive function, such as developing and conducting project activities. The OSCE Secretariat has a functional structure. It is organized into different administrative and programmatic departments and units with specific areas of responsibility. Each department and unit is divided and subdivided into several hierarchical organizational elements, each of which is responsible for a segment of the functions of that department/unit. These include: the Department of Management and Finance (DMF)[382], which as the largest department in the OSCE Secretariat, consists of the Budget and

[379] See OSCE Ministerial Council Decision No. 8, Role of the OSCE Chairmanship-in-Office (MC(10).DEC/8 of 7 December 2004), para. 3. (‚The Chairmanship-in-Office draws upon the expert, advisory, material, technical and other support of the Secretariat, which may include background information, analysis, advice, draft decisions, draft statements, summary records and archival support as required. Such support in no way diminishes the responsibilities of the Chairmanship-in-Office. The Chairmanship-in-Office shall provide the Secretariat with the necessary information in order to enable it to provide institutional memory and to promote continuity in the handling of OSCE business from one Chairmanship-in-Office to the next.'). See also ‚OSCE Secretariat' in *OSCE Commemorative book: 40th anniversary of the Helsinki Final Act* (1 December 2015), at pp. 48-49: https://www.osce.org/h40commemorativebook?download=true. Accessed on 20 September 2019. See also OSCE website ‚OSCE Secretariat': https://www.osce.org/secretariat. Last accessed on 20 September 2019.

[380] See ‚OSCE Secretariat' in *OSCE Commemorative book: 40th anniversary of the Helsinki Final Act* (1 December 2015), at p. 48. See OSCE website: https://www.osce.org/h40commemorativebook?download=true. Last accessed on 30 October 2019.

[381] See OSCE website, 'OSCE Secretariat': https://www.osce.org/secretariat. ccessed on 30 October 2019. 'The Secretariat assists the OSCE Chairmanship; supports OSCE field activities; maintains contacts with international and non-governmental organizations, and provides conference, language, administrative, financial, personnel and information technology services.')

[382] See OSCE website, Vacancy notice VNSECP01431, Date of Issue: 13 May 2019: https://jobs.osce.org/vacancies/director-management-and-finance-vnsecp01431. Last accessed on 17 September 2019. ('The Department of Management and Finance (DMF) is responsible for managing the material and financial resources of the Organization. The objective of DMF is to provide efficient and effective management of non-staff resources in support of OSCE programmatic activities. It provides policy guidance on the management of OSCE financial and material resources and develops and maintains OSCE Financial Regulations and Rules and Financial Administrative Instructions.').

Finance Services Section[383]. This individual Section consists of four units: the Accounts Unit, the Budget Unit[384], the Treasury Unit, and the Extra-Budgetary Unit. DMF also includes the Mission Support Section[385], which provides the working framework for: the Procurement and Contracting Unit[386], the Asset Management and Logistics Unit[387], the Travel Unit[388], and the Facilities Management Unit[389]. DMF also includes the Information and Communication Technology Section[390], as well as the Information Security and

[383] See OSCE website, Vacancy notice VNSECP01429, Date of Issue: 8 May 2019: https://jobs.osce.org/vacancies/chief-budget-unit-vnsecp01429. Last accessed on 17 September 2019. (‚The Budget and Finance Services Section is responsible for co-ordinating and supporting the programme planning and budgeting process in general, including providing policy guidance and support to the Secretariat, OSCE Institutions and Field Operations').

[384] See OSCE website, Vacancy notice VNSECP01429, Date of Issue: 8 May 2019: https://jobs.osce.org/vacancies/chief-budget-unit-vnsecp01429. Last accessed on 17 September 2019. ('[T]he [Budget Unit is involved in the] preparation, in co-ordination with the Secretariat and OSCE Executive Structures, submission of all budget-related documents in accordance with the Common Regulatory Management System (CRMS) and decisions of the OSCE's policy-making bodies).

[385] See OSCE website, Vacancy notice VNSECP01464, Date of Issue: 5 September 2019: https://jobs.osce.org/vacancies/travel-officer-vnsecp01464. Last accessed on 17 September 2019. ('Mission Support Section provides the working framework for OSCE's procurement and contracting assets, logistics, transport, travel and facilities management activities. It also acts as the policy development and co-ordination point for resource administration in the OSCE's Executive Structures in relation to these activities, including providing on-site assistance and technical training programmes.').

[386] No information can be found which provides a general description of this Unit.

[387] Ibid.

[388] See OSCE website, Vacancy notice VNSECP01464, Date of Issue, 5 September 2019: https://jobs.osce.org/vacancies/travel-officer-vnsecp01464. Last accessed on 22 September 2019. ('Under the direct supervision of the Chief, Assets, Logistics and Travel Support Unit, the [Travel Officer] will be responsible for managing the OSCE Secretariat's Travel Office while ensuring the Secretariat's compliance with the Common Regulatory Management System (CRMS). You will be accountable for the delivery of a high customer service oriented approach with internal and external customers.').

[389] See OSCE website, Vacancy notice VNSECP01407, Date of Issue, 7 February 2019: https://jobs.osce.org/vacancies/chief-facilities-management-vnsecp01407. Last accessed on 22 September 2019. (‚Facilities Management Unit is involved in 'provid[ing] on-going daily support for functioning of the OSCE premises in Vienna, overall guidance to institutions and field operations on premises related issues. It includes providing technical assistance and advice of the design and implementation of various capital projects and related cost control in collaboration with program managers.')

[390] See OSCE website, Vacancy notice VNSECS01454, Date of Issue: 6 August 2019: https://jobs.osce.org/vacancies/deputy-director-ict-services-vnsecs01454. Last accessed on 17 September 2019. ('Information and Communications Technology Services (ICTS) ensures efficient, available, and cost-effective management, operation and utilisation of Information Technology (IT) in support of the core business of the OSCE. This comprises activities associated with co-ordination, operation, management, development and implementation of Information and Communications Technology (ICT) supported projects and infrastructure.').

Coordination Unit[391]. The Department for Human Resources (DHR)[392], comprises two sections: Human Resources (HR) Services and Talent Management. HR Services[393] includes: the Personnel Section[394] and Payroll Administration; HR Services also serves as the office of the OSCE Ethics Co-ordinator. The Talent Management Section encompasses: the Recruitment Unit[395], the Learning and Development Unit[396] and the Classification and Post Table Team[397]. The Office of the Secretary General (OSG)[398] groups two offices.

[391] See OSCE website, Vacancy notice VNSECP01467, Date of Issue: 13 September 2019: https://jobs.osce.org/vacancies/information-security-officer-vnsecp01467. Last accessed on 17 September 2019. ('The Information Security and Co-ordination (ISC) Unit assists the Secretary General in his role as Chief Administrative Officer of the OSCE, to protect critical systems and data across all OSCE executive structures. Specifically, ISC is implementing an information security framework and maintaining co-ordination with information security focal points in the executive structures.').

[392] See OSCE website, Vacancy notice VNSECP01276, Date of Issue: 14 August 2017: https://jobs.osce.org/vacancies/director-human-resources-vnsecp01276. Last accessed on 18 September 2019. ('The Department of Human Resources (DHR) ensures that the OSCE benefits from a capable and committed workforce that delivers on the security priorities of participating States. DHR provides a a range of Human Resources services throughout the OSCE, including the recruitment and administration of staff, the management of benefits and entitlements, and high quality learning and development opportunities. DHR is also responsible for the development and review of human resources policies.').

[393] See OSCE website, Vacancy notice VNSECG01353, Date of Issue: 21 June 2018: https://jobs.osce.org/vacancies/hr-assistant-vnsecg01353. Last accessed on 20 September 2018. ('The HR Services Section, as part of the Department of Human Resources, is responsible for the implementation of personnel management policies, the optimal utilization of human resources, and the development and refinement of Staff Regulations, Rules and Instructions.').

[394] See OSCE website, Vacancy notice VNSECG01396, Date of Issue: 21 December 2019: https://jobs.osce.org/vacancies/temporary-payroll-assistant-vnsecg01396. Last accessed on 23 September 2019. ('The Personnel Section, as part of the Department of Human Resources, is responsible for the planning, administering and control of human resource management programmes at the OSCE, such as entitlements and benefits, job classification, performance appraisals, social security packages and implementation of the Staff Regulations and Rules and development of staff/management relations.')

[395] See OSCE website, Vacancy notice VNSECG01371, Date of Issue: 10 August 2018: https://jobs.osce.org/vacancies/recruitment-assistant-vnsecg01371. Last accessed on 21 September 2018. ('The Recruitment Unit, as part of the Talent Management Section of the Department of Human Resources, […] is primarily responsible for the recruitment and selection of international contracted and seconded staff for the Secretariat and field operations and of general staff, temporary staff and consultants at the Secretariat.').

[396] See OSCE website, Vacancy notice VNSECG01357, Date of Issue: https://jobs.osce.org/vacancies/learning-and-development-clerk-vnsecg01357. Last accessed on 21 September 2019. ('The Learning and Development Unit within the Talent Management Section of the Department of Human Resources at the OSCE Secretariat […] is responsible for the co-ordination and support of all staff learning and development activities throughout all Executive Structures of the OSCE.')

[397] No information can be found which provides a general description of this Team.

[398] See OSCE website, Vacancy notice VNSECS01382, Date of Issue: 23 October 2018: https://jobs.osce.org/vacancies/executive-officer-vnsecs01382. Last accessed on 17 September 2019. ('The Office of the Secretary General (OSG) supports the Secretary General in implementing all aspects of his mandate by facilitating processes and supporting the Secretariat, [the Chairman-in-Office], as well as other executive structures and [the participating States]. [The OSG is led by a Director, who also serves as Chief of Staff and the Head of Executive Management.']).

First, 'service-oriented offices' include: the Office of Legal Affairs (OSCE OLA)[399], Conference and Language Services (CLS)[400], the Records Management Unit (RMU)[401], and as an extension of the OSCE Secretariat in Vienna, DCiP (formerly the Prague Office of the OSCE Secretariat)[402]; and 'policy-oriented offices' are the Communications and

[399] OSCE OLA was formerly known as the Legal Services Section before 2018. The title 'Office' matches the UN Office of Legal Affairs and the US Office of the legal Adviser. See also OSCE website, Vacancy notice VNSECP01414, Issued on 19 March 2019: https://jobs.osce.org/vacancies/head-office-legal-affairs-vnsecp01414. Last accessed on 16 September 2019. Within the OSCE Secretariat, the Office of Legal Affairs is the central legal service of the Organization. *Inter alia,* it ('provides authoritative legal advice and assistance on a wide range of issues to the Secretary General and the Secretariat's Departments, the Chairmanship, the Institutions and Field Operations and, as required, to the Delegations.').

[400] See OSCE website, Vacancy notice VNSECG01277, Issued on 16 August 2017: https://jobs.osce.org/vacancies/conference-support-clerk-vnsecg01277. Last accessed on 28 November 2019. ('Conference and Language Services (CLS), as part of the Office of the Secretary General (OSG), provides professional support to the decision-making bodies of the OSCE and the respective delegations on matters dealing with the organization of meetings, including interpretation and translation, documents control, editing and word processing services.')

[401] See OSCE website, Vacancy notice VNSECP01310, Issued on 20 February 2018: https://jobs.osce.org/vacancies/chief-records-management-vnsecp01310. Last accessed on 18 September 2019. ('The Records Management Unit (RMU), as part of the Office of the Secretary General (OSG), […] comprises […] staff members who are responsible for registering official correspondence, overseeing the systematic transfer and destruction of records, handling reference requests, and developing record-keeping tools and resources. RMU also provides advisory services on record-keeping to all OSCE executive structures and actively promotes best practices in records management.'). It may be highlighted, however, that until the 2019 Unified Budget, the RMU was headed by a Chief of the Records Management Unit (RMU) at the P-3 level, together with three (3) G-4 Registry and Records Assistants, at the OSCE Secretariat in Vienna, Austria. However, since the 2019 Unified Budget, the P-3 post has not only been downgraded to a P-2 Associate Records Management Officer, but also transferred to the OSCE DSiP under the direct supervision of the Head, OSCE DCiP. Over the same period, it may also be regarded as significant that the 3 G-4 level Registry and Records Assistants are still providing central registry services at the Secretariat in Vienna without any qualified on-site supervision. While a separate (but reduced) budget line for RMU appears to have been approved by the Permanent Council (seemingly for staffing costs) in the 2019 Unified Budget, it is unclear whether the decision to transfer the downgraded P-2 post to the DCiP is part of a restructuring measure that entails the eventual abolition of RMU and its 3 G-4 posts. Such an anomaly is likely to have a marked impact on the effective management of records across the Organization. See OSCE Permanent Council Decision No. 1288 Approval of the 2018 Unified Budget (PC.DEC/1288 of 15 February 2018), at p. 12. See OSCE website: https://www.osce.org/permanent-council/373016?download=true. Last accessed on 7 January 2020. See OSCE Permanent Council Decision No. 1326 Aproval of the 2019 Unified Budget, (PC.DEC/1326 of 11 April 2019), at p. 12. See OSCE website: https://www.osce.org/permanent-council/417164?download=true. Last accessed on 7 January 2020.

[402] See OSCE website, 'OSCE Documentation Centre in Prague', ('The Documentation Centre in Prague holds the permanent records of the OSCE, documenting its history since the early 1970s. It is the trusted repository for the OSCE's archives and those of its predecessor, the CSCE (Conference on Security and Co-operation in Europe). The Centre is the custodian of the OSCE's institutional memory. It engages with a wide range of people to promote the use of its extensive record holdings and to share information on OSCE themes.'): https://www.osce.org/documentation-centre-in-prague. Last accessed on 28 September 2019. See also *Factsheet of the Prague Office of OSCE Secretariat* (4 June 2013): https://www.osce.org/secretariat/102299. Last accessed on 28 September 2019.

Media Relations Section (COMS)[403], External Co-operation Section[404], and the Gender Section[405]. OSG also includes Security Management[406] and Executive Management[407]. A key administrative organ within OSCE Secretariat established by the 1990 *Charter of*

[403] See OSCE website, Vacancy notice VNSECC01410, Date of Issue: 5 March 2019, 'Background': https://jobs.osce.org/vacancies/communication-and-media-relations-intern-vnsecc01410. Last accessed on 17 September 2019. ('The Communication and Media Relations Section (COMMS) is part of the Office of the Secretary General, and promotes awareness and understanding of the OSCE's work among outside audiences by working with the media, by developing an effective communications strategy, using all available tools and innovative new channels to increase visibility and engagement, and get the Organization's messages across to key stakeholders as well as the general public.')

[404]See OSCE website, Vacancy notice VNSECP01313, Date of Issue: 23 February 2018, 'Background': https://jobs.osce.org/vacancies/head-external-co-operation-section-vnsecp01313. Last accessed on 17 September 2019. ('The External Co-operation Section is the Secretariat's initial contact point for liaison with international, regional, and sub-regional organizations and institutions. It is also responsible for the strengthening and operationalizing of the OSCE's interaction with the 11 states representing the Asian and Mediterranean Partners for Co-operation.').

[405] See *OSCE Factsheet Gender Equality,* 'How we work', (Publisher, OSCE, 15 September 2017), at p. 4. ('The Gender Section, in the Office of the OSCE Secretary General, assists with integrating a gender perspective into the Organization's policies and programmes in the three dimensions. The Gender Section develops operational tools, guidelines and capacitybuilding materials to assist staff members apply gender mainstreaming in their work. It also implements thematic programmes to support participating States and OSCE structures address gender issues across the three dimensions, including on women in conflict, women's economic participation and combating gender-based violence.'). See OSCE website: https://www.osce.org/resources/factsheets/gender-equality?download=true. Last accessed on 17 September 2019.

[406] See OSCE website, Vacancy notice VNSECP01403, Issued on 18 January 2019: https://jobs.osce.org/vacancies/head-security-management-vnsecp01403. Last accessed on 18 September 2019. (,The OSCE Security Management System ensures the security, safety and well-being of OSCE staff while carrying out their work. Security Management serves as the clearing house for all security related issues, it defines the Organization's safety and security policy and standards and it supports the Organization's security managers in meeting their responsibilities. It also maintains contact with host authorities, as well as with partner organizations and embassies, on all security-related matters and participates actively in the Crisis Management Team and the Security Management Committee. Security Management currently comprises six staff members.')

[407] See OSCE website, Vacancy notice VNSECS01269, Issued on 31 July 2017: https://jobs.osce.org/vacancies/executive-officer-vnsecs01269. Last accessed on 21 September 2019. (,Within the OSG, Executive Management serves as the Secretary General's personal staff, assisting him with both policy and administrative co-ordination. OSG includes a Policy Team and a Co-ordination Team, both of which are responsible to the Director of OSG (D/OSG).').

Paris[408] is the Conflict Prevention Centre[409] (CPC), which has assumed a primarily supportive role in arms control and conflict prevention activities. CPC comprises: the Policy Support Service (PSS)[410], including four regional desks covering Eastern Europe, South-Eastern Europe, the South Caucasus, and Central Asia. CPC also comprises the Operations Service (OS) and this is divided into: the Planning and Analysis Team, the Mediation Support Team and the Situation/Communications Room[411]. Further, there is the

[408] See CSCE, *Charter of Paris*, 1990 (n. 4), supplementary document to give effect to certain provisions contained in the Charter of Paris for a New Europe, I F, paras. 2 and 3. ('1. The Conflict Prevention Centre (CPC) will assist the Council in reducing the risk of conflict. The Centre's functions and structure are described below. 2. During its initial stage of operations the Centre's role will consist in giving support to the implementation of CSBMs such as: - mechanism for consultation and co-operation as regards unusual military activities; - annual exchange of military information; - communications network; - annual implementation assessment meetings;- co-operation as regards hazardous incidents of a military nature. 3. The Centre might assume other functions and the above tasks are without prejudice to any additional tasks concerning a procedure for the conciliation of disputes as well as broader tasks relating to dispute settlement, which may be assigned to it in the future by the Council of the Foreign Ministers.').

[409] See *OSCE Factsheet The Conflict Prevention Centre* (Publisher, OSCE, 1 September 2015), at p. 2. ('The Conflict Prevention Centre, based in the OSCE Secretariat in Vienna, plays a pivotal role in OSCE efforts to promote peace and stability across the OSCE area. Established by the landmark 1990 Charter of Paris for a New Europe to help reduce the risk of conflict, the CPC supports the OSCE and its 57 participating States in the fields of early warning, conflict prevention, crisis management and postconflict rehabilitation (conflict cycle).'). See OSCE website: https://www.osce.org/cpc/13717. Last accessed on 16 September 2019.

[410] See OSCE website, Vacancy notice VNSECP01426, Issued on 30 April 2019: https://jobs.osce.org/vacancies/policy-support-officer-caucasus-desk-vnsecp01426. Last accessed on 19 September 2019. ('The Policy Support Service (PSS) serves as the Organization's primary point of contact on all matters concerning field operations; it monitors the implementation of the mandates of the individual field operations and advises the Secretary General (SG) and the Chairmanship on related policy and operational issues. It also analyses early-warning signals regarding the situation in the field and recommends the implementation of relevant preventive or reactive action. Support provided to the SG and the Chairperson-in-Office includes background information, policy support and advice, input to speeches and travel files as well as drafting summary records. PSS facilitates the co-ordination of programmes and activities among field operations and with those of OSCE specialized units within the Secretariat and institutions and assists field operations with their input to the budget cycle process. PSS also provides support for the Chairperson-in-Office's representatives dealing with protracted conflicts and related formats.').

[411] See OSCE website, Vacancy notice VNSECS00936, Issued on 3 September 2014: https://jobs.osce.org/vacancies/chief-situationcommunications-room-vnsecs00936. Last accessed on 23 September 2019. The 24/7 Situation/Communications Room (SitRm) 'acts as a flexible emergency and crisis management cell capable of responding effectively to a broad range of contingencies and ready to support the Crisis Management Team (CMT) or Task Force Meetings within the OSCE Secretariat. […]. [T]he SitRm carries out 24/7 monitoring of events in the countries of deployment of OSCE field operations (FO) and of issues in other areas of interest for the OSCE by media and open sources research. The team produces daily morning and afternoon briefings, a weekly regional summary, a weekly calendar of upcoming events, as well as special briefings when required. The SitRm provides real-time reporting and fulfills an early warning function to the senior management of the Secretariat. During times of crisis, the SitRm acts as focal point of contact for the receipt, exchange and dissemination of security related information thus being a vital 24/7 link in the security chain between the Secretariat and the FO. The SitRm also provides 24/7 assistance to FO in cases of medical evacuations of OSCE staff and repatriation of remains.').

Programming and Evaluation Support Unit (PESU)[412] and the Forum for Security Co-operation Support Section (FSC)[413], which includes: the Communications Network Unit. Also part of the Secretariat is the Office of Internal Oversight (OIO)[414]. Thematic units of the OSCE Secretariat include: the Office of the Co-ordinator of OSCE Economic and Environmental Activities (OCEEA)[415], the Office of the Special Representative/Co-

[412] See OSCE website, Vacancy notice VNSECP01417, Issued on 20 March 2019: https://jobs.osce.org/vacancies/chief-programming-and-evaluation-support-unit-vnsecp01417. Last accessed on 23 September 2019. (‚The Programming and Evaluation Support Unit (PESU) assists the Secretary General and the Chairmanship in the implementation of the Organization's Project Management framework and standards, in line with the Common Regulatory Management System (CRMS) and with the recognized international standards. It is the primary point of contact for the Chairmanship and participating States' delegations on programmatic and project management matters in relation to the Unified Budget (UB) process, as well as the Extra-budgetary contributions. PESU advises senior management and field operations on implementation of programme and project management as well as Performance-Based Programme Budgeting (PBPB) and co-ordinates all related training and coaching activities (i.e. strategic planning, programme management, project management) undertaken by the Unit across the Organization.')

[413] See OSCE Vacancy notice VNSECS01235, Issued on 5 April 2017: https://jobs.osce.org/vacancies/associate-forum-security-co-operation-support-officer-vnsecs01235. Last accessed on 18 September 2019. (‚The Forum for Security Co-operation (FSC) is the main OSCE body dealing with the politico-military aspects of security and provides a forum for political dialogue for OSCE participating States. The FSC Support section within the Conflict Prevention Centre at the OSCE Secretariat supports the work of the FSC by providing technical support and expertise. In this respect, the Section acts as a focal point and prepares reports and overviews on military information exchanged by participating States. The Section also fosters implementation of Confidence and Security-building Measures (CSBMs) and develops assistance projects with regard to Small Arms and Light Weapons (SALW) and Conventional Ammunition.').

[414] See *Factsheet of the OSCE Office of Internal Oversight,* (Publisher: OSCE, 16 January 2017), at p. 2: https://www.osce.org/resources/factsheets/office-of-internal-oversight?download=true. Last accessed on 17 September 2019. ('Established in 2000 by the OSCE Permanent Council, the Office of Internal Oversight (OIO) provides a broad range of oversight services ranging from internal audit to evaluation and investigation. The Office's work is conducted in accordance with the Internal Oversight Mandate and the OSCE Financial Regulations and covers all OSCE activities, regardless of the source of funding.')

[415] See OSCE website, 'Secretariat, What we do, Economic and environmental activities': https://www.osce.org/secretariat/eea. Last accessed on 17 September 2019.
('Economic and environmental considerations represent an important element of the OSCE's approach to security. To tackle challenges in this area, the Co-ordinator of OSCE Economic and Environmental Activities and his Office co-operate on the ground with field officers; organize an annual Economic and Environmental Forum; and hold a yearly Implementation Meeting to assess progress and identify future priorities. The Office works closely with the Organization's Chairmanship and under the guidance of the Economic and Environmental Committee, a body of representatives of the OSCE's participating States. Vuk Zugic is Co-ordinator of OSCE Economic and Environmental Activities since 2017. The activities in this area stretch from anti-money laundering, transport security, migration, developing more efficient border and customs policies, water management, controlling dangerous waste through to climate change, sustainable energy and involving the public in decisions affecting the environment. With other international partners, the OSCE is also an active member of the Environment and Security Initiative.'). See also *OSCE Factsheet Office of the Co-ordinator of the OSCE Economic and Environmental Activities* (Publisher: OSCE, 20 February 2012). See OSCE website: https://www.osce.org/secretariat/30348?download=true. Last accessed on 17 September 2019.

ordinator for Combating Trafficking in Human Beings (OSR/CTHB)[416], and the Transnational Threats Department (TNT)[417], with the latter comprised of four units: the Action Against Terrorism Unit (ATU)[418], the Border Security and Management Unit

[416] See *Factsheet on Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings,* (Publisher: OSCE, 11 March 2016). In 2003, the OSCE set up the Office and post of the Special Representative and Coordinator for Combating Trafficking in Human Beings (OSR/CTHB) as a high-level mechanism within the OSCE Secretariat to help participating States develop and implement effective policies for combating human trafficking. The Office of the Special Representative promotes a victim-centred and human rights-baded approach in protecting victims. The Office is committed to addressing all forms of trafficking as identified in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, 2237 UNTS 319. See UN website: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en. Last accessed on 5 January 2020. In Decision No. 2/03 Combating Trafficking in Human Beings, MC.DEC/2/03 of 2 December 2003 (see OSCE website: https://www.osce.org/odihr/23866?download=true. Last accessed on 5 January 2020), the Maastricht Ministerial Council endorsed the OSCE Action Plan to Combat Trafficking in Human Beings, the key document which provides a framework for OSCE activities in support of the anti-trafficking efforts of OSCE participating States. It contains core recommendations for action at the national level, known as the the '3 Ps': Prevention, Prosecution and Protection. See OSCE website: https://www.osce.org/secretariat/74755?download=true. Last accessed on 16 September 2019. See also OSCE website, 'Combating human trafficking': https://www.osce.org/combating-human-trafficking. Last accessed on 6 September 2019.

[417] See OSCE website, Vacancy notice, VNSECP01439, Issued on 2 July 2019: https://jobs.osce.org/vacancies/co-ordinator-activities-address-transnational-threats-vnsecp01439. Last accessed on 24 September 2019. (,The Transnational Threats Department (TNTD) was created in the OSCE Secretariat as per Ministerial Council Decision MC.DEC/9/11 of 7 December 2011, 'Strengthening Co-ordination and Coherence in the OSCE's Efforts To Address Transnational Threats' (see OSCE website: https://www.osce.org/mc/86089?download=true. Last accessed on 5 January 2020), with a view to ensuring better co-ordination, strengthened coherence of action and more efficient use of OSCE's resources in addressing transnational threats. It supports the Secretary General in functioning as the focal point of the Organization-wide programmatic activities that relate to countering transnational threats and in ensuring co-ordination and coherence of action across all three dimensions and among all OSCE executive structures, while respecting their mandates.')

[418] See *OSCE Factsheet Transnational Threats Department Action against Terorism Unit,* 'Who we are', (Publisher: OSCE, 29 September 2017) ('The Action against Terrorism Unit of the OSCE Transnational Threats Department supports the OSCE's 57 participating States and 11 Partners for Co-operation in the implementation of their anti-terrorism commitments.'). See OSCE website: https://www.osce.org/resources/factsheets/action-against-terrorism-unit?download=true. Last accessed on 17 September 2019.

(BSMU)[419], the Strategic Police Matters Unit (SPMU)[420], and the Co-ordination Cell. The heads of these administrative and programmatic departments and units usually hold the rank of Director, Head, Senior Adviser, or Chief.

2.7.2. OSCE Secretary General

To increase the efficiency of the work of the then CSCE, the function of a Secretary General was introduced at a later stage, for the first time in 1992[421] at the Third Meeting of the CSCE Ministerial Council in Stockholm[422] and first OSCE Secretary General took office in June 1993 and the current Secretary General is Thomas Greminger (Switzerland).[423] The Secretary General is appointed by the Ministerial Council by consensus upon recommendation of the Permanent Council and Chairman-in-Office for a

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[419] *OSCE Factsheet Transnational Threats Department Border Security and Management Unit*, 'Who we are', (Publisher: OSCE, 11 July 2017) ('The Border Security and Management Unit of the OSCE Transnational Threats Department supports OSCE participating States and Partners for Co-operation to address emerging border security risks and challenges. [It] works to enhance standards in border services by facilitating the exchange of and promoting best practices through workshops and training courses, co-ordinating a national focal points network on border security and management, and supporting the capacitybuilding activities of OSCE field operations on the ground. The Unit also works closely with other regional and international organizations.'). See OSCE website: https://www.osce.org/resources/factsheets/border-security?download=true. Last accessed on 17 September 2019.

[420] *OSCE Factsheet Transnational Threats Department Strategic Police Matters Unit,* (Publisher: OSCE, 15 December 2015). ('Strategic Police Matters Unit The Strategic Police Matters Unit (SPMU) is the focal point for the OSCE's police-related work. As a part of the OSCE Transnational Threats Department (TNTD), the SPMU supports the activities of the Secretary General, the OSCE Chairmanship, the TNTD Director, participating States and field operations in: Promoting police development and reform within the principles of democratic policing; Countering organized crime, terrorism, trafficking in illicit drugs, trafficking in human beings, and cybercrime.'). See OSCE website: https://www.osce.org/secretariat/13732?download=true. Last accessed on 17 September 2019.

[421] From 1990 until 1992, there was a Head of the CSCE Secretariat in Prague, together with a 'skeleton staff of three or four officers seconded from national administrations'. See *OSCE Handbook,* OSCE Press and Public Information Section (now known as the Communication and Media Relations Section) at the OSCE Secretariat, 2007, at p. 6.

[422] *Third Meeting of the Council, Summary of Conclusions, Decision on Peaceful Settlement of Disputes*, Decisions, 7. Evolution of CSCE structures and institutions, (3STOCK92.e) (Stockholm 1992), at p. 15-16. '[…] Ministers have decided to improve further CSCE operations and institutions by establishing the post of Secretary General of the CSCE […]'.

[423] See OSCE Ministerial Council Decision No. 4/17 Appointment of the OSCE Secretary General, (OSCE Doc. MC.DEC/4/17 of 18 July 2017). See OSCE website: https://www.osce.org/chairmanship/361606?download=true. Last accessed on 12 November 2019. Previous Secretaries General are: Lamberto Zannier (Italy): July 2011 – June 2017; Marc Perrin de Brichambaut (France) : June 2005 – June 2011; Ján Kubiš (Slovak Republic): June 1999 – June 2005; Giancarlo Aragona (Italy): June 1996 – June 1999; Wilhelm Höynck (Germany): June 1993 – June 1996.

period of three years[424], with the possibility of extension for a 'second and final term of three years'[425]. Whereas the Chairmanship's leadership role is generally considered political, as a high-ranking personality the Secretary General is the 'head of the Secretariat' and also 'Chief Administrative Officer of the OSCE'[426], which encompasses responsibilities beyond the organ of the Secretariat. In particular, he/she is 'responsible to [the Permanent Council] for the efficient use of the Organization's resources', for the 'proper implementation of the Financial Regulations and Financial Rules', and 'responsible and accountable to the Permanent Council for the proper application of the Staff Regulations and Staff Rules [, with the] Heads of institution and heads of mission [exercising] their responsibility to the Permanent Council in respect of their institutions/missions, through the Secretary General'[427]. He/she is responsible for the 'effective and efficient management' of the OSCE Secretariat[428] and '[o]versees the management of OSCE field operations and coordinating their operational work'[429]. As head of the Secretariat, the Secretary General is responsible for appointing or assigning 'all staff members of the Secretariat below Director level.'[430] Above this level, while he/she

[424] *Third Meeting of the Council, Summary of Conclusions, Decision on Peaceful Settlement of Disputes*, Stockholm 1992, (3STOCK92e), Decisions, The Secretary General of the CSCE, para. 2. See OSCE website: https://www.osce.org/mc/40342?download=true. Last accessed on 12 November 2019. See also OSCE Staff Regulation 3.02 Designation of the Secretary General and Heads of Institution, Article III Appoints and Assignments, SRSR. ('The Secretary General […] shall be appointed by the Ministerial Council in accordance with procedures and for periods established by it.'). However, Liechtenstein noted that '[w]hile every single State has an equal say, in practice, a candidate is well positioned to win the race if he or she has the support of the three key players within the OSCE, notably the European Union member states as a bloc, the United States of America, and the Russian Federation'. S. Liechtenstein., *supra,* note 361, 14 March 2017.

[425] See Decision No. 3/08 Periods of Service of the OSCE Secretary General, (OSCE Doc. MC.DEC/3/08 of 22 October 2008). See OSCE website: https://www.osce.org/mc/34663?download=true. Last accessed on 11 September 2019.

[426] OSCE Staff Regulation 1.01 Terminology, Article I General, SRSR.

[427] See OSCE Staff Regulation 1.05 (a) Accountability, 'The Secretary General shall be responsible and accountable to the Permanent Council for the proper application of the Staff Regulations and Staff Rules. In this regard, heads of institution and heads of mission shall exercise their responsibility to the Permanent Council in respect of their institution/mission, through the Secretary General'. See also Ministerial Council Decision No. 15/04 Role of the OSCE Secretary General (OSCE Doc. MC.DEC/15/04 of 7 December 2004), at para. 3. See OSCE website: https://www.osce.org/mc/29705?download=true. Last accessed on 27 November 2019.

[428] Ibid. See also OSCE Ministerial Council Decision No. 15/04 Role of the OSCE Secretary General (OSCE Doc. MC.DEC/15/04 of 7 December 2004), at para. 9.

[429] Ibid, para. 7.

[430] OSCE Staff Regulation 3.05(a) Appointments or Assignments of Other Staff, Article III Appointments and Assignments, SRSR.

appoints 'Directors in the Secretariat' with the 'consent of the Chairmanship'[431], he/she, along with the respective head of institution or mission, is merely consulted by Chairmanship in the appointments of directors[432] and deputy heads[433] of institutions and missions[434]. At the same time, the Secretary General supports the co-ordinated planning, implementation and evaluation of the OSCE's programmatic activities[435]. Notwithstanding the fact that the 'Secretary General shares the OSCE leadership with the OSCE Chairmanship'[436], the Secretary General's relationship with the CiO may be described as 'subordinate' in many respects[437], acting as the representative of the CiO and supporting him/her in all activities aimed at fulfilling the goals of the OSCE by, *inter alia,* providing expert, advisory, material, technical and other support which may include background information, analysis, advice, draft decisions, draft statements, summary records and archival support[438]. He/she further '[s]upports the process of political dialogue and negotiations among participating States, in particular through the preparation and implementation of decisions and through assisting the Chairmanship in the preparation and conduct of meetings'[439]. While the Secretary General of the OSCE also has political tasks,

[431] OSCE Staff Regulation 3.04 (a) Designation of Directors in the Secretariat, Deputy Heads of Institution and Mission and Directors in the Institutions and Missions, Article III Appointments and Assignments, SRSR. See also Ministerial Council Decision No. 15/04 Role of the OSCE Secretary General (OSCE Doc. MC.DEC/15/04 of 7 December 2004), at para. 10.
[432] OSCE Staff Regulation 3.04 (c) Designation of Directors in the Secretariat, Deputy Heads of Institution and Mission and Directors in the Institutions and Missions, Article III Appointments and Assignments, SRSR.
[433] OSCE Staff Regulation 3.04 (b) Designation of Directors in the Secretariat, Deputy Heads of Institution and Mission and Directors in the Institutions and Missions, Article III Appointments and Assignments, SRSR.
[434] While the 'appointment of heads of mission is the responsibility of the Chairmanship', the Secretary General '[c]ountersigns letters of appointment for heads of mission as Chief Administrative Officer of the OSCE and informs the appointed head of mission of the applicable rules and regulations. Ministerial Council Decision No. 15/04 Role of the OSCE Secretary General, (OSCE Doc. MC.DEC/15/04 of 7 December 2004), para. 8. See also OSCE Staff Regulation 3.03 (a) Designation of Heads of Mission and Representatives of the Chairmanship, Article III Appointments and Assignments, SRSR.
[435] See Ministerial Council Decision No. 15/04 Role of the OSCE Secretary General, (OSCE Doc. MC.DEC/15/04 of 7 December 2004), at para. 11.
[436] See S. Liechtenstein., *supra,* note 361, 14 March 2017.
[437] See Annex I of the Summary of Conclusions of the Stockholm Meeting of the CSCE Council (15 December 1992). The Secretary General of the CSCE, Mandate 5(i) 'The Secretary General will act as the representative of the Chairman-in-Office and will support him/her in all activities aimed at fulfilling the goals of the CSCE […]'. See A. Bloed., *supra,* note 4, (Martinus Nijhoff Publishers, 26 October 1993), at p. 17.
[438] Ministerial Council Decision No. 15/04 Role of the OSCE Secretary General, para. 2.
[439] Ibid, para. 4.

these appear to be somewhat limited[440]. As the representative of the CiO, he/she has a responsibility to publicize OSCE policy and practices and is entitled to make public statements on behalf of the Organization as a whole[441]. He/she ensures the effective and continuous working contacts with other international organizations and institutions[442]. The Secretary General is also the focal point for co-ordination and consultations among OSCE Institutions[443], while respecting their mandates, as provided under MC Decision No. 18/06[444]. He/she may bring to the attention of the decision-making bodies, in consultation with the Chairmanship, any matter relevant to his/her mandate[445].

2.8. Entities designated OSCE institutions

Within the institutional structure of the OSCE human dimension, there are three special bodies known as 'institutions' within the OSCE executive structures.

2.8.1. OSCE Office for Democratic Institutions and Human Rights (ODIHR)

First, as the OSCE's main institution of the human dimension, and 'one the world's principal regional human rights bodies'[446], the OSCE Office for Democratic Institutions

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[440] That said, Liechtenstein also notes that, unlike the UN Secretary-General, for example, whose 'political role has grown in the course of the years [the result is that today States expect the UN Secretary-General to speak out and take action on all relevant matters of international peace and security]', the OSCE Secretary General 'is kept in check by States and the Chairmanship'. Accordingly, Liechtenstein argues that the OSCE's leadership model is not up to date. See S. Liechtenstein., *supra,* note 361, 14 March 2017.

[441] OSCE Ministerial Council Decision No. 15/04, *supra,* note 188, at para. 2. Moreover, OSCE Ministerial Council Decision No. 3/11 Elements of the Conflict Cycle, Related to Enhancing the OSCE's Capabilities in Early Warning, Early Action, Dialogue Facilitation and Mediation Support, and Post-Conflict Rehabilitation' (OSCE Doc. MC.DEC/3/11 of 7 December 2011). See OSCE website: https://www.osce.org/mc/86621?download=true. Last accessed on 27 November 2019.

[442] Ibid.

[443] As provided by Section 1 of OSCE Ministerial Council Decision No. 18/06 Further Strengthening the Effectiveness of OSCE Executive Structures (MC.DEC/18/06) 5 December 2006. See OSCE website: https://www.osce.org/mc/29705?download=true. Last accessed on 27 November 2019.

[444] OSCE Ministerial Council Decision No. 18/06 Further Strengthening the Effectiveness of OSCE Executive Structures (OSCE Doc. MC.DEC/18/06 of 5 December 2006). See OSCE website: https://www.osce.org/mc/23120?download=true. Last accessed on 27 November 2019.

[445] OSCE Ministerial Council Decision No. 15/04, *supra,* note 188, at para. 5.

[446] See OSCE website, OSCE Office for Democratic Institutions and Human Rights, 'Who we are': https://www.osce.org/odihr/who-we-are. Last accessed on 27 November 2019.

and Human Rights (ODIHR), with its seat in Warsaw, Poland, was originally created in 1990 by *Charter of Paris* as the 'Office for Free Elections'[447] to help promote democratic elections and their observation[448]. When it became clear two years later that 'elections in line with OSCE commitments and other international standards are only a part of a democratic system'[449], in order to extend practical co-operation among participating States in the Human Dimension[450], the Office's mandate was broadened significantly and it was renamed the ODIHR; the Office was given additional functions at the second Meeting of the CSCE Council of 30 and 31 January 1992, held in Prague, which adopted, *inter alia,* a decision on Further Development of CSCE Institutions and Structures[451]. The Helsinki Fourth Follow-Up Meeting of the CSCE[452] further elaborated this decision in greater detail, which vested ODIHR with an enhanced mandate to assist participating States to 'ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote the principles of democracy and, in this regard, to build, strengthen and protect democratic institutions, as well as to promote tolerance throughout society'[453]. Indeed, the Istanbul Summit in 1999 recognized ODIHR as one of the 'essential instruments in

[447] See *Charter of Paris for a New Europe,* Paris, 19-21 November 1990, New structures and institutions of the CSCE Process, ‚We decide to establish an Office for Free Elections in Warsaw to facilitate contacts and the exchange of information on elections within participating States.' See also *Factsheet of the OSCE Office for Democratic Institutions and Human Rights,* (Publisher: OSCE, 20 October 2017), 'What is ODIHR?'. See OSCE website: https://www.osce.org/odihr/13701?download=true. Last accessed on 27 November 2019.
[448] The Supplementary Document to Give Effect to Certain Provisions Contained in the Charter of Paris provided in Section G.1: ‚The function of the Office for Free Elections will be to *facilitate contacts and the exchanage of information on elections within participating States*. The Office will thus foster the implementation of paragraphs 6, 7 and 8 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE [...]' [emphasis added].
[449] See *OSCE Commemorative book: 40th anniversary of the Helsinki Final Act* (Publisher: OSCE, 1 December 2015), at p. 9. See OSCE website: https://www.osce.org/h40commemorativebook?download=true. Accessed on 27 November 2019.
[450] Ibid, at p. 14. ('OSCE's comprehensive approach to security, under which all OSCE participating States have agreed that lasting security cannot be achieved without respect for human rights and functioning democratic institutions').
[451] See Final Document of the Second Meeting of the CSCE Council of Ministers, Summary Conclusions, Prague Document on Further Development of CSCE Institutions and Structures, Declaration on Non-Proliferation and Arms Transfers, III Human Dimension, (Prague, 31 January 1992, Doc. 2PRAG92.e), at para. 9. See OSCE website: https://www.osce.org/mc/40270?download=true. Last accessed on 27 November 2019.
[452] See *CSCE Helsinki Document 1992 The Challenges of Change,* 9 – 10 July 1992, VI (2) Human Dimension. See OSCE website: https://www.osce.org/mc/39530?download=true. Last accessed on 27 November 2019.
[453] Ibid.

ensuring respect for human rights, democracy and the rule of law'[454], areas which it deemed to be 'at the core of the OSCE's comprehensive concept of security'[455]. As a result, ODIHR's mandate and taskings have grown over the years since its establishment, assisting in particular through monitoring implementation of human dimension commitments, holding human dimension meetings and through offering concrete programmes of support. In its activities, ODIHR has a crucial role in five broad areas: elections, reviewing legislation and advising governments on how to develop and sustain democratic institutions, and supporting civil society in developing greater capacity to aid in the development of these institutions[456]. It also conducts training programmes for government and law-enforcement officials and non-governmental organizations on how to uphold, promote and monitor human rights, and to counter intolerance and discrimination. Through its Contact Point for Rome and Sinti Issues[457], ODIHR advances the rights and participation in the political and economic life of their societies for Rome and Sinti individuals and communities. The Office also organizes the yearly Human Dimension Implementing meetings and a seminar, which reviews governments progress and give NGOs a platform to freely voice their concerns. The Office's personnel is composed of a Head of Institution known as the Director of ODIHR who is appointed for a period of three years by the Ministerial Council[458], upon the recommendation of the Permanent Council. While programmatic operations are carried out under the authority of the Director of ODIHR, he/she is accountable to the OSCE's decision-making bodies as fund manager and as Director of the Institution[459]. The Office employs nearly one hundred fifty (150) staff[460].

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[454] See *Istanbul Document* 1999, III. Our Common response, Our Institutions, January (Istanbul, 19 November 1999, Doc. 2000/Corr) at para. 18. See OSCE website: https://www.osce.org/mc/39569?download=true. Last accessed on 27 November 2019.
[455] Ibid, para. 19.
[456] See *Factsheet of the OSCE Office for Democratic Institutions and Human Rights – What is ODIHR?* (20 October 2017). See OSCE website: https://www.osce.org/odihr/13701?download=true. Last accessed on 27 November 2019.
[457] This was established in 1994.
[458] See OSCE Staff Regulation 3.02, Designation of the Secretary General and Heads of Institution, Article III Appointments and Assignments, SRSR. (,[…] the heads of institution shall be appointed by the Ministerial Council in accordance with procedures and for periods established by it.')
[459] In respect of the proper application of the Staff Reglations and Staff Rules, OSCE Staff Regulation 1.05(b), Accountability, SRSR, states that 'heads of institution […] shall exercise their responsibility to the Permanent Council in respect of their institution/[…], through the Secretary General.'
[460] See OSCE website, OSCE Office for Democratic Institutions and Human Rights, 'Who we are': https://www.osce.org/odihr/who-we-are. Last accessed on 15 September 2019.

Pursuant to Decision No. 3/17 of the OSCE Ministerial Council, on the Appointment of the Director of ODIHR, Ingibjörg Sólrún Gísladóttir (Iceland) has been the Director of ODIHR since 19 July 2017[461].

2.8.2. High Commissioner of National Minorities (HCNM)

Secondly, the post and mandate of the High Commissioner of National Minorities (HCNM)[462] was laid down in the Helsinki 1992 Document of July 1992[463] to act as a high-

[461] OSCE Ministerial Council Decision No. 3/17 Appointment of the Director of the Office for Democratic Insitutions and Human Rights, (OSCE Doc. MC.DEC/3/17 of 18 July 2017). See OSCE website: https://www.osce.org/chairmanship/361651?download=true. Last accessed on 12 November 2019. See also OSCE website, 'OSCE Office for Democratic Institutions and Human Rights', 'Director': https://www.osce.org/node/120670. Last accessed on 25 September 2019. Former ODIHR Directors are: 2014-2017: Michael Georg Link (Germany); 2008-2014: Janez Lenarčič (Slovenia); 2003-2008: Christian Strohal (Austria); 1997-2002: Gerard Stoudmann (Switzerland); 1994-1997: Audrey Glover (United Kingdom); 1991-1994: Luchino Cortese (Italy).

[462] Throughout this thesis, the terms ‚High Commissioner and ‚HCNM' are used interchangeably for the sake of readability.

[463] See CSCE High Commissioner on National Minorities Mandate in the *CSCE: Helsinki Document 1992, The Challenges of Change*, adopted at the July 9–10 Helsinki Summit, at Chapter I, paragraph (23), (The Council will appoint a High Commissioner on National Minorities. The High Commissioner provides "early warning" and, as appropriate, "early action" at the earliest possible stage in regard to tensions involving national minority issues that have the potential to develop into a conflict within the CSCE area, affecting peace, stability, or relations between participating States. The High Commissioner will draw upon the facilities of the Office for Democratic Institutions and Human Rights (ODIHR) in Warsaw.'). The mandate and method of work of the HCNM are regulated in Chapter II: CSCE High Commissioner on National Minorities (1) – (37): https://www.osce.org/mc/39530?download=true. Last accessed on 18 February 2019. For a general introduction to the mandate and to the problems of the HCNM, see H. Zaal, *The CSCE High Commissioner on National Minorities,* in *Helsinki Monitor,* 1992, Vol. 3 No. 4, pp. 33-37 and also A. Zaagman., 'The CSCE High Commissioner on National Minorities: An Analysis of the Mandate and the Institutional Context', in A. Bloed (ed.) *The Challenges of Change: The Helsinki Summit of the CSCE and Its Aftermath,* (London, Martinus Nijhoff Publishers, 1994). See also A. Bloed., 'The High Commissioner on National Minorities: Origins and Background', *Journal on Ethnopolitics and Minority Issues in Europe (JEMIE),* Vol 12, No. 3, 2013, 15-24, at p. 20. ('Th[e] [HCNM] mandate leads to many questions which remained unanswered in the text, such as: what exactly is "the earliest possible stage" or what are "tensions" or "national minority issues". What does it mean that tensions "have not yet developed beyond an early warning stage" and what exactly is meant by "an early warning stage"?'). Available at European Centre for Minority Issues (ECMI) website: https://www.ecmi.de/fileadmin/downloads/publications/JEMIE/2013/Bloed.pdf. Last accessed on 6 September 2019.

ranking [464] and independent [465] instrument of conflict prevention [466]. The HCNM is appointed by the Ministerial Council by consensus upon the recommendation of the Permanent Council for a period of three years[467]. At the Stockholm Meeting of the CSCE Council of Ministers for Foreign Affairs (15 December 1992), Max van der Stoel (the Netherlands), was appointed the first High Commissioner and took office in January 1993 [468]. Former OSCE Secretary General, Lamberto Zannier, is the current High Commissioner, having taken up the HCNM's mandate on 19 July 2017[469]. Working from a modest office in The Hague, the Netherlands, with approximately thirty (30) staff [470], the

[464] In relation to the of the High Commissioner, it has been agreed that he/she should be 'an eminent international personality with longstanding relevant experience from whom an impartial performance of the function may be expected'. See *CSCE: Helsinki Document 1992, The Challenges of Change*, adopted at the July 9–10 Helsinki Summit, Helsinki Decisions, Chapter II (8) CSCE High Commissioner on National Minorities, Profile, appointment, support.

[465] See OSCE HCNM, ‚Mandate' (‚The High Commissioner does not require the approval of the Permanent Council or of the state concerned to get involved. He acts in confidence and independently of all parties concerned, although speeches, news and publications are available to the public. He does not deal with individual cases or situations involving organized acts of terrorism, or communicate with any person or organization that practices or publicly condones terrorism or violence'). Available at OSCE wesbite: https://www.osce.org/hcnm/107878. Last accessed on 6 September 2019.

[466] See OSCE website, OSCE High Commissioner on National Minorities, 'Who we are' ('The High Commissioner is a conflict-prevention instrument but takes a cross-dimensional approach.'): https://www.osce.org/hcnm/107876. Last accessed on 15 September 2019.

[467] CSCE High Commissioner on National Minorities, Mandate, *CSCE: Helsinki Document 1992, The Challenges of Change*, adopted at the July 9–10 Helsinki Summit, at Chapter II, paragraph (9). For latest appointment decision, see OSCE Ministerial Council Decision No. 1/17 Appointment of the OSCE High Commissioner on National Minorities, (OSCE Doc. MC.DEC/1/17 of 18 July 2019). See OSCE website: https://www.osce.org/chairmanship/361796?download=true. Last accessed on 12 November 2019.

[468] See Annex 1 of the *Summary of Conclusions of the Stockholm Meeting of the CSCE Council,* Decisions, 3. High Commissioner on National Minorities. See OSCE website: https://www.osce.org/mc/40342?download=true. Last accessed on 15 September 2019. Previous High Commissioners were: Max van der Stoel (the Netherlands): December 1992 – July 2001; Rolf Ekéus (Sweden): July 2001 – July 2007; Knut Vollbaek (Norway): July 2007 – August 2013; Astrid Thors (Finland): July 2013 – August 2016.

[469] See OSCE website, OSCE High Commissioner on National Minorities, 'Lamberto Zannier': https://www.osce.org/node/107881. Last accessed on 15 September 2019. ('Before taking up the position of High Commissioner, Zannier was OSCE Secretary General for two consecutive three-year terms, from 1 July 2011 until 30 June 2017.').

[470] This includes international and local personnel. See OSCE website, OSCE High Commissioner on National Minorities, 'Who we are': https://www.osce.org/hcnm/107876. Last accessed on 15 September 2019. See also H. Villadsen., 'The Director's Chair: Behind the Scenes at the HCNM Henrik Villadsen, Director', *HCNM at 25: Personal Reflections of the High Commissioners*, Core Institute for Peace Research and Security Policy at the University of Hamburg, OSCE HCNM, (Published by the OSCE High Commisioner on National Minorities (HCNM), 2018), at p. 7. See OSCE website: https://www.osce.org/hcnm/402845?download=true. Last accessed on 15 September 2019. ('The authority of the institution is invested in one person alone; however, the High Commissioner does not work alone. He or she is supported by a dedicated team of legal, political, and project specialists, most of whom join the institution already with extensive experience in working across the OSCE region, and a deep understanding of their areas of specialization. In practical terms, visits of the High Commissioner are prepared in advance

HCNM has a broad mandate to provide 'early warning' and, as appropriate, 'early action' at the earliest possible stage with regard to tensions relating to national minority issues that have the potential to develop into a conflict within the OSCE area, affecting peace, stability or relations between participating States[471]. For these purposes, the High Commissioner is required to collect and assess information on national minority issues, *inter alia,* through country-visits in order to obtain first-hand information from all parties. The HCNM reports directly to the Chairperson-in-Office on these visits, submitting confidential reports that provide an assessment of the situation at hand and may draw the Chairperson's attention to issues requiring further action if the participating State is not meeting its political commitments or international norms[472]. Based on the institution's unique experience, the HCNM publishes thematic Recommendations and Guidelines that give advice on common challenges and best practice[473]. The High Commissioner also provides structural support through small collaborative projects that aim to achieve sustainability thorough increasing local ownership[474].

2.8.3. OSCE Representative on Freedom of the Media (RFOM)

In addition to two special representatives, the last of the institutions is the office of OSCE Representative on Freedom of the Media (RFOM) based in Vienna, Austria. In 1996, the

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by staff teams working out of his office in The Hague, in constant communication with the authorities of the countries concerned.').

[471] See CSCE High Commissioner on National Minorities Mandate in the *CSCE: Helsinki Document 1992, The Challenges of Change*, adopted at the July 9–10 Helsinki Summit, at Chapter II, paragraph (3). See also OSCE website, ‚OSCE High Commissioner on National Minorities': https://www.osce.org/hcnm. Last accessed on 15 September 2019 ('Much of the day-to-day work is in identifying and addressing causes of ethnic tensions and conflicts. The High Commissioner addresses the short-term triggers of inter-ethnic tension or conflict and long-term structural concerns.'). 'Two formal "early warnings", as defined in the mandate, have been issued: on the former Yugoslav Republic of Macedonia in 1999 and on Kyrgyzstan in 2010'. See OSCE website, OSCE High Commissioner on National Minorities, 'Mandate': https://www.osce.org/hcnm/107878. Last accessed on 15 September 2019.

[472] To keep participating States informed on activities, the HCNM regularly addresses to the OSCE Permanent Council with general statements that do not reveal specific details.

[473] See *OSCE Commemorative book: 40th anniversary of the Helsinki Final Act* (Publisher: OSCE, 1 December 2015), at p. 25: https://www.osce.org/h40commemorativebook?download=true. Last accessed on 15 September 2019.
See OSCE website, Resources, Thematic Recommendations and Guidelines, OSCE High Commissioner on National Minorities: https://www.osce.org/hcnm/thematic-recommendations-and-guidelines. Last accessed on 15 September 2019.

[474] Ibid.

OSCE Lisbon Summit Declaration on freedom of expression and media mechanism was established[475] as an extension of the OSCE's focus on the human dimension and, in pursuant to Permanent Council Decision No. 193 of 5 November 1997, the Mandate of the OSCE RFOM was determined[476]. Representatives are appointed in accordance with OSCE procedures by the Ministerial Council upon the recommendation of the Chairman-in-Office after consultation with the participating States'[477] and 'serve for a period of three years which may be extended under the same procedure for one further term of three years.'[478] The office of the Representative is based in the OSCE Secretariat in Vienna, Austria, and has a staff of around 15[479]. The first RFOM was appointed in 1997[480] and Harlem Désir is the Forth and current OSCE Representative[481]. The OSCE RFOM has an early warning function and provides rapid response to serious non-compliance with regard to free media and freedom of expression. The OSCE participating States consider freedom of expression

[475] See *I. Lisbon Document 1996, Lisbon Summit Declaration*, Fifth OSCE Summit of Heads of State or Government, Lisbon, DOC.S/1/96 of 2-3 December 1996, at 11 ('Freedom of the press and media are among the basic prerequisites for truly democratic and civil societies. In the Helsinki Final Act, we have pledged ourselves to respect this principle. There is a need to strengthen the implementation of OSCE commitments in the field of the media, taking into account, as appropriate, the work of other international organizations. We therefore task the Permanent Council to consider ways to increase the focus on implementation of OSCE commitments in the field of the media, as well as to elaborate a mandate for the appointment of an OSCE representative on freedom of the media to be submitted not later than to the 1997 Ministerial Council'). See OSCE website: https://www.osce.org/mc/39539?download=true. Last accessed on 6 September 2019.

[476] OSCE Permanent Council Decision No. 193, Mandate of the OSCE Representative on Freedom of the Media (PC.DEC/193 of 5 November 1997). See OSCE website: https://www.osce.org/pc/40131?download=true. Last accessed on 12 November 2019. See also OSCE website, OSCE Representative on Freedom of the Media, Who we are, 'Mandate': ('[t]he mandate states that the Representative on Freedom of the Media should be an eminent international personality with long-standing relevant experience from whom an impartial performance of the function would be expected. In the performance of his or her duty the OSCE Representative on Freedom of the Media will be guided by his or her independent and objective assessment.') See OSCE website: https://www.osce.org/node/306336. Last accessed on 14 September 2019.

[477] OSCE Permanent Council Decision No. 193, Mandate of the OSCE Representative on Freedom of the Media (OSCE Doc. PC.DEC/193 of 5 November 1997), at para. 12. See OSCE website: https://www.osce.org/pc/40131?download=true. Last accessed on 27 November 2019.

[478] Ibid.

[479] See *OSCE Commemorative book: 40th anniversary of the Helsinki Final Act* (Publisher: OSCE, 1 December 2015), at p. 21. See OSCE website: https://www.osce.org/h40commemorativebook?download=true. Last accessed on 15 September 2019.

[480] The First Representative was Freimut Duve, (Germany): 1998-2004; Second Representative, Miklós Haraszti, (Hungary): 2004-2010; Third Representative, Dunja Mijatović, (Bosnia and Herzegovina): 2010-2017.

[481] See OSCE Ministerial Council Decision No. 2/17 Appointment of the OSCE Representative on Freedom of the Media, (OSCE Doc. MC.DEC/2/17 of 18 July 2017), in which Harlem Désir (France) was appointed by the Ministerial Council as RFOM for a period of three years from 19 July 2017. See OSCE website: https://www.osce.org/chairmanship/361826?download=true. Last accessed on 12 November 2019.

a fundamental and internationally recognized human right and a basic component of a democratic society [482]. In its activities, the Representative first observes media developments as part of an early warning function and secondly, helps participating States abide by their commitments to freedom of expression and free media[483]. This includes efforts to ensure the safety of journalists; assist with the development of media pluralism; promote decriminalization of defamation; combat hate speech while preserving freedom of expression; provide expert opinions on media regulation and legislation; promote online media freedom; and assist with the process of switching from analogue to digital broadcasting. In addition to routinely consulting with the Chairmanship and reporting on a regular basis to the Permanent Council[484], the Representative also holds annual regional media conferences, bringing together journalists, representatives of civil society and government, as well as academics, to discuss current media freedom issues[485].

2.9. OSCE related-bodies established by separate treaties

While established by separate treaties, three entities are directly related to the OSCE.

2.9.1. OSCE Court of Conciliation and Arbitration

In December 1992, the Stockholm CSCE Ministerial Council adopted the text of a 'Convention on Conciliation and Arbitration within the CSCE' [486] and opened it for signature. After the treaty entered into force in December 1994 when the requisite number

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[482] See OSCE website, 'OSCE Representative on Frredom of the Media': https://www.osce.org/representative-on-freedom-of-media. Last accessed on 15 September 2019.
See also *OSCE Commemorative book: 40th anniversary of the Helsinki Final Act* (Publisher: OSCE, 1 December 2015), at p. 19. See OSCE website: https://www.osce.org/h40commemorativebook?download=true. Last accessed on 14 September 2019.
[483] Ibid.
[484] Ibid. This is usually twice a year.
[485] Ibid.
[486] See *Third Meeting of the Council Summary of Conclusions Decision on Peaceful Settlement of Disputes*, Stockholm, 1992, (3STOCK92.e), Annex 2. See OSCE website: https://www.osce.org/mc/40342?download=true. Last accessed on 27 November 2019. For Convention, see OSCE website: https://www.osce.org/cca/111409?download=true. Last accessed on 27 November 2019.

of twelve ratifications[487] were received, the OSCE Court of Conciliation and Arbitration (OSCE CCA) was established in Geneva in May 1995. The Court's mandate is to settle, by means of conciliation, and, where appropriate, arbitration, disputes which are submitted to it in accordance with the provisions of the Convention[488]. Despite its name, the OSCE CCA is not formally part of the OSCE's institutional structure and in contrast to other courts, it has no permanent organs. The necessary conciliation commissions and arbitral tribunals are instead created on an *ad hoc* basis. Indeed, there has been considerable doubt about the efficacy of the Convention, it being recited by major OSCE States from the outset that the treaty is 'superfluous and deviat[es] from the political character of the OSCE'[489]. The treaty has been ratified by 34 signatories out of a total of 57 participating States within the OSCE and, perhaps unsurprisingly, to date the jurisdiction of the Court has never been invoked[490].

[487] See Article 33(3), Chapter V – Final Provisions Signature and Entry into Force, Convention on Conciliation and Arbitration within the OSCE, adopted by the Council of Ministers at its meeting held on 15 December 1992 in Stockholm, as part of the Decision on Peaceful Settlement of Disputes.

[488] Ibid, Article 1 Establishment of the Court Chapter 1 – General Provisions. See OSCE website: 'Court of Conciliation and Arbitration – Mandate': https://www.osce.org/cca/107470. Last accessed on 27 November 2019. See also 2010 OSCE Review Conference 'Overview of the Court of Conciliation and Arbitration within the OSCE', (OSCE Doc. RC.GAL/4/10 of 28 September 2010). Here, it was noted that, '[i]n addition to its role in dispute settlement, the Court's function is to provide States Parties with high-level legal studies and advice in the area of international law and interpretation of the commitments undertaken within the framework of the OSCE'. See OSCE website: https://www.osce.org/home/71491?download=true. Last accessed on 27 November 2019. For conciliation and arbitration procedures, see also ‚Rules of the Court of Conciliation and Arbitration within the OSCE, 1 February 1997. See OSCE website: https://www.osce.org/cca/40108?download=true. Last accessed on 27 November 2019.

[489] According to Bloed, ‚the Stockholm Convention seems to be rather a political symbol than an effective instrument for peaceful settlement of disputes. From the very outset major OSCE states (such as the USA, the United Kingdom, Turkey, the Netherlands) have announced that they will not sign the convention as they consider it to be superfluous and deviating from the political character of the OSCE. From a strictly legal point of view, however, the Stockholm Convention also raises particular questions. On the basis of this treaty a ‚Court of Conciliation and Arbitration' has been established. It remains an open question what a legal instrument as such a court has to do with a strictly political settlement procedure as conciliation. It would not be surprising if the Stockholm system with the Geneva court will never be used in practice in the near future'. See A. Bloed. ‚The OSCE from Process to Organization: A Brief Introduction', *The Conference on Security and Co-operation in Europe. Basic Documents, 1993-1995.* (A. Bloed ed), xix.

[490] See C. Tomuschat., 'Conciliation within the framework of the OSCE Court of Conciliation and Arbitration: An Assessment from the Viewpoint of Legal Policy', in *Conciliation in International Law – The OSCE Court of Conciliation and Arbitration,* C. Tomuschat, R. Pisillo Mazzeshchi and D. Thürer (eds), (BRILL/Nijhoff, November, 2016), at p. 83.

2.9.2. Joint Consultative Group and Open Skies Consultative Commission

In addition to the OSCE CCA established by the Convention on Conciliation and Arbitration, two other treaty bodies negotiated in the framework of the OSCE may be mentioned. First, the Joint Consultative Group (JCG) is a body established by the 1990 Treaty on Conventional Armed Forces in Europe (CFE)[491], deals with questions relating to compliance of the 30 State members with its provisions on arms control[492]. Secondly, the Open Skies Consultative Commission (OSCC) is the implementing body of the 1992 Open Skies Treaty[493], an arms control agreement which in 2002 established a regime of unarmed aerial observation flights over the territories of its 34 signatories[494]. Both entities regularly meet at OSCE premises in Vienna, Austria, and are serviced under its auspices[495].

2.10. Ad hoc bodies/OSCE missions and field operations

Finally, the institutional structure of the OSCE also encompasses a number of *ad hoc* bodies of central importance to the work of the Organization[496]. These *ad hoc* bodies are, in particular, OSCE missions or field operations[497] and other field-related activities in the OSCE area. Pursuant to a decision of the 15th Meeting of the Committee of Senior Officials

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[491] Treaty on Conventional Armed Forces in Europe (OSCE) (1991) 30 ILM 1 (Date signed: 19 November 1990) (Publisher: OSCE, 19 November 1990). See OSCE website: https://www.osce.org/library/14087?download=true. Last accessed on 30 October 2019.

[492] See OSCE website, 'OSCE-related bodies, Joint Consultative Group': https://www.osce.org/jcg. Last accessed on 30 October 2019.

[493] The Treaty on Open Skies was signed at Helsinki on 24 March 1992 (Publisher: OSCE, 24 March 1992). See OSCE website: https://www.osce.org/library/14127?download=true. Last accessed on 30 October 2019.

[494] See OSCE website, 'OSCE-related bodies, Open Skies Consultative Commission': https://www.osce.org/oscc. Last accessed on 30 October 2019.

[495] CSCE, Summit, *Helsinki Document: The Challenges of Change*, 9-10 July 1992, Decision V on the Forum for Security Co-operation, 'Conference services', para 43. ('The Executive Secretary may also, if so decided by those concerned, provide conference services for meetings of the CFE Joint Consultative Group and the Open Skies Consultative Commission. The Executive Secretary will assume full responsibility for the organization of all the relevant meetings as well as for all related administrative and budgeting arrangements, for which he will be accountable to the participating States according to procedures to be agreed.'). See OSCE website: https://www.osce.org/mc/39530?download=true. Last accessed on 30 October 2019.

[496] As noted by Liechtenstein, field operations are 'often referred to as the "crown jewels" of the OSCE.'. See also S. Liechtenstein., 'What is the future of OSCE field operations?', *Security and Human Rights Monitor,* 24 August 2013. See Security and Human Rights Monitor website: https://www.shrmonitor.org/future-osce-field-operations/. Last accessed on 31 October 2019.

[497] OSCE Staff Regulation 1.01 Terminology, Article I General, SRSR. *Mission* is defined as an OSCE field operation.

[now the Permanent Council], held in Prague on 14 August 1992, the three CSCE Missions of Long Duration in Kosovo, Sandjak and Vojvodina began their work on 8 September 1992, making them the first of the Organization's numerous field operations to be deployed[498]. Since these long-term missions were withdrawn in July 1993[499], OSCE field operations have been deployed in host countries in South-Eastern Europe, Eastern Europe, the South Caucasus and Central Asia, for a longer, but not unlimited period, and all of them are based on an individual tailor-made mandate, agreed by consensus of the participating States, that has to be extended after an initial duration of, usually, one year[500]. The basic purpose of the OSCE's field operations is to assist host countries in putting their 'OSCE commitments' into practice[501]. While most field operations have been deployed to enable the OSCE to tackle crises as they arise (so-called 'first generation field operations')[502], mandates have changed over time and concentrated on post-conflict rehabilitation instead ('second generation' field operations)[503], helping to restore trust among affected communities[504]. A third generation of field operations has been developed over time that focuses on providing assistance and capacity building through concrete projects that respond to the needs of host countries[505]. Field operations are only established with the agreement of the host country, and operate on bilateral Memoranda of Understanding

[498] See OSCE website: ,First CSCE field operations deployed': https://www.osce.org/who/timeline/1990s/08. Last accessed on 30 April 2019.
[499] While some missions have grown, others have shrunk in size or closed entirely. See OSCE website, 'Closed field operations and related field activities': https://www.osce.org/closed-field-operations. Last accessed on 15 September 2019.
[500] See W. Zellner et al., 'Forms and Mandates',in *The Future of OSCE Field Operations (Options),* OSCE Network of Think Tanks and Academic Institutions (December 2014), at p. 12. See OSCE website: https://www.osce.org/networks/129791?download=true. Last accessed on 6 September 2019.
[501] See *OSCE Factsheet*: What is the OSCE? (OSCE, 19 September 2019), at p. 7. See OSCE website: https://www.osce.org/whatistheosce/factsheet?download=true. Last accessed on 31 October 2019.
[502] See also S. Liechtenstein., *supra,* note 496, 24 August 2013.
[503] Ibid.
[504] See *OSCE Factsheet*: What is the OSCE? (OSCE, 19 September 2019), at p. 6. See OSCE website: https://www.osce.org/whatistheosce/factsheet?download=true. Last accessed on 31 October 2019.
[505] See *OSCE Factsheet*: What is the OSCE? (OSCE, 25 March 2019), at p. 7. See OSCE website: https://www.osce.org/whatistheosce/factsheet?download=true. Last accessed on 30 April 2019. ('[Such needs] include initiatives to support law enforcement, minority rights, legislative reform, the rule of law and media freedom, promote tolerance and non-discrimination, as well as many other areas. A number of field operations contribute to early warning and conflict prevention. In accordance with their respective mandates, some field operations also monitor and report on developments on the ground. A number of field operations, enabling them to manage crises and to play a critical post-conflict role.'). See OSCE website, 'Where we are': https://www.osce.org/where-we-are. Last accessed 15 September 2019. See also S. Liechtenstein., *supra,* note 496, 24 August 2013.

(MOU) or other instruments concluded between the host state and the OSCE[506]. While there is no officially agreed-upon definition of the term 'OSCE field operation'[507], it may be noted that there are currently sixteen (16) activities with this same term[508], which for largely political reasons carry different designations[509]: there are eight 'missions': the OSCE Mission to Bosnia and Herzegovina (BiH)[510], the OSCE Mission to Montenegro (MtMon)[511], the OSCE Mission to Serbia (OMiS)[512], the OSCE Mission in Kosovo

[506] See W. Zellner et al., 'Forms and Mandates', in *The Future of OSCE Field Operations (Options),* OSCE Network of Think Tanks and Academic Institutions (December 2014), at p. 3. See OSCE website: https://www.osce.org/networks/129791?download=true. Last accessed on 31 October 2019.
[506] For a comprehensive overview of OSCE field operations, see Survey of OSCE Field Operations (SEC.GAL/116/19/Rev.1 of 20 June 2019). See OSCE website: https://www.osce.org/secretariat/74783?download=true. Last accessed on 15 September 2019.
[507] See W. Zellner et al., 'Forms and Mandates', in *The Future of OSCE Field Operations (Options),* OSCE Network of Think Tanks and Academic Institutions (December 2014), at p. 11. See OSCE website: https://www.osce.org/networks/129791?download=true. Last accessed on 31 October 2019.
[508] For a comprehensive overview of OSCE field operations, see Survey of OSCE Field Operations (SEC.GAL/116/19/Rev.1 of 20 June 2019). See OSCE website: https://www.osce.org/secretariat/74783?download=true. Last accessed on 15 September 2019.
[509] Ibid. Notably, ,[i]t has also been stated in OSCE forums and elsewhere that an OSCE field presence in a host nation is some sort of a black mark on that country. Having such a presence, it has been said, makes a negative statement concerning the ability of the country to handle its own problems.' See D. R. Nicholas., 'Conflict Prevention and Dispute Settlement – The OSCE Project Co-ordinator in Ukraine', in (ed.), *OSCE Yearbook 2004,* at p. 148.
[510] Establishment: CSCE Permanent Committee, 2 June 1994, Journal No. 23. OSCE Permanent Council Decision No. 145 (OSCE Doc. PC.DEC/40 of 4 May 1995). See OSCE website: https://www.osce.org/pc/20500?download=true. Last accessed on 6 January 2020. PC Decision No. 145 decided to extend the mandate of the OSCE Mission to Sarajevo until 31 December 1995. Transformation: The 5th Meeting of the Ministerial Council, Budapest, 8 December 1995 (MC(5).DEC/1), agreed that the Mission in Sarajevo would be expanded and reorganized into a distinct section of the new OSCE Mission to Bosnia and Herzegovina. Terms of Reference: ibid. General Framework Agreement for Peace in Bosnia and Herzegovina (Proximity Peace Talks. Wright-Patterson Air Force Base, Dayton, Ohio, November 1-21, 1995 (REF.PC/716/95/Rev.1)), (OSCE Permanent Council Decision No. 145 (OSCE Doc. PC.DEC/40 of 4 May 1995). See OSCE website: https://www.osce.org/pc/20500?download=true. Last accessed on 6 January 2020.
[511] The Mission was established by Permanent Council Decision No. 732 Establishment of the OSCE Mission to Montenegro (OSCE Doc. PC.DEC/732 of 29 June 2006). See OSCE website: https://www.osce.org/pc/19691?download=true. Last accessed on 6 January 2020.
[512] The Mission was established as the OSCE Mission to the Federal Republic of Yugoslavia by OSCE Permanent Council Decision No. 401 Establishment of the OSCE Mission to the Federal Republic of Yugoslavia (OSCE Doc. PC.DEC/401 of 11 January 2001). See OSCE website: https://www.osce.org/pc/22327?download=true. Last accessed on 6 January 2020.It was renamed the OSCE Mission to Serbia and Montenegro by OSCE Permanent Council Decision No. 533 Renaming the OSCE Mission to the Federal Republic of Yugoslavia (OSCE Doc. PC.DEC/533 of 13 February 2003). See OSCE website: https://www.osce.org/pc/43035?download=true. Last accessed on 6 January 2020; and then the OSCE Mission to Serbia by OSCE Permanent Council Decision No. 733 Renaming the OSCE Mission to Serbia and Montenegro (OSCE Doc. PC.DEC/733 of 29 June 2006). See OSCE website: https://www.osce.org/pc/19697?download=true. Last accessed on 6 January 2020.

(OMiK)[513], the OSCE Mission to Skopje (OMtS)[514], the OSCE Mission to Moldova (MtMol)[515], the OSCE Special Monitoring Mission to Ukraine (SMM), the OSCE's current

[513] Establishment: OSCE Permanent Council Decision No. 305 (OSCE Doc. PC.DEC/305 of 1 July 1999). See OSCE website: https://www.osce.org/pc/28795?download=true. Last accessed on 6 January 2020. Terms of Reference: OSCE Permanent Council Decision No. 218 (OSCE Doc. PC.DEC/218 of 11 March 1998). See OSCE website: https://www.osce.org/pc/20518?download=true. Last accessed on 6 January 2020. OSCE Permanent Council Decision No. 259 (OSCE Doc. PC.DEC/259/98 of 15 October 1998). See OSCE website: https://www.osce.org/pc/20584?download=true. Last accessed on 6 January 2020. NATO-FRY Agreement, 15 October 1998. OSCE-FRY Agreement, 16 October 1998. OSCE Permanent Council Decision No. 263 (OSCE Doc. PC.DEC/263 of 25 October 1998). See OSCE website: https://www.osce.org/pc/20595?download=true. Last accessed on 6 January 2020. Interpretative statement under paragraph 79 (Chapter 6) of the Final Recommendations of the Helsinki Consultations. OSCE Permanent Council Decision No. 265 (OSCE Doc. PC.DEC/265/Corr. Of 5 November 1998). See OSCE website: https://www.osce.org/pc/20597?download=true. Last accessed on 6 January 2020. OSCE Permanent Council Decision No. 266 (OSCE Doc. PC.DEC/266 of 11 November 1998). See OSCE website: https://www.osce.org/pc/20598?download=true. Last accessed on 6 January 2020. United Nations Security Council Resolution 1244 of 10 June 1999; UNSG Report, 12 June 1999 (S/1999/672); OSCE Permanent Council Decision No. 305 (OSCE Doc. PC.DEC/305 of 1 July 1999); and Exchange of Letters between Ambassador Kim Traavik, Head of OSCE Department, Norwegian Royal Ministry of Foreign Affairs and Bernard Miyet, USG UN Department of Peacekeeping Operations (DPKO), 19 July 1999.

[514] Establishment: 15th Committee of Senior Officials (CSO) Meeting, 14 August 1992, 15-CSO/Journal No. 2, Annex 1. See OSCE website: https://www.osce.org/documents/16159?download=true. Last accessed on 7 January 2020. 16th Committee of Senior Officials (CSO) Meeting, 18 September 1992, 16-CSO/Journal No. 3, Annex 1. 17th CSO Meeting, 6 November 1992, 17-CSO/Journal No. 2, Annex 3 'Articles of Understanding concerning the CSCE Spillover Monitor Mission', 7 November 1992. Modalities: OSCE Permanent Council Decision No. 218 (OSCE Doc. PC.DEC/218 of 11 March 1998). See OSCE website: https://www.osce.org/pc/20518?download=true. Last accessed on 7 January 2020. OSCE Permanent Council Decision No. 405 (OSCE Doc. PC.DEC/405 of 22 March 2001). See OSCE website: https://www.osce.org/pc/22022?download=true. Last accessed on 7 January 2020. OSCE Permanent Council Decision No. 414 (OSCE Doc. PC.DEC/414 of 7 June 2001). See OSCE website: https://www.osce.org/pc/21259?download=true. Last accessed on 7 January 2020. OSCE Permanent Council Decision No. 437 (OSCE Doc. PC.DEC/437/Corr.1 of 6 September 2001). See OSCE website: https://www.osce.org/pc/20166?download=true. Last accessed on 7 January 2020. OSCE Permanent Council Decision No. 439, 28 September 2001 (PC.DEC/439). See OSCE website: https://www.osce.org/pc/20107?download=true. Last accessed on 7 January 2020. OSCE Permanent Council Decision No. 457 (OSCE Doc. PC.DEC/457 of 21 December 2001). See OSCE website: https://www.osce.org/pc/18088?download=true. Last accessed on 7 January 2020. OSCE Permanent Council Decision No. 524 (OSCE Doc. PC.DEC/524 of 19 December 2002). See OSCE website: https://www2.osce.org/pc/12542?download=true. Last accessed on 7 January 2020. The OSCE Spillover Monitor Mission to Skopje was renamed the OSCE Mission to Skopje by OSCE Permanent Council Decision No. 977 (OSCE Doc. PC.DEC/977 of 16 December 2010). See OSCE website: https://www.osce.org/pc/75225?download=true. Last accessed on 7 January 2020.

[515] Establishment: 19th CSO Meeting, 4 February 1993, 19-CSO Journal No. 3/Annex 3. Terms of Reference: 7th Meeting of the CSO Vienna Group, 11 March 1993, Annex 1 (Approved by the CSO Vienna Group on a preliminary basis only. The CSO gave final approval of the terms of reference at its 21st meeting on 28 April 1993 (Decision k)). 21st CSO Meeting, 28 April 1993, 21-CSO Journal No. 3/(Corrected reissue), Decision 5(k). OSCE Permanent Council Decision No. 329, 9 December 1999 (PC.DEC/329). See OSCE website: https://www.osce.org/pc/28025?download=true. Last accessed on 7 January 2020.

largest field operation[516], the Observer Mission at the Russian Checkpoints Gukovo and Donetsk (OM)[517]; one 'presence': the OSCE Presence in Albania[518]; three 'offices', OSCE Programme Office in Dushanbe (PoiD)[519], OSCE Programme Office in Nur-Sultan (PoiN)[520], OSCE Programme Office in Bishkek (POiB)[521]; one 'centre': the OSCE Centre

[516] OSCE Permanent Council Decision No. 1117 Deployment of an OSCE Special Monitoring Mission to Ukraine (OSCE Doc. PC.DEC/1117 of 21 March 2014). See OSCE website: https://www.osce.org/pc/116747?download=true. Last accessed on 7 January 2020.

[517] Establishment: OSCE Permanent Council No. 1130 Deployment of OSCE Observers to Two Russian Checkpoints on the Russian-Ukrainian Border (OSCE Doc. PC.DEC/1130 of 24 July 2014). See OSCE website: https://www.osce.org/pc/121826?download=true. Last accessed on 7 January 2020.

[518] Establishment: OSCE Permanent Council No. 158 (OSCE Doc. PC.DEC/158, of 20 March 1997). See OSCE website: https://www.osce.org/pc/20431?download=true. Last accessed on 7 January 2020. OSCE Permanent Council No 160 (OSCE Doc. PC.DEC/160 of 27 March 1997). See OSCE website: https://www.osce.org/pc/42380?download=true. Last accessed on 7 January 2020. OSCE Permanent Council Decision No. 206 (OSCE Doc. PC.DEC/206 of 11 December 1997). See OSCE website: https://www2.osce.org/pc/21312?download=true. Last accessed on 7 January 2020. OSCE Permanent Council Decision No 218 (OSCE Doc. PC.DEC/218 of 11 March 1998). See OSCE website: https://www.osce.org/pc/20518?download=true. Last accessed on 7 January 2020. Update of Mandate of the Presence: OSCE Permanent Council Decision No. 588 Mandate of the OSCE Presence in Albania (OSCE Doc. PC.DEC/588 of 18 December 2003). See OSCE website: https://www.osce.org/pc/20402?download=true. Last accessed on 7 January 2020.

[519] Establishment: The OSCE Mission to Tajikistan was established with Decision I.4 at the 4th Meeting of the Council, Rome, 1 December 1993. Change of mandate and change of name to the OSCE Centre in Dushanbe: OSCE Permanent Council No. 500/Corrected reissue* Mandate of the OSCE Centre in Dushanbe (OSCE Doc. PC.DEC/500/Corr.1 of 31 October 2002). See OSCE website: https://www.osce.org/pc/12764?download=true. Last accessed on 7 January 2020. The mandate of the OSCE Centre in Dushanbe expired on 30 June 2008. The OSCE Office in Tajikistan was established by OSCE Permanent Council Decision No. 852 Mandate of the OSCE Office in Tajikistan (PC.DEC/852 of 19 June 2008), replacing the OSCE Centre in Dushanbe. See OSCE website: https://www.osce.org/pc/32467?download=true. Last accessed on 7 January 2020. Revision of Mandate: OSCE Permanent Council Decision No. 1251 Programme Office in Dushanbe (OSCE Doc. PC.DEC/1251 of 1 June 2017), which renamed the Office as the OSCE Programme Office in Dushanbe, with effect from 1 July 2017. See OSCE website: https://www.osce.org/permanent-council/322446?download=true. Last accessed on 7 January 2020.

[520] See OSCE Programme Office in Nur-Sultan, 'Mandate' ('As of 21 March 2019 the name of the Programme Office in Astana was changed to Programme Office in Nur-Sultan following a name change of Kazakhstan's capital. The change is reflected in the Journal of the 1221st Plenary Meeting of the OSCE Permanent Council. The Mandate remains unchanged'). See OSCE website: https://www.osce.org/programme-office-in-nur-sultan/106449. Last accessed on 6 September 2019. Establishment: OSCE Permanent Council Decision No. 243 (OSCE Doc. PC.DEC/243 of 23 July 1998). See OSCE website: https://www.osce.org/pc/40133?download=true. Last accessed on 7 January 2020. Revision of Mandate: OSCE Permanent Council Decision No. 797 Mandate of the OSCE Centre in Astana (OSCE Doc. PC.DEC/797 of 21 June 2007). See OSCE website: https://www.osce.org/pc/25836?download=true. Last accessed on 7 January 2020. Revision of Mandate: OSCE Permanent Council Decision No. 1153 OSCE Programme Office in Astana (OSCE Doc. PC.DEC/1153/Corr.1 of 18 December 2014). See OSCE website: https://www.osce.org/permanent-council/133946?download=true. Last accessed on 7 January 2020.

[521] Establishment: OSCE Permanent Council Decision No. 245 (OSCE Doc. PC.DEC/245 of 23 July 1998). See OSCE website: https://www.osce.org/pc/40155?download=true. Last accessed on 7 January 2020. Additions: OSCE Permanent Council Decision No. 339 Establishment of an OSCE Field Office in Osh, Kyrgyzstan (OSCE Doc. PC.DEC/339 of 10 February 2000). See OSCE website: Last accessed on 7 January 2020. OSCE Permanent Council Decision No. 947 OSCE Police Advisory Group to Kyrgyzstan (OSCE Doc.

in Ashgabat (CiA)[522]; two project co-ordinators': OSCE Project Co-ordinator in Ukraine (PCU)[523]; OSCE Project Co-ordinator in Uzbekistan (PCUz)[524]; and, the Personal Representative of the OSCE Chairperson-in-Office on the conflict dealt with by the OSCE Minsk Conference, based in Tblisi, Georgia[525]. In addition to their headquarters, some field operations also have field offices, regional centres, and/or training centres in their host countries[526]. For the most part, it has been noted that 'these different designations and mandates reflect the varying attitudes of host states towards the OSCE and its norms'[527]. While OSCE field operations vary in size, a Head is designated as the chief officer by the OSCE Chairmanship to each field operation[528], with the initial appointment by secondment

PC.DEC/947 of 22 July 2010) and OSCE Permanent Council Decision No. 961 (OSCE Doc. PC.DEC/961 of 18 November 2010). See OSCE website: https://www.osce.org/pc/70950?download=true. Last accessed on 7 January 2020. By OSCE Permanent Council Decision No. 1238 Extension of the Mandate of the OSCE Centre in Bishkek (OSCE Doc. PC.DEC/1238 of 27 January 2017), the Permanent Council decided to rename the OSCE Centre in Bishkek to the OSCE Programme Office in Bishkek starting from 1 May 2017 and to revise the mandate. See OSCE website: https://www.osce.org/pc/297276?download=true. Last accessed on 7 January 2020. Revision of Mandate: OSCE Permanent Council Decision No. 1250 Programme Office in Bishkek (OSCE Doc. PC.DEC/1250 of 27 April 2017). See OSCE website: https://www.osce.org/permanent-council/317106?download=true. Last accessed on 7 January 2020.

[522] Establishment: OSCE Permanent Council Decision No. 244 (OSCE Doc. PC.DEC/244 of 23 July 1998). See OSCE website: https://www.osce.org/pc/40139?download=true. Last accessed on 7 January 2020.

[523] Establishment: OSCE Permanent Council Decision No. 295, (OSCE Doc. PC.DEC/295 of 1 June 1999). See OSCE website: https://www.osce.org/pc/29031?download=true. Last accessed on 7 January 2020.

[524] The OSCE Centre in Tashkent was established by the OSCE Permanent Council Decision No. 397 (OSCE Doc. PC.DEC/397 of 14 December 2000). See OSCE website: https://www.osce.org/pc/12636?download=true. Last accessed on 7 January 2020. The OSCE Project Co-ordinator in Uzbekistan was established by OSCE Permanent Council Decision No. 734 OSCE Project Co-ordinator in Uzbekistan (OSCE Doc. PC.DEC/734 of 30 June 2006). See OSCE website: https://www.osce.org/pc/19717?download=true. Last accessed on 7 January 2020.

[525] The Chairperson-in-Office appointed as of 10 August 1995 a Personal Representative of the OSCE Chairperson-in-Office on the Conflict Dealt with by the OSCE Minsk Conference. The present Personal Representative (PR), Ambassador Andrzej Kasprzyk (Poland), was first appointed by the Chairperson-in-Office on 1 January 1997, having served as Acting Personal Representative since July 1996. See OSCE website, 'Chairperson-in-Office Representatives': https://www.osce.org/cio/andrzej-kasprzyk. Last accessed on 9 October 2019. ('Mandate The Personal Representative of the Chairperson-in-Office on the Conflict Dealt with by the OSCE Minsk Conference, based in Tbilisi, Georgia, represents and assists the Chairperson-in-Office on issues related to the Nagorno-Karabakh conflict, reports on activities to the CiO and, through him, to the Minsk Group and its co-chairs, and assists the parties to implement confidence-building and humanitarian measures').

[526] For example, the OSCE Mission to BiH, '[b]ased in the capital city of Sarajevo, […] relies on its network of 9 field offices to fully engage citizens and authorities at all levels – municipal, cantonal, entity, as well as State.' See OSCE website, OSCE Mission to Bosnia and Herzegovina': https://www.osce.org/mission-to-bosnia-and-herzegovina/who-we-are. Last accessed on 9 October 2019.

[527] See W. Zellner et al., 'Forms and Mandates', in *The Future of OSCE Field Operations (Options),* OSCE Network of Think Tanks and Academic Institutions (December 2014), at p. 11.

[528] Pursuant to OSCE Staff Regulation 1.01, Terminology, Article I General, Heads of Field Operations are commonly referred to as Heads of Mission (HoM). However, as shall be seen, since the OSCE has various forms of field presence in host countries, more specific terms are used according to the type of field presence,

normally for one year for a maximum period of three years, extendable for a final period of up to one year[529]. Heads of mission 'enjoy a high level of political and executive independence'[530], but they must report to the Chairmanship and the PC. Apart from field operations with longer mandates, there is a category of 'other field-relates activities, which include the OSCE Minsk Group[531], the High Level Planning Group[532] and the OSCE Representative to the Latvian-Russian Joint Commission on Military Pensioners[533]. Moreover, an even broader range of OSCE activities in all three dimensions that are implemented in the field include temporary activities, such as election observation

for example, Head of OSCE Mission, Head of OSCE Programme Office, Head of OSCE Centre, and OSCE Project Co-ordinator. It may also be noted that larger missions have a Deputy Head of Mission (DHoM), appointed by the Chairmanship, inconsultation with the respective Head of Field Operation and the Secretary General (see OSCE Staff Regulation 3.04(b); and he/she may serve in the same field operation for a maximum of seven years (see OSCE Staff Regulation 3.08(f)).

[529] See OSCE Staff Regulation 3.08 (e) Periods of Service, SRSR. With the adoption of OSCE Permanent Council Decision No. 760 Improving the Effectiveness and Efficiency of Human Resources of the OSCE, (PC.DEC/760 of 5 December 2006), the Permanent Council decided, *inter alia,* to encourage one-year duration secondment assignments, as well as their extensions. See OSCE website: https://www.osce.org/pc/23146?download=true. Last accessed on 5 December 2019.

[530] See W. Zellner et al., 'Forms and Mandates', in *The Future of OSCE Field Operations (Options),* OSCE Network of Think Tanks and Academic Institutions (December 2014), at p. 23.

[531] According to the OSCE, the 'Minsk Group, the activities of which have become known as the Minsk Process, spearheads the OSCE's efforts to find a peaceful solution to the Nagorno-Karabakh conflict. It is co-chaired by France, the Russian Federation, and the United States'. See OSCE website, ‚OSCE Minsk Group': https://www.osce.org/mg. Last accessed on 6 September 2019.

[532] The High Level Planning Group was established in 1994 in accordance with the Decisions of the Budapest Summit of the Heads of State or Government of the participating States of the CSCE 1994 (see *CSCE Budapest Document 1994, Towards A genuine Partnership In A New Era*, Budapest Decision II(4) Regional Issues, Intensification of CSCE action in relation to the Nagorno-Karabakh conflict, Corrected version 21 December 1994, at p. 6) with an open-ended mandate, issued on 23 March 1995, to make recommendations to the OSCE CiO on developing a plan for the establishment, force structure requirements and operation, of a possible future multinational OSCE peacekeeping force for the area of conflict dealt with by the OSCE Minsk Conference, namely Nagorno-Karabakh.

[533] On 30 April 1994 Latvia and Russia signed an Agreement *on the Social Welfare of Retired Military Personnel of the Russian Federation and their Family Members Residing on the Territory of the Republic of Latvia*. Article 2 of the above Agreement stipulates that *questions relating to the application of its provisions, including the stipulated rights of persons to whom the agreement applies, may be submitted by either Party for joint consideration by authorized representatives appointed for this purpose by the Latvian Party and the Russian Party, as well as by the representative or representatives of the CSCE*. At the 27th CSO Meeting on 15 June 1994, participating States welcomed requests made by Latvia and Russia for CSCE assistance in the implementation of the above Agreement and asked the Permanent Committee to work out the necessary modalities. Accordingly, the OSCE Representative to the Latvian-Russian Joint Commission on Military Pensioners was established pursuant to OSCE Permanent Council Decision No. 17, (OSCE Doc. PC.DEC/17 of 23 February 1995). See OSCE website: https://www.osce.org/pc/20221?download=true. Last accessed on 7 January 2020. It may also be noted that the function of the Personal Representative of the OSCE Chairperson-in-Office for Article IV, Annex 1-B of the General Framework Agreement for Peace in Bosnia and Herzegovina was discontinued 2015. See OSCE website: https://www.osce.org/article-iv-discontinued. Last accessed on 7 January 2020.

missions in various formats, all kinds of seminars, workshops, training and assessment missions, permanent institutions, such as the OSCE Academy in Bishkek[534] and the OSCE Border Management Staff College in Dushanbe[535].

2.11. Organization and regulation of administrative services

In the context of the classification of the OSCE as a 'unitary institution'[536], three aspects, in particular, may be highlighted: first, in outline, the formal structures of each of its organs; secondly, the human resources for staffing and administration; and, thirdly, the financing of the Organization. Throughout, particular attention will be paid to identifying the adequacy of the financial and human resources allocated to the OSCE and their consequences for any proposed internal justice reform and their chances of success.

2.11.1. Organizational structure of the OSCE

First, due in large part to the expressed desire of OSCE participating States to avoid transforming the CSCE/OSCE into a large, inflexible UN-type bureaucracy[537], it may again

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[534] See OSCE website, OSCE Academy in Bishkek: https://www.osce.org/what-we-do. Last accessed on 12 September 2019.
[535] See OSCE website, OSCE Border Management Staff College: https://www.oscebmsc.org/en/. Last accessed on 12 September 2019.
[536] See L. Tabassi., *supra*, note 21, (Cambridge, Cambridge University Press, May 2019), at p. 62.
[537] According to Bloed, there existed a ‚fear among a number of CSCE participating States of creating a new bureaucracy which might undermine existing [IOs], [and this is] ‚reflected in the fragmentation of offices [...], the limited mandate of a mainly administrative character for all [...] organs, and the minimal size of the staff'. A. Bloed, *supra,* note 2, at p. 15. For example, at the Stockholm meeting in 1992, the Council stressed that in ‚add[ing] further to the improvements in the operational capacity of the CSCE agreed in Paris and Helsinki[,]' Ministers 'confirmed that the CSCE should *retain its flexibility and openness, avoiding the creation of a bureaucracy*. Further evolution in CSCE institutions and procedures should be based on the CSCE's democratic rules. It should preserve the strength and diversity afforded by the basic political structure established by the Paris Summit, and should improve the effectiveness of the CSCE's daily work [emphasis added]'. See *Third Meeting of the Council Summary of Conclusions Decision on Peaceful Settlement of Disputes*, Stockholm, 1992, (3STOCK92.e), 7. Evolution of CSCE structures and institutions, at para. 7. At the 1993 Rome Council Meeting, it was stated that the [f]urther evolution of CSCE's operational capabilities will be based on the overriding objective of a non-bureaucratic, cost-efficient and flexible administrative structure which can be adapted to changing tasks'. *Fourth Meeting of the Council CSCE and the New Europe – Our Security is Indivisible - Decisions of the Rome Council Meeting,* Rome, 1993, Decisions of the Rome Council Meeting, VII. CSCE Structures and Operations, para. 5. Similarly, at the 1994 Budapest meeting, it was stressed that: ‚[i]n its organizational development the CSCE will remain flexible and dynamic'. *CSCE Budapest Document 1994 Towards A Genuine Partnership in A New Era,* Corrected version 21 December 1994, Budapest Decisions, I. Strengthening the CSCE, para. 29. See L. Tabassi., *supra*, note 21, (Cambridge,

be reiterated that the Organization has remained highly fragmented in both its structure and the location of its officials[538]. At the same time, although its officials and structures have vastly expanded since the early 1990s, the OSCE remains in many respects a relatively light Organization. Factors behind this include the types of appointment, the size of its staff and financing. In the area of its organizational structure, as shall be seen, while the OSCE remains outside the 'families'[539] or civil service 'systems' of other organizations[540], it would seem to have incorporated parts of their institutional components and, in particular, its SRSR, which would seem adapted to the staff regulations of functionally comparable IOs or families of IOs.

Cambridge University Press, May 2019), at p. 50. ('In practice, the absence of formal legal constraints and legal clearance processes for its decisions has resulted in an organisation that is flexible and able to move remarkably quickly to respond to crises or other needs in its region, is relatively small in view of its broad mandates, is not overly bureaucratic and is cost-effective. This flexibility is viewed by some as critical for the preservation of the effectiveness of the OSCE, and a formal alteration of the OSCE's legal basis poses a risk to that flexibility. This is the core of the active debate in the OSCE: the advocates for flexibility are juxtaposed against those who argue that international legal personality of an international organisation can only be acquired on the basis of a formal constitution.')

[538] That said, not every function can be decentralized; legal advice has to be consistent across the Organization, and it seems some core staff activities for the OSCE are retained at the Secretariat in Vienna.

[539] Schermers and Blokker stated that ‚[t]he term „family of [IOs]" is used when mutual relations are stronger than occasional exchange of information, a partly overlapping membership or an agreement to send observers to each others meetings. In a family of organizations, tasks are divided and each organization plays a role in the larger unit formed by the family. There must be some institutional links between organizations, which may be common organs, and, in principle, (potential) uniform membership'. H. G. Schermers & N. M. Blokker., *supra,* note 3, (Brill Nijhoff Publishers, 2018), at p. 1136.

[540] The international civil service system comprises: the conditions of service of staff of those UN organizations which belong to the UN ‚Common System' (which is a specialized system within the ‚UN family'; the conditions of service of the EU institutions and bodies (the ‚EU family'); the conditions of service of Coordinated Organizations (the ‚Coordinated System'). See G. Ullrich, *The Law of the International Civil Service- Institutional Law and Practice in International Organisations* (Duncker & Humblot, Berlin, 2018), at p. 35. Coordinated Organizations are comprised of six IOs which coordinate their remuneration and pension systems under auspices of the International Service for Renumeration and Pensions (ISRP). The six organizations are: the Council of Europe; the European Centre for Medium-Range Weather Forecasts; the European Space Agency; the European Organization for the Exploitation of Meteorological Satellites; The Organization for Economic Co-operation and Development; and NATO. See ISRP website, ‚About': https://www.sirp-isrp.org/index.php?option=com_content&view=article&id=180&Itemid=836&lang=en. Last accessed on 27 November 2019.

2.11.2. Categories of OSCE officials

In the OSCE, there are six categories of personnel[541], five of which include international[542] or local contracted fixed-term staff/mission members, and those recruited must have the nationality of one of the 57 participating States[543]. Each category have their own grading structure: first, as indicated, the highest-ranking staff members are the OSCE Secretary General (SG)[544], as the Chief Administrative Officer of the OSCE and head of the Secretariat[545], and senior appointments of Heads of Institution[546] and Heads of Mission (HoM) and Deputy Heads of Mission (DHoM); secondly, are management professionals[547], comprising higher category Directors (D)[548], subdivided into the ranks D-

[541] In most cases, letter codes are used to indicate the grades of OSCE staff/mission members. For all grades, see Unified Budget Post Table contained in Annex II of OSCE Permanent Council Decision No. 1326 of the Approval of the 2019 Unified Budget (OSCE Doc. PC.DEC/1326 of 11 April 2019), pp. 2-49. See OSCE website: https://www.osce.org/permanent-council/417164?download=true. Last accessed on 29 October 2019.

[542] OSCE Staff Regulation 1.01 Terminology, Article I General, SRSR. The term *'International Staff/Mission Member'* refers to '[c]ontracted staff/mission member holding an international post or seconded staff/mission member'. As such, under this definition, such persons may not be 'a national or permanent resident of the country of the duty station'.

[543] The OSCE would appear to rarely recruit personnel from non-participating States. For example, according to OSCE Staff Regulation 3.01(a) Designation and Recruitment, Article III Appointments and Assignments, SRSR, '[r]ecruitment shall be […] subject to open competition among nationals of participating States […].' See also OSCE website, Frequently Asked Questions, 'If I live in a country which is not an OSCE participating State, am I eligible to apply for an OSCE position?': https://jobs.osce.org/frequently-asked-questions. Last accessed on 29 October 2019. ('Vacancies are open for competition *only amongst nationals of its 57 participating States*. OSCE Partners for Co-operation can also nominate candidates for seconded posts at S1 and S2 level [emphasis added].')

[544] Since 18 July 2017, Switzerland's Thomas Greminger's has been serving as OSCE Secretary General. Thus far, the six Secretaries General of the OSCE have come from diplomatic service backgrounds.

[545] OSCE Staff Regulation 10.01 Terminology Article I General, SRSR.

[546] Pursuant to OSCE Staff Regulation 1.01 Terminology, Article I General, SRSR, the three heads of institution include the OSCE High Commissioner on National Minorities, (HCNM), the Representative on Freedom of the Media (RFOM), and Director of the ODIHR (D/ODIHR).

[547] According to the OSCE website, '[a]pplicants for positions at the Professional (P) and Director (D) category are required to have a university degree, including several years of experience at national and/or international level in a relevant field of expertise. Postgraduate specialization is necessary for a number of positions'. Available at: https://jobs.osce.org/employment-types/contracted-positions. Last accessed on 15 September 2019.

[548] According to OSCE Staff Regulation 1.01 Terminology, Article I General, SRSR. ,*Director'* is defined as a 'Staff/mission member holding a post at the level D1 or D2'.

1[549] and D-2[550], and Professional (P-5)[551] staff; thirdly, middle-ranking professionals include grades P-3 and P-4; fourthly, junior professionals include grades P-1 and P-2; fifthly, while the above are appointed by the OSCE on a direct contractual basis, as indicated, Seconded (S)[552] employees are instead pre-selected and nominated by their respective participating State. They are categorised by four levels of professional competence: S-1 (professional) – S-2 (senior professional) – S-3 (middle management) – S-4 (senior management); and, sixthly, all other civil servants (administrative support staff/mission members and those engaged in maintenance, security, or technical assistance) are directly appointed by the OSCE and hold local posts[553] in the General Service (GS) in the Secretariat[554], institutions[555] and missions[556], at G-1, G2, G-3, G-4, G-5, G-6, G-7, and

[549] For example., Director, Office of the Secretary General, Director of Internal Oversight, Co-ordinator of Activities to Address Transnational Threats , First Deputy Director of ODIHR, Director, Office of HCNM, Director, Office of the RFOM.

[550] For example, Co-ordinator of OSCE Economic and Environmental Activities, Director of the CPC/Deputy Head of the OSCE Secretariat, Director for Human Resources, Director for Management and Finance.

[551] For example, Head, Security Management, Head, External Co-operation Section, Head, Office of Legal Affairs, Head, Communication and Media Relations Section, Head, Conference Services, Senior Adviser on Gender Issues, Head, Internal Audit/Deputy Director, Deputy Co-ordinator/Head, Economic Activities, Deputy Co-ordinator/Head, Environmental Activities, Deputy Director for Policy Support Service, Deputy Director for Operations Service.

[552] For example., OSCE Special Representative and Co-ordinator/Deputy Co-ordinator for Combating Trafficking in Human Beings (S) and Head, Strategic Police Matters Unit (S). According to OSCE Staff Regulation 10.01 Article I General, SRSR, a '*Seconded Staff/Mission Member* is defined as Person seconded by or through a participating State for an assignment to the Secretariat, an institution or a mission and to whom the OSCE does not pay any salary from its own Unified Budget'. And, '*Secondment is a '*[p]rocess of assignment of an OSCE official to the Secretariat, an institution or a mission to whom the OSCE does not pay any salary from its own Unified Budget'.

[553] According to OSCE Staff Regulation 1.01 Terminology, Article I General, SRSR, *Local Post* is defined as a '[p]ost in the General Service and National Professional categories for the purpose of the application of the salary scales'.

[554] See OSCE website, 'General Services Staff in the Secretariat and Institutions': https://jobs.osce.org/general-services-staff-secretariat-and-institutions. Last accessed on 9 October 2019. ('General Service staff members are appointed by the OSCE on a direct contractual basis, hold a local general service post in the Secretariat or an Institution, and have their salary established with reference to the applicable net salary scales of the United Nations common system and paid corresponding to the personal grade and step.'). For further information, see also OSCE website: https://jobs.osce.org/frequently-asked-questions. Last accessed on 9 October 2019. ('[...]. Applicants for positions in the […] General Service (GS) category are required to have completed secondary education, supplementary courses related to the functions of the position and the commensurate number of years of relevant working experience. General Service staff contracts may be issued on a one or two year basis following a satisfactory performance appraisal and are not limited in the total number of years of service.'

[555] Ibid.

[556] See OSCE website, 'National Professional and General Service Mission Members': https://jobs.osce.org/national-professional-and-general-service-mission-members. Last accessed on 9 October 2019. ('General Service mission members are appointed by the OSCE on a direct contractual basis, hold […] a local general service post in a Field Operation.').

National Professional (NP) [557] (only in the field operations) (NP-1, NP-2, N-P3) categories. Other categories of personnel not included in post tables submitted to OSCE' participating States through the Unified Budget, but support the work of the Organization include consultants[558], daily staff[559], interns[560], so-called Junior Professional Officers (JPO)[561], as well as Experts/Young Diplomats[562].

2.11.3. Conditions of service

The conditions of service of OSCE officials reflect the need for 'securing the highest standards of efficiency, competence, and integrity, with 'full account' being paid to 'the principle of recruiting staff from all OSCE participating States on a fair basis' and the importance of achieving gender balance within the Organization, as stated in OSCE Staff Regulation 3.01. Like all UN organizations, the conditions of service for OSCE officials in the Professional and higher categories would seem to be based on the Noblemaire

[557] See OSCE website, 'National Professional and General Service Mission Members': https://jobs.osce.org/national-professional-and-general-service-mission-members. Last accessed on 9 October 2019. ('National Professional [staff] are appointed by the OSCE on a direct contractual basis, and hold a national professional […] post in a Field Operation.')

[558] See OSCE website, 'Types of Employment and Fields of Expertise, Consultants': https://jobs.osce.org/employment-types-and-fields-of-expertise. Last accessed on 9 October 2019. ('The OSCE recruits consultants to provide advisory services and expert assistance on a short-term and ad-hoc basis.')

[559] As the OSCE Staff Instruction on Daily Staff is not publicly available, there are no further details on this category of staff member. Daily paid workers are used for unskilled work needed on a contractual basis.

[560] While the OSCE Staff Instruction on Internships is not publicly available, their website explains that: ,The OSCE Internship Programme provides a framework for graduate/postgraduate students or recent graduates or postgraduates (within one year of graduation) to develop their professional skills and gain practical work experience in an international environment. The aim of the programme is to expose interns to the work of the OSCE and to provide OSCE departments with qualified and specialized assistance in various professional fields. The OSCE offers a limited number of places for interns that are filled subject to the current needs and facilities of various Departments. Internships usually last between two to six months and do not constitute a commitment to future employment with the OSCE.' See OSCE website 'Employment, Internships': https://jobs.osce.org/internships. Last accessed on 9 October 2019.

[561] See OSCE website, 'Types of Employment and Fields of Expertise, Junior Professional Officer Programme': https://jobs.osce.org/employment-types-and-fields-of-expertise. Last accessed on 9 October 2019. ('The OSCE offers a limited number of positions to young professionals who have recently completed their university degree to gain experience in the OSCE Secretariat, Institutions, and field operations.')

[562] See OSCE website, 'Types of Employment and Fields of Expertise, Experts/Young Diplomats Programme': https://jobs.osce.org/employment-types-and-fields-of-expertise. Last accessed on 9 October 2019. ('The OSCE offers a limited number of four-month placements to expert/young diplomats who are nationals of the OSCE Asian and Mediterranean Partner for Co-operation States. Interested applicants should have a university degree and some prior work experience in a diplomatic service, Ministry or another international/regional organization.').

principle[563]; and the conditions of service of OSCE officials in the General Service categories would seem be founded on the Flemming principle[564]. As indicated, however, due to the non-career limited term basis under which OSCE staff are employed, some elements of its conditions of service may be similar, but not necessarily identical with those of the UN common system.

2.11.4. Salaries and entitlements

The OSCE internal regulatory framework establishes a 'renumeration package' for its officials[565] 'roughly commensurate with that of other [IOs]'[566], with the upper limit being that of the UN common system[567], which represents common standards, methods, and arrangements being applied to salaries, allowances, and benefits for the staff of the UN, the specialized agencies that have entered into a relationship with the UN, the International Atomic Energy Agency (IAEA), and other specialized agencies[568]. In particular,

[563] The conditions of service of UN staff in the Professional and higher categories are based on the Noblemaire principle. Under the application of the principle, Professional salaries are determined by reference to those of the highest-paying national civil service, the US Federal Civil Service being the comparator since the inception of the UN (ICSC, n 74, 21). Georges Noblemaire was Chairman of a League of Nations Committee of Experts, which had recommended that salaries of League staff be based on the salaries of the highest-paid civil service of the world (at that time the British Civil Service). As a general rule, they are maintained at a level slightly higher than those of the comparator, in order to to ensure that the organizations are able to attract and retain high quality staff from all countries. See *Oppenheim's International Law United Nations*, 'United Nations Secretariat and Secretary-General', at p. 514 (footnote 119).

[564] Ibid, (footnote 120). Conditions of service for staff in the General Service and other locally recruited categories at the UN are founded on the Flemming Principle. This provides that conditions of employment are based on the best prevailing local conditions (ICSC, *A Framework for Human Resources Management*, 2001, 20).

[565] See Article V Salaries and Entitlements, SRSR.

[566] See L. Tabassi., *supra*, note 21, (Cambridge, Cambridge University Press, May 2019), at p. 58.

[567] OSCE Staff Regulation 5.00 Standards of Remuneration, Article V Salaries and Entitlements, SRSR. ('The OSCE adheres to the standards of remuneration established in the United Nations common system. Under no circumstances shall the cost of the remuneration package exceed that of the United Nations common system.'). See also See OSCE website: 'General Conditions of Employment': https://jobs.osce.org/general-conditions-employment. Last accessed on 27 November 2019.

[568] The common system is designed to avoid serious discrepancies in terms and conditions of employment, to prevent competition in recruitment of staff and to facilitate the exchange of personnel (ICSC, *A Framework for Human Resource Management* (2001), 21. The basic principles for the International Civil Service (International Civil Service Advisory Board Report on Standards of Conduct in the International Civil Service, Coord/Civil Service/5 (1954) are accepted by all the UN organizations. They are based on the British secretariat tradition established by Sir Eric Drummand during the time of the League of Nations, as well as on Arts. 100 and 101 of the UN Charter (stöckl, n 19, 2075). However, the common system is composed of principles, not binding legal norms. See United Nations International Civil Service Commission website,

notwithstanding Seconded posts in the missions[569], '[p]osts open for fixed-term appointments and assignments[570] up to the P-5 level' in the OSCE 'shall be classified in accordance with the Common Job Classification Standards established by the International Civil Service Commission'[571], which regulates and coordinates the conditions of service of staff in the UN common system. Likewise, salaries of international contracted OSCE

'History': https://icsc.un.org/Home/History. Last accessed on 27 November 2019. The UN common system applies to over 52,000 staff serving at 600 duty stations (UNOHRM, *Common System* (2006)). comprises: the United Nations Secretariat (New York); its affiliated Programmes and Funds: ITC, UNDP, UNICEF, UNHCR, WFP, UNODC, UNFPA, UNCTAD, UNEP, UNRWA, UN Women, UN-Habitat. The relationship agreements with the specialized agencies are concluded under arts. 57 and 63 of the UN Charter. Twelve agencies have concluded such agreements; the International Monetary Fund (IMF) and the World Bank Group (International Bank for Reconstruction and Development (IBRD), International Centre for Settlement of Investment Disputes (ICSID), International Development Association (IDA), International Finance Corporation (IFC), Multilateral Investment Guarantee Agency (MIGA), do not belong to the common system. The IAEA concluded its cooperation agreement with the UN in 1957. The agreements concluded in the 1940s contain a declaration of intent to create a single, unified 'International Civil Service' (International Law Association (ILA) and Food and Agriculture Organization (FAO) Agreements (Art XI), World Health Organization (WHO) and the International Civil Aviation Organization (ICAO) Agreements (Art XII), and the United Nations Educational, Scientific and Cultural Organization (UNESCO) Agreement (Art 13)), but the agrements concluded in later years do not have such a declaration (International Telecommunication Union (ITU) Agreement (Art VIII), World Meteorological Organizaion (WMO) Agreement (Art IX), IAEA Agreement (Art XVIII), European Parliament's Committee on Internal Market and Consumer Protection (IMCO) Agreement (Art X) and World Intellectual Property Organizaion (WIPO) Agreement (Art. 15). The Agreements with the International Fund for Agricultural Development (IFAD) (1977) and the United Nations Industrial Development Organization (UNIDO) (1985) provide for institutionalized cooperation with the ICSE (created in 1975) (stöckl, n 19, 2076). A general agreement 'to consult and cooperate' regarding personnel standards, methods and arrangements appears in the relationship agreements between the UN and the International Criminal Court (ICC), Note by the Secretary-General (UN Doc A/58/874 of 20 August 2004), Art. 8) (see UN website: https://undocs.org/en/A/58/874. Last accessed on 8 January 2020) and GA Res. 52/251 Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea (A/RES/52/251 of of 15 September 1998), Art. 6). See UN website: https://undocs.org/en/A/RES/52/251. Last accessed on 8 January 2020.

[569] According to OSCE Staff Rule 5.01.1(b) – Classification System, Article V Salaries and Entitlements, SRSR, 'Posts open for assignments by secondment in the OSCE Missions are categorized in accordance with the [so-called Rapid Expert Assistance and Co-operation Teams] (REACT) Staffing Matrix, from S1 to S4, except for posts of head of mission and deputy head of mission'.

[570] OSCE Staff Regulation 5.01.1(c) – Classification System, Article V Salaries and Entitlements, SRSR, states that '[p]osts open for assignments in the Secretariat and institutions shall be classified in accordance with Staff Rule 5.01.1 (a)'.

[571] OSCE Staff Rule 5.01.1(a) – Classification System, Article V Salaries and Entitlements, SRSR. The International Civil Service Commission (ICSE) is an independent body established by the UN General Assembly in 1974 (GA Res 3557 (XXIX) (1974) and revised in 1987. Its mandate is to regulate and coordinate the conditions of service of staff in the UN common system, but the type of action it is empowered to take in a specific area is regulated by its Statute (ICSC/1/Rev. 1). It may take decisions itself, for example, the establishment of daily subsistence allowance and the schedule of post adjustment in the different duty stations (Art. 11 of the ICSC Statute). However, in areas such as Professional salary scales, dependency allowance, and education grant, the ICSC may only make recommendations to the General Assembly (Art. 10); it may also only make recomendations to the specialized agencies regarding recruitment and job classification (Arts. 13 and 14). It is clear, however, that the OSCE is not a participating Organization of the UN common system and has not accepted the Statute of the ICSC.

officials[572] 'shall be in accordance with the net salary scale applicable in the [UN] common system to staff in the Professional and higher categories'[573]. On the other hand, salary scales of locally contracted staff/mission members 'shall be established by the Secretary General, taking into account, if available, the local net salary scales of the organizations of the [UN] common system or, if not, the generally applicable local salary levels in the respective duty station, and the host country's applicable income tax system if any'[574]. A periodic salary increment 'shall be awarded to fixed-term contracted staff/mission members' [575], with the 'normal qualifying period for in-grade movement between consecutive steps' being 'two years'[576]. Only for 'international contracted staff members, and to the Secretary General and the heads of institution', are base (or minimum) salaries

[572] Pursuant to OSCE Staff Regulation 5.02 Salaries, Article V Salaries and Entitlements, SRSR, salary scales shall be (c) 'appended the the Staff Rules' and (d) 'included in the Unified Budget'.
[573] See OSCE Regulation 5.02(a) Salaries, Article V Salaries and Entitlements, SRSR. OSCE Staff Rule 5.02.1(a) — Payment of salaries, Article V Salaries and Entitlements, SRSR: '[s]alaries of international contracted staff members, including the Secretary General and heads of institution, shall be paid in accordance with the United Nations Common System'. While, as indicated, under Article 10(b) of its Statute, ICSC reports and makes recommendations to the General Assembly on the salary scales for staff in the Professional and higher categories in organizations belonging to the UN common system, it is the latter which establishes salary scales showing the minimum net amounts received by staff in grade P-1 to D-2 throughout the world, which is known in the OSCE as the 'base' salary scale. As indicated, each duty station is placed on an index, which sets the cost of living in New York at a rate of 100. By that means, calculation is made of the amount to be added to the official's basic salary where the cost of living at the duty station is above 100, or subtracted where it is below. The sum due to each official is the product of a post pdjustment multiplier and the amount of the allowance that goes with his or her grade and step.
[574] OSCE Staff Regulation 5.02(b) Salaries, Article V Salaries and Entitlements, SRSR.
[575] OSCE Staff Regulation 5.04(b) Salary Increments, Article V Salaries and Entitlements, SRSR.
[576] OSCE Staff Rule 5.04.2(a) — Salary Increments, Article V Salaries and Entitlements, SRSR.

supplemented with a post adjustment [577]; and other special entitlements [578]. The renumeration of OSCE officials is generally not subject to national taxation[579], but in the event (locally recruited mission members being a clear example) salaries paid are 'subject to national income taxation with respect to the net salaries and emoluments paid to him/her by the OSCE, the Secretary General is authorized to refund him/her the amount of those

[577] OSCE Staff Regulation 5.03 Post Adjustment, Article Salaries and Entitlements, SRSR. For a useful summary of post adjustment, see International Civil Service Commission (ICSC) website: 'First established in 1957, the post adjustment system helps to ensure that that no matter where United Nations common system staff work, their take-home pay has a purchasing power equivalent to that at the base of the system, New York. Post adjustment is an amount paid in addition to salary that accounts for the following elements: differences in prices between the location where the staff member works and New York; local inflation; the exchange rate of local currency relative to the United States Dollar; and the average expenditure pattern of staff members at a given location. Together, the net base salary and the post adjustment add up to the net remuneration, or take-home pay. It is applicable to the United Nations Common System international staff in the Professional and higher categories. The post adjustment is a variable component that is adjusted periodically to reflect changes in the cost of living in a duty station. When the United Nations was established, inflation and exchange rates remained relatively stable. Thus, it was possible to apply a simple system of salary adjustment. Following the expansion of UN activities in the mid-1950s, the need arose for a more accurate and responsive system that could be easily and efficiently administered. Over the decades, the post adjustment system has been improved, resulting in greater transparency and active participation of staff in the process. Under its statute, ICSC is mandated to manage the system and calculate post adjustment indices. The Advisory Committee on Post Adjustment Questions (ACPAQ) advises ICSC on technical aspects, including statistical methodology. The calculation of post adjustment indices reflecting cost-of-living and currency movements at the different locations in the United Nations common system is one of the Commission's main responsibilities. To obtain the inputs for these calculations, the Cost-of-Living Division of the ICSC Secretariat organizes the periodic collection of data through cost-of-living surveys. Numerous surveys are conducted at duty stations each year, and much of the data used to compute post adjustment levels are collected from staff.' See ICSE website: https://icsc.un.org/Home/PostAdjustment. Last accessed on 11 October 2019. See also ILOAT Judgment No. 825, in *re* Beattie and Sheeran, at consideration 4: *'[t]he purpose [..] is to make the pay of international civil servants equivalent by making its real value, or purchasing power, as uniform as possible from one duty station to another. For that purpose account has to be taken of variations in the cost of living and the value of the local currency in terms of the United States dollar, the currency in which international civil servants' salaries and allowances are reckoned. In 1957 the United Nations introduced what are known as "post adjustment" allowances. These are sums added to or subtracted from the base salary according as the purchasing power of the dollar is higher or lower in another duty station than in New York'.*

[578] See OSCE Staff Regulation 5.04 Salary Increments, OSCE Staff Regulation 5.08 Travel Expenses, OSCE Staff Regulation 5.09 Removal Expenses, OSCE Staff Regulation 5.05 Taxation, OSCE Staff Regulation 5.10 Installation Grant, OSCE Staff Regulation 5.11 Repatriation Grant, OSCE Staff Reguation 5.12 Rental Subsidies, OSCE Staff Regulation 5.13 Board and Lodging Allowances, OSCE Staff Regulation 5.14 Dependency Allowances, OSCE Staff Regulation 5.15 Education Grant, OSCE Staff Regulation 5.16 Hazard Pay, OSCE Staff Regulation 5.17 Special Post Allowance, Article V Salaries and Entitlements, SRSR.

[579] However, while it has been noted that the 'Secretariat and the three Insitutions receive treatment comparable to that of the [UN], and consequently the staff of all four structures have been granted exemption from national taxation by the host States (Austria, the Netherlands and Poland), with no discrimination on the basis of nationality', there are some 'States hosting field operations which grant application *mutatis mutandis* of the 1961 Vienna Convention on Diplomatic Relations (VCDR), an instrument intended to regulate the relations between States, not an [IO]', where the OSCE's local mission members are exposed to income tax liability. See OSCE Chairmanship: Austria, *Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2017,* MC.GAL/7/17, (8 December 2017), paras 21-24. See OSCE website: https://www.osce.org/chairmanship/361771?download=true. Last accessed on 10 October 2019.

taxes paid to the extent that such amounts have been reimbursed to the Organization by the State concerned' [580]. The OSCE Provident Fund[581] was established by the Secretary General in July 1995[582] for fixed-term contracted OSCE officials whose security upon retirement is not provided through affiliation with the national social security system at their respective duty station, and provides either '[e]ligible OSCE officials with a cash sum in lieu of retirement benefits upon separation from the OSCE'[583] or '[b]eneficiaries with benefits upon death of eligible OSCE officials.'[584]. Other benefits under the OSCE Social Security Scheme include health insurance for contracted OSCE officials[585], pension insurance for fixed-term contracted officials[586], accident and life insurance connected with the performance of official duties for OSCE officials [587], and emergency medical evacuation insurance for OSCE officials.[588]

2.11.5. Duration of appointments and assignments

As a self-proclaimed 'non-career' Organization, the OSCE is committed to the principle of

[580] See OSCE Staff Regulation 5.05 Taxation, Article V Salaries and Entitlements, SRSR.
[581] See OSCE Staff Regulation 6.02(a) OSCE Health Insurance Scheme and OSCE Staff Regulation 6.03(a) OSCE Provident Fund; OSCE Staff Rule 6.04.1 – OSCE Accident and Life Insurance Scheme; OSCE Staff Rule 6.05.1(a) – OSCE Emergency Medical Evacuation Insurance Scheme, Article VI Social Security and Provident Fund, SRSR. See also Appendix 8 Administration of the OSCE Provident Fund, SRSR.
[582] See OSCE Secretary General Annual Report 1995 on OSCE Activities, OSCE DOC.SEC/1/95 30 November 1995, VII. Administration and Finance, 1. Organizational and Personnel Matters, at p. 40. See OSCE website: https://www.osce.org/secretariat/14563?download=true. Accessed on 9 October 2019.
[583] Article I (a)(i) Establishment of the OSCE Provident Fund, Administration of the OSCE Provident Fund, Appendix 8, SRSR.
[584] Ibid, Article I (a)(ii).
[585] OSCE Staff Regulation 6.01(a)(i) OSCE Social Security Scheme, Article VI Social Security and Provident Fund, SRSR. Under OSCE Staff Regulation 6.02 (d) OSCE Health Insurance Scheme, '[s]hould [seconded OSCE officials who provide the OSCE with evidence that they have appropriate and sufficient health insurance coverage] wish to participate in the OSCE health insurance scheme, they shall contribute to it at their own expense.'
[586] OSCE Staff Regulation 6.01(a)(ii) OSCE Social Security Scheme, Article VI Social Security and Provident Fund, SRSR.
[587] OSCE Staff Regulation 6.01(a)(iii) OSCE Social Security Scheme, Article VI Social Security and Provident Fund, SRSR.
[588] OSCE Staff Regulation 6.01(a)(iv) OSCE Social Security Scheme, Article VI Social Security and Provident Fund, SRSR.

staff rotation rather than permanent[589] or long-term continuing contracts[590]. Limits have been set on staffing arrangements, with so-called 'periods of service' for OSCE officials who 'shall be appointed or assigned for fixed terms'[591]. While periods of employment served in local posts, namely General Service or National Professional categories, may be 'extended for periods of up to two years at a time'[592], they are not limited in the total number of years of service[593]. By contrast, the 'total length of service of international staff/mission members with the OSCE shall not exceed ten years'[594]. Extensions may be granted[595], however, but 'appointments and assignments shall not carry any expectation of extension or conversion to another type of employment'[596], and these 'shall end without

[589] When the UN was created, the majority of member states supported the idea of a permanent international secretariat with a career civil service symbolized by permanent contracts. This was opposed by the Soviet Union and its allies, who supported fixed-term contracts of two to five years and the secondment to the UN of staff from national governments. Secretary-General Hammarskjöld proposed a compromise of 75 per cent permanent contract staff and 25 per cent fixed-term contract staff, with the option of secondment. See Dame R. Higgins DBE, QC, P. Webb, D. Akande, S. Sivakumaran, & J. Sloan, ,The United Nations Secretariat and Secretary-General', Chapter 15, *Oppenheim's International Law United Nations*, Volume I, (Oxford Univesity Press, 2017), p. 514. According to the UN HR Portal, , Permanent appointments were linked to the concept of a career service, and thus subject to satisfactory performance. A staff member granted a permanent appointment had a reasonable expectation of continued employment until his/her mandatory age of separation'.

[590] Long-term 'continuing contracts' were introduced in the UN following GA. Res 63/250 Human resources management (UN Doc. A/RES/63/250 of 10 February 2009). See UN website: https://undocs.org/A/RES/63/250. Last accessed on 8 January 2020. ('The idea behind continuing contracts is to allow staff to move more easily between missions, and also to encourage them to stay in the organization, even in difficult living conditions in the field'. Ibid, p. 515. According to the UN HR Portal, '[c]ontinuing appointments are open-ended appointments. However, unlike the permanent appointment, the Secretary-General may terminate the appointment without the consent of the staff member if, in the opinion of the Secretary-General, such action would be in the interest of the good administration of the Organization'). See UN HR Portal: https://hr.un.org/faq/what-difference-between-permanent-appointment-and-continuing-appointment. Last accessed on 27 November 2019.

[591] Pursuant to OSCE Staff Regulation 3.08(a) on Periods of Service, Article III Appointments and Assignments, SRSR: '[t]he OSCE is committed to the principle of non-career service. Thus, OSCE officials shall be appointed or assigned for fixed terms. Letters of appointment and terms of assignment shall specify the expiration date'.

[592] OSCE Staff Rule 3.11.1(c) – Extension procedure, Article III Appointments and Assignments, SRSR. ('[…] provided that their performance is rated as satisfactory.')

[593] OSCE Staff Rule 3.08.1(a) – Calculation of the periods of service, Article III Appointments and Assignments, SRSR. OSCE website also states that ,[p]eriod of employment in local general service or national professional posts is not included in the calculation of maximum period of service'. See OSCE website: 'National Professional and General Service Mission Members': https://jobs.osce.org/national-professional-and-general-service-mission-members. Accessed on 29 October 2019.

[594] OSCE Staff Rule 3.11(b)(ii) Extension of Appointments and Assignments, Article III Appointments and Assignments, SRSR.

[595] OSCE Staff Regulation 3.11(a) Extension of Appointments and Assignments, Article III Appointmnets and Assignments, SRSR.

[596] Ibid.

notice on the expiration date'[597]. Pursuant to OSCE Ministerial Council Decision No. 3/08 of 22 October 2008 on the periods of service of the OSCE Secretary General, the 'OSCE Secretary General shall be appointed for a term of three years, which may be extended for a second and final term of three years'[598]. Heads of mission may serve in the same field operation for a maximum of three years, extendable for a final period of up to one year[599]. Directors in the Secretariat, the institutions and the missions shall be appointed for a three-year fixed term, which can be extended for up to one year[600]. Staff/mission members holding positions at the P-5 level shall be appointed for a two-year fixed term which can be extended for up to three years[601]. Contracted staff/mission members[602] holding professional posts below the P-5 level shall be appointed for a two-year fixed term which can be extended for further periods[603]. Subject to the prior approval of the seconding country[604], seconded mission members may serve in the same mission for a maximum period of seven years[605]. While the example of the League of Nations, which created an independent staff in permanent employment, has been followed by most IOs, the OSCE is not alone in using a limited tenure policy. Other exceptions include the IAEA[606], the

[597] OSCE Staff Regulation 3.08(a) Periods of Service, Article III Appointmnets and Assignments, SRSR.
[598] See OSCE Ministerial Council Decision No. 3/08 Periods of Service of the OSCE Secretary General (OSCE Doc. MC.DEC/3/08 of 22 October 2008). See OSCE website: https://www.osce.org/mc/34654?download=true. Last accessed on 29 October 2019.
[599] OSCE Staff Regulation 3.98(e) Periods of Service, Article III Appointments and Assignments, SRSR.
[600] OSCE Staff Regulation 3.98(b) Periods of Service, Article III Appointments and Assignments, SRSR.
[601] OSCE Staff Regulation 3.98(c) Periods of Service, Article III Appointments and Assignments, SRSR.
[602] OSCE Staff Regulation 3.08(d) Periods of Service, Article III Appointments and Assignments, SRSR.
[603] OSCE Staff Regulation 3.98(d) Periods of Service, Article III Appointments and Assignments, SRSR.
[604] OSCE Staff Rule 3.11.1 (b) – Extension procedure, Article III Appointments and Assignments, SRSR.
[605] OSCE Staff Regulation 3.98(f) Periods of Service, Article III Appointments and Assignments, SRSR. Emphasis appears to have been placed on the fixed-term contract as a means of attracting efficient national civil servants who are prepared to be seconded rather than resign from their civil services, with a view to securing high levels of experience, efficiency, and geographical representation.
[606] IAEA Staff Regulation 3.03(a) states that '[t]he Agency shall be guided by the principle that its permanent staff shall be kept to the minimum compatible with the efficient operation of the Agency. (b) Appointments of officials of the rank of Deputy Director General or equivalent shall normally be for a period of not more than five years, subject to extension or renewal. Other staff members shall be granted fixed-term appointments each for a period of not more than five years, or short-term appointments subject to extension or renewal […]. (d) A fixed-term appointment may be extended or renewed at the discretion of the Director General, if the staff member is willing to accept such extension or renewal. IAEA Information Circular, The Staff Regulations of the Agency, INFCIRC/612 (30 August 2002). See IAEA website: https://www.iaea.org/publications/documents/infcircs/staff-regulations-agency. Last accessed on 27 November 2019. The IAEA website states that '[f]or professional positions, the IAEA follows a policy of rotation out of the organization. This policy allows Member States to benefit from the return of their nationals after gaining expertise at the IAEA, and it allows the IAEA to have a continuous influx of fresh knowledge and experience at all levels. This increase in international capacity is also of benefit to staff members, who have an opportunity to be part of a dynamic team facing the IAEA's challenges. Regular fixed-term

Preparatory Commission for the Comprehensive Nuclear-Test-ban Treaty Organization (CTBTO)[607] and the Organization for the Prohibition of Chemical Weapons (OPCW)[608]. Despite the obvious tensions between ensuring independence of the international civil service, security of tenure, and the need to have a flexible and mobile workforce[609], the OSCE does not seem to have developed any practices that reduce the impact of periods of service, such as the loss of institutional knowledge, leading to inefficiency. Also significant is the fact that both the lack of a concept of permanent appointment to ensure independence and the system of secondment for staff recruitment, especially in OSCE's field operations, paid by national governments rather than the core OSCE budget, it could perhaps be argued

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appointments are typically made for an initial three-year period. Based on programme requirements and work performance, the Agency may offer an extension for a period of two years, bringing the total service to five years. As a rule, five years constitute the normal period a staff member can expect to be employed by the IAEA'. See IAEA website: https://www.iaea.org/about/employment/professional-staff. Last accessed on 27 November 2019.

[607] According to CTBTO Staff Rule 4.4.01: Fixed-Term Appointments, [a]ll staff members shall be granted fixed-term appointments. (a) Subject to paragraph (b) below, a fixed-term appointment, having an expiration date specified in the letter of appointment, may be granted for a period or periods not exceeding three years'. (b) A fixed-term appointment for staff members who have been recruited under a short term appointment as set out in Rule 4.1.06 shall be granted for no more than one year and may be extended for a further period of no more than one year […]. In granting fixed-term appointments, the Executive Secretary shall bear in mind the *non-career nature* of the Commission' [emphasis added]. Regulations and Rules of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban-Treaty Organization (July 2017). See CTBTO website: https://www.ctbto.org/fileadmin/user_upload/legal/CTBT-RR-7-EBOOK.pdf. Last accessed on 27 November 2019.

[608] According to OPCW Staff Regulation 4.4(a) '[t]he OPCW is a *non-career organisation*. This means that no permanent contracts shall be granted. Staff members shall be granted one of the following types of temporary appointments: short-term or fixed-term. The initial contract period shall not normally exceed three years. Contract extensions are possible; […]. (b) The total length of service of Secretariat staff shall be seven years unless otherwise specified' [emphasis added]. Consolidated version of the Staff Regulations and Interim Staff Rules of the Technical Secretariat of the OPCW, as published in the Director-General's Bulletins OPCW-S/DGB/26, dated 12 December 2017 and as amended by OPCW-S/DGB/28, dated 21 December 2018. See OPCW website: https://www.opcw.org/sites/default/files/documents/2019/02/OPCW%20Staff%20Regulations%20%20Interim%20Staff%20Rules%20%28December%202018%29.pdf. Last accessed on 27 November 2019.

[609] While ,security of tenure has been seen as vital to the independence of the International Civil Service' (see UNAdT Judgment No. 29 [1953], UNAT Nos. 1-70 p. 120 at p. 123. permanent appointments can somewhat be less easily terminated than other kinds of appointments) (see e.g., GA Res. 13 (I) Appointment of a Committee on Contributions (A/RES/16 (I)13 February 1946) and the Report of the Preparatory Commission of the UN (1945), PC/20, p. 92.) ,permanent contracts can also be seen as promoting stagnation and as an obstacle to equitable geographical distribution of staff' (see eg., GA Res. 1436 (XIV). Geographical distribution of the staff of the Secretariat of the United Nations (UN Doc. A/4329 of 5 December 1959). See UN website: https://undocs.org/en/A/RES/1436(XIV). Last accessed on 8 January 2020. GA Res. 2241 (XXI). Composition of the Secretariat (UN Doc. A/6605 and Corr.1 of 20 December 1966). See UN website: https://undocs.org/en/A/RES/2241(XXI). Last accessed on 8 January 2020. Report of the Secretary-General, 'Human resources management reform' (UN Doc. A/55/253 of 1 August 2000), paras 45-50). See UN website: https://undocs.org/pdf?symbol=en/A/55/253. Last accessed on 8 January 2020. See Dame R. Higgins DBE, QC, P. Webb, D. Akande, S. Sivakumaran, & J. Sloan, *supra,* note 157, p. 514.

that the OSCE is not wholly based on the notion of an international civil service[610].

2.11.6. Staffing and employment

It may be noted that, while the OSCE is currently the 'world's largest regional security organization' with broad mandates, the size of it's staff is surprisingly very small[611]. As at 19 September 2019, the total number of OSCE fixed-term staff, including staff financed from extra-budgetary contributions employed across the executive structures was 3,603. [612] According to the latest *2018 OSCE Annual Report*, 406 (including 20 under extra-budgetary projects) are at its Secretariat[613] in Vienna and Prague (as the central executive structure of the Organization[614]); in the three institutions, 193 staff (85 international, 80 local (including 28 under extra budgetary projects) are at the ODIHR[615] in Warsaw; 36

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[610] Bloed has noted that [t]he desire to keep the ,administrative institutionalization' of the CSCE as modest as possible is reflected in the fragmentation of offices over three states (Austria, Poland and the Czech Republic), the limited mandate of a mainly administrative character for all three organs, and the minimal size of the staff. Moreover*, the seconding system also aims at avoiding the creation of a new bureaucracy: the directors and officers in all three organs are seconded by their governments and remain in function at the CSCE bodies only for two or three years*' [emphasis added]. A. Bloed, *supra,* note 2, at p. 15. By way of background, the 1990 *Charter of Paris for a New Europe* installed a system of secondment for staff recruitment, which means that an OSCE participating State can submit an individual for an OSCE position which is then confirmed by the Ministerial Council, an annual meeting of foreign ministers. The cost of the seconded post is paid for by the participating State, rather than from the OSCE core budget. Today, as shall be seen, the OSCE currently employs some 3,500 staff, the ,majority' of whom are filled by secondment in its field operations. See OSCE website, 'Seconded positions': https://jobs.osce.org/employment-types/seconded-positions. Last accessed 27 November 2019.

[611] Comparatively speaking, this is far fewer than those working for the UN or European Commission (EC) for instance. According to the Report of the UN Secretary-General on the Composition of the Secretariat: staff demographics, as at 30 June 2015, UN Secretariat alone employed a total of 41,081 staff members. See UN website: http://www.un.org/ga/search/view_doc.asp?symbol=a/70/605. Last accessed on 27 November 2019. The official EU website, notes that around 33,000 people are employed by the European Commission (EC). See official website of the EU: https://europa.eu/european-union/about-eu/figures/administration_en. Last accessed on 27 November 2019. Over the past decade, there has been a marked reduction in the scale of the OSCE's field operations as a result of restructuring, downsizing or closure. See OSCE website,Closed field operations and related field activities': https://europa.eu/european-union/about-eu/figures/administration_en. Last accessed on 27 November 2019.

[612] See *OSCE Factsheet*: What is the OSCE?, 'Facts and Figures, Staffing' (As of September 2019) (OSCE, 19 November 2019), at p. 8. See OSCE website: https://www.osce.org/whatistheosce/factsheet. Last accessed on 27 November 2019.

[613] OSCE Secretariat Budget: €41,164,000 (Unified budget), €9,169,359 (Extra-budgetary pledges). See *2018 OSCE Annual Report,* 'Secretariat', (OSCE, 25 April 2019), at p. 33. See OSCE website: https://www.osce.org/annual-report/2018?download=true. Last accessed on 27 November 2019.

[614] Indeed, as Schermers and Blokker have noted, ,[s]ecretariats have become central organs in all [IOs]''. H. G. Schermers & N. M. Blokker, *supra,* note 3, (Brill Nijhoff Publishers, 2018), at p. 331.

[615] See *2018 OSCE Annual Report,* 'Office for Democratic institutions and Human Rights', (OSCE, 25 April 2019), at p. 49. Available at OSCE website: https://www.osce.org/annual-report/2018?download=true. Last

staff (20 international, 11 local (including 5 under extra-budgetary projects) are at the HCNM in the Hague[616]; and 13 staff are at the RFOM in Vienna[617]. At the OSCE Secretariat and institutions, the staff members of the OSCE include: fixed-term international contracted[618], international seconded, general service[619]; and, temporary. In the OSCE's network of 16 field operations, 2,999[620] mission members, in which the

accessed on 27 November 2019. Budget: €16,279,300 (Unified Budget), €712,059 (Extra-Budgetary pledges).

[616] See *2018 OSCE Annual Report,* 'High Commissioner on National Minorities', (OSCE, 25 April 2019), at p. 52. See OSCE website: https://www.osce.org/annual-report/2018?download=true. Last accessed on 27 November 2019. Budget: €3,466,300 (Unified Budget), €342,270 (Extra-Budgetary pledges).

[617] See *2018 OSCE Annual Report,* 'Secretariat', (OSCE, 25 April 2019), at p. 54. Available at OSCE website: https://www.osce.org/annual-report/2018?download=true. Last accessed on 27 November 2019. Budget: €1,519,800 (Unified Budget), €510,401 (Extra-Budgetary expenditure).

[618] According to the OSCE website, ,The OSCE offers fixed term contracts for positions at the Secretariat, institutions, and, to a limited extent and mainly in the area of administration, at its missions'. See OSCE website: https://jobs.osce.org/employment-types/contracted-positions. Last accessed on 27 November 2019.

[619] General service staff are hired under temporary contracts, which can be renewed continuously.

[620] See OSCE Factsheet: What is the OSCE?, 'Facts and Figures' (as of September 2019) (OSCE, 19 November 2019), at p. 8. See OSCE website: https://www.osce.org/whatistheosce/factsheet?download=true. Last accessed on 27 November 2019. See also *2018 OSCE Annual Report,* 'Secretariat', (OSCE, 25 April 2019), OSCE Secretariat, at p. 56. See OSCE website: https://www.osce.org/annual-report/2018?download=true. Last accessed on 27 November 2019. This provides the following overview of the staffing and budgets of its field operations: OSCE Presence in Albania: Budget: €2,917,900 (Unified budget), €431,747 (Extra-budgetary pledges), Staff: 19 international, 67 local (including 2 under extra-budgetary projects); OSCE Mission to Bosnia and Herzegovina: Budget: €11,647,200 (Unified budget), €1,469,232 (Extrabudgetary pledges), Staff: 34 international, 289 local; OSCE Mission in Kosovo: Budget: €17,414,300 (Unified budget), €263,896 (Extrabudgetary pledges), Staff: 117 international, 387 local (including 1 under an extra-budgetary project); OSCE Mission to Montenegro: Budget: €2,146,200 (Unified budget), €309,530 (Extra-budgetary pledges) Staff: 9 international, 26 local; OSCE Mission to Serbia: Budget: €6,238,000 (Unified budget), €1,244,656 (Extrabudgetary pledges) Staff: 21 international, 117 local (including 14 under extra-budgetary projects); OSCE Mission to Skopje: Budget: €6,483,400 (Unified budget), €414,379 (Extrabudgetary pledges) Staff: 40 international, 114 local (including 6 under extra-budgetary projects); OSCE Mission to Moldova: Budget: €2,263,900 (Unified budget), €168,745 (Extrabudgetary pledges), Staff: 13 international, 39 local; OSCE Special Monitoring Mission to Ukraine: Budget: €100,945,000 for the period 1 April 2018 to 31 March 2019, with €84,793,800 from assessed contributions and €16,151,200 from extra-budgetary contributions. Extra-budgetary expenditure as of 31 December 2018: €6,112,164. Staff: 1,311 (892 international, 419 local) including 777 monitors as of 31 December 2018; OSCE Project Co-ordinator in Ukraine: Budget: €3,598,800 (Unified budget), €2,193,495 (Extrabudgetary pledges) ,Staff: 3 international, 84 local (including 37 under extra-budgetary projects); OSCE Observer Mission at the Russian Checkpoints Gukovo and Donetsk: Budget: €1,404,400 (for the period 1 February 2018 to 31 January 2019) Staff: 21 observers, 2 Vienna-based staff; OSCE Centre in Ashgabat: Budget: €1,655,400 (Unified budget), €835,635 (Extrabudgetary pledges), Staff: 6 international, 19 local; OSCE Programme Office in Nur-Sultan: Budget: €2,225,500 (Unified budget), Staff: 6 international, 22 local; OSCE Programme Office in Bishkek: Budget: €6,797,400 (Unified budget), €304,773 (Extrabudgetary pledges, including the OSCE Academy in Bishkek), Staff: 13 international, 107 local; OSCE Programme Office in Dushanbe: Budget: €7,285,900 (Unified budget), €1,697,057 (Extrabudgetary pledges), Staff: 24 international, 154 local (including 31 under extrabudgetary projects); OSCE Project Co-ordinator in Uzbekistan: Budget: €2,293,400 (Unified budget), €142,146 (Extra-budgetary pledges) Staff: 3 international, 27 local.

'majority' of international staff are seconded[621], are engaged in South-Eastern Europe, Eastern Europe, the South Caucasus and Central Asia on a fixed-term basis, where most activities are implemented[622]. These mission members include: fixed-term international contracted, seconded, national professional, general service; and, temporary. As in most other IOs, taking into account the principle of equitable geographical distribution at the OSCE in the recruitment of its officials[623], the fact that the Organization employs some 3,603 officials from among 57 participating States to perform work across the OSCE area, there is the added dimension of diversity of 'national backgrounds, cultures and social statuses' operating in 'diverse settings', making work place conflict inevitable. [624]

2.11.7. Funding and budget

As might be expected, staff costs account for the largest share (62% in 2018)[625] of the

[621] As seen, according to the OCSE website, '[t]he majority of positions in OSCE field operations are filled by secondment'. See OSCE website: https://jobs.osce.org/employment-types/seconded-positions. Last accessed on 27 November 2019.
[622] Ibid. As also stated by the 2017 Annual Report of the OSCE Secretary General, '[t]he OSCE's field operations assist host countries in putting their OSCE commitments into practice and fostering local capacities through specific projects that respond to their needs. Activities vary with the context of the individual field operation and host country, and are governed by the mandate of each field operation. The field operations enable the OSCE to manage crises and to play a critical post-conflict role, helping to restore trust among affected communities. A number of field operations contribute to early warning and conflict prevention, some also monitor and report on developments on the ground'. See *OSCE Annual Report 2017*, OSCE Secretariat, March 2018, at p. 55.
[623] OSCE Staff Regulation 3.01(b), SRSR, '[…] taking full account of the principle of recruiting staff from all OSCE participating States on a fair basis […]'. However, according to Schermers and Blokker, ,[e]quitable geographical distribution of staff members does not mean that an equal number must be appointed from each region. In practice, the number of staff members from a specific state is usually related to the contribution paid by that state to the organization'. H. G. Schermers & N. M. Blokker., *supra,* note 3, (Brill Nijhoff Publishers, 2018), at p. 369.
[624] See O. A. Jefferson and I. Epichev., 'International Organisations as Employers: Searching for Practices of Fair Treatment and Due Process Rights of Staff', Part VI – Global Governance and the Precepts of Public Law, in K. Rubenstein and K. G. Young (eds.), *The Public Law of Gender: From the Local to the Global,* (Cambridge University Press, 2016), at p. 489.
[625] See *2018 OSCE Financial Report and Financial Statements (for the year ended 31 December 2018) and the Report of the External Auditor*, 9 July 2019, para 39. See OSCE website: https://www.osce.org/secretariat/425201?download=true. Last accessed on 27 November 2019. It may be noted that each staff post in the OSCE is justified and mentioned in the so-called ,post table' in Annex II of the OSCE unified budget, as approved by the OSCE Permanent Council.

OSCE's core unified budget[626], which is financed through scaled[627] annual[628] dues paid by its 57 participating States[629] known as 'assessed contributions'[630]. This is the main source of funding for the OSCE and covers expenses that are fundamental to the existence of the Organization and its institutional mandates. At the same time, the second largest source of funds for the OSCE are voluntary contributions, referred to in OSCE terminology as 'extra-budgetary contributions'. The latter comprises both financial assets in support of activities not funded by the unified budget and in-kind contributions of goods and services, including salaries for seconded personnel[631], free rental of premises[632] and equipment, all of which may be valued in monetary terms[633]. While extra-budgetary contributions usually come

[626] According to OSCE Permanent Council Decision No. 553 on the OSCE's Unified Budget Process (OSCE Doc. PC.DEC/553 of 27 June 2003), the 'Unified Budget is a core management tool for programming, budgeting, approving, implementing, reporting and evaluating the operational activities of the Organization' (para 1), which 'comprises a set of separate Funds, as established by the Permanent Council, and which are based on specific mandates' (para 2), with the OSCE adhering to the 'principle of programme budgeting' (para 3). See OSCE website: https://www.osce.org/pc/42765?download=true. Last accessed on 27 November 2019.

[627] Since 1997, assessed contributions have been calculated in accordance with two different scales, a 'standard scale' and a 'field operation scale'. The scales of contibutions are expressed as a percentage of the projected OSCE expenditure (standard expenditure or field operations). See OSCE Permanent Council Decision No. 1196 Scales of Contributions for 2016-2017 (OSCE Doc. PC.DEC/1196 of 17 December 2015). See OSCE website: https://www.osce.org/pc/212816?download=true. Last accessed on 27 November 2019.

[628] According to Liechtenstein, the fact that the core OSCE budget is adopted on an annual basis 'not only leads to lengthy and cumbersome negotiations every year, but also does not provide for strategic, long-term planning of substantive issues'. See S. Liechtenstein., *supra,* note 361, 14 March 2017. Indeed, calls have recently been made by certain participating States for consideration of a 'multi-year budget cycle'. For example, see United States Mission to the OSCE, Response to the Report of the External Auditor on the Financial Report and Statement for 2016 and to the Report of the OSCE Audit Committee, July 2016 – June 2017 (PC.DEL/932/17 of 6 July 2017). See OSCE website: https://www.osce.org/permanent-council/330166?download=true. Last accessed on 27 November 2019.

[629] Like other OSCE commitments, these are politically, as opposed to legally, binding.

[630] The 'scales of contributions' were initially referred to as the *'scale of distribution'* adopted in the CSCE Helsinki Document 1992, Chapter XII, paras 3 and 4: adoption of the Scale of Distribution effective 1 July 1992. (paragraph 3). Scales are the arithmetical means of calculating the assessed contribution of each participating State to the total approved budget amount, not the source of the budgetary obligation itself.

[631] As the salary and other expenses for personnel seconded by the OSCE participating States remain the responsibility of national governments, it may be noted that the OSCE only provides for certain entitlements, such as official holidays and leave, social security, assignment travel, Board and Lodging Allowance (BLA), and separation travel.

[632] For example, the Austrian, Polish and Czech governments all provide free office rent and facilities.

[633] However, in accordance with the International Public Sector Accounting Standards (IPSAS) and the OSCE's Financial Regulations (the latter is not publicly available), in-kind contributions of services are not formally recognized as revenue in the OSCE's financial statements. However, it is of note that if ,the Organization did not receive these in-kind contributions, it would need 34% additional revenue from assessed contributions to maintain the current level of activities'. 2016 OSCE Financial Report and Financial Statements, *supra,* note, 76, p. 47, para 10. See also para. 47. 3.4.3) Contributions In-kind: 'OSCE receives each year a significant amount of contributions in-kind provided in the form of premises, equipment, seconded staff and other services. The estimated value of these contributions in 2016 amounted to EUR

from a States and non-State contributors such as the European Union (EU), they are entirely discretionary[634]. However, it may be regarded as a paradox that despite the OSCE's broad functional mandate and increased scope of its tasks since the end of the Cold War, the budgetary expenditure of the Organization has decreased considerably over the years in line with decreases in its unified budget[635]. Even though the global financial crisis was not without repercussion for the financing of IOs[636], the OSCE struggled with its own financing problems long before.[637]. For the year 2000, the OSCE Permanent Council approved a unified budget[638] of €211.8 million, while the latest figures available for 2019 show a mere €138.2 million[639], representing a 35% fall in real terms from 2000[640]. The financial resources of the OSCE can be put in perspective by comparing its budget with those of other IOs. Although it is difficult to put figures for each institution into a common, fully comparable basis, it is not difficult to conclude that, the unified budget of the OSCE is very small relative to most other regional organizations in the European space with limited

80,394 thousand or over one third of the total resources put at the disposal of the OSCE. This includes an estimated EUR 74,064 thousand for seconded staff salaries (services in-kind) and EUR 4,657 thousand for buildings provided by host countries (goods in-kind)'.

[634] As recognized by the UN Secretary General, see UN Doc. A/60/83-E/2005/72 (2005), para. 40. In this context, it may be noted that as the OSCE donor base would appear to be rather narrow and donor States in particular tend to attach conditions to voluntary contributions, there is a risk of a concentration of operational work on themes that correspond to donor preferences rather than programme priorities.

[635] 2016 OSCE Financial Report and Financial Statements and the Report of the External Auditor (Publisher: OSCE, 18 July 2017), para 30.

[636] See G. Ullrich, *supra,* note 540, (Duncker & Humblot, Berlin, 2018), Preface.

[637] It may also be questioned whether, like the UN, non-payment or delayed payment of assessed contributions is also chronic problem at the OSCE.

[638] OSCE Permanent Council Decision No. 400 Year 2000 Budget Revision, (OSCE Doc: PC.DEC400 of 14 December 2000). See OSCE website: https://www.osce.org/pc/23651?download=true. Last accessed on 18 October 2019.

[639] OSCE Permanent Council Decision No. 1326 Approval of the 2019 Unified Budget (OSCE Doc. PC.DEC/1326, 11 April 2019). See OSCE website: https://www.osce.org/permanent-council/417164?download=true. Last accessed on 10 October 2019.

[640] Coinciding with the overall decrease in financial contributions by the OSCE participating States, there has also been a marked reduction in the scale of the OSCE's field operations as a result of restructuring, downsizing or closure. Most recently, the OSCE Office in Yerevan, which started its activities on 16 February 2000, discontinued its operations on 31 August 2017. For further information, see OSCE website: https://www.osce.org/closed-field-operations. Last accessed on 1 November 2019.

membership[641]. Thus, the budget of the European Union (EU)[642] for the year 2019 sets the total level of payments at approximately €148.2 billion while the civilian budget of the North Atlantic Treaty Organization (NATO)[643] during the same period is estimated at about €250.5 million; and, despite having a geographically smaller mandate with 47 Member States[644] and around 2,500 staff, the ordinary budget of the Council of Europe (CoE)[645] is almost twice the size of the OSCE unified budget at around €244.7 million. Away from regional IOs, and at the international level, it is perhaps no surprise that the OSCE lags far behind the budget of the UN and its specialized agencies, given their almost universal membership and agenda. For example, the UN employs some 44,000 staff from 193 Member States[646]: for 2016-17 biennium, the regular budget of the UN amounted to approximately $5.4 billion (about €5 billion)[647]. This state of affairs may be explained by, *inter alia,* the divergent priorities and interests of the OSCE participating States[648] and,

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[641] As far back as 1997, Bloed observed that ‚in financial terms [the OSCE] 'is undoubtedly the ´cheapest´ security organization in the international arena'. See A. Bloed. ‚The OSCE from Process to Organization: A Brief Introduction', *The Conference on Security and Co-operation in Europe. Basic Documents, 1993-1995.* (A. Bloed ed) (Martinus Nijhoff Publishers, 1997), at xx.

[642] See European Council, Council of the European Union website, 'EU budget for 2019': https://www.consilium.europa.eu/en/policies/eu-budgetary-system/eu-annual-budget/2019-budget/. Last accessed on 27 November 2019.

[643] In contrast to other intergovernmental bodies, NATO does not publish an annual financial report on its revenue and expenditure. As regards the officially recognized budgetary process, of the three budgets within the common funding arrangements, the civil budget is of particular relevance. The NATO website states on 19 December 2018 that ‚at a meeting of the North Atlantic Council on 18 December 2018, Allies agreed a civil budget of €250.5 million', which ‚provides funds for personnel, operating costs, and programme expenditures at NATO Headquarters in Brussels. The 2019 civil budget is 1.9% above the 2018 level, and includes funding to implement the functional review of NATO Headquarters.' See NATO website: https://www.nato.int/cps/en/natohq/news_161633.htm?selectedLocale=en. Last accessed on 1 November 2019. See also CNN Money website, 'How NATO is funded and who pays what', 20 March 2017: https://money.cnn.com/2017/03/20/news/nato-funding-explained/index.html. Last accessed on 1 November 2019.

[644] See CoE website, 47 Member States,: https://www.coe.int/en/web/portal/47-members-states. Last accessed on 1 November 2019.

[645] The ordinary budget of the CoE for 2019 is €437,180.100. Since 2012, the CoE has adopted a biennial Programme and Budget. See CoE website: https://www.coe.int/en/web/about-us/budget. Last accessed on 1 November 2019.

[646] See UN Careers website: https://careers.un.org/lbw/home.aspx?viewtype=VD. Last accessed on 1 November 2019.

[647] Adopted by UN General Assembly Resolution 70/249.

[648] More broadly, this may be reflected in the debate on the declining importance of the OSCE in Europe's security architecture, with European States in the OSCE increasingly turning to the EU. Trachsler has noted that '[f]or about ten years now, the OSCE has been struggling against a loss of relevance'. See D. Trachsler., 'The OSCE: Fighting for Renewed Relevance', CSS Analysis in Security Policy, Center for Security Studies (CSS), ETH Zürich, No. 110, March 2012. See ETH Zürich, Department of Humanities, Social and Political Sciences, Center for Security Studies website: https://www.files.ethz.ch/isn/141518/CSS-Analysis-110-EN.pdf. Last accessed on 27 November 2019. See also F. Tanner., 'Helsinki +40 and the Crisis in Ukraine,

since 2005[649] a budget policy of zero nominal growth[650], which unlike real growth, does not allow for adjustment for inflation and exchange rate movements. There is, it should be added, a range of views on this policy among the OSCE participating States[651]. Yet, whatever the motivations, this restriction has found clear expression in successive unified budget documents, which called for continued efforts to 'streamline and prioritize the work

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The Search for Renewal, (Institute for Peace Research and Security Policy at the University of Hamburg / IFSH (ed.), in *OSCE Yearbook 2014: Yearbook on the Organization for Security and Co-operation in Europe (OSCE),* Volume 20, (Nomos, 2014), at p. 69. One observer has noted, 'the Western countries […] have deliberately given up the spheres of competence of the [OSCE] to NATO, the EU and the Council of Europe, thus marginalizing the OSCE'. B. Milinkovic., 'OSCE Peacekeeping: Still Waiting to Perform', *Helsinki Monitor* 15(3) (2004), at p. 201. Another observer stated 'the OSCE has gradually lost all comparative advantages it used to have at the end of the Cold War. The change in objective conditions has been accompanied by the revision of the intentions of its members, again partly due to objective reasons. The mainplayers in Euro-Atlantic security can now decide which institution to reply on in order to solve problems. The region's states, however, take into account the capacities of the different institutions, including how they are endowed with resources. As resources originate from the states themselves, it is also up to them to allocate them according to their political priorities. The three decicive players in Euro-Atlantic security – the EU, the US and the Russian Federation- seem to opt more often than not for institutions other than the OSCE. the EU, NATO and G-8 have become more important political coordination forums than the OSCE'. See P. Dunay., *The OSCE in Unabated Decline,* (2007, Real Instituto Elcano), at p. 3. That said, the OSCE has continued to extend eastward, with several Central Asian countries as new participating States. See also., W. Zellner., 'Russia and the OSCE: From High Hopes to Disillusionment', *Cambridge Review of International Affairs* 18, no. 3 (October 2005). P. Hoffmann, ‚The OSCE Role in European Transatlantic Security: Does It Have a Future?', in R. Kanet (ed), *The United States and Europe in a Changing World,* Dordrecht, 2010, pp. 83-112. S. Lehne, ‚Reviving the OSCE: European Security and the Ukraine Crisis', (2015), Carnegie Europe, http://carnegieeurope.eu/2015/09/22/reviving-osce-european-security-and-ukraine-crisis/ii06. Last accessed on 15 September 2019.

[649] W. Zellner, ‚Identifying the Cutting Edge: The Future Impact of the OSCE, Working Paper 17, Centre for OSCE Research (CORE), Institute for Peace and Security Policy, University of Hamburg, p. 16-17, https://ifsh.de/file-CORE/documents/CORE_Working_Paper_17.pdf. Last accessed on 15 September 2019. According to Socor, the principle of Zero Nominal Growth was adopted by the OSCE as a compromise solution after the 2004 budgetary crisis, provoked in large part by the Russian Federation as an attempt to push forward its views on the OSCE. See V. Socor., 'OSCE 'Reform' Or a New Lease on Life?', Euroasia Daily Monitor, 16 December 2004, https://jamestown.org/program/osce-reform-or-a-new-lease-on-life/. Last accessed on 15 September 2019.

[650] See H. G. Schermers & N. M. Blokker., *supra,* note 3, (Brill Nijhoff Publishers, 2018), at p. 636. 'The budgets of [IOs] have grown substantially since their early years, although since the 1990s a ‚zero growth' policy has at times been followed in a number of organizations'.

[651] For example, in its recent Statement in Response to the Secretary General's presentation of the 2018 Programme Outline, Norway expressed its concern that the 'OSCE is gradually being weakened through sustained budget cuts in real terms…we will very soon end up with an organization that has been reduced to irrelevance'. Statement in response to the Secretary General's Presentation of the 2018 Programme Outline, Permanent Delegation of Norway to the OSCE (OSCE Doc. PC.DEL/785/17 of 9 June 2017). See Permanent Delegation of Norway to the OSCE website: https://www.norway.no/contentassets/e1fa1cc8f8f04e7b82b93dc625e1ea6c/06-08-norway-on-2018po.pdf. Last accessed on 15 September 2019.

of the OSCE across[652] as well as 'efficiencies in particular in the field of staff costs'[653], and this led to recommendations in 2016, *inter alia*, for OSCE executive structures to […] whenever possible downgrade or eliminate posts and affect this when posts become vacant' [654]. While the decrease in the size of the unified budget of the OSCE[655] is largely replicated with extra-budgetary contributions in financial assets[656], it would appear that in-kind contributions in services as a funding mechanism has assumed far greater significance in recent years[657]. This may be graphically illustrated by the OSCE response to the crisis in and around Ukraine, with the rapid deployment and subsequent expansion of the OSCE Special Monitoring Mission (SMM)[658]. Notwithstanding the very significant increase in

[652] See 2019 OSCE Unified Budget, *supra,* note . See section II: 'Taking into consideration financial constraints faced currently by participating States and reiterating that any request for a supplementary budget during a financial year shall be met, wherever possible, by reallocating existing resources…'. See also section II(1): 'Undertakes to continue efforts, including throughout the Unified Budget cycle in 2019, to focus, steamline and proritize the work of the OSCE across the three dimensions…'. See also section II(6) 'Tasks the Secretariat to amend Financial Administrative Instruction No. 9 on OSCE official travel management to reduce travel costs […]'.

[653] See, for example, OSCE Permanent Council Decision No. 1197 Approval of the 2016 Unified Budget, (OSCE Doc. PC.DEC/1197 of 31 December 2015), at II. (4). The 'Chair of the ACMF [was tasked] to initiate a working group on horizontal issues of the OSCE budget in order to *identify efficiencies in particular in the field of staff costs*. The working group shall start its work as soon as possible and prepare recommendations to the ACMF by June 2016 to be taken to the Permanent Council and reflected in the 2017 Unified Budget Proposal if agreed. The chair of this group will report to the ACMF every three months […]' [emphasis added].
See OSCE website: https://www.osce.org/pc/215416?download=true. Last accessed on 10 October 2019.

[654] See OSCE Permanent Council Decision No. 1216, (OSCE Doc. PC.DEC/1216/Corr.1 of 21 July 2016), at 4(a), Classification recommendations, With regard to identifing efficiencies in the OSCE budget, recommendations were also made on: salary structure, repatriation grant, incentive payment, staff and mission member travel, annual leave encashment, overtime, Board and Lodging Allowance (BLA) and Daily Subsistence Allowance (DSA) overlap. In the event, approved amendments to the SRSR were made on: the payment of salaries, repatriation grants, BLA, dependency allowances, education grants, on overtime and on the accumulation and granting of annual leave. See PC.DEC/1216/Corr.1. See OSCE website: http://www.osce.org/pc/255976?download=true. Last accessed on 15 September 2019.

[655] It is not entirely clear whether chronic problems of non-payment or delayed payment of assessed contributions at the UN also apply for the OSCE, and this has an impact on the operational capability of the Organization. At the end of 2015, 51 member states had not paid their assessed contributions for the regular UN budget, amounting to $533 million in unpaid assessments. See Report of the Secretary-General, 'Financial situation of the United Nations, (UN Doc A/70/433/Add.1 of 6 May 2016), available at: http://undocs.org/en/A/70/433/Add.1 (paras 6 - 7). Last accessed on 15 September 2019.

[656] 2016 OSCE Financial Report and Financial Statements and the Report of the External Auditor (Publisher: OSCE, 18 July 2017), p.48, para 22. ,Extra-budgetary revenue continues to be an important source of funding for the OSCE. Howvowever, it should be noted that as a percentage of total contributions revenue it decreased from 17% in 2015 to 11% in 2016'.

[657] With the exception of some of the leadership functions and local appointments in the general service, it may be noted that almost all other positions in OSCE missions are occupied by staff on secondment or national professional officers.

[658] The SMMU was originally established pursuant to OSCE Permanent Council Decision No. 1117 Deployment of an OSCE Special Monitoring Mission to Ukraine (OSCE Doc. PC.DEC/1117 of 21 March

assessed contributions[659] for this particular Mission, formulated separately from the unified budget of the OSCE, it is of note that 64% of the SMM's budgeted posts (933 posts) were seconded as at 31 December 2018, demonstrating the Mission's high reliance on voluntary resources[660]. At the same time, with the SMM consisting of 1,454 budgeted posts, compared with 2,269.3 posts for the unified budget, as of 31 December 2018[661], this highlights the uneven staffing and budgets across the Organization.[662]

2.11.8. Conclusion

While there are different ways to measure administration and costs, such economy by participating States not only poses significant challenges on the OSCE's ability to carry out its mandate effectively[663], but in the context of the present discussion, also raises

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2014), for a period of six months. See OSCE website: https://www.osce.org/pc/116747?download=true. Last accessed on 8 January 2020. The mandate was subsequently extended by OSCE Permanent Council Decisions: PC.DEC/1129 of 22 July 2014, PC.DEC/1162 of 12 March 2015 and PC.DEC/1199 of 18 February 2016, PC.DEC/1246 of 16 March 2017; and No. 1289 of 22 March 2018 (PC.DEC/1289). Pursuant to Decision No. 1323 of the OSCE Permanent Council on the Extension of the Mandate of the OSCE Special Monitoring Mission to Ukraine, OSCE Doc. PC.DEC/1323, 29 March 2019, the mandate of the OSCE Special Monitoring Mission to Ukraine now runs until 31 March 2020. See OSCE website: https://www.osce.org/permanent-council/415988?download=true. Last accessed on 10 October 2019.

[659] Ibid. The OSCE Permanent Council approved 'the financial and human resources requirements as presented in annex 1 and annex 2 of PC.ACMF/14/19/Rev.2 for the OSCE Special Monitoring Mission to Ukraine for the period 1 April 2019 to 31 March 2020 as well as the arrangements, as contained in PC.ACMF/16/19/Rev.3. In this respect, to *authorize the assessment of 84,709,400 euros on the basis of the field operation scale*, with the *remaining balance being financed through voluntary contributions* [emphasis added].' See also *2018 OSCE Financial Report and Financial Statements (for the year ended 31 December 2018) and the Report of the External Auditor*, 9 July 2019, para 45. (,assessed contributions [for the SMM] amounted to EUR 77.3 million in 2018 (67.6 million in 2017)'). See OSCE website: https://www.osce.org/secretariat/425201?download=true. Last accessed on 10 October 2019.

[660] Ibid, para 46.

[661] Ibid.

[662] Ibid.

[663] See 'Secretary General Lamberto Zannier Report to the Ministerial Council Hamburg, 8 December 2016' (OSCE Doc. MC.GAL/9/16 9 of December 2016), at p. 4, where he stated that '…[a]s the range of the Organization's activities has expanded, this has not been matched with adequate resources. A number of [participating States] emphasized at the informal ministerial events this fall in Potsdam and New York that the OSCE deserves more financial and human resources. As the OSCE remains a very lean, inexpensive and efficient organization, the sustained policy of Zero Nominal Growth applied to our very modest budget is limiting the effectiveness of our Organization'. See OSCE website: https://www.osce.org/cio/287901?download=true. Last accessed on 27 November 2019. A similar observation has been made by Møller in Crisis States Working Papers Series No. 2 that: 'most of the 'branches' of the 'OSCE tree' are very weak, understaffed, under-funded and granted competences quite inadequate for their stated objectives'. See B. Møller., 'European Security: The Role of the Organization for Security and Co-operation in Europe', *Working Paper 30 – Regional and Global Axes of Conflict* -,(February 2008, LSE Development Studies Institute), at p. 7.

questions about the adequacy of the human and financial resources made available for the proper functioning and possible reform of the OSCE's internal dispute resolution mechanism. Such concerns were likewise articulated by the *Redesign Panel*[664] towards the old UN system, linking inadequate financial and human resources at the informal and formal levels to its '[ultimate] ineffective[ness][665]. As shall be seen, this is a constant theme in the OSCE internal justice regime and will be examined below with regard to the efficacy of any proposed reforms.

2.12. The Legal Relationship Between IOs and International Civil Servants

2.12.1. The emergence of the international civil service

To properly understand the framework that governs the employment relationship between the OSCE and its officials, it is useful to briefly trace the emergence of the international civil service and the independence of the international civil servant from the domestic legal regime of the host state. Until the early twentieth century[666], IOs mostly relied on the work of nationals of the host state or individuals seconded by their home governments, who were subject to the laws and jurisdiction of their own home country[667]. The birth of the international civil service in its modern context[668] is usually traced to the establishment of the International Institute of Agriculture (IIA) in 1905[669], whose civil servants were the

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[664] See *Report of the Redesign Panel, supra,* note 137, Overview, paras 5, 6, 8.
[665] Ibid.
[666] See J. Klabbers, *supra*, note 84, (Cambridge University Press, 2015), pp. 242-243. For a brief general overview, see D. Mihajlov., ‚The Origin and the Early Development of International Civil Service' (2004), *Miskolc JIL,* 79-87. See Journal of International Law Department of the University of Miskolc: http://epa.oszk.hu/00200/00294/00002/20042mihajlov1.htm. Last accessed on 2 November 2019.
[667] See M. B. Akehurst., *supra,* note 127, (Cambridge University Press, 1967), at p. 243.
[668] As observed by Gulati, ‚international unions and their offices, such as the Universal Postal Union (founded in 1874), and the International Telcommunications Union (founded in 1865) were provided with a permanent organ responsible for administration, often named „bureau", which was supplied with a small number of staff members. These offices were required to represent „the common will of the members of the union and not of any one member and these offices in question came to be regarded as the international civil services'. R. Gulati., 'The Internal Dispute Resolution Regime of the United Nations – Has the Creation of the United Nations Dispute Tribunal and United Nations Appeals Tribunal Remedied the Flaws of the United Nations Administrative Tribunal?' *2010 Working Paper*, University of New South Wales, 7.
[669] The IIA was founded in 1905 to collect and publish statistical information on farming and agricultural products. In 1948, the functions and assets of the IIA were transferred to Food and Agricultural Organization (FAO).

first [670] to be granted special status by a host country, namely Italy[671]. Others have suggested that the concept of independent international civil service can be traced back to the League of Nations era, and its first director-general Sir Eric Drummond [672]. Nevertheless, with the establishment of the UN and proliferation of IOs in various fields after the Second World War, 'the model of the international civil service'[673] has become the rule, both at global (e.g. the UN and all Specialized Agencies[674]) and regional (e.g., the EU, the Council of Europe, the OSCE, NATO, the Organization of African Unity, and the Organization of American States) levels[675]. Against such a background, the general principle that the relationship between the IO and its staff is not governed by any kind of municipal law (including national labour laws), but rather the internal rules of each organization, has been increasingly followed[676], and can now be said to represent a core element of the system. Indeed, ever since the League of Nations Administrative Tribunal (LONAT) stated in its first decision that it was ‚bound to apply the internal law of the League of Nations' to settle the dispute before it, this principle has been consistently reaffirmed by other IATs[677]. Accordingly, it may be reiterated that the governing law is a

[670] S. Villalpando, *supra*, note 132, (Oxford University Press, 2016), at 1069. See also M. B. Akehurst., *supra,* note 127, (Cambridge University Press, 1967), at p. 4.
[671] Article 2 of the Staff Regulations of the IIA provided that its staff could not seek or receive instructions from anyone but their own superiors, to whom they were responsible. See C. Vitta, 'La Cooperation internationale en matiere d'agriculture,'*Hague Academy Collected Courses* 56 (1936), 301-405, 330.
[672] See also J. Klabbers., *supra*, note 84, (Cambridge University Press, 2015), at p. 243. See also T. G. Weiss, *International Bureaucracy* (Lexington, MA, 1975), at p. 35.
[673] See S. Villalpando, *supra*, note 132, (2016, Oxford University Press), at p. 1070.
[674] According to the UN website, 'The UN specialized agencies are autonomous organizations working with the United Nations. All were brought into relationship with the UN through negotiated agreements. Some existed before the First World War. Some were associated with the League of Nations. Others were created almost simultaneously with the UN. Others were created by the UN to meet emerging needs'. See UN website: https://www.un.org/en/sections/about-un/funds-programmes-specialized-agencies-and-others/. Last accessed on 18 October 2019.
[675] S. Villalpando, *supra*, note 129, (Edward Elgar Publishing, 2016), p. 67.
[676] See H. G. Schermers & N. M. Blokker., *supra,* note 3, (Brill Nijhoff Publishers, 2018), at p. 401. There is no national legal system regulating the relationship between the officials and the orgaization. Originally the contract of service was the only set of rules. This contract cannot provide solutions for all problems. The League of Nations soon drafted „Staff Regulations", which included more detailed rules for its officials. Today, each [IO] has its own legislation for its personnel, embodied in a statute or in staff regulations, or sometimes in other decisions of the organization. This legislation is binding on all officials of the organization, and includes a fairly extensive regulation of their legal position.'
[677] League of Nations Administrative Tribunal, *Di Palma Castiglione*, Judgment No. 1, 1929, 3 (quoted by C. F. Amerasinghe., *The Law of the International Civil Service, supra,* note 126, (Oxford University Press, 2nd ed., 1994), at p. 10. See *Waghorn*, ILOAT Judgment No. 28, at 3 (1957), 'the complainant wrongly alleges that English law is applicable as his national law…the Tribunal is bound exclusively by the internal law of the Organization'; *de Merode et al,* WBAT Decision No. 1, para. 27 (1981), The Tribunal, which is an international tribunal, considers that its task is to decide internal disputes between the Bank and its staff

'unique system of law'[678] referred to, *inter alia*, as the 'law of the international civil service', enabling the efficient management of international civil servants, which include a 'wide range of personnel, such as regular staff, fixed-term staff, consultants and even temporary staff'[679]. It has evolved to comprise a detailed regulation relating to the:

> 'selection, appointment and promotion of staff members; rights and obligations of officials; the classification of posts, salaries and allowances; staff leave and travel; performance and evaluation; social security; staff associations; separation from service; disciplinary measures and appeals'[680].

As shall be seen, the law of the international civil service is seen as part of the mandate of IOs, and linked to their legitimacy at a global level[681]. The adoption of autonomous rules applicable to the employment relationship may be seen to be both an 'important practical tool to ensure the efficient functioning of the international administration and an essential safeguard of the independence of the international civil service'[682]. These rules ensure that all employees are subject to comparable conditions of service, offered the same legal guarantees, they establish rights and obligations that are incumbent upon international officials in the exercise of their functions, and provide for uniform accountability mechanisms, including internal systems to impose disciplinary sanctions or settle disputes which are likely to arise[683]. This in turn serves to insulate employees against all sorts of pressures emanating not only from the host State of the organization or the state of

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within the organized legal system of the World Bank and that it must apply the internal law of the Bank as the law governing the conditions of employment'.

[678] M. B. Akehurst., *supra,* note 127, (Cambridge University Press, 1967).

[679] C. F. Amerasinghe., 'Section 3 The Individuals', *A Handbook on International Organizations* (eds. R. J. Depuy) (Martinus Nijhoff Publishers, 17 November 1998), at p. 339.

[680] S. Villalpando, *supra*, note 129, (Edward Elgar Publishing, 2016), p. 68.

[681] As pointed out by the ICJ, the creation of IATs by the UN may be linked with the aims of the Charter: by ensuring that justice is done for its own staff, the Organization is effecting internally what it preaches externally, namely the promotion of the rule of law and justice. See International Court of Justice, *Effects of Compensation Made by the United Nations Administrative Tribunal, ICJ Reports 1954,* 56.

[682] See S. Villalpando, *supra*, note 129, (Edward Elgar Publishing, 2016), p. 65. For example, in ILOAT Judgment No. 2232, the Tribunal, *inter alia*, considered that: '[i]n accordance with the established case law of all international administrative tribunals, the Tribunal reaffirms that the independence of international civil servants is an essential guarantee, not only for the civil servants themselves, but also for the proper functioning of international organizations'.

[683] Ibid, p. 66.

nationality of the civil servant, but also pressures emanating from within the organization[684]. Two key purposes served by such rules may be highlighted. The first is internal: 'the need to ensure the smooth relationship between the public administration and a wide variety of employees'[685]. The second is external: 'protecting officials from undue national pressures that could affect their partiality',[686] since the basic idea behind IOs is to 'foster cooperation between states with a view to achieving the common good (however defined)'[687]. This idea is reflected in many of the founding documents of IOs,[688] including the OSCE's internal regulatory framework. For example, OSCE Staff Regulation 2.01 (b) states that 'by signing the signing the letter of appointment or terms of assignment, OSCE officials shall agree to discharge their functions and regulate their conduct with the interests of the OSCE only in mind and neither to seek nor accept instructions from any Government or from any authority external to the OSCE'[689]. Paragraph 2 of the OSCE Code of Conduct also requires that 'OSCE officials shall neither seek nor accept instructions regarding the performance of their duties, from any Government or from any authority external to the OSCE'[690]. In terms of the OSCE's accountability and duty of care as an employer, OSCE

[684] S. Villalpando., *supra*, note 129, (Edward Elgar Publishing, 2016), p. 65.
[685] Ibid. See also R. Gulati., *supra,* note 668, *2010 Working Paper*, University of New South Wales, at 7. ('[O]ne must not underestimate the difficulties that could be generated as a result of the interaction of staff who have extraordinarily diverse backgrounds. At the 21st Session of the Legal of Nations [Records of the Twenty-first Session of the Assembly of the League of Nations, League of Nations Official Journal, Special Supplement No. 194, (1946)], the British representative said: 'I remember how one night in the Hotel Crillon Hymans expressed his doubts and fears. "I understand the Assembly," he said; "that is like the Conference at The Hague. I understand the Council; it is like the Concert of the Powers. But the Secretariat? How can men and women of forty different nations work together beneath a single roof? It will be not only a Tower of Babel, but a Bedlam too.'
[686] See J. Klabbers, *supra*, note 84, (Cambridge University Press, 2015), at p. 244. Paragraph 3 of the OSCE Code of Conduct on Impartiality states that: 'OSCE officials shall conduct themselves at all times in a manner befitting the status of an international civil servant. They shall refrain from any action that might cast doubt on their ability to act impartially. OSCE officials shall not engage in any activity which is incompatible with the proper performance of their duties with the OSCE or may adversely reflect on their status, as well as on the integrity, independence and impartiality of their position and function as OSCE officials. OSCE officials shall ensure that their own personal views and convictions, including their political and religious convictions do not adversely affect their official duties or the interests of the OSCE. OSCE Code of Conduct, Paragraph 3. Impartiality, Appendix 1, SRSR.
[687] Ibid, at p. 244.
[688] For example, Article 100 of the UN Charter stipulates that UN staff 'shall not seek or receive instructions from any government or from any other authority external to the Organization'. Paragraph 2 of the same article, moreover, obligates member states of the UN to respect the international character of the secretariat and to refrain from seeking to influence the staff.
[689] OSCE Staff Regulation 2.01(b) Conduct of OSCE Officials, Article II Duties, Obligations and Privileges, SRSR.
[690] OSCE Code of Conduct, paragraph 2 Relations with National Authorities, Appendix 1, SRSR.

Staff Regulations 2.03[691] and 2.07[692] explicitly require the OSCE to ensure the privileges and immunities and the functional protection of its officials. These two mechanisms flow from rules of customary international law, including those of the responsibility of IOs and from the general principles of law[693], where the OSCE has a primary obligation of 'duty of care'[694] as an employer of OSCE officials for their health[695], safety[696] and security[697],

[691] OSCE Staff Regulation 2.03 Privileges and Immunities, Article II Duties, Obligations and Privileges, SRSR. '(a) The Secretary General, the heads of institution and heads of mission, as well as staff members and international 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. Local staff/mission members shall enjoy privileges and immunities only to the extent granted to them by the respective host State under national legislation and relevant bilateral agreements which may be concluded between a State and the OSCE; (b) Privileges and immunities granted to OSCE officials are conferred in the interests of the OSCE and not for personal benefit; (c) Such privileges and immunities shall not exempt OSCE officials from respecting the laws and regulations of the host country; (d) The Secretary General shall decide, in consultation with the Chairmanship, whether immunity of a staff/mission member should be waived. Immunity of the Secretary General, the heads of institution and the heads of mission may be waived by the Chairmanship, who shall inform the Permanent Council of his intention to do so.

[692] OSCE Staff Regulation 2.07 Functional Protection, Article II Duties, Obligations and Privileges, SRSR. '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'.

[693] In 1949, the ICJ concluded that effective protection of international civil servants is an essential duty: 'the Organization may find it necessary, and has in fact found it necessary, to entrust its agents with important missions to be performed in disturbed parts of the world. Many missions, from their very nature, involve the agents in unusual dangers to which ordinary persons are not exposed […]. Both to ensure the efficient and indeoendent performance of these missions and to afford effective support to its agents, the Organization must provide them with adequate protection […]. In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization and *that he may count on it*' [emphasis added]. ICJ Advisory Opinion, *Reparation for Injuries Suffered in the Service of the United Nations*, [1949], ICJ Reports 174-220 at 183.

[694] While the term ‚duty of care' is not used in the OSCE Staff Regulations and Staff Rules, that deals with the Organization's officials and its relationship with them, OSCE Staff Regulation 1.02 on the Scope and Purpose states that '[t]hese Regulations embody [‚*inter alia*, the] rights of OSCE officials […]', which may infer organizational duties. In addition, OSCE official documentation such as the *OSCE Operational Guidelines for Working in a Potentially Hazardous Environment*, OSCE Conflict Prevention Centre's Operations Service and the Folke Bernadotte Academy, specifically refers at 2.2 Duty of Care, p. 15, to the ‚duty of care'. It states that ‚*The OSCE has a duty of care towards its staff*. Stated simply, it means that the Organization must take reasonable steps to ensure actions undertaken on its behalf do not knowingly cause harm to its employees, but also other individuals' [emphasis added]. See OSCE website: https://www.osce.org/secretariat/74739?download=true. Last accessed on 6 December 2019.

[695] See, for example, OSCE Staff Regulation 6.02 on the OSCE Health Insurance Scheme, Article VI Social Security and Provident Fund, SRSR.

[696] According to Russo, '[w]hile building security within the territory of its participating States remains the main goal of the OSCE, *providing a safe workplace for its personnel is a major precondition* for furthering its global mission' [emphasis added]. See D. Russo., 'Implementation of the Duty of Care by the OSCE', in A. de Guttry, M. Frulli, E. Greppi, C. Macchi (Eds.) *The Duty of Care of International Organizations Towards Their Civilian Personnel Legal Obligations and Implementation Challenges*, (Springer, T.M.C ASSER Press, 2018), at p. 266.

[697] See, for example, OSCE Staff Regulation 6.01 on OSCE Social Security Scheme, Article VI Social Security and Provident Fund, SRSR.

enabling the independence and the required loyalty[698]. Thus, the OSCE is required to provide a professional working environment[699] with 'sound administrative procedures for addressing employment disputes in order to avoid a 'denial of justice'[700]. Given the independence of OSCE officials from their home states in all possible respects, and the fact that the Organization is immune from the domestic legal regime of the respective host State in relation to employment disputes, as international civil servants, they may only take their claims before internal grievance mechanisms and ultimately before a special quasi-judicial body set up by the Organization. All this raises important questions about the law that governs the relationship between the OSCE and its officials, which will be examined in the next section with regard to the instruments that contain the internal law of the Organization and the sources of the law that may be used in determining the extent of its internal law, enabling a decision-maker to draw from various areas of the law to resolve a dispute.

2.12.2. Relevant instruments containing IO/OSCE internal law

Within each IO the law applicable to the international civil service has typically been seen as a 'well-defined set of sources organized in hierarchical order, comprising the organization's constituent act, staff regulations and rules, and administrative issuances'[701] and the mechanisms that ensure adequate participation on the part of the rules' recipients. This hierarchical structure, which has been confirmed by IATs[702] 'is similar to that of

[698] Ibid.

[699] For example, on the protection of human dignity in the workplace and claims of harassment, the OSCE is under a duty to both investigate such allegations ,promptly and thoroughly' and accord full due process and protection to the person accused (ILOAT Judgments No: 3337 para. 11; No. 3071, para. 36; No. 3065 para. 10; No. 2642, para 8; Court of Justice of the European Union (CJEU) Judgment F-52/05, para. 25: ,with all the necessary vigor and respond with the rapidity and solicitude requested by the circumstances of the case'.

[700] See paragraphs 34 and 35 of the *Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2018,* OSCE Doc. MC.GAL/10/18 of 7 December 2018.

[701] See S. Villalpando., *supra*, note 129, (Edward Elgar Publishing, 2016), p. 68.

[702] See e.g., UNAdT, *Aglion,* Judgment No. 56, 14 December 1954, para 14 (holding that the internal law of the UN consists of 'the Charter, Regulations adopted by the General Assembly, Staff Rules, promulgated by the Secretary-General, and the Statute and Rules of the Administrative Tribunal'; UNDT, *Hastings*, Judgment No. UNDT/2009/030, 7 October 2009, para. 18 ('To establish the meaning and intention of a UN provision the relevant context is the hierarchy of the UN's internal legislation. This is headed by the Charter of the UN followed by resolutions of the General Assembly, staff regulations and rules, Secretaty-General bulletins and then administrative instructions'.); *Villamoran,* Judgment No. UNDT (2011/126, 12 July 2011, para 29 ('At the top of the hierarchy of the Organization's internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General's bulletins, and administrative instructions…Information circulars, office guidelines, manuals, and memoranda are at the

domestic legal orders, but, as noted, such framework may be distinguished from other areas of international regulation'[703]. Two elements, in particular, may be highlighted in the specific context of relations between the OSCE and its employees. First, there are statutory sources from which the relevant rights, duties and obligations of the OSCE and its employees flow, forming part of the internal regulatory framework of the Organization. They are set out in 'three distinct layers' in Decision No. 705 of the OSCE Permanent Council, which formally established the OSCE's so-called 'Common Regulatory Management System (CRMS)'[704]. As the OSCE decision-making bodies have not adopted a constituent act[705] setting out fundamental principles, the first and highest 'layer' in the hierarchy of sources relating to the international civil service in the Organization consists of 'Staff Regulations, […] and 'other relevant decisions[706] of the Ministerial Council and/or Permanent Council, related to management of the OSCE's activities'[707]. These make explicit reference to its officials and provide the 'general framework upon which the other regulatory layers shall be built'[708], and may be considered the legal basis for the establishment of the mechanisms for the resolution of employment disputes. This first layer 'remains the exclusive prerogative of the participating States, through the Organization's representative decision-making bodies'[709], the Ministerial Council and Permanent Council,

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very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances'.)

[703] S. Villalpando., *supra*, note 129, (Edward Elgar Publishing, 2016), p. 68.

[704] OSCE Permanent Council Decision No. 705 on the Common Regulatory Management System ('…the regulatory system for the effective and efficient use of the Organization's human, financial and material resources') (OSCE Doc. PC.DEC/705 of 1 December 2005). See OSCE website: https://www.osce.org/pc/17526?download=true. Last accessed on 5 December 2019.

[705] According to Amerasinghe, 'IATs have readily and generally conceded that the constituent instrument of an [IO] is a source of law in employment relations' (*Howrani,* UNAT (Judgment) No. 17 [1955] 21. See also *Mortished,* UNAT (Judgment) No. 273 [1981], at 8; *Mullan,* UNAT (Judgment) No. 162 [1972]; *Duberg,* ILOAT (Judgment) No. 17 [1955]; *Aicher,* OECD Appeals Board (Decision) No. 37 [1964]; *Von Lachmüller,* CJEC Cases Nos. 43, 45, 48/59 [1960] ECR 463). It is the highest written law governing employment' (de Merode, at 9-11). See C. F. Amerasinghe., 'International Administrative Tribunals', in: C. P.R. Romano, K. Alter, Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, (Oxford University Press, 2014), at p. 323.

[706] Ibid. ('The decisions of the main legislative organs of [IOs] are also a source of law. In the case of the UN, the Charter gives the UNGA the power to establish the regulations governing the staff.')

[707] OSCE Permanent Council Decision No. 705 on the Common Regulatory Management System.

[708] Ibid.

[709] As indicated, the decisions of the OSCE's main legislative organs (known as 'decision-making bodies') are also a source of law, standing at the top of the hierarchy of sources. According to Tabassi, '[t]he Secretariat argues that the accumulation of Summit, Ministerial and Permanent Council decisions comprise the OSCE's Constitution as a living instrument in the most dynamic sense [,..].' See L. Tabassi., *supra*, note 21*,* (Cambridge, Cambridge University Press, May 2019), at p. 76. In the case of the UN, Article 101.1 of

with the latter empowered, *inter alia*, to draw up and adopt decisions over the Staff Regulations and approve the unified budget[710]. In terms of their scope and purpose, the OSCE's Staff Regulations determine the whole employment relationship, embodying the 'fundamental conditions of service, duties, obligations and rights of OSCE officials'[711], thus articulating the 'broad principles of personnel policy for the recruitment and administration of OSCE officials'[712]. They comprise eleven articles, which cover: General (provisions)[713], Duties, Obligations and Privileges[714], Appointments and Assignments[715], Separation from Service[716], Salaries and Entitlements[717], Social Security and Provident Fund[718], Working Hours and Leave[719], Staff Relations[720], Disciplinary Procedure[721], Appeals[722], Final Provisions[723], together with accompanying Appendices[724]. As in most

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the Charter gives the UN General Assembly the power to establish the regulations governing the staff. See also the *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal Case,* 1982 ICJ Rep 362. In *de Merode*, the World Bank Administrative Tribunal (WBAT) said that in the IBRD there were decisions taken in the exercise of the power accorded to the Board of Governors and Executive Directors by Article V(2)(f) principally, to adopt rules and regulations necessary for or appropriate to the conduct of the bank's business. The most formal constitued the By-Laws. The individual decision of the Board of Governors establishing the WBAT was also law-creating as were decisions of the Executive Directors affecting staff rights and obligations which were taken regularly. WBAT Reports [1981], Decision No. 1, at p. 11.

[710] See Decision No. 533 of the OSCE Permanent Council on the OSCE's Unified Budget Process, Step 2(d) Unified Budget, Preparation and Approval. See OSCE website: https://www.osce.org/pc/42765?download=true. Last accessed on 1 November 2019.

[711] OSCE Staff Regulation 1.02 Scope and Purpose, Article 1, General, SRSR. According to Article I, OSCE Staff Regulation 1.01, Terminology, Article 1, General, SRSR, '[an] OSCE Official [is defined as] '[a]ny person subject to the Staff Regulations in accordance with Regulation 1.03, including the Secretary General, the heads of institution and the heads of mission and all international or local, contracted or seconded, fixed-term and short-term staff/mission members'.

[712] OSCE Staff Regulation 1.02, Scope and Purpose, Article 1, General, SRSR.

[713] Article I, General, SRSR. This includes ‚Terminology', Scope and Purpose', ‚Applicability', Authority', ‚Accountability', ‚Delegation of Authority', ‚Reallocation of post table positions'.

[714] Article II, SRSR.

[715] Article III, SRSR.

[716] Article IV, SRSR.

[717] Article V, SRSR.

[718] Article VI, SRSR.

[719] Article VII, SRSR.

[720] Article VIII, SRSR.

[721] Article IX, SRSR.

[722] Article X, SRSR.

[723] Article XI, SRSR.

[724] Appendices 1 – 13 include: OSCE Code of Conduct, Terms of Reference of the PoA, Salary Scales for International Contracted Staff/Mission Members, Local Salary Scales, Amount of Repatriation Grant, Amount Education Allowance, Dependency Allowances for Professional and Higher Categories, Administration of the OSCE Provident Fund Compensation in the Event of Death or Disability Resulting From the Performance of Official Duties, Compensation for Termination of Appointment for Medical Reasons Attributable to Performance of Official Duties, Terms and Conditions of the OSCE Emergency

IOs, the Staff Regulations are reviewed on an ongoing basis in light of evolving organizational and staff needs[725], and OSCE Staff Regulation 1.01 authorizes the OSCE Permanent Council to revise, amend, or suspend the Staff Regulations[726]. The Staff Regulations also contain basic principles regarding OSCE officials, in particular the international character of their functions[727] and their independence[728]; and 'in the employment of OSCE officials and in the determination of the conditions of service'[729], 'efficiency, competence, and integrity'[730] are the 'paramount consideration[s]'[731]. Like many IOs[732], the latter provision mitigates the disadvantages of over-emphasizing the requirement of equitable distribution of posts[733] from participating States, and this is particularly relevant for middle-ranking and management professionals. As indicated, there are also certain mechanisms that ensure adequate participation by OSCE staff/mission members. Thus, OSCE Staff Regulation 8.01 require that:

Medical Evacuation Insurance Scheme, Internal Appeals Procedure, Terms and Conditions of the OSCE Temoprary Incapacity Insurance Scheme.

[725] OSCE Staff Regulation 11.01(c) Amendment, Article XI Final Provisions, SRSR, states that: '[t]he Permanent Council shall review periodically the implementation of these Regulations, including the effectiveness of the recruitment and appointment criteria, policies and procedures, the conditions of service of OSCE officials and the adequacy of the level of renumeration and its affordability in the light of the OSCE's financial situation'.

[726] OSCE Staff Regulation 1.01 Amendment, Article I General, SRSR.

[727] OSCE Staff Regulation 2.01(a) Conduct of OSCE Officials, Article II Duties, Obligations and Privileges, SRSR. ‚OSCE officials shall conduct themselves at all times in a manner befitting the status of an international civil servant. They shall not engage in any activity which is incompatible with the proper performance of their duties with the OSCE. They shall avoid any action and, in particular, any kind of public pronouncement which may adversely reflect on their status as well as on the integrity, independence and impartiality of their position and function as officials of the OSCE'.

[728] Ibid.

[729] OSCE Staff Regulation 3.01(b), Designation and Recruitment, Article III Appointments and Assignments, SRSR, ‚The paramount consideration in the employment of OSCE officials and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity […]'.

[730] Ibid.

[731] Ibid.

[732] See H. G. Schermers & N. M. Blokker., *supra,* note 3, (Brill Nijhoff Publishers, 2018), at p. 369. According to Schermers and Blokker, ‚[m]any [IOs] attempt to mitigate the disadvantages of over-emphasizing the requirement of equitable distribution of staff members by expressly providing in the constitution or in staff regulations that competence and integrity are the primary considerations, and that nationality is to be of only secondary importance'.

[733] OSCE Staff Regulation 3.01(b) Designation and Recruitment, Article III Appointments and Assignments, SRSR. '[…] taking full account of the principle of recruiting staff from all OSCE participating States on a fair basis and the importance of achieving a gender balance within the Organization'.

> 'the Secretary General to establish and maintain continuous contact and communication with all staff/mission members in order to ensure their effective participation in identifying, examining and resolving issues relating to staff welfare, including conditions of work and other personnel policies. The Secretary General shall provide guidelines for this purpose'[734].

The second layer governing the details of employment relations in the OSCE consists of the Staff Rules which in turn 'elaborate the provisions of the Staff Regulations, where appropriate'[735]. As such Rules are updated on an ongoing basis in response to changing management needs and new policies, the OSCE Secretary General has the authority[736] to 'develop'[737], 'issue'[738] and revise[739] the Staff Rules and these must be 'in conformity with [Staff] [R]egulations and the policies enshrined therein'[740]. Prior to issuing or revising the Staff Rules, the Secretary General shall consult with Institutions and Field Operations, as appropriate, and shall submit such Rules in a timely manner to the Advisory Committee on Management and Finance (ACMF)[741], an informal subsidiary body[742] of the OSCE

[734] OSCE Staff Regulation 8.01 Staff Relations, Article VIII Staff Relations, SRSR.
[735] OSCE Permanent Council Decision No. 705, *supra,* note 44.
[736] OSCE Staff Regulation 1.04(a) Authority, Article I General, SRSR.
[737] OSCE Staff Regulation 1.04(a) Authority, Article I General, SRSR.
[738] Ibid.
[739] OSCE Staff Regulation 11.01(b) Amendment, Article XI Final Provisions, SRSR.
[740] Ibid.
[741] An informal Committee of Experts was established by the 1992 Helsinki Summit (Decision XII of the Helsinki Decisions). In June 2003, this Informal Financial Committee (IFC) was transformed into the Advisory Committee on Management and Finance (ACMF) which is considered an advisory committee to the Permanent Council. According to its terms of reference established in OSCE Permanent Council Decision No. 552 of 27 June 2003, (OSCE Doc: PC.DEC/552), '[it] shall normally meet in informal and open-ended format once a week or as often as the Chairmanship deems necessary, at the request of the membership of the Committee, or at the request of the Preparatory Committee and/or Permanent Council. The ACMF is composed of representatives of the OSCE participating States and chaired by a representative of the Chairmanship which rotates on an annual basis. As an advisory committee to the Permanent Council, the ACMF reviews all matters relating to and submits recommendations for consensus-based decision-making on, *inter alia,* 2(i) '…monitor[ing] the observance of the Organization's common regulatory framework for management of the resources at its disposal, in particular the Staff and Financial Regulations'. See OSCE website: https://www.osce.org/pc/42759?download=true. Last accessed on 18 October 2019.
[742] In paragraph II (C) 1 of the OSCE Rules of Procedure, the ACMF is recognized as an informal subsidiary body (ISB), as specified in paragraph II (A) 6 of the OSCE Rules of Procedure: '[e]ach decision-making body[, including the OSCE Permanent Council,] may set up informal subsidiary working bodies, hereinafter referred to as informal subsidiary bodies (ISBs), or dissolve them. The ISBs shall not have decision-making capacity and shall be open to all participating States.' Paragraph paragraph II (A) 7 further states: '[e]ach ISB shall work in accordance with its terms of reference or mandate and shall be accountable and report to a decision-making body hereinafter referred to as the superior decision-making body of that ISB.'). Under paragraph V (A) 2 (a) Rules of procedure for informal bodies, '[t]he ACMF, during a calendar year, shall be

Permanent Council, established to review all matters related to the OSCE budget, funding and resources management, for consideration[743]. If objections to proposed changes are raised by its members (i.e. representatives of the OSCE participating States), these are submitted to the OSCE Permanent Council for approval[744]. Any budgetary or extra-budgetary implications of amendments to rules shall be presented to the Permanent Council for approval before the rules in question are promulgated. However, in case of conflict, the Staff Regulations prevail as the first layer of the CRMS, and any provision of the Staff Rules that violates the Staff Regulations will be disregarded. And, at the lower level of the hierarchy of sources is a third layer consisting of administrative issuances, in the form of, *inter alia,* staff instructions, administrative/staff circulars or guidelines from the Secretariat, institutions or field operations. These subsidiary instruments provide 'more detailed work-related guidance for the day-to-day management of the OSCE's activities, in accordance with the provisions of the first and, where applicable, second layers'[745], forming an integral part of the internal legal system of the Organization. Of particular importance in the present context, are staff instructions. Staff Instruction 21 OSCE Policy on the Professional Working Environment[746], which 'provides the regulatory framework for implementing the OSCE's commitment to a healthy, harassment-free working environment for all its officials'[747]. While not publicly available, the purpose of this Staff

chaired by a representative of the Chairmanship from 1 January to 30 September and by a representative of the incoming Chairmanship from 1 October to 31 December; […].'

[743] See Decision No. 705 of the OSCE Permanent Council, Common Regulatory Management System, PC.DEC/705 (1 December 2005), p. 2. OSCE Staff Regulation 11.01(b) Amendment, Article XI Final Provisions, SRSR, states that: '[a]mendments to the Staff Rules shall be communicated to the Permanent Council prior to their promulgation by the Secretary General. Any budgetary implications of amendments to the Staff Rules shall be presented to the Permanent Council for approval before the Rules in question are promulgated'.

[744] Ibid.

[745] OSCE Permanent Council Decision No. 705, *supra,* note 44.

[746] Staff Instruction 21 OSCE Policy Professional Working Environment cannot be accessed publicly. However, reference to the title of this document can be found under CRMS Documents on the OSCE Ethics Awareness Site: http://www.ethicslearn.org/crms-documents.html. Last accessed on 15 September 2019. The only other Staff Instruction identified is Staff Instruction 11/2004 Preventing the Promotion/facilitation of Trafficking in Human Beings.

[747] Professional Working Environment – Guide on the OSCE Policy against Harassment, Sexual Harassment and Discrimination Second Edition, Published by the Department of Human Resources in co-operation with the Gender Section and Legal Services (renamed Office of Legal Affairs in 2018), OSCE Secretariat (2010), http://www.osce.org/gender/30604?download=true. Last accessed on 15 September 2019.

Instruction is to establish the informal[748] and formal[749] grievance resolution procedures to be followed should allegations of violations of the Policy be reported[750]. Significantly, the preparation, issuance and revision of the second and third layers of the CRMS are mostly regulated in ways which guarantee their transparency. Both are the responsibility of the OSCE Secretary General[751] and '[t]he Secretariat shall inform the ACMF as a rule in advance of issuing instructions, and shall consult on these instructions if so requested by the ACMF'[752]. Secondly, in addition to statutory sources, there are also contractual elements, namely the individual contract of employment[753] which affect the personal status of each OSCE staff/mission member. In the absence of express use of the word 'contract'[754], OSCE Staff Regulation 1.01 refers specifically to 'letters of appointment' for

[748] As shall be seen, an informal procedure provides OSCE officials who believe they have been subjected to harassment, sexual harassment, discrimination or retaliation, with an opportunity to first try and resolve the problem at an early stage and avoid unnecessary litigation. The informal options include approaching the alleged offender, involving a third party, including another staff/mission members of confidence, staff representatives or supervisors, the advice of personnel/administrative officers in the respective OSCE executive structure or the Department of Human Resources in the Secretariat; or requesting mediation.

[749] As shall again be seen, there are two formal procedures available for OSCE officials to address allegations of violation of the professional working environment. First, an appeal may be filed by an OSCE official against an administrative decision that he/she alleges derives from harassment, sexual harassment, discrimination or retaliation, in accordance with Article X of the SRSR. Secondly, a formal complaint may be filed to the Secretary General or to the Head of the respective OSCE executive structure by an OSCE official who considers that he/she has been subjected to harassment, sexual harassment, discrimination or retaliation, and which could not be settled informally or through mediation.

[750] Ibid. Improper behaviour in the Oraganization includes work-place harassment, sexual harassment, discrimination or retaliation.

[751] OSCE Permanent Council Decision No. 705 Common Regulatory Management System, (OSCE Doc. PC.DEC/705 of 1 December 2005).

[752] Ibid.

[753] The ICJ has put beyond doubt that , a contract of employment entered into between an individual and an IO is a source of rights and duties for the parties to it'. *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization Upon a Complaint Filed Against the International Fund for Agricultural Development*, Advisory Opinion, 2012 I.C.J. 76 (Feb 1). It also held that ,it is necessary to consider these contracts not only by reference to their letter but also in relation to the actual conditions in which they are entered into and the place which they occupy in the Organization'. See also *Judgments of the Administrative Tribunal of the International Labour Organization upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization*, Advisory Opinion, 1956. I.C.J. 91 (Oct. 23). According to the Court, staff regulations and rules of the organization , constitute the legal basis on which the interpretation of the contract must rest'. Ibid 94.

[754] Schermers & Blokker explain that '[i]n the modern law concerning international officials, "statutory" provisions are distinguished from "contractual" ones. The former regulate the service in general and may be altered by the organization unilaterally. The latter concern the civil servants individually (such as the provisions on salary and rank), and may be only altered by mutual agreement'. See H. G. Schermers & N. M. Blokker., *supra,* note 3, (Brill Nijhoff Publishers, 2018), at p. 403. However, as noted by Ullrich, [t]oday the vast majority of IO employ their staff on a contractual basis (based on bilateral acts of consensus). Only EU and EPO staff are appointed on a statutory basis by means of a unilateral act of appointment […] [t]he only significant difference between statutory and contractusal relationship lies ultimately in the generally

contracted OSCE officials and 'terms of assignment' for seconded OSCE officials. Such appointment or assignment take the form of an offer which is required to be accepted by the prospective official[755]. In this situation, the legal relations between the OSCE official and the Organization are governed by the letters of appointment for contracted OSCE officials or terms assignment for seconded OSCE officials, which set out 'expressly or by reference, all terms and conditions of employment with the OSCE'[756]. The letters of appointment or terms assignment are limited to a few basic elements of a mainly formal nature that are particular to the official concerned, and include provisions on '[t]he date on which the OSCE official is required to enter upon his/her duties'[757], the category, grade, step of the commencing salary (for contracted OSCE officials)[758] or entitlements to Board and Lodging Allowance and reimbursement of travel costs upon assignment and separation (for seconded OSCE officials)[759], duration of appointment or assignment[760], social security arrangements[761]. Letters of appointment and terms of assignment are supplemented by documents of general application which are not negotiable. In OSCE Staff Rule 3.07.1(a), the letter of appointment or assignment refers to the SRSRs in stipulating that the appointment or assignment is offered 'subject to the provisions of the SRSRs, and to amendments thereto which may be adopted'[762]. OSCE staff/mission members should also receive a copy of the SRSRs at the time of appointment/assignment, which regulates their relationship with the Organization. However, this arguably does not derogate from the contractual nature of the relationship since the SRSR are incorporated by 'reference', which may account for the fact that OSCE Staff Regulation 10.01(a) refers to the breach of the SRSRs as a case of 'non-observance' of the 'letters of appointment or terms of assignment'[763]. Furthermore, OSCE Staff Rule 3.07.1(b) states that when joining the

easier termination of contracual relationships […]'. See G. Ullrich, *supra,* note 540, (Duncker & Humblot, Berlin, 2018), at p. 258.

[755] According to OSCE Staff Regulation 3.07 Letters of Appointment and Terms of Assignment, SRSR, '[t]hey shall be signed by the appointing authority….and countersigned by the OSCE officials concerned, at the time of their appointment or assignment'.

[756] Ibid.

[757] OSCE Staff Rule 3.07.1(d) – Contents of Letters of Appointment and Terms of Aassignment, SRSR.

[758] Ibid, OSCE Staff Rule 3.07.1(e).

[759] Ibid, OSCE Staff Rule 3.07.1(f).

[760] Ibid, OSCE Staff Rule 3.07.1(c).

[761] Ibid, OSCE Staff Rule 3.07.1(g).

[762] OSCE Staff Rule 3.07.1(a) – Contents of Letters of Appointment and Terms of Assignment, SRSR.

[763] OSCE Staff Regulation 10.01(a), Internal Appeals Procedure, Article X, Appeals, SRSR.

Organization, OSCE officials are also subject to a separate Code of Conduct, set out in Appendix 1 of the SRSR, which forms the 'cornerstone' of the Organization's 'ethical framework'[764]. Notably, paragraph 6 on the 'Professional working environment' states that: 'OSCE officials shall abstain from any action which may be contrary to the OSCE policy on professional working environment. All OSCE officials are treated equally and with respect, regardless of gender, race, religion or belief, nationality, ethnic or social origin, age, sexual orientation, marital status or other aspects of personal status'. And, in this context, they are required under the same provision to sign a 'declaration of loyalty' joined with the letter of appointment or terms of assignment[765]. Other than these formal administrative issuances which are regulatory in nature, it may be noted that administrations also typically use a myriad of other instruments that implement its human resource policies, such as 'information circulars, policy guidelines, memoranda and manuals'[766], as well as headquarter agreements[767]. In the context of the structurally fragmented OSCE[768], these also address the specificities of its twenty-four separate structures in twenty-two different countries, which operate under a very broad variety of national legal arrangements, but must be consistent with the three layers. As such, IATs often invoke the latter as evidence of the IO's practice in matters relating to the international civil service[769]. Pursuant to OSCE Staff Regulation 10.02 on the 'External Appeals Procedure', another integral part of the internal law of the OSCE is the Terms of Reference of the PoA (ToR PoA), set forth in Annex 2 to the SRSR. Like the statutes of most IATs, the ToR PoA do not contain provisions outlining the applicable law apart from referencing internal law in Article I(2) of the ToR PoA to rights 'under the [SRSR] or the

[764] See OSCE website ,Ethics applied at the OSCE': https://jobs.osce.org/working-for-osce. Last accessed on 6 December 2019.
[765] Although not exhaustive, relevant OSCE CRMS documents related to the OSCE Code of Conduct may be identified on the OSCE website at: http://www.ethicslearn.org/crms-documents.html. Last accessed on 15 September 2019. However, as indicated, these documents cannot be publicly accessed.
[766] S. Villalpando., *supra*, note 129, (Edward Elgar Publishing, 2016), p. 70.
[767] See P. Schmitt., '5. Categorization of the Relationships between individuals and international organizations and applicable law', in *Access to Justice and International Organizations,* Leuven Global Governance Series (Edward Elgar Publishing, 2017), at p. 37.
[768] In the context of the OSCE, see, for example, *Agreement between the OSCE and Austria regarding the Headquarters of the OSCE and* on the hosting of the headquarters of the ODIHR in Warsaw, see *Arrangement between the OSCE and the Republic of Poland regarding the Status of the OSCE in the Republic of Poland*.
[769] S. Villalpando., *supra*, note 129, (Edward Elgar Publishing, 2016), p. 70.

letter of appointment or terms of assignment'[770]. Moreover, since final adjudication decisions rendered by the PoA are not made publicly available, thus allowing light to be shed on the question of the sources of law they apply, it is reasonable to assume that the Panel is solely basing its analysis on the interpretation of employment contracts or applicable OSCE CRMS. On the one hand, the CRMS can be distinguished from the individual contract of employment: the latter cannot be changed without the agreement of the two parties and any element of the CRMS may be revised, amended or suspended at any time through the regulations established by the OSCE Permanent Council[771]. On the other hand, the individual contract of employment and CRMS would seem to operate in tandem, largely constituting the documents that contain internal law of the OSCE.

2.12.3. The sources of the internal law of an IO

Various areas of the law that could be applicable between an IO and its staff include 'employment/labour law, the law of contracts, administrative law, human rights law, institutional law, and public international law.'[772] It is worth reiterating at this point that the governing law is a unique system of law, and the employees of an IO are required to have an allegiance greater than that is owed to an ordinary employer[773], 'transcending national sentiments and national law.'[774] In this regard, Akehurst has succinctly noted that '[t]he unique character of employment in an [IO] can be best emphasized by subjecting it to a unique system of law.[775] While the statutes of IATs are generally silent as to the applicable sources of law, there are numerous formal sources from which tribunals have in practice derived the law that they apply.[776] Such reference has not rested on any preconceived theory of formal sources of international civil service law; rather, 'practical necessity and judicial wisdom have determined what formal sources should be invoked in

[770] Article 1(2) Competence of the Panel of Adjudicators, Appendix 2, ToR PoA, SRSR.
[771] Article XI Final Provisions Regulation 11.01(a) Amendment, SRSR. 'These Regulations shall not be regarded as establishing acquired rights of the staff; they may be revised, amended or suspended by the Permanent Council […]'.
[772] See R. Gulati., *supra,* note 668, *2010 Working Paper*, University of New South Wales, at p. 10.
[773] Ibid.
[774] M. B. Akehurst., *supra,* note 127, (Cambridge University Press, 1967), at p. 6.
[775] Ibid.
[776] C. F. Amerasinghe, s*upra*, note 127, (Cambridge University Press, 2005), at p. 283.

deciding cases.'[777] The administration of IOs, including that of the UN and the OSCE, 'tends to become [its] government. Or, at least, tends to compensate for the lack of government' [778]; thus, the law of the international civil service, which is primarily concerned with providing a check on the exercise of governmental power constitutes one major area of law that informs the internal law of an IO[779]. It is accepted that judicially created rules of employment law within IOs have been heavily influenced by the law of public administration, and less so by private employment law, consequently, employment related disputes are often analyzed by using an international civil service law framework.[780]

2.12.4. The law of the international civil service

According to Amerasinghe, '[the] exercise of administrative powers, particularly, in connection with employment relations is controlled by the application of [international civil service] law'[781], and that '[IOs] generally exercise their powers vis-à-vis their staff through administrative decisions'[782]. When a staff member disputes an act or omission of the administration of an IO, he/she usually questions a decision taken by the administrative authority[783]. As a result, IATs exercise judicial control over decisions taken by the organization in the exercise of their powers[784]. While more detailed consideration of administrative decision may be addressed later in the specific context of its scope and meaning, as a preliminary point, however, it is clear that the concept of administrative decision-making is central to the way in which decisions within IOs are made, and consequently key to the conflict resolution regimes in IOs are made. Administrative decisions are unilateral decisions that are taken by the administration and have a personal

[777] Ibid.
[778] S. Battini., 'Political Fragmentation and Administrative Integration: the Role of the International Civil Service', in K. Papanikolaou and M. Hiskaki (eds.), *International Administrative Tribunals in a Changing World: United Nations Administrative Tribunal Conference: Organized Under the Auspices of the Executive Office of the Secretary-General, New York, Friday, 9 November 2007* (London [UK]: Esperia Publications, 2008, at p. 187.
[779] See R. Gulati., *supra,* note 668, *2010 Working Paper*, University of New South Wales, at p. 11.
[780] Ibid.
[781] See C. F. Amerasinghe., *supra,* note 127, (Cambridge University Press, 2nd revised ed, 2005), at p. 299.
[782] Ibid.
[783] Ibid.
[784] Ibid.

impact upon the concerned staff member. An administrative decision adversely impacting upon a staff member may in some cases suffer from a substantive irregularity[785] or a procedural irregularity[786], and be consequently invalid. Substantive irregularities are often difficult to prove, and manifest themselves as, *inter alia,* drawing of mistaken conclusions and taking into account irrelevant considerations.[787] With regard to procedural issues, the exercise of broad discretionary powers without adequate procedural safeguards, 'inevitably procedures arbitrary limitation upon the exercise of any power.'[788] Amerasinghe noted that:

> While the requirement of procedural propriety cannot be disputed, the content of that requirement may vary with the kind of discretionary decision in issue. Apart from the fact that the prescriptions of the written law may be different in different circumstances, the requirements of the unwritten law (i.e., general principles of law) in regard to procedure may also vary with the kind of decision taken. Thus, the procedural safeguards accorded to staff members in the usual disciplinary case are, perhaps, the most extensive, while in other cases administrative authorities are evidently under less severe constraints in terms of the procedure to be followed. What all discretionary decisions have in common is that a 'fair' procedure or 'due process' be followed when they are taken.[789]

Accordingly, to ensure that administrative decisions are free from procedural irregularities, it is necessary to accord due process to persons in respect of whom administrative decisions

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[785] Ibid, at p. 304. ('Substantive irregularity pertains to the substantive content of the decision taken, as contrasted with the motive for the decision or the procedure followed in the taking of the decision. Thus, for example, the facts on which a decision is based, the conclusions drawn from the facts established and the relationship of the elements of the decision or the acts upon which it rests to the governing laws are matters concerning the substance or content of the decision.')

[786] Ibid, at p. 305. ('The need for a fair procedure to be followed in th etaking of discretianary administrative decisions has been emphasized by IATs. The recognition of the right of staff members to a fair procedure in the taking of discretionary decisions is particularly important, because it is often difficult to prove the existence of irregular motives or *détournement de pouvoir* as a ground for judicial review of a discretiaonary decision. Thus, judicial review of procedural factors constitutes a sifnificant means of checking arbitrary action on the part of administrative authorities.')

[787] See R. Gulati., *supra,* note 668, *2010 Working Paper*, University of New South Wales, at p. 12.

[788] Ibid.

[789] See C. F. Amerasinghe., *supra,* note 127, (Cambridge University Press, 2nd revised ed, 2005), at p. 305.

are being made. Thus, the law of the international civil service plays a major role as a source of law not only for IATs, but also decision-makers at IOs.

2.12.4. Contract law

In their case law, IATs have generally qualified employment with an IO as being based on a contractual relationship, [790] while noting that the relationship tends to mix contractual stipulations with provisions of statutory character. [791] Therefore, the employment relationship is not only governed by the private law of contract, but in certain instances, irrespective of the agreement of the parties, is modified by public law concepts which exist in the law governing the civil service of many states.[792] Where the employment relationship is partly contractual and partly statutory, statutory elements may govern the employment relationship, 'particularly as regards salary, grade, and the nature of the appointment',[793] even though they are not incorporated in the contract of employment.[794]

2.12.5. Other sources

The staff regulations and staff rules and their equivalent (the contract of appointment or

[790] Ibid, at p. 283-284. The former UNAT and the ILOAT have accepted the fact that the contract of appointment is a source of law. In *Kaplan*, [UNAT Judgment No. 19 [1953], at p. 73], the former UNAT conceded that the contract was a source of law, though there were other sources. See also *Mortished,* UNAT Judgment No. 273 [1981], para II. The same approach was taken by the ILOAT in *Lindsey,* ILOAT Judgment No. 61 [1962], para. 6. For other tribunals, see e.g., *de Merode,* Decision No. 1 [1981] WBAT Rep 9, and *Uehling,* OASAT Decision No. 9 [1974] 10. See also H. G. Schermers & N. M. Blokker (eds.)., *supra,* note 3, (Brill Nijhoff Publishers, 2018), at p. 403. ('[Contractual provisions] concern civil servants individually (such as the provisions on salary and rank), and may be altered only by mutual agreement.')

[791] ILOAT, *Lindsey,* Judgment No. 61 [1962], para. 12. See also WBAT, *de Merode,* Decision No. 1 [1981], para. 17; *Castelli,* Judgment No-2010-UNAT-037, 1 July 2010, para. 23. See C. F. Amerasinghe., *supra,* note 127, (Cambridge University Press, 2nd revised ed, 2005), at p. 283. ('[Statutory provisions] regulate the service in general and may be altered by the organization unilaterally.') See also S. Villalpando, *supra,* note 129, (Edward Elgar Publishing, 2016), at p. 72. ('[D]omestic systems have divergent conceptions of how their own national civil service relationship is to be contrued: in some countries (particularly those of the Commonwealth), this relationship is based on a contract of employment, while in others (e.g. in continental Europe) it is traditionally established by an act of public authority that attributes a certain status to the individual, to which the application of a number of publicly sanctioned rules and regulations is attached. In this regard, the practice of [IOs] varies and has evolved, such that clear guidance cannot be provided.')

[792] See C. F. Amerasinghe., *supra,* note 127, (Cambridge University Press, 2nd revised ed, 2005), at p. 282.

[793] See C. F. Amerasinghe., *supra,* note 705, (Oxford University Press, 2014), at p. 323.

[794] See C. F. Amerasinghe., *supra,* note 127, (Cambridge University Press, 2nd revised ed, 2005), at p. 282. ('Further, the power to alter terms and conditions of employment may be different in the two cases.')

other written sources) 'do not comprise a complete legal system'[795]. General principles of law also constitute a relevant source in the internal employment law of IOs,[796] as a further control on the exercise of administrative powers and discretion. In this regard, two methods of deriving general principles of law may be identified. First, most of the general principles of law applied over a wide range of subject matter are those of administrative or civil service law found mainly in national civil law systems;[797] and, secondly, the general principles of law applicable to international civil service law are also derived from the case law of IATs.[798] In these instances, general principles of law are used primarily in 'interpreting written texts [of IOs] so as to supplement them and fill in gaps.'[799], when the otherwise governing law is incomplete. There are some general principles of law applicable in general and in various areas, such as contract or the conflict of laws, which have been invoked by tribunals.[800] While IATs are not bound by the decisions of other international

[795] See H. G. Schermers & N. M. Blokker., *supra,* note 3, (Brill Nijhoff Publishers, 2018), p. 402.
[796] See S. Villalpando., *supra,* note 129, (Edward Elgar Publishing, 2016), p. 70. For example, the UNDT has stated in *Obdeijn,* Judgment No. UNDT/2011/032, 10 February 2011, paras. 30-31, that while the international civil service is governed by the internal law of each organization: 'international administrative tribunals may rely on, among other sources, general principles of law – including international human rights law, the law of the international civil service and labour law – which may be derived from, *inter alia,* international treaties and international case law.' For more recent examples from the UN, see also UNAT, *Tabari,* Judgment No. 2010-UNAT-030, 30 March 2010, para. 17.
[797] See C. F. Amerasinghe., *supra,* note 127, (Cambridge University Press, 2nd revised ed, 2005), at p. 289.
[798] See below examples of IATs that have referred to 'general principles of international civil service law'. See *Di Palma Castiglione* [1929], LNT (Judgment) No. 1. See also *de Merode* et *al. v. World Bank*, WBAT Reports, (Decision) No. 1 [1981], at 12; *Vassiliou,* UNAT (Judgment) No. 275 [1981]; *Gubin and Nemo,* ILOAT (Judgment) 429 [1980]; *Pagani,* Council of Europe Appeals Board (Decision) No. 76/1981 [1982]; *Warren,* NATO Appeals Board (Decision) No. 57 [1974]; *Alaniz,* OASAT (Decision) No. 12 [1975]; *Angelopoulos,* OECD Appeals Board (Decision) No. 57 [1976]; *Algera,* CJEC Case No. 7/56 [1957]. See G. Ullrich, *supra,* note 540, (Duncker & Humblot, Berlin, 2018), at p. 79. ('As a rule, the details of this time-intensive and labour-consuming cognitive process are not disclosed in the judgment and the existence of a general legal principle applicable to the international civil service is expressed rather succinctly in the judgments. The legislative and executive bodies of the organization are bound to observe these fundamental legal principles in all actions affecting the staff. In addition to the general legal principles applicable to the staff of IO, the [IATs] have derived some specific legal principles of international civil service in order to take account of the specific legal position and functions of IO. Some general legal principles govering the employment relationship of all IO are already codified in the [staff regulations] itself. For eample, the right to equal treatment, to a fair trial and the freedom of association and assembly are to be found in most [staff regulations]')
[799] See C. F. Amerasinghe., *supra,* note 127, (Cambridge University Press, 2nd revised ed, 2005), at p. 290.
[800] Ibid, at 289 –290. ('Thus, reference has been made in *Mayras,* [LNT Judgment No. 24 [1946] at p. 5] by the [Administrative Tribunal of the League of Nations] to the contractual principle of *force majeure,* although it was found to be inapplicable in the case, and by the [Court of Justice of the European Communities (CJEC) see *von Lachmüller,* CJEC Cases 43, 45 and 48 [1960] ECR, at p. 475] to the principle of good faith. The principle of unjust enrichment has been invoked, explained and applied with varying results by the ILOAT [*Wakley,* ILOAT Judgment No. 53 [1961]], the OASAT [*Ogle,* OASAT Judgment No. 34 [1978]; and *Reeve,* OASAT Judgment No. 59 [1981]] and the CJEC [*Danvin,* CJEC Case 26/67 [1968] ECR, p. 315]]. Both the

tribunals, they are 'often a source to which judges [of the various IATs] may place reliance',[801] especially when finding support for their view of a particular general principle of law[802]. Notwithstanding the discussion about there being a 'common system of law' between the IOs,[803] the mutual recognition of jurisprudence between IATs has been specifically noted by tribunals, which have the potential to influence decision-makers and judges in diverse IOs[804] For example, in *de Merode,* the WBAT mentioned the tendency towards a certain *rapprochement* in the solutions provided by other IATs in comparable situations.[805] Another source of law is the practice of an organization,[806] but these practices

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UNAT [*Smith,* UNAT Judgment No. 249 [1979], JUNAT No.s 231–300, p. 202]] and the ILOAT [*Waghorn,* ILOAT Judgment No 28 [1957], at p. 7]] have referred to the principle of estoppel in a general sense as being potentially applicable [In *Hatt and Leuba,* ILOAT Judgment No. 382 [1979], the ILOAT invoked the general principles of *forums conveniens* and of comity in deciding to adopt and apply a decision of the UNAT on a matter within the latter's competence]]. There are numerous other principles of a general nature which have been referred to and applied by tribunals in the course of their judgments [see footnote 85 at p. 290].'

[801] See R. Gulati., *supra,* note 668, *2010 Working Paper*, University of New South Wales, at p. 13.

[802] For example, in *de Merode* et *al. v. World Bank*, WBAT Reports, (Decision) No. 1 [1981], para. 19, in establishing the distinction between essential or fundamental elements in the conditions of employment of staff members and non-essential terms of employment, the WBAT stated 'In various forms and with differing terminology this distinction is found in the jurisprudence of other [IATs].'

[803] See J. S. Powers., 'Evolving Jurisprudence of the International Administrative Tribunals: Convergence or Divergence?' Chapter 6, in G. J. Sanders (ed.) *Good Governance and Modern International Financial Institutions*, *AIIB Yearbook of International Law*, Volume 1, (BRILL Nijhoff, Leiden / Boston, 2018), at p. 109, footnote 1. ('As of 1960, scholars such as Prof. Michael Barton Akehurst referred to the "theory of a common system of law" between [IOs], which was reflected in the tribunals' jurisprudence. M. B. Akehurst., *supra,* note 127, (Cambridge University Press, 1967), at 262').

[804] Ibid, at p. 110. See also O. Elias and M. Thomas., 'Administrative Tribunals of International Organizations', (eds.) in *The Rules, Practice, and Jurisprudence of International Courts and Tribunals'*, (Martinus Nijhoff Publishers, 2012), at p. 176.

[805] Ibid, para. 28. The WBAT stated: The Tribunal does not overlook the fact that each [IO] has its own constituent instrument; its own membership; its own institutional structure; its own functions; its own measure of legal personality: its own personnel policy; and that the difference between one organization and another are so obvious that the notion of a common law of [IOs] must be subject to numerous and sometimes significant qualifications. But the fact that these differences exist does not exclude the possibility that similar conditions may affect the solution of comparable problems. While the various [IATs] do not consider themselves bound by each other's decisions and have worked out a sometimes divergent jurisprudence adapted to each organization, it is equally true that on certain points the solutions reached are not significantly different. It even happens that the judgments of one tribunal may refer to the jurisprudence of another. Some of these judgments even go so far as to speak of general principles of international civil service law or of a body of rules applicable to the international civil service. Whether these similar features amount to a true *corpus juris* is not a matter on which it is necessary for the Tribunal to express a view. The Tribunal is free to take note of solutions worked out in sufficiently comparable conditions by other administrative tribnals, particularly those of the [UN] family. In this way the Tribunal may take account both the diversity of [IOs] and the special character of the Bank without neglecting the tendency towards a certain *rapprochement.*').

[806] Ibid, para. 23. ('The practice of the organization may also, in certain circumstances, become part of the conditions of employment. Obviously, the organization would be discouraged from taking measures favorable to its employees on an ad hoc basis if each time it did so it had to take the risk of initiating a practice which might become legally binding upon it. The integration of practice into the conditions of employment must therefore be limited to that of which there is evidence that it is followed by the organization in the

must be followed out of the conviction that the are mandatory[807]. Equitable principles may be applied by IATs only to the extent that they form part of the general principles of law.[808] International law may be considered a possible, albeit 'remote', source of law for IATs. [809] In so far as international law embodies general principles of law,[810] they are applied by tribunals *qua* general principles and not as international law as such. [811] However, international law may have to be applied by tribunals because it is incorporated implicitly in the written law of an organization.[812] Similarly, international law may be applied by reference in interpreting the written law of an organization.[813] With regard to treaties and

conviction that it reflects a legal obligation, as was recognized by the International Court of Justice in its Advisory Opinion on Judgments of the Administrative Tribunal of the ILO (ICJ Reports 1956, p. 91).'). The ICJ expressed the view that practice could alter the written law: *Effect of Awards Case* [1954] ICJ Rep 91. The practice of an IO, if carried out with a reflection of a legal obligation *opinio juris*, may also constitute a source of internal law.

[807] See *de Merode* et *al. v. World Bank*, WBAT Reports, Decision No. 1 [1981], paras. 11–12; *Vanhove*, UNAT Judgment No. 14 [1952]; *Garcin*, ILOAT Judgment No. 32 [1958]. See C. F. Amerasinghe., *supra,* note 705, (Oxford University Press, 2014), at p. 324.

[808] See C. F. Amerasinghe., *supra,* note 127, (Cambridge University Press, 2nd revised ed, 2005), at p. 292. ('This would be the case where, for instance, equity was applied in regard to the discovery of dcouments or in the interpretation of provisions concerning time limits. This is not a true deviation from the rules of equity in any technical sense as a source of law. It is the application of general principles of law.')

[809] Ibid.

[810] See A. Reinisch., 'Sources of International Organizations' Law: Why Custom and General Principles are Crucial', III. The Accountability of International Organizations As Independent Actors', in S. Besson and J. d'Aspremont (eds.), *The Oxford Handbook on the Sources of International Law,* (Oxford University Press, 2017), at p. 1022. According to Reinisch, [g]eneral principles of law may provide a valid ground for establishing obligations also for [IOs]. The binding nature of general principles of law, which are normally considered to dervive from principles common to various domestic legal orders of States, may be difficult to establish for [IOs] because – as with custom – [IOs] will not have had an opportunity to participate in their creation. Nevertheless, there are sufficient examples of areas where [IOs] have been ready to accept that general principles of law derived from domestic law of their Member States. Most prominent in this regard is the case law of the Court of Justice of the European Union (CJEU) developed in the early 1970s, according to which the fundamental rights, as they were contained in the ECHR and in the domestic constitutional law of the European Communities Member States, were regarded as general principles of law binding upon the organs of the Communities. Through the general-principles-of-law approach the CJEU effectively created a protection against fundamental rights abuses by institutions of the Communities at a time where the ECHR protections were not yet part of the primary law through the adoption of the Charter of Fundamental Rights, or the earlier reference to the ECHR in Article 6 of the Treaty on European Union.
Article 6 (3) of the Treaty on EU: Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

[811] See C. F. Amerasinghe., *supra,* note 127, (Cambridge University Press, 2nd revised ed, 2005), at p. 293. ('Thus, discrimination has been regarded as contrary to law in some cases because of the general principle against discrimination, although sometimes international instruments may be referred to in support of the decision.')

[812] Ibid. ('Thus, where the question of immunities was at issue it has been held that the matter was governed among other things by an international agreement which gave the head of the organization complete discretion in the matter.')

[813] Ibid.

custom, only the international law incorporated into the written internal law of an IO will be of direct applicability[814]. Therefore, not every international treaty or customary rule is binding on the employment relationship of the IO with its employees[815]. National law may in certain circumstances be a source of law for IATs but generally not *per se*.[816] While general principle is that the written law of the organization is the main source of internal law governing employment relations,[817] there is some authority for the view that general principles of law 'can override the written law of an [IO]'.[818] Among the general principles of law in the hierarchy of sources of law, the general principles of law of a *fundamental nature* may be considered 'superior hierarchically to any written law in particular and could, indeed, be the supreme source of law.'[819]

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[814] R. Gulati., *supra,* note 668, *2010 Working Paper*, University of New South Wales, 7, at 13. See also C. F. Amerasinghe., *supra,* note 705, (Oxford University Press, 2014), p. 324. (Apart from the above situations where international law *per se* may be applied, tribunals have not expressly recognized international law as a common source of law. National law may in certain circumstances be a source of law for IATs but generally not per se. The commonest situation where national law becomes relevant is where it is specifically incorporated in the written law of the organization. Clearly national law could also give rise to general principles of law.')

[815] See e.g., *Champoury v. UN Secretary-General,* UNAT Judgment No. 76 [1959], para. 8.

[816] See C. F. Amerasinghe., *supra,* note 705, (Oxford University Press, 2014), at p. 324. ('The commonest situation where national law becmes relevant is where it us specifically incorporated in thr written law of the organization. Clearly national law could also give rise to general principles of law.')

[817] See C. F. Amerasinghe., *supra,* note 127, (Cambridge University Press, 2nd revised ed, 2005), at p. 294. It is of note that if there is a conflict between the staff regulations and staff rules or their equivalent, labour contracts and general principles of law, the latter 'yield to the written sources.' See H. G. Schermers & N. M. Blokker., *,supra,* note 3, (Brill Nijhoff Publishers, 2018), at p. 402.

[818] See P. Schmitt, *supra,* note 767, (Edward Elgar Publishing, 2017), at p. 37-38. According to Schmitt, '[a]lthough staff regulations and staff rules generally contain the most important rules applicable to staff relations, the [ILOAT in *Breuckmann v. European Organization for the Safety of Air Navigation (Eurocontrol) No. 2,* Judgment No. 322, para. 2] has considered that they may be superseded by 'general principles of law in so far as they may apply to the international civil service''. See also C. F. Amerasinghe., *supra,* note 705, (Oxford University Press, 2014), at p. 324. ('First, there are some general principles of law, such as the rule against amendment, which violate acquired or essential rights that are in fact applied even in the face of written rules to the contrary [In *di Palma Castiglione*, LNT (Judgment) No. 1 [1929] 3, the LNT stated that it was only in the absence of rules of positive law that the application of general principles of law could be considered. See also, e.g., *Vukmanovic*, ILOAT (Judgment) No. 896 [1988]; *Mullan*, UNAT (Judgment) No. 162 [1972], JUNAT Nos. 114–66, 387]. Secondly, the ILOAT said in *Ferrechia*, [ILOAT Judgment No. 203 [1973]] that a staff member must be given the right to be heard before a disciplinary sanction is imposed on him, deriving as it does from a general principle of law, must be respected "even where contrary provisions exist.". Thirdly, it is clear from the jurisprudence of tribunals that they try to interpret the written law so as to conform to general principles of law and to establish that the written law does not violate general principles of law [E.g. NATO Appeals Board (Decision) No. 203(a) [1985]; *Beydoun*, CJEC Cases 75 and 117/82 [1984] ECR 1,530; *Callewaert*-Haezebrouck (No. 2), ILOAT (Judgment) No. 344 [1978]; and *Artzet*, CoEaB (Appeal) No. 8 [1973], Case Law Digest (1985) 42.]'].

[819] C. F. Amerasinghe., *supra,* note 705, (Oxford University Press, 2014), at p. 325. In this regard, Amerasinghe noted that '[t[he rule against discrimination or equality of treatment and the principle that a staff member has a right to be heard before a disciplinary sancation is imposed on him are examples of general

2.12.6. Conclusion

The law applied by OSCE decision-makers and the OSCE internal justice system is a true hybrid of sources, both in the range of documentation which contains the internal law of the OSCE, and areas of law that govern the employer-employee relationship. While the contract of employment is of key importance, the OSCE Staff Regulations and Staff Rules, together with other sources combine to generate the legal regime that governs the relationship between the OSCE and its officials. The internal law of an IO may be described 'as being situated in and derived from the system of public international law and therefore being part of public international law, while at the same time having a special character as a system akin to municipal law, particularly because it operates in an area in which municipal law has been traditionally known to operate.'[820] Given the independence of an IO from external influences, and given IO immunity discussed below, the question now is whether there exists a rule of law within the structure of an IO. From the perspective of a staff member, the rule of law manifests itself in the form of procedural safeguards such as due process. Since difficulties with the OSCE internal justice system is related to the absence of certain due process rights, it is important to briefly outline that concept.

2.13. The rule of law and due process

In the context of the reform of the internal justice system at the UN, the *Redesign Panel*[821] and UN General Assembly[822] made express reference to the principles of 'rule of law' and 'due process' in terms of procedural safeguards. These require elaboration and will be considered in turn, including whether there exists a rule of law within the structure of an IO and, in particular, the OSCE. First, although it has been acknowledged that the rule of

principles of a fundamental nature.') See also C. F. Amerasinghe., *supra,* note 127, (Cambridge University Press, 2nd revised ed, 2005), at p. 297.

[820] See C. F. Amerasinghe., *The Law of the International Civil Service, supra,* note 119, (Oxford University Press, 2nd ed., 1994), at 21–23.

[821] *Report of the Redesign Panel, supra,* note 137, (rule of law) paras. 6, 13, 71, 73, 86, 97, 123, 149; (due process) paras. 5, 10, 137, 138.

[822] UNGA Res. 61/261. Administration of Justice at the United Nations, (UN Doc. UNGA A/RES/61/261 of 30 April 2007). See UN website: https://undocs.org/en/A/RES/61/261. Last accessed on 19 January 2020.

law 'is almost universally supported at the national and international level'[823], the concept itself (rule of law, 'prééminence du droit', Rechtsstaatlichkeit', and similar notions) does not have a precise definition, and its meaning can have variances between nations and legal traditions[824]. Perhaps the most often-quoted definition is from the work of Dicey, who in the common law tradition identified three aspects of the rule of law: the absolute supremacy of law over government power; equality before the law; and enforcement before the courts[825]. While the rule of law has its origins in a theory concerned with domestic legal orders, it has also appeared in a large number of documents[826] and statements[827] of international institutions, which extend the concept to certain substantial elements, such as a core of fundamental rights, or a democratic environment. For present purposes, two such organizations may be noted. First, for the OSCE, there is no conclusive definition of the rule of law despite the fact that the Organization works to promote and strengthen human rights and the rule of law among its participating States. For example, with regard to the

[823] S. Chesterman., ‚An International Rule of Law?' (2008) 56 *American Journal of Comparative Law* 331.
[824] H. J Berman., *Law and Revolution. The Formation of the Western Legal Tradition (*Cambridge, Mass., and London, England: Harvard University Press, 1983); I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (The Hague, London, Boston: Martinus Nijhoff Publishers, 1998); TRS Allen., *Consitutional Justice: A Liberal Theory of the Rule of Law* (Oxford, Oxford University Press, 2003); P. Craig., 'Formal and Substantive Conceptions of the Rule of Law: and Analytical Framework' (1997), in *Public Law,* 466; R. Grote, ‚Rule of Law, Rechtsstaat and „Etat de droit" in C. Starck (ed), *Constitutionalism, Universalism and Democracy – A Comparative Analysis* (Nomos, 1999) 269–306; M. Koskenniemi., *The Gentler Civilizer of Nations: The Rise and Fall of International Law* (Cambridge University Press, 2001) 1870–1960; T. Bingham., *The Rule of Law* (Penguin, 2011).
[825] See A.V. Dicey, Lectures Introductory to the Study of the Law of the Constitution 171 at 208, Macmillan 1st ed. (1885). '[N]o man is punishable…except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land…no man is above the law…every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'. See also A. Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan 1885) Pt II.
[826] For example, the rule of law is referred to in Article 6(1) of the Treaty on European Union as a principle, common to the member states, on which the Union is founded. The Copenhagen criteria of 1993 for EU membership include 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities' as a condition for membership. The rule of law was referred to in the preamble to the Universal Declaration of Human Rights of 1948: 'Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'. This underlines the function of the rule of law (or 'régime de droit') as an indispensible framework for the protection of human rights.
[827] See for example, UN Millennium Declaration 2000, UN Doc A/Res/55/2, Report of the Secretary-General, 'Strengthening and coordinating United Nations rule of law activities', United Nations General Assembly Sixty-Eighth session, A/68/213; UN Sustainable Development Goals 2015, included as the 2030 Agenda for Sustainable Development UN Doc A/69/L.85. Access to justice is also included as Goal 16 and Targets 8, 9 and 35; Declaration on the Rule of Law at the National and International Levels 2012 made at the High-Level Meeting on the Rule of Law at the National and International Levels, para 2.

OSCE's political commitments in the 'human dimension'[828], the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the then CSCE, adopted[829] by the participating States in July 1990, declared, *inter alia,* that 'the Rule of Law does not mean a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression', and that 'democracy is an inherent element of the Rule of Law'[830]. Significantly, there are several other commitments to specific rule of law principles ('elements of justice') which are set out in the Copenhagen and other documents. Many of these are important expressions of the principles of legality, accountability, equality and non-discrimination, accessibility of the law, and of human rights standards concerning detention and fair trial rights[831]. Particular attention will be directed to this latter right in the context of the OSCE's commitments related to administrative justice later in this section, which, for reasons that shall be outlined, are considered to be of particular importance in ensuring that justice is also done for its own staff/mission members. Secondly, the concept of the rule of law was first defined by the

[828] The 'human dimension' is used to describe the set of standards and activities related to human rights and fundamental freedoms, democracy, elections, tolerance and the rule of law, as well as national monorities, human contacts and international humanitarian law. The main insitutions involved in the human dimension are ODIHR and RFOM. See *OSCE Human Dimension Commitments: Volume 2, Chronological Compilation,* (third edition), (OSCE, 12 November 2012). See OSCE website: https://www.osce.org/odihr/76895?download=true. Last accessed on 3 Novembr 2019.

[829] The Copenhagen criteria of 1993 for EU membership include 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities' as a condition for membership. The Copenhagen and Moscow Documents are key documents of the OSCE that reflect developments in the area of human rights and human security, which includes the rule of law. Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990; Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, in: Arie Bloed (ed.), *The Conference on Security and Co-operation in Europe, Analysis and Basic Documents*, 1972-1993, Dordrecht 1993., pp. 605-629. For all relevant provisions, see 'Specific Human Dimension Commitments – 2.4 Rule of Law General Provisions' in OSCE Human Dimension Commitments: Volume 1, Thematic Compilation (third edition, 12 November 2012), p. 91-97. See OSCE website: https://www.osce.org/odihr/elections/76894?download=true. Last accessed on 31 October 2019.
As indicated, the main OSCE body active on rule of law issues is the ODIHR, which even has a rule of law unit within its Democratization Department. Its mandate, as set out in the 1992 Helsinki Document: is to help participating states 'ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote principles of democracy and […] to build, strengthen and protect democratic institutions, as well as promote tolerance throughout society'.

[830] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, (1990), para. 3.

[831] See R. Gulati., 'An international Administrative Procedural Law of Fair Trial: Reality or Rhetoric?', Vol. 21, *Max Planck Yearbook of United Nations Law,* (2018, Koninklijke BRILL NV, Leiden), at pp. 210 – 211.

UN in similarly broad, though arguably more concise terms in 2004, in a report by the then Secretary-General. The report stated that:

> [the rule of law] is a concept at the very heart of the [UN] Organization's mission. It refers to the principle of governance to which all persons, institutions and entities public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles to the supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency'[832].

This sets out a definition that has elements of transparency, equality before the law, an independent judiciary and protection of human rights[833]. When taken together, difficulty may arise from the fact that the respective commitments and definitions of the OSCE and UN are statements about how the rule of law should operate in national systems in conflict and post-conflict societies and is not a definition of the rule of law at the global level. Put another way, it refers to the State itself being accountable within its own system. However, above and beyond the State, the contention that IOs themselves are governed by the rule of law and therefore bound by law seems to have become a reality[834] with the adoption in 2012 of a resolution by the UN General Assembly of the 'Declaration on the high-level meeting of the General Assembly on the rule of law at the national and international levels'[835] (the Declaration on the Rule of Law). Not only did the Heads of State and

[832] See 'The rule of law and transitional justice in conflict and post-conflict societies,' *Report of the Secretary-General,* (UN Doc S/2004/616* of 23 August 2004), at para. 6. See UN website: https://undocs.org/S/2004/616. Last accessed on 21 November 2019.
[833] The UN has a Rule of Law Unit and a website on the rule of law: https://www.un.org/ruleoflaw/. Last accessed on 15 September 2019.
[834] Although UN General Assembly resolutions are in principle non-binding, they may be seen to have strong authority.
[835] UNGA Res. 67/1. Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, (UN Doc. A/RES/67/1* of 30 November 2012), para 2. See UN website: https://undocs.org/A/RES/67/1.

Government solemnly recognize that 'the rule of law applies […] to [IOs], including the [UN] and its principal organs' [836], it also made clear that IOs must practice what they preach by recognizing 'promotion of' and 'respect for' the rule of law and justice, which 'should guide all their activities and accord predictability and legitimacy to their actions.'[837] Assuming that all IOs like the OSCE are under a duty to conduct their internal affairs in a manner consistent with the rule of law[838], it then becomes necessary to consider this concept in context of the law of the international civil service. Drawing substantially from work by Gulati [839], it may be suggested that in the emerging field of global administrative law[840], which can be understood as 'comprising the legal rules, principles and institutional norms applicable to processes of 'administration''[841], the latter may be transplanted and adapted to the inner workings of an IO[842]. The global administrative law approach is to promote accountability of global administrative bodies[843], and in this regard, Kingsbury and Casini have noted that 'some procedural principles are sufficiently common

[836] This was highlighted, for example, by *Tadić* Tribunal with regard to the UN Security Council. *Prosecutor v. Tadić*, Case No. IT-94-1-1 (ICTY Oct. 2, 1995), paras. 26-28.
[837] UNGA Res. 67/1. Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, (UN Doc. A/RES/67/1* of 30 November 2012), para 2. Last accessed on 19 January 2020. The argument was reiterated that the rule of law had to apply to the UN itself for reasons of credibility: 'Only an organization that upholds the highest standards itself can be credible in promoting those standards elsewhere'. Swiss Confederation (GA, 4th Plenary Meeting (67th Session), Official Records, UN Doc A/67/PV.4, 24 September 2012, 2 [GA, 4th Plenary Meeting (67th Session)]) & Luxembourg (GA, 4th Plenary Meeting).
[838] This applies to the OSCE despite its lack of a constituent treaty or treaty-making power.
[839] R. Gulati., *supra,* note 668, *2010 Working Paper*, University of New South Wales, at 15 – 17.
[840] As noted by Peters, 'Global administrative Law (GAL) […] has been triggered by the perception of an accountability deficit in the exercise of power by [IOs.]. These are only one type of 'global administration'. The Scope of GAL is thus broader than the traditional law of [IOs] to the extent that it covers both international and national, both public and private law, both hard ("formal") and ("soft") informal norms, and all bodies operating with those norms…the constraining function of the law, constitutes the core of GAL as a normative project, with the help of the concept of accountability. A main research question concerns "institutional design issues as to how such mechanisms should be designed in order to ensure accountability without unduly compromising efficacy.' A. Peters., 'International Organizations and International Law', in *The Oxford Handbook of International Organizations,* J. Katz Cogan, I. Hurd and I. Johnstone (eds.) (Oxford University Press, 2016), at p. 44.
[841] On Global administrative law and the internal administration of justice in the UN, see C. A. Feinäugle., ,The rule of law and its application to the United Nations', in (eds.) C. May and A. Winchester, *Handbook on the Rule of Law,* (2018, Edward Elgar Publishing, Cheltenham, UK, Northampton, MA, USA), at pp. 208 – 209.
[842] R. Gulati., *supra,* note 668, *2010 Working Paper*, University of New South Wales, at 15-17.
[843] ('[…] in particular by ensuring that they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make as well as the principle of proportionality.'). C. A. Feinäugle., ,The rule of law and its application to the United Nations', in (eds.) C. May and A. Winchester., *Handbook on the Rule of Law,* (2018, Edward Elgar Publishing, Cheltenham, UK, Northampton, MA, USA), at p. 208.

across diverse IOs to suggest that a unified regime may be discernible'[844]. Some fundamental aspects of procedural justice emerging as the basic requirements of due process in the context of the law of the international civil service include:

- transparency in rulemaking;
- due process (in certain cases including notice, hearings, and reason-giving requirements in decisions that directly affect private parties);
- review mechanisms to correct errors and ensure rationality and legality;
- variety of other mechanisms to promote accountability[845].

As the language of due process has also been used in the context of the rule of law, Gulati[846], with reference to Harlow' analysis, underlines the conceptual link between the two in the context of administrative law[847], which gives rise to due process principles similar to the ones contained in the above-mentioned list. For Harlow, these include the right to be heard by or make representations to an adjudicator; the right to be heard by an impartial adjudicator; and right to a reasoned decision[848]. Viewed as an inherent part of the right to a fair trial, the key principle of access to a court[849], together with due process rights that generally accompany it, are well entrenched in many international human rights instruments, as well as national fundamental rights guarantees[850]. Such instruments include the Universal Declaration of Human Rights (UDHR)[851], the International Covenant on Civil and Political Rights (ICCPR)[852] and the European Convention on Human Rights

[844] B. Kingsbury and L. Casini., 'Global Administrative Law Dimensions of International Organizations Law', *International Organizations Law Review* 6 (Martinus Nijhoff Publishers, 2009) 319 – 358, at p. 333.
[845] Ibid.
[846] R. Gulati., *supra,* note 668, *2010 Working Paper*, University of New South Wales, at 16.
[847] C. Harlow., ,Global Administrative Law: The Quest for Principles and Values' *European Journal of International Law*, Vol. 17 No. 1, at 190 (2006).
[848] Ibid.
[849] UN Human Rights Council., 'General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial' (UN Doc. CCPR/C/GC/32 of 23 August 2007), para.19.
[850] See A. Reinisch., 'Privileges and Immunities', *The Oxford Handbook of International Organizations,* J. Katz Cogan, I. Hurd and I. Johnstone (eds.) (Oxford: Oxford University Press, 2016), at p. 1062-1063.
[851] Article 10 of the Universal Declaration of Human Rights, 10 December 1948, UNGA. Res. 217A (III), (UN. Doc A/810), at p. 71 ('Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him'.
[852] Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS, 171 (1976).

(ECHR)[853]. As shall be seen, even though IOs are not party to such treaties, the translation of the right to a fair trial has been incorporated into the institutional setting, primarily via the jurisprudence arising out of international administrative dispute resolution.[854] It is perhaps worth noting here that the right to a fair trial in administrative justice 'has also been acknowledged by the OSCE participating States'[855]. Indeed, the core of the OSCE's commitments related to the administrative justice are enshrined in the 1990 Copenhagen Document, where the States declared that 'effective means of redress against administrative decisions' are 'among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings'[856]. The Copenhagen Document further states that administrative decisions should be reasoned and justified and should indicate the remedies available[857]. The 1991 Moscow Document added that participating States should endeavour to provide for judicial review of those regulations and decisions[858]. In this regard, Helsinki Ministerial Council Decision No. 7/08 on 'Further strengthening the rule of law in the OSCE area' encourages the participating States to strengthen the rule of law in the following areas: independence of the judiciary, effective administration of justice, the right to a fair trial, access to a court, accountability of state institutions and officials, the respect for the rule of law in public administration, the right to legal assistance, and the provision of and access to effective

[853] Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, 213 UNTS, 221.
[854] See R. Gulati., Assessing the Fair Trial Element in the Regulatory Arbitrage – A Manifestly Deficient Regime?', Chapter 3, in *Securing a Fair Trial Against International Organizations: A Private International Law Perspective* (Kings College London, 2019), at p. 154. See Kings College London Research Portal website: https://kclpure.kcl.ac.uk/portal/en/theses/securing-a-fair-trial-against-international-organisations(304e09a0-01ea-4713-bacf-0dfd85d06fb5).html. Last accessed on 2 December 2019.
[855] See *Handbook for Monitoring Administrative Justice*, Folk Bernadotte Academy and the OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the Folke Bernadotte Academy (FBA) (September 2013), Chapter 1.2 The right to a fair trial in administrative justice, p. 12. See OSCE website: https://www.osce.org/office-for-democratic-institutions-and-human-rights/105271?download=true. Last accessed on 2 November 2019.
[856] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 5 to 29 June 1990, paras 5 and 5.10. See OSCE website: https://www.osce.org/odihr/elections/14304?download=true. Last accessed on 2 November 2019.
[857] *Ibid.*, paras 5.10 and 5.11. See also Document of the Moscow Meeting of the [Third] Conference on the Human Dimension of the CSCE, Moscow, 10 September to 4 October 1991, paras 18.2 and 18.3. See OSCE website: https://www.osce.org/odihr/elections/14310?download=true. Last accessed on 2 November 2019.
[858] *Ibid.,* para 18.4.

legal remedies[859]. When delivering international administrative justice to its officials, access to an independent tribunal or arbitral process with an independent judge, the right to equality in the administration of justice[860], the right to be heard, the right to a fair hearing without undue delay[861], and the right to reasoned decisions[862], are some of the key due process related human rights of the staff/mission members of the OSCE, against which the adequacy, and indeed the legitimacy of its internal justice system may be judged[863]. The *Redesign Panel* criticized the pre-reform internal justice system at the UN for failing to satisfy the minimum requirements of the rule of law and affording little, if any, protection of individual rights, including the right to be treated fairly[864]. The fundamental elements of the new system were then encapsulated in paragraph 4 of resolution 61/261, in which the General Assembly stated the core objectives of the internal justice system, which were to be consistent with the relevant rules of international law and the principles of the rule of law and due process[865]. They were reiterated in resolutions 62/228[866] and 63/253[867]. In his

[859] OSCE Ministerial Council, Decision No. 7/08, Further Strengthening the Rule of Law in the OSCE Area, (OSCE Doc. MC.DEC/7/08 of 5 December 2008), para. 4. See OSCE website: https://www.osce.org/mc/35494?download=true. Last accessed on 2 November 2019.
[860] See ICCPR, Arts 2, 14 (1) and 26.
[861] UN Human Rights Committee 'General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial' (UN Doc. CCPR/C/GC/32 of 23 August 2007), para. 27.
[862] At the same time, actively participating and complying with the independent adjudication decisions of an independent quasi-judicial body that the OSCE has created is an inherent aspect of operating within the rule of law.
[863] Article VIII (8) Adjudication decisions, ToR PoA, Appendix 2, SRSR.
[864] *Report of the Redesign Panel, supra,* note 137, paras. 72 and 73.
[865] See UNGA Res. 61/261. Administration of justice at the United Nations, New system of administration of justice, (UN Doc. A/RES/61/261 of 30 April 2007), at para. 4. See UN website: https://undocs.org/en/A/RES/61/261. Last accessed on 19 November 2019. ('Decides to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike[.]')
[866] See UNGA Res. 62/228. Administration of justice at the United Nations, (UN Doc. A/RES/62/228 of 6 February 2008). See UN website: https://undocs.org/en/A/RES/62/228. Last accessed on 19 November 2019 ('Reaffirming its decision in paragraph 4 of resolution 61/261 to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike[.])'
[867] See UNGA Res. 63/253. Administration of justice at the United Nations, (UN Doc. A/RES/63/253* of 17 March 2009). (,Reaffirming the decision in paragraph 4 of its resolution 61/261 to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability

comments on the *Panel's* report, the Secretary-General reiterated the need for the UN to offer its personnel effective recourse and must bear many of the attendant costs, recalling that, as an Organization involved setting norms and standards and advocating the rule of law, it has a special duty to offer its staff timely, effective and fair justice that fully complied with applicable international human rights standards[868]. According to the *Redesign Panel*, 'these international standards include the right to a competent, independent and impartial tribunal in the determination of a person's rights, the right to appeal and the right to legal representation.'[869]. According to the *Redesign Panel*, the pre-reform internal justice system 'failed to meet many basic standards of due process established in international human rights instruments'[870]. Recognizing the very basic tenet that the rule of law applies to all categories of personnel, equally, and without regard to position or power, the *Redesign Panel* was unequivocal in asserting that 'the effective rule of law in the UN means not only the protection of the rights of staff members and management, but accountability of managers and staff members alike'[871]. This outcome is likewise of fundamental importance to the OSCE in determining whether the delivery of international administrative justice to all categories of its employees is consistent with the previously mentioned due process guarantees.

2.13.6. Immunity of IOs from the jurisdiction of national courts

Brief consideration may also be given to immunities. As IOs now constitute a significant employer[872], a great number of persons are recruited from all over the world to perform work in many different countries and are subject to an autonomous regime of internal law,

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of managers and staff members alike[.]') See UN website: https://undocs.org/en/A/RES/63/253. Last accessed on 19 November 2019.

[868] See Note by the Secretary-General, Report of the Redesign Panel on the United Nations system of administration of justice, (UN Doc. A/61/758 of 23 February 2007), paras. 5 (a) and (b)).

[869] Ibid, at para 9. The *Redesign Panel* emphasized the need 'to avoid the *double standard* […] where the standards of justice that are now generally recognized internationally and that the Organization pursues in its programmatic activities, are not met within the Secretariat or the funds and programmes themselves.'

[870] *Report of the Redesign Panel, supra,* note 137, para. 5.

[871] Ibid, at para. 6.

[872] C. F. Amerasinghe., *The Law of the International Civil Service, supra,* note 119, (Oxford University Press, 2nd ed., 1994), at p. 4. According to Amerasinghe, staff members of IOs have increasingly come to be regarded as 'ubiquitous and active figure[s] on the international stage.'

as opposed to the domestic law of the host country. It has also been recognized that IOs are international subjects capable of possessing a 'corporate'[873] will of their own, as opposed to a 'mere aggregate of the wills of the member states'[874]. While in practice not all organizations usually referred to as IOs are considered to possess this characteristic[875], at a general level, nonetheless, an IO can 'boast a strong political claim' that it should be entitled to some immunities[876]. In this regard, IOs are generally recognized as requiring immunity from the jurisdiction of domestic courts, [877] particularly in relation to employment disputes where an adequate internal dispute resolution mechanism has been made available. It is also generally accepted that IOs and persons working for them need strong immunity rules in order to remain independent[878] and unimpeded in the fulfilment

[873] See N. M. Blokker and R. A. Wessel., *supra,* note 1, (Cambridge, Cambridge University Press, May 2019), at p. 155.
[874] Ibid. See also e.g., J. Klabbers., *supra*, note 84, (Cambridge University Press, 2015), at pp. 12-13. ('…In one way, the [IO] is little more than a tool in the hands of the member states, and viewed from this perspective, the distinct will of the organization is little more than a legal fiction. Yet, the [IO], in order to justify its *raison d'être* and its somewhat special status in international law, must insist on having such a distinct will. Otherwise, it becomes indistinguishable from other forms of cooperation […]')
[875] Ibid.
[876] ibid.
[877] See A. Reinisch., 'To What Extent Can and Should National Courts 'Fill the Accountability Gap?', (2014) 10 *International Organizations Law Review*, (Brill Nijhoff), 572-587, at p. 1.
[878] Ibid. See ICJ Advisory Opinion, *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 ICJ Reports 174-220 at 183, the International Court of Justice (ICJ) concluded that ,[t]o ensure the independence of the [international civil servant], and, consequently the independent action of the Organization itself, it is essential that in performing his duties he need not rely on any other protection than that of the Organization…In particular, he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might as well be compromised. The Standards of Conduct of the International Civil Service also provides in para. 8 that '[i]f the impartiality of the international civil service is to be maintained, international civil servants must remain independent of any authority outside their organization.' See ICSC website: https://icsc.un.org/Resources/General/Publications/standardsE.pdf. Last accessed on 28 November 2019. While these standards do not have force of law, they help staff understand their role as international civil servants. At the same time, the Administrative Tribunal of the International Labour Organization (ILOAT) has declared that, 'the independence of international civil servants is an essential guarantee, not only for the civil servants themselves, but also for the proper functioning of [IOs]'. In consequence, international civil servants generally have to pledge their independence upon their appointment, and that staff regulations and staff rules may further detail what such independence entails. For instance, OSCE Staff Regulation 2.01(a) Conduct of OSCE Officials, Article II Duties, Obligations, and Privileges, SRSR, 'OSCE officials shall conduct themselves at all times in a manner befitting the status of an international civil servant. They shall not engage in any activity which is incompatible with the proper performance of their duties with the OSCE. They shall avoid any action and, in particular, any kind of public pronouncement which may adversely reflect on their status as well as on the integrity, independence and impartiality of their position and function as officials of the OSCE'. See also OSCE Code of Conduct, Appendix 1, SRSR, '1. OSCE Officials' Conduct. OSCE officials…shall comply with the principles, norms and commitments of the OSCE and adhere to the mandate of their respective institution or mission in performing their duties. 2. Relations with National Authorities, OSCE officials shall neither seek nor accept instructions regarding the performance of their duties, from any government or from any authority external to the OSCE'.

of their functions and duties [879]. Support for this underlying 'functional necessity' rationale may be found in the UN Charter[880], the constituent treaties of most other IOs set up after 1945[881], separate general multilateral privileges and immunities treaties[882], or in bi-lateral headquarters or host agreements[883]. However, there is an ongoing debate and a diversity of domestic courts' views as to whether and to what extent IOs enjoy immunity as a matter of customary international law[884] In addition, national legislation may provide a legal basis for the immunity of IOs.[885] While most IOs enjoy some form of immunity, and the immunity standards are often substantively different, in practice most national courts have traditionally tended to interpret functional immunity as a fairly broad and almost absolute

[879] N. Blokker and N. Schrijver., *Immunity of International Organizations* (Nijhoff, 2015), at 14. ,In 1944, McKinnon Wood gave three reasons why IOs need immunity: the danger of prejudice or bad faith in national courts, the need for protection against baseless actions brought for improper motives, and the undesirability of national courts determining the legal effects of acts of IOs, possibly in diverging directions…this reasoning still largely rings true today'; See H. McKinnon Wood,. 'Legal Relations between Individuals and a World Organization of States' (1945) 30 *The Grotius Society, Transactions for the year 1944 – Problems of Peace and War,* pp. 143-44. Such pressures do not only emanate from the host state of the organization, but also pressures from within the organization itself. See J. Klabbers, *supra*, note 84, (Cambridge University Press, 2015), at p. 245.

[880] Article 105(1) UN Charter states that 'The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes'. The latter is referred to in the preamble to the 1946 Convention on the Privileges and Immunities of the UN. See A. Reinisch., *International Organizations Before National Courts* (Cambridge University Press, 2000), at 13.

[881] Article 67(a) World Health Organization Constitution: 'The Organization shall enjoy in the territory of each Member such privileges and immunities as may be necessary for the fulfillment of its objective and for the exercise of such functions'). See WHO website: https://www.who.int/governance/eb/who_constitution_en.pdf. Last accessed on 9 January 2020. Article 133 Organization of American States Charter states that: 'The Organization of American States shall enjoy in the territory of each Member such legal capacity, privileges, and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes'. See OAS website: http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp. Last accessed on 9 January 2020.

[882] The main sources are the Convention on Privileges and Immunities of the UN, 13 February 1946, 1 UNTS 15 and the Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947, 33 UNTS, 261.

[883] See e.g, Agreement between the UN and the United States of America regarding the Headquarters of the UN, 26 June 1947, US-UN, 11 UNTS 11; Agreement regarding the Headquarters of the FAO, 31 October 1950, 1409 UNTS 521.

[884] See A. Reinisch and G. Novak., 'International Organizations, Chapter 5, in A. Nollkaemper, A. Reinisch *with* R. Janik, and F. Simlinger (eds.), *International Law in Domestic Courts: A Casebook,* (Oxford University Press, Oxford, UK, 2018), IV. The Scope of Immunities of International Organizations, para 25 (at p. 180). See overview of the debate in A. Reinisch., *supra,* note 880, (Cambridge University Press, 2000) at p. 145. See also M. Wood., 'Do International Organizations Enjoy Immunity Under Customary International Law?' (2014) 10, *International Organizations Law Review,* 287.

[885] Ibid. See e.g., International Organisations Act 1968, c48, Halsbury's Statutes of England, 4th ed, vol 10, Constitutional Law (pt 5); International Organizations Immunities Act, 1945, 59 Stat. 669, 22 USCA, 288.

immunity[886]. In the context of law governing employment relations, apart from the desire of IOs to protect themselves from interference in their internal affairs on the part of national courts, Amerasinghe articulated in his seminal two-volume treatise, *The Law of the International Civil Service,* other reasons why national courts should be circumvented:

> Employment relations in [IOs] are not governed by any particular system of national law but [...] is governed by the internal law of the organization. A national court may be ill equipped and not the proper forum for settling disputes to which such law would be applicable. Moreover, the multiplicity of fora for the settlement of disputes, if employees of [IOs] were to choose each his/her own national court for the settlement of disputes in which they were involved, could lead to conflicting pronouncements on the law and not be conducive to consistency and the fair administration of justice. Further, the special nature of the law governing employment relations in [IOs] which is closely linked with delicate issues of administrative policy, makes national courts unsuited to deal with it[887].

Similar arguments on the necessity of immunities in the employment relations of an IO have been expressed by national courts and these often provide the basis for rulings that decline to exercise jurisdiction over IOs. A case in point is the decision of the United States Court of Appeals for the District of Columbia Circuit, in the landmark case of *Broadbent et al. v. Organization of American States et al* [888], where the court upheld the doctrine of

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[886] See A. Reinisch and G. Novak., *supra,* note 884 (Oxford University Press, Oxford, UK, 2018), IV., para 25 (at p. 171). See also A. Reinisch and U. Weber., *supra,* note 133 (2004), at p. 59.

[887] C. F. Amerasinghe., *The Law of the International Civil Service, supra,* note 119, (Oxford University Press, 2nd ed., 1994), at p. 46. See also A. Reinisch., 'The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals', 7 *Chinese Journal of International Law*, 2 (2008), p. 286, who explained that 'litigation of staff disputes before national courts, perhaps even courts in different states, is throught to put the uniform employment law at risk and may lead to fragmented and different level of protection. As a matter of substance and of procedure, different national courts may provide [IOs'] staff members with different remedies, claims and types of compensation: they demand different forms of evidence and offer different procedural rights'.

[888] *Broadbent v. OAS,* D.C. Court of Appeals, 628 F.2d 27, 35 (D.C.Cir.1980), at 34–35. The Court of Appeals for the D.C. Circuit held that the defendant was immune under the [International Organizations Immunities Act, 22 U.S.C. §§ 288–228f-2. Section 2(b)] Act from a suit brought by its employees alleging breach of their employment contracts. The Court reasoned: '[t]he United States has accepted without qualification the principles that [IOs] must be free to perform their functions and that no member state may take action to hinder the organization. The unique nature of the international civil service is relevant. International officials should be as free as possible, within the mandate granted by the member states, to

non-interference and held that the Organization of American States (OAS) was immune from suit[889]. The European Court of Human Rights (ECtHR) has also ruled that national courts may rely on the immunity of IOs to decline jurisdiction over staff law suits without violating the rights of individuals to a fair and public hearing in the administration of their civil rights [890]. To these may be added the decisions of influential international administrative regimes, such as the Administrative Tribunal of the International Labour Organization (ILOAT), which has stated that '[i]nternational civil servants, regardless of rank, cannot protect their rights in national tribunals. Their only recourse is through the mechanisms established by the relevant Staff Rules'[891].

2.13.7. Rationale behind the creation of internal justice systems at IOs

The very creation and existence of internal justice mechanisms at IOs is not only a matter of policy preference, but also a legal requirement stemming from treaty obligations incumbent upon IOs to provide 'appropriate modes' of dispute settlement[892]. The grant of

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perform their duties free from the perculiarities of national politics. The OAS charter, for example, imposes contraints on the organization's employment practices. Such constraints may not coincide with the employment policies pursued by ist various member states. It would seem singularly inappropriate for the [IO] to bind itself to the employment law of any particular member […] An attempt by the courts of one nation to adjudicate the personnel claims of international civil servant would entangle those courts in the internal administration of those organizations. Denial of immunity opens the door to divided decisions of the courts of different member states passing judgment on the rules, regulations, and decisions of the international bodies. Undercutting uniformity in the application of staff rules or regulations would undermine the ability of the organization to function effectively'.

[889] Similarly, in *Mendaro v. World Bank,* 717 F.2d, 610 (D.C. Cir. 1983), at 615–616, the same court held that the defendant was immune under the Act from an employee's Title VII suit alleging sex discrimination: '[T]he purpose of immunity from employee actions is rooted in the need to protect [IOs] from unilateral control by a member nation over the activitiesof the [IO] within its territory. The sheer difficulty of administering multiple employment practices in each area in which an organization operates suggests that the purposes of an organization could be greatly hampered if it could be subjected to suit by its employees worldwide.' See also A. Reinisch and G. Novak., *supra,* note 884 (Oxford University Press, Oxford, UK, 2018), para 25 (at p. 180). ('This policy underlying the immunity of an [IO] also suggests that the Court should be slow to find an "express" waiver. As the *Mendaro* court noted, "courts should be reluctant to find that an [IO] has inadvertantly waived immunity when the organization might be subjected to a class of suits which would interfere with its functions" (*Mendaro v. World Bank,* 717 F.2d, at 617; see also *Boimah v. United Nations General Assembly,* 664 f.sUPP., at 72; *Tuck v. Pan American Health Organization,* 666 F.2d 527)].'

[890] *Waite and Kennedy v. Germany,* 30 Eur. Ct. H. R. 261, 63-74 (1999); see generally also J. Wouters *et al.* (eds), *Accountability for Human Rights Violations by IOs* (Antwerp, 2010).

[891] International Telecommunications Union (ITU) ILOAT Judgment No. 2540 [2006], para. 27.

[892] See e.g., Art. VIII, s. 29(a) of the General Convention on the Privileges and Immunities of the United Nations ('the United Nations shall make provision for appropriate modes of settlement of…disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party'). Indeed,

immunities that entrenches inequality of access at the national level, created the very demand for alternative justice mechanisms for staff seeking to raise claims against IOs. This argument had already been acknowledged by international courts and tribunals[893], especially International Court of Justice (ICJ) in its 1954 Advisory Opinion on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* which concluded that despite the absence of an express power in the UN Charter, the UN General Assembly had the power to create a judicial organ vested with the jurisdiction to resolve employment disputes between the UN and its employees.[894] In this regard, most other IOs have followed suit[895] and made provision for some kind of internal mechanism giving individuals the opportunity to have their complaints heard.[896] Since the late 1990s, it has been observed that some domestic courts have challenged the broad understanding of the immunity of IOs[897]. As shall be seen, this challenge was based on a concern for the implications of immunity for human rights generally and the right of access to justice by affected parties specifically. The underlying argument was that IOs should not be considered free from effective mechanisms to ensure their accountability. The idea that individuals have a right of access to justice concerning the determination of their rights and obligations is also reflected in administrative tribunals of IOs, which have recognized the 'general principle' that employees should have access to a form of employment dispute settlement[898]. For example, with the existence of staff tribunals being considered as

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the UN has recognized that it 'is duty-bound to provide for such alternative modes of settlement'. International Law Commissiom, 'Comments and Observations Received from International Organizations' (17 February 2011) A/CN.4/637/Add.1 para 18(2).

[893] See Advocate General Tesauro in SAT *Fluggesellschaft mbH v EUROCONTROL,* Case – 364/92, ECR I [1994], 43, 48.

[894] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (*Advisory Opinion*) [1954] ICJ Rep 47, at 57. The ICJ stated that it would '[…] hardly be consistent with the expressed airm of the Charter to promote freedom and justice for individuals […] that [the United Nations] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them'.

[895] However, as noted by Schemers and Blokker, ,not all organizations have created judicial organs to deal with conflicts between staff and the organization'. H. G. Schermers & N. M. Blokker., *supra,* note 3, (Brill Nijhoff Publishers, 2018), at p. 405. See also R. Gulati., *supra,* note 854, (Kings College London, 2019), pp. 154-155.

[896] Ibid, H. G. Schermers & N. M. Blokker., (Brill Nijhoff Publishers, 2018), at p. 404.

[897] See A. Reinisch and G. Novak., *supra,* note 884 (Oxford University Press, Oxford, UK, 2018), V. The Balancing of Immunities with Access to Justice Concerns, pp. 181–182.

[898] In *Chadsey v. Universal Postal Union*, ILOAT Judgment No. 122, 15 October 1968, the Tribunal identified ,the principle that any employee is entitled in the event of a dispute with his employer to the safeguard of some appeals procedure'. In *Rubio v Universal Postal Union*, ILOAT Judgment No. 1644, 10

positively warranted as a matter of principle[899], when the World Bank established its Administrative Tribunal (WBAT)[900], in 1980, the then President of the Bank, Robert MacNamara, noted the principle accepted in many national legal systems and in the UDHR that where administrative power is exercised, mechanisms should exist to accord a fair hearing and due process in the event of disputes. There was therefore a need for an independent judicial body to decide complaints relating to the exercise of the Bank's administrative powers in relation to its staff. Significantly, the absence of such a body to resolve disputes might be viewed as justification for national courts to assert their jurisdiction[901]. More recently, still, as has been observed by Reinisch, 'the policy demands of having a legal forum where claims against [IOs] can be adjudicated have been supported by legal arguments about the rights of access to justice as a fundamental right'[902]. As indicated, while access to a court has been a traditional part of many international human rights instruments (UDHR, ICCPR, or ECHR), as well as national fundamental rights guarantees, most human rights treaties do not explicitly contain such a right and instead provide for due process or fair trial guarantees[903]. In the application of such standards, the ECHR has held that the detailed fair trial guarantees under Article 6 of the European Convention on Human Rights (ECHR) requires not only a trial to be fair if one is provided

July 1997, para. 12, the Tribunal speaks of the valid principle ,that an employee of an [IO] is entitled to the safeguard of an impartial ruling by an international tribunal on any dispute with the employer'.

[899] See J. Klabbers, *supra*, note 84, (Cambridge University Press, 2015), at p. 248.

[900] It is sometimes thought that the increase in IATs over recent decades owes much to an Argentinian lady named Susana Mendaro. Mendaro started to work for the World Bank in 1977, fell victim to a pattern of harassment and gender discrimination by her supervisors and fellow workers. She tried to sue the World Bank in the United States for violation of a U.S. statute that forbids workplace harrassment based on gender. The case was summarily dismissed, the Bank being immune from prosecution. As a consequence of her unsuccessful suit, the perceived legal vaccum arguably played a role in the establishment of the WBAT. For an in-depth discussion, see M. Singer., 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' (1995) 36 *Virginia Journal of International Law* 53.

[901] See Memorandum to the Executive Directors, dated 14 January 1980, from the President of the World Bank, Documents R80, and IFC/R80, pp. 1 – 2. At the same time, Robert McNamara apparently stated that: 'the Bank was *voluntarily* creating the Administrative Tribunal in order to bring the rule of law to the Bank's internal operations, to regulate the behaviour of management so as to assure fair treatment of staff members, and as a result to enhance the morale of the staff and to make the Bank a desirable and efficient place to work. This is what R. A. Gorman recalls being told by McNamara in 1980. See R. A. Gorman., 'The Development of International Employment Law: My Experience on International Administrative Tribunals at the World Bank and the Asian Development Bank' in N. G. Ziadé (ed), *Problems of International Administrative Law* (Leiden, Martinus Nijhoff, 2008), at 210 (emphasis in original).

[902] See A. Reinisch., *supra,* note 850, (Oxford: Oxford University Press, 2016), at p. 1062.

[903] Ibid.

for under national procedural law, but also the right to have a trial in the first place[904]. Human rights bodies[905] together with national, often constitional, courts[906] have been central to the development of the notion that access to justice must have 'alternative – equally effective – ways of dispute settlement' for jurisdictional immunity to be granted[907]. Early impetus for the concept of the availability of an alternative forum was derived from the fundamental rights debate within the European Community (EC)[908]; and after being 'integrated into the immunity versus access to court debate in national courts and human rights institutions, the concept of the availability of an alternative forum become part of a widely accepted view on how IOs should work[909]. Within Europe, it has proved a particularly important factor in the landmark judgment of *Waite and Kennedy v. Germany* rendered by the ECtHR in 1999[910]. In that case, representing a departure from the traditional approach to the immunities of IO, which merely decided on the basis of the applicable immunity provisions without considering the human right impact of the decision[911], the ECtHR[912] suggested that civil claims against IOs affects the right to a fair

[904] Ibid. See *Golder v. United Kingdom*, Application No. 4451/70, 21 February 1975, Series A No. 18, [1975] ECHR 1, para 36; *Osman v. United Kingdom,* ECtHR, Application No. 23452/94, 28 October 1998, [1998] ECHR 101, para. 136.

[905] See e.g., the statement of the UN Human Rights Committee, which views access to court as an inherent part of the right to a fair trial; 'CCPR General Comment no. 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law' HRI/GEN/1/Rev.9 (vol I) (13 April 1984) para 3.

[906] See *Hetzel v EUROCONTROL*, Federal Constitutional Court, Second Chamber, 10 November 1981, BverfG 59, at 91, where the German Constitutional Court affirmed that German courts lacked jurisdiction over employment disputes between the European Organization for the Safety of Air Navigation (EUROCONTROL) and its officials and held that the organization's immunity did not violate minimum requirements of the rule of law as protected by the German Basic Law because the exclusively competent ILOAT provided an adequate remedy.

[907] See A. Reinisch., *supra,* note 850, (Oxford: Oxford University Press, 2016), at p. 1062-1063.

[908] According to Reinisch, 'National courts like the German Constitutional Court exerted some pressure on the Community by holding that they would exercise their fundamental rights review even over Community acts 'as long as' the Community did not have its own internal corresponding system of control. *Internationale Handelsgesellschaftmb H v. Einfuhr- und Vorratstelle für Getreide und Futtermittel,* Federal Constitutional Court, 29 May 1974, [1974] 2 CMLR 540 (*Solange I)*. Only when the ECJ developed its fundamental rights jurisprudence in the 1970s, national courts renounced their judicial control powers 'as long as' the ECJ itself provided adequate relief. *In re application of Wünsche Handelgesellschaft,* Federal Constitutional Court, 22 October 1986, [1987] 3 CMLR 225 (*Solange II)*.

[909] See A. Reinisch., *supra,* note 850, (Oxford: Oxford University Press, 2016), at p. 1062-1063.

[910] *Waite and Kennedy v. Germany*, ECtHR, No. 26083/94, 18 February 1999; *Beer and Regan v. Germany,* ECtHR, No. 28934/95, 18 February 1999.

[911] See A. Reinisch., *supra,* note 850, (Oxford: Oxford University Press, 2016), p. 32.

[912] Ibid, at p. 1063. Reinisch further noted that the ,idea that individuals have a right of access to justice concerning determination of their rights and obligations is not merely a specific European approach limited to contracting parties of the ECHR: it is also reflected in various other international courts and tribunals as

trial under Article 6 of the ECHR[913], including due process and access to justice. The Court further held that while as indicated, this right of access to justice might be limited for legitimate purposes, such limitation was only legitimate and permissible if it was also proportionate. In the Court's view, the proportionality of the grant of immunity depended upon the availability of 'reasonable' alternative means[914]. In consequence, this demanded that IOs set up some kind of mechanism to hear employment disputes, such as an administrative tribunal – otherwise, international civil servants would be deprived of their right to access to justice[915]. Where claimants are deprived of their individual right to such access, a municipal or international court may on occasion deny an IO of its immunity. Notably, in the aftermath of *Waite and Kennedy*, it has been observed that 'more and more national courts are equally looking at the availability and adequacy of alternative dispute settlement mechanisms'[916]. In particular, domestic courts in European jurisdictions such as France[917], Italy[918] and Belgium[919] as well as Switzerland[920], have shown a willingness to

well as administrative tribunals of [IOs] which have recognized the ‚general principle' that employees should have access to a form of employment dispute settlement'. See e.g., *Rubio v. Universal Postal Union,* ILOAT, 10 July 1997, Judgment No. 1644, para. 12.

[913] 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms,* adopted 4 November 1950, 213 UNTS (entered into force 3 September 1953).

[914] *Waite and Kennedy v. Germany*, ECtHR, No. 26083/94, 18 February 1999, para 68: 'a material factor in determining whether granting…immunity from…jurisdiction is permissible is whether the applicants has available to them reasonable alternative means to protect effectively their rights under the Convention'.

[915] Ibid, at 121.

[916] A. Reinisch., *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals,* Institute for International Law and Justice, Justice, Working Paper 2007/11, New York University School of Law, (Global Administrative Law Series), at p. 3.

[917] *UNESCO v. Boulois*, France, Tribunal de grande instance de Paris (ord. Réf.), 20 October 1997, Rev Arb. (1997) 575; Cour d'Appel Paris (14e Ch. A), 19 June 1998, (1999) XXIV *Yearbook Commercial Arbitration*, 294, at 295. UNESCO's immunity 'would inevitably lead to preventing [claimant] from bringing his case to a court. This situation would be contrary to public policy as it constitutes a denial of justice and a violation of the provisions of Article 6(1) of the [ECHR].

[918] In Italy, courts have upheld the immunity of IOs employment disputes as long as they have set up effective alternative dispute settlement procedures. Thus, the judgments in *Drago v. International Plant Genetic Resources Institute*, Corte di Cassazione, Judgment No. 3718/2007; *European University Institute v. Piette,* Corte di Cassazione Judgment No. 149/1999; *Rivista di diritto internazionale privato e processuale* (2000) p. 472; *Paola Pistelli v. European University Institute,* Italian Court of Cassation, all civil sections, 28 October 2005, no 20995, Guida al diritto 40 (3/2006), ILDC 297 (IT 2005), have endorsed the result of the *Waite and Kennedy* jurisprudence.

[919] *Energies nouvelles et environnement v. Agence spatiale européenne,* Civ Bruxelles (4th Chanber), 1 December 2005, *Journal des tribunaux* (2006), 171. Moreover, Belgian courts extended the *Waite and Kennedy* approach demanding 'reasonable' alternative means to enforcement measures in *Lutchmaya v. General Secretariat of the ACP Group v. Lutchmaya,* Final appeal judgment, 21 December 2009, ILDC 1573 (BE 2009).

[920] *Consortium X v. Swiss Federal Government (Conseil fédéral),* Swiss Federal Supreme Court, 1st Civil Law Chamber, 2 July 2004, partly published as BGE 130 I 312, ILDC 344 (CH 2004).

follow the *Waite and Kennedy* approach and deny immunity to IOs in cases in which recognition of the immunity would have deprived claimants of their right to access to justice. Arguably the 'leading case'[921] which engaged in a balancing of immunities with access to justice and fair trial concerns is *Siedler v. Western European Union*[922] , where the Belgium Labour Court of Appeal, expressly relying on *Waite and Kennedy*, investigated whether the internal appeals procedure of the Western European Union (WEU) constituted a 'reasonable' alternative means to effectively protect the plaintiff's rights. The Court found that there were no provisions for the execution of judgments of WEU appeals commission, that there was no public hearing and the publication of decisions was not guaranteed, that the members of the commission were appointed by the Intergovernmental Council of the WEU for a short time mandate (two years) which created an excessively close link with the organization itself and that it was not possible to challenge a particular member of the appeals commission[923]. As a result, the Belgium court conceded that the WEU personnel statute did not 'offer all the guarantees inherent in the notion of due process' and thus 'the limitation on the access to the normal courts by virtue of the jurisdictional immunity of the WEU [was] incompatible with Article 6(1) ECHR'. Although it is regarded as too early to say whether such decisions, where jurisdictional immunity has been denied to IOs, will remain isolated case-law[924], it would seem clear that

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[921] A. Reinisch & G. Novak., 'Desirable Standards for the Design of Administrative Tribunals from the Perspective of Domestic Courts, Part IV: Issues of Effectiveness and Legitimacy, (O. Elias eds.) in *The Development and Effectiveness of International Administrative Law On the Occasion of the Thirtieth Anniversary of the World Bank Administrative Tribunal*, (2009) Martinus Nijhoff Publications, at p. 280.

[922] *Siedler v. Western European Union,* Belgium, Brussels Labour Court of Appeal (4th Chamber), 17 September 2003, Journal des Tribunaux 2004, 617; upheld on final appeal, *Western European Union v Siedler*, Belgium, Court of Cassation, Appeal Judgment, 21 December 2009, Cass No. S 04 0129 F;

[923] Ibid.

[924] See A. Reinisch., ‚To What Extent Can and Should National Courts „Fill the Accountability Gap"?', (2014) 10 *International Organizations Law Review*, at p. 575. See also A. Reinisch., *supra,* note 850, (Oxford: Oxford University Press, 2016), at p. 1066-1067. Reinisch noted that '[…] it may be premature to predict whether national courts will generally follow the *Waite and Kennedy* approach. In fact, a number of courts seem to have rejected it and continue to grant immunity to IOs irrespective of whether alternative mechanisms of dispute settlement exist or not. A case on point is the UK judgment in [*Entico Corporation Ltd v. United Nations Educational, Scientific and Cultural Association* [2008] EWHC 531 (Comm) 18 March 2008): 25]. In that case, the High Court rejected the argument that the right to a fair trial under Article 6 of the ECHR 'conditioned' UNESCO's immunity. Rather, it found that the *Waite and Kennedy* reasoning was inapplicable because the applicable immunity instrument, the 1947 Specialized Agencies Convention, was adopted long before the ECHR entered into force for a minority of the Convention's contracting parties. As a result, it upheld the defendant organization's immunity. See also the Dutch Supreme Court in the *Mothers of Srebrenica v. Netherlands and United Nations* (Final appeal judgment, 12 April 2012, LJN: BW 1999: ILDC 1760 (NL 2012) and the ECtHR's recent judgment in *Stichting Mothers of Srebrenica v. The*

as long as the Strasbourg Court feels that 'reasonable' alternative dispute settlement mechanisms for staff disputes are available within an IO, it will not claim that immunity from prosecution before national courts constitutes a violation of human rights[925]; and, in this context, as the OSCE is an IO whose 57 participating States[926] are not all state parties to the ECHR, 'one my not exclude a stricter application of the requirements with respect to an IO *whose members are all state parties to the ECHR*, such as the WEU[927] [emphasis added]'. Thus, given the important role of many European domestic courts in granting the broad, usually *de facto* absolute, immunity to IOs in most jurisdictions, from inside and outside Europe, it seems clear that an affected staff member of an IO can usually only seek justice within the legal order of the defendant organization[928]. Since aggreived employees of IOs might find themselves unable to access domestic courts in cases where they believe their rights have been breached, in language borrowed from the *Redesign Panel* with regard to the UN, it is therefore 'essential to have an internal justice system that both provides adequate safeguards and ensures accountability of staff members'[929]. Ensuring that the internal dispute resolution processes of IOs, including at the OSCE, are compliant with basic due process guarantees, and generally with internally accepted human rights based

Netherlands (Application No. 65542/12, ECtHR, 11 June 2013). This trend against relaxation of the jurisdictional immunity of IOs was more recently confirmed by the ECtHR in its decision in the *Klausecker v. Germany* case (Decision of 6 January 2015, Application No. 415/07, para. 75) concerning an employment dispute with the UN and in the *Kokakshvili v. Georgia* case (Decision of 1 December 2015, Application No. 21110/03, para. 35) concerning the dismissal of a female employee in the OSCE office in Tbilisi.

[925] See J. Klabbers, *supra*, note 84, (Cambridge University Press, 2015), at p. 249, citing Application no 39619/06, ECtHR, *Chapman v. Belgium,* decision of 5 March 2013 490-1, as a ‚good illustration [...] Mr Chapman had been employed by NATO; his contract was terminated, and he went to court in Belgium (where NATO is headquartered). The Belgium courts upheld NATO's immunity from suit, upon which he went to the Strasbourg Court, claiming a violation of his right to access to justice. The Court, however, citing the availability of alternative procedures within NATO, declared the case inadmissible'. See also ECtHR case involving NATO, *Gasperini v. Belgium and Italy,* Application No. 10750/03, 12 May 2009, ECtHR (2nd Chamber).

[926] From 57 participating States, the OSCE represents 29 non-EU member states.

[927] See P. Schmitt., 7.8 Immunity: *Western European Union v Siedler,* Belgian Court of Cassation, 21 December 2009, in *Judicial Decisions on the Law of International Organizations*, C. Ryngaert, I. F. Dekker, R. A. Wesel and J. Wouters (eds.), (Oxford Universiy Press, 2016), IV. Commentary, at p. 431. ‚However, even in this case, it seems hardly defendable to require that dispute-settlement mechanisms established by [IOs] should meet all the conditions of art. 6 since [IOs] – with the possible exception in the future of the EU – are not parties to the ECHR'.

[928] See A. Reinisch., *supra,* note 850, (Oxford: Oxford University Press, 2016), at p. 1060.

[929] *Report of the Redesign Panel, supra,* note 137, 'II. Overview', para 7. '…as a result of the jurisdictional immunities enjoyed by the Organization, staff members have no external recourse to the legal systems of Member States, while the Secretary- General may waive their functional immunity from action under national legal systems in certain cases. Thus, it is essential to have an internal justice system that both provides adequate safeguards and ensures accountability of staff members…'.

fair trial standards, thus becomes crucial.[930]

2.13.8. OSCE and immunity from suit and legal process

Accordingly, the effect of immunities is that, generally speaking, OSCE officials are precluded from suing the Organization in both municipal and domestic courts in employment-related disputes, unless the OSCE Secretary General waives its immunity in a particular matter[931] (which rarely occurs in practice). As indicated, in contrast to the vast majority of treaty-based IOs[932], which normally possess international legal personality, either explictly or implicitly[933], the OSCE is based rather uniquely on a series of politically but not legally-binding documents and in particular not on a founding treaty. As a result, its positon in international law is unclear. It may also be reiterated that, despite various attempts to strengthen the legal framework of the OSCE over the past two decades, including agreement at the technical level of a '*Draft Convention on the international legal personality, legal capacity, and privileges and immunities of the OSCE'*, reaching political consensus among participating States continues to prove difficult[934]. While the Organization still lacks a clear international status, including the benefits of a uniform system of privileges and immunities in its participating States[935], immunity from jurisdiction does not necessarily depend on whether an IO possesses international legal

[930] R. Gulati., *supra,* note 668, *2010 Working Paper*, University of New South Wales, at 19.
[931] Concomitant with the grant of privileges and immunities by a State, it is the obligation of the OSCE Secretary General under OSCE Staff Regulation 2.03(d) Privileges and Immunities, Article II Duties, Obligations, and Privileges, SRSR, to give due consideration to requests for waivers of immunity so as not to impede the course of justice, when such waiver can be granted without prejudice to the interests of the Organization. In this regard, it should also be noted that the standard practice has been articulated, developed and codified in Section 20 of the 1946 Convention on the Privileges and Immunities of the UN.
[932] *See* International Labour Organization Constitution art. III, § 4; International Monetary Fund, Articles of Agreement art. IX, § 3; International Bank of Reconstruction and Development., Articles of Agreement art. VII, § 3; International Development Association, Articles of Agreement art. VIII, § *3; see also* Convention on the Privileges and Immunities of the Specialized Agencies art. III, § 4, Nov. 21, 1947, 33 U.N.T.S. 261.
[933] (Closed organizations will have international personality only with regard to those states that have recognized them expressly, or implicitly by concluding mutual agreements, by exchanging diplomatic missions, or by entering into any kind of mutual relations. This restriction does not affect the capacity of [IOs] to act under international law.').
[934] See H. Tichy and C. Quidenus., *supra,* note 71, (2017), at p. 406.
[935] For an extensive analysis, see, for example, H. Tichy & U. Köhler., *supra,* note 51, (Martinus Nijhoff Publishers, Leiden/Boston, September 2008), at. 455-78.

personality[936]. Rather uniquely in international practice, it has also been seen that the OSCE executive structures (i.e. the Secretariat, the three Institutions (ODIHR, HCNM, RFOM and sixteen field operations) and their officials enjoy immunity from jurisdiction of its host countries and immunity from legal suit in the national courts by virtue of a multiplicity of *ad hoc* legal instruments[937]. However, it has also been seen that the lack of a generally acknowledged international legal personality has real consequences for OSCE structures and their officials across the OSCE region, creating different statuses, treatment and levels of privileges and immunities. In particular, among the OSCE's field operations where the Organization as such does not enjoy treatment equivalent to that of the UN system[938], this fragmented legal status has 'created a number of practical and legal difficulties.'[939] For example, lack of legal standing before courts, and issues of responsibility and liability, have created legal uncertainty – not only for the Organization itself[940] but also for the

[936] See T. Gazzini., 'Personality of International Organizations', in J. Klabbers and Å. Wallendahl (eds.), *Research Handbook on the Law of International Organizations* 33 (Edward Elgar, 2011). ('[IOs] do not necessarily have to possess international legal personality in order to be immune from jurisdiction. Indeed, a state may certainly grant immunity to an [IO] as a collectivity of states and its organs as common organs through which member states perform jointly certain acts'; 'the Swiss law on privileges and immunities granted by Switzerland as host State, for instance, applies to organizations, entities and individuals regardless of their international legal status', at p. 42-43; see also, eg, *Cristiani v. Italian Latin-American Institute* (1985, 1992) (Court of Cassation, 23 November 1985 No 5819)), at 24-5.

[937] OSCE Staff Regulation 2.03 Privileges and Immunities, Article II Duties, Obligations and Privileges, SRSR states that: (a) The Secretary General, the heads of institution and heads of mission, as well as staff members and international 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. *Local staff/mission members shall enjoy privileges and immunities only to the extent granted to them by the respective host State under national legislation and relevant bilateral agreements which may be concluded between a State and the OSCE* [emphasis added]; […] (d) The Secretary General shall decide, in consultation with the Chairmanship, whether immunity of a staff/mission member should be waived. Immunity of the Secretary General, the heads of institution and the heads of mission may be waived by the Chairmanship, who shall inform the Permanent Council of his intention to do so'.

[938] This is in contrast to the OSCE Secretariat and the three Institutions.

[939] See H. G. Schermers & N. M. Blokker (eds.)., „*supra,* note 3, (Brill Nijhoff Publishers, 2018), at p. 1032.

[940] Ibid. ('The OSCE has no capacity to issues claims against states and has experienced difficulties in cooperation with other [IOs] (for example, in the fromer Yugoslavia). Third parties can initiate legal proceedings against the OSE staff and hamper the finctioning of the organization. In the absence of treaty-making capacity of the organization, its participating States could not conclude proper seat agreements with the OSCE concerning the status, privileges and immunities of various of its organs, and [as has been seen], national laws have been adopted to at least provide for some arrangements').

people working for[941] and dealing with the OSCE[942]. Notwithstanding such treaty and legislation-based immunity, more controversially, a former Head of the OSCE Office of Legal Affairs at the OSCE Secretariat argues that '[d]ue to the critical need for legal status and privileges and immunities in order for the OSCE to function, the OSCE Sectetariat is left with no other choice but to pragmatically assert that the OSCE enjoys them on a de facto or customary basis across the OSCE region.[943]' Further, the accumulation of instruments adopted by its decision-making bodies has resulted in establishing a living constitution in the most flexible sense for the OSCE, which enjoys de facto international legal personality as well as privileges and immunities on a customary basis[944].

2.13.9. Transparency, accountability and participation at the OSCE

To conclude this section, it is also necessary to discuss briefly issues of transparency and accountability through access to information in the OSCE, which are linked to mechanisms

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[941] Ibid ('for example, OSCE staff members do not have the necessary legal protection when on mission to countries that have no unilaterally granted privileges and immunities.' See also *Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2017,* OSCE Doc. MC.GAL/7/17 8 December 2017 at para. 21. ('The source of the problem lies in the Memoranda of Understanding concluded with the States hosting the field operations which grant application *mutatis mutandis* of the 1961 Vienna Convention on Diplomatic Relations (VCDR), an instrument intended to regulate the relations between States, not with an international organisation. Over half of the VCDR cannot be applied to an international organisation (e.g., rupture of diplomatic relations etc.) and the customary practice of taxing the salaries of local staff in embassies is one of the provisions which cannot be applied to the international civil service'). See OSCE website: https://www.osce.org/chairmanship/361771?download=true. Last accessed on 28 November 2019. In some jurisdictions, the direct payment of taxes by local staff who have been subjected to national taxation on their OSCE income has raised difficulties in practical, operational terms for both the OSCE as an exempt employer and for the non-exempt local staff member who is attempting to comply with national tax law, as he/she is required to do under OSCE Staff Rule 5.05.1.

[942] According to the *Helsinki + 40 Project, Food-for-Thought Paper*, *supra,* note 250, p 3, the OSCE has faced particular difficulties 'in asserting immunity in respect of lawsuits filed in national courts in relation to labour issues'. See also OSCE Staff Regulation 2.03(a) Privileges and Immunities '…Local staff/mission members shall enjoy privileges and immunities *only to the extent granted to them by the respective host State* under national legislation and relevant bilateral agreements which may be concluded between a State and the OSCE' [emphasis added].

[943] See L. Tabassi., *supra*, note 21*,* (Cambridge, Cambridge University Press, May 2019), at p. 49.

[944] Ibid. It is also argued that OSCE institutions and field operations are immune from jurisdiction of a host State in the OSCE region to the extent of the mandates and tasks assigned by consensus by OSCE decision-making bodies, which is generally equivalent to those customarily accorded to IOs. See A. Reinisch., 'Privileges and Immunities', Part II: General Issues, Chapter 6, in J. Klabbers & Å. Wallendahl, (eds.), *Research Handbook of International Organizations* 33 (Edward Elgar, 2011), at p. 135. ('Whether there is customary international law on the jurisdictional immunity of IOs and if so, the precise content of such customary law has remained controversial and led to divergent answers by different courts'). See also M. Wood., *supra,* note 884 (2014), at p. 287.

for resolving or litigating employment-related grievances and complaints discussed elsewhere in this thesis. Among the principles and aims of the OSCE regulatory system, Decision No. 705 of the OSCE Permanent Council makes explicit reference to two key elements of the concept of good governance [945], namely transparency and accountability[946]. The preamble, which is in principle of equal normative value to other provisions of the Decision, states that the overall aim of the Regulations and relevant decisions' includes '[…] maintaining the highest standards of *transparency*, cost-efficiency and *accountability*' [emphasis added] [947]. In the operational part of the Decision, OSCE participating States decided '[t]hat, through the [CRMS], the Organization shall be guided by the principles of *full transparency and accountability* towards the participating States' [emphasis added][948]. Notwithstanding the lack of a precise and clear definition for either transparency or accountability [949], as the Decision has been framed to focus on the accountability[950] relationship to and of the participating States, this seems to reflect the traditional position that IOs are exclusively accountable to national governments and, through this chain, to parliaments and the people. Using principal-agent analysis, member states can be understood as the rightful 'principals'[951], with citizens or residents being entirely and properly mediated by their States of the given organization. In consequence,

[945] United Nations Commission on Human Rights (the predecessor of the current UN Human Rights Council), adopted Resolutions 2000/64, E/CN.4/2003/102, on 'The Role of Good Governance in the Promotion of Human Rights.' In that resolution, the Commission identified the key attributes of good governance: transparency, responsibility, accountability, participation, and responsiveness to the needs of the people. This was further elaborated in Resolution 2005/68 in the promotion and protection of human rights.
[946] Transparency and accountability is a term which is referenced in numerous CSCE/OSCE documents.
[947] OSCE Permanent Council Decision No. 705 CRMS, Premable, para 2.
[948] Ibid, para 5.
[949] *Transparency* refers to a process by which reliable, timely information about existing conditions, decisions and actions relating to the activities of the organization is made accessible, visible and understandable. See Report of the Working Group on Transparency and Accountability –extract, IMF, World Bank and 22 countries (1998). In this section of the thesis, the term 'transparency' is used to denote public access to information about OSCE activities and human resources policies. Accountability is defined as 'a mechanism to control power of a public body by calling it to account'. From a legal perspective, this benchmark is the law. See M. Kanetake., 'Enhancing Accountability of the Security Council through Pluralistic Structure: The Case of the 1267 Committee', *Max Planck Yearbook of United Nations Law*, 12 (2008), 113-75. *Accountability* is the obligation to (i) demonstrate that work has been conducted in accordance with agreed rules and standards and (ii) report fairly and accurately on performance results vis-à-vis mandated roles and/or plans. See Organisation for Economic Co-operation and Development, Glossary of Key Terms in Evaluation and Results Based Management (2002, republished in 2010).
[950] There does not appear to be a common definition of accountability for all OSCE executive structures.
[951] See J. Tallberg, 'Transparency', *The Oxford Handbook of International Organizations,* J. Katz Cogan, I. Hurd and I. Johnstone (eds.) (Oxford: Oxford University Press, 2016), 1183-1185.

to the extent this exclusive link with member states does not convey external accountability, it excludes the meaningful participation of a wide range of key stakeholders, that is, civil society, individuals and NGOs[952], all whom play a fundamental role in tracking and promoting compliance by IOs with accepted international human rights standards. This is returned to in the conclusion below. However, with shifting perceptions of the desirable level of transparency and openness of IOs since the 1990s[953], as conditions affecting their accountability and legitimacy, not just to governments but also toward the general public, this raises questions as to the extent information relating to the internal dispute resolution processes of IOs are publicly available and accessible. International standards and the principle that information should be freely available to everyone[954], except in very specific cases [955] is widely accepted. While the OSCE has developed an

[952] See A. Bloed., *supra,* note 2, at p. 28-29. Bloed stated that another ‚basic feature of the Helsinki process concerns the *involvement of private citizens*. Although the CSCE process is an intergovernmental process, it has to be taken into account that private citizens and non-governmental organizations have an importnant role to play in order to achieve the purposes of the CSCE. This aspect of the CSCE process was officially enacted in the Helsinki agreements' [...] in the field of the human dimension of the CSCE the importance of private citizens and non-governmental organizations (NGOs) is currently quite considerable [...] Although NGOs have been granted considerable access to CSCE meetings, many limitations continue to exist'.

[953] Ibid. In 1993, the World Bank was the first major IO to adopt a comprehensive public information policy. In the late 1990s, the IMF also followed suit and in 1997, the UN Development Programme (UNDP) was the first major agency from the U.N. system to follow the lead of the development banks by adopting a comprehensive Information Disclosure Policy. Several other agencies soon followed. At the regional level, the EU surrendered its traditional culture of secrecy in 2001, when adopting Regulation 1049/2001 on public access to information, and access to both documentation and deliberations has subsequently continued to expand.

[954] See B. Kingsbury and M. Donaldson., 'Global Administrative Law', in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2011). As indicated, human rights law also requires a measure of transparency, including potentially, 'transparency about rule making and decisions pursuant to global administration'. 32: 'Article 19 (2) International Covenant on Civil and Political Rights (1966) provides that everyone shall have the right to freedom of expression, and that this right shall include freedom to seek, receive, and impart information of all kinds (→ Opinion and Expression, Freedom of, International Protection). The Inter-American Court of Human Rights (IACtHR) has stated that a similar provision in the American Convention on Human Rights (1969) 'protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention … and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case' (Claude Reyes v Chile [Judgment] IACtHR Series C No 151 [19 September 2006] para. 77). An analogous provision in the → European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) has not been interpreted as bestowing a general right of access by individuals but the → European Court of Human Rights (ECtHR) has recognized the right of the public to receive information of general interest, and has scrutinized in particular measures that hamper the press, and now other 'social watchdogs' in their functions (Társaság). 33. In some cases, treaties impose requirements not only on domestic agencies or officials but on international organization'.

[955] For example, where the nature of the information prohibits its widespread circulation inside and/or outside the organization (eg. Personnel files, internal memorandums, investigation files). See Report of the Joint

accountability system that mainly rests on internal and external control mechanisms, including internal oversight[956], external auditors and the Audit Committee[957], with the broader aim to promote, *inter alia*, transparency at all levels[958], given its contemporary importance, it is perhaps surprising that the OSCE does not seem to have in place a disclosure policy on access to information tailored to its particular functions and requirements[959]. Accordingly, there is not only an absence of details of existing principles, practices[960] and procedures for making such information available, but also lack of a clear list of exceptions to full disclosure[961]. However on one level, it must be acknowledged that a high degree of transparency has been achieved by the Organization in recent years with an expansion in the range of programmatic and operational documents made publicly available via its corporate website[962]. In the Resources section of the site[963], there are 'CSCE/OSCE key documents' on Euro-Atlantic and Eurasian security; '[d]ocuments

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Inspection Unit, *Accountability Frameworks in the United Nations System*, (United Nations, Geneva, 2011) (JIU/REP/2011/5), para. 26.

[956] According paragraph 5 of OSCE Permanent Council Decision No. 399 dated 14 December 2000 (PC.DEC/399) Annex 6, Internal Oversight Mandate: 'The scope of Internal Oversight encompasses the examination and evaluation of the adequacy and effectiveness of the Organization's systems of internal controls and the quality of performance in carrying out assigned responsibilities. *It incorporates the full range of internal audit, including management audit, evaluation and investigation, quality and value for-money assurance and management advice* […]' [emphasis added]. See also *Factsheet: OSCE Office of Internal Oversight*, (Publisher: OSCE, 16 January 2017), '[w]hile internal audits may routinely assess processes and systems for compliance with the OSCE's Common Regulatory Management System, their broader aim is to support management in fulfilling its responsibilities for achieving the OSCE's objectives and to *promote the concepts of effectiveness, efficiency, transparency and accountability at all levels'* [emphasis added]. See OSCE website: https://www.osce.org/resources/factsheets/office-of-internal-oversight?download=true. Last accessed on 28 November 2019.

[957] See OSCE Permanent Council Decision No. 1211, Terms of Reference of the OSCE Audit Committee (OSCE Doc. PC.DEC/1211 of 7 July 2016).

[958] See Secretary General Lamberto Zannier Address to the Plenary Session of the 22nd Annual Session of the OSCE Parliamentary Assembly Istanbul (29 June 2013). 'Transparency and accountability are core values that apply to *all components of the Organization'* [emphasis added]; at p. 5.

[959] Following a preliminary review of publicly available documentation on accountability and transparency at the OSCE, no recommendations appear to have been made on this matter in past reports, documents from OSCE decision-making bodies, internal document and policies, and relevant oversight reports.

[960] In the absence of a policy or guidelines, this seems to be elaborated on an *ad hoc* and case-by-case basis.

[961] The only reference to disclosure in the SRSR is OSCE Staff Regulation 2.02, which states that 'OSCE officials shall observe maximum discretion with regard to all matters relating to the activities of the OSCE. They shall at no time use, disseminate and/or publish information known to them by reason of their official position, except in connection with the discharge of their functions. They shall maintain due discretion regarding the matters related to the activities of the OSCE upon separation from the Organization'. OSCE Staff Regulation 2.02 Disclosure of Information, Article II Duties, Obligations and Privileges, SRSR.

[962] OSCE website: https://www.osce.org/. Last accessed on 28 November 2019.

[963] OSCE website: https://www.osce.org/resources. Last accessed on 28 November 2019.

issued by the OSCE decision-making bodies'[964], including documents published during meetings; a 'Documents Library'[965] with an online search system providing access to materials dating back to 1975; '[p]ublications' from factsheets and handbooks for government, civil society and educators, to in-depth studies, and reporting on OSCE work including, *inter alia*, annual reports, financial reports and financial statements and the opinion of the external auditor[966]; 'Press Releases and News Archive' from the OSCE's global activities[967]; '[e]-libraries' with a range of databases and electronic libraries on specialized subjects; the 'LINK Newsletter' on OSCE activities[968]. Besides, since 1998, the OSCE has run a 'Researcher-in-Residence' programme'[969] in the Prague Office of the OSCE Secretariat, where researchers are given access to CSCE/OSCE historical records comprising of CSCE/OSCE documents of a similarly operational and programmatic nature. Nonetheless, while the majority of official OSCE documents are publicly available and easily accessible, this has not resulted in a significant gain in transparency with respect to the sources of law on its internal dispute resolution processes and arguably falls well short of national freedom of information duties[970]. In particular, even though the OSCE Secretary General has 'a responsibility to publicize OSCE policy and practices'[971], this does not appear to extend to the internal activities of the OSCE, including basic third layer CRMS documents governing personnel matters such as staff instructions[972], records of proceedings in internal and external appeals, as well as rules of procedure, all of which are

[964] OSCE website: https://www.osce.org/resources/documents/decision-making-bodies. Last accessed on 28 November 2019.
[965] OSCE website: https://www.osce.org/resources/documents. Last accessed on 28 November 2019.
[966] OSCE website: https://www.osce.org/resources/publications. Last accessed on 28 November 2019. It may be highlighted that, pursuant to OSCE Permanent Council Decision No. 1040, the OSCE Permanent Council approved the Adoption of International Public Sector Accounting Standards in the OSCE (OSCE Doc. PC.DEC/1040), 10 May 2012), resulting in strengthening public financial management, enhancing the quality and transparency of the financial reporting of public sector.
[967] OSCE website: https://www.osce.org/press-releases. Last accessed on 28 November 2019.
[968] OSCE website: https://www.osce.org/resources/link. Last accessed on 28 November 2019.
[969] See *Factsheet of the OSCE Researcher-in-Residence Programme*, (Publisher: OSCE, 5 June 2013). See OSCE website: https://www.osce.org/networks/102310?download=true. Last accessed on 28 November 2019.
[970] While national freedom of information laws apply to require divulgence of documentation from government agencies (eg. Freedom of Information Act, 5 U.S.C. § 552(f)), they do not cover IOs, which in any event would be immune from suit to enforce demands for disclosure under the relevant legislation.
[971] OSCE Ministerial Council Decision No. 15/04, Role of the OSCE Secretary General (OSCE Doc. MC.DEC/15/04 of 7 December 2004), at para. 2.
[972] The only human resources document available on the OSCE website is the SRSR.

excluded from public scrutiny. In the context of the present discussion, inviolability of such information[973] includes, but is not limited to:

- OSCE Staff Instruction No. 21 Policy on the Professional Working Environment;
- Staff Instructions on Special Service Agreements; Daily Staff; Internship programme at the OSCE; Short-Term Appointments/Assignments;
- The Terms of Reference for OSCE Staff Representatives[974];
- IRB reports and recommendations[975];
- Final decisions by the OSCE Secretary General or heads of institution/missions in internal appeals[976];
- Rules of Procedure of the Panel of Adjudicators[977];
- The texts of final adjudication decisions in external appeals[978];
- More generally, the lack of public access to information on the internal dispute resolution system of the OSCE, including online resources on how it works, the procedures that must be followed, and the deadlines that apply, will also be addressed below.

[973] The inviolability of the right to exclude from public scrutiny and the reach of national authorities the internal documents of IOs have traditionally been considered fundamental immunities for the purpose of protecting the independent exercise of their functions. Section 5-8 of the OSCE headquarters agreement provide for inviolability of the headquarters and of the OSCE's archives and documents. In practice, however, inviolability may be said not to constitute an absolute obstacle to the accessibility of information held by an IO but rather translates into the right of the such organizations to determine which categories of information should be considered sensitive or confidential and under which conditions, if any, it may be disclosed. See also Article II Property, Funds and Assets, Section 4, Article III Property, Funds and Assets, Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 1 UNTS 15.
Section 6, Article III, Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947, 33 UNTS 261.
[974] OSCE Staff Rule 8.02.1(c) – Constitution of the Staff Committee, SRSR.
[975] Article V (5) Procedure of the Internal Review Board, Appendix 12, Internal Appeals Procedure, SRSR.
[976] Article VIII(1) Final decision, Internal Appeals Procedure, Appendix 12, SRSR. Article VIII(3) Final Decision, Internal Appeals Procedure, Appendix 12, SRSR. ,The decision, with a copy of the report of the Board, shall be notified to the staff/mission member without delay. A copy of the decision shall be transmitted to the chairperson of the Board. 4. *Copies of all essential documents of the appeal (request, supporting documents, Board's report, final decision) shall be forwarded to the Secretariat* ' [emphasis added].
[977] OSCE Staff Rule 10.02.2 – Applications, Article X Appeals, SRSR.
[978] Article VIII(7) Adjudication decisions, Appendix 2, ToR PoA, SRSR. ,The Chairperson shall notify the adjudication decision to the applicant and to the Secretary General without delay. The Secretary General shall forward a copy of it to the head of the institution/mission concerned. *The original of the adjudication decision shall be filed in the Secretariat, which shall publish the adjudication decision electronically in a location accessible by staff/mission members and delegations*. The published version shall have names, post titles, and other personal information redacted' [emphasis added].

This lack of transparency and access to information is striking compared to the internal legal frameworks of most other IOs, from the World Trade Organization (WTO) to the Organization for Economic Co-operation and Development (OECD) to the World Bank, who have 'taken significant steps to make documents and records of proceedings available to the public in response to widespread criticisms of secretive decision-making practices'[979]. While the *Redesign Panel* found that the 'formal justice system' in the pre-reform UN 'generally lack[ed] transparency'[980], the new UN system is considered to have become more transparent[981]; and, in this context, high priority was accorded to making available to the public all sources of internal law relating to administration of justice, including administrative instructions through its 'Human Resources Portal'[982]. It may also be regarded as significant that, Rules of Procedure and Judgments for the Dispute and Appeals Tribunals are publicly available via separate links on the OAJ website[983]. However, as a consequence of the lack of transparency or veil of secrecy in the specific case of the OSCE, the task of identifying whether its internal dispute resolution processes conform to basic standards of due process and the rule of law[984] is rendered substantially more difficult. Given that the OSCE actively promotes access to information (a term roughly synonymous with transparency[985]), participation and access to justice in 'environmental matters' through the ratification and implementation of the Aarhus

[979] See B. Kingsbury & A. B. Stewart., 'Administrative Tribunals of International Organizations from the Perspective of the Emerging Global Administrative Law', Part I: The Development of International Administrative Law as a Field of Law, (O. Elias eds.) in *The Development and Effectiveness of International Administrative Law On the Occasion of the Thirtieth Anniversary of the World Bank Administrative Tribunal*, (Martinus Nijhoff Publications, 2009), at p. 78.
[980] *Report of the Redesign Panel, supra,* note 137, para. 73.
[981] See Report of the Secretary-General (UN Doc. A/71/163), *Findings and recommendations of the Interim Independent Assessment Panel on the system of administration of justice at the United Nations, and revised estimates relating to the programme budget for the biennium 2016-2017* (18 July 2016), para. 28.
[982] The UN HR Portal 'provides relevant, up-to-date online HR information', including, *inter alia*, Administrative Instructions: https://hr.un.org/handbook/source/administrative-instructions/date. Last accessed on 28 November 2019.
[983] See generally, Administration of Justice at the UN, UN Internal Justice System website, 'Office of Administration of Justice': https://www.un.org/en/internaljustice/. Last accessed on 28 November 2019.
[984] *Report of the Redesign Panel, supra,* note 137, para 9.
[985] 'According to Peters, 'A scheme or culture of access to information/transparency means that relevant information (on law and politics) is available and accessible', at 49.

Convention of 1998[986] by its participating States,[987] there is perhaps a sad irony that such key procedural elements are being ignored internally. At the same time, on a broader level, it has been argued that such elements have not only been imposed on States but also IOs by the Almaty Guidelines of 2005[988] and, as a customary rule can be 'realistically and appropriately further fleshed out as a more general procedural framework for implementing and improving accountability of [IOs][989]'. Nevertheless, despite the development of public expectations concerning the level of transparency and openness of IOs, as conditions affecting their accountability and legitimacy as entities exercising public authority in various forms, it remains to be seen whether this and regimes such as Aarhus will have

[986] Aarhus Convention: Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted 28 June 1998, entered into force 30 October 2001, 2161 UNTS 447. The Aarhus Convention, developed under the auspices of the United Nations Economic Commission for Europe (UNECE), and now raified by some 47 parties, contains requirements for public authorities to provide environmental information to the public on request, and certain types of information on a routine and proactive basis; as well as for public participation in various stages of environmental decision-making. See UNECE website: https://www.unece.org/env/pp/aarhus/map.html. Last accessed on 28 November 2019.

[987] Since 2002, the OSCE Office of the Co-ordinator of Economic and Environmental Activities, together with OSCE field operations, have been supporting the implementation of the Aarhus Convention, including through the establishment and functioning of Aarhus Centres in several countries of South Eastern Europe, Eastern Europe, Central Asia, and South Caucus. For further information, see *Factsheet on the OSCE and the Aarhus Convention* (Publisher, OSCE, 15 January 2008). See OSCE website: https://www.osce.org/secretariat/15981?download=true. Last accessed on 28 November 2019.

[988] UN Economic Commission for Europe, Report of the 2nd Meeting of the Parties to the Convention on Access to Decision-Making and Access to Justice in Environmental Matters held in Almaty, Kazakhstan, 25-7 May 2005, decision II/4 entitled Promoting the Application of the Principles of the Aarhus Convention in International Forums, ECE/MP.PP/200572/Add.5, 20 June 2005.

[989] A. Peters., ‚International Organizations and International Law', *The Oxford Handbook of International Organizations,* J. Katz Cogan, I. Hurd and I. Johnstone (eds.) (Oxford University Press, 2016), p. 48. See also B. Kingsbury and M. Donaldson., *supra,* note 955, (Oxford University Press, 2011), who stated that human rights law also requires a measure of transparency, including potentially, 'transparency about rule making and decisions pursuant to global administration'. 32: 'Article 19 (2) International Covenant on Civil and Political Rights (1966) provides that everyone shall have the right to freedom of expression, and that this right shall include freedom to seek, receive, and impart information of all kinds (→ Opinion and Expression, Freedom of, International Protection). The Inter-American Court of Human Rights (IACtHR) has stated that a similar provision in the American Convention on Human Rights (1969) 'protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention … and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case' (Claude Reyes v Chile [Judgment] IACtHR Series C No 151 [19 September 2006] para. 77). An analogous provision in the → European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) has not been interpreted as bestowing a general right of access by individuals but the → European Court of Human Rights (ECtHR) has recognized the right of the public to receive information of general interest, and has scrutinized in particular measures that hamper the press, and now other 'social watchdogs' in their functions (Társaság). 33. In some cases, treaties impose requirements not only on domestic agencies or officials but on international organization'.

some influence on the development of institutional practices at the OSCE that place these core principles at the forefront of its internal dispute resolution processes. While direct cause and effect may be difficult to measure, and in the absence of treaty or other formal requirements, there is no doubt that strengthening the transparency of the OSCE by maximizing public access to information[990] will depend not only on the proactiveness of the Secretary General, in reporting to the Permanent Council[991], but also recognition by participating States that this represents an effective and efficient use of the Organization's resources[992].

2.13.9. Why IOs need internal dispute resolution mechanisms?

Before briefly considering the personnel structure of the OSCE, it is necessary to understand why IOs need dispute resolution mechanisms. It is axiomatic that conflict exists in all areas of life, including organizations, even if the legal position of the international civil servant is well regulated[993]. A conflict can be defined as 'any opposition or difference of wishes, needs, statements, arguments, actions or principles between two or more staff members, or between staff members and the Organization. Conflict is a natural yet also manageable phenomenon that can occur in any organization and that can and should be handled professionally and in good faith'[994]. Hence, on occasions, if the conflict is not managed at a personal level, it may give rise to disputes that require resolution. While disputes can be 'catalysts that motivate organizations to learn and evolve, they can also

[990] Ibid; see also United Nations Staff Union, *Report of the Commission of Experts on Reforming Internal Justice at the United Nations* (New York: United Nations, 2006), at 26. In line with the common law system with the right of document discovery through independent court registry and subpoena system , it was recomended that the UN promulgate its own ‚Freedom of Information Act'.
[991] OSCE Permanent Council Decision No. 705 on the Common Regulatory Management System of 1 December 2005 (PC.DEC/705) states: '…[t]hat the Organization shall continue to incorporate relevant modern management practices and relevant new technical developments, and that the Secretary General shall report regularly to the Permanent Council on progress in this field and propose ways to further improve the Organization's management and the Common Regulatory Management System'. See OSCE website: https://www.osce.org/pc/17526?download=true. Last accessed on 28 November 2019.
[992] Ibid.
[993] See Report of the Secretary-General, Activities of the Office of the United Nations Ombudsman and Mediation Services, UN General Assembly Doc. A/70/151 of 15 July 2015, I. Informal conflict resolution A. Workplace conflict and its impact, para. 1.
[994] See Information Circular, ST/IC/2004/4 Conflict Resolution in the UN Secretariat', para. 1, 23 Jan 2004.

pose risks and have the potential to erode productive working relationships'[995]. This can be detrimental, not only to the individuals involved but also to the strategic organizational objectives, often resulting in substantial financial, human and credibility costs for an organization[996]. Here, the OSCE is no exception. Furthermore, even in the absence of an apparent conflict, staff might wish to seek justice for being adversely affected by a decision made against them by the administration relating to issues such as arbitrary staff evaluations, contract renewals, equity of treatment, in promotion, discrimination, harrassment, or the imposition of disciplinary measures[997]. To ensure an efficient, effective and just work-place, it is considered critical that an organization have 'systems, rules, and procedures that set a common standard for behaviour and actions'[998], including conflict resolution mechanisms that operate within the rule of law. The unavoidability of disputes between the UN and its staff, and the need to effectively deal with them, was also pointed out by the ICJ in its Advisory Opinion in *Effect of Awards:*

> 'When the Secretariat was organized, a situation arose in which the relations between the staff members and the Organization were governed by a complex code of law…*It was inevitable that there would be disputes between the Organization and staff members as to their rights and duties*. The Charter contains no provision which authrorizes any of the principal organs of the United Nations to adjudicate upon these disputes and Article 105 secures for the United Nations jurisdictional immunities in national courts. It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own

[995] See Report of the Secretary-General, Activities of the Office of the United Nations Ombudsman and Mediation Services, (UN Doc. A/69/126 of 15 July 2014), paras. 1-2. See UN website: https://undocs.org/pdf?symbol=en/a/69/126. Last accessed on 19 January 2020.
[996] H. Buss., 'Informal Conflict Resolution', in (eds.) H. Buss, T. Fitschen, T. Laker, C. Rohde and S. Villalpando, *Handbook on the Internal Justice System at the United Nations* (United Nations System Staff College, 2014), at 61.
[997] See *A Guide to Resolving Disputes, Administration of Justice in the United Nations* 1, New York (2009).
[998] See UN website, Administration of Justice at the UN, UN Internal Justice System: https://www.un.org/en/internaljustice/. Last accessed on 28 November 2019.

staff for the settlement of any disputes which may arise between it and them [emphasis added][999].

Although the above was stated in the context of the power of the UN General Assembly to establish a tribunal to deal with disputes between the Organization and staff members, it undoubtedly acknowledges the reality that in the absence of conflict-resolution mechanisms in the Charter, the UN was duty-bound to establish judicial or arbitral means of resolving a dispute[1000]. According to Gulati, 'the same logic can be transported into the need for all kinds of dispute resolution mechanisms, including informal means[1001]. The UN itself states: '[i]t is a fundamental right of staff at all levels to have recourse to an internal justice system'[1002]. Such means must comply with the rule of law and with due process standards, especially as IOs such as the OSCE enjoys jurisdictional immunities.

2.13.11. Personnel structure of the OSCE

As already observed, responsibilities in the area of human resources management are shared between the OSCE participating States, through its decision-making bodies, the OSCE Chairmanship, the OSCE Secretary General, as the 'Chief Administrative Officer of the Organization and head of the Secretariat'[1003], and the respective heads of institution

[999] ICJ, *Effect of awards of compensation made by United Nations Administrative Tribunal,* Advisory Opinion of July 13th, 1954: I.C.J. Reports 1954, at p. 57.
[1000] R. Gulati., *supra,* note 668, *2010 Working Paper*, University of New South Wales, at p. 23.
[1001] Ibid.
[1002] See Administration of Justice at the UN, Office of Administrative of Justice website, 'Main Page': https://www.un.org/en/internaljustice/oaj/. Last accessed on 5 December 2019.
[1003] OSCE Staff Regulation 1.01 on Terminology, Article I, SRSR. The Secretary General of the OSCE has a role with both political and administrative aspects. OSCE Ministerial Council Decision No. 15/04 on the Role of the OSCE Secretary General (OSCE Doc. MC.DEC/15/04 of 7 December 2004). See OSCE website: https://www.osce.org/mc/29705?download=true. Last accessed on 3 November 2019. According to Ministerial Council Decision No. 15/04, the Secretary General acts as the representative of the Chairperson-in-Office (see paragraph 2 of MC.DEC/15/04). Administratively, according to paragraph 3 of MC.DEC/15/04, as Chief Administrative Officer of the OSCE, the Secretary General 'Assists the Permanent Council and is responsible to it for the *efficient use of the Organization's resources*; responsible for proper implementation of the Financial Regulations and Financial Rules which govern the budgetary and financial administration of the OSCE. On administrative matters and for the efficient use of resources, Fund managers are accountable to the Permanent Council through the Secretary General; *Is responsible and accountable to the Permanent Council for the proper application of the Staff Regulations and Staff Rules.* In this regard, Heads of institution and heads of mission shall exercise their responsibility to the Permanent Council in respect of the institutions/missions, through the Secretary General. Permanent Council Decision No. 705

and heads of mission, including personal representatives who are fund managers, as well as the Secretariat's main programme managers at the director level. The appointing authorities of the OSCE are defined in Article III on appointments and assignments in the OSCE Staff Regulations. According to OSCE Staff Regulation 3.02, '[t]he Secretary General and the heads of institution shall be appointed by the Ministerial Council in accordance with procedures and for periods established by it'[1004]. Pursuant to OSCE Staff Regulation 1.05(a), '[t]he Secretary General shall be responsible and accountable to the Permanent Council for the proper application of the Staff Regulations and Staff Rules. In this regard, the heads of institution and heads of mission shall exercise their responsibility to the Permanent Council in respect of their institution/mission, through the Secretary General'[1005]. OSCE Staff Regulation 3.03(a) states that: '[t]he appointment of heads of mission is the responsibility of the Chairmanship. They shall be appointed from among nominations by participating States, and taking full account of the results of consultations with the Secretary General, the OSCE Troika[1006] and the host country; under subparagraph (b) 'Representatives of the Chairmanship shall be designated in accordance with Decision MC(10).DEC/8 of 7 December 2002'[1007], which specifies the responsibilities of the Chairmanship-in-Office for appointments and assignments[1008], who may be appointed by the latter, *inter alia*, after consulting 'with the participating States in advance through the Preparatory Committee'[1009]. OSCE Staff Regulation 3.04(a) states that 'Directors in the

states that '...the Secretary General, in his capacity as Chief Administrative Officer of the Organization, is responsible to the participating States, through the Permanent Council, for the effective and efficient use of the Organization's human, financial and material resources, in accordance with the Regulations and relevant decisions'.

[1004] OSCE Staff Regulation 3.02, Designation of the Secretary General and Heads of Institution, Article III Appointments and Assignments, SRSR.

[1005] OSCE Staff Regulation 1.05(a) Accountability, Article I General SRSR.

[1006] See OSCE website, The OSCE Troika. 'Each year, a different OSCE participating State chairs the Organization and brings its own perspective to bear on the year's work. The OSCE Troika was invented at the Helsinki Summit in 1992 to bring an element of continuity to the OSCE's leadership. It is a format of co-operation between the present, previous and succeeding Chairmanships'. See OSCE website: https://www.osce.org/magazine/171776. Last accessed on 3 November 2019.

[1007] OSCE Staff Regulation 3.03(a) Designation of Heads of Mission and Representatives of the Chairmanship, Article III Apointments and Assignments, SRSR.

[1008] OSCE Ministerial Council Decision No. 8, Role of the OSCE Chairmanship-in-Office, (OSCE Doc. MC(10).DEC/8), V. Decisions of the Porto Ministerial Council Meeting, Tenth Meeting of the Ministerial Council 6 and 7 December 2002, Porto 2002, 2(f) at p. 49. See OSCE website: https://www.osce.org/mc/40521?download=true. Last accessed on 12 November 2019.

[1009] Ibid, at 2(h)(i) 'May, when dealing with a crisis or a conflict or in order to ensure better co-ordination of participating States' efforts on specific areas, appoint personal representatives for the duration of the

Secretariat shall be appointed by the Secretary General with the consent of the Chairmanship; (b) Deputy heads of institution and deputy heads of mission shall be appointed by the Chairmanship, in consultation with the respective head of institution or mission and the Secretary General; and (c) Directors in the institutions and missions shall be appointed by the Chairmanship, in consultation with the respective head of institution or mission and the Secretary General'[1010]. OSCE Staff Regulation 3.05(a) states that the 'Secretary General shall appoint[1011] or assign[1012] all [fixed-term] staff members of the Secretariat below Director level[1013]. Pursuant to OSCE Staff Regulation 3.05(a), the heads of institution shall appoint or assign their respective staff in consultation with the Secretary General'[1014]. Under subparagraph (b), 'international fixed-term mission members shall be appointed or assigned by the respective head of mission, in consultation with the Secretary General, and subparagraph (c) states that '[l]ocal mission members and international short-term mission members shall be appointed by the respective head of mission'. And, '[i]n the performance of their duties, staff/mission members [of the OSCE] shall be subject to the authority of and be responsible to the Secretary General and their respective head of institution or head of mission.'[1015] While the above provisions indicate that the personnel function is shared, *inter alia*, by the Secretary General, the heads of institution and the heads of mission, in effect this Human Resources Management (HRM) function in the

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Chairmanship with a clear and precise mandate: When appointing a personal representative related to a specific issue, the Chairmanship-in-Office shall consult with the participating States in advance through the Preparatory Committee regarding the creation, the designation and the mandate of such a representative; (ii) When appointing a personal representative related to a specific issue, the Chairmanship-in-Office shall consult with the participating States in advance through the Preparatory Committee regarding the creation, the designation and the mandate of such a representative.'

[1010] OSCE Staff Regulation 3.04(a)(b) and (c) Designation of Directors in the Secretariat, Deputy Heads of Institution and Mission and Directors in the Institutions and Missions, Article III Appointments and Assignments, SRSR.

[1011] *Appointment* is defined under OSCE Staff Regulation 1.01, Terminology, Article I, General, SRSR, as 'Employment with the Secretariat, an institution or a mission through a contract of employment hereinafter referred to as "letter of appointment'.

[1012] *Assignment* is defined OSCE Staff Regulation 1.01, Terminology, Article I, General, SRSR, as 'Employment with the Secretariat, an institution or a mission by secondment through a contract of employment hereinafter referred to as "terms of assignment'.

[1013] According to OSCE Ministerial Council Decision No. 15/04 on the Role of the Secretary General, '[a]ll Secretariat staff are accountable to the Secretary General, and he/she will answer for their performance'.

[1014] OSCE Staff Regulation 3.5(a) Appointments or Assignments of Other Staff, Article III, Appointments and Assignments, SRSR.

[1015] OSCE Staff Regulation 2.01(b) Conduct of OSCE Officials, Article II Duties, Obligations and Privileges, SRSR.

OSCE is generally delegated[1016] by the latter to the administrative department of the DHR at the Secretariat and the designated human resources staff[1017] in the OSCE institutions[1018] and field operations. As indicated, within the Secretariat, this includes HR Direction and Management[1019], HR Services[1020], and Talent Management, with the latter responsible, *inter alia*, for recruitment[1021]. Indeed, DHR provides a range of HR services throughout the OSCE, including, *inter alia*, on 'the recruitment and administration of staff, the management of benefits and entitlements, and high quality learning and development opportunities'. DHR is also responsible for the 'development and improvement of HR policies and procedures and for the proper implementation of OSCE Staff Regulations and Staff Rules and Staff Instructions' [1022], including on allegations of violation of the professional working environment. On the one hand, DHR is the organizational unit concerned with the administration of personnel matters generally, and on the other hand, administrative decisions that adversely impact upon staff/mission members of the OSCE, and that give rise to disputes, are taken by managers and other persons in whom decision-making authority is vested in varying contexts. The seeds of an internal dispute are sown

[1016] OSCE Staff Regulation 1.06 Delegation of Authority, Article I General, SRSR; 'The Secretary General, the heads of institution and the heads of mission may delegate their authority under these Regulations to their authorized representatives. Such delegation of authority shall not relieve them from their responsibility and accountability'. For example, while the hiring manager in the OSCE Secretariat and insitutions is the director or head of the department, and in the field operations the head of mission, this responsibility may be delegated to heads of departments or respective units.

[1017] Depending on their size, a specific person may be tasked with the planning and management of recruitment-related activities, such as the chief of fund administration, the senior administrative/personnel officer, chief of human resources management or the human resources Officer.

[1018] For example, the ‚ODIHR Human Resources Unit' or 'Senior Administrative Officer' in HCNM.

[1019] According to the OSCE 2018 Unified Budget Post Table, this includes the Director for Human Resources (D1), Planning and Co-ordination Officer (P-3), and Senior Secretary (G-5).

[1020] According to the OSCE 2018 Unified Budget Post Table, this incudes Deputy Director/Head HR Services and OSCE Ethics Co-ordinator (P-5), Chief, Payroll and HR ERP Sysgtems (P-4), Human Resources Officer (P-3), Associate HR Policy and Procedures Officer (S), Associate Ethics Officer (S), Senior IRMA HR Support Assistant (G-7), Senior Payroll Assistant (G-6), Senior HR Assistant (G-6), Payroll Assistant (G-5), HR Asistant (G-4), HR Clerk (G-3).

[1021] According to the OSCE 2018 Unified Budget Post Table, Talent Management includes the Deputy Director/Head, Talent Management Section (P-5), Chief, Learning and Development Unit (P-4) Chief Recruitment Unit (P-4), Learning and Development Officer (P-3), Talent Management Officer (P-3), Talent Management Officer (S), Associate Recruitment Officer (S), Senior HR Assistant (G-7), Senior Recruitment Assistant (G-6), Senior Learning and Development Assistant (G-6), Recruitment Assistant (G-5), Learning and Development Assistant (G-5), Recruitment Assistant (G-4), HR Assistant (G-4), Learning and Development Clerk (G-3).

[1022] See OSCE Vacancy VNSECP01276 issued on 14 August 2017. See OSCE website: https://jobs.osce.org/vacancies/director-human-resources-vnsecp01276. Last accessed on 5 December 2019. See also *2016 OSCE Financial Report and Financial Statements and the Report of External Auditor*, for the year ended 31 December 2016, at 4.1 Human Resources, para. 56.

the moment a person decides to challenge (formally or informally) a decision they perceive as adverse to them. That is why dispute resolution mechanism is required, and it is important that the regime of dispute settlement be fair and impartial from the very beginning, and through all the various stages[1023].

[1023] See R. Gulati., *supra,* note 668, *2010 Working Paper*, University of New South Wales, at p. 24.

P A R T 3

PERSONS ENTITLED TO ACCESS THE OSCE JUSTICE SYSTEM

3. Access to the informal and formal system of internal justice

3.1. Introduction

As has been seen, since potential claimants ranging from staff members to private parties are regularly deprived of access to domestic courts to pursue their claims against IOs[1024], this raises important issues of justice in the context of the scope of access of persons employed by the OSCE to its formal and informal mechanisms of internal dispute resolution. This will require an interpretation of the provisions of the SRSRs.

3.2. Jurisdictional competence: scope of access to the OSCE justice system

Turning first to persons with access to informal resolution, paragraph 6 of the OSCE Code of Conduct, which sets out the broad principles of OSCE 'policy on the professional working environment'[1025], is clearly limited to '*OSCE officials*'[1026] [emphasis added]. It may also be noted that, in the context of the mechanisms to ensure adequate participation by the SRSR' recipients, particular reference is made in OSCE Staff Regulation 8.01 on Staff Relations to establishing and maintaining continuous contact and communication with *'all staff/mission members'* [emphasis added] [1027]. With regard to access to the formal system of internal justice, OSCE Staff Regulation 10.01(a) on the Internal Appeals Procedure, provides that '[t]he Secretary General shall establish an appeals procedure for *staff/mission members* […]' [emphasis added][1028]. OSCE Staff Regulation 10.02 on the External Appeals Procedure similarly states that: 'a *fixed term staff/mission member* shall have a right of final appeal to a [PoA][1029]. In terms of jurisdiction *ratione personae*, the

[1024] See A. Reinisch., *supra,* note 850, (Oxford: Oxford University Press, 2016), at p. 1060-1061.
[1025] As indicated, the OSCE policy on the professional working environment has been supplemented by a staff instruction which, *inter alia,* established informal grievance resolution procedures.
[1026] According to Paragraph 6. Professional working environment, OSCE Code of Conduct, Appendix 1, SRSR, 'OSCE *officials* shall abstain from any action which may be contrary to the OSCE policy on professional working environment. *All OSCE officials* are treated equally and with respect, regardless of gender, race, religion or belief, nationality, ethnic or social origin, age, sexual orientation, marital status or other aspects of personal status'.
[1027] OSCE Staff Regulations 8.01 Staff Relations Article VIII Staff Relations, SRSR.
[1028] OSCE Staff Regulation 10.01(a) Internal Appeals Procedure, Article X Appeals, SRSR.
[1029] OSCE Staff Regulation 10.02 External Appeals Procedure, Article X Appeals, SRSR.

ToR PoA[1030] states that the Panel is competent to 'decide on final appeals filed by *fixed-term staff/mission members* [emphasis added][1031]. This raises the question of what is meant by '*OSCE official*', '*staff/mission member*' and '*fixed-term staff/mission member*'. For the purposes of exploring these terms, some assistance may be obtained from four definitions provided under OSCE Staff Regulation 1.01 on 'Terminology'. Firstly, a 'Staff Member' is defined as an 'OSCE official working within the Secretariat or an institution, excluding the Secretary General and the heads of institution'[1032]. Secondly, 'Mission Member' is defined as an 'OSCE official working within a mission, excluding the Heads of Mission'[1033]. Thirdly, an OSCE Official is more broadly defined as '[a]ny person subject to the Staff Regulations in accordance with Regulation 1.03, including the Secretary General, the heads of institution and the heads of mission and all international or local, contracted or seconded, fixed-term and short-term[1034] staff/mission members'[1035]. Since 'fixed-term staff/mission member' is defined as a '[p]erson holding a fixed term appointment or assignment'[1036], this would also seem to include those working on a 'part-time basis[1037]. In terms of the PoA's jurisdiction *ratione personae*, the ToR PoA clarifies that the 'expression "fixed-term staff/mission members", shall mean any current or former fixed-term staff/mission member and any person who can show that he/she is entitled to some right under SRSRs or the letter of appointment or terms of assignment of a deceased fixed-term staff/mission member[1038]. Thus, to formally count as an OSCE official and have access to the informal and formal mechanisms of dispute resolution at the Organization, the relevant appointing authorities must have appointed or assigned the complainant pursuant to OSCE Staff Regulations 3.02, 3.03, 3.04, and 3.05, through a letter of

[1030] Appendix 2, Adjudication, ToR PoA, SRSR.
[1031] Ibid, Article I (1) Competence of the Panel of Adjudicators.
[1032] OSCE Staff Regulation 1.01 Terminology, Article I General, SRSR.
[1033] Ibid.
[1034] According to OSCE Staff Regulation 1.01 Terminology, Article I General, SRSR, a *Short-Term Staff/Mission Member is a '*[p]erson who is appointed or assigned to the Secretariat, an institution or a mission for less than six months, excluding those employed on an hourly or daily basis'.
[1035] OSCE Staff Regulation 1.03(a) and (b) Applicability, Article I General, SRSR.
[1036] OSCE Staff Regulation 1.01 Terminology, Article I General, SRSR.
[1037] OSCE Staff Rule 7.01.2(a)(ii) — Part-time employment, SRSR, states that '[i]f the Secretary General or the respective head of institution or head of mission has authorized *contracted staff/mission members to temporarily work on a part-time basis*, for a period not exceeding one year. Subject to prior approval by the respective seconding country, *part-time employment may also be granted, on a temporary basis, to seconded staff/mission members* [emphasis added]'.
[1038] Ibid, Article I (2) Competence of the Panel of Adjudicators.

appointment or terms of assignment. Accordingly, other categories of non-staff personnel with alternative contractual arrangements with the OSCE do not appear to be subject to the SRSR, and while there is no effective definition of the term non-OSCE staff, these would seem to include consultants, daily or hourly staff[1039], interns, and junior professional officers, each governed by their own legal framework [1040] with separate OSCE staff instructions and guidelines[1041]. It is also clear from the SRSRs that such staff are not only denied representation by 'staff representative bodies' [1042] in the Secretariat, or their respective institution or mission, but they also do not have access to any of OSCE's formal or informal dispute resolution mechanisms to channel their complaints, namely internal[1043] and external appeals procedures[1044], as well as separate informal and formal grievance resolution procedures for adressing violations of the OSCE professional working environment (providing for protection against harassment, sexual harassment, discrimination and retaliation) under the applicable policy, Staff Instruction No. 21. Over and above the notable absence of an ombudsman and in-house legal representation at the OSCE to address work-related issues and grievances for OSCE officials and non-OSCE staff alike, non-OSCE staff are also denied informal dispute resolution frameworks such as access to mediation services. Moreover, as the OSCE does not make final adjudication

[1039] OSCE Staff Regulation 1.03(b) Applicability, Article I General, SRSR.states that the OSCE Staff Regulations shall apply to '[s]taff members and mission members, *excluding those employed on an hourly or daily basis*' [emphasis added].
[1040] However, OSCE staff instructions are not publicly available for each of these categories of non-staff.
[1041] For example, OSCE Staff Instruction 23 on Special Service Agreements for consultants. See OSCE Recruitment presentation, Vienna, 14 March 2016, slide 5. See website for OSCE Recruitment Slides: https://www.urm.lt/uploads/default/documents/Lietuva%20regione%20ir%20pasaulyje/Isidarbibimas/Recruitment.pdf. Last accessed on 4 November 2019.
[1042] See OSCE Staff Regulation 8.1 and 8.2 (a) and (b), Article VIII, Staff Relations, SRSR. OSCE 8.2(a) states that Staff/mission members shall have the right to elect staff representatives. Staff Rules shall specify the conditions under which staff representation in the Secretariat, the institutions and the missions is organized and define the criteria for eligibility to elect or to be elected as staff representatives; (b) Staff representative bodies shall be composed in such a way as to afford equitable representation of all staff/mission members in the Secretariat or their respective institution or mission. See also C. Terzi and P.L., Fall, *supra*, note 657, at para. 166. ('In the majority of organizations ['[a]t FAO, IAEA, ITC, ITU, the United Nations Secretariat, UNAIDS, UNDP, UNFPA, UNHCR, UNICEF, UNIDO, UNOPS, UN-Women, UNWTO, WFP, WHO and WMO'], non.staff personnel are not members of staff representative bodies precisely because they are not staff.'
[1043] Management review of an administrative decision by the OSCE Secretary-General or respective head of instititon/mission pursuant to Article II (1) Composition of an Internal Review Board, Appendix 12, SRSR, and if the impugned decision is not overruled, consideration by an IRB at the OSCE Secretariat or within the instition/mission concerned.
[1044] Final appeal to a PoA against an administrative decision in accordance with OSCE Staff regulation 10.02 External Appeals Procedure, Article X Appeals, SRSR.

decisions publicly available[1045], it is not possible to explore PoA jurisprudence and practice in terms of whether the Panel has extended its jurisdiction to persons having an additional type of contract[1046]. According to a report of the only independent external oversight body of the UN system, the Joint Inspection Unit (JIU)[1047], entitled 'Use of non-staff personnel and related contractual modalities in the UN system organizations'[1048], a very considerable number of personnel of UN system organizations are working under non-staff contracts, and thus without access to internal grievance mechanisms, estimated in 2012-2013 to be around 45 per cent of its total workforce[1049]. While by contrast the proportion of non-OSCE staff in the OSCE's total workforce is likely to be much lower than the UN[1050], this

[1045] Article VIII(7), Appendix 2, ToR PoA, SRSR, states that the original adjudication decision shall be published 'electronically in a location accessible by staff/mission members and delegations'.

[1046] See, for example, *Gabaldon* 2011-UNAT-120. See also A. Reinisch., *supra,* note 916, (2007/11, Global Administrative Law Series), at p. 8. ('In some cases, administrative tribunals have even interpreted the scope of their jurisdiction in a deliberatively broad fashion, in order to avoid a situation which would deprive claimants of their right of access to dispute settlement. As early as the *Irani* case in 1971 [*Irani v. Secretary-General of the United Nations*, UN Administrative Tribunal, 6 October 1971, Judgment No. 150.], the UNAT had *extended its jurisdiction to a dispute involving a non-staff member*. It noted that "unless the tribunal was competent in the case before it, the safeguard of some appeals procedure for the benefit of the applicant [as called for in *Chadsey*] would not exist, and article V of the contract between the applicant and the Organization [providing for the establishment of appropriate machinery to hear and to decide disputes] would not be respected." [UNJYB (1971), 164.] [emphasis added].'). See IILJ website: http://iilj.org/wp-content/uploads/2016/08/Reinisch-The-Immunity-of-International-Organizations-and-the-Jurisdiction-of-Their-Administrative-Tribunals-2007-2.pdf. Last accessed on 8 November 2019.

[1047] See UN website, ,About the Joint Inspection Unit: https://www.unjiu.org/content/about-jiu. Last Accessed on 11 November 2019.

[1048] See C. Terzi and P.L. Fall., 'Use of non-staff personnel and related contractual modalities in the United Nations system organizations, Note by the Secretary-General, UN General Assembly Doc. A/70/685, 26 January 2016, Joint Inspection Unit, (UN Doc. JIU/REP/2014/8), at para. 167. See UN website: https://undocs.org/A/70/685. Last accessed on 8 November 2019. The JIU assessed the use of non-staff personnel and analyses the policies, regulations, contractual practices and associated managerial processes of the UN system organizations in respect of such personnel and mae related recommendations. The repot also sets out critical insights into the use of consultants, along with possible risks associated with the use of contracting and staffing in that regard. The report of the JIU was considered by the General Assembly at its seventy-first session (resolution 71/263). Data on the engagement of non-staff personnel are provided in the Report of the Secretary-General on the composition of the Secretariat: gratis personnel, retired staff and consultants and individual contractors (UN Doc. A/73/79/Add.1).

[1049] Ibid, at para. 44. ('[T]hese figures are not an indication of a permanent state within organizations, but rather a snapshot of the situation at a particular moment, i.e., the end of March 2012 and the end of March 2013. Given the short-term nature of non-staff contracts, the share of non-staff personnel may vary with time. Therefore, in order to have a more precise idea of the use of non-staff personnel by organizations, it is necessary to have full-time equivalent/whole year data, which, unfortunately, were not available. However, the above data show similar figures/weight of non-staff in two consecutive years for the organizations. This may cautiously be interpreted to some extent as demonstrating that non-staff personnel as a proportion of the total workforce remain similar over the years.')

[1050] There appears to be no official data showing the use of non-OSCE staff, and in particular on the profile and cost of the non-staff workforce, as well as the proportion of non-staff engaged across the Organization.

nevertheless raises questions about the extent to which such personnel are working for extended periods under a *de facto* employer-employment relationship at the Organization and the remedies available to them, particularly in the field operations, where, it is recalled, most of the OSCE worforce is serving. Again, given the lack of relevant information made available by the OSCE, difficulties confront attempts to provide an assessment of the level of use of long-serving non-staff personnel in the Organization, as well as related contractual policies and practices. What would seem clear, in any event, is that denying non-OSCE staff access to informal and formal recourse procedures on the one hand, while at the same time requiring them to behave like staff and abide by its policies on the other hand, poses a major ethical challenge to the Organization[1051]. Since these structural weaknesses are not dissimilar from that of the UN where 'non-staff often fear that their weak position is generally not conducive to raising issues with their supervisors'[1052], it is necessary to consider the existing mechanisms for resolving disputes for non-OSCE staff against the aims of the *Redesign Panel* on the UN system of internal justice.

3.3. Scope of personal jurisdiction of the UN justice system

In its report pertaining to scope and jurisdiction, the *Redesign Panel* noted that the UN's internal justice system – formal and informal – was applicable only to those considered staff members, which was interpreted restrictively by UN practice and the established jurisprudence[1053]. Persons employed in special service contracts and individual contractors were not included[1054]. While UN agreements with troop-contributing countries provide for a dispute resolution framework for locally recruited staff, no such system has been established and many locally recruited personnel in peacekeeping missions are recruited for long periods as individual contractors[1055]. Since it is readily apparent that disputes in

[1051] See C. Terzi and P.L. Fall., 'Use of non-staff personnel and related contractual modalities in the United Nations system organizations', Note by the Secretary-General, UN General Assembly Doc. A/70/685, 26 January 2016, Joint Inspection Unit Doc. JIU/REP/2014/8, at para. 171. See UN website: https://undocs.org/JIU/REP/2014/8. Last accessed on 4 November 2019. ('the ethical dilemma remains, as it is not appropriate to treat non-staff personnel differently, denying certain benefits and privileges to them, while requiring them to behave like staff.')
[1052] Ibid, at para. 167.
[1053] Ibid, III, A unified system, Scope and jurisdiction, at para. 15.
[1054] Ibid.
[1055] Ibid, para. 18.

the work place, including harassment and discrimination cases, do not arise only between staff, but between staff and non-staff, the *Panel* emphasized the need for a unified dispute resolution mechanism. The *Redesign Panel* observed in this respect:

> All individuals appointed to work for the Organization by way of personal services should have full access to the informal and formal justice system of the United Nations. The Redesign Panel considers that, in addition to those currently covered by article 2 of the statute of [the United Nations Administrative Tribunal], the system of justice should be extended to:
>
> > (a) Any person appointed by the Secretary-General, the General Assembly or any principal organ to a remunerated post in the Organization;
> > (b) Any other person performing personal services under contract with the United Nations. This category includes consultants and locally recruited personnel of peacekeeping missions.[1056]

While the Secretary-General agreed with the above proposals[1057], the primary forum for the consideration of legal questions in the General Assembly, the Sixth Committee[1058], could not immediately give its endorsement and felt the they should be further considered

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[1056] *Report of the Redesign Panel, supra,* note 137, para. 20 (a) and (b). See also XIII. Recommendations, para 156. ('The scope and jurisdiction of the informal and formal internal justice system [at the UN] should include all persons employed in a remunerated post or performing personal services under contract with the Organization.')

[1057] See Note by the Secretary-General, 'Report of the Redesign Panel on the United Nations system of administration of justice', III. A unified system, A. Proposed scope of the new system (UN Doc. A/61/758 of 23 February 2007), at para. 10. See UN website: https://undocs.org/A/61/758. Last accessed on 1 November 2019. In his note, the Secretary-General recommended that the new informal and formal system of justice at the UN should also cover the category of non-staff personnel, including: 'all persons who perform work by way of their own personal service for the Organization, no matter the type of contract by which they are engaged, but not including military or police personnel in peacekeeping operations, volunteers (other than United Nations Volunteers), interns, type II gratis personnel (as defined in United Nations Secretariat, Administrative Instruction, Gratis personnel*, (UN Doc. ST/AI/1999/6 of 28 May 1999)) or persons performing work in conjunction with the supply of goods or services extending beyond their own personal service or pursuant to a contract entered into with a supplier, contractor or consulting firm.'

[1058] See UN website, General Assembly of the United Nations, Sixth Committee (Legal), 'General information': https://www.un.org/en/ga/sixth/. Last accessed on 5 November 2019. ('The Sixth Committee is the primary forum for the consideration of legal questions in the General Assembly. All of the United Nations Member States are entitled to representation on the Sixth Committee as one of the main committees of the General Assembly.')

before reaching agreement on them [1059]. Work on the legal and financial aspects of this and other major issues continued in an *Ad Hoc* Committee on the Administration of Justice at the United Nations [1060], the Fifth Committee [1061], and the Advisory Committee on Administrative and Budetary Questions (ACABQ) [1062], which ultimately led the General

[1059] On the proposed scope of the new system of administration of justice, to extend the new system of administration of justice to certain categories of non-staff personnel, see 'Administration of Justice at the United Nations: conclusions of the Sixth Committee,' Appendix I to the letter dated 19 November 2007 from the Chairman of the Sixth Committee to the President of the General Assembly (UN Doc. A/C.5/62/11 of 20 November 2007). See UN website: https://undocs.org/pdf?symbol=en/A/C.5/62/11. Last accessed on 5 November 2019. See also A. Megzari., *supra,* note 163, (Leiden/Boston, Brill/Nijhoff, 2015), pp. 433-433.

[1060] On 6 December 2007, the General Assembly adopted decision 62/519, in which it took note of the conclusions of the Sixth Committee on the administration of justice at the UN following its consideration of the legal aspects of the report of the Secretary-General. The Assembly also decided to establish an *Ad Hoc* Committee on the Administration of Justice at the United Nations, to be open to all States members of the United Nations, members of the specialized agencies or members of the IAEA, for the purposes of continuing the work on the legal aspects of the item, taking into account the results of the deliberations of the Sixth Committee on the item, previous decisions of the Assembly and any further decisions that the Assembly may take during its sixty-second session prior to the meeting of the *Ad Hoc* Committee.

[1061] See UN website, 'About the Fifth Committee': https://www.un.org/en/ga/fifth/index.shtml. Last accessed on 7 November 2019. ('The Fifth Committee is the Committee of the General Assembly with responsibilities for administrative and budgetary matters. Based on the reports of the Fifth Committee, the General Assembly considers and appproves the budget of the Organization […]. The Assembly also considers and approves financial and budgetary arrangements with specialized agencies and makes recommendations to the agencies concerned.')

[1062] See 'Administration of justice at the United Nations', Report of the Secretary-General on the administration of justice, Eighth report of the Advisory Committee on Administrative and Budgetary Questions on the proposed programme budget for the biennium 2008-2009, II. New system of administration of justice, A. Scope and jurisdiction, (UN Doc. A/62/7/Add.7 of 25 October 2007), paras. 14 and 15. (14. '[…]. The Committee continues to believe that there is no sound basis for granting access to the internal justice system of the United Nations to individual contractors, consultants and United Nations Volunteers who have existing means of recourse. In the opinion of the Committee, the Secretary-General has not provided any new or convincing rationale for expanding the scope of the system to these categories of personnel. 15. Therefore, the Advisory Committee recommends that the system of internal justice continue to apply only to those individuals covered by the Staff Regulations and Rules of the United Nations. The lower number of persons to be covered should have an impact on the level of resources required in the other parts of the system. The Committee does recognize, however, the Organization's responsibility to ensure that the daily paid workers in peacekeeping missions (3,312 individuals as of September 2007) are made aware of their rights and obligations and have access to suitable recourse procedures within the framework of the United Nations.'). See UN website: https://undocs.org/A/62/7/Add.7. Last accessed on 11 November 2019. For unformation on the ACABQ, see UN website, 'About the ACABQ': https://www.un.org/ga/acabq/about. Last accessed on 7 November 2019. ('The Advisory Committee on Administrative and Budgetary Questions, a subsidiary organ of the General Assembly, consists of 16 members appointed by the Assembly in their individual capacity. The functions and responsibilities of the Advisory Committee, as well as its composition, are governed by the provisions of Assembly resolutions 14 (I) of 13 February 1946 and 32/103 of 14 December 1977 and rules 155 to 157 of the rules of procedure of the Assembly. The major functions of the Advisory Committee are: (a) to examine and report on the budget submitted by the Secretary-General to the General Assembly; (b) to advise the General Assembly concerning any administrative and budgetary matters referred to it; (c) to examine on behalf of the General Assembly the administrative budgets of the specialized agencies and proposals for financial arrangements with such agencies; and (d) to consider and report to the General Assembly on the auditors' reports on the accounts of the United Nations and of the specialized

Assembly to reject the proposal to extend the scope of the new internal justice system at the UN to all non-staff personnel (notwithstanding that interns, type II gratis personnel and volunteers (other than UN Volunteers) may request management evaluation), accepting to extend it only to one small category of non-staff personnel[1063], namely daily paid workers in peacekeeping missions who totalled only some 3,300 individuals in September 2007[1064]. Several factors account for the resistance to the recommendations of the *Redesign Panel*. A first argument is that if the *Panel's* recommendation were to be accepted, 'the internal justice system would have to handle and adjudicate very different legal frameworks, which would have significant financial and legal implications'[1065]. A second argument has been that if the system's scope were expanded to include non-staff personnel, the expected number of appellants would 'require twice the number of full-time and half-time judges, and doubling the staff of the Dispute Tribunal registries'[1066] and lawyers representing both parties, including the respondent[1067]. A third argument has been legal concerns that 'expansion of the scope and jurisdiction of the internal justice system to individuals other than [UN] staff members might be misunderstood as implying that non-staff personnel are assimilated to staff, even though their terms of employment and the recourse available to

agencies. The programme of work of the Committee is determined by the requirements of the General Assembly and the other legislative bodies to which the Committee reports.')

[1063] However, the General Assembly added that they do not have access to the UNDT and UNAT. See UNGA Res. 63/253 Administration of justice at the United Nations, I. New system of administration of justice, (UN Doc. A/RES/63/253* of 17 March 2009), at para. 7. See UN website: https://undocs.org/en/A/RES/63/253. Last accessed on 19 November 2019. Consultants and individual contractors have no access to the internal justice system. See Dame R. Higgins DBE, QC, P. Webb, D. Akande, S. Sivakumaran, & J. Sloan, ,The United Nations Secretariat and Secretary-General', Chapter 15, *Oppenheim's International Law United Nations*, Volume I, (Oxford Univesity Press, 2017), p. 521. (,Several states, including Switzerland are trying to change this, because the only mechanism available to those categories is arbitration.')

[1064] This issue was considered repeatedly by the General Assembly. See General Assembly decision 62/519 of 6 December 2007; and General Assembly Resolutions 62/228, 63/253, 64/233 and 65/251. See Report of the Secretary-General, 'Findings and recommendations of the Interim Independent Assessment Panel on the system of administration of justice at the United Nations' (UN Doc. A/71/163 of 18 July 2016), at para. 58. See also A. Megzari., *supra,* note 163, (Leiden/Boston, Brill/Nijhoff, 2015), pp. 433-433.

[1065] See Report of the Secretary-General, Findings and recommendations of the Interim Independent Assessment Panel on the system of administration of justice at the United Nations, (UN Doc. A/71/163 of 18 July 2016), at para. 59. ('Non-staff personnel comprise various categories (including interns, United Nations Volunteers, volunteers other than United Nations Volunteers, type II gratis personnel, daily paid workers, consultants, individual contractors, experts on mission not retained by means of a consultant contract, and officials other than Secretariat officials), each with its own legal framework.')

[1066] See Report of the Secretary-General, 'Administration of justice at the United Nations' (UN Doc. A/65/373 of 16 September 2010), paras. 180 -182. See UN website: https://undocs.org/en/A/65/373. Accessed on 3 November 2019.

[1067] Ibid.

them for resolving employment grievances are significantly different from those of staff members'[1068]. Nonetheless, the General Assembly decided to revert to the issue of the the scope of the system of administration of justice at its sixty-fifth session, with a view to ensuring that effective remedies were available to all categories of UN personnel, with due consideration given to the types of recourse that were most appropriate to that end[1069]. In 2009, the Assembly specifically requested the Secretary-General to explore the respective advantages and disadvantages of several options[1070], including the establishment of an expedited special arbitration procedure for smaller claims.[1071] Although the issue has come before the General Assembly every year, and notwithstanding efforts at improving prevention and resolution of disputes involving non-staff personnel, the reality on the ground is that, like the OSCE, no adequate and cost effective system of justice exists for non-staff members and staff, particularly in the field.

[1068] See 'Findings and recommendations of the Interim Independent Assessment Panel on the system of administration of justice at the United Nations', Report of the Secretary-General, (UN Doc. A/71/163 of 18 July 2016), at para. 61. In addition to these arguments, the Secretary-General noted that ,[f|or the funds and programmes, expanding access to the internal justice system to the categories of non-staff personnel, who number more than 40,000 (and are part of the 45 per cent mentioned above), would have particularly burdensome financial, human resources and support implications. Some funds and programmes employ more non-staff than staff personnel. Furthermore, under the current cost-sharing model for the internal justice system the funds and programmes contribute on the basis of the headcount of their eligible staff, not the extent of their utilization of the internal justice system. Thus, some funds and programmes would see their resource requirements for the internal justice system more than doubling, potentially redirecting their voluntary funding away from programme implementation.'

[1069] UNGA Res. 63/253 Administration of justice at the United Nations, I. New system of administration of justice, (UN Doc. A/RES/63/253* of 17 March 2009), at para. 8. See UN website: https://undocs.org/en/A/RES/63/253. Last accessed on 19 November 2019.

[1070] See UNGA Res. 64/233, 'Administration of justice at the United Nations', (UN Doc. A/RES/64/233 of 16 March 2010), para. 9 (a) to (d). See UN website: https://undocs.org/A/RES/64/233. Accessed on 3 November 2019. In 2009, the UN General Assembly requested the Secretary-General to explore the respective advantages or disadvantages of several options, namely: (a) the establishment of an expedited special arbitration procedure, conducted under the auspices of local, national or regional arbitration associations for claims under twenty-five thousand United States dollars submitted by personal service contractors; (b) the establishment of an internal standing body that would make binding decisions on disputes submitted by non-staff personnel, not subject to appeal and using streamlined procedures; (c) the establishment of a simplified procedure for non-staff personnel before UNDT, which would make binding decisions not subject to appeal and using streamlined procedures; and (d) granting of access to the UNDT and Appeals Tribunal, under their current rules of procedure, to non-staff-personnel.

[1071] At the UN, a mechanism for external expedited arbitration procedures has been considered by the General Assembly. See UN Doc. GA Res. 67/241, Administration of justice at the United Nations (2012).

3.4. Remedies available to non-staff personnel at the OSCE and UN

To mitigate the injurious impact of immunity on private parties, particularly in relation to non-staff personnel [1072], who often cannot access internal justice mechanisms or procedures[1073] to resolve contractual disputes, it is 'increasingly general practice'[1074] for IOs to make available alternative methods of dispute settlement[1075]. When organizations enter into contractural relations with non-staff personnel, they will often include a standard dispute settlement clause, in accordance with their general conditions for contracts attached

[1072] See D. Akande., ‚International Organizations', Part II. The Structure of international legal obligation in *International Law* (ed. M. D. Evans), 4th ed. (Oxford University Press, 2014), at p. 272.

[1073] That said, Terzi and Fall have noted that '[c]onsultants are treated differently than other non-staff categories by some organizations. At FAO and WFP, consultants are considered "officials" of the organization and allowed to have full access to the internal appeals system used by staff, including final recourse to the ILO Administrative Tribunal'. See C. Terzi and P.L. Fall., *supra*, note 659, at para. 173.

[1074] See H. Fox & P. Webb., ‚Part IV. Other Immunities, 19. International Organizations and Special Regimes', in (eds.), *The Law of State* Immunity, (3rd edition), (Oxford University Press, 2013), at p. 577. (‚Whilst the Member States, the host State, and the organization itself may all incur international responsibility for an act of the organization which constitutes a denial of justice, it has been additionally contended that the *interests of individuals dealing with the organization whether as suppliers of goods or services or employees, also require legal protection*. So far as suppliers of goods or services are concerned, there may be waiver of immunities provided in the specific contract or a more general waiver in the constituent treaty (see earlier section on Waiver). An alternative method of dealing with this problem, early adopted by the UN in respect of itself and its specialized agencies, and *now increasingly general practice*, is for the constituent instrument or the headquarters agreement of an organization to require the inclusion and to specify some alternative method of settlement of disputes.')

[1075] As noted by Reinisch, '[t]he importance of offering some kind of legal recourse against acts of [IOs] which affect private persons was already recognized in the [Institut de droit international (IDI)'s Amsterdam Resolution of 1957 where the Institute, as a result of the 'duty [of every international organization] to respect the law', demanded that 'for every particular decision of an international organ or organization which involves private rights or interests, there be provided appropriate procedures for settling by judicial or arbitral methods juridicial differences which might arise from such a decision'. (1957 II) 47 *Annuaire de I'Institut de Droit International* 488'. See A. Reinisch, *supra,* note 880, (Cambridge University Press, 2000), footnote 122 at p. 276. Article 7 of the Oslo Resolution 1977 on the Settlement of Disputes in Case of Immunity from Jurisdiction, adopted by the Institut de droit international (IDI), which provides that: '[c]ontracts concluded with private persons by [IOs] should, in cases where the latter enjoy immunity from jurisdiction, provide for the settlement of disputes arising out of such contracts by an independent body'. It counts among the independent dispute settlement organs in Article 8: a) an arbitration body set up in accordance with the rules of a permanent arbitration institution or in pursuance of ad hoc clauses; b) a tribunal set up by an international organization, if conferring such jurisdiction is compatible with the rules of the organization; or c) a national judicial body, if this is not incompatible with the status and functions of the organization'. See IDI website: http://www.idi-iil.org/app/uploads/2017/06/1977_oslo_03_en.pdf. Accessed on 4 November 2019. See K. Schmalenbach., ‚Dispute Settlement (Article VIII Sections 29–30 General Convention)' in *The Conventions on The Privileges and Immunities of the United Nations and its Specialized Agencies A Commentary* (ed. A. Reinisch) (Oxford University Press, 2016), at p. 29.

to the individual contract[1076], which provide that while best efforts should be made to amicably settle any dispute arising out of the contract in question, if this should fail, the dispute may be referred to arbitration as the only formal dispute resolution remedy. Contracts concluded by the UN, by its subsidiary organs (e.g., UN field missions) and its separately administered organs (e.g., UNDP, UNICEF, UNWRA) routinely contain such clauses[1077], set out in the UN General Conditions of Contract[1078]. Likewise, the OSCE General Conditions of Contract[1079] contains a standard dispute settlement clause on the settlement of 'disputes arising out of or in connection with the [c]ontract or its interpretation.'[1080] The initial method of settling contractual disputes for all categories of non-staff personnel at the OSCE[1081] and UN[1082] are, as their respective standard dispute

[1076] See, for example, A. Reinisch, *supra,* note 880, (Cambridge University Press, 2000), at p. 266. See also F. Seyersted, ‚Provisions on Applicable Law', 13.5 IGO Regulations and General Conditions, in *Common Law of International Organizations,* (Martinus Nijhofff Publishers (2008), at p. 474.

[1077] See UN Procurement Division website: https://www.un.org/Depts/ptd/about-us/conditions-contract. Last accessed on 10 November 2019. See also 'Administration of justice at the United Nations', Report of the Secretary-General, (UN Doc. A/73/217* of 23 July 2018), at para. 100. ('The […] remedies available to non-staff personnel in specialized agencies and related bodies of the United Nations correspond to the remedies available to non-staff personnel in the United Nations Secretariat and funds and programmes *which provide for: […] arbitration* (for consultants and individual contractors, United Nations Volunteers) [emphasis added]'). See UN website: https://undocs.org/A/73/217. Last accessed on 13 January 2020.

[1078] See United Nations Secretariat, Administrative Instruction amending administrative instructuion ST/AI/1999/7: Consultants and individual contractors (UN Doc. ST/AI/1999/7/Amend.1, annex of 15 March 2006). See UN website: https://undocs.org/ST/AI/1999/7/Amend.1. Last accessed on 13 January 2020. The use of *ad hoc* arbitration as a mode of resolving disputes arising from contracts with consultants and individual contractors derives from article VIII, section 29(a) of the 1946 General Convention on the Privileges and Immunities of the UN, which mandatorily obliges the UN as the addressee to 'make provisions for appropriate modes of settlement of: disputes arising out of contracts or other disputes of a private law character to which the [UN] is a party; […]'. In order to provide an appropriate mode of settlement of any disputes arising out of contracts, it may be noted that the UN has regularly made provisons in its contracts for recourse to arbitration. See *Yearbook of the International Law Commission*, 1967, vol. II, p. 296, and the *United Nations Juridical Yearbook*, 1976, pp. 168-176. See also K. Schmalenbach., *supra,* note 1074, (Oxford University Press, 2016), at p. 549.

[1079] See OSCE General Conditions of Contract (Services) at para. 41. See OSCE website: https://procurement.osce.org/resources/document/general-conditions-contract-services. Last accessed on 4 November 2019.

[1080] See OSCE General Conditions of Contract (Services), para. 41.

[1081] See paragraph 41. Settlement of Disputes, OSCE General Conditions of Contract (Services). See OSCE website: https://procurement.osce.org/resources/document/general-conditions-contract-services. Last ccessed on 6 November 2019. ('The Parties shall use their best efforts to *settle amicably* all disputes arising out of or in connection with the Contract or its interpretation. Any dispute, controversy or claim arising out of or in relation to this Contract shall be *settled through negotiations* between the Parties. If the Parties fail to settle the dispute amicably within 60 (sixty) Days of commencement of the negotiations, the dispute shall be *settled through arbitration* [emphasis added].')

[1082] See Article 17.1. UN General Conditions of Contract (2012), Contracts for the Provision of Goods and Services. ('The Parties shall use their best efforts to amicably settle any dispute, controversy, or claim arising out of the Contract or the breach, termination, or invalidity thereof.'). See UN Procurement Division website: https://www.un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/general_conditio

settlement clauses point out, amicable settlement and negotiation; and in the case of the UN, if the parties agree, conciliation in accordance with the relevant UNCITRAL Conciliation Rules[1083]. Standard dispute settlement clauses in most organizations[1084], including the OSCE[1085] and the UN[1086], invoke the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)[1087]. In the context of the dispute resolution mechanisms currently available to non-staff personnel at the UN and OSCE, two deficiencies may be highlighted. First, with regard to access of non-staff personnel, especially those serving in the field[1088], to other remedies and frameworks, such as the

n_goods_services.pdf. Last accessed on 10 November 2019. See also 'Administration of justice at the United Nations', Report of the Secretary-General, (UN Doc. A/73/217* of 23 July 2018), at para. 100. ('The […] remedies available to non-staff personnel in specialized agencies and related bodies of the United Nations correspond to the remedies available to non-staff personnel in the United Nations Secretariat and funds and programmes *which provide for: amicable settlement (for all categories of non-staff personnel:* consultants and individual contractors, United Nations Volunteers, interns and type II gratis personnel), [emphasis added]'). See UN website: https://undocs.org/A/73/217. Last accessed on 13 January 2020.

[1083] See Article 17.1. UN General Conditions of Contract (2012), Contracts for the Provision of Goods and Services. ('Parties wish to seek such an amicable settlement through conciliation, the conciliation shall take place in accordance with the Conciliation Rules then obtaining of the United Nations Commission on International Trade Law ("UNCITRAL"), or according to such other procedure as may be agreed between the Parties in writing.') See UNGA Res. 35/52, Conciliation Rules of the United Nations Commission on International Trade Law (4 December 1980). See UN website: https://undocs.org/en/A/RES/35/52. Accessed on 10 November 2019.

[1084] For example, the WHO uses the rules of arbitration of the International Chamber of Commerce.

[1085] Paragraph 41 of the OSCE General Conditions of Contract (Services) provides that: 'Arbitration shall be performed in accordance with the UNCITRAL arbitration rules.'

[1086] See Article 17.2. UN General Conditions of Contract (2012), Contracts for the Provision of Goods and Services, ('Any dispute, controversy, or claim between the Parties arising out of the Contract or the breach, termination, or invalidity thereof, unless settled amicably under Article 17.1, above, within sixty (60) days after receipt by one Party of the other Party's written request for such amicable settlement, shall be referred by either Party to arbitration in accordance with the UNCITRAL Arbitration Rules then obtaining.'). See UN Procurement Division website: https://www.un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/general_condition_goods_services.pdf. Last accessed on 10 November 2019. See also UNGA Resolution 31/98 (15 December 1976). See UN website: https://undocs.org/en/A/RES/31/98. Accessed on 5 November 2019; see also UNGA Res. 65/22 UNCITRAL Arbitration Rules as revised in 2010, (UN Doc. of 10 January 2011). See UN website: https://undocs.org/en/A/RES/65/22. Last accessed on 5 November 2019. See also K. Schmalenbach., *supra,* note 1074, (Oxford University Press, 2016), at p. 549.

[1087] See UNCITRAL Arbitration Rules, approved by the General Assembly on 15 December 1976, GAOR, 31st Sess., No. 17, Chap. V, Sec. C, Doc. A/31/17, 1976, ILM 15 (1976), 701. See UN wesbite for UNCITRAL Model Law on International Commercial Conciliation, passed by the UN General Assembly in 2002. See UNCITRAL website: https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf. Last accessed on 3 November 2019.

[1088] See 'Activities of the Office of the United Nations Ombudsman and Mediation Services', Report of the Secretary-General, UN Doc, A/73/167 of 16 July 2018, para. 89. See UN website: https://undocs.org/A/73/167. Last accessed on 13 November 2019.

UNOMS[1089], it may be reiterated that this single intergrated Office is not mandated to serve non-staff personnel[1090] and does so only on an exceptional basis and when feasible within existing resources.[1091] The General Assembly has began to address this issue and in 2019 requested the Secretary-General to establish, within existing resources, a pilot project to offer access to informal dispute-resolution services to non-staff personnel[1092], but nonetheless decided that it 'will not affect the mandate of the [UNOMS]'[1093]; it also recognized that the 'Office may decide to conduct outreach to non-staff.'[1094] Secondly, concerning formal procedures, in view of the very low number of cases that have been settled by arbitration under UNCITRAL rules[1095], the question was asked whether this type of arbitration provides an adequate remedy to non-staff personnel at the UN, in particular in the light of the vast cost and expenses involved[1096], including the staff time and resources

[1089] Ibid, para. 7. (‚The Office serves the constituencies of the following entities, through its three pillars: the Secretariat; the funds and programmes, including the United Nations Development Programme, the United Nations Population Fund, the United Nations Children's Fund, the United Nations Office for Project Services and United Nations Entity for Gender Equality and the Empowerment of Women; and UNHCR. Each pillar is established and administered by its respective entity or entities.') See also United Nations Secretariat, Secretary-General's bulletin, Terms of Reference for the Office of the United Nations Ombudsman and Mediation Services, (UN Doc. ST/SGB/2016/7 of 22 June 2016), Section 1 Establishment of the Office of the United Nations Ombudsman and Mediation Services, Scope. 1.2. See UN website: https://undocs.org/ST/SGB/2016/7. Last accessed on 13 November 2019.

[1090] See Report of the Secretrary-General, Administration of justice at the United Nations, (UN doc. A/73/217* of 23 July 2018), at para. 35. See UN website: https://undocs.org/A/73/217. Last accessed on 12 November 2019. ('The Committee was also informed upon enquiry that, while the terms of reference of the Office did not include a specific mandate for the provision of services to non-staff personnel (see UN Doc. ST/SGB/2016/7), there was already a mandate in place for the Office on selected issues, such as that covering the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority under UN Doc. ST/SGB/2008/5.')

[1091] Ibid.

[1092] See Resolution adopted by the General Assembly on 22 December 2018, II. Informal system, (UN Doc. A/RES/73/276 of 7 January 2019), para. 16. See UN website: https://undocs.org/A/RES/73/276. Last accessed on 7 November 2019.

[1093] Ibid.

[1094] Ibid. See also para. 18. '*Requests* the Secretary-General to establish, in assessing the current and projected workload arising from services to non-staff personnel, both quantitative and qualitative analysis, including type of grievances and the efficiency of case management, and requests the Secretary-General to provide this information and, if necessary, further recommendations in the context of his next report[.]'

[1095] As reported by the Secretary-General in his report on the administration of justice (see Report of A/62/748 and Corr.1 (2008) See UN website: accessed on 10 August 2018.), only 16 claims by consultants or individual contractors during the period 1996 to 2006 were referred to the Office of Legal Affairs, of which only two proceeded to arbitration. This number results from the fact that the great majority of cases involving non-staff personnel are resolved amicably through direct negotiations. Thus, the Organization has limited experience with formal dispute settlement mechanisms with non-staff personnel.

[1096] See Report of the Secretary-General, *supra,* note 625, para. 169. 'With respect to the two arbitrations that were conducted under the UNCITRAL Arbitration Rules, in the first case the arbitration was conducted with a sole arbitrator and resulted in the claims being denied. However, the Organization was required to pay $8,323 for the Claimant's arbitration expenses and $12,218 for the Arbitrator's fee and expenses.

and the lack of a fast track procedure[1097]. In his reports A/66/275 and Corr.1 (annex II) and A/67/265 and Corr.1 (annex IV), and in response to a request from the General Assembly, the Secretary-General submitted a proposal for implementing a mechanism for expedited arbitration procedures for consultants and individual contractors,[1098] including a cost estimate for engaging a neutral entity which would, *inter alia*, vet arbitrators, promulgate and maintain a roster of arbitrators, appoint an arbitrator when a party initiated arbitration and provide certain administrative functions during arbitration[1099]. While the General Assembly took note of and decided to remain seized of the matter[1100], it is clear that *ad hoc* arbitrations under UNCITRAL rules do not constitute an effective remedy for individuals.

Additionally, the Organization incurred significant costs for the staff time required to support the arbitration, which was managed directly by the Office of Legal Affairs. The second arbitration was conducted by a sole arbitrator and the Organization was required to pay compensation in the amount of $1,626.14. Each party was responsible for its own fees and expenses and the Arbitrator waived his fees and expenses. Again, the Organization incurred significant costs for the staff time required to support the arbitration, which was directly managed by the Office of Legal Affairs'.

[1097] Ibid, para. 171.

[1098] See UN Docs. A/66/275 and A/67/265.

[1099] See *Report of the Secretary-General*, 'Administration of justice at the United Nations', (UN Doc. A/74/172 of 15 July 2019), 95(a) - (d). See UN website: https://undocs.org/pdf?symbol=en/A/74/172. Last accessed on 16 November 2019.

[1100] See *Report of the Secretary-General*, 'Administration of Justice at the United Nations', (UN Doc. A/73/217* of 23 July 2018), at para. 102.

P A R T 4

INFORMAL DISPUTE RESOLUTION SYSTEM AT THE OSCE

4. Informal System of Internal Justice at the OSCE

4.1. Introduction

Like all other employment environments, whenever a dispute[1101] arises the parties have the option either to avoid the matter and do nothing, take legal action, or try to identify an informal solution[1102]. Informal means of dispute settlement is the first, and usually optional[1103], mechanism for the settlement of internal disputes between an IO and its staff and has the potential of resolving a conflict at a very early stage with relatively little expense and also greatly enhances the potential of positive outcomes[1104]. While non-adversarial means have been introduced only recently in some IOs[1105], others have dedicated considerable resources over recent decades to constantly improving their options for informal dispute resolution[1106]. For example, the UN General Assembly placed particular emphasis on these means, pointing out that 'informal resolution of conflict is a crucial element of the system of administration of justice' and that 'all possible use should be made of the informal system in order to avoid unnecessary litigation'[1107]. Since IOs are not strictly required to provide informal procedures for resolving disputes, they have

[1101] For these purposes, the terms 'dispute' and 'conflict' resolution are used interchangeably.
[1102] H. Buss., *supra,* note 565, at 61.
[1103] In the absence of a provision on mediation, an organization is not required to establish a mediation procedure as it enjoys discretion in this regard. See ILOAT Judgment No. 2306, under 8.
[1104] It has been said that resolving disputes through negotiations, mediation and other alternative means is ususally quicker, and often proves to be a less stressful and less cumbersome process than litigation. See A Guide to Resolving Disputes, Administration of Justice in the United Nations, *supra,* note 331. See also Information Circular Doc. ST/IC/2004/4 of 23 January 2004, para. 6. See also UN website, 'Administration of Justice at the UN, UN Internal Justice System': https://www.un.org/en/internaljustice/overview/resolving-disputes-informally.shtml. Accessed on 13 November 2019. (' Attempts at informal resolution are often more effective when begun as early as possible. […] Taking an informal approach to resolving a dispute can be preferable for the staff member and any other party that is involved. Informal dialogue is often less stressful than formal legal action, offers more control of the outcome and often creates mutually beneficial solutions. The outcome is agreed to by both parties, as opposed to cases brought before the Tribunal whose judgment may be in favour of one party only. It can also take much less time to discuss finding a solution to a grievance than it takes to work the case through the formal system.')
[1105] See G. Politakis., 'Foreword' (in A. Talvik ed) *Best Practices in Resolving Employment Disputes in International Organizations*: Conference Proceedings, ILO Geneva, V. September 2014. See ILO website: http://mango.ilo.org/record/464053?ln=en. Last accessed on 1 February 2019.
[1106] Ibid.
[1107] GA Res. No. 61/261. Administration of justice at the United Nations, (UN Doc. A/RES/61/261 of 30 April 2007, para 11. See UN website: https://undocs.org/en/A/RES/61/261. Last accessed on 20 January 2020.

'evolved organically to reflect the composition and purpose of each organization'[1108]. Indeed, some organizations have established an internal ombudsman or mediator as an informal, voluntary mechanism to try to settle employment disputes within their respective secretariats[1109].

4.2. Informal grievance procedures

The concept of informal dispute resolution at the OSCE is not explicitly mentioned in the SRSRs. However, the OSCE Code of Conduct[1110], which determines the principles of conduct and boundaries of professionalism for OSCE officials[1111], is supplemented by an 'OSCE policy on professional working environment'[1112]. While the latter policy has not been made publicly available[1113], according to the 'Professional Working Environment Guide on Staff Instruction 21/2006 OSCE Policy against Harassment, Sexual Harassment and Discrimination (the Professional Working Environment Policy Guide) [1114], its purpose is to establish, *inter alia*, informal grievance procedures for OSCE officials in specific cases of allegations of violations of the professional working environment, including alleged harassment, sexual harassment, discrimination, or retaliation. However, as OSCE

[1108] See J. Javits., 'Internal Conflict Resolution at International Organizations', *ABA Journal of Labor & Employment Law*, Volume 28, Number 2, Winter 2013, at 239.
[1109] See L. Reif., ,The Ombudsman in the International Organization: Small Steps', Chapter 10, in *The Ombudsman, Good Governance and the International Human Rights System,* (Springer Science+Business Media Dordrecht, 2004), at p. 338. ,[T]hese ombudsman are not classical ombudsman on the international level, but are analogous to the public or private sector "workplace" ombudsman'.
[1110] In accordance with paragraph 6 of the OSCE Code of Conduct, Appendix 1, SRSRs, 'OSCE officials shall abstain from any action which may be contrary to the *OSCE policy on professional working environment*. All OSCE officials are treated equally and with respect, regardless of gender, race, religion, or belief, nationality, ethnic or social origin, age, sexual orientation, marital status or other aspects of personal status [emphasis added].'
[1111] These are also reflected in the SRSRs, in particular OSCE Staff Regulation 2.01.
[1112] Paragraph 6 of the OSCE Code of Conduct, Appendix 1, SRSRs.
[1113] It may also be noted that, unlike the UN, the OSCE has not made publicly available a staff/mission members' guide to resolving workplace disputes. See, for example, https://www.un.org/en/internaljustice/assets/pdf/StaffMembersGuideToResolvingDisputes.pdf. Last accessed on 13 November 2019. As already observed, the lack of publicly available OSCE documents is problematic in identifying weaknesses in the existing internal dispute resolution mechanisms at the Organization and, in particular, whether the informal procedures need strengthening.
[1114] Professional Working Environment – Guide on the OSCE Policy against Harassment, Sexual Harassment and Discrimination Second Edition, Published by the Department of Human Resources in co-operation with the Gender Section and Legal Services (renamed Office of Legal Affairs in 2018), OSCE Secretariat (2010). See OSCE website: https://www.osce.org/gender/30604?download=true. Last accessed on 13 November 2019.

staff instructions may be 'revise[ed], amend[ed] or suspend[ed] at any time'[1115], it is unclear whether the Professional Working Environment Policy Guide represents the most recent version of Staff Instruction 21, thus reflecting current informal procedures. Before bringing their grievance to the formal procedure (by submitting a formal complaint or appeal), Section 3(c) of the Professional Working Environment Policy Guide states that any OSCE official who believes that he/she has been subjected to harassement, sexual harassment, discrimination or retaliation should first 'try to *informally* resolve the problem at an early stage'[1116]. In light of the scope of the SRSRs, it has been seen that only OSCE officials may have access to informal dispute resolution procedures; whereas, the category of non-OSCE staff, including consultants, daily or hourly staff, JPOs, and interns, who are not subject to the SRSRs, but may be presumed to be expected to abide by the same, do not seem to have such access. The question then arises as to what informal conflict resolution options may be provided to OSCE officials. According to Section 3(c) of the the Professional Working Environment Policy Guide, the OSCE's informal system of dispute resolution comprises three non-adversarial options[1117] to help resolve any workplace complaints or grievances[1118]: approaching the alleged offender, involvement of a third party, and mediation. If an OSCE staff or mission member believes he/she has been subjected to improper behavior by another colleague or colleagues and it is not possible to defuse the situation at an early stage by talking directly with the alleged offender(s) or such an approach was not successful, informal and discreet help may then be sought through the involvement of a third party. The so-called 'channels of assistance' are voluntary and include:

- Another staff/mission member;

[1115] OSCE Permanent Council Decision No. 705 on the Common Regulatory Management System of 1 December 2005. See OSCE website: https://www.osce.org/pc/17526?download=true. Last accessed on 1 February 2019.
[1116] Ibid, Section 3. Channels for Assistance. Step C, p. 6.
[1117] This is after finding out if the problem the staff/mission member is facing relates to Staff Instruction 21.
[1118] Since the OSCE informal dispute resolution procedure provides OSCE officials with an opportunity to resolve any complaints or grievances, this may include range of other disputes, relating to contract renewal, staff selection, interpersonal issues and important managerial decisions, as well as bureaucratic issues or when there has been a lack of response to an administrative request or entitlement query.

- An OSCE Staff Representative;
- His/her supervisor;
- Personnel/Administrative Officer in the Secretariat, institution or mission; or,
- Mediation Co-ordination Team/Department of Human Resources, Secretariat;
- Mediation Focal Point in the OSCE Secretariat, Institution or mission;
- Neutral mediator from within the OSCE; and if no resolution is found,
- Independent external mediator.

Two aspects of these informal grievance procedures will be highlighted here, both of which have important implications for successful informal dispute resolution. First, it may be noted that the first five 'channels of assistance' are not independent third parties that can reconcile disputes, but rather provide preliminary advice to staff/mission members about their problems. Although there is no doubt that such actors play an important advisory role, any consideration of these mechanisms must inevitably address the OSCE's seemingly disparate and overlapping informal dispute resolution processes. If an OSCE staff or mission member is not familiar with the various actors involved, their structure and their role, it is only natural that he/she would face immense confusion about where to turn for assistance with their problems. It is also clear that such duplication in services will inevitably lead to waste of human and financial resources. Similar observations were made by the *Redesign Panel* in the pre-reform UN system, in which there also existed numerous mechanisms that sought to resolve disputes informally[1119]. Secondly, it may also be asked whether the above-mentioned 'channels of assistance' are trained in the OSCE's policies and procedures to address conflict, and whether the neutral mediator from within the OSCE is actually trained to mediate. Even if the latter was the case, it has been observed that the 'quality and consistency of peer mediators varies greatly, which can make a programme that uses peer mediators challenging to manage'[1120]. Besides, notwithstanding that

[1119] *Report of the Redesign Panel, supra,* note 137, para. 37.
[1120] See C. Azcarate., 'Creating a Mediation Programme in International Organizations: Lessons Learned, (in A. Talvik ed) *Best Practices in Resolving Employment Disputes in International Organizations*: Conference Proceedings, ILO Geneva, 15-16 September 2014, pp. 158 – 159. See ILO website: https://www.ilo.org/public/libdoc/ilo/2015/115B09_146_engl.pdf. Last accessed on 13 November 2019. With regard to the quality of mediators, Azcarate also noted that '[i]n mediation programmes with low case loads, administrators may be able to conduct mediation themselves. However, in organizations expecting

'professional mediators require additional funding and initial training in the organization's rules and culture, they also tend to be more consistent and professional in their performance'[1121]. While mediation does not generally require the presence of lawyers, and notwithstanding that many organizations do not permit representation through external counsel during informal stages, given the lack of an in-house programme of legal assistance to staff/mission members in the dispute resolution system of the OSCE, an affected party would also not have access to either summary legal advice, for example, whether it is legally advisable to pursue the matter, or representation in such a process.

4.3. Function and Office of the OSCE Ethics Co-ordinator

In the case of other stakeholders who may be instrumental in informal dispute resolution, one in particular may be highlighted. In 2009, the OSCE created the function of Ethics Co-ordinator[1122], under the umbrella of a new Office of the OSCE Ethics Co-ordinator. The Office of the OSCE Ethics Co-ordinator is 'mandated to strengthen the Organization's ethical culture by increasing awareness of ethics-related issues in the Organization, and contributing to the implementation of the Ethical Framework [1123] Strengthening

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larger case loads, the creation of a roster of mediators is a cost-effective alternative that also has the benefit of providing diversity and flexibility to the process.'

[1121] Ibid.

[1122] By way of background, ,in November 2006 the Office of Internal Oversight (OIO) in the OSCE Secretariat issued a report entitled 'Ethical Framework: An Assessment and Plan for Action'. The assessment was aimed at defining the ethical framework and its importance for the Organization, comparing the existing framework with examples of best practices, and suggesting how proposed amendments to the current framework could be implemented. Several recommendations made in the above report were implemented, and some specific areas for policy amendment were identified, including the need to raise awareness and provide ethics training for OSCE officials'. In this context, 'an additional consultancy report entitled 'Provision of OSCE Ethical Framework Strengthening' was presented to Executive Management in April 2009'. Notably, the 'Department of Human Resources took ownership of the implementation process and the Chief of Personnel (now known as Deputy Director, HR Services) was initially appointed by the Secretary General as the OSCE Ethics Coordinator in 2009'. See vacancy: https://unjobs.org/vacancies/1336979510513. Last accessed on 31 January 2019. Furthermore, an Associate Ethics Officer now supports the Office of the OSCE Ethics Co-ordinator. See OSCE Vacancy, 'Tasks and Responsibilities', include, *inter alia,* '2. Assisting in the provision of interpretation and advice to OSCE staff and mission members on issues involving ethical dilemmas and interpretation/application of the OSCE Ethical Framework', (14 June 2018): https://jobs.osce.org/vacancies/associate-ethics-officer-vnsecs01330. Accessed on 31 January 2019.

[1123] (OSCE's ethical framework is mainly determined by the Code of Conduct, the OSCE Staff Regulations and Staff Rules, Staff Instruction 21 "Policy on the Professional Working Environment", and FAI 14 on "Fraud Prevention and Detection".') See *2018 OSCE Financial Report and Financial Statements (for the year ended 31 December 2018) and the Report of the External Auditor*, at para. 145. Published online on 9

initiative'[1124]. Addressing individual cases on issues related to the professional work environment (i.e. harassment, sexual harassment, discrimination and retaliation), the Office of the OSCE Ethics Co-ordinator also provides direct 'advice and recommendations [OSCE-wide] on ethical dilemmas'[1125]. With regard to the effectiveness of the Office, two issues may be addressed. First, as the Deputy Director, Human Resources (HR) Services 'simultaneously performs the function of OSCE Ethics Co-ordinator'[1126] and the fact that this and the Office of the OSCE Ethics Co-ordinator is not independent of senior management or from other departments and units, including the DHR at the OSCE Secretariat[1127], itself raises potential and perceived conflicts of interest[1128] and thus the risk of loss of trust and confidence among staff/mission members, particularly with regard to the advice and guidance function[1129]. With specific regard to the UN Ethics Office[1130], Rohde has noted that 'the (Ethics Office) would entirely lose value if the offices would

July 2019. See OSCE website: https://www.osce.org/secretariat/425201?download=true. Last accessed on 25 August 2019.

[1124] Ibid, OSCE Vacancy, 'Background' (14 June 2018).

[1125] See section entitled 'Ethics applied at the OSCE': https://jobs.osce.org/working-for-osce. Last accessed on 31 January 2019. To strengthen staff awareness of their ethical rights, duties, and obligations in the workplace, all OSCE officials are required to complete an 'interactive online ethics training course'. See also The Secretary General's Annual Evaluation Report, 3 September 2015, Para 1.3 Professional Working Environment, https://www.osce.org/secretariat/181366?download=true. Last accessed on 31 January 2019.

[1126] It is interesting to note that, despite the OSCE Secretariat stating in OSCE Vacancy, 'Background', (14 June 2018), that '[t]he Office of the OSCE Ethics Co-ordinator is […] independent in the discharge of its responsibilities, accountable directly to the Secretary General', this very same Office is 'a part of the Department of Human Resources'. See OSCE website: https://jobs.osce.org/vacancies/associate-ethics-officer-vnsecs01330. Last accessed on 15 November 2019.

[1127] In this context, it may be noted that the DHR in the OSCE Secretariat is responsible for OSCE-wide implementation of the OSCE policy on the Professional Working Environment.

[1128] Since the internal dispute resolution system at the OSCE is mostly handled within the DHR, the same Department in the OSCE Secretariat that makes decisions on human resource and disciplinary matters, it is unclear whether, if the Deputy Director of DHR is consulted by staff in his capacity as Ethics Co-ordinator, he/she would not later handle the same matter as Deputy Director of DHR.

[1129] On the absence of operational independence of the ethics function in IOs, see S. Walden and B. Edwards., 'Whistleblower protection in international governmental organizations', in A. J. Brown., D. Lewis., R. Moberly., and W. Vandekerckhove (eds.), *International Handbook on Whistleblowing Research*, Chapter 18. Channels for Reporting Retaliation, (Edward Elgar Publishing Limited, Cheltenham, UK – Northampton, MA, USA, 2014), at p. 444. ('Where Ethics Offices exist, anecdotal evidence suggests that they lack sufficient institutional independence to act impartially. To ensure objectivity, a credible ethics officer must be recruited externally by an objective and representative committee. Candidates must have legal training […].')

[1130] The UN Ethics Office was established by the Secretary-General as an independent unit of the Secretariat, pursuant to paragraph 161 (d) of General Assembly resolution 60/1. The objective of the Ethics Office is to assist the Secretary-General in ensuring that staff members observe and perform their functions consistent with the highest standards of integrity required by the Charter of the United Nations through fostering a culture of ethics, transparency and accountability.

lack independence'; the purposes and credibility of these accountability/control mechanisms, or this mechanism of balancing disputes, respectively would vanish.'[1131] Moreover, the OSCE Ethics Co-ordinator as the head of the OSCE Ethics Office, *inter alia,* is a function that arguably plays a key role in supporting OSCE whistleblower policies. In like vein, the JIU's 2018 report on the review of whistle-blower policies and practices in UN system organizations emphasized that 'ensuring the independence of the ethics function is a key element in protection against retaliation policies as it assures staff that the function will review reports free from undue political and hierarchical pressure, influence or interference.'[1132] Although the OSCE's OIO 'reviewed the ethical framework of the OSCE resulting in a report issued on 21 February 2017, that recommended, among others, the review and update of the Ethical Framework, and the enhancement of independence of the investigation function'[1133], which presumably includes issues addressed to the Office of the OSCE Ethics Co-ordinator, this appears to be 'still ongoing'[1134]. Secondly, as it would seem that both the Office of the OSCE Ethics Co-ordinator and the OSCE OIO may receive complaints regarding retaliation against whistle-blowers, which could cause confusion among OSCE officials about where to turn for assistance with their problems.[1135]. In reponse to such shortcomings at the UN, the *Redesign Panel* suggested

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[1131] See C. Rohde., 'The Formal System (I): Management Evaluation', in (eds.) H. Buss, T. Fitschen, T. Laker, C. Rohde and S. Villalpando., *Handbook on the Internal Justice System at the United Nations* (United Nations System Staff College, 2014), at p. 94. The amended Secretary-General's bulletin, entitled 'United Nations system-wide application of ethics: separately administered organs and programmes' (UN Doc. ST/SGB/2007/11 of 16 April 2013), further provides that independence, impartiality and confidentiality are vital prerequisites for the functioning and operation of an Ethics Office and should be fully respected. See also 'Activities of the Ethics Office', *Report of the Secretary-General*, II. Background, (UN Doc. A/74/78 of 12 April 2019), at para. 7. See UN website: https://undocs.org/A/74/78. Last accessed on 15 November 2019. ('In the 2010 report of the Joint Inspection Unit on the ethics in the United Nations System (JIU/REP/2010/3), the Inspectors observed that to ensure the independence of the ethics function, rigorous conditions governing the appointment of heads of ethics offices must be in place, including term limits and that term limits supported the independence of the function by protecting the incumbent from undue influence while avoiding the risks inherent in long-term tenure. The Inspectors further found that the Head of the Ethics Office must report directly to the executive head and must also have both formal and informal access to the legislative bodies to ensure that the independence of the functions was not circumscribed by the executive head.')

[1132] See Report of the Secretary-General, Activities of the Ethics Office, IV. Activities of the Ethics Office, C. Protection against retaliation, (UN Doc. A/74/78 of 12 April 2019) at para. 38. See UN website: https://undocs.org/A/74/78. Last accessed on 15 November 2019.

[1133] See *2018 OSCE Financial Report and Financial Statements (for the year ended 31 December 2018) and the Report of the External Auditor*, at para. 147. Published online on 9 July 2019. See OSCE website: https://www.osce.org/secretariat/425201?download=true. Last accessed on 14 August 2019.

[1134] Ibid.

[1135] See OSCE website, Employment: Working for the OSCE, 'Ethics applied at the OSCE'. See OSCE website: https://jobs.osce.org/working-for-osce. Last accessed on 31 January 2019. It may also be noted that

that the 'role of the Ethics Office should be clearly defined in order to avoid unnecessary confusion and duplication [of services].'[1136]

4.4. Comparisons with the pre-reform UN informal dispute resolution system

As these issues in the OSCE appear to resemble in many respects those of the pre-reform UN informal system[1137], it is not difficult to share the conclusion of the *Redesign Panel* that the informal dispute resolution mechanisms in the OSCE 'constitute neither a proper alternative nor a complement to the formal justice system'[1138]. Notably, many of these issues had already been clearly articulated by the Joint Inspection Unit (JIU)[1139] in its report in respect of the UN system back in 2000, in which it formally recommended the establishment of the position of an Ombudsman[1140]; this suggestion was generally endorsed by the Secretary-General and led two years later to the creation of a UN Ombudsman's

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the Terms of Reference of the OSCE Ethics Co-ordinator is no longer available on the OSCE website: http://www.ethicslearn.org/tor-of-the-ethics-co-ordinator.html. Last accessed on 31 January 2019.

[1136] *Report of the Redesign Panel, supra,* note 137, para. 45.

[1137] With the notable exception of 'Panels on Discrimination and Other Grievances' 'established in 1977 as an informal grievance procedure emphasizing mediation to address allegations of discriminatory treatment', and which the *Redesign Panel* proposed should be 'abolished'. *Report of the Redesign Panel, supra,* note 137, para. 38.

[1138] Ibid, para. 37.

[1139] The UN operates a so-called 'Joint Inspection Unit', the 'only independent external oversight body of the [UN] system mandated to conduct evaluations inspections and investigations system-wide', and aims to achieve greater coordination in human resources matters. It has prepared a number of reports on the UN common system. As an auditing body, it tends to take a critical approach in its examination of UN issues, and may be contrasted with the ICSC , which is a regulatory body, with a tendency to take note of problems rather than to criticize it. See UN JIU website: https://www.unjiu.org/. Last accessed on 31 January 2019.

[1140] 'Administration of Justice at the United Nations', Report of the Joint Inspection Unit JIU, Doc. JIU/REP/2000/1, Geneva 2000, paras 2-12. In its second report on the administration of justice at the UN submitted to the General Assembly in June 2000 (paras. 149–150), the JIU stated: ,The time may be appropriate to move, once and for all, towards the establishment of a full-time *Ombudsman* function responsible for settling all types of staff-management disputes through informal conciliation, mediation or negotiation procedures designed to eschew the insitution of adversary procedures...The function of *Ombudsman* should be entrusted to an independent official at the senior level appointed by the Secretary-General, inconsultation with the staff representatives, for a single, non-renewable five-year term. The access of staff members at all duty stations to the *Ombudsman* should be ensured at all times. The *Ombudsman* may be assisted as each duty station by a person or a panel, appointed on a part-time basis, whose work the *Ombudsman* will coordinate'.

Office[1141]. Nevertheless, while not a new reform as such[1142], the position of Ombudsman[1143] was considered to play an important role in improving the workplace environment and in solving a large number of disputes before they reached the formal stage of litigation[1144]. The *Redesign Panel* in 2006 took the reform agenda further forward in terms of suggesting structural changes within the same Office[1145], in particular the creation of a Mediation Division[1146], combining formal mediation functions with proactive monitoring of maladministration[1147], and the establishment of a regional Ombudsman, with jurisdiction over all matters arising in their respective region. To address these issues, it was apprehended that combining monitoring and dispute resolution functions will not only 'alleviate the confusion among staff members about where to turn for assistance with their

[1141] In UNGA Res. 56/253 of 24 December 2001, the UN General Assembly decided to establish the position of ombudsman at the level of Assistant Secretary-General. See UN Secretariat, 'Office of the Ombudsman – Appointment and Terms of Reference of the Ombudsman' (15 October 2002) UN Doc. ST/SGB/2002/12.

[1142] According to Megzari, '[t]he establishment of an Ombudsman institution in organizations of the [UN] system began at WHO in 1972, followed by UNESCO in 1976, then by the Bretton Woods institutions, the IMF in 1979 and the World Bank in 1981. The idea of establishing an office of Ombudsman in the [UN] Secretariat has been apparently suggested for the first time in 1982 by the Administrative Management Service. However, it was formally considered only in 1984, when the General Assembly, by its resolution 39/245 of 18 December 1984 on the "Composition of the Secretariat" requested the Secretary-General *inter alia* "to strengthen the various appeals machinery, with a view to eliminating the backlog of cases" and "to report to the General Assembly at its fortieth session on feasibility of establishing an office of Ombudsman." See A. Megzari., *supra,* note 163, (Leiden/Boston, Brill/Nijhoff, 2015), at p. 393.

[1143] The ombudsman has the ‚authority consider workplace conflict relating to employment within their respective organizations' (Section 3:3.1). 'An ombudsman cannot make or set aside managerial decisions, mandate policies or be a party to any formal administrative procedure. However, an ombudsman may be consulted on policy issues where his or her views and experience may prove useful. An ombudsman shall not have decision-making powers, but shall advise and make suggestions or recommendations, as appropriate, on actions needed to settle conflicts, taking into account the rights, equities and obligations existing between the organization and the staff member'. (Section 3:3.16). UN Secretariat, ‚Terms of reference for the Office of the United Nations Ombudsman and Mediation Services' (22 June 2016), Section 3. Operating principles (3.3) (UN. Doc. ST/SGB/2016/7). Available at: https://hr.un.org/content/office-ombudsman-appointment-and-terms-reference-ombudsman. Last accessed on 19 January 2020.

[1144] See A. Megzari, *supra*, note 81, at 398.

[1145] In addition, the *Redesign Panel* stated that ‚[t]he Panels on Discrimination and Other Grievances were established in 1977 as an informal grievance procedure emphasizing mediation to address allegations of discriminatory treatment. They have not functioned as intended. They are ineffective, and few, if any, Panels now function. They should be abolished'.

[1146] *Report of the Redesign Panel, supra,* note 137, XIII. Recommendations, para 167.

[1147] Ibid, the *Redesign Panel* stated in para. 44 that ‚It is highly desirable to have an informal justice system that combines in an office of the ombudsman both the monitoring of maladministration and the mediation of disputes. Bringing dispute-resolution activities within an office of the ombudsman — by means of formal mediation by the ombudsmen and by full-time mediators — will provide the office with a centralized source of data from which to identify systemic problems and trends, such as ambiguities in the United Nations Staff Regulations and Rules affecting contractual modalities and entitlements. Such data — which can be collated while respecting the obligation of confidentiality — would be extremely difficult to gather if informal dispute resolution were to remain scattered, as it is at present'.

problems'[1148], but also replace 'overlapping processes with a "one-stop shopping" approach'[1149], to 'parallel the formal system'[1150]. This was subsequently endorsed by the General Assembly[1151], and as indicated, led to the creation of a 'single, integrated but decentralized'[1152] UNOMS in 2008[1153], with its terms of reference promulgated in 2016 by the Secretary-General[1154], which as an informal component of the UN system of administration of justice, 'make[s] available confidential services of impartial and indpendent persons to address work-related issues.'[1155]

4.5. Conclusion: proposed reforms to the OSCE informal system of justice

As a result of clear gaps in the OSCE's informal justice mechanisms, creating a position of an ombudsman with a single integrated[1156] but decentralized[1157] office, with its centre at

[1148] *Report of the Redesign Panel, supra,* note 137, para. 45.
[1149] Ibid.
[1150] Ibid.
[1151] See UN Doc. A/RES/61/261 of 4 April 2007, para 16.
[1152] See 'Administration of justice at the United Nations and activities of the Office of the United Nations ombudsman and Mediation Services, *Eleventh report of the Advisory Committee on Administrative and Budgetary Questions on the proposed programme budget for 2020*, at para. 21. ('Regarding the global presence of the Office, the report indicates that apart from offices in Bangkok, Entebbe (Uganda), Geneva, Goma (Democratic Republic of the Congo), Nairobi, New York, Santiago and Vienna, regional ombudsman offices provide the full range of conflict-management services at the duty station they serve. The Office also engaged in a pilot initiative in locations where there is no resident ombudsman. To establish an outreach network of focal points, 25 staff members from 11 duty stations in the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic were trained to assist the Office in increasing awareness of early conflict resolution and fostering a respectful workplace.')
[1153] Ibid, para. 12; A/RES/62/228 of 22 December 2007, para 25.
[1154] In consultation with the executive heads of the separately administered funds, programmes and entites of the UN system. See ,Terms of reference for the Office of the United Nations Ombudsman and Mediation Services', *Secretary-General's bulletin,* (UN Secretariat Doc. ST/SGB/2016/7 of 22 June 2016). See UN website: https://undocs.org/ST/SGB/2016/7. Last accessed on 14 November 2019.
[1155] Ibid, Section 1 Establishment of the Office of the United Nations Ombudsman and Mediation Services, *Purpose of the Office, 1.1.*
[1156] *Report of the Redesign Panel, supra,* note 137, para. 48 'consolidating individual informal dispute resolution within the Office of the Ombudsman will give the Ombudsmen a privileged position from which to monitor systemic problems and to recommend solutions'.
[1157] Ibid. XIII. Recommendations, para 164. See also para. 48 'decentralization of the [Office of the Ombudsman] is based on recognition that the current Ombudsman and Ombudsperson have in recent years seen a marked increase (to about 75 per cent) in the proportion of cases originating away from Headquarters. For field staff in particular, decentralization is the only viable means of providing effective and timely informal dispute resolution'. Most recently, in his report on the activities of the Office of the United Nations Ombudsman and Mediation Services (UN Doc. A/74/171), 'the Secretary-General indicates that the Office opened 3,577 cases in 2018, including mediation cases, representing an increase of 10 per cent over the previous year. Of those cases, 2,776 originated in the Secretariat, 539 in the funds and programmes and 262 in the Office of the United Nations High Commissioner for Refugees (UNHCR), *reflecting an overall upward*

the OSCE Secretariat, including a strong mediation mechanism by means of full-time mediators, and an outreach network of trained focal points from all the OSCE's duty stations, may likewise go some way to remedying these weaknesses. An ombudsman and full-time mediators[1158] would provide a combination of an objective third party, not part of the OSCE Administration and thus a 'true outsider'[1159], with proactive and preventive roles to help resolve disputes, and an independent and neutral monitor to report maladministration in employment-related matters[1160]. At the same time, as noted by the *Redesign* Panel, it has readily apparent advantages in terms of offering greater coherence and consistency throughout an organization, by directing the problems of all staff to a single office, as well as a centralized source of data[1161] from which to identify and highlight systemic issues[1162]. This may be achieved primarily through tracking root causes of conflict and proposing changes in behaviour, structure, policies, procedures or practices to minimize those causes in the future, creating a more harmonious professional working environment[1163]. Furthermore, it is impossible to ignore similarities with the pre-reform UN system in respect to the lack of established links in the SRSRs between the informal and formal system at the OSCE[1164]. Thus, this was the context where the *Redesign Panel*

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trend [emphasis added].' See 'Administration of justice at the United Nations and activities of the Office of the United Nations Ombudsman and Mediation Services', *Eleventh report of the Advisory Committee on Administrative and Budgetary Questions on the proposed programme budget for 2020*, III. Activities of the Office of the United Nations Ombudsman and Mediation Services, (UN Doc. A/74/7/Add.10 of 1 November 2019), at para. 18. See UN website: https://undocs.org/A/74/7/ADD.10. Last accessed on 4 November 2019. An important question, therefore, will be whether the OSCE has likewise seen an increase in the number of complaints, in particular at duty stations away from headquarters in recent years.

[1158] Mediators will mediate disputes upon referral by the ombudsman. See *Report of the Redesign Panel, supra,* note 137, para 49.

[1159] The standards of practice, i.e. confidentiality, neutrality and impartiality, independence and informality attributed to the function are spelled out for the UNOMS in UN Secretariat, ,Terms of reference for the Office of the United Nations Ombudsman and Mediation Services' (22 June 2016), Section 3. Operating principles (3.3) UN. Doc. ST/SGB/2016/7.

[1160] *Report of the Redesign Panel, supra,* note 137, para 44 and XIII. Recommendations, para 166.

[1161] Ibid, para. 44.

[1162] See GA Res. 61/261, para 18. 'Emphasizes the role of the Ombudsman to report on broad systemic issues that he or she identifies, as well as those that are brought to his or her attention'. According to Buss, '[a] systemic issue is characterized by the existence of the issue independent of the individuals involved. The conflict stems from issues that are more deeply rooted or from existing gaps in the organization, such as those found in its policies, procedures, practices, and structures, all of which influence organizational culture'. H. Buss, *supra*, note 565, at p. 73.

[1163] Ibid, para.

[1164] The only provisions in the SRSRs which refer to processes by which disputes are brought to an end are: OSCE Regulation 11.02 Settlement by Mutual Agreement, SRSR. 'In exceptional cases and in the interest of the OSCE, the Secretary General, or the respective head of institution/mission in consultation with the Secretary General, shall be empowered to conclude mutually agreed settlements with staff/mission members,

suggested that informal resolution of staff grievances, as an important component of an effective and efficient system of administration of justice[1165], should be available to any party to the conflict, either at the pre-litigation (management evaluation) stage or litigation (Dispute Tribunal) stage, where a judge can also recommend mediation[1166]. Moreover, '[i]n any mediation — whether conducted by an Ombudsman or by a mediator from the Mediation Division — any settlement reached should be signed by the parties and followed, if necessary, by an administrative decision giving effect to the agreement. Anything said or written during the mediation process is wholly confidential and should be inadmissible in subsequent litigation'[1167]. On the other hand, any attempt to reform the informal dispute resolution mechanism at the OSCE must recognize the current realities of the Organization; and in this context two limitations to the feasibility of such refom may be highlighted. First, as indicated, the sheer scale of the UN renders it effectively impossible to provide for a single template to improve the informal system at the OSCE. It has been seen that, given the size of OSCE personnel, with 3,603 staff serving across the executive structures[1168], 604 at Secretariat and Institutions[1169] and 2,999 in its 16 field operations[1170], all informal components would need to be decentralized with trained focal points 'to provide easier access and quicker response'[1171]. Secondly, a familiar feature of reform of the OSCE internal justice regime is the budget decline of the Organization over the past decade, well illustrated in successive Unified Budgets. In terms of the resource requirements of the informal justice system at the OSCE, the establishment of a new programme in the Secretariat and a number new posts in the regular OSCE Unified Budget

in relation to separation from service or disputes about working conditions, provided that they renounce all right of appeal'; Article VII(6) Adjudication Procedure, Appendix 2, ToR PoA, SRSR. , 6. The proceedings shall be immediately put to an end if… a settlement by mutual agreement under Regulation 11.02 is reached'.

[1165] See GA Res. 61/261. Administration of justice at the United Nations, (UN Doc. A/RES/61/261) 'Informal system', para. 15.

[1166] *Report of the Redesign Panel, supra,* note 137, para 49. Thus, in para 117, the *Redesign Panel* stated that '[j]udges should be provided with training to familiarize them with the Organization and its funds and programmes, in particular their administrative structures. *As they should also be empowered to mediate disputes, they should undergo high-level training in judicial mediation*' [emphasis added].

[1167] Ibid, para. 57.

[1168] For up-to-date figures, see *OSCE Factsheet,* ‚What is the OSCE?, ‚Facts and figures, Staffing' (Publisher: OSCE, as of September 2019), at p. 8. See OSCE website: https://www.osce.org/whatistheosce/factsheet?download=true. Last accessed on 14 November 2019.

[1169] Ibid.

[1170] Ibid.

[1171] *Report of the Redesign Panel, supra,* note 137, para. 47.

Post Table would require significant additional budgetary allocations. While the proposed decentralization of informal dispute resolution services away from OSCE headquarters with an outreach network of trained focal points could be cost-effective and assist in increasing awareness of early conflict resolution and fostering a respectful workplace in large institutions and missions, they are unlikely to provide the full range of conflict-management services at the duty station they serve, esepcially in smaller duty stations.

P A R T 5

FORMAL SYSTEM OF DISPUTE RESOLUTION AT THE OSCE

5. Formal System of Internal Justice at the OSCE

5.1. Introduction

If a dispute is not resolved through informal mechanisms, the next step in the internal dispute resolution regime at the OSCE is to formally contest a decision taken by the Administration. In this context, with reference to the reform suggestions put forward by the *Redesign Panel*, four aspects of the OSCE's internal recourse procedures may be considered: first, the scope and meaning of an administrative decision; secondly, disciplinary matters and DCs; and thirdly, the initial steps in contesting an administrative decision or disciplinary measure and the establishment of internal and external appeals procedures, including IRBs and the Panel of Adjudicators[1172]; and, in conclusion, observations on the adequacy of these mechanisms, whether they meet certain due process standards or should be modified or 'replaced'[1173].

5.2. Disciplinary procedures at the OSCE

IOs are generally empowered by their written law to take disciplinary measures against staff members in case of misconduct[1174]. Most staff regulations and staff rules have fairly detailed provisions relating to such measures, including procedures once a particular misconduct has been reported to the Administration[1175]. At the OSCE, as indicated, the

[1172] OSCE Staff Regulation 10.01(a) provides that: [t]he Secretary General shall establish an appeals procedure for staff/mission members against administrative decisions concerning alleged non-observance of their letters of appointment or terms of assignment, or of any provisions governing their working conditions, as well as in relation to disciplinary measures taken against them. OSCE Staff Regulation 10.02(a) also provides that: '[f]urther to the procedure established in Regulation 10.01, a fixed term staff/mission member shall have a right of final appeal to a Panel of Adjudicators against an administrative decision directly affecting him/her in accordance with the Terms of Reference set forth in Appendix 2 of the Staff Regulations and Rules.

[1173] *Report of the Redesign Panel, supra,* note 137, XIII. Recommendations, para 154 ('The redesign Panel recommends [that]…[t]he Tribunal should replace existing advisory bodies, including the Joint Appeals Boards and the Joint Disciplinary Committee…').

[1174] C. F. Amerasinghe., *The Law of the International Civil Service, supra,* note 119, (Oxford University Press, 2nd ed., 1994), at p. 188.

[1175] See C. de Cooker., ‚Ethics and Accountability in the International Civil Service', (ed., C. de Cooker), Chapter 1, *Accountability, Investigation and Due Process in International Organizations*, (Leiden/Boston: Martinus Nijhoff Publishers, 2005), at p. 37.

conduct of disciplinary proceedings is addressed in Article IX of the SRSRs. Pursuant to OSCE Staff Regulation 9.04[1176], the OSCE Secretary General and the respective heads of institution/mission[1177] are empowered[1178] to impose disciplinary measures, which are quasi-judicial in nature, such as written censure[1179] or termination of employment[1180] on contracted and seconded staff/mission members who are found to have engaged in misconduct[1181]. Misconduct warranting disciplinary action includes failure of OSCE staff/mission members to comply with their obligations under the SRSRs[1182], the OSCE Code of Conduct[1183], or other relevant administrative issuances[1184], or to observe the standards of conduct 'befitting the status of an international civil servant'[1185]. Examples of misconduct by OSCE officials include unlawful acts (e.g. theft, fraud, and trafficking in human beings) while on or off duty[1186]; misrepresentation; and misuse of OSCE property[1187], documents and resources. Yet, as shall be seen, while much greater delegation of authority is given at the OSCE to heads of institution and heads of mission compared to the pre-reform centralized UN system[1188], their respective disciplinary procedures share many of the same flaws concerning the lack of certain due process safeguards. As regards the courses of disciplinary action at the OSCE, 'following the response of a staff/mission

[1176] Article IX Disciplinary Procedure, OSCE Staff Regulation 9.04 (a) Disciplinary Measures, SRSR.
[1177] OSCE Staff Rule 9.06.4(a) Decision following the Disciplinary Committee's report, SRSR.
[1178] Disciplinary powers are seen as very different from other discretionary powers, such as the power to promote or classify, since the imposition of disciplinary measures by Administrations involves the exercise of a quasi-judicial power. See C. F. Amerasinghe., ‚Reflections on the Internal Judicial Systems of International Organizations', Part I The Development of International Administrative Law as Field of Law (O. Elias eds.) in *The Development and Effectiveness of International Administrative Law On the Occasion of the Thirtieth Anniversary of the World Bank Administrative Tribunal*, (Martinus Nijhoff Publications, 2009), p. 46.
[1179] OSCE Staff Regulation 9.04(a)(i) Disciplinary Measures, Article IX Disciplinary Procedure, SRSR.
[1180] Ibid, (a)(ix).
[1181] Should the allegations of misconduct not be serious enough to warrant initiating disciplinary action, administrative measures such as written reprimands may be issued pursuant to OSCE Staff Rule 9.03.1 – Reprimand Procedure, Article IX Disciplinary Procedure, SRSR, or the ‚partial or full recovery of financial loss under OSCE Staff Regulations 9.03(c)(ii) Courses of action following the response to the allegations, SRSR) in accordance with OSCE Staff Regulation 2.05 on the Reimbursement of Financial Losses.
[1182] OSCE Staff Regulation 9.01 Misconduct Warranting Disciplinary Action, SRSR.
[1183] Ibid.
[1184] Ibid.
[1185] OSCE Staff Regulation 2.01(a) Conduct of OSCE Officials, SRSR.
[1186] OSCE Code of Conduct, Appendix 1, 1. OSCE Officials' Conduct, SRSR.
[1187] OSCE Staff Rule 2.05.1 Use of OSCE Property and Assets, SRSR.
[1188] The *Redesign Panel* noted that, '[i]t is essential to give much greater delegation of authority to special representatives of the Secretary-General and heads of offices away from Headquarters in disciplinary sanctions, including dismissal…'. *Report of the Redesign Panel, supra,* note 137, para. 27.

member to the allegations raised against him/her and the initial investigation if one has been conducted'[1189], should the facts appear to indicate that misconduct has occurred, OSCE Staff Regulation 9.06(a) stipulates that '[n]o disciplinary measure shall be imposed on a fixed-term staff/mission member until the case has been reviewed by a [DC]'[1190]. However, there are two exceptions to this rule. First, the OSCE Secretary General or the respective head institution/mission may summarily dismiss[1191] a staff/mission member for serious misconduct without the case being 'reviewed by a [DC]'[1192]. Secondly, the staff/mission member may in writing waive his/her right that the case be referred to the DC[1193]. Such exceptions are almost identical to the Staff Rules[1194] in the pre-reform UN system, where the Secretary-General also needed to receive the advice of the JDCs before imposing a disciplinary measure on a staff member. As this has proved to be controversial, *Redesign Panel* considered that 'full delegation of authority'[1195] should be given 'in disciplinary sanctions, including dismissal, but subject to the right of the sanctioned staff member to challenge such decisions in the formal justice system'[1196]. Since concerned staff/mission members of the OSCE may directly appeal decisions 'in relation to disciplinary measures'[1197] within 30 days from the date of the notification of the impugned decision[1198], consideration may be given to amending OSCE Staff Regulation 9.06, subparagraph (a)(i) and (ii), to allow the OSCE Secretary General and respective heads of institution/mission to impose a disciplinary measure without the advice of a DC. Before examining the proceedings of the DCs, the provisions on the imposition of disciplinary measures may be noted. First, OSCE Staff Rule 9.04.1(a) includes express provision that

[1189] OSCE Staff Regulation 9.03(a) Courses of action following the response to thr allegations, Article XI Disciplinary Procedure, SRSR.
[1190] OSCE Staff Regulation 9.03(a)(iii) Courses of action following the response to thr allegations, Article XI Disciplinary Procedure, SRSR.
[1191] Ibid, 9.06(a)(i), XI Disciplinary Procedure, SRSR.
[1192] OSCE Staff Regulation 9.06(a) Disciplinary Committee, Article IX Disciplinary Procedure, SRSR.
[1193] Ibid, 9.06(a)(ii).
[1194] Old UN Staff Rule 110.4(b).
[1195] *Report of the Redesign Panel, supra,* note 137, para. 27.
[1196] Ibid, XIII. Recommendations, para. 161. In disciplinary matters, the UN Secretary-General may now impose a sanction without any advice and the concerned staff member may appeal the decision directly to the UNDT. See Article 2(1)(b), UNDT Statute, 'The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations: To appeal an administrative decision imposing a disciplinary measure'.
[1197] OSCE Staff Regulation 10.01(a) Internal Appeals Procedure, Article X, Appeals, SRSR.
[1198] OSCE Staff Regulation 10.01(c) Internal Appeals Procedure, Article X Appeals, SRSR.

'any disciplinary measure imposed on a staff/mission member shall be proportionate to the gravity of the misconduct'. However, it is unclear whether there is criteria to provide the OSCE Secretary General and heads of institution/mission with guidance as to which disciplinary measure to impose for particular misconduct to ensure consistency. Secondly, pursuant to OSCE Staff Rule 9.04.1(b), '[a] single disciplinary case shall not give rise to the imposition of more than one of the disciplinary measures listed in Regulation 9.04. However, in addition to the disciplinary measure, the staff/mission member may be required to partially or fully compensate the OSCE for a financial loss suffered as a result of misconduct under Regulation 2.05'[1199]. Under OSCE Staff Rule 9.06.1, a DC[1200] shall be established at the OSCE Secretariat[1201], institutions or missions[1202] for a particular case. Often referred to as 'peer review bodies', DCs at the OSCE consist of a pool of staff/mission members, which are selected randomly, taking into consideration their availability and any potential conflicts of interest[1203]. The Secretariat DC is a 'standing body' consisting of six members[1204] designated by the Secretary General[1205] and Staff Committee[1206], with the Chairperson and his/her alternate designated by the Secretary General in consultation with the Staff Committee[1207]. However, a DC may only be

[1199] OSCE Staff Rule 9.04.1(b), Article IX Disciplinary Procedure, SRSR.
[1200] OSCE Staff Rule 9.06.1(b) – Composition of a Disciplinary Committee, Article IX Disciplinary Procedure, SRSR. 'The Secretariat Disciplinary Committee shall be a standing body, consisting of six members'.
[1201] OSCE Staff Rule 9.06.1(a) – Composition of a Disciplinary Committee, Article IX Disciplinary Procedure, SRSR: 'A Disciplinary Committee shall be established: (i) at the Secretariat, if the disciplinary procedure is initiated against: - a Secretariat staff member; or - an international staff/mission member who committed the alleged misconduct outside his/her current duty station or mission area; or - an international staff/mission member, and the head of institution/mission has requested that the Secretariat Disciplinary Committee reviews the case'.
[1202] OSCE Staff Rule 9.06.1(a) – Composition of a Disciplinary Committee, Article IX Disciplinary Procedure, SRSR: 'A Disciplinary Committee shall be established: (ii) in the respective institution or mission if the disciplinary procedure is initiated against: - a local staff/mission member; or - an international staff/mission member, in other cases than those specified in (i) above'.
[1203] OSCE Staff Rule 9.06.1 – Composition of a Disciplinary Committee, Article IX Disciplinary Procedure, SRSR.
[1204] OSCE Staff Rule 9.06.1(b), Article IX Disciplinary Procedure, SRSR: 'The Secretariat Disciplinary Committee shall be a standing body, consisting of six members: the chairperson, his/her alternate and four members'.
[1205] OSCE Staff Rule 9.06.1(b)(ii) – Composition of a Disciplinary Committee, Article IX Disciplinary Procedure, SRSR: 'Two members shall be designated by the Secretary General'.
[1206] OSCE Staff Rule 9.06.1(b)(iii) – Composition of a Disciplinary Committee, Article IX Disciplinary Procedure, SRSR: 'Two members shall be designated by the Staff Committee or his/her alternate'.
[1207] OSCE Staff Rule 9.06.1(b)(i) – Composition of a Disciplinary Committee, Article IX Disciplinary Procedure, SRSR.

established on an *ad hoc* basis to review disciplinary cases in the institutions and field operations, which consist of three members[1208] designated by the respective head of institution/mission[1209] and staff representatives[1210], with the Chairperson designated by the respective head of insitution/mission in consultation with staff representatives[1211]. However, it is far from clear whether in practice the DCs are functioning as intended to the extent that cases are being properly referred under OSCE Staff Regulation 9.06. To ensure disciplinary decisions are taken 'fairly and transparently'[1212] in the pre-reform UN system, the *Redesign Panel* recommended that '*standing panels* on disciplinary matters'[1213] should be 'established'[1214] 'in all…offices away from Headquarters as an advisory body to review and recommend disciplinary action' [emphasis added][1215]. Due to the fact that DC members in the OSCE perform their role in addition to other responsibilities, the basic standards required to guarantee their independence[1216] are arguably not met, particularly as the OSCE offers fixed-term contracts for some positions at the OSCE Secretariat, institutions and at its field operations. Similar observations were made by the *Redesign Panel* with regard to the independence of the members of the former JDCs in the pre-reform UN system. It may be recalled in this context that access to an impartial, independent court or tribunal is a fundamental right[1217]. Furthermore, given the relatively small size of some OSCE institutions and missions[1218], difficulties may thus arise in recruiting volunteers,

[1208] OSCE Staff Rule 9.06.1(c) – Composition of a Disciplinary Committee, Article IX Disciplinary Procedure, SRSR.
[1209] OSCE Staff Rule 9.06.1(c)(ii), Article IX Disciplinary Procedure, SRSR.
[1210] OSCE Staff Rule 9.06.1(c)(ii), Article IX Disciplinary Procedure, SRSR.
[1211] OSCE Staff Rule 9.06.1(c)(i), Article IX Disciplinary Procedure, SRSR.
[1212] *Report of the Redesign Panel, supra,* note 137, para. 27.
[1213] Ibid, XIII. Recommendations, para 146.
[1214] Ibid.
[1215] Ibid.
[1216] This is despite express provision that the: 'members of the Disciplinary Committee shall be completely independent in the discharge of their duties and shall not receive instructions or be influenced in making their recommendations'. See OSCE Staff Rule 9.06.3(b) – Procedure before the Disciplinary Committee, Article IX Disciplinary Procedure, SRSR.
[1217] See e.g., Article 6(1) of ECHR states *inter alia* 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'; Article 25 of the American Convention on Human Rights states *inter alia* 'Everyone has the rights to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights'.
[1218] For example, according to the latest unified budget figures, the total staff members in the HCNM is 31 and at the mission level, the Programme Office in Nur-Sultan has 28 mission members. See OSCE Permanent Council Decision No. 252 Approval of the 2017 Unified Budget, (OSCE Doc. PC.DEC/1252/Corr.1 1 of June 2017).

which could generate delays in the handling of cases; and this casts doubt on the possibility of establishing standing Committees in the institutions and missions. Proceedings before a DC may take up to 30 days[1219] after referral, and its recommendation must then be provided to the OSCE Secretary General or the respective head institution/mission. However, it may be noted that no time limit is fixed within the proceedings after receipt of the DC report, as to when the decision must be taken. In this regard, the Secretary General or respective head institution/mission would appear to have full discretion to determine this procedual step until the decision itself has been taken[1220], which may result in protracted proceedings. As membership of DCs in the OSCE institutions/missions are *ad hoc*, and there is generally no requirement as to any legal qualifications for all DC members, this raises serious questions about the quality of their reports with respect to the analysis of facts and familiarity with the CRMS. This echoes concerns expressed by the *Redesign Panel* in respect of the 'uneven quality'[1221] of JDC reports in the pre-reform UN system, who also stated that 'unanimous recommendations in favour of staff members [were] not always accepted' [1222] and 'this is generally perceived by staff members as an indication of management's unwillingness to be bound by adverse recommendations and as evidence that the system operates to their disadvantage'[1223]. Besides the negative impact on due process, it is also likely to lead to an increased number of contested decisions in the formal justice system. Under OSCE Staff Rule 9.06.3, proceedings before DCs would seem to be normally limited to a written presentation of the case, together with statements and rebuttals, which can be made orally or in writing[1224]. As a DC 'shall determine its own

[1219] OSCE Staff Rule 9.06.3(f) Procedure before the Disciplinary Committee, Article IX Disciplinary Procedure, SRSR. 'This deadline may be extended by up to thirty additional days'.
[1220] OSCE Staff Rule 9.06.4(b) Decision following the Disciplinary Committee' report, Article IX Disciplinary Procedure, SRSR. 'The decision, together with the report of the Disciplinary Committee, shall be communicated to the staff/mission member concerned within one week of having been taken, and to the seconding country in the case of a seconded staff/mission member'.
[1221] Ibid, para. 68.
[1222] Ibid.
[1223] Ibid. In its 2000 report, the Joint Inspection Unit of the UN system noted that the high proportion of the recommendations of Joint Disciplinary Committees had been justified on the grounds that the recommendations were ,based on defective application of the law, or disregarded established policies, or were not supported by evidence'. Joint Inspection Unit, *Report of the Joint Inspection Unit on the Administration of Justice at the United Nations,* (UN Doc. A/55/57 of 12 June 2000), at 122-135.
[1224] OSCE Staff Rule 9.06.3(a) Procedure before the Disciplinary Committee, Article IX Disciplinary Procedure, SRSR.

procedure'[1225], it may, at its discretion, obtain the testimony of the staff/mission member or of other witnesses by written deposition or by personal appearance before it[1226]. The *Redesign Panel* criticized such an approach in the pre-reform UN system, stating that in *'all cases'* 'provision must be made for 'a staff member accused of misconduct to appear before disciplinary proceedings in person, even when he or she has the services of counsel [emphasis added]' [1227]. At the same time, however, it may be highlighted that the OSCE has attempted to enshrine certain due process standards with regard to disciplinary proceedings. Under OSCE Staff Regulation 9.02.1(a) on Due Process and Staff Rule 9.06.2(a) on Notification of the submission of the case to the DC, it states that the staff/mission member 'shall be advised in writing of the allegations' against him/her and 'notified in writing' of the submission of the case to the DC, including the charges against him/her. He/she will also be notified of the right to be assisted by 'an external lawyer'[1228] for his/her defence at his/her expense, and is given a reasonable opportunity to respond to those allegations. However, while in principle an adversely affected OSCE staff/mission member has the right to seek the assistance of an 'external lawyer' if he/she chooses to exercise it in the course of the disciplinary procedure, including in the preparation of any written document intended for the [DC]'[1229], '[p]ersons from outside the Organization, including external lawyers, shall not be allowed to attend meetings of the [DC] as a representative of the staff/mission member against whom disciplinary action is initiated'[1230]. In the absence of any express CRMS provisions to the contrary, and from the previous and current[1231] years' approved OSCE unified budget post tables, it would seem that no in-house programme of professional legal assistance has ever been provided by the OSCE to its staff/mission members in the internal justice system, including in disciplinary, internal and external appeal proceedings. This lack of machinery to ensure effective access

[1225] Ibid.
[1226] Ibid.
[1227] *Report of the Redesign Panel, supra,* note 137, para. 24.
[1228] OSCE Staff Rule 9.02.3(a) Assistance to the staff/mission members against whom disciplinary action is initiated, Article IX Disciplinary Procedure, SRSR.
[1229] OSCE Staff Rule 9.02.3(a) Assistance to the staff/mission members against whom disciplinary action is initiated, Article IX Disciplinary Procedure, SRSR.
[1230] OSCE Staff Regulation 9.02.3(b) — Assistance to the staff/mission member against whom disciplinary action is initiated, Article IX Disciplinary Procedure, SRSR.
[1231] See Annex II, Post Table of OSCE Permanent Council Decision No. 1288, Approval of the 2018 Unified Budget, (PC.DEC/1288 of 15 February 2018).

to legal services in internal disputes and the due process right of equality of arms has real consequences in that, as shall be explored more fully later, a significant number of OSCE staff/mission members will either have to pursue their cases by themselves without any legal support, or if they can financially afford it, to resort almost clandestinely to expensive outside lawyers, who in the present context cannot in practice represent them before a DC. In relation to the presentation of claims and to facilitate decisions, and to guarantee equality before courts and tribunals, 'access to lawyers and legal services is crucial'[1232]. While not binding on the OSCE, Administrative Instruction Doc. ST/AI/371 of 2 August 1991 provides guidelines and instructions on disciplinary measures and procedures. Outlining the basic requirements of due process to be afforded a staff member against whom misconduct is alleged, paragraph 17 is particularly instructive:

> The proceedings of the [JDC] and its rules of procedures shall be consistent with due process, the fundamental requirements of which are that the staff member concerned has the right to know the allegations against him or her; the right to see or hear the evidence against him or her; the right to rebut the allegations and the right to present countervailing evidence and any mitigating factors. If the Committee decides to hear oral testimony, both parties and counsel should be invited to be present[1233].

Once a DC has issued its report on a case, the OSCE Secretary General or the respective head of institution/mission[1234] 'shall decide on the disciplinary measure to be taken, if any'[1235]. As specified in OSCE Staff Rule 9.06.4(a), the function of the DC is merely to '[act] as an advisory board'[1236]. Accordingly, the recommendations of these bodies 'shall not be binding'[1237], so they cannot determine the rights and obligations of the persons concerned. This ultimately leaves the PoA as a one-tier justice system with no right of

[1232] *Report of the Redesign Panel, supra,* note 137, para. 10.
[1233] Administrative Instruction Doc. ST/AI/371 of 2 August 1991. https://www.un.org/womenwatch/osagi/pdf/SGBSTAI371.pdf. Last accessed on 20 January 2020.
[1234] OSCE Staff Rule 9.06.4(a) Decision following the Disciplinary Committee's report, Article IX Disciplinary Procedure, SRSR.
[1235] Ibid.
[1236] Ibid.
[1237] Ibid.

appeal. As shall be seen, comparison may be drawn between DCs and IRBs at the OSCE, and the other now abolished advisory boards in the pre-reform UN system, the JDCs and JABs, in which the absence of certain due process safeguards were widely prevelant. Accordingly, rather than having two peer-review processes, action could be taken to strengthen the OSCE internal appeals procedure.

5.3. Conduct of Investigations/fact-finding by the OSCE OIO

Turning very briefly to the role of the OSCE Office of Internal Oversight (OIO), pursuant to Annex 6 (6) of OSCE Permanent Council Decision No. 399 on the Mandate of the Office of Internal Oversight (OIO)[1238], this includes the 'investigation of allegations which come to or are brought to its attention, of possible violations of regulations, rules or related administrative instructions…'[1239]. While the scope of its role does not normally 'extend to those areas for which separate provision has been made for review and investigation'[1240], it would seem that OIO may investigate alleged violations of the SRSR such as the OSCE Code of Conduct[1241], Disciplinary Procedures[1242], Appeals Procedures[1243] or Staff Instruction No. 21 OSCE Policy on the Professional Working Environment, if the application of the procedures contained within the provisions are being abused or avoided. In such cases, questions arise as to whether because of OIO's asserted 'independence'[1244], this has resulted in a lack of feedback to OSCE Secretariat, insitutions/missions on matters concerning the rights and obligations of OSCE officials that also fall within their authority when the OIO takes over the investigation of a complaint. The *Redesign Panel* identified a 'significant 'coordination gap'[1245] in the pre-reform UN system, and, accordingly,

[1238] Annex 6 (3) of OSCE Permanent Council Decision No. 399/2000 Internal Oversight Mandate (OSCE Doc. PC.DEC/399 of 14 December 2000). See OSCE website: https://www.osce.org/oio/20768?download=true. Last accessed on 14 January 2020.
[1239] Ibid, (6).
[1240] Ibid.
[1241] Appendix 1, OSCE Code of Conduct, SRSR.
[1242] Article IX, Disciplinary Procedures, SRSR.
[1243] Article X, Appeals Procedure, SRSR.
[1244] Ibid. 'Reporting directly to the OSCE Secretary General, OIO is fully independent of other arms of the Organization'. See *Factsheet: OSCE Office of Internal Oversight*, 16 January 2017. See OSCE website: https://www.osce.org/resources/factsheets/office-of-internal-oversight?download=true. Last accessed on 16 January 2020.
[1245] *Report of the Redesign Panel, supra,* note 137, para. 31.

recommended that 'a clear framework of cooperation and coordination between the Office of Internal Oversight Services and the [UN] internal justice system should be established on a priority basis'[1246]. While it is not immediately clear whether there already exists an integrated system of common processes among the relevant departments of the OSCE, standard operating procedures should be in place not only in OIO but also DHR if the latter is conducting investigations and fact-finding.

5.4. Internal appeals procedure at the OSCE

5.4.1. Challenging an administrative decision

Pursuant to OSCE Staff Regulation 10.01, the Secretary General of the OSCE is required to 'establish an appeals procedure for staff/mission members against *administrative decisions* concerning alleged non-observance of their letters of appointment or terms of assignment or of any provisions governing their working conditions, as well as in relation to disciplinary measures taken against them'[1247] [emphasis added]. Likewise, for OSCE staff/mission members under Staff Regulation 10.02 to have recourse to a final appeal to the PoA, it must be 'against an *administrative decision* directly affecting him/her in accordance with the Terms of Reference of the PoA set forth in Appendix 2 of the [SRSRs] [emphasis added]. The Terms of Reference of the PoA states that '[i]n accordance with Regulation 10.02, a [Panel]…shall be competent to decide on final appeals filed by fixed-term staff/mission members against *administrative decisions* affecting them [emphasis added]. Thus, before an OSCE staff/mission member can contest an adverse decision via the internal or external appeals procedures, it is necessary that the relevant decision be classified as an administrative decision. In the context of this thesis, the scope of what constitutes an administrative decision is a matter of some importance as it defines how broad or narrow the rights of an staff/mission member is in challenging decisions of the OSCE. There is no official definition of the term 'administrative decision' in the SRSRs nor in those of most other IOs. What seems clear, however, is that these are restricted to

[1246] Ibid, XIII. Recommendations, para 162.
[1247] OSCE Staff Regulation 10.01(a) and (b) Internal Appeals Procedure, Article X Appeals, SRSR.

decisions that are taken by the OSCE. While there is no simple and widely accepted definition, and the term may take any form[1248], the jurisprudence of IATs has provided some guidance in this respect. Recently, the UNAT, for example in *Hamad* 2012-UNAT-269 and in *Al-Surki* et al 2013-304, reference has been made to the case law of the former UNAdT, which, in its Judgment No. 1157 *Andronov,* defined an 'administrative decision' as:

> 'a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities'[1249].

This definition seems to identify four elements of an administrative decision: first, a unilateral act; secondly, a decision; thirdly, it is taken in an individual case; and fourthly, it has direct legal consequences for the individual. In its Judgment *Planas*[1250], the UNDT noted the *Andronov* definition and further confirmed: 'In light of the foregoing, the Tribunal deems that an administrative decision can only be considered as such if – inter alia – it has direct legal consequences (effects) on an individual's rights and obligations'. This definition has been upheld by the UNAT. In this regard, the UNAT also addressed the issue of what constituted an appealable decision before the UNDT. UNAT held: '[w]hether or not the UNDT may review a decision…will depend on the following question: Does the contested decision affect the staff member's rights directly and does it fall under the

[1248] See ILOAT Judgment(s) 2573, at 8, or 2629, at 6.
[1249] *Andronov v. Secretary-General of the United Nations,* UNAdT, 30 January 2004, Judgment No. 1157.
[1250] UNDT/2009/086.

jurisdiction of the UNDT?'[1251] As shall be seen, there has also been clear articulation by the UNDT Judgment in the case *Teferra* that the four elements might sometimes be the subject of dispute between the staff member and the responding Organization as there may not always be clarity of definition, and an assessment of an organizational act, or inaction, will depend on a broader view of the issue.[1252]: 'what is or is not an administrative decision must be decided on a case by case basis and taking into account the specific context of the surrounding circumstances when such decision were taken'. Accordingly, an administrative decision must be related to an appellant or applicants' specific rights as an OSCE staff/mission member. In practice, neither IRBs[1253] nor the PoA would have competence[1254] to decide on administrative decisions having no possible link to the appellants or applicants' rights deriving from his/her letter of appointment or terms of assignment, or of any provisions governing their working conditions, as well as in relation to disciplinary measures taken against them. That said, IRBs and the PoA has the inherent authority to define the administrative decision impugned by the applicant and to identify what is in fact being contested and subject to review. The above is a critical issue as it bears direct relevance to receivability.

5.4.2. Exhaustion of administrative remedies

The internal means of redress available to staff members in IOs, prior to the invocation of the judicial remedy through an IAT, are essentially of a non-judicial and non-legal

[1251] *Nwuke* 2010-UNAT-099.
[1252] UNDT/2009/090.
[1253] Article IV(3) Written Statements, Appendix 12, Internal Appeals Procedure, SRSR.
[1254] OSCE Staff Regulation 10.02(a) External Appeals Procedure, SRSR; Article I(1) Competence of the PoA, Appendix 2, ToR PoA, SRSR.

character[1255]. In most IOs[1256], the formal pre-litigation procedure[1257] ususally includes three steps, each of which engages principles of due process[1258]: first, the administrative or management review of the challenged decision[1259]; second, a review by a joint advisory peer review body and recommendation; and third, the final decision by the executive head. Indeed, the right to review of administrative decisions has long been considered a 'cornerstone of domestic administrative law and such right has been widely introduced in IOs, in particular for their staff'[1260]. As the ILOAT has consistently held, 'the right to an internal appeal is a safeguard which international civil servants enjoy in addition to their right of appeal to judicial authority. Thus, except in cases where the staff member concerned forgoes the lodging of an internal appeal, an official should not in principle be denied the possibility of having the decision which he or she challenges effectively reviewed by the competent appeal body.[1261] The Tribunal also stated '[a]n internal appeal

[1255] See C. F. Amerasinghe., ‚The rule and international organizations' in *Local Remedies in International Law* (Cambridge University Press, 2004), at 375 – 376.

[1256] See e.g., at the UN, this is a request for a management evaluation submitted to the Secretary General (see Rule 11.2 of the Staff Regulations); at the EU, a complaint submitted to the appointing authority (see Article 90.2 of the Staff Regulations of Officials of the European Communities); at the World Bank and the ILO, every internal means of redress available within the Organization (see Article II.2 of the Statute of the WBAT and Article VII.1 of the ILOAT Statute. The Service Regulations of the European Patent Office (EPO) provide that a staff member concerned must first submit a request for review before lodging an internal appeal to the Appeals Committee; once the latter has issued ist decision, a complaint may then be filed with the ILOAT (see Articles 109 – 113 of the Service Regulations). At NATO, before filing an appeal with the Administrative Tribunal (NATO AT), staff must exhaust all internal means of redress, namely, in principle, an administrative review followed by a complaint in writing to the Head of the NATO body with authority to rescind or modify the challenged decision (see Articles 61 and 62 and Annex IX to the NATO Civilian Personnel Regulations). At the OECD and the CoE, the complainant must first apply to the Secretary General with a ‚written request' (see Article 3, Annex III to the OECD Staff Regulations, Rules and Instructions applicable to Officials of the Organization and an administrative complaint (see Articles 59 and 60 of the CoE Staff Regulations; at the European Space Agency (ESA), when a staff member considers that a decision taken affecting him or her should be rescinded, he or she must first seek the opinion of the Advisory Board, unless the parties agree not to seek the said opinion (Regulation 30.1 (ii) of the ESA Staff Regulations.

[1257] See C. de Cooker., 'V.6. Pre-Litigation Procedures in International Organizations', in C. de Cooker (ed), *International Administration, Law and Management Practices in International Organisations* (Martinus Nijhoff Publishers, Leiden/Boston, 2009), 'III. Types of Procedure', at p. 783.

[1258] See L. Fauth., 'Due Process and Equality of Arms in the Internal Appeal: New Developments from Judgments 3586 and 368', (5 May 2017), p. 2.

[1259] 'While most organizations do not require an administrative review prior to the lodging of a formal complaint, a study by the ICSC shows it to be established practice for such reviews to be undertaken whenever possible and indicates there is a high rate of settlement'. P. 784. UN.Doc. ICSC/29/R.8/Add.2, paras. 23-24.

[1260] C. Rohde, *supra,* note 1132, (United Nations System Staff College, 2014), at p. 83. See also B. Kingsbury & R. B. Stewart., ‚Legitimacy and Accountability in Global Regulatory Governance', UNAdT Conference on *International Administrative Tribunals in a Changing World* (Katerina Papanikolaou / Martha Hiskaki eds., London: Esperia, 2008), at p. 203.

[1261] See ILOAT Judgment No. 2781, at 15; ILOAT Judgment No. 3068, at 20.

procedure that works properly is an important safeguard of staff rights and social harmony in an [IO] and, as a prerequisite of judicial review an indispendable means of preventing the dispute from going outside the organization'[1262].

5.4.3. First step in the review of an administrative decision

If a staff/mission member of the OSCE considers that an administrative decision has been taken in non-observance of his/her letter of appointment or terms of assignment, or of any provisions governing his/her working conditions, as well as in relation to a disciplinary disciplinary measure,[1263] and is unable to resolve the matter informally or through mediation, if such methods are pursued, the staff/mission member is entitled to contest such a decision through the formal mechanisms – the so-called internal appeals procedure. The question of appeals against administrative decisions, including disciplinary measures, is regulated in general by Article X on Appeals of the SRSR, and the Internal Appeals Procedure is set forth in detail in Appendix 12 to the SRSR. The first step is for the staff/mission member to lodge a request for internal review (also known as 'internal appeal') under OSCE Staff Rule 10.01(b), by writing to the OSCE Secretary General or the respective head of institution/mission setting out*, inter alia,* the 'aspects of the decision he/she is challenging'[1264] and 'his/her arguments for asking the review of the decision'[1265]. Upon receipt of the request for review, pursuant to OSCE Staff Regulation 10.01(a), 'the Secretary General is required to 'establish an appeals procedure […]'. '[W]ithin 30 days[1266] from the date of the notification of the impugned decision'[1267], the appellant or his/her representative is required to lodge an internal appeal. This time-limit may be extended if

[1262] ILOAT Judgment 1317, under 31.
[1263] Pursuant to OSCE Staff Instruction No. 21, it would seem that OSCE officials may file a complaint in writing if it is considered to derive from harassment, sexual harassment, discrimination or retalitation.
[1264] OSCE Staff Rule 10.01.1(iii) – Request for internal review, Article X Appeals, Appendix 12, SRSR.
[1265] OSCE Staff Rule 10.01.1(c)(iv) – Request for internal review, Article X Appeals, Appendix 12, SRSR. OSCE Staff Rule 10.01.1(c) states that '[t]he request for internal review shall be submitted in accordance with the form set out in a Staff Instruction issued by the Secretary General'. This is not publicly available.
[1266] As the prescribed time limit is expressed in 'days', this usually indicates 'calendar days'.
[1267] OSCE Staff Regulation 10.01(c) Internal Appeals Procedure, Article X Appeals, Appendix 12, SRSR. See also Article III(1) Time-limit, Article X Appeals, Appendix 12, SRSR.

the IRB[1268] considers that the appellant has 'legitimate reasons for not having submitted his/her request within the prescribed time-limit'[1269] in a specific case. However, it is unclear whether under this provision the time-limit for completing an internal review may be extended by an IRB pending efforts for informal resolution by third party or mediation.

5.4.4. Administrative review

At the initial stage of the OSCE internal appeals procedure, importance is attached to upholding the general principle of exhausting administrative remedies[1270] before entry into formal proceedings with the composition of an IRB. Article II(1) of the Internal Appeals Procedure requires an administrative review[1271] after the lodging of a request, allowing the OSCE Administration a full opportunity to determine within 14 days[1272] (7 days for the OSCE Secretariat) whether a complaint or grievance resulting from a contested administrative decision was made in accordance with the Organization's applicable regulations, rules, and policies and on the proportionality of any sanction[1273]. As noted,

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[1268] Article III(2) Time-limit, Article X Appeals, Appendix 12, SRSR. ‚Should the appellant provide explanation for not having submitted his/her request within the prescribed time-limit, the appeal *shall be transmitted to the Internal Review Board* for it to decide on the receivability of the appeal' [Emphasis added].
[1269] Article III(3)(a) Time-limits, Article X Appeals, Appendix 12, SRSR. 'If, in the light of the explanation supplied by the appellant, the Board considers that: The appellant had legitimate reasons for not having submitted his/her request within the prescribed time-limit, the Board shall admit the appeal and give a ruling on the substance of the case […]'.
[1270] This may be defined as procedures before an administrative authority with a view to obtaining the legal cessation of an act, its annulment or modification, or compensation for the damages caused. See J. Salmon., *Dictionnaire de droit international public,* Bruxelles, Bruylant/AUF, 2001, p. 1137. According to OSCE Staff Rule 10.02.2 – Applications (to the Panel of Adjudicators) (d)(i), Article X Appeals, Appendix 12, SRSR: '[t]he applicant must have exhausted the internal appeals procedures, except if the jurisdiction of the Internal Review Board has been waived in accordance with Rule 10.02.1 […]'.
[1271] The staff rules of several IOs open the possibility for staff members to request review administrative decisions by a hierarchical superior. This administrative review – considered a cornerstone of domestic administrative law – is often a prerequisite for the triggering of formal mechanisms under the general principle that administrative remedies shall be exhausted before formal proceedings are instituted. For example, UN Staff Rule 11.2(a) provides that: 'A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment [...] shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision', which is a condition for a staff member having standing to file a case before the UNDT with regard to the administrative decision.
[1272] Article II(1)(a) and (b) Composition of an Internal Review Board, Appendix 12, SRSR. This depends on whether a request is filed by a staff member or mission member.
[1273] Turning to provisions in the SRSRs which entail administrative discretion, the fact that the filing of an 'internal appeal or a final appeal' under OSCE Staff Regulation 10.03, Article X Appeals, Appendix 12, SRSR, 'shall not imply suspension of the execution of the impugned decision', this may not prevent the Administration in an appeals procedure from making suspension of its implementation until the *de facto*

three distinctive aspects to this stage of the Internal Appeal Procedure may be highlighted: first, like the pre-reform UN system[1274], it would seem that the manager at the OSCE who took the impugned decision has no obligation to respond, at least to a formal complaint within this specific time frame, to defend his/her decision[1275]; and, secondly, it would seem that sanctions cannot be applied to force compliance. Thirdly, if it is determined that an improper decision has been made, the OSCE Secretary General or respective head of institution/mission has a duty to take either corrective action by giving his/her 'immediate and full consent to overrule[1276] the impugned decision and thereby bring the appeals procedure to an end'[1277] or, alternatively, to ensure an appropriate remedy is provided, a necessary element of the internal appeals procedure. While this stage of the Internal Appeals Procedure constitutes an important element of managerial accountability within the OSCE[1278], it remains to be seen, however, whether such review is an effective mechanism to redress poor administrative decisions[1279], enabling managers to apply

administrative review has been completed, particularly in cases involving separation from service.

[1274] Similarly, in the old UN system, managers were not required to provide explanations for their decisions. See M. Struyvenberg, ‚The New United Nations System of Administration of Justice', Part III: The Institutional Framework, (O. Elias eds.) in *The Development and Effectiveness of International Administrative Law On the Occasion of the Thirtieth Anniversary of the World Bank Administrative Tribunal*, (Martinus Nijhoff Publications, 2009), at p. 246.

[1275] See e.g., OSCE Staff Rule 9.02.1(b), Article IX Disciplinary Procedure, SRSR, states that after the receipt of a formal complaint, the alleged offender '*may respond* to the Secretary General or the head of institution/mission, as appropriate, within 10 working days of receipt of the allegations' [emphasis added].

[1276] Article II(1), Composition of an Internal Review Board, Appendix 12, SRSR.

[1277] Ibid.

[1278] As indicated, it seems that the OSCE has does not have in place an overall accountability framework, which includes holding staff accountable for mismanagement and improper decisions as a key accountability issue. However, in common with other IOs, the OSCE's reform efforts appear to have focused on clearly defining a new employment relationship between the staff/mission members and the Organization, and improving the effectiveness of the human resources function. In 2015, the OSCE developed a so-called ‚Competency Model', a framework of core values and core competencies specific to the Organization that aims to define the behaviours that are essential to effective performance in a given position. Notably, one of the four ‚core values' that underpin the Organization's work and that guide actions and behaviours of staff is accountability. Effective Accountability Behaviours were described as follows: '1) Respecting and working within the regulatory framework of the Organization; 2) Delivering results in line with agreed strategy, time and budget; 3) Acknowledging and learning from mistakes in a constructive manner; 4) Taking into account own strengths and weaknesses and listens to feedback; 5) Recognizing the impact of own behaviour on others; 6) Maintains confidentiality of sensitive information'. OSCE Competency Model, OSCE Secretariat. See OSCE website: https://jobs.osce.org/resources/document/our-competency-model. Last accessed on 14 January 2020. As the OSCE Competency Model appears to be relied upon by DHR in its work, the PoA may invoke such instrument as evidence of the OSCE's practice.

[1279] The Report of the *Redesign Panel* on accountability stated that: '[i]n order to achieve an effective change in management culture and to properly address the prevailing perception that the present system shields managers from accountability, the Redesign Panel proposes that they personally answer for their acts and decisions'. It went further in this regard stating that 'the formal justice system should entertain applications

lessons learned[1280], and whether it reduces exposure of the Organization to risk and the number of cases that proceed to an IRB. Fourthly, competence to carry out administrative review of the contested decision and provide a reasoned response before the grievance or complaint proceeds to the IRB for consideration would seem to be assigned to the Office of Legal Affairs[1281], the central legal service of the Organization[1282], within the Office of the Secretary General, OSCE Secretariat. This may give rise to an appearance of a conflict of interest should the same Office also be responsible for defending the Organization before IRBs and subsequently advise the OSCE Secretary General or the respective head of insitution/mission, in consultation with the Secretary General, on the 'final decision'[1283] . The risk of a perception on the part of OSCE officials that such reviews of final decisions lack independence and impartiality can only serve to undermine confidence in the internal dispute resolution regime at the OSCE, which is necessary for a harmonious work environment[1284]. To eliminate this perception in the internal appeals procedure, the office

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for the enforcement of individual financial accountability, and Dispute Tribunal judges should have power to refer appropriate cases to the Secretary-General for possible action to enforce that accountability'[1279]. While this area falls beyond the scope of this thesis, it is worth mentioning that pursuant to Article 10(8) of the Statute of the UNDT and Article 9(5) of the Staute of the UNAT respectively, the new UN Tribunals may refer appropriate cases to the UN Secretary-General or executive heads of separately administered UN funds and programmes for possible action to enforce accountability. See *Report of the Redesign Panel, supra,* note 137, VIII. Accountability, para 121. Notwithstanding extreme cases in the OSCE where disciplinary measures would be appropriate, in the case responsibility for a decision is established, and there are no factors which make the taking of accountability measures other than acknowledgment and learning inappropriate, it may be questioned whether accountability in the OSCE may be expressed in the performance evaluation of a decision-maker or added to the record of the staff/mission member. While the SRSRs contain a reference to the accountability of individuals in OSCE Staff Regulation 2.05, this is limited to punitive aspects where 'wilful action or inaction [of OSCE officials], their negligence or their failure to observe any regulation, rule or administrative issuance' has led to financial loss. OSCE Staff Regulation 2.05 Reimbursement for Financial Losses, Article II Duties, Obligations and Privileges, SRSR.

[1280] The UN Under-Secretary-General for Management issues Lessons Learned Guides prepared by the MEU in consultation with other offices in the UN and Ombudsman's office.

[1281] *OSCE Handbook*, (2007), *supra*, note 5, at 23. '*Legal Services Section* (renamed Office of Legal Affairs in 2018) provides advice and assistance on legal issues to the Secretary General, the Secretariat, the Chairmanship, the institutions, the field operations and, as required, to the delegations of the participating States'. At the same time, according to Vacancy Notice: VNSECS01301, issued on 19 January 2018*,* one of the 'tasks and responsibilities' of a Legal Officer in the Office of Legal Affairs, Office of the Secretary General in the OSCE Secretariat, includes: 'Providing legal advice on dispute resolution, including by examining claims by or against the Organization and its officials'. See OSCE website: https://jobs.osce.org/vacancies/legal-officer-vnsecs01301. Last accessed on 14 January 2020.

[1282] A related question is whether legal advisers are available in all OSCE field operations.

[1283] Article VIII(1) Final decision, Internal Appeals Procedure, Appendix 12, SRSR. 'The final decision shall be taken by the Secretary General or the respective head of institution/mission in consultation with the Secretary General, within thirty days upon receipt of the report of the Board'.

[1284] On the paramount importance of the independence of judges and lawyers, see Special Rapporteur on the 'Independence of judges and lawyers.' Note by the Secretary-General, General Assembly document

that reviews the final IRB recommendations must be independent from the Office of Legal Affairs, otherwise due process is not observed. Nevertheless, while the short time-frame required to reconsider the contested decision has the clear advantage of accelerating the appeals procedure and thereby avoiding delay for OSCE staff/mission members, a critical element of justice, there are several difficulties with such tight deadlines. Not least, for the Office of Legal Affairs in the OSCE Secretariat to deliver an opinion it can be assumed that it needs to review the appeal request, establish the facts of the case, conduct legal research and drafting, obtain timely comments from one or possibly more than one decision-maker regarding the rationale for their decisions, and provide the OSCE Secretary General with time to consider its recommendation. It may also be noted that this preliminary process of review at the OSCE has similarities with the now abolished administrative review before action at the UN Secretariat, at least with respect to its purpose. The administrative review function was formerly carried out by the Administrative Law Unit (ALU) within the Office of Human Resources Management (OHRM), the same Office that was responsible for defending the UN Secretary-General before the JAB and JDC. Moreover, OHRM dealt with an overwhelming number of review requests with no statutory deadlines and due to lack of resources on the one hand, and in the absence of sanctions that could be applied to force compliance on the part of managers on the other, complete reviews were few and far between[1285]. As the reviews and issuing of a final decision often took months or in some cases much longer, and few staff members

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A/64/181 of 28 July 2009, submitted to the General Assembly in 2009 in accordance with Human Rights Council resolution 8/6. See UN website: https://undocs.org/A/64/181. Last accessed on 14 January 2020. The 'principle of the independence of judges and *lawyers* has been defined as international custom and general principle of law recognized by the international community, respectively in the sense of article 38 (1) (b) and (c) of the Statute of the International Court of Justice Furthermore, it has also been a treaty-based obligation, as shown by the requirement of 'independence of a tribunal' established in article 14, paragraph 1, of the ICCPR, which , as stated by the Human Rights Committee in its general comment No. 32, is an absolute right that is not subject to any exception' [emphasis added] (para. 14). The Special Rapporteur added: 'The principles of impartiality and independence are the hallmarks of the rationale and the legitimacy of the judicial function in every State…Their absence leads to a denial of justice and makes the credibility of the judicial process dubious' (para. 15). The Special Rapporteur further stated: 'It is the principle of the separation of powers, together with the rule of law, that opens the way to an administration of justice that provides guarantees of independence, impartiality and transparency. In this connection, it should be noted that a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable, or where the latter is able to control or direct the former, is incompatible with the notion of an independent tribunal. Therefore, the Committee pointed to this concern in several of its concluding recommendations and called for a *clear demarcation between the respective competencies of the different branches of power'* [emphasis added] (para. 18).

[1285] See M. Struyvenberg., *supra*, note 761, at p. 246.

actually received a reasoned response[1286], this undesirable situation for an ongoing conflict between a staff member and a decision-maker over a decision may in part explain the recommendation of the *Redesign Panel* to abolish the process[1287]. As indicated, the UN General Assembly followed the Secretary-General's recommendation that the old process of administrative review before action be replaced with 'a properly resourced and strengthened management evaluation function', with the imposition of stricter time-limits, as a first step in the formal justice system'. Similarly, General Assembly reiterated that evaluation is 'an essential management tool for executive heads to hold managers accountable for their decisions'[1288] and would give management an early opportunity to to review a contested decision, to determine whether mistakes have been made or whether irregularities have occurred and to rectify those mistakes or irregularities before a case proceeds to the establishment of an IRB. As indicated, the MEU in the UN Secretariat now operates as an independent [1289] institution from decision-makers and from the Administration's legal advisers, including those that represent the UN Administration before tribunals. Although it seems unlikely that the OSCE would have a similar backlog of cases similar to the UN given its relatively small size, two proposed reforms may, nonetheless, be identified. First, as the administrative review procedure at the OSCE is currently integrated in the Internal Appeals Procedures, it may be recommended to require, as a first formal step prior to the lodging of a formal appeal, mandatory review of all final administrative decisions. Secondly, to ensure independence and partiality in the OSCE internal appeals procedure, there would seem to be merit in this initial review function being carried out by another unit of legal officers with operational independence and perhaps with an extended timeline. In this regard, rather than a mere 7-14 days, such review might follow the practice of the UN[1290] within 30 calendar days of receipt of the request for administrative review if the staff/mission member is at the OSCE Secretariat and within 45 calendar days of receipt of the request for administrative review if the staff/mission

[1286] *Report of the Redesign Panel, supra,* note 137, para. 87.
[1287] Ibid, para. 87, and XIII. Recommendations, para. 158.
[1288] UNGA Res. 62/228, para 35.
[1289] See Report of the Secretary-General, Administration of Justice, (UN Doc. A/62/294 of 23 August 2007), para. 86. See UN website: https://undocs.org/A/62/294. Last accessed on 14 January 2020.
[1290] The UN is required by the Staff Rule 11.2(d) to respond to a management evaluation request within 45 or 30 days, depending on whether a request was filed by a staff member stationed in the field or in headquarters.

member is stationed outside Vienna. The unit may also propose means of informally resolving disputes between staff/mission members and the Administration, by either extending the deadlines for filing requests by staff/mission members or extending deadlines for completing review of the decision.

5.4.5. Composition, designation of members of an IRB

When the OSCE Secretary General or respective head of institution/mission does not overrule the impugned decision, an 'IRB shall be established [in the Secretariat] to advise the Secretary General or [in the institutions/missions], to advise the respective heads of institution/mission'[1291]. As with most organizations[1292], Boards in the OSCE are composed of an uneven number of (three) members[1293], each having equal voting rights[1294]: '[a] *chairperson* is designated by the Secretary General or the respective head of institution/mission in consultation with the staff representatives if any'[1295]; '[a] *member* is designated by the Secretary General or respective head of insitution/mission, in consultation with the staff representatives if any' [1296]; '[a] *member* designated by the staff representatives if any' [1297] [emphasis added]. Unlike most other organizations where members are appointed for a fixed period, generally one or two years[1298], IRBs are constituted *ad hoc* in the OSCE Secretariat, insitutions and missions for each particular case[1299]. The balance sought to be achieved by the composition of this advisory body, which includes members appointed by the OSCE Administration and the staff

[1291] OSCE Staff Regulation 10.01(b), Article X, Appeals, SRSR.
[1292] See C. de Cooker, *supra,* note 1258, (Martinus Nijhoff Publishers, Leiden/Boston, 2009), at p. 785.
[1293] Article II(2) Composition of an Internal Review Board, Internal Appeals Procedure, Appendix 12, SRSR.
[1294] Article V(5) Procedure of the Internal Review Board, Internal Appeals Procedure, Appendix 12, SRSR.
[1295] Article II(2)(a) Composition of an Internal Review Board, Internal Appeals Procedure, Appendix 12, SRSR.
[1296] Article II(2)(b) Composition of an Internal Review Board, Internal Appeals Procedure, Appendix 12, SRSR.
[1297] Article II(2)(c) Composition of an Internal Review Board, Internal Appeals Procedure, Appendix 12, SRSR.
[1298] See C. de Cooker, *supra,* note 1258, (Martinus Nijhoff Publishers, Leiden/Boston, 2009), at p. 786.
[1299] It is unclear whether IRBs are assisted by a secretary who helps the Chairperson in the preparation of the Board's sessions and subsequent recommendations. According to the *Redesign Panel,* in the old UN system, [...] the Secretary of JAB/JDC serves as acting coordinator in addition to his other functions'. *Report of the Redesign Panel, supra,* note 137, para. 102.

representation, is a fundamental guarantee of impartiality[1300]. However, as Article II(3) of the Internal Appeals Procedure expressly provides for the possibility of a 'Board [being] composed by the head of institution/mission with a view to ensuring a fair and impartial composition'[1301] '[i]f the institution/mission does not have staff representatives'[1302], this is not always satisfactory, as it may lead to an improperly composed Board[1303]. Where institutions and missions do not meet these staff conditions, an 'IRB shall be constituted at the Secretariat'. In such circumstances, it may be questioned whether such cases also result in delay, affecting the efficient functioning of the procedures. Once the IRB has been provided with a copy of the request for review[1304], and this is 'substantiated', the chairperson 'shall ask the Secretary General or the respective head insitution/mission to submit his/her reply within thirty days'[1305].

5.4.6. Initial methods of formal internal review

An important question that may be asked at this juncture, however, is the extent to which IRBs meet certain due process guarantees, which, as indicated, include the right to be heard by or make representations to an impartial adjudicator; the right to appeal; and the right to make a reasoned decision. As IRBs are *ad hoc* peer review bodies composed of volunteer OSCE staff/mission members, this arguably offers advantages in terms of familiarity with institutional culture and policies. However, since there is no requirement that Board members possess legal qualifications, the *Redesign Panel* suggested in such cases that recommendations in favour of staff members may not always be accepted. Other difficulties which may be encountered include the designation and availability of

[1300] See ILOAT Judgment No. 3694, consideration 6.
[1301] Article II(3) Composition of an Internal Review Board, Appendix 12, Internal Appeals Procedure, SRSR.
[1302] Ibid.
[1303] In such cases, OSCE mission members should be represented by a Staff Representative at the Secretariat. See H. P. Kunz-Hallstein., 'Views from Practice, Paralysing the Functioning of International Organizations' Internal Appeals Boards, *International Organizations Law* Review, 14 (2017) 196-203, Brill / Nijhoff, p. 198. As noted by Kunz-Hallstein, '[p]roblems arise when staff representatives do not participate in the meetings and deliberations of an appeal body. The question is whether in such situations the internal appeals procedure still functions or whether the statutory review by an appeals board in a reduced composition is compromised'.
[1304] Article IV(1) Written Statements, Appendix 12, Internal Appeals Procedure, SRSR.
[1305] Ibid, Article IV(2).

volunteers for IRBs, delays in the handling of appeals, or as with DCs, the 'uneven quality' of IRB reports. Another problem raised by the internal appeals procedure is that Board members are designated by the OSCE Secretary General or head institution/mission, who will often be a respondent in the proceedings as an embodiment of the OSCE. In its report, the *Redesign Panel* had proposed that proceedings in the new UN system be brought against the 'Organization' or the relevant fund or programme'[1306], which would 'conform to the legal reality' and 'to the practice in other [IOs]', and would also allow the Secretary-General 'to be, and to be seen as the guardian of the integrity of the internal justice system and the protector of the rule of law'[1307]. In the event, the UN General Assembly decided to maintain prior practice. That said, it should be emphasized that the OSCE Secretary General or respective the head of institution/mission is not the respondent in his/her personal capacity, but only in representation of the Organization, the former as the 'Chief Administrative Officer of the OSCE and of the Secretariat'[1308], and the latter as heads of institution/mission exercising their responsibility, through the Secretary General[1309]. Article VII of the Internal Appeals Procedure gives the guarantee that 'in the discharge of their duties'[1310] the members of the IRBs 'shall be completely independent' and 'shall not receive instructions or be influenced by pressure intended to affect their recommendations'[1311]. However, due to the fact that the IRBs are composed of staff/mission members acting in an advisory capacity to the OSCE Secretary General or respective head institution/mission and are volunteers who perform their role in addition to their other responsibilities, regardless of the presumable good intentions of the persons constituting such boards, such mechanisms cannot be said to be objectively independent judicial mechanisms[1312]. As indicated, it is a fundamental right that a person has access to

[1306] *Report of the Redesign Panel, supra,* note 137, XIII. Recommendations, para 172. 'Proceedings in the formal justice system should be brought against the Organization or the relevant fund or programme, not the Secretary-General or the executive heads'.
[1307] Ibid, paras. 122-123.
[1308] OSCE Staff Regulation 1.05 (a) Accountability, SRSR.
[1309] Ibid, 1.05 (b).
[1310] Article VII(2) Duties and Protection, Appendix 12, Internal Appeals Procedure, SRSR.
[1311] Ibid.
[1312] See A. M. Thévenot-Werner, 'The Need to Develop Effective Individual Dispute Resolution Mechanisms Prior to Judicial Appeals in International Organizations', in A. Talvik (ed.), *Best Practices in Resolving Employment Disputes in International Organizations: Conference Proceedings* (ILO 2014), at p. 33. ('In this regard, it should be recalled that bodies which intervene prior to the final decision of the decision-making authority, namely the various internal advisory bodies, which are often joint appeals bodies, only adopt

an impartial court or tribunal to seek protection of his/her fundamental rights. For these reasons, like DCs, IRBs do not objectively constitute an impartial and competent tribunal and this is especially relevant as there exists the situation of there being only one layer of judicial appeal after the OSCE Secretary General or the respective head institution/mission has made an adverse finding. The OSCE's advisory bodies, namely DCs and IRBs, would appear to be facing substantially similar problems to those in the pre-reform UN system, in which the *Redesign Panel* noted that 'the administration of justice in the [UN] lags so far behind international human rights standards is a matter of urgent concern requiring immediate, adequate and effective remedial action'[1313]. As a result, it recommended the establishment of a 'two-tiered system of formal justice' at the UN, to replace the then existing peer review mechanism. Realistically, with the financial burden of the UN approach being considerably heavier than a peer review system, which is perceived as being less expensive, it may be suggested to build a more credible and robust peer review system. Steps may be taken to ensure greater independence of IRBs by appointing an external professional full-time IRB chairperson, such as a law professor or experienced lawyer from outside the Organization[1314].

5.4.7. Alternative approaches to the administration of justice

There is also an argument that a decentralized approach to internal justice carries the risk that rules and policies will be applied differently from one duty station to another within the same organization[1315]. Indeed, in recent years, 'driven primarily by the need for cost savings' [1316], some organizations have adopted a more centralized aproach, by

recommendations. Admittedly it is desirable for decision-making authorities to follow such recommendations. However, in law, they may choose not do to so. These bodies are not therefore courts'.

[1313] *Report of the Redesign Panel, supra,* note 137, para. 11.

[1314] This has been particularly beneficial, for example in the case of the OECD. See A. M. Thévenot-Werner., 'The Need to Develop Effective Individual Dispute Resolution Mechanisms Prior to Judicial Appeals in International Organizations' (in A. Talvik ed), *supra,* note 309.

[1315] See C. de Cooker, *supra,* note 1258, (Martinus Nijhoff Publishers, Leiden/Boston, 2009), at p. 788, who noted that '[t]he application of standard and globally administered processes remains a challenge in a decentralized organization'. See also JIU Report, 'Administrative Support Services: The Role of service centres in redesigning administrative service delivery', (UN doc. JIU/REP/2016/11), Box 6, page 29. See UN website: https://undocs.org/JIU/REP/2016/11. Last accessed on 14 January 2020.

[1316] Ibid.

consolidating their administrative of justice functions to a globally administered 'shared services centre' at a lower cost location away from headquarters. Those IOs that have adopted this approach such as the World Health Organization[1317] (WHO) have highlighted what they consider to be the main benefits; in this context, two may be highlighted. First, unlike their former *ad-hoc* appeals boards, the WHO states that 'regardless where they are working'[1318] its staff members now 'have equal access to justice'[1319]. Secondly, with 'additional human resources [of full-time professional and general service staff] engaged'[1320], this ensures a 'more effective and more expeditious'[1321] justice system[1322]. Admittedly, such a process runs counter to the 'decentralized system' of internal justice for the UN recommended by the *Redesign Panel*[1323] and contrary to its findings that the former 'overcentralized'[1324] UN structure did not guarantee 'equality of arms'[1325].

5.4.8. Single-tier formal justice system and the right to a court

In any event, there has been little appetite on the part of other IOs to take up the option of appellate[1326] judicial review. Notwithstanding the UN (UN Dispute Tribunal and Appeals

[1317] In 2016, the WHO established a Centre in Budapest to support an enlarged administration of justice function. It estimated that it could provide for the increased staffing in Budapest at existing appropriation levels, or half of what would be required in Geneva. In particular, this included an institutionalized administrative review and appeals process, including a Global Board of Appeal, a peer-review body which offers a formal venue for WHO staff members (whether they are based in the Phillipines, Ghana, Finland, or Columbia) to appeal against final administrative decisions or actions affecting their employment status. See JIU Report, (UN Doc.JIU/REP/2016/11), para. 30.
[1318] See Report by the Director-General, ‚Human resources: update', Programme, Budget and Administration of the Executive Board, Twenty-seventh meeting Provsional agenda item 8, Doc. EBPBAC27/4 of 8 December 2017, paras. 13-14. See WHO website: http://apps.who.int/gb/pbac/pdf_files/pbac27/pbac27_4-en.pdf. Last accessed on 20 January 2020.
[1319] Ibid.
[1320] Ibid.
[1321] Ibid.
[1322] However, according to Laperriere, while ‚the new incumbents will work "in total independence and impartiality" when it reviews the soundness of those decisions by the Director General staff have complained against' [...,] in order to ensure such total independence and impartiality, the Deputy Chief reports to the Chief and the Chief directly to the Director General!'. K. Laperriere., *WHOligans: A witness account of fraud and bullying at the heart of the World Health Organization* (p. 79). Kindle Edition.
[1323] *Report of the Redesign Panel, supra,* note 137, para. 73.
[1324] Ibid, para.
[1325] Ibid, para. 14.
[1326] A conceptual distinction may be drawn between, on the one hand, 'appellate' functions exercised by the court, and, on the other hand, 'supervisory' or 'supervisory' jurisdictions. The 'appellete' aspect involves a court in a complete rehearsing of the case, which distinguishes it from what civil lawyers call courts of 'cassation', which involves an appeal purely on the documents, and is concerned solely with errors of law

Tribunal[1327]), the only other internal justice system that currently provides for a two-tiered judicial review are the European Union's (EU) institutions (the General Court and the Court of Justice thereafter[1328])[1329]. Thus, the vast majority of IOs, including the OSCE, still have an internal system of justice based on peer review and a single adjudicatory body, as developed by the League of Nations in the 1930s. This may in part be explained by the fact that, as noted by Hwang[1330], international human rights standards do not recognize the right to appeal in civil cases as compared with criminal cases[1331]. For example, in point 120 of the the Guide on Article 6 of the ECHR – Right to a fair trial (civil limb), December 2017: 'Article 6 does not compel the contracting states to set up courts of appeal or cassation'[1332]. Moreover, this legal position is shared, for example, by the case law of the ECHR, the ICJ

committed by the court below. By contrast, the 'complete-rehearsing' type of appeal involves court's re-examining all the aspects of the cases before it; if necessary, hearing witnesses again. It takes cognisance of the law, the facts and the evidence in a manner which, in principle, is equal to a court of first instance.

[1327] Final judgments of the UNDT (Article. 11(3)) UNDT Statute) are subject to appeal.

[1328] For more than a decade, the instutitions of the EU benefited from a three-tier judicial system in institutional and employment matters: the EU Civil Service Tribunal (CST) and thereafter, the General Court (GC) and the Court of Justice of the EU (CJEU). The CST, aspecialised court within the CJEU and the first of the three tiers, was established in December 2005 and ceased to exist in September 2016 following EU Regulation 2016/1192 on the transfer to the GC of jurisdiction at first instance in disputes between the EU and its servants. Today, final judgments of the GC at first instance (Article. 56 et seq CJEU Statute) are subject to appeal to the CJEU. See website of the Court of Justice of the European Union: 'The Institution': https://curia.europa.eu/jcms/jcms/T5_5230/en/. Accessed on 15 May 2019.

[1329] While it is of note that IOs such as the Organization of American States (OAS) have appellate processes built into the Rules of Procedure and Statute of its Administrative Tribunal, the OAS Administrative Tribunal (OASAT), Article XII (1) of its Statute on the Review of Judgments provides that 'Judgments of the Tribunal may be reviewed by an ad hoc Administrative Tribunal Review Panel (Review Panel) only in instances where the Tribunal's judgment is alleged to be ultra vires because it exceeds the Tribunal's authority in relation to its jurisdiction, competence, or procedures under this Statute. The Review Panel shall not have competence to reexamine the merits of the underlying dispute'. See Article XII – Review of Judgments, Statute of the OAS Administrative Tribunal, adopted on July 16, 1971 by the Permanent Council of the Organization, through Resolution CP/RES. 48 (I-O/71). See OASAT website: https://web.oas.org/tribadm/en/Pages/estatuto.aspx. Accessed on 15 May 2019.

[1330] P. Hwang., ,Reform of the Administration of Justice System at the United Nations', 8 *Law and Practice of International Courts and Tribunals* (Martinus Nijhoff Publishers, 2009) 181 – 224, at 208.

[1331] In its review of Article 14(5) of the International Covenant on Civil and Political Rights (ICCPR), which provides for the right appeal to appeal criminal convictions and sentences, the Human Rights Committee noted that 'Article 14(5) does not apply to procedures determining rights and obligations in a suit at law or any other procedure not being part of a criminal appeal process, such as constitutional motions. At the same time, the report of an external panel that conducted a review of the IMF's dispute resolution system noted that: 'there is no obligation arising from general principles of international administrative law to provide a further appeal'. Report of the External Panel, *Review of the International Monetary Fund's Dispute Resolution System* (27 November 2001). See IMF website: https://www.imf.org/external/hrd/dr/112701.pdf. Last accessed on 14 January 2020.

[1332] See point 120, A. Concept of a 'tribunal', 2. Level of Jurisdiction, European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb), (Council of Europe, Updated to 31 December 2017), at p. 29. See ECHR/COE website: https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf. Last accessed on 20 January 2020.

and the German Federal Constitutional Court[1333]. A common feature of reforms to both the UN and the EU systems concerned the need to reduce their caseloads[1334] and concerns about delays in the administration of justice. However, while this may not be the case with the OSCE given its much smaller staff numbers, it will be recalled from the SIC in 2017 that the OSCE has experienced a *increased number of complaints and appeals cases submitted in 2017 by current or former OSCE officials*' [emphasis added] [1335]. Inevitably, this may have important ramifications. On the other hand, strong pressures now exist to incorporate a layer of appeal or at least robust review against first-instance determinations of employee rights[1336]. With staff representatives, supported by human rights groups, also arguing that the right to appeal forms a standard of the administration of justice, particularly at the UN, the establishment of a second instance is considered desirable in order to improve the level of protection and bring it into line with most national court systems. This is partly why the question of a two-tier legal protection was vigorously addressed in the context of the reform of the UN administration of justice and leading to the establishment of the UNDT and UNAT in 2009[1337].

5.4.9. Oral hearings, legal representation

Although an IRB shall determine whether oral hearings[1338] shall be held (such hearings will take place in camera), by convention proceedings are conducted exclusively in writing. At the same time, as 'persons from outside the Organization shall not be allowed to attend meetings of the [IRB] as a representative of the appellant'[1339], a staff/mission member of the OSCE may only have his/her appeal presented to the IRB in writing, on his/her behalf

[1333] G. Ullrich, *supra,* note 540, (Duncker & Humblot, Berlin, 2018), 'III. Right of appeal, review', at p. 517.
[1334] See H. Cameron., ,Establishment of the European Union Civil Service Tribunal', *Law and Practice of International Courts and Tribunals,* (2006), 273-283.
[1335] See OSCE Financial Report and Financial Statements for the year ended 31 December 2017 and the Opinion of the External Auditor, 11 July 2018. See OSCE website: https://www.osce.org/secretariat/387377?download=true. Last accessed on 20 January 2020, at para. 46.
[1336] See B. Kingsbury & R. B. Stewart., *supra,* note 1261, (Katerina Papanikolaou / Martha Hiskaki eds., London: Esperia, 2008), at p. 91. Kingsbury and Stewart have noted that '[t]hese pressures reflect the need to provide a workable realization of (or surrogate for) a general human right to a judicial-type process, including appellate review, for certain kinds of claims'.
[1337] G. Ullrich, *supra,* note 540, (Duncker & Humblot, Berlin, 2018), at p. 518.
[1338] Article V(2) Procedure of the Internal Review Board, Appendix 12, SRSR.
[1339] Article VI(1) Assistance to the appellant, Appendix 12, SRSR.

by a lawyer at his/her own expense[1340]. As recognized by the UN Secretary-General in his 2012 report with regard to the UN[1341], there are likewise many barriers to OSCE staff/mission members engaging private lawyers, either paid or *pro bono*, to handle issues relating to their employment at the OSCE, especially those in the field. These include, in the context of the OSCE, the unfamiliarity of external lawyers with the specificities of the Organization's internal regulatory framework[1342], as well as resulting from the costs involved for the staff/mission member and their ability to have access to justice. Article VI(1) of the Internal Appeals Procedure at the OSCE states that: '[p]ersons from outside the Organization shall not be allowed to attend meetings of the [IRB] as a representative of the appellant'[1343]. All this compromises the due process right to equality of arms, with OSCE staff/mission members either representing themselves or relying on the support of frequently not highly qualified staff representatives[1344]. In relation to the presentation of claims and equality of arms, the *Redesign Panel* stated that to guarantee due process and to facilitate decisions, and to guarantee equality before courts and tribunals, 'access to lawyers and legal services is crucial'[1345]. As has been seen, the lack of a programme of in-house legal assistance and representation at the OSCE which provides legal services to OSCE staff/mission members who wish to appeal an administrative decision, or, as indicated, who are subject to disciplinary action, may be contrasted with the UN which has a 'long-standing principle' dating from 1956 of providing access to legal advice and representation for its staff members[1346]. This has the clear advantage of providing professional and objective legal advice so as to avoid non-meritorious claims which encumber the formal system[1347]. To ensure that all employees have access to its internal

[1340] Ibid.
[1341] UN Doc. A/67/265, paras. 21 and 25.
[1342] See A. Trebilcock, Panel Discussion – Summary and Introduction', 'Legal representation in hearings has been eliminated in the World Bank peer review system, largely because in the past outside counsel for staff did not understand the peer review setting and often proved to be a hindrance to their clients. Now staff obtain helpful advice from the Staff Association lawyer […]' p. 75.
[1343] Article V(1) Assistance to the appellant, Appendix 12, Internal Appeals Procedure, SRSR.
[1344] *Report of the Redesign Panel, supra,* note 137, para. 100-06.
[1345] Ibid, para. 10.
[1346] See UN Office of Administration of Justice, Office of Staff Legal Assistance (OSLA) website: https://www.un.org/en/internaljustice/osla/. Last accessed on 14 January 2020.
[1347] In UNGA Res. 68/254. Administration of justice at the United Nations (2013), (UN Doc. A/RES/68/254 of 14 January 2014), para 18, the UN General Assembly recognized the importance of the Office of Staff Legal Assistance in the informal system ,as filter in the system of administration of justice' and encouraged the Office ,to continue to advise staff on the merits of their cases, especially when giving summary or

dispute resolution system, the OSCE could provide funds for the Staff Committee to employ an attorney to offer legal assistance during the peer review process.

5.4.10. Operational independence

The Board considers the case in private – without the presence of the appellant, the Administration's representatives or staff representative observers. Within 60 days upon receipt of the Secretary General's or the respective head of institution/mission's reply to the appellant's request and/or written statement'[1348], and at the end of the Board's deliberations, the IRB 'shall, by majority vote, adopt its report' (summarizing the case), including its 'recommendation'[1349] to the OSCE Secretary General or respective head of institution/mission[1350]. This amounts to advice to the OSCE Secretary General on what action he/she should take in a final decision. Like DCs, such bodies only act in an advisory [1351] capacity to the OSCE Secretary General or respective head institution/missions, who retain discretion on the final binding decision. As IRBs can only make recommendations after performing its fact-finding function, and cannot determine the rights and obligations of the persons concerned, this leaves the PoA as a one-tier justice system with no right of appeal. Moreover, the extent to which recommendations made by an IRB are rejected by the OSCE Administration and the time taken for the examination of such cases is open to question. On the other hand, it is a basic duty of the OSCE, like all IOs, to ensure the effective and efficient management of financial resources made available to the Organization by its participating States, which requires that any appeal lodged is to

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preventive legal advice'. See UN website: https://undocs.org/A/RES/68/254. Last accessed on 14 January 2020.

[1348] Article V(7) Procedure of the Internal Review Board, Appendix 12, Internal Appeals Procedure, SRSR.

[1349] Ibid, Article V(5).

[1350] Ibid, Article V(6). 'The report of the Board shall be submitted to the head of institution/mission concerned, and to the Secretary General if the Board was constituted at the Secretariat due to staff deficit in the institution/mission concerned or if the appeal relates to a decision from the Secretary General'.

[1351] For IRBs, see Article X Appeals OSCE Staff Regulation 10.01(b) Internal Appeals Procedure, SRSR: '[i]n the event of an appeal, an Internal Review Board shall be established to *advise* respectively the Secretary General…' [emphasis added]; for the DC, see OSCE Staff Rule 9.06.3(g) - Procedure before the Disciplinary Committee: '[t]he Disciplinary Committee shall act in an *advisory* capacity to the Secretary General or the respective head of mission/institution..'

be examined in depth[1352]. This is expressly addressed by Article VIII(2) of the Internal Appeals Procedure[1353], which provides that the decision of the OSCE Secretary General or respective head of institution/mission is required to be 'fully substantiated and provide reasons on which it is based'[1354]. However, while the concerned OSCE staff/mission member has the right to appeal the final 'decision'[1355] of the OSCE Secretary General or respective heads of institution/mission to the PoA, where adjudication decisions on such cases are 'final, and binding within the OSCE'[1356], this leaves no right of appeal. Once the final decision, with a copy of the report of the Board, has been notified to the OSCE staff/mission member concerned and to the Chairperson of the Board[1357], 'copies of all the essential documents of the appeal (request, supporting documents, Board's report, final decision), shall be forwarded to the Secretariat)'[1358]. In view of their character, the Board's proceedings and its reports are confidential. One significant exception to this rule is that an appellant wishing to contest the final decision of the OSCE Secretary General may disclose the report to the Panel.

5.4.11. Conclusion

Although the OSCE system of internal justice has enshrined certain due process standards in the SRSRs, they lack certain key features necessary to comply with a staff/mission member's procedural rights. As indicated, the situation with the IRBs and DCs is comparable to the now abolished JABs and JDCs in the pre-reform UN regime, where the latter was considered by the *Redesign Panel* not to objectively constitute an impartial and

[1352] In this context, it is of note that the ILOAT have encouraged decision-making authorities to fulfill this duty by requiring them to give reasons for any divergence between the final decision and the opinion of the internal advisory body. It considers that '[…] the right to an internal appeal is a safeguard enjoyed by international civil servants […]. The value of the safeguard is significantly eroded if the ultimate decision-making authority can reject conclusions and recommendations of the internal appeal body without explaining why'. ILOAT, Judgment No. 3208, para 11.
[1353] Article VIII(2) Final decision, Appendix 12, Internal Appeals Procedure, SRSRs.
[1354] See ILOAT Judgment No. 3969, consideration 20. The Tribunal observed ,[t]he executive head of an international organisation is not bound to follow a recommendation of any internal appeal body nor bound to adopt the reasoning of that body. However an executive head who departs from a recommendation of such a body must state the reasons for disregarding it and must motivate the decision actually reached [...]'.
[1355] OSCE Staff Regulation 10.02 External Appeals Procedure, SRSR.
[1356] Article VIII(8) Adjudication decisions, Appendix 2, ToR PoA, SRSR.
[1357] Article VIII(3) Final Decision, Appendix 12, Internal Appeals Procedure, SRSR.
[1358] Ibid, Article VIII(4).

competent tribunal. This serves to reduce confidence in the system by the parties to disputes and raises the question of the extent to which a perception of 'unequal justice' exists in the 'handling of cases' across the OSCE executive structures.

5.5. External Appeal to Panel of Adjudicators of the OSCE

5.5.1. Introduction

As already noted, the question of the establishment of a PoA for the OSCE was first considered in 1996 by the OSCE Permanent Council, having approved Staff Regulations which included provisions on 'External Appeals Procedures' and the 'right of final (also known as external) appeal to a PoA. However, although a ToR PoA was subsequently approved by the OSCE Permanent Council in 1998, it was not until the adoption of SRSRs in 2003[1359] and the Panel's subsequent composition a year later that the PoA was formally established. Today, as indicated, the provisions relevant to the functioning of the PoA are laid down in Article X on Appeals of the SRSR, namely OSCE Staff Regulation 10.02 on External Appeals Procedure; OSCE Staff Rule 10.02.1 on Direct appeal to the PoA; OSCE Staff Rule 10.02.2 (a) to (e) on Applications; and, in Appendix 2 of the SRSR, which contains the ToR PoA[1360]; and, as shall be seen, the ToR PoA contains certain features that are common to a number of tribunal statutes. In addition to this set of rules approved by the OSCE Permanent Council, the PoA, pursuant to OSCE Staff Rule 10.02.2 and the general principle that courts are masters of their own procedure[1361], adopted its own Rules of Procedure[1362], which prescribe in detail the format requirements for external appeal

[1359] Report of the OSCE Secretary General, Ambassador Ján Kubiš, 12th Meeting of the OSCE Ministerial Council, (OSCE Doc. MC.GAL/6/04 of 6 December 2004), states that , [f]ollowing the *adoption* of the Staff Regulations and Rules, Legal Services (renamed Office of Legal Affairs in 2018) has been active in the establishment of the Panel of Adjudicators which will hear final appeals from fixed-term staff and mission members. *The Panel will commence hearing appeals in the New Year*' [emphasis added], at p. 10. See OSCE website: https://www.osce.org/mc/38448?download=true. Last accessed on 14 January 2020.
[1360] OSCE Permanent Council Decision No. 248, Approves the attached Terms of Reference for the Panel of Adjudicators foreeseen under Staff Regulation 11.02, (OSCE Doc. PC.DEC/248 of 23 July 1998). See OSCE website: https://www.osce.org/pc/20561?download=true. Last accessed on 14 January 2020.
[1361] See O. Elias and M. Thomas., *supra,* note 804, (Martinus Nijhoff Publishers, 2012), at p. 169.
[1362] Pursuant to OSCE Staff Rule 10.02.2(a) on Applications, 'Applications shall conform to the format requirements as set out in the *[RoP PoA]* as established in accordance with Article VII [on Adjudication Procedure] of Appendix II, [ToR PoA] of the Staff Regulations, as applicable at the time of filing an application' [emphasis added]. While the OSCE has not made the RoP of the PoA publicly available, two

submissions; but unlike most other principal IATs[1363], this latter document has not been made available to the public[1364]. Rather than joining another administrative tribunal[1365], and despite the additional costs normally involved, it is noteworthy that the OSCE opted to establish its own single-instance body for the formal adjudication of internal staff disputes[1366]. This is a common feature of other regional organizations, such as the OECD[1367], CoE[1368], NATO[1369], OAS[1370] and EU[1371], all of which have established their

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sources at least shed some light on when the RoP PoA was adopted after composition of the Panel in 2004. First, Professional Working Environment – Guide, *supra,* note 216, (2010), p. 18, indicates that the RoP PoA was identified and distributed by the OSCE as CIO.GAL/58/06. See OSCE website: https://www.osce.org/gender/30604?download=true. Last accessed on 14 January 2020. Secondly, A-M Thévenot-Werner, 'II Les juridictions instituées', *Le droit des agents internationaux à un recours effectif. Vers un droit commun de la procédure administrative internationale*, (Brill/Nijhoff, 2016), p. 284, noted that the RoP PoA was adopted on 31 March 2006. However, it remains unclear whether there have been any subsequent amendments.

[1363] See e.g., Rules of Procedure of the UNDT: https://www.un.org/en/internaljustice/pdfs/2009-12-16-undt-rop.pdf. Last accessed on 31 October 2019; Rules of Procedure of the UNAT: https://www.un.org/en/internaljustice/pdfs/2019-01-11-UNAT-rules-of-procedure.pdf. Last accessed on 30 October 2019; Rules of the ILOAT, https://www.ilo.org/tribunal/about-us/WCMS_249195/lang--en/index.htm. Last accessed on 31 October 2019; Rules of Procedure of the OECD Administrative Tribunal: https://www.oecd.org/administrativetribunal/statuteandrulesofprocedure.htm. Last accessed on 30 October 2019; IMFAT Rules of Procedure: https://www.imf.org/external/imfat/pdf/IMFATrules.pdf. Last accessed on 31 October 2019; OASAT Rules of Procedure: https://web.oas.org/tribadm/en/Pages/reglamento.aspx. Accessed on 31 October 2019.

[1364] As the Rules of Procedure of the PoA are not publicly available, it is unclear whether the Panel holds an annual plenary meeting to deal with questions affecting its administration or operation.

[1365] Article II, para. 5 of the Statute of the Administrative Tribunal of the International Labour Organization (ILOAT), grants IOs other than the ILO the right of recognizing the jurisdiction of the ILOAT, which has its seat in Geneva. Most agencies of the UN and several other IOs with separate internal appeal systems have utilized this offer. Today, the jurisdiction of the ILOAT extends to fifty-nine organizations, which include not only universal organizations (such as the World Trade Organization (WTO), the International Atomic Energy Agency (IAEA), the World Intellectual Property Organization (WIPO) and the International Criminal Court (ICC)), but also regional institutions in Europe (e.g., the European Organization for Nuclear Research (CERN) or the European Free Trade Association (EFTA), and the Americas (e.g., the Pan American Health Organization, under the aegis of the World Health Organization (WHO). See http://www.ilo.org/tribunal/membership/lang--en/index.htm, accessed on 24 July 2018.

[1366] It may also be noted that no provision is made for other IOs to affiliate with the Panel.

[1367] The OECD Administrative Tribunal was set up in 1992 when it replaced the Organization's Appeals Board. See OECD website: https://www.oecd.org/administrativetribunal/abouttheoecdadministrativetribunal.htm, accessed on 24 July 2018.

[1368] The Administrative Tribunal of the Council of Europe (CoEAT), previously named the Council of Europe Appeals Board until 5 April 1994, was established in 1965. See CoE website: https://www.coe.int/en/web/tribunal/administrative-tribunal. Last accessed on 14 January 2020.

[1369] The NATO Appeals Board, the predecessor of the Administrative Tribunal of NATO, was created in 1965 and remained operational until its replacement in 2013. See NATO website: https://www.nato.int/cps/en/natohq/topics_114072.htm. Last accessed on 14 January 2020.

[1370] The Administrative Tribunal of the OAS was established in 1971. See OAS website: https://web.oas.org/tribadm/en/pages/default.aspx. Last accessed on 14 January 2020.

[1371] In 2016, the EU Civil Service Tribunal was established in 2005 and ceased to exist in 2016 when all disputes between the EU and its civil servants were transferred to the General Court of Jurisdiction at first

own administrative tribunals since the 1960s[1372]. Although it remains unclear, given the lack of a published record[1373] behind its decision, why the OSCE Permanent Council agreed at the outset that the OSCE should have its own judicial mechanism[1374], one possible explanation refers to the importance of IOs seeking to enjoy 'a certain degree of autonomy in interpreting the legal rules governing the status of its staff members'[1375]. Finally, even though the SRSRs refer to 'a PoA'[1376] rather than 'tribunal', the adjudicatory[1377] functions

instance. It may also be noted that two financial intitutions of the UN system opted to establish their own judicial mechanisms, namely the World Bank Group and the International Monetary Fund (IMF). Other financial institutions at the world and regional level that have founded their own administrative tribunals instead of delegating the task of adjudication include, for example, the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), International Finance Corporation (IFC); African Development Bank, Inter-American Development Bank, and the Asian Development Bank (ADB).

[1372] See J. Powers., 'The Evolving Jurisprudence of the International Administrative Tribunals: Convergence or Divergence?', in (eds. P. Quayle and X. Gao) *Asian Infrastructure Investment Bank (AIIB) Yearbook of International Law*, (Beijing, China, 2018), at p. 69.

[1373] It her 2018 article in the *Asian Infrastructure Investment Bank (AIIB) Yearbook of International Law*, Powers stated that 'there are now over 15 different administrative tribunals in existence', but perhaps not surprisingly, omitted the PoA from her list: African Development Bank Administrative Tribunal (AfDBAT); Asian Development Bank Administrative Tribunal (ADBAT); Administrative Tribunal of the Bank for International Settlements (BISAT); Council of Europe Administrative Tribunal (CoE AT); European Bank for Reconstruction and Development Administrative Tribunal (EBRDAT); Appeals Board of the European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT); European Space Agency Appeals Board (ESA Appeals Board); European Stability Mechanism Administrative Tribunal (ESMAT); Inter-American Development Bank Administrative Tribunal (IDBAT); ILOAT; International Monetary Fund Administrative Tribunal (IMFAT); North Atlantic Treaty Organization Administrative Tribunal (NATO AT); Organization of American States Administrative Tribunal (OASAT); Organization for Economic Co-operation and Development Administrative Tribunal (OECDAT); UNAT; WBAT. The European Union Civil Service Tribunal was dissolved in 2016. See J. S. Powers, *supra,* note 803, (BRILL Nijhoff, Leiden / Boston, 2018), at p. 69.

[1374] Given the lack of a published record behind the OSCE's decision to establish its own judicial mechanism, it is unclear how the OSCE participating States sought to influence the management of human resources. However, as noted by Schermers and Blokker, it is ,quite possible [to use the administrative tribunal of another organization] ,since the relationship between [IOs] and their staff is more or less founded on the same principles in all [IOs]'. H. G. Schermers & N. M. Blokker., *supra,* note 3, (Brill Nijhoff Publishers, 2018), at p. 456.

[1375] C. Tomuschat., 'International Courts and Tribunals, in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law,* vol V, (Oxford University Press, 2012), para 13. See also J. S. Powers., ,V. 10. Reinventing the Wheel – The Establishment of the IMF Administrative Tribunal', in C. de Cooker (ed), *International Administration, Law and Management Practices in International Organisations* (Martinus Nijhoff Publishers, Leiden/Boston, 2009), at p. 955. According to Powers, considerations that weighed in favour of the IMF establishing its own tribunal rather than accede to the jurisdiction of an existing one include '[…] independence in matters of administrative policy [and] the possibly undesirable consequences of applying another organization's jurisprudence […]'.

[1376] OSCE Staff Regulation 10.02(a) External Appeals Procedure, SRSR. The ToR PoA refers to 'decisions' rather than 'judgments', and 'adjudicators' than 'judges'.

[1377] Examination of the term adjudication discloses that the adjudicatory function is considered to be '[t]he giving or pronouncing of a judgment or decree in a cause; also the judgment'. See *Black's Law Dictionary*: https://thelawdictionary.org/adjudication/. Last accessed on 14 January 2020.

of those serving on the Panel may be considered in essence as no different from that of most other IATs established to settle employment disputes judicially[1378]. The dispute settlement involved in the PoA relates only to formal disputes and which therefore as a rule must be determined solely by the application of legal norms[1379]. The provisions and terminology used in the ToR PoA that 'adjudication decisions shall be final, and binding within the OSCE'[1380] may be contrasted with OSCE Staff Regulation 10.01 relating to establishing an IRB to 'advise respectively the Secretary General, the head of institution or the head of mission regarding'[1381] staff appeals, and it may be noted that the ToR PoA contains no similar provision attributing an advisory character to its functions. However, as has been seen, with greater attention paid in recent years to due process requirements in administrative tribunal models[1382], particularly in the light of the 2006 Report of the *Redesign Panel*, some concerns about the adequacy and indeed the legitimacy of the OSCE's external appeal procedures[1383], including the design and operation of the existing PoA, may be noted.

[1378] C. F. Amerasinghe., *The Law of the International Civil Service, supra,* note 119, (Oxford University Press, 2nd ed., 1994), at 220-224.
[1379] Ibid, at 221.
[1380] Article VIII(8) Adjudication Decisions, ToR PoA, Appendix 2, SRSR.
[1381] OSCE Staff Regulation 10.01(b) Internal Appeals Procedure, Article X, Appeals, SRSR.
[1382] As the Executive Secretary of the World Bank Administrative Tribunal noted in 2007, one year after the Report of the *Redesign Panel*: ‚times are changing quickly. Practices that were considered unobjectionable twenty years ago would be highly problematic today and could give national courts grounds to pierce a tribunal's veil of independence. Public scrutiny has greatly increased, and the demands for transparency have become ever more stringen...International administrative tribunals were created in the first half of the last century, and proliferated in ist second half. International administrative law was developed through the genius of leading members of the international legal community. The field can no longer, however, rest solely on the reputation of ist founders and successors'. N. Ziadé., ‚The Independence of International Administrative Tribunals', unpublished paper presented at the World Bank Administrative Tribunal Conference, 27 March 2007, p. 17.
[1383] As noted by Kingsbury and Stewart, '[t]he issues of legitimacy facing international administrative tribunals may be compared, for example, with those confronting investor-state arbitration tribunals under bilateral and miultilateral investment treaties. These two sets of tribunals are also comparable in that both are developing a jurisprudence on substantive and procedural issues of global administrative law'. B. Kingsbury and R. B. Stewart., *supra,* note 980, (Martinus Nijhoff Publications, 2009), p. 89.
[1383] *Report of the Redesign Panel, supra,* note 137, para. 130.

5.5.2. Lack of possibility for appealing final adjudication decisions of the Panel

The judgments of most IATs have the authority of *res judicata*, literally translated 'a matter that has already been judged'[1384]. A shared feature of both civil and common law systems[1385], this legal principle comprises two aspects. First, a judgment given by a tribunal closes without further recourse the proceedings brought under its jurisdiction[1386]. The effect of substantive *res judicata* prevents rights confirmed by a previous judgment of a tribunal from being disputed anew[1387]. In so far as the Statute of a tribunal may state that its judgments are final and without appeal[1388], the doctrine is clearly applicable, as has been confirmed in consistent case law of the tribunals[1389]. For example, the WBAT, commenting on the parallel provision of its Statute, observed in *van Gent (No. 2) v. International Bank for Reconstruction and Development*: 'Article XI lays down the general principle of the finality of judgments of all judgments of the Tribunal. It explicitly stipulates that judgments shall be 'final and without appeal'. No party to a dispute before the Tribunal may, therefore, bring his or her case back to the Tribunal for a second round of litigation, no matter how dissatisfied he or she may be with the pronouncement of the Tribunal or its

[1384] G. Ullrich, *supra,* note 540, (Duncker & Humblot, Berlin, 2018), at p. 516. See also C. F. Amerasinghe., *The Law of the International Civil Service, supra,* note 119, (Oxford University Press, 2nd ed., 1994), at p. 241.
[1385] See N. Ridi., 'Precarious Finality? Reflections on *Res Judicata* and the *Question of the Delimitation of the Continental Shelf Case*', in the *Leiden Journal of International Law,* Volume 31, Issue 2, (Cambridge University Press, 2018), at p. 384-385. '[I]t protects defendants from having to answer proceedings multiple times concerning the same matter (*nemo debet bis vexari pro una et eadem causa*) and can thus be analogized with the cognate principle of *ne bis in idem*. As a matter of public policy, it ensures that there is an end to litigation (*expedit rei publicae ut sit finis litium*), furthers legal security considerations by preventing divergent decisions being taken on the same matter, and encourages the economic efficiency of the courts in both the second proceedings (by allowing the dismissal of the suit) and in the first (by charging the claimant with the burdern or presenting a comlete claim, rather than fragmenting it)'.
[1386] See, for example, ILOAT Judgments No. 3106, para. 4, 2316, para. 11. A judgment with the force of *res judicata* is brought about when proceedings in an action filed by an applicant terminate. Proceedings would terminate in such a judgment for any of the following reasons: (a) where the respondent and the applicant agree to terminate proceedings; (b) by a transaction between the applicant and the respondent; (c) by withdrawl of the complaint; or (d) by a final judgment from the court of jurisdiction. See C. F. Amerasinghe., *The Law of the International Civil Service, supra,* note 119, (Oxford University Press, 2nd ed., 1994), at p. 242-243.
[1387] Ibid. If, however, there is no judgment on the merits, a new complaint is not barred by *res judicata.* See G. Ullrich, *supra,* note 540, (Duncker & Humblot, Berlin, 2018), at p. 516.
[1388] Ibid.
[1389] Ibid.

considerations'[1390]. It may also be noted that the principle of substantive *res judicata* is applicable even in the absence of express reference to finality in the constituent documents of the tribunal in question. Where an earlier compliant has been dismissed, the principle applies if the 'parties, the purpose of the suit and the cause of action are the same […]'[1391]. Secondly, since the principle of formal *res judicata* has it that no appeals may be brought against the decision of most IATs, there is no recourse to a higher court for staff members. Indeed, subject to request for 'revision'[1392] by the Panel, 'adjudication decisions shall be final, and binding within the OSCE'[1393] and, consequently, an OSCE staff/mission member cannot exercise his/her due process right to appeal an adverse finding by the Panel. Unlike with the former UNAdT[1394] and for a long time the ILOAT[1395], the ToR PoA do not provide

[1390] WBAT Decision No. 13 (1983), para. 21. The IMFAT has affirmed the principle of the finality of a judgment in rejecting requests for interpretation of judgments, concluding '[t]he legality of the Judgment is not a matter in respect of which the applicable provisions of the Statute and the Rules of Procedure enable the Tribunal to issue an interpretation, because the judgment is final and without appeal'. The doctrine is also applicable even in the absence of express reference to finality in the constituent documents of the tribunal. IMFAT Order No. 1997-1, *Interpretation of Judgment No. 1997-1 (Mrs. "C", Applicant v. International Monetary Fund, Respondent),* (22 December 1997).

[1391] See, for example, ILOAT Judgment No. 3511, Consideration 4, citing, ILOAT Judgments Nos. 1216, under 3, and 1263, under 4. See ILOAT Judgment 2993, under 6, reiterated in Judgment 3248, under 3. See also C. F. Amerasinghe., *The Law of the International Civil Service, supra,* note 119, (Oxford University Press, 2nd ed., 1994), at p. 242.

[1392] Requests to revise a final adjudication decision may be made in certain circumstances, which is a derogation from the principle of *res judicata* and the finality of judgments. Article IX(1) Revision of an Adjudication Decision, Appendix 2, SRSR states that: '[t]he Secretary General or the respective head of institution/mission, or the applicant may request the Panel, through its Chairperson, to revise the adjudication decision, in the event of the discovery of a fact that, by its nature might have had a decisive influence on the adjudication decision of the Panel and was unknown both to the Panel and to the party/parties concerned at the time the adjudication decision was delivered. Such a request shall be made within two months of that party acquiring knowledge of such fact, but not later than six months of the date of the adjudication decision'.

[1393] Article VIII(8) Adjudication decisions, ToR PoA, Appendix 2, SRSR. An adjudication decision with the force of *res judicata* is brought about when proceedings in an action filed by an applicant terminate. Proceedings would terminate in such a decision, for example if the applicant withdraws his/her application or if a settlement by mutual agreement is reached pursuant to Article VII(6) Adjudication Procedure, Appendix 2, ToR PoA, SRSR, or, as indicated, by a final adjudication decision from the Panel.

[1394] In 1955, the Statute of the former UNAdT, as amended by GA. Res. 957 (X). Procedure for review of United Nations Administrative Tribunal judgments: amendments to the Statute of the Administrative Tribunal, (UN Doc. A/RES/957 (X) of 8 November 1955), made provision in its new Article 11 for a very limited right of appeal of UNAdT judgments through the power of a special committee to request Advisory Opinions from the ICJ. See UN website: https://undocs.org/A/RES/957%20(X). Last accessed on 15 January 2020. This was abolished in 1995 by the GA Res. 50/54. Review of the procedure provided for under article 11 of the statute of the Administrative Tribunal of the United Nations, (UN Doc. A/RES/50/54 of 29 January 1996). See UN website: https://undocs.org/en/A/RES/50/54. Last accessed on 15 January 2020.

[1395] In accordance with Article V(1) of the ILOAT Statute, the judgments rendered by the Tribunal ,shall be final and without appeal'. However, the Statute contained a crucial *caveat*, since Article XII(1) still permits reference to a judgment to the ICJ for an advisory opinion when the Governing Body of the ILO or the Administrative Board of the Pensions Fund challenges a judgment confirming the jurisdiction of the ILOAT or considers that the judgment is vitiated by a fundamental fault in the procedure followed.

for a procedure for final adjudication decisions to be reviewed by the ICJ by way of an Advisory Opinion.[1396]. At this point, it is worth reiterating that the challenges of a single-tier justice system faced by litigants at the OSCE are similar in character to most other IOs, including the pre-reform UN, when in 2000 the Joint Inspection Unit considered the possibility of establishing a higher recourse instance in respect of the decisions of the former UNAdT[1397]. Likewise, in its Report, the *Redesign Panel* emphasized the need for a second instance and suggested the 'establishment of a two-tiered system' formal system of administration of justice in the UN as one of the cornerstones of the reform efforts. As indicated, a new tribunal, the UNDT, was subsequently created to serve as the first instance, whereas the then existing UNAdT was renamed the UNAT and has the primary function of hearing appeals from the UNDT.

5.5.3. Composition of the Panel of Adjudicators

The PoA has a very simple and reduced structure. Article III of the ToR PoA states that 'a maximum of six adjudicators shall be appointed'[1398], all of whom 'shall be 'nationals of

[1396] The appeal possibility for the UNAdT and ILOAT has been sparingly used, resulting in 3 and 2 ICJ advisory opinions respectively. See C. F. Amerasinghe., *supra,* note 705, (Oxford University Press, 2014), p. 333.
[1397] Joint Inspection Unit, Report of the Joint Inspection Unit, Administration of Justice at the United Nations, (UN Doc. JIU/REP/2000/1, Geneva 2000) at ix. See UN website: https://www.unjiu.org/sites/www.unjiu.org/files/jiu_document_files/products/en/reports-notes/JIU%20Products/JIU_REP_2000_1_English.pdf. Last accessed on 15 January 2020. For further attempts at establish mechanisms of review, see Report of the Joint Inspection Unit, Reform of the Administration of Justice in the United Nations System: Options for Higher Recourse Instances, Report of the Joint Inspection Unit, (JIU Doc. JIU/REP/2002/5). See UN website: https://www.unjiu.org/sites/www.unjiu.org/files/jiu_document_files/products/en/reports-notes/JIU%20Products/JIU_REP_2002_5_English.pdf. Last accessed on 15 January 2020. The latter report made concrete suggestions as to the composition of an *ad hoc* Panel functioning as a second instance as well as on the application criteria for a review of judgments. Interestingly, the report also included the views of a number of organizations within the UN system and not all were in favour of such a second instance. Ibid, paras. 52-66.
[1398] Article III(1) Appointment of the Panel, ToR PoA, Appendix 2, SRSR.

different participating States'[1399], with the Panel exercising their functions in Vienna[1400], where the OSCE has its Secretariat and the main decision-making bodies convene. There is one Chairperson, one Deputy Chairperson[1401], and four adjudicators[1402] and applications for an external appeal are ordinarily examined by a Panel consisting of three adjudicators[1403], including the Chairperson or his/her deputy[1404]. Like the statutes of more recently established IATs[1405], the ToR PoA contains general and specific indications as to the qualifications required for adjudicators, imposing less excessive constraints on the choice by the OSCE Chairmanship. Pursuant to Article II(2) Appendix 2, ToR PoA, SRSR, adjudicators 'shall be jurists or other persons of high standing with experience in the field of labour law, or international or national civil service law'[1406]. The use of the term 'adjudicators' to describe persons serving on the Panel rather than 'judges' is significant, indicating that judicial experience is not a requirement. While the OSCE excludes from

[1399] Article III(2) Appointment of the Panel, ToR PoA, Appendix 2, SRSR. In contrast with the statutes of the UNDT (Art. 4) and UNAT (Art. 3), it is noteworthy that no provision is included in the ToR PoA that due regard shall be given to gender balance in the appointment of adjudicators. See also M. Ebrahim-Carstens, ‚Gender Representation on the Tribunals of the United Nations Internal Justice System: A Response to Nienke Grossman', *AJIL Unbound,* 9 September 2016. See Cambridge Core website: https://www.cambridge.org/core/services/aop-cambridge-core/content/view/05D9914C66977187F0D00CB974833060/S2398772300002889a.pdf/gender_representation_on_the_tribunals_of_the_united_nations_internal_justice_system_a_response_to_nienke_grossman.pdf . Last accessed on 15 January 2020. That said, it is clear that the OSCE is committed to the principle of gender equality and an improved ratio of men and women at all levels of the Organization on a continuous basis as emphasized in OSCE Ministerial Council Decision No. 14/04 -2004 OSCE Action Plan for the Promotion of Gender Equality, (OSCE Doc. MC.DEC/14/04 of 7 December 2004). See OSCE website: https://www.osce.org/mc/23295?download=true. Last accessed on 15 January 2020. Furthermore, all OSCE international contracted vacancy notices include the following sentence: '[t]he OSCE Gender Action Plan is committed to increasing the number of female staff in all areas of the OSCE's work. Female candidates are strongly encouraged to apply for this management opportunity'. See OSCE website: https://jobs.osce.org/vacancies. Last accessed on 15 January 2020.

[1400] Article VII(4) Adjudication Procedure, Appendix 2, ToR PoA, SRSR.

[1401] Article VI(2) Composition of the Panel, Appendix 2, ToR PoA, SRSR. 'The Panel shall consist of three adjudicators, including the Chairperson or his/her deputy...'.

[1402] Article III(3) and (4) Appointment of the Panel, Appendix 2, ToR PoA, SRSR.

[1403] Article VI (2) Composition of the Panel, ToR PoA, Appendix 2, SRSR.

[1404] Ibid.

[1405] See S. Villalpando, *supra*, note 132, (Oxford University Press, 2016), at 1095- 1096. According to Art. V(1) of the WBAT Statute, judges 'shall be persons of high moral character that must possess the qualifications required for high judicial office or be jurisconsultants of recognized competence in the relevant fields such an employment relations, intertnational civil service and [IO] administration'. Similarly, Art. VII(1)(c) of the IMFAT Statute required that members of the Tribunal 'possess the qualifications required for appointment for high judicial office or be jurisconsults of recognized competence'.

[1406] Article II(2) Candidatures, ToR PoA, Appendix 2, SRSR.

public access the identity of the present and former Chairperson[1407], Deputy Chairperson, and the adjudicators, individuals appointed to these positions seem to reflect the old tradition in the UNAdT, which tended to be 'academics or persons who had served as state representatives to [IOs] or worked within such organizations'[1408]. But, again, in practice, the question of whether the provisions of the ToR PoA has enabled the PoA to have adjudicators possessing adequate qualifications and experience appointed to the Panel, and the extent to which this has affected its performance in the adjudication of cases remains unclear. Over the years, concerns have been voiced about the limited judicial, and in particular, the administrative law qualifications of judges serving on administrative tribunals and also the terms and conditions of service and the manner of their appointment[1409]. It has been pointed out that the selection process plays a significant role in order to ensure the appointment of individuals with the highest qualifications as well as to safeguard the independence of the judges[1410]. In the former UNAdT, this led to three separate amendments[1411] to its statute, with the last demanding 'judicial experience in the field of administrative law or its equivalent within their national jurisdiction'[1412]. To further improve the formal system, the *Redesign Panel* recommended stricter qualifications, requiring that candidates possess at least 10 years (for the UNDT) and 15 years (for the

[1407] It is interesting to note that an undated UN Human Rights Office of the High Commissioner (OHCHR) document entitled 'Vienna workshop on the prohibition of incitement to hatred' provides the following 'Biography' of Mr. Omür Orhun, described as the 'Chairperson of OSCE's Panel of Adjudicators, which is an 'honorary position'. Reflecting the old tradition at the UNAdT, Mr. Omür Orhun is not a 'professional judge' but instead 'was the Turkish Ambassador to Norway and later to Azerbaijan. He has served twice at the Turkish Foreign Office as Director General for International Security Affairs and was the Permanent Representative of Turkey to the OSCE. He has also served as the Personal Representative of the Chairman-in-Office of the OSCE on Combating Intolerance and Discrimination against Muslims. Presently, Ambassador Orhun is the Adviser and Special Envoy of the Organization of the Islamic Conference (OIC), dealing mainly with human rights issues, including combating discrimination against Muslims, and OIC's relations with other international organizations'. OHCHR Website: https://www.ohchr.org/Documents/Issues/Expression/ICCPR/ViennaExpertsBio.pdf
Last accessed on 15 January 2020.
[1408] See A. Reinisch & C. Knahr, *supra,* note 134, (2008), at p. 461. See also O. Elias and M. Thomas., *supra,* note 804, (Martinus Nijhoff Publishers, 2012), at p. 164. According to Elias and Thomas, members of IATs have tended to be experts in the field of employment law, the law of international organizations, international arbitration or dispute resolution.
[1409] Ibid, A. Reinisch & C. Knahr., at p. 460. See also Amsterdam International Law Clinic., 'The Judicial Independence of the Administrative Tribunal of the International Labour Organization (ILOAT): Potential for Reform', April 2007, 32-37.
[1410] Ibid, at 32.
[1411] Article 3(1) UNAdT Statute, as amended by A/RES/55/159 of 12 December 2000, para. 1(a); Article 3(1) UNAdT Statute, as amended by A/RES/58/87 of 9 December 2003.
[1412] Article 3(1) UNAdT Statute, as amended by A/RES/59/283 of 13 April 2005, para. 40.

UNAT) of 'relevant professional experience'[1413]. While the Statutes of the UNDT and UNAT now require 'judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions'[1414], Article 3(3)(b) of the UNAT Statute extends eligibility to '[…] *employment law*, or the equivalent within one or more national or *international jurisdictions*' (emphasis added). No doubt this instils professionalism into the appointments process in the new UN system, but it has raised some debate, in so far as the requirement that candidates have 'judicial experience' excludes from office well-qualified candidates who might be experts in the area, including those who have traditionally served in IATs such as professors of law or lawyers who have served as part-time judges[1415].

5.5.4. Independence and transparency of the Panel

5.5.4.1. Appointment procedure

A novel feature of the appointment of adjudicators to the PoA is their lack of transparency and the closed nature of the nomination processes[1416]. Pursuant to OSCE Staff Regulation 10.02(b), adjudicators are 'appointed by the OSCE Chairmanship (as opposed to the decision-making body that established the PoA, the OSCE Permanent Council)[1417] from a

[1413] *Report of the Redesign Panel, supra,* note 137, para. 129(c).
[1414] Article 4(3)(b) UNDT Statute provides that 'To be eligible for appointment as a judge, a person shall...Possess at least 10 years of judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions'. The latter provision would seem to limit membership to persons with administrative law experience. By contrast, Article 3(3)(b) UNAT Statute provides that 'To be eligible for appointment as a judge, a person shall…Possess at least 15 years of aggregate judicial experience in the field of administrative law, employment law or the equivalent within one or more national or international jurisdictions…'
[1415] See *Letter dated 18 July 2008 from the President of the Administrative Tribunal addressed to the President of the General Assembly,* (UN Doc. A/623/253 of 12 August 2008), and *Report of Internal Justice Council,* Administration of justice at the United Nations, (UN Doc. A/67/98 of 18 June 2012), para. 35. In 2014, the UN General Assembly amended (GA Res. 69/203. Administration of justice at the United Nations (UN Doc. A/RES/699/203 of 21 January 2015) the Statute of the UNAT to allow consideration of ‚Relevant academic experience, when combined with practical experience in arbitration or the equivalent, may be taken into account towards 5 of the qualifying 15 years'. Article 3(3)(b) UNAT Statute.
[1416] According to Judge Ebrahim-Carstens of the UNDT, ‚inviting applicants globally to apply on an individual basis rather than by way of state nomination...ensures a larger pool of global competitors who can apply independently, and freely, ruling out state politics, bias, and favouritism, and also assures a more representative candidature'. M. Ebrahim-Carstens, *supra*, note, 453, ‚Recruitment'.
[1417] It has been observed that judges are 'usually appointed by the governing body that established the tribunal'. In the case of the ILOAT, the appointing authority is only the International Labour Conference.

roster to which all participating States are invited to nominate candidates'[1418]; and it may be reiterated that the Chairmanship is held for one calendar year by an OSCE participating State. As the ToR PoA is silent on whether management of the OSCE, the Staff Committees or staff representatives are consulted in the process, this would seem to grant a virtual monopoly over the formal appointment of adjudicators to the OSCE Chairmanship[1419], which even extends to specifying 'the names of the persons who shall serve as the Chairperson and the Deputy-Chairperson of the Panel'[1420]. Awareness of the need for autonomy of IATs is very evident in most IOs where, as a rule, judges elect their own president[1421], who is entrusted with various tasks relating to the functioning of the tribunal[1422]. In terms of restrictions on eligibility, Article II(3) of the ToR PoA codifies the well-accepted principle[1423] that candidates nominated for the function of adjudicator 'shall not serve as OSCE officials'[1424]. However, that former OSCE officials may be considered

Article III(2) of the ILOAT Statute. See S. Villalpando, *supra*, note, 26, (Oxford University Press, 2016), at 1095.

[1418] OSCE Staff Regulation 10.02(b), SRSR. Article III(1) Appointment of the Panel, Appendix 2, ToR PoA, SRSR. See also Letter from OSCE Chairperson of the Permanent Council requesting ‚participating States to put forward candidatures for the Panel'. It is also emphasized that ‚Panel of Adjudicators serves an important function, ensuring OSCE internal compliance with the rule of law by providing an adequate legal remedy for employment issues to all OSCE officials'. Letter from Permanent Mission of Austria to the OSCE All Heads of Delegations of the OSCE Participating States and Partners for Cooperation, OSCE Secretariat and Institutions, (OSCE Doc. CIO.GAL/64/17 of 25 April 2017).

[1419] Yet, it may be questioned whether the OSCE Chairmanship consults with the OSCE Secretary General on the appointment of adjudicators given their daily co-operation. OSCE Ministerial Council Decision No. 15/04 Role of the OSCE Secretary General, (OSCE Doc. MC.DEC/15/04 of 7 December 2004). See para. 2. 'Acts as the representative of the Chairman-in-Office and supports him/her in all activities aimed at fulfilling the goals of the OSCE by, inter alia: — Providing expert, advisory, material, technical and other support which may include background information, analysis, advice, draft decisions, draft statements […].' The OSCE Chairmanship is held for one calendar year by the OSCE participating States designated as such by a decision of the Ministerial Council.

[1420] Ibid, para. 127.

[1421] Art. X(1) of the ILOAT Statute. Article VI(1) of the WBAT Statute. Article 4(7) of the UNDT Statute. Article 3(7) of the UNAT Statute. See, however, the special case of the IMFAT, whose President is appointed by the Managing Director (Article VII(1)(a) of the IMFAT Statute).

[1422] The Chairperson of the PoA has the function of: composing a Panel of three adjudicators to examine an application for external appeal (Article VI(1) Composition of the Panel, ToR PoA, Appendix 2, SRSR), notifying the applicant within once week of receipt of the application; informing the Secretary General, the respective head of institution/mission, of all procedural steps relating to the case (Article VII(3) Adjudication Procedure); notifying the adjudication decision to the applicant and to the Secretary General without delay (Article VIII(7) Adjudication decisions, ToR PoA, Appendix 2, SRSR).

[1423] Council of Europe Administrative Tribunal (CEAT) Statute, Art. 1(1); OECDAT, Staff Regulation 22(d); NATO Appeals Board (NATOAB), Statute, Art. 4.11; European Space Agency Appeals Board (ESAAB), Staff Regulation 34.2; OASAT, Statute, Art. III(6)(c), Rules of Procedure, Art. 1(2)(b).

[1424] Article II(3) Candidatures, Appendix 2, ToR PoA, SRSR.

'if three years have elapsed since separation from service'[1425] leaves open the possibility for the politicization of the appointments of adjudicators. Further, in the event that an adjudicator or deputy-adjudicator becomes an OSCE official, he/she shall resign immediately from his/her office of adjudicator'. The *Redesign Panel* noted that 'a person appointed as a judge should not be eligible for appointment to any other post within the [UN], except another judical post'[1426]. Besides, unlike the other more recently established IAT's[1427], no provision appears to be made in the ToR PoA for a stage of preliminary vetting of candidates by an independent advisory body at the OSCE to ensure impartial and efficient selection process. This is similar to the process by which judges in the pre-reform UN system were selected and re-elected[1428], raising the issue of political influence in appointments and issues concerning lack of independence and impartiality of adjudicators. To ensure that judges are 'free from external influence'[1429], the *Redesign Panel* proposed that judges at the UNDT and UNAT be appointed from a list of candidates prepared by a newly created independent body, the Internal Justice Council[1430], on which basis the UN General Assembly will proceed to the election[1431]. This proposal was taken up by the latter, with the conviction that the establishment of such a body can 'help to ensure independence, professionalism and accountability in the system of administrative justice'[1432]. According to the Internal Justice Council itself, this vetting mechanism has the advantage of providing

[1425] Article II(3) Candidatures, Appendix 2, ToR PoA, SRSR.
[1426] *Report of the Redesign Panel, supra,* note 137, para. 130.
[1427] In the WBAT, the President of the Bank draws up a list of candidates based on the recommendations of an advisory committee composed of four members, including representatives of management and staff associations, with one external expert. See O. Elias and M. Thomas., *supra,* note 804, (Martinus Nijhoff Publishers, 2012), at p. 164.
[1428] Article 3(2) of the original 1949 UNAT statute provided that ‚The members shall be appointed by the General Assembly […].'
[1429] *Report of the Redesign Panel, supra,* note 137, para. 126.
[1430] Ibid, para. 127. '[…] consisting of a staff representative, a management representative and two distinguished external jurists, one nominated by the staff and one by management, and chaired by another distinguished external jurist appointed by the Secretary-General after consultations with the other four members...'.
[1431] While the *Redesign Panel* proposed (*Report of the Redesign Panel, supra,* note 137, para. 128) that appointments to the UNDT were to be made by the Secretary-General, who represents the defendant organization in staff disputes, both Statutes now provide for appointment through the UN General Assembly. Article 4(2) of the UNDT Statute provides that 'The judges shall be appointed by the General Assembly on the recommendation of the Internal Justice Council in accordance with Assembly resolution 62/228'. Article 3(2) of the UNAT Statute provides that 'The judges shall be appointed by the General Assembly on the recommendation of the Internal Justice Council in accordance with General Assembly resolution 62/228'.
[1432] UN General Assembly Resolution 62/228, para. 35.

'expert and unbiased advice to the General Assembly on the merit of judicial candidates', and ensuring transparency in the selection process[1433]. At the same time, serious concerns have been raised over the existence of the possibility of judges being appointed for terms which can be renewed. Adjudicators of the PoA are currently appointed by the OSCE Chairmanship for 'a period of three years renewable'[1434]. While it is clear that the vast majority of the statutes of IATs allow for the renewal of the terms of judges without a limit as to the number of times[1435], the existence of such possibility at the OSCE nonetheless creates a conflict of interest. In the case of IATs, it has been acknowledged that the prospect of renewal 'could induce judges to favour the organization in their judgments in order to ensure or make more likely their reappointment'[1436]. In this respect and in keeping, by analogy, with the maxim that 'justice must not only be done; it must also be seen to be done[1437], the involvement of outside experts in the appointment process is considered to be crucial for guaranteeing independence and impartiality, as one of the conditions of a fair hearing. On the other hand, although a tribunal whose members are allowed to serve for long periods is likely to 'assemble a solid body of doctrines and set down firm roots that ensure jurisprudential continuity', it is recognized that 'there is today a growing opinion among experts that judges should be appointed for a long (say ten- or twelve-year) but non-renewable term'[1438]. The *Redesign Panel* recommended the appointment of judges of the UNDT and UNAT for 'a term of five years, renewable once only'[1439], which was slightly modified in the respective statutes to a 'non-renewable term of seven years'[1440]. Accordingly, to remove any perception of bias based on considerations of future employment in the PoA, an absolute prohibition on the reappointment of adjudicators would seem necessary and instead their terms of office should be prolonged. In addition,

[1433] See *Report of the Internal Justice Council, supra,* note 467, para. 8.
[1434] Article IV(1) Term of Office, ToR PoA, SRSR.
[1435] AfDBAT, Statute, Art(4); CEAT, Statute, Art. 1(2); IMFAT, Statute, Art. VII(2); ESAAB, Staff Regulation 34.3. This was also the situation at the WBAT prior to 31 July 2001. See, however, Art. IV(3) WBAT Statute (as amended in 2001), allowing only one reappointment.
[1436] See C. F. Amerasinghe., *supra,* note 705, (Oxford University Press, 2014), at p. 319. On independence and appointment procedure, see also A. Reinisch & C. Knahr, *supra,* note 134, (2008), at 462.
[1437] C. F. Amerasinghe., *supra*, note 127, (Cambridge University Press, 2005), at 256.
[1438] N. G. Ziade, Conflicts of Interest in International Administrative Law', Chapter 21 in (O. Elias eds.), *The Development and Effectiveness of International Administrative Law On the Occasion of the Thirtieth Anniversary of the World Bank Administrative Tribunal*, (2009) Martinus Nijhoff Publications, p. 389.
[1439] *Report of the Redesign Panel, supra,* note 137, para. 130.
[1440] Article 4(4) of the UNDT Statute. Article 3(4) of the UNAT Statute.

while the OSCE Chairmanship as the appointing body has the authority to appoint a replacement adjudicator, for example 'in the event of the death or resignation of an adjudicator during his/her term'[1441], there are no provisions in the ToR PoA relating to the removal[1442] of an adjudicator from 'office' in case of incompetence or misconduct. In this regard, the OSCE does not seem to have adopted a code of conduct[1443] for adjudicators of the PoA, which regulate the exercise of their functions, as well as mechanisms to investigate complaints against them. Such a code should be adopted by the OSCE and would conduce to the overarching principle in OSCE Staff Regulation 3.01 that 'the paramount consideration in the employment of OSCE officials and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity'[1444]. Lastly, against both customary international law and soft law, the ToR PoA does not reqire adjudicators to disclose possible conflicts of interest, thus seemingly leaving participation or recusal to the discretion of individual adjudicators.

5.5.4.2. Operational and budgetary autonomy of the Panel

In regard to the independence and autonomy of the PoA, Article V of the ToR PoA provides explicitly that 'in the discharge of their duties, the adjudicators and deputy-adjudicators shall be completely independent' and that adjudicators 'shall neither seek nor receive any instructions'[1445]. Notwithstanding this provision, there are some structural features of the ToR PoA that may compromise the operational and financial independence of the Panel. First, with regard to 'financial arrangements', the PoA does not have its own budget. Pursuant to Article X(1) of the ToR PoA, '[t]he Secretary General shall make all the

[1441] Article IV(2) Term of Office, Appendix 2, ToR PoA, SRSR.
[1442] Express reference was also made by the *Redesign Panel* to the need for putting in place 'removal procedures'. See *Report of the Redesign Panel, supra,* note 137, para. 126.
[1443] See the Codes of Conduct which regulate the exercise of judicial functions for the UNDT and UNAT judges, adopted by the UN General Assembly Res. 66/106 of 9 December 2011. Available at OAJ website: https://www.un.org/en/internaljustice/oaj/. Last accessed on 15 January 2020. With regard to the mechanism established to investigate complaints against judges, see GA Res. 67/241, Administration of justice at the United Nations, (UN Doc. A/RES/67/241 of 14 February 2013), para. 41 (in Annex VII, Section B, of the UN Secretary-General's report A/67/241 of 8 August 2012.
[1444] OSCE Staff Regulation 3.01, SRSR.
[1445] Article V Independence of the adjudicators and deputy-adjudicators, Appendix 2, ToR PoA, SRSR.

administrative arrangements necessary for adjudication' and 'within the existing OSCE Budget'[1446]. It is to be noted in this regard that funds allocated to the PoA from the OSCE Unified Budget fall under the budget line of the 'OSCE 'Chairman-in-Office'[1447], the same office which, as indicated, appoints the PoA[1448] and upon receipt of an application for external appeal, decides whether to 'overrrule the impugned decision'[1449] or to transmit the application to the Chairperson of the Panel for the 'Panel to decide on the application'[1450]. Since '[a]djudicators shall serve without remuneration from the OSCE'[1451], this budget line covers only 'travel expenses and payment of a subsistence allowance, if applicable, for the duration of the adjudication sessions'[1452]. Appreciation of the need for renumeration for judicial services provided by judges has been cogently articulated by Amerasinghe, who noted that 'if the quality and independence of of judges of IATs is to be preserved, respectable compensation must be provided for work done'[1453]. The fact that adjudicators are not paid appointees does not promote commitment and work of high quality. In this, a clear parallel can be drawn with the judges of the former UNAdT, in which the *Redesign Panel* suggested that judges of the new UN Tribunals 'should be paid a proper honorarium'[1454]. The UN has now changed its system and judges of both the UNDT and UNAT are paid appointees, with the former being paid the salary of D-II staff members of

[1446] Article X(1) Administrative and Financial Arrangements, Appendix 2, ToR PoA, SRSR.
[1447] See 2017 OSCE Unified Budget, *supra,* note 86, at 'I. Funds Related to the Secretariat and Institutions, Chairman-in-Office', at p. 3. According the the *OSCE Handbook*, the 'Chairmanship is headed by a 'Chairman-in.Office (CiO), the Foreign Minister of the State concerned. The post was first introduced at the 1990 Paris Summit. At the 1992 Helsinki Summit, the responsibilities of the Chairman-in-Office were defined as 'the co-ordination of and consultation on current CSCE business'. The Chairman-in-Office presides over summits and the Ministerial Council. A member of the Chairmanship, generally the Permanent Representative, chairs the Permanent Council. The Chairman-in-Office is assisted by the outgoing and incoming Chairman-in Office, who together form the OSCE Troika'. See *OSCE Handbook*, *supra,* note 5, at 19.
[1448] OSCE Staff Regulation 10.02(b) External Appeals Procedure, SRSR.
[1449] OSCE Staff Rule 10.02.2(a)(i) – Applications, SRSR. This would bring the appeals procedure to an end.
[1450] OSCE Staff Rule 10.02.2(a)(ii) – Applications, SRSR.
[1451] Article X(2) Administrative and Financial Arrangements, Appendix 2, ToR PoA, SRSR.
[1452] Ibid.
[1453] As noted by Amerasinghe with regard to the old UNAdT. C. F. Amerasinghe, *supra,* note 1179, (Martinus Nijhoff Publications, 2009), at p. 44.
[1454] *Report of the Redesign Panel, supra,* note 137, para 99.

the UN and the latter paid at the rate underlying the salaries of D-II staff members of the UN[1455].

5.5.4.3. Executive Secretary to the Panel

The second area which merits discussion is that of the servicing of the Panel. While the provisions of IATs vary[1456], the ToR PoA gives less discretion to the OSCE in that it states in Article X(1) that the 'OSCE Secretary General shall make all administrative arrangements necessary for the adjudication *within the existing OSCE budget'* [1457] [emphasis added]. Article X(3) further states '[t]he Secretary General shall designate an OSCE staff member at the Secretariat to serve as Executive Secretary to the Panel on an ad hoc basis' [1458]. Under this provision, the 'Executive Secretary shall also keep a registry'[1459], serving as the administrative arm of the Panel. This small registry is based in Vienna where the Panel holds its 'adjudication sessions'[1460] and the OSCE Secretariat headquarters is located. With only an Executive Secretary to serve the Panel on an 'ad hoc basis' and no other personnel[1461] expressly envisaged by the ToR PoA, this may in part be attributed to the small number of final appeal cases adjudicated per year. Before examining the provision set out in Article X of the ToR PoA on the independence of the Executive Secretary, as a preliminary point, it may be observed that the 'Executive Secretary or Registrar of an IAT is ordinarily a senior official of the organization, which shows that the

[1455] Judges of the WBAT are paid approximately at the rate of $250 per hour ($1,500 for a six-hour working day) for work done, which is comparable to legal fees in the US legal sector. The ADB and IDB, among other organizations, also have provision for respectable judges' renumeration.
[1456] The statute of the former UNAdT states in Article 3(4): ‚the Secretary-General shall provide the Tribunal with an Executive Secretary and such other staff as may be considered necessary'. According to Article 6(2) of the UNDT, ‚The Registries of the Dispute Tribunal shall be established in New York, Geneva and Nairobi, each consisting of a Registrar and such other staff as necessary'. Article 5(2) of the UNAT Statute provides that ‚The Registry of the Appeals Tribunal shall be established in New York. It shall consist of a Registrar and such other staff as necessary'. Article VI(2) of the WBAT Statute provides that 'the President of the Bank shall be make the administrative arrangements necessary for the functioning of the Tribunal'. Likewise, Article IX(1) of the IMFAT Statute provides that the ‚Managing Director shall make the administrative arrangements necessary for the functioning of the Tribunal'.
[1457] Article X(1) Administrative and Financial Arrangements, Appendix 2, ToR PoA, SRSR.
[1458] Article X(3) Administrative and Financial Arrangements, Appendix 2, ToR PoA, SRSR.
[1459] Article VII(4) Adjudication Procedure Appendix 2, ToR PoA, SRSR.
[1460] Article VII(4) Adjudication Procedure, Appendix 2, ToR PoA, SRSR.
[1461] For example, a Deputy Executive Secretary to the Panel, or other necessary staff.

organization attach importance to his or her functions'[1462]. Although the grade of the post of the designated OSCE staff member in the Secretariat remains unclear, even without access to the Rules of Procedure of the PoA, it would seem from Article X of the ToR PoA that the Executive Secretary to the Panel plays an important but far less decisive role compared with his/her counterparts in other IATs, such as the WBAT[1463] and ILOAT[1464], with the latter providing not only administrative but also technical, factual and legal support functions[1465]. Therefore, it is unlikely that the post[1466] of the OSCE staff member serving as ad-hoc Executive Secretary to the Panel is in the professional or higher category (P and D) given the exclusively administrative duties involved[1467]. Until 2009, while the

[1462] S-H. Hohenveldern, 'The Organs of International Organizations', Part 1 – Chapter 3 (ed. R-J Dupuy), *A Handbook on International Organizations*, 2nd Edition, (Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1998), p. 218.

[1463] On the Director of the Secretariat of the WBAT, see S-H. Hohenveldern, supra, note 565, p. 218.

[1464] See A. Megzari., *supra,* note 163, (Leiden/Boston, Brill/Nijhoff, 2015), at 69 – 70, on 'The Appointment of Judges and the Lack of Independence for the Tribunal', referencing the ILO Proposed Budget for the Biennium 1986-1987, Supplement No. 6 (A/40/6), Vol. II, Section 26, page 9, 'the Executive Secretary provided the Tribunal with the following crucial administrative and technical support: Preparation of draft summary of facts and contentions of parties for judgments to be rendered by the Tribunal; analysis and research of documentation relevant to cases on appeal to the Tribunal; consultations with Administrations of subsidiary organs of the United Nations, the secretariat of the United Nations Joint Staff Pension Fund and the Administrations of the specialized agencies subject to the jurisdiction of the Administrative Tribunal (ICAO and IMO). External relations of the Tribunal, including its relations with secretariats of the International Labour Organization, the Tribunals of the Organization of American States and of the International Bank for Reconstruction and Development'.

[1465] Article VIII(6) of the ToR PoA suggests that examination of applications for external appeal are carried out exclusively by the Panel. Article VIII(6) Adjudication decisions, Appendix 2, ToR PoA, SRSR.

[1466] According to OSCE Regulation 5.00, 'The OSCE adheres to the standards of remuneration established in the United Nations common system'. OSCE Staff Regulation 5.00 Standards of Remuneration, Article V Salaries and Entitlements, SRSR. At the same time, OSCE Staff Regulation 5.01 states that 'The Secretary General shall make provision for the classification of posts according to the nature of the duties and responsibilities required and reflect such determinations in the post tables submitted to participating States through the Unified Budget'. OSCE Staff Regulation 5.01 Classification of Posts, Article V Salaries and Entitlements, SRSR. Accordingly, the OSCE workforce is made up of different categories of staff. Within each category, there are different levels, which reflect increasing levels of responsibilities and requirements. The different categories include: General Service (GS); Junior Professionals (grades P1, P2); Middle-ranking Professionals (grades P3, P4); Management Professionals (grades P5, D).

[1467] From the provisions of the ToR PoA, the core functions of the Executive Secretary would seem to include: (1) assisting the Panel and its members in the discharge of their duties (Article X(3) Administrative and Financial Arrangements, Appendix 2, ToR PoA, SRSR); (2) being a channel for all communications made by or addressed to the Panel (receiving 'an application for adjudication' (Article VI Composition of the Panel, Appendix 2, ToR PoA, SRSR), 'notify[ing] the applicant of the composition of the Panel' (Article VI Composition of the Panel, Appendix 2, ToR PoA, SRSR), 'notify[ing] the adjudication decision to the applicant and to the Secretary General' (Article VIII(7) Adjudication decisions, ToR PoA, SRSR); (3) having custody of the archives of the Panel ('The Executive Secretary shall also keep a registry' (Article X(3) Administrative and Financial Arrangements, Appendix 2, ToR PoA, SRSR); (4) keeping a register containing the date of registration of each application for external appeal; (5) 'fil[ing] the original of the adjudication

Executive Secretary of the former UNAdT was similarly designated by the Secretary-General, he/she was a 'regular de facto staff member of the legal department'[1468], and his/her level was a 'P4 or P5'[1469]. Although still much higher than the Executive Secretary to the Panel, this was considered to be 'lower than the level of his or her counterparts in other IATs, and not senior enough for such an important function'[1470]. Undoubtedly, greater weight needs to be given to the key role of the Executive Secretary to the Panel and, as a result, it would be highly desirable for the designated holder to be at a sufficiently senior level possessing legal qualifications and experience, including experience in court administration[1471]. As suggested by the *Redesign Panel* with regard to registrars at the UN, the Executive Secretary to the Panel may also benefit from training comprising 'both an educational programme of international or national court systems that have developed efficient systems of court administration'[1472] and '[i]f necessary, follow-up training can be provided by an outside senior court administrator'[1473]. On the role envisaged for the registries of the new UN tribunals, the *Redesign Panel* suggested that 'registrars should be responsible for 'mediation' in appropriate circumstances[1474], 'case management of all matters filed'[1475], and to 'ensure that the system works effectively'[1476], 'identifying matters to be referred to a judge for possible summary dismissal or for directions as to the further conduct of the case, including for fast-tracking or priority hearing'[1477]. As the registry and Executive Secretary should be an integral part of the Panel, which, as indicated, is in essence a judicial organ, it is necessary to consider the extent to which both are regarded

decision in the Secretariat' (Article VIII(7) of the ToR PoA. Article VIII(7) Adjudication decisions, Appendix 2, ToR PoA, SRSR).

[1468] A. Megzari., *supra,* note 163, (Leiden/Boston, Brill/Nijhoff, 2015), at p. 71.

[1469] Ibid.

[1470] Ibid.

[1471] See *Report of the Redesign Panel, supra,* note 137, para. 118, where it is explained that court administration 'involves the case management of court files, handling requests for information and dealing with litigants'.

[1472] Ibid.

[1473] Ibid.

[1474] Ibid, para. 90.

[1475] Ibid. The *Redesign Panel* noted in paragraph 91 that 'case management' includes: 'the transmission of the complaints to the person whose acts or decisions are in question and to the designated legal representative; ensuring that time limits and procedural requirements are complied with; subject to review by a judge, granting extensions in cases proceeding to mediation or other wise in exceptional circumstances; and after consultation with a judge, fixing the times and dates for hearings and issuing orders for the production of documents or the attendance of witnesses'.

[1476] Ibid.

[1477] Ibid.

as independent and outside the regular institutional structure of the OSCE. Similar to the statutes of some other IATs[1478], Article X(3) of the ToR PoA clearly provides that the Executive Secretary to the Panel 'shall only act according to the instructions of the Chairperson of the Panel'[1479] when 'carrying out his/her role'[1480], and 'shall neither seek nor receive instructions from the Secretariat or the Chairmanship'[1481]. While this latter provision may be regarded as of particular importance, recognizing the independence of the Executive Secretary to the Panel, this merely formal safeguard does not insulate the Executive Secretary particularly from the interference or influence of the Organization[1482]. Indeed, the fact that the Executive Secretary to the Panel is at the same time an OSCE staff member raises several problems. He/she is designated by and continues to be administratively accountable to the OSCE Secretary General in the 'staff member's regular day-to-day duties' [1483], receives performance assessments by the Organization and, nowhere is it stipulated in the ToR PoA that the OSCE Secretary General should consult the Chairperson of the Panel before designation of the Executive Secretary; and, in practice it is open to question whether there has ever been any such consultation. A similar situation in the pre-reform UN system led the *Redesign Panel* to note that 'judges recommend that the 'principal registrar or registrars…should be appointed only after consultation with the President of UNAT and the appropriate Dispute Tribunal'[1484]. It is noteworthy that there is no provision in the ToR PoA on how long Executive Secretaries to the Panel shall serve. The decision on the renewal of the Executive Secretary's designated term, if such term exists, would seem to be left entirely to the OSCE Secretary General. At the same time, while there is also no provision in the ToR PoA on emoluments, which in reality include benefits, these are paid or provided by the OSCE[1485]. Yet, while it is not uncommon for an executive secretary or registrar to be staff members of an IO, and appointed by the

[1478] See e.g., Statute of the WBAT, Art. VI(2); Council of Europe Administrative Tribunal Statute, Art. 14, para 2; European Space Agency Appeals Board, Reg. 40.
[1479] Article X(3) Administrative and Financial Arrangements, Appendix 2, ToR PoA, SRSR.
[1480] Ibid.
[1481] Ibid.
[1482] See H. G. Schermers & N. M. Blokker., *„supra,* note 3, (Brill Nijhoff Publishers, 2018), at p. 515. ‚The administrative tribunals of ILO, World Bank, IMF, and OAS [...] have to rely on the secretariats of the organizations concerned'.
[1483] Ibid.
[1484] *Report of the Redesign Panel, supra,* note 137, para. 131.
[1485] Article X(1) Administrative and Financial Arrangements, Appendix 2, ToR PoA, SRSR.

administration[1486], there is a strong argument for strengthening the independence of the Executive Secretary to the Panel. Administratively, the Executive Secretary would seem to be compromised by a structural conflict of interest since the OSCE Secretary General, supported by the Secretariat's Office of Legal Affairs, is the respondent in all proceedings brought before the Panel, while at the same time responsible for making 'all the administrative arrangements necessary for adjudication'[1487]. To avoid situations where the independence – both actual and perceived – of the Executive Secretary to the Panel may be compromised from any undue influence[1488] being exerted by the Administration, it would be desirable to establish an administrative nexus through a more suitable senior official other than the OSCE Secretary General. As indicated, the Registries for the Dispute and Appeals Tribunals in the new UN system[1489] are now part of the OAJ, which along with the Principal Registrar[1490], Registrars[1491] and Registry teams, have operational and budgetary autonomy from the Administration of the UN.

[1486] Art. VI(2) of the WBAT Statute; Art. IX(2) of the IMFAT Statute; Art. 6(2) of the UNDT Statute; Art. 5(2) of the UNAT Statute.
[1487] Article X(1) Administrative and Financial Arrangements, Appendix 2, ToR PoA, SRSR.
[1488] For example, with the way in which an adjudicator conducts his/her case and make his/her decision.
[1489] The UNDT has three Registries, located in Geneva, Nairobi and New York, each headed by its own Registrar, and the Appeals Tribunal has one Registry, located in New York, also headed by a Registrar.
[1490] See Section 4 of the Secretary-General's Bulletin Organization and terms of reference of the Office of Administration of Justice, 7 April 2010, UN Secretariat, ST/SGB/2010/3. The Principal Registrar is part of the Office of the Executive Director, the head of the OAJ, and his/her functions include coordinating the support provided to judges in the adjudication of cases and the other tasks assigned to the Registries. He/she also advises the Executive Director on the resources allocated to the Tribunals, and on administrative, human resources and logistical matters related to the Registries.
[1491] See Section 5 of the Secretary-General's Bulletin Organization and terms of reference of the Office of Administration of Justice, UN Secretariat, (UN Doc. ST/SGB/2010/3 of 7 April 2010). Under the authority of the Principal Registrar, the core functions of the Registry of the UNDT are: (a) Providing substantive, technical and administrative support to the judges of the Tribunal in the adjudication of cases, including by enforcing compliance with the rules of procedure of the Tribunal by the parties and editing outputs of the Tribunal, and by identifying cases that are amenable to informal resolution, such as mediation; (b) Maintaining the Tribunal's registers and managing the publication and dissemination of the decisions, rulings and judgements rendered by the Tribunal; (c) Maintaining the Tribunal's case law and jurisprudence databank; (d) Preparing input for reports on the work of the Tribunal to the General Assembly and other bodies, as may be mandated, and representing the Tribunal in relevant bodies; (e) Managing the human, financial and other resources allocated to the Registry, as required; (f) Analysing the implications of emerging issues in each Registry and making recommendations on possible strategies and measures; (g) Advising the Principal Registrar on administrative, human resources and logistical matters related to the Registries' operational activities, including distribution of cases.

5.5.5. The functioning of the Panel: examining final appeal applications

Adjudicators of the Panel do not sit on a permanent basis, but instead hold a limited number of 'adjudication sessions' for the purposes of examining individual final appeal applications before them[1492]. As indicated, given that final adjudication decisions are not made available publicly, it is not clear how many sessions are held or the number of cases decided each year. Similar to the rules and practice of the former UNAdT, a Panel is composed of three adjudicators [1493] including the Chairperson or his/her deputy, they sit in oral hearings[1494], as required (however, as shall be seen, this likely to happen rarely), deliberate on cases and render adjudication decisions[1495] by consensus or majority vote[1496]. One possible explanation for such an arrangement is that the PoA, as already indicated, is a one-tier justice system deciding only a limited number of cases on an annual basis, which stands in stark contrast to the UNDT who are composed of three full-time judges work throughout the year in the cases they hear on first instance[1497]. While the OSCE's staff and resources are, as has been seen, mostly deployed in the OSCE's field operations, there appears to be no provision in the ToR PoA for adjudication sessions to be held at its duty stations, raising the question of the accessibility of the system. The *Redesign Panel* expressed similar concerns with the old UN system and suggested that 'to ensure that all staff, particularly those in the field, have access to justice, the UNDT should have registries in New York, Geneva, Nairobi, Santiago and Bankok. New York, Geneva and Nairobi should each have a full-time judge, while Santiago and Bankok should each have a half-time judge'[1498]. However, controversy was generated by the fact that such cases were to be

[1492] Article VII(4) Adjudication Procedure, ToR PoA, Appendix 2, SRSR.
[1493] Article VI(2) Composition of the Panel, ToR PoA, Appendix 2, SRSR.
[1494] Article VII(2)(c) Adjudication Procedure, ToR PoA, Appendix 2, SRSR.
[1495] Article VIII Adjudication decisions, ToR PoA, Appendix 2, SRSR.
[1496] Article VIII(2) Adjudication decisions, ToR PoA, Appendix 2, SRSR.
[1497] See Office of Administration of Justice, *Tenth Activity Report, Office of Administration of Justice*, 1 January to 31 December 2016, p. 6. In 2016, the UNDT received 383 new applications and disposed of 401 cases. In 2016, the UNAT received 170 new appeals and 221 appeals were disposed of. Ibid, p. 14. Available at OAJ website: https://www.un.org/en/internaljustice/oaj/reports/OAJ10thActivityReport4May2017FINAL.pdf. Last accessed on 15 January 2020.
[1498] *Report of the Redesign Panel, supra,* note 137, para 76. See also XIII. Recommendations, para 143.

ordinarily determined by a judge sitting alone[1499]. In the negotiations that led up to the reform, the UN Secretary-General had suggested that cases also be heard by a panel of three judges on first instance to ensure representation of diverse legal traditions and practices, as well as cultural and linguistic backgrounds[1500]. A further argument was that the appointment of judges who will decide cases sitting in geographically distant places 'carries with it the danger of a fragmentation of the case-law of the UNDT'.[1501]. That said, these arguments did not prevent the UN General Assembly deciding that cases shall normally be considered by a single UNDT judge; however, the UNAT President may, upon a request of the UNDT President, authorize the referral of a case to a panel of three UNDT judges, when necessary, 'by reason of the particular complexity or importance of the case'[1502]. On the one hand, in order to enhance access to justice for OSCE staff/mission members working away from the OSCE Secretariat, there seems to be a good argument that the PoA should have registries in four duty stations in South-Eastern Europe, Eastern Europe, the South Caucasus and Central Asia. On the other hand, taking into account the considerable cost of funding full-time or even part-time adjudicators in different locations, it is questionable whether such reforms could be implemeted within the budgetary constraints of the OSCE. Critically, total funding in the 2005 OSCE Unified Budget, under the budgetline of the OSCE 'Chairman-in-Office', allocated €65,000 to the PoA, and most recently, in 2017, the sum is a paltry €39,000[1503], marking a reduction of forty per cent.

[1499] Ibid, para. 93. The *Redesign Panel* envisaged the possibility that the judge be assisted by assesors in disciplinary cases or medical assessors in cases involving medical issues.
[1500] UN Doc. A/62/748 of 14 March 2008, and Corr.1 of 8 April 2008, para. 110.
[1501] A. Reinisch & C. Knahr, *supra,* note 134, (2008), at p. 465.
[1502] Article 10(9) of the UNDT Statute. 'Cases before the Dispute Tribunal shall normally be considered by a single judge. However, the President of the United Nations Appeals Tribunal may, within seven calendar days of a written request by the President of the Dispute Tribunal, authorize the referral of a case to a panel of three judges of the Dispute Tribunal, when necessary, by reason of the particular complexity or importance of the case. Cases referred to a panel of three judges shall be decided by a majority vote'. By contrast, at the UNAT, cases on appeal are normally reviewed by a panel of three judges, but may be referred for consideration by the whole Tribunal (i.e., seven judges) when they raise a significant question of law. Article 10(1) and (2) of the UNAT Statute. At the ILOAT, a meeting of the Tribunal shall be composed of three judges or, in exceptional circumstances, five, to be designated by the President, or all seven. Article III(3) of the ILOAT Statute. At the WBAT, a quorum of five members suffices to constitute the Tribunal, but the latter may choose to form a panel of no less than three judges to deal with particular cases. Article. V of the WBAT Statute.
[1503] OSCE Permanent Council Decision No. 715 OSCE 2005 OSCE Unified Budget Revision, (OSCE Doc. PC.DEC/715 of 19 January 2006). See I. Funds Related to the Secretariat and Institutions. Chairman-in-Office. Panel of Adjudicators. See OSCE website: https://www.osce.org/pc/17851?download=true. Last accessed on 15 January 2020. See also OSCE Permanent Council Decision No. 1252 Approval of the 2017

Nevertheless, it would seem incontrovertible that the PoA functioning as a collegiate body increases the coherence of its case-law rather than single adjudicators. In this context, a Panel consisting of three adjudicators could decide to hold adjudication sessions in each of the four locations, as required by its caseload.

5.5.6. Competence of the Panel

5.5.6.1. Competence ratione personae

The PoA, like other IATs and international tribunals, is a tribunal of limited jurisdiction (*jurisdiction d'attribution*) and not of general jurisdiction (*jurisdiction de droit commun*). Consequently, the Panel has jurisdictional competence only to the extent laid down in the SRSR and its ToR. In the ToR PoA, the term 'competence' is used rather than 'jurisdiction'[1504] to describe the initial power of the Panel to decide whether it has the appropriate authority to begin and continue examination of a case. Pursuant to Article 1(1) of its ToR, the *ratione personae* competence of the Panel relates to 'fixed-term staff/mission members' of the OSCE, and, in conjunction with subparagraph (2), extends beyond 'current or former fixed-term staff/mission member[s]', to 'any person on whom the fixed-term staff/mission member's rights are devolved on his/her death or who can show that he/she is entitled to some right under the [SRSR] or the letter of appointment or terms of assignment of a deceased fixed-term staff/mission member'. However, as already noted, non-OSCE staff such as consultants, daily or hourly staff, JPOs and interns do not have access to the Panel but would seem to be obliged to litigate their disputes before an arbitration board designated in their respective contract of employment.

5.5.6.2. Admissibility conditions

Reference is also made in the ToR PoA to the competence of the Panel to examine the

Unified Budget, (OSCE Doc. PC.DEC/1252/Corr.1). See I. Funds Related to the Secretariat and Institutions. Chairman-in-Office. A.1.3 Panel of Adjudicators. See OSCE website: https://www.osce.org/permanent-council/321931?download=true. Last accessed on 15 January 2020.

[1504] The term used in English generally is 'jurisdiction'.

merits of grievances raised in cases brought before it[1505], which is conditioned by compliance with a number of requirements as to admissibility. These include: having standing to bring an application (*locus standi*), in particular, being adversely and personally affected by an act of the respondent Organization; prior and proper exhaustion of the administrative complaint procedure existing within the OSCE; and compliance with strict time-limits[1506] for filing of external appeal applications.

5.5.6.3. Competence ratione materiae

As with the majority of IATs[1507], cases before the Panel arise from alleged non-observance of letters of appointment or terms of assignment for fixed-term staff/mission members. In terms of competence *ratione materiae*, this includes breaches of the internal law of the OSCE affecting individual staff/mission members in their employment, including violations of the SRSRs and staff instructions. There has, however, been recognition that such limited subject-matter[1508] competence precludes findings of accountability for issues such as harassment, discrimination, health and safety or more fundamentally, claims of violations of basic human rights[1509]. The *Redesign Panel* repeatedly criticized the old UN system and UNAdT jurisprudence for their failure to provide 'protection of individual rights, such as the right to a safe and secure workplace, or the right to be treated fairly and without discrimination'[1510]. As a result, the *Redesign Panel* suggested in its report to include the power of a new Dispute Tribunal to hear allegations:

> '[a]lleging prejudicial or injurious conduct that does not conform to the Staff Rules

[1505] Article VII(1) Adjudication Procedure, Appendix 2, ToR PoA, SRSR. See H. G. Schermers & N. M. Blokker., *supra,* note 3, (Brill Nijhoff Publishers, 2018), at p. 518. ‚In accordance with a general principle of law, judicial organs themselves may decide whether they have jurisdiction [...], and whether a party may appear before them'.
[1506] Article VII(2)(a) Adjudication Procedure, Appendix 2, ToR PoA, SRSR.
[1507] Art. II(1) of the ILOAT Statute; Art. 2(1)(a) of the UNDT Statute; Art. II(1) of the WBAT Statute.
[1508] See A. Reinisch & C. Knahr, *supra,* note 134, (2008), at p. 466. 'This restricted interpretation of administrative tribunals, taken together with the general practice of IOs not to waive immunity, and national courts reluctance to hear cases, rasies a number of questions with regard to the ability of staff members to effectively defend their rights'.
[1509] Ibid, at 466-467.
[1510] *Report of the Redesign Panel, supra,* note 137, para. 72.

and Regulations or administrative instructions, that involves a breach of the duty of care, the duty to act in good faith or the duty to respect the dignity of staff members, that infringes their rights, including the right to equality, or was engaged in for an improper purpose, including reprisal for seeking the assistance of the Ombudsman's Office or for bringing action before the Tribunal'[1511].

In the event, this provision was not incorporated into the UNDT Statute, with the result that the Tribunal's competence is restricted to hearing appeals against administrative decisions alleged to be in non-compliance with the 'terms of appointment' or the 'conditions of employment'[1512]. That said, while it has long been recognized that administrative decisions can be either explicit or implied[1513], concerns have been raised as to the scope of the definition and the extent complainants have been unable bring claims before the UNDT where no formal administrative decision has been taken. Importantly, a narrow interpretation fails to take into account *de facto* violations of letters appointment or terms of assignment through acts or omissions[1514]. In terms of competence *ratione*

[1511] Ibid, Annex I (a)(iii) Jurisdiction of the UNDT.
[1512] Article 2(1) UNDT Statute. 'The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations: (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged noncompliance'.
[1513] According to Amerasinghe, 'there does not always have to be a positive act in order that rights of staff members be infringed. Where an omission results in such infringments, a decision confirming the omission may, in the appropriate circumstances, be taken to be implied for the purpose of a tribunal's competence'. See C. F. Amerasinghe., 'International administrative Tribunals', *Jurisdiction of International Tribunals* (The Hague; London; New York: Kluwer Law International, 2003), at 684. As has been seen, the issue of unwritten decisions was addressed by the former UNAdT in its *Andronov* Judgment No. 1157 (*supra,* note 318), where it found that not only express, but also implied administrative decisions could be appealed. Since then, in *Tabari* 2010-UNAT-030, the UNAT held that not taking a decision is also a decision and in *Tabari* 2011-UNAT-177, it held that: 'The absence of any response on the part of the UNRWA Administration to that request for hazard pay constitutes an appealable administrative decision because it is considered an implied unilateral decision with direct legal consequences. Consequently, that decision is subject to judicial review under Article 2(1) of the Statute of the Appeals Tribunal.
[1514] In recent years, the UNAT has developed a number of principles for determining when a staff member has been 'notified' of an implied decision for the purposes of UN Staff Rule 11.2(c) ['A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested…']. In *Auda v. Secretary-General of the United Nations* Judgment No. UNDT/2016/117, the UNDT noted in para. 40 that '[t]he jurisprudence [citing such principles] is neatly summarized in *Awan* 2015-UNAT-588, [where a] staff member contested an implied decision of UNICEF not to provide him "safety and functional immunity" from criminal proceedings. In upholding the Dispute Tribunal's judgment that the case was not receivable, the Appeals Tribunal affirmed previous judgments in which it had set out tests for

personae, the PoA is open to 'any current or former member of staff of the OSCE'[1515], as well as to 'any person on whom the fixed-term staff/mission member's rights are devolved on his/her death or who can show that he/she is entitled to some right under the [SRSRs] or the letter of appointment or terms of assignment of a deceased fixed-term staff/mission member…'[1516]. As indicated, while no provision is included in the ToR PoA on the limits of this competence, the wording of this latter provision seems to favour a restrictive interpretation as to who constitutes a staff member, thus excluding a large category of non-staff OSCE personnel comprising consultants, daily or hourly staff, junior professional officers, and interns, from accessing the OSCE's internal justice mechanisms. In the event of a dispute, the PoA has the authority to decide on its own competence[1517], which seems intended to allow the Panel to interpret but not expand its competence with respect to a particular case[1518]. However, since the OSCE does not publish its decisions on the Internet[1519], it is not possible to explore PoA practice, including whether the Panel has declared itself competent to decide an appeal, for example, so as to avoid a denial of justice of an aggrieved employee who did not strictly qualify as a staff/mission member, but would have no other recourse[1520]. Given the similar problems raised by the diversification of contractual relations at the UN[1521], the *Redesign Panel* suggested a new, much wider range

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determining the date of notification of an implied administrative decision. The [UNAT] stated (emphasis added): 19. *With an implied administrative decision*, the Dispute Tribunal must determine the date on which the staff member knew or reasonably should have known of the decision he or she contests [citing, by way of footnote, *Rosana* 2012-UNAT-273 and *Chahrour* 2014-UNAT-406, para. 31]. Stated another way, the Dispute Tribunal must determine the date of *the implied decision* based "on objective elements that both parties (Administration and staff member) can accurately determine" [citing *Terragnolo* 2015-UNAT-566, para. 36; *Rosana* 2012-UNAT-273, para. 25; *Collas* 2014-UNAT-473, para. 40].

[1515] Article I(2) Competence of the Panel of Adjudicators, Appendix 2, ToR PoA, SRSR.

[1516] Ibid.

[1517] Article VII(1) Adjudication Procedure, ToR PoA, Appendix, SRSR.

[1518] See Art. IV IMF

[1519] See *Report of the Redesign Panel, supra,* note 137, XIII. Recommendations, para 154 ('The Dispute Tribunal should give reasoned decisions in every case that proceeds to judgment. All judgments should be delivered in public, either orally or in writing, and should be published on the Intranet and the Internet…The judge should be able to suppress the names of the parties or witnesses if that is considered to be in the interests of justice'); see Article VIII(7) Adjudication decisions, Appendix 2, ToR PoA, SRSR, which states that the original adjudication decision shall be published 'electronically in a location accessible by staff/mission members and delegations'.

[1520] Some IATs have cautiously broadened the scope of personal jurisdiction by including single cases of non-staff members where such persons would not have had any legal recourse against the defendant organizations elsewhere. See *Teixera v. Secretary-General of the United Nations,* UNAT, 14 October 1977, Judgment No. 230; *Irani v. Secretary-General of the United Nations*, UNAT, 6 October 1971, Judgment No. 150; *Zafari v. UNRWA*, UNAT, 10 November 1990, Judgment No. 461.

[1521] The limitations on the UNDT's jurisdiction have been affirmed by the UNAT (see *Megerditchian* 2010-

of persons who should be able to access its internal justice system by providing a new definition of the 'staff' of the Organization. In addition to real staff and 'former staff and persons making claims in the name of deceased staff members'[1522], staff should include: 'all persons who all persons who perform work by way of their own personal service for the Organization, no matter the type of contract by which they are engaged or the body or organ by whom they are appointed but not including military or police personnel in peacekeeping operations, volunteers, interns or persons performing work in conjunction with the supply of goods or services extending beyond their own personal service or pursuant to a contract entered into with a supplier, contractor or a consulting firm'[1523]. This suggestion to expand the scope of jurisdiction of the UNDT was taken up by the UN Secretariat, with the Draft Statute of the Dispute Tribunal including under article 3(1)(d): (in addition to staff members, former staff members, as well as persons making claims in the name of an incapacitated or deceased staff member) 'any person performing work by way of his or her own personal service for the [UN] Secretariat or separately administered [UN] funds and programmes, no matter the type of contract by which he or she is engaged' [1524]. However, while the UN General Assembly has not made a final determination on the matter, proposals have been made to maintain separate and distinct bodies of law and applicable legal frameworks for staff and non-staff personnel, including volunteers, consultants, individual contractors, personnel under service contracts, or service agreements, and daily paid workers, with the creation of simplified mechanisms of dispute settlement[1525]. In the event the OSCE maintains significant levels of non-staff

UNAT-088, *Basenko* 2011 UNAT-139, *di Giacomo* 2012-UNAT-249).

[1522] *Report of the Redesign Panel, supra,* note 137, Index I.

[1523] Ibid.

[1524] This was subject to certain exceptions, including persons in the following categories: (i) military or police personnel in peacekeeping operations; (ii) volunteers (or other [UN] Volunteers); (iii) interns; (iv) type II gratis personnel provided to the [UN] by a Government or other entity responsible for the renumeration of the services of such personnel and who do not serve under any other established regime); or (v) persons performing work in conjunction with the supply of goods or services extending beyond their own personal service or pursuant to a contract entered into with a supplier, contractor or consulting firm'. Administration of Justice: Further Information Requested by the General Assembly, Note by the Secretary-General, Draft Statute of the United Nations Dispute Tribunal, (UN Doc, A/62/748 of 14 March 2008), Annex I, article 3(1)(d).

[1525] See Report of the Secretary-General, Administration of Justice at the United Nations, (UN Doc. A/65/373 of 16 September 2010, paras. 165-183. Dispute settlement mechanisms for non-staff personnel under consideration include: '(a) Establishment of an expedited special arbitration procedure conducted under the auspices of local, national, or regional arbitration associations, for claims under twenty-five thousand United States dollars submitted by personal service contractors;" "(b) Establishment of an internal standing body

working for extended periods under employer-employee relationship like regular OSCE officials, the Organization should also provide those non-staff with a practical and accessible justice mechanism. This can be done either by allowing access to the existing internal dispute resolution system or expedited arbitration mechanisms[1526].

5.5.7. Access to legal advice and representation

As indicated, the right to a fair trial entails protecting the 'equality of arms' principle, an inherent element of the due process of law in both civil as well as criminal proceedings[1527]. Strict compliance with this principle is required at all stages of the proceedings in order to order to afford both parties – especially the weaker litigant – a reasonable opportunity to present their case under conditions that do not put him/her at a substantial disadvantage vis-à-vis his/her opponent[1528]. The core concept of equality of arms, as elaborated in domestic and international case law, is the idea that both parties should be treated in a manner ensuring that they have procedurally equal position to make their case during the whole course of the trial. Fundamental procedural safeguards aimed at securing such equality are guaranteed in most domestic legal orders, enshrined in human rights treaties[1529] and other relevant international instruments and set out in the Statutes and Rules of the major international courts and tribunals. The principle of ensuring 'equality of arms' in an adversarial proceeding has been recognized universally as a feature of the wider concept of a fair trial[1530]. As already noted, this principle underpins some separate due process

that would make binding decisions on disputes submitted by non-staff personnel, not subject to appeal and using streamlined procedures.' '(c) Establishment of a simplified procedure for non-staff personnel before the United Nations Dispute Tribunal, which would make binding decisions not subject to appeal and using streamlined procedures;' '(d) Granting of access to the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, under their current rules of procedure, to non-staff personnel.'

[1526] As noted, contracts with the OSCE routinely provide for arbitration pursuant to the UNCITRAL Arbitration Rules (*supra,* note 283), but such method of dispute settlement is often prohibitively costly and lacks due regard for the special character of employment disputes.

[1527] See e.g., *Feldbrugge v. Netherlands* (1986) 8 EHRR 425, para. 44.

[1528] See e.g., *Dombo Beheer B.V. v. The Netherlands,* Appl. No.14448/88, 27 October 1993, para. 33.

[1529] The Human Rights Committee has acknowledged that ,the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way'. Human Rights Committee, General Comment No. 32, para 10. Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, (UN. Doc. CCPR/C/GC/32 of 2007).

[1530] See, for example, the fair trial provisions in the international and regional conventions listed in supra note 50. With regard to the concept of 'fair trial' in Article 14(1) of the ICCPR, the Human Rights Committee has

rights, including, *inter alia*, the availability of legal representation and access to legal services, which is often crucial in carrying out successful litigation in courts or tribunals.

5.5.8. Rules on staff legal representation before the Panel

Turning first to the rules on staff legal representation before the Panel, like the internal appeal procedures, there is no clear mention in the SRSR, ToR PoA, or other publicly available sources, with regard to necessary assistance by lawyers or competent legal counsel. On the one hand, one of the parties in a dispute, the OSCE Secretary General, has at his/her disposal at every step of the external appeals procedure, experienced specialized lawyers in the Office of Legal Affairs[1531] in the OSCE Secretariat, whose one of many functions is to defend the Organization against employment-related claims brought by staff/mission members[1532], as well as from the technical support of the administrative services of the Organization. In this regard, it may be argued that the OSCE also have the necessary funds at hand to engage external lawyers to advise it and protect its interests. Thus, the above considerations are relevant not only to equality of arms on the procedural level, but also with respect to equality in financial terms. On the other hand, for the other

explained that it 'must be interpreted as requiring a number of conditions, such as equality of arms and respect for the principle of adversary proceedings'. *D. Wolf v. Panama*, Views adopted on 26 March 1992, Human Rights Committee, Communication No. 289/1988, pp. 289-290, para. 6.6. The African Commission on Human and Peoples' Rights has held that 'the right to fair trial involves fulfillment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of justice, as well as the obligation on the part of courts and tribunals to conform to international standards in order to guarantee a fair trial to all'. *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi,* Decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, African Commission on Human and People's Rights, Communication No. 231/99, paras. 26-27. The ECtHR has explained the principle of equality of arms as 'one of the features of the wider concept of a fair trial' as understood by article 6(1) of the ECHR, which implies that 'each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent'; in this context, 'importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice'; *Bulut v. Austria*, 22 Feb 1996, R.J.D. 1996-III, No. 5, ECtHR, p. 359.

[1531] In the approved 2018 Unified Budget Post Table, Annex II, OSCE Permanent Council Decision No. 1288, Approval of the 2018 Unified Budget (OSCE Doc. PC.DEC/1288 of 15 February 2018), the Office of Legal Affairs in the Office of the OSCE Secretary General had a budget allocation of €653,300. In this programme, there is: 1 x P-5 Head, Office Legal Affairs, 1 x P-4 Deputy Head, Office of Legal Affairs, 2 x P-3 Legal Advisers, 1 x S Legal Adviser, 1 x S Legal Officer, 1 x S Associate Legal Officer, 1 x G-5 Legal Assistant, 1 x G-4 Legal Assistant. However, it may be questioned whether there are sufficient legal advisers in the OSCE's institutions/field operations away from the OSCE Secretariat in Vienna.

[1532] See ‚tasks and responsibilities' of a Legal Officer in the Office of Legal Affairs of the Office of the Secretary General, OSCE Secretariat, *supra,* note 540. A Legal Officer ‚[p]rovid[es] legal advice on dispute resolution, including by examining claims […] against the Organization […]'.

party, the applicant staff/mission member, access to lawyers or legal services is in practice not effective and equal. In the absence of an in-house programme of legal assistance to OSCE staff/mission members in internal disputes, this leaves external appeal applicants either to elect to be self-represented[1533] or rely on the rather limited assistance that could be gratuitously offered by a current or former staff/mission member or OSCE staff representative who very often may not have either sufficient legal qualifications, experience or time to offer to the applicant so as to maximize his/her chances of succeeding in the enforcement of his/her rights. Unless OSCE staff/mission members decide to secure the assistance of external private legal counsel if they can afford it[1534], who often lack the inside knowledge of specific characters of the international civil service[1535] and experience of dealing with the PoA, they will usually have no other option than to be self-represented[1536] at various stages of the external appeals procedure. And, like most other IOs, the OSCE does not seem to provide for any form of 'legal aid' for its officials in employment-related disputes. While the ToR PoA states that '[t]he Panel may award costs to be reimbursed to a successful applicant for properly vouched legal fees and expenses incurred', these can only be only awarded at the very end of a case, which can take up to

[1533] Two issues, however, remain unclear: first, the degree of self-representation of OSCE officials before the Panel, and, secondly, whether specific guidance is provided by the Organization to self-represented applicants to enhance their understanding and ability to utilize the internal justice system, such as a toolkit (to better inform officials' decisions regarding whether to file a case and, if so, how) like the one created by the OAJ at the UN, which was issued and posted on the website of the UN Internal Justice System in May 2019: https://www.un.org/en/internaljustice/. Last accessed on 6 November 2019. See *Report of the Secretary-General*, 'Administration of justice at the United Nations', (UN Doc. A/74/172 of 15 July 2019), 'Self-representation before the Dispute Tribunal', at para. 89. See UN website: https://undocs.org/en/A/74/172. Accessed on 6 November 2019.

[1534] The issue of costs of litigation for the applicant directly relates to the fundamental principle of law aiming at equality between the two parties in the proceedings, as enshrined in Article 10 of the UDHR, which stipulates that ,everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal'.

[1535] See A. Megzari., *supra,* note 163, (Leiden/Boston, Brill/Nijhoff, 2015), at p. 92.

[1536] On the issue of 'Adequate representation of applicants before the Tribunals', see paras. 66-67 of the Report of the Internal Justice Council, Administration of justice at the United Nations, (UN Doc. A/72/210 of 24 July 2017), which states that: '[u]nrepresented litigants have a negative impact on the workload of the Tribunal. Unrepresented litigants often do not understand the legal process and tend to file numerous irrelevant documents and submissions, inundate the Registries with unnecessary or inappropriate queries and requests and generally slow down the system, causing delays in proceedings. […]. Almost as important as the lack of legal representation of litigants is the amateurish and often damaging representation by individuals who have no legal training whatsoever. Those individuals also do not understand the legal process and file confused and inarticulate processes that do not disclose any cause of action. There is a dire need to professionalize legal representation'. See UN website: https://undocs.org/A/72/210. Last accessed on 15 January 2020.

'six months upon receipt of the application by the Chairperson of the Panel'[1537]. This raises the question whether applicant staff/mission members across the OSCE executive structures can effectively access external appeal proceedings or participate in them in a meaningful way. In other words, if the applicant has a full undertanding of all the documents tendered to the Panel[1538]. As noted by the *Redesign Panel,* this disparity in legal resources available to the management and staff members has created an egregious inequality of arms in the internal justice system'[1539].

5.5.9. The pre-reform UN formal system

On the other hand, in the case of the old UN system, there has been a long tradition, dating as far back as 1956, for providing in-house legal assistance to potential appellants or applicants without cost through a Panel of Counsel in disciplinary and appeal cases, with the former JAB, the JDC and the UNAdT. Those who served as cousel were current or retired staff members of the UN or one of its specialized agencies and volunteered their services. With only two full-time staff members, the fact that staff members in the old UN system were at a disadvantage was already pointed out by the JIU in 2002[1540], and in its statement to the Fifth Committee in 2003, referred to the 'unequal conditions of battle in which an unarmed international civil servant was pitted against an administration with an army of lawyers'[1541]. the disparity in legal was criticized in 2006 by the *Redesign Panel* not only for being 'under-resourced' but also 'unprofessional'[1542] in that there was no requirement for legal qualifications in order to serve on it. The *Redesign Panel* similarly identified 'access to lawyers and legal services' as being 'crucial' to guarantee equality before the courts and tribunals[1543]. In its report, the *Redesign Panel* noted that the Panel of

[1537] Article VIII(1) Adjudication decisions, Appendix 2, ToR, PoA, SRSR.
[1538] In turn, as it follows that compliance with the principle of equality of arms also requires a right to have access to interpretation/translation facilities, it may also be questioned whether the OSCE grants such access to applicants who cannot sufficiently master the official language of English used in the Panel.
[1539] *Report of the Redesign Panel, supra,* note 137, para. 106.
[1540] *Reform of the Administration of Justice in the United Nations System: Options for Higher Recourse Instances, Report of the Joint Inspection Unit*, (UN Doc. JIU/REP/2002/5), p. viii.
[1541] Fifth Committee, Summary Record of the 41st meeting held on 5 March 2003, (UN Doc. A/C.5/57/SR.41 of 4 April 2003), page 7, para. 64.
[1542]Ibid, paras. 100 and 102.
[1543] *Report of the Redesign Panel, supra,* note 137, II. Overview, para. 10.

Counsel had the 'responsibility to provide legal assistance and representation to the [UN] staff members in proceedings within the internal justice system' and recommended the establishment of a properly resourced professional Office of Counsel, staffed by full-time persons with legal qualifications recognized by the courts of any Member State and one of the organizational units of the OAJ [1544]. Furthermore, the *Redesign Panel* emphasized the importance of professional legal assistance on the basis that it encourages the 'effective and appropriate utilization' of the system and 'acts as a filter'[1545], which serves to offer 'benefits to both staff members and the Organization'[1546]. In the event, to promote the equality of arms, the UN General Assembly decided to 'establish the Office of Staff Legal Assistance (OSLA) [1547] to succeed the Panel of Counsel'. For all these reasons, given the inherent inequality in external appeal proceedings between the OSCE Administration and the applicant OSCE staff/mission member, there must be a respectable argument for in-house legal assistance and representation to be provided free of charge to OSCE staff/mission members through a properly resourced office of staff legal assistance, staffed by professional legal officers based at the OSCE Secretariat, with coordinators in the largest missions[1548]. Besides providing objective legal expertise, this would be an essential advantage in some of the host countries of the OSCE's field operations where recourse to external counsel could be very costly and may not particularly effective. That said, financing of the entire cost of legal assistance to be provided to staff/mission members of the OSCE may be difficult in practice due to budgetary restrictions. As indicated, in view of the 'financial constraints' currently facing OSCE participating States, this may provide impetus for the Organization to consider alternative solutions such as the decision of UN General Assembly that financing of OSLA will be supplemented, on an experimental

[1544] Ibid, para 107. XIII. Recommendations, para 170.
[1545] GA Res. 62/228, para 12.
[1546] *Report of the Redesign Panel, supra,* note 137, paras. 123 and 124.
[1547] The OSLA's function of representation today is acknowledged by the Rules of Procedure of the UN Tribunals Article 12 (Representation), para 1, UNDT Rules: ‚a party may present his or her case to the Dispute Tribunal in person, or may designate counsel from the Office of staff Legal Assistance or counsel authorized to practice law in a national jurisdiction'; and Article 13 (Representation), para 1, UNAT Rules: ‚A party may present his or her case before Appeals the Tribunal in person or may designate counsel from the Office of Staff Legal Assistance or counsel authorized to practice law in a national jurisdiction'. The UN Staff Rules: UN Staff Rule 11.4(d) 'A staff member shall have the assistance of counsel through the Office of Staff Legal Assistance if he or she so wishes, or may obtain outside counsel at his or her expense, in the presentation of his or her case before the [UNDT]'.
[1548] *Report of the Redesign Panel, supra,* note 137, paras. 107-111.

basis[1549], by a voluntary funding mechanism by way of a payroll deduction not exceeding 0.05 per cent of a staff member's monthly net base salary[1550]. As a practical matter, the low participation rate would seem to present a particular difficulty. Other possibilities include training and credentialing of staff represenatives and other interested OSCE staff/mission members, who may be interested in serving as peer advocates or staff-funded scheme that would allow staff/mission members to secure external legal counsel.

5.5.10. Standing of staff committees and staff representatives at the OSCE

Respecting the fundamental right of freedom of association[1551] within the OSCE, the SRSRs allow the establishment of staff representative bodies, which are organized in such a way as to afford 'equitable representation'[1552] to all staff/mission members across the OSCE executive structures. Staff Committees composed of Staff Representatives are elected[1553] by staff/mission members in the Secretariat, the respective Institutions and missions[1554]. Single representatives for the Institutions and missions are also elected where there are less than nineteen staff/mission members[1555]. While Staff Representatives are intended to maintain 'continuous contact and communication between the Secretary

[1549] In accordance with paragraph 33 of GA Res. 68/254, Administration of justice at the United Nations, (UN Doc. A/RES/68/254 of 14 January 2014). See UN website: https://undocs.org/A/RES/68/254. Last accessed on 6 November 2019. (‚Decides that the funding of the Office of Staff Legal Assistance shall be supplemented by a voluntary payroll deduction not exceeding 0.05 per cent of a staff member's monthly net base salary and that this funding mechanism shall be implemented on an experimental basis from 1 January 2014 to 31 December 2015, and requests the Secretary-General to report on its implementation[.]')

[1550] GA Res. 68/254, para 33. The Assembly decided to extend the mechanism for a period of three years until 31 December 2021.

[1551] Freedom of association occupies a central position in the scheme of fundamental human rights. It is explicitly protected in general human rights instruments such as the ECHR and the UDHR as a right of ‚everyone', including trade unions and working people. In addition to the ILO and the Council of Europe's European Social Charter, it is also ‚firmly rooted in the OSCE human dimension commitments'. See ‚Joint Guidelines on Freedom of Association', OSCE/ODIHR, 1 January 2015, p. 5. See OSCE website: https://www.osce.org/odihr/132371?download=true. Last accessed on 15 January 2020.

[1552] OSCE Staff Regulation 8.02(b) Staff Representation, Article VIII Staff Relations, SRSR.

[1553] OSCE Staff Regulation 8.02(a) gives staff/mission members the 'right to elect staff representatives'. OSCE Staff Regulation 8.02(a) Staff Representation, Article VIII Staff Relations, SRSR.

[1554] OSCE Staff Rule 8.02.1(a) – Constitution of the Staff Committee, Article III Staff Relations, SRSR.

[1555] OSCE Staff Rule 8.02.1(d) – Constitution of the Staff Committee, Article III Staff Relations, SRSR. It has been argued that the 'lack of a single group representing all staff in one organization cannot but weaken and blur their message'. See Y. Beigbeder, 'The Staff Unions' Dilemma: Confrontation or Partnership?', Chapter 12, in *The Internal Management of United Nations Organizations: The Long Quest for* Reform, (Palgrave Macmillan, 1997), at 202.

General, the heads of institutions and the heads of mission'[1556] and 'all staff/mission members'[1557], it is unclear how many OSCE officials are in fact contributing members. Pursuant to OSCE Staff Rule 8.02.3, Staff Representatives are entitled to 'effective participation in identifying, examining and resolving issues relating to staff welfare, including conditions of work and other personnel policies'[1558]. The rationale for granting such rights is that 'staff participation in the review of employment and work conditions will result in a well-informed acceptance of management decisions'[1559]. In terms of their relationship with senior management[1560] at the OSCE, Staff Representatives are 'entitled to make proposals on behalf of the staff to the Secretary General or their respective head of institution/mission, who shall bring it to the attention of the Secretary General if it affects general conditions of employment'[1561]. It may be noted, however, that the 'terms of reference of the Staff Committee', as foreseen by OSCE Staff Rule 8.02.1(c)[1562], has not been made publicly available. Yet, whatever the precise scope of competence of Staff Representatives, it may be emphasized that the SRSRs do not place any limitation or obligation on the decision-making authority of the OSCE Secretary General, the Heads of Insitution or Heads of Mission[1563]. While Staff Committees and Staff Representatives undoubtedly play an important role in representing and defending the interests of OSCE officials in the Secretariat, the Institutions and missions[1564], it has been noted more generally that 'staff-management relations governed by consultation alone too often lead to a perception that staff input is merely advisory and that the most important aspect of

[1556] OSCE Staff Regulation 8.01 Staff Relations, Article III Staff Relations, SRSR.
[1557] Ibid.
[1558] OSCE Staff Rule 8.02.3 – Role of the Staff Representatives, Article III Staff Relations, SRSR.
[1559] Y. Beigbeder., *supra*, note 598, at 199.
[1560] This includes the OSCE Secretary General, Heads of Institution and Heads of Mission, as well as co-operation with the Director for Human Resources in the Secretariat, Chiefs of Fund Administration, Chiefs of Personnel/Administrative Officers in the Institutions/Field Operations.
[1561] Ibid.
[1562] According to OSCE Staff Rule 8.02.1(c) – Constitution of the Staff Committee, Article III Staff Relations, SRSR, the 'terms of reference of the Staff Committee shall be specified in a Staff Instruction issued by the Secretary General'.
[1563] According to Beigbeder, ,[m]ost staff associations have limited access to their organization's governing body. Y. Beigbeder, *supra*, note 598, at 203.
[1564] Beigbeder also noted that the 'open and contructive collaboration of elected staff representatives with management officials should identify problems, correct amomalies and agree reasonable solutions. Staff/management cooperation should improve the quality of human resources management and contribute to a more effective organization'. Ibid, at 199.

employment decisions rest unilaterally with management'[1565]. Likewise, there would also appear to be certain limitations on the effectiveness of Staff Committees and Staff Representatives in terms of their access to the formal system of internal justice at the OSCE. Accepting that, in practice, the Panel has to decide on its own competence in particular cases[1566], including 'other matters relating to adjudication'[1567], this raises the question of whether the Rules of Procedure of the PoA includes provision for intervention by Staff Committees and Staff Representatives to whom the Panel is open and whose rights may be affected by an adjudication decision[1568]. In this context, there are no express provisions in the ToR PoA giving Staff Committees and Staff Representatives standing to: first, intervene in a case on the ground they have a right which may be affected by an adjudication decision to be given by the Panel[1569]; secondly, file class actions on behalf of a group of staff/mission members; and, thirdly, submit *amicus curiae* ('friend of the court') briefs in cases brought by one or more staff/mission members. By contrast, according to its rules of procedure, the former UNAdT could, 'in its discretion', grant a hearing to a representative of a staff association and in practice the tribunal has even accepted friend of the court briefs[1570] submitted by staff associations. On the other hand, the former UNAdT

[1565] J. Javits, *supra*, note 380, at 245-246. However, it may be noted that where the internal law requires the consultation with a staff representative body before the adoption of a decision, in accordance with the principle *tu patere legem quam ipse fecisti,* the competent authority must follow that procedure, otherwise its decision will be unlawful (ILOAT Judgment 1488, Consideration 10, ILOAT Judgment 3671, Consideration 4, ILOAT Judgment 3737, Consideration 7). However, where such consultation has not occurred, it can give rise to a cause of action for the members of the representative body which ought to have been consulted prior to the adoption of the decision to contest the same. Under the Tribunal's current jurisprudence, it is not possible to contest a general decision which has no direct and adverse impact on the complainant except through an implementation decision. For instance, a change to the salary structure cannot be contested as such, except by way of contesting a payslip which implemented that salary structure. This is the case even for staff representatives, unless it can be proven that they were part of an advisory body which was to be consulted mandatorily (under the organization's internal laws) prior to the issuance of the general decision and were not consulted (ILOAT Judgment 3921).

[1566] Article VII(1) and (2) Adjudication Procedure, Appendix 2, ToR PoA, SRSR.

[1567] Article VII(2)(c) Adjudication Procedure, Appendix 2, ToR PoA, SRSR.

[1568] Not least, this includes whether the Panel, on its own motion or on the application of the Staff Committee or Staff Representatives, may grant a hearing, for the purpose of additional information.

[1569] According to Elias and Thomas, 'Generally, international administrative tribunals permit *amicus curiae* briefs to be submitted by persons or organizations. The WBAT may permit a representative of the Bank's Staff Association and 'any person or entity with a substantial interest in the outcome of a case to participate as a friend-of-the-court'. See O. Elias and M. Thomas., *supra,* note 804, (Martinus Nijhoff Publishers, 2012), at p. 170.

[1570] In the context of the UN, the former UNAdT 'in its discretion' could grant a hearing to a representative of a staff association. See Article 23(2) Chapter IX Miscellaneous provisions, Rules of the former Administrative Tribunal of the United Nations, As adopted by the Tribunal on 7 June 1950 and amended on 20 December 1951, 9 December 1954, 30 November 1955, 4 December 1958, 14 September 1962, 16

did not allow staff associations to file an application on behalf of a class of staff members. Noting that UN staff members are sometimes reluctant to enter the formal justice system for fear of reprisals, the *Redesign Panel* recommended 'to give staff associations an independent right to bring action to enforce the Staff Rules and Regulations', allowing them to act on behalf of individual applicants; in its view, this kind of 'class or representative action'[1571] was in line with the jurisprudence of the ILOAT[1572] and would 'promote efficiency in the judicial process'[1573]. In his comments to the Report of the *Redesign Panel*, the UN Secretary-General supported this recommendation[1574], proposing that staff associations be allowed to bring applications: (a) to enforce the rights of the staff association, as recognized under the Staff Regulations and Rules; (b) to file an application in its own name on behalf of a group of named staff members who are entitled to file and who are affected by the same administrative decision arising out of the same facts; (c) to support an application by one or more individuals who are entitled to file an application against the same administrative decision by means of the submission of a friend-of-the-court brief or by intervention. Although the issue of class actions is considered by some as 'neither necessary nor applicable in the context of [IATs]' [1575], calls for their introduction

October 1970, 3 October 1972, 1 January 1998, 1 January 2001, and 27 July 2004. See UN website: https://untreaty.un.org/UNAT/Rules.htm. Last accessed on 15 January 2020.

[1571] *Report of the Redesign Panel, supra,* note 137, XIII. Recommendations, para. 160.

[1572] Citing the case of *Wansing and Others v. European Patent Office,* the *Redesign Panel* asserted that the jurisprudence of the ILOAT has recognized the standing of staff associations to 'enforce the Staff Rules if there is no one else who can do so'. Ibid, para. 82. According to Hwang, there is the difficulty that the 'issue of standing was not addressed in detail in the *Wansing* case…[and] the jurisprudence cited in Judgment 2562 (*S. v. European Patent Organization.,* Judgment No. 2562, para 10), delivered concurrently…related to cases in which the ILO Administrative Tribunal recognized that where the rights of the Staff Committee are at issue, then staff representatives have standing to "bring the compliant on behalf of the Staff Committee"…'. P. Hwang, *supra*, note 431, at 212.

[1573] Ibid, para. 82.

[1574] See Note by the Secretary-General, Report of the Redesign Panel on the United Nations system of administration of justice, (UN Doc. A/61/758 of 23 February 2007), para 26.

[1575] The role of staff associations in initiating litigation was examined in the Secretary-General's 1987 report on the feasibility of establishing a single administrative tribunal (Report of the Secretary-General on the Administrative and Budgetary Co-ordination of the United Nations with the Specialized Agencies and the International Atomic Energy Agency: Feasibility of Establishing a Single Administrative Tribunal, (UN Doc. A/42/328 of 15 June 1987). According to Hwang, ,the Secretary General's observation that the reasons underpinning class actions in national jurisdiction are inapplicable to international tribunals remained valid. As used in the American legal system, class actions allow an individual to bring a lawsuit on behalf of a group of plaintiffs who have yet to be identified, in cases where the members of that class are so numerous that joinder would be impractical. However, whereas in a national jurisdiction it may be difficult to identify all individuals who have suffered the injury at issue in a class action, it is possible to identify all staff members who are affected by the application of a disputed human resources management policy. Moreover, since any changes to a particular human resources management policy required by a UN Administrative Tribunal

have resonated not only throughout the history of the reform of the administration of justice system in the UN, but also in the course of reforming the internal justice systems of other IOs[1576]. In the event, however, when it adopted the Statutes of the Tribunals, the UN General Assembly set the Secretary-General's proposal aside with the exception of only permitting staff associations to file a request to submit a friend of the court brief. As the General Assembly has not followed up on the issue of the possibility of staff associations filing applications before the UNDT, this issue seems to have either been 'abandoned or [left] open to future consideration'[1577]. Accordingly, Article 2(3) of the UNDT Statute merely provides that 'the Dispute Tribunal shall be competent to permit or deny leave to an application to file a friend-of-the-court brief by a staff association'[1578]. While the Statute of the UNAT does not explicitly refer to the staff associations, its Rules of Procedure also foresee that the latter 'may submit a signed application to file a friend-of-the-court brief'[1579]. For the future, a matter of some interest will be the extent to which staff associations shall be entitled to file applications before IATs. Finally, it is unclear whether or not the Rules of Procedure of the PoA give standing to the Staff Committees and Staff Representatives at the OSCE. Since the right to file a case is recognized as a fundamental right under the freedom of association, the Staff Committees and Staff Representatives at

judgement would be applied not only to the plaintiffs in a particular case, but to all staff members, the phenomenon of staff members filing multiple applications to litigate the same issue does not arise, as it would in a national jurisdiction where plaintiffs would need to file their own lawsuits to claim remedies from the same tortfeasor'. See P. Hwang, supra, note 431, at 212.

[1576] For example, the ILO Staff Union and the external panel that conducted the review of the IMF's dispute resolution also suggested the introduction of class actions. Reform of the ILO Administrative Tribunal (20 February 2003), at 1, 8. See ILO website: https://www.ilo.org/public/english/staffun/info/iloat/pdf/summary_note.pdf. Last accessed on 15 January 2020. Reform of the External Panel, *Review of the International Monetary Fund's Dispute Resolution System* (27 November 2001), at 69-70. See IMF website: https://www.imf.org/external/hrd/dr/112701.pdf. Last accessed on 15 January 2020.

[1577] S. Villalpando, Institutions of the system of administration of justice', *supra*, note 598, at 57-58.

[1578] See also UNDT Rules of Procedure, Article 24 Friend-of-the-court briefs, para. 1. 'A staff association may submit a signed application to file a friend-of-the-court brief on a form to be prescribed by the Registrar, which may be transmitted electronically. The Registrar shall forward a copy of the application to the parties, who shall have three days to file any objections, which shall be submitted on a prescribed form; para. 2. 'The President or the judge hearing the case may grant the application if it considers that the filing of the brief would assist the Dispute Tribunal in its deliberations. The decision will be communicated to the applicant and the parties by the Registrar'.

[1579] Article 17(1) Friend-of-the-court briefs, UNAT Rules of Procedure. Article 6, para. 2(g) of the UNAT Statute provides that ,the rules of procedure of the Appeals Tribunal shall include provisions concerning, *inter alia*, ,The filing of a friend-of-court briefs, upon motion and with the permission of the Appeals Tribunal' (but does not explicitly mention staff associations).

the OSCE should similarly have the right to appropriate access to the Panel. However, in practical terms the possibility to do so may be limited since all Panel cases remain private until the decision is taken[1580].

5.5.11. Applicable law and the Panel

In contrast to international courts and tribunals, the statutes of most IATs remain silent on the applicable law even though such tribunals are completely detached from domestic legal systems[1581]. It is therefore not surprising that the ToR PoA contains no such provisions. Article VIII(3) of the ToR PoA merely states that an 'adjudication decision shall state the reasons on which it is based'[1582]. Despite adjudication decisions not being made publicly available, as indicated, it would seem that the reasoning of the Panel and legal basis of their decisions is limited to the terms of employment contracts or applicable SRSRs[1583]. Thus, such reasoning does not take into account fundamental rights guarantees. In this context, Reinisch and Knahr have observed that '[a]lthough some administrative tribunals have come close to recognizing the relevance of fundamental rights as general principles of law to be respected by them, the case-law of most of them makes clear that they are not formally bound by any human rights instruments'[1584]. From this background, it is perhaps not surprising that the *Redesign Panel* did not recommend a general inclusion of human rights in the applicable law of the new UN Tribunals. Nonetheless, it suggested the inclusion 'of the duty of care, the duty to act in good faith or the duty to respect the dignity of staff

[1580] See A. Reinisch & C. Knahr., *supra,* note 134, (2008), at p. 473.
[1581] Ibid, p. 475. Reinisch and Knahr noted that in the statutes of most international courts and tribunals, 'applicable law clauses are standard features'. For example, the ICJ lists the applicable sources of international law. For example, Article 38(1) of the Statute of the ICJ provides that the sources of applicable law include international conventions, international custom, general principles of law, as well as judicial decisions and techings of the most highly qualified publicist as subsidiary sources for the dtermination of the rules of law. Statute of the International Court of Justice, art. 38(1), 26 June, 1945, 59 Stat. 1055, 1 U.N.T.S. 993.
[1582] Article VIII(3) Adjudication decisions, Appendix 2, ToR PoA, SRSR.
[1583] See M. Parish., *An Essay on the Accountability of International Organizations,* 7 International Organizations Law Review, 227, 285 (2010).
[1584] See A. Reinisch & C. Knahr., *supra,* note 134, (2008), at p. 475, citing *Waghorn v. ILO* [1957] ILOAT Judgment No. 28, holding that it is 'bound […] by general principles of law'. See also *Franks v. EPO*, [1994] ILOAT Judgment No. 1333, in which the ILOAT included alongside 'general principles of law' also 'basic human rights.' Similarly, the World Bank Administrative Tribunal held that sexual discrimination or harassment violated 'general principles of law', *Mendaro v. IBRD*, World Bank Administrative Tribunal Reports, Judgment No. 26 [1981] at 9.

members, that infringes their rights, including the right to equality'[1585]. Notwithstanding that this recommendation was not followed in the Statute of the new UNDT, over recent years there has been evidence of an increased willingness to recognize human rights as belonging to the body of applicable law before the new UN internal justice system, a development which may in part be attributed[1586] to adoption of Article 7(g) of the Code of Conduct for Judges by the General Assembly in 2012, which provides that '[j]udges must take reasonable steps to maintain the necessary level of professional competence and to keep themselves informed about relevant developments in international administrative and employment law as well as international human rights norms'[1587]. Further, despite the absence of explicit human rights considerations in its Statute, the UNDT has repeatedly referred to to such considerations as part of the general principles of law. In a 2011 case, it held that '[i]n the adjudication of employment disputes that come before them, [IATs] may rely on, among other sources, general principles of law – including international human rights law, international administrative law and labour law – which may be derived from, *inter alia*, international treaties and international case law'[1588]. That having been said, it must also be recognized that despite the move towards an increased application of human rights principles before these IATs, notwithstanding certain exceptional cases[1589], 'the exact contours of these rights often remain unclear'[1590].

[1585] *Report of the Redesign Panel, supra,* note 137, Annex I(a)(iii), Jurisdiction of the UN Dispute Tribunal.
[1586] See P. Schmitt., *supra,* note 767, (Edward Elgar Publishing, 2017), pp. 169-170.
[1587] *Code of Conduct for the judges of United Nations Dispute Tribunal and the United Nations Appeals Tribunal,* UN General Assembly, Resolution, (UN Doc. A/Res/66/106 (2012)).
[1588] UNDT, *Obdijn v. Secretary-General of the United Nations,* Judgment No. UNDT/2011/032, 10 February 2011, para. 31. See P. Schmitt, *supra,* note 767, (Edward Elgar Publishing, 2017), at p. 169-170. As noted by Schmitt, ‚[a]n illustration of this practice may be found in the a case where the UNDT referred at length to the case-law of the EctHR on the impartiality of judges (UNDT, *Campos v. Secretary-General of the United Nations,* Judgment No. UNDT/2009/005, 12 August 2009, para. 6.2, in which it referred to ECtHR, *Trigo Saraiva v. Portugal,* App. No. 28381/12, 22 April 1994, Series A, No. 286-B, 38, para. 33; ECtHR, *Hauschildt v. Denmark,* Judgment , 24 May 1989, Series A, No. 154, 21, para. 48; ECtHR, *Nortier v. the Netherlands,* Judgment, 23 August 1993, series A, No. 267, para. 33; ECtHR, *Campbell and Fell v. the United Kingdom,* App. Nos. 7819/77 and 7878/77, 28 June 1984, 7 *EHRR* (1985) 165, para. 78.) Another occurrence may be found in a 2009 case, where the UNDT noted ‚that the rules and regulations of the [UN] relating to employment should be interpreted and applied in a manner that takes into account the international human rights standards'. The Tribunal further added that ‚[t]he way in which the employment is terminated should therefore be considered in the context of the rights of the employee to due process and the compliance by the decision maker to international law and principles of the rule of law' (UNDT, *Tadonki v. Secretary-General of the United Nations,* Judgment No. UNDT/2009/058, 30 October 2009, paras. 8.27–8.2.8'.
[1589] In such cases, certain provisions were mentioned, as in the UNAT case-law.
[1590] See P. Schmitt, *supra,* note 767, (Edward Elgar Publishing, 2017), at p. 169-170.

5.5.12. Final adjudication decision: remedies that may be obtained

5.5.12.1. Rescission or specific performance and/or monetary compensation

The statutes of most IATs deal with the remedies which may be granted by the tribunals[1591]. Thus, the remedies that the PoA of the OSCE can prescribe if 'the application' challeging the legality of a decision 'is well founded'[1592] are specified in Article VIII of its ToR. As shall be seen, the Statutes of several other tribunals have similar, though not exactly the same provisions[1593]. Pursuant to Article VIII(4) of the ToR, the Panel may 'recommend the rescission of the impugned decision'[1594] which would generally involve reinstatement or some form of specific 'performance by the OSCE of the obligation invoked'[1595]. At the same time, however, the Panel is required to 'fix the amount of compensation to be paid to the applicant should the impugned decision not be rescinded or the obligation invoked not be performed'[1596]. This provision raises a number of difficult issues. First, while the Panel is required to give a monetary award by way of compensation in lieu of execution of the

[1591] See C. F. Amerasinghe., *supra*, note 127, (Cambridge University Press, 2005), at p. 502.
[1592] In other words, there is no authority to award relief if the Panel does not invalidate the decision in question.
[1593] Article XII(1) of the WBAT Statute; Article VIII of the Statute of the ILOAT; Article XIII of the Statute of the Administrative Tribunal of the African Development Bank. Article 10(1) of the former UNAdT statute;
[1594] Article VIII(4) Adjudication decisions, Appendix 2, ToR PoA, SRSR. The result of rescission of administrative decisions is ,to restore as far as possible the status quo ante. That is to say, the applicant is regarded as being as far as possible in the same position as he [or she] would have been in, had the administrative decision [...] rescinded never been taken'. See C. F. Amerasinghe., *The Law of the International Civil Service, supra,* note 119, (Oxford University Press, 2nd ed., 1994), at p. 447. In disciplinary cases, for example, rescission of the disciplinary measure implies that the applicant shall be treated as if this (unlawful) measure had never been taken.
[1595] Article VIII(4) Adjudication decisions, Appendix 2, ToR PoA, SRSR. As explained by Amerasinghe, '[t]here are situations in which the remedy ordered has been specific performance of an obligation of the administrative authority which was in issue before the tribunal. Specific performance may also refer to acts to be carried out by the respondent and which it has refused to do, which may not be exactly the same as its obligations which have been brought into question. Thus, a tribunal, while holding that an administrative decision has not been tainted by the application of an illegal procedure by the respondent, may, nevertheless, order an appraisal report or part of it to be excluded from the applicant's personnel file'. It can be recommended as a kind of active counterpart of recission. See C. F. Amerasinghe., *The Law of the International Civil Service, supra,* note 119, (Oxford University Press, 2nd ed., 1994), at p. 447-448.
[1596] Article VIII(4) Adjudication decisions, Appendix 2, ToR PoA, SRSR. Compensation very often accompanies rescission, as for example in *Lamson-Scriber,* WBAT Decision No. 32 [1987], para. 57, wherein it was stated that '[i]t is also appropriate to award the Applicant a sum of money to compensate him for the intangible [i.e. moral] injury caused by the Respondent's breach of these conditions of his employment'. At the same time, compensation may be the sole remedy in specific instances, i.e. where the decision taken was valid, but there was some irregularity in connection with it.

adjudication decision, the option whether an decision is to be rescinded (or the obligation performed) or compensation is to be paid in any case appears to lie with the respondent Secretary General or the respective head of institution/mission[1597] and not with the Panel: thus, for example, in the case of an applicant held to have been wrongfully dismissed from service at the OSCE[1598], Article VIII(4) of the ToR PoA appears to have the effect of depriving the Panel of the power to reinstate the employee if such remedy is considered undesirable by the respondent. In practice, other IATs with a similar provision in their statutes have frequently seen respondent institutions award compensation rather than rescission, with the consequence that reinstatement after unlawful termination or failure the renew is extremely rare[1599]. Accordingly, restoration status quo ante cannot be achieved by these remedies in many cases. Secondly, as the ToR PoA contains no reference to the quantification of such compensation, the vital question here is whether there are limitations in the Rules of Procedure of the PoA on the amount that may be fixed by the Panel; and if indeed there are such limits, it must be asked what is the manner in which they are formulated and their extent, including whether circumvention is permitted in exceptional circumstances. It has been suggested, on the one hand, that there is 'good reason for not permitting awards of exhorbitant compensation, given the cirsumstances of [IOs]'[1600]. Yet, on the other hand, the 'limits must not be so low as to cease being truly compensatory or to act as a deterrent on the organizations'[1601]. One of the most frequent methods utilized by IATs to determine the amount to be awarded is to describe the in lieu compensation in terms of net base salary earned by the applicant, with or without reference to equity (*ex aequo et bono*)[1602]. In some cases, limits stated in the written law usually do not exceed the

[1597] Article VIII(8) Adjudication decisions, Appendix 2, ToR PoA, SRSR.
[1598] See e.g., OSCE Staff Rule 4.02.5 – Disciplinary measure, Article IV Separation From Service, SRSR.
[1599] See C. F. Amerasinghe., *The Law of the International Civil Service, supra,* note 119, (Oxford University Press, 2nd ed., 1994), at p. 448. 'Compensation is reguarly ordered in lieu of [rescission or specific performance] where, particularly, the Statutes of tribunals require that the alternative of compensation be given the respondent'. See also S. D. Gray., 'Special Tribunals', in *Judicial Remedies in International Law,* (Clarendon Press, Oxford Monographs in International Law, 1990), at p. 165.
[1600] See C. F. Amerasinghe, *supra,* note 1179, (Martinus Nijhoff Publications, 2009), at p. 54.
[1601] Ibid.
[1602] See C. F. Amerasinghe., *The Law of the International Civil Service, supra,* note 119, (Oxford University Press, 2nd ed., 1994), at p. 449.

equivalent of one, two or three years' net base pay[1603], which, as shall be seen, has given rise to serious concerns about the authority of tribunals to provide 'proper or adequate remedies'[1604]. This is most readily apparent where reinstatement is not an acceptable remedy to the respondent but the applicant deserves substantial compensation on account of the gravity of the injury suffered[1605]. Though compensation – other than as an alternative to resission of the impugned decision or specific performance of certain obligations – is not referred to in the express provisions of the ToR PoA as a possible remedy[1606], it is of note that IATs have often resorted to so-called as 'inherent powers' in order to prescribe remedies in a manner or to an extent not envisaged in the statutes[1607]; but again, the lack of publicly available final adjudication decisions takes this discussion no further forward in identifying the practice and jurisprudence of the Panel, and whether or not it has been deterred from granting a variety of effective remedies during its existence which is appropriate to the injury done[1608], respecting the maxim 'there cannot be a wrong without a remedy[1609].

[1603] Ibid. According to Amerasinghe, '[i]n these circumstances it is likely that other reasons than actual material loss may govern the award of compensation, a notional scale of injury being the guide within the parameters of the limits stated in the written law'.
[1604] *Report of the Redesign Panel, supra,* note 137, para. 73. See also C. F. Amerasinghe., 'The Future of International Administrative Law', in *International and Comparative Law Quarterly*, Vol. 45 (October 1996), at p. 791. These sentiments are similarly expressed by Amerasinghe: '[…] limiting compensation to three years' net salary, for instance, in any situation would seem to be an unhealthy approach […]'.
[1605] See C. F. Amerasinghe., *ibid,* at p. 791. See also A. Megzari., *supra,* note 163, (Leiden/Boston, Brill/Nijhoff, 2015), at p. 500.
[1606] 'This is generally done where wrongful action of the respondent is regarded as having caused additional damage to the applicant'. See C. F. Amerasinghe., *The Law of the International Civil Service, supra,* note 119, (Oxford University Press, 2nd ed., 1994), at p. 448.
[1607] See C. F. Amerasinghe., *supra,* note 705, (Oxford University Press, 2014), at p. 332.
[1608] Where statutes on their face have limited available remedies in other ways, it has been observed that most IATs have resorted to what has been described as 'inherent powers' in order to 'prescribe remedies in a manner or to an extent not envisaged in the statutes'. See C. F. Amerasinghe., *The Law of the International Civil Service, supra,* note 119, (Oxford University Press, 2nd ed., 1994), at p. 445. According to Amerasinghe, '[i]t seems to be accepted that, even in the absence of specific provision in a Statute of a tribunal which expressly or by clear implication refers to certain remedies that the tribunal may grant and the circumstances in which they may be granted, and even where the Staute may appear exhaustively to describe those remedies and the circumstances in which they may be granted, a tribunal has an inherent power to grant remedies other than those specifically mentioned and in circumstances other than those expressly referred to in the Statute. It is reasonable, however, that this inherent power should not be too broadly construed. Clearly, a tribunal must not exceed a power to grant remedies that is clearly and unequivocally circumscribed in the Statute'.
[1609] See C. F. Amerasinghe., *supra,* note 705, (Oxford University Press, 2014), at p. 332.

5.5.12.2. Provisions in statutes of other IATs and the Redesign Panel findings

In terms of the potential remedies available to the former UNAdT, Article 10(1) of the tribunal's statute similarly provided for the power to 'order the rescinding of the decision contested or the specific performance of the obligation invoked'. However, unlike those of the other major tribunals such as the ILOAT[1610] and the WBAT[1611], this power was severely limited in practice by also having to fix the amount of compensation to not normally exceed the equivalent of two years' net base salary of the applicant, and UN Secretary-General[1612] and the tribunal could only, in exceptional cases, when it considered it justified, order the payment of a higher indemnity. In cases of wrongful termination, difficulty arose from the fact that the UN Secretary-General almost always opted to pay compensation to an adversely affected staff member instead of reinstating the person[1613]. According to a 2004 report of the JIU of the old UN system, the fact that it is *de facto* the Secretary-General and not the UNAdT who decided whether specific performance will be required or damages will be paid 'undermines staff confidence in the Tribunal and raises questions regarding the independence and fairness of the process'[1614]. Compared to the ILOAT, which decides itself whether rescission or specific performance 'is not possible or

[1610] The ILOAT has no limit on the amount of monetary compensation to be awarded. See Article VIII of the ILOAT Statute, '[…] [i]f such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to her or him'.
[1611] The Statute of the WBAT previously imposed a limit of three years' salary, but this cap was removed in 2001. Article XII(1) now states that '[i]n [the] event that ['the Tribunal finds that the Respondent institution has reasonably determined that […] rescission or specific performance would not be practicable or in the institution's interest'], 'the Tribunal shall, instead, order such institution to pay restitution in the amount that is reasonably necessary to compensate the applicant for the actual damages suffered'.
[1612] Article 10(1) of the former UNAdT statute, 'If the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation invoked. At the same time, the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the Secretary-General, within thirty days of the notification of the judgment, decide, in the interest of the [UN], that the applicant shall be compensated without further action being taken in his or her case, provided that such compensation shall not exceed the equivalent of two years' net base salary of the applicant. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher indemnity. A statement of the reasons for the Tribunal's decision shall accompany such each order'.
[1613] T. Laker., 'The formal system (II): Judicial review', in (eds.) H. Buss, T. Fitschen, T. Laker, C. Rohde and S. Villalpando, *Handbook on the Internal Justice System at the United Nations* (United Nations System Staff College, 2014), at p. 117.
[1614] Report of the Joint Inspection Unit, Administration of Justice: Harmonization of the Statutes of the United Nations Administrative Tribunal and the International Labour Organization Administrative Tribunal, (JIU Doc. JIU/REP/2004/3, Geneva 2004), at 2.

advisable'[1615], in which case it awards monetary compensation, the former UNAdT considered this to be a 'glaring example of injustice and discrimination between the two categories of staff members under the [UN] system'[1616]. Further, in this context, the two years limitation has often been considered as amounting to inadequate compensation[1617]. While the *Redesign Panel* did not make any specific recommendation for the abolition or raising of the ceiling – two years' salary – on financial compensation that may be awarded by the UN Dispute and Appeals tribunals so as to harmonize their statutes with that of the ILOAT, it likewise emphasized that the power of the UN Secretary-General to choose between 'specific performance and the payment of limited compensation can, and sometimes does, result in inadequate compensation, particularly in cases of wrongful termination or non-renewal of contract. A system that cannot guarantee adequate compensation or other appropriate remedy is fundamentally flawed. More specifically, a system that does not have authority to finally determine the rights and appropriate remedies is inconsistent with the rule of law'[1618]. For these reasons, the *Redesign Panel* recommended that the new '[UNDT] should have power to grant final and binding relief by way of [*inter alia*]…[s]pecific performance, injunction and declaratory decree, including the order that an appointment be set aside'[1619]. In the event, these proposals were not carried forward into the new statutes themselves, with the result that the potential remedies before the UNDT and UNAT are still understood to be few in number. In fact, the primary remedies envisaged in the statutes of both UN Tribunals are either the rescission of the contested administrative decision or specific performance[1620]. However,

[1615] Article VIII of the ILOAT Statute. 'In cases falling under article II, the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to her or him'.
[1616] Ibid. Letter dated 8 November 2002 from the President of the United Nations Administrative Tribunal addressed to the Chairman of the Fifth Committee, (UN Doc. A/C.5/57/25 of 20 November 2002). Annex 2, para. 2.
[1617] Ibid, at 3, 4. See also G. Robertson, R. Clark., O. Kane., *Report of the Commission of Experts on Reforming Internal Justice at the United Nations*, (2006), para. 53.
[1618] *Report of the Redesign Panel, supra,* note 137, para. 71.
[1619] Ibid, para 83(a).
[1620] Article 10(5)(a) of the UNDT Statute. Article 10(5). As part of its judgement, the Dispute Tribunal may only order one or both of the following: (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph […]'. Article 9(1) of the UNAT Statute, 'the

pursuant to Article 10(5) of the Statute of the Dispute Tribunal and Article 9.1 of the Statute of the Appeals Tribunal, in cases where the contested administrative decision concerns appointment[1621], promotion or termination, the Tribunals must indicate the amount of compensation that 'the respondent may elect to pay as an alternative to the rescission of the contested decision or specific performance ordered'. While this provision is an exception to the general rule that an unlawful administrative decision cannot stand, the UNDT in *Rockcliffe* explained that:

> 'art. 10(5)(a) should not be interpreted too broadly as if it was meant to cover all decisions somehow related to appointment, promotion, and termination matters. This Tribunal finds that the clause should be interpreted as applying primarily to decisions not to appoint or promote a staff member or to terminate her or his appointment. The likely rationale for including this clause in the Statute is, inter alia, to avoid affecting third-party rights and to avoid imposing reinstatement or continued employment where the relationship between the parties has irretrievably broken down'[1622].

In nearly all such cases, it has been observed that the UN Administration has chosen to pay the compensation instead of rescinding the administrative decision. As seen, Article 10(5)(b) of the Statute of the Dispute Tribunal and Article 9(1)(b) of the Statute of the

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Appeals Tribunal may only order one or both of the following: (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Appeals Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph; […]'.

[1621] The UN Administration contended that, for example, 'if the Dispute Tribunal were to rescind an appointment decision, without any alternative remedy, the rights of the selected staff member would thereby be adversely affected' (See Report of the UN Secretary-General, A/65/373, para. 227). However, Flaherty and Campos have argued that [t]his is not true. As a matter of law, once the decision has been challenged, it cannot be said that the – as judicially determined- wrongly selected staff member has any "right" at all; she or he had only a potential right, which depended on the final result of the challenge'. See E. P. Flaherty and X. Campos., 'The Reform of the UN Internal Justice System: The 'Lampedusa" Syndrome' (2011), at p. 8.

[1622] *Rockcliffe v. Secretary-General of the United Nations,* Judgment No. UNDT/2012/121, para. 17, See UN website: https://www.un.org/en/internaljustice/files/undt/judgments/undt-2012-121.pdf. Last accessed on 15 January 2020. In this context, Gulati also emphasized that it 'might be inappropriate to resore the employment of certain persons following their dismissal as in certain circumstances, there exists a real risk of the creation of a hostile work environment following reinstatement'. R. Gulati., *supra,* note 668, *2010 Working Paper*, University of New South Wales, at 53.

Appeals Tribunal[1623] provides that any compensation shall normally not exceed two years' net base salary of the applicant[1624]. On the other hand, even where the UN's approach seems to reflect an attempt to reduce the risk of a hostile work environment and tribunals do possess discretion to award compensation higher than two years' salary, this may only be ordered in exceptional cases[1625]; and in this context, it has been forcefully argued that such 'artificial limit' 'has absolutely no basis in accepted doctrine or State practice[1626]. Apart from not being able to decide whether or not rescission or specific performance is possible[1627], it would seem that the power of the UN Tribunals continue to be limited in general to fixing the amount of compensation to two years' net base salary. In addition, the *Redesign Panel's* suggestion to allow for punitive damages in exceptional cases was also expressly rejected in both statutes[1628]. Nonetheless, there has been some evidence that the UNDT has been prepared to award compensation for non-pecuniary moral injury as an alternative to specific performance. On appeal by the Secretary-General, the UNAT upheld the compensation in each case, rejecting the argument that compensatory awards are

[1623] Article 10(5)(b) of the Statute of the UNDT. ('Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision. Article 9(1) of the Statute of the UNAT. 'The Appeals Tribunal may only order one or both of the following: (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Appeals Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.')

[1624] Article 10(5)(b) of the Statute of the UNDT. (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

[1625] With regard to the need to justify a higher compensation, the UNAT held in *Mmata* 2010-UNAT-092 that 'Article 10(5)(b) of the Statute of the UNDT does not require a formulaic articulation of aggravating factors; rather it requires evidence of aggravating factors which warrant higher compensation. The findings of fact mady by the UNDT […] point to evidence of blatant harassment and an accumulation of aggravating factors that support an increased award. Blatant harrassment and an accumulation of aggravating factors in administrative and investigative conduct in the course of wrongful dismissal cases are consistent with the principles of law applied in the former Administrative Tribunal to justify increased compensation'.

[1626] E. P. Flaherty and X. Campos., *supra,* note 1622, (2011), at p. 8. According to Flaherty and Campos ‚the well established principle of law is that a cap is only imposed when the so called „objective responsibility" comes into play, that is, when only the damage –but not the guilt or negligence must be proven [...]'.

[1627] Silverstein has stated that 'one could conceivably make the argument that neither the UNDT or the UNAT arguably issue truly "binding" decisions'. R. Silverstein., 'Revisiting the Legal Basis to Deny International Civil Servants Access to a Fundamental Human right, *Michigan State International Law Review,* [Vol. 25.2] (2017), p. 412.

[1628] Article 10(7) of the UNDT Statute, ‚The Dispute Tribunal shall not award exemplary or punitive damages'. See identical provision under Article 9(3) of the UNAT Statute.

punitive damages by another name[1629]. In the view of the Tribunal, compensation could not be set artificially high in order to make specific performance a real option[1630]; and, significantly, the Appeals Tribunal noted that:

> ‚[u]nder Article 10(5)(a) of the UNDT statute, the Secretary-General has the right to elect between paying compensation and implementing the order for rescission. The submission [by the appellant] that compensation ought to be set by the UNDT at a level which would force the Secretary-General to implement the order for rescission is without any foundation'.

In this regard, Otis and Reiter noted that '[w]hile this is in keeping with the compensatory purpose of damages mandated by the statutes, and while it reaffirms the discretionary power of the Administration, it is troubling nevertheless, since it *indicates* a rejection of the critique of compensation in lieu of specific performance raised by the [*Redesign Panel]* as well as other commentators. Particularly in cases of unwarranted termination, an award of two years' compensation is far from the [basic standard of full compensation] *restutio in integrum* required by national legal systems. The almost exclusive resort to this option by the Administration is a clear indication that it is in most cases a far cheaper choice [for the UN]' [1631] ‚but a major loss' [1632] for some of its staff members. Given the lack of fundamental guarantees for full and fair compensation to staff members at the UN, this raises similar unanswered questions about OSCE practice.

[1629] 2010-UNAT-035, *Crichlow v. Secretary-General*, para. 22; 2010-UNAT-042, *Wu v. Secretary-General*, para. 33; 2010-UNAT-076, *Kasyanov v. Secretary-General*, para. 30.
[1630] This argument was raised in 2010-UNAT-044, *Solanki v. Secretary-General* by the appellant staff member, but was rejected by the tribunal, para.16.
[1631] L. Otis and E. H Reiter., 'The Reform of the United Nations Administration of Justice System: The United Nations Appeals Tribunal after One Year', *The Law and Practice of International Courts and Tribunals* 10 (2011) 405 – 428, 418 – 419.
[1632] See A. Megzari., *supra,* note 163, (Leiden/Boston, Brill/Nijhoff, 2015), at p. 498.

5.5.12.3. Interim measures

5.5.12.3.1. Conditions for seeking interim relief

Administrative tribunals are typically vested with the power to take a number of interim measures[1633] where urgent judicial intervention is necessary, for example in case of non-renewal of appointment[1634] to preserve the applicant's rights on a provisional basis[1635]. The Panel is not granted authority by its ToR to order interim relief measures, and the same limitation applies to other IATs[1636]. As the case law of the Panel has not been made publicly available, it is unclear whether this statutory *lacuna* has been addressed, namely that the Panel possesses an inherent jurisdiction to indicate provisional measures. That said, since the Panel has competence to decide on 'the procedure to be followed'[1637], it would seem that the Panel is nonetheless entitled to render such measures. As the Panel is given a general competence to determine its own 'procedure with regard to hearings'[1638], this allows the latter to arrogate unto itself the authority to award interim or temporary relief in the form of a suspension of the implementation of the contested administrative decision (i.e extension or expiration of a contract, reassignment, Performance Appraisal Report (PAR) completion or deferral of a step increment), though naturally this cannot go beyond

[1633] See O. Elias and M. Thomas., *supra,* note 804, (Martinus Nijhoff Publishers, 2012), at p. 171.
[1634] At the UN, in cases of non-renewal of appointment, no suspension of action is possible after expiration of the last appointment.
[1635] See C. Rohde., *supra,* note 1132, (United Nations System Staff College, 2014), at p. 122. Chapter on 'The Formal System (I): Management Evaluation', B. Handling the matter: Proceedings before the Tribunals. 2. Application for suspension of action.
[1636] See S. Flogaitis., 'Aspects of Judicial Review of Administrative Action by the World Bank Administrative Tribunal with Relevant Comparisons', in N. G. Ziadé (ed), *Problems of International Administrative Law* (Leiden, Martinus Nijhoff, 2008), at p. 130. For example, the Statute of the International Monetary Fund Administrative Tribunal, Article VI, para 4, states that ,the filing of an application shall not have the effect of suspending the implementation of the decision contested'. Since 1 January 2002, the Tribunal's amended Rules [Rule 13) have provided for provisional relief to be granted where the execution of the decision ,is shown to be highly likely to result in grave hardship to the applicant that cannot otherwise be redressed'.
[1637] Article VII(1)(b) Adjudication Procedure, Appendix 2, ToR, SRSR.
[1638] Article VII(2)(b) Adjudication Procedure, Appendix 2, ToR PoA, SRSR. According to Miles, 'it may be argued that the power to order provisional measures constitutes a general principle of international law within the meaning of Article 38(1)(c) of the ICJ Statute, and is therefore generally available to adjudicators even in the absence of an express power…' See C. A. Miles., 'Power to Order Provisional Measures', Chapter 4, in *Provisional Measures Before International Courts and Tribunals,* (Cambridge University Press, 2017), at 136.

the scope of the SRSRs. Similarly, the WBAT may grant a request for provisional relief 'in case in which the execution of the decision is shown to be highly likely to result in grave hardship to the applicant that cannot otherwise be redressed'[1639]. As reference cannot be made to the Rules of Procedure of the PoA, it is unclear what criteria must be taken into account by the Panel in deciding whether such relief should be granted. That said, OSCE Staff Regulation 10.03 follows the principle applicable to other IATs[1640] that the 'filing of an internal or final appeal shall not imply suspension of the execution of the impugned decision' [1641]. This may be considered necessary for the efficient operation of the Organization, so that the pendency of a case would not disrupt day-to-day administration or the effectiveness of disciplinary measures, including removal from the staff in termination cases[1642]. The *Redesign Panel* proposed that the Dispute Tribunal should have 'power to make interim orders, including orders for the suspension of action in any case where there is a good prima facie case' [1643]. Accordingly, the UNDT[1644] and Appeals Tribunal[1645] may order an interim measure. Pursuant to Article 10(2) of the UNDT Statute, this is 'where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its 'implementation would cause irreparable damage'. While this temporary relief may include an order to suspend the implementation of the contested administrative decision, the UNDT notably excludes cases of appointment, promotion or termination[1646].

[1639] Rule 13 of the Rules of the WBAT.
[1640] For example, Article 7(6) of the former UNAdT statute provided that ‚The filing of an application shall not have the effect of suspending the execution of the decision contested'.
[1641] OSCE Staff Regulation 10.03 Effect of an Appeal, SRSR.
[1642] See Article VI, Section 4, Administrative Tribunal of the IMF, *Commentary on the Proposed Statute*.
[1643] *Report of the Redesign Panel, supra,* note 137, para. 84.
[1644] Article 10(2) of the UNDT Statute. 'At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage'.
[1645] Article 9(4) of the UNAT Statute. ‚'At any time during the proceedings, the Appeals Tribunal may order an interim measure to provide temporary relief to either party to prevent irreparable harm and to maintain consistency with the judgement of the Dispute Tribunal'.
[1646] Article 14(1) Suspection of action during the proceedings, UNDT Rules of Procedure. ‚…[t]his temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination'.

5.5.13. Adjudication decisions

5.5.13.1. Reimbursement of legal costs

With regard to the award of costs, Article VIII(5) of the ToR PoA allows the Panel to 'award costs to be reimbursed to a successful applicant for properly vouched legal fees and expenses[1647] incurred by the applicant'[1648]. By virtue of this provision, a 'successful applicant'[1649] in an external appeal could recover his or her costs from the respondent Organization, but in the event of the latter succeeding, both sides bear their own costs[1650]. In this context, however, an interesting feature is that 'tribunals have […] been rather conservative and cautious in deciding whether, and to what extent, to award costs in a case'[1651]. ToR PoA attempts to codify these principles through the language in Article VIII(5), which authorizes the Panel to award costs, taking into account factors 'nature and importance of the dispute'[1652]. Even when applicants are successful, the amount awarded may not always cover all 'legal fees and expenses incurred'[1653] by the applicant. Moreover, taking into consideration the fact that the OSCE does not provide or fund in-house legal assistance and representation for OSCE officials in employment disputes, this shifts the burden of costs on to unsuccessful applicants, who will very often have to pay substantial fees for an 'external lawyer' as well as incur significant secretarial and other costs. As it is not possible to review final adjudication decisions, it is unclear whether as a matter of practice[1654], the Panel has facilitated access to legal representation and the due process right to the right of equality of arms by making reasonable awards of costs by a successful

[1647] Recoverable costs may include 'travel' and 'subsistence' expenses incurred in attending a hearing.
[1648] Article III(5) Adjudication decisions, Appendix 2, ToR PoA, SRSR.
[1649] Under this provision, Panel is authorized to award costs against the Organization in whole or in part, i.e the Panel's decision has found favour of all or a portion of his/her claims for relief.
[1650] See S. Flogaitis, *supra*, note 1637, (Leiden, Martinus Nijhoff, 2008), at p. 128. ('The established, general principle, on the issue of costs, however, is that in international administrative law [e]ach party shall bear its own costs in presenting a case to the Tribunal'). See Statute of the Inter-American Development Bank Administrative Tribunal (IDBAT Statute), Article V, para 3. Article V provides that, as an exception, transportation expenses incurred in the presentation of an application by a staff member who is stationed in any of the Bank's Field Offices, and which the Tribunal deems to be reasonable, shall be bourne by the Bank.
[1651] See J. S. Powers, *supra,* note 1376, (Martinus Nijhoff Publishers, Leiden/Boston, 2009), at p. 962.
[1652] Ibid.
[1653] Article VIII(5) Adjudication decisions, Appendix 2, ToR PoA, SRSR.
[1654] According to Powers, most administrative tribunals, whether pursuant to their rules or as a matter of practice, have comparable authority to award costs.

applicant in a case. However, notwithstanding the practice of ILOAT, which has been awarding costs often in a way which may be described as generous, comparison may be made with the awards made by the former UNAdT. [1655] Given the importance attached by the *Redesign Panel* to the right to legal representation, it was, therefore, perhaps somewhat surprising that the *Panel* recommended that the '[UNDT] should have power to grant final and binding relief by way of, *inter alia*, '[o]rders for the payment of out-of-pocket expenses and legal costs, provided that an order should be made for the payment of a staff member's legal costs only if, in the opinion of the judge, it was appropriate to have private representation'[1656]. In this regard, it may be relevant that, in general, the IOs which have accepted the jurisdiction of the ILOAT do not provide their staff with a service comparable with the Panel of Counsel of the UN (i.e free legal assistance). However, unike the UNAdT[1657], both the Dispute Tribunal and the Appeals Tribunal are precluded by their respective statutes from awarding legal costs to applicants or appellants. Indeed, the General Assembly specifically considered authorizing the new tribunals to award costs of litigation, but ultimately decided against it[1658]. Article 10(6) of the Dispute Tribunal's Statute stipulates: Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party'. A similar stipulation is made under Article 9(2) of the Appeals Tribunal's Statute.

5.5.13.2. Avoidance of vexatious proceedings

To ensure safeguards against abuse of process by applicants who pursue frivolous claims,

[1655] See A. Megzari., *supra,* note 163, (Leiden/Boston, Brill/Nijhoff, 2015), at p. 426. While the Statute of the ILOAT has no provisions concerning the award of costs, a general policy was clearly stated in ILOAT Judgment No. 262 [1965] *Lamadie* (IPI) at p. 7. 'In principle a complainant whose complaint is allowed in whole or in part is entitled to costs, to be paid by the defendant organization. There is no need for the complainant to have put in an express claim for such costs. Nor is it material whether he has been assisted or represented by counsel. However, costs are payable only to the extent warranted by the circumstances of the case, that is to say its nature, importance and complexity and the actual contribution made by the claimant or his counsel to the proceedings'. See also *Ghaffar,* ILOAT Judgment No. 320 [1977] at p. 9.
[1656] *Report of the Redesign Panel, supra,* note 137, para. 83(d).
[1657] The UNAdT only granted costs within the limits set forth in its statement of Policy A/CN.5/R.2 of 18 December 1950, namely if such costs are demonstrated to have been unavoidable, if they are reasonable in amount, and if they exceed the normal expenses of litigation before the tribunal. Despite this policy the tribunal for a long time awarded what seemed to be a fixed amount of $300 before coming more recently to follow its earlier stated policy, as for example, in *Powell* UN Judgment No. 237.
[1658] See A. Megzari., *supra,* note 163, (Leiden/Boston, Brill/Nijhoff, 2015), at p. 474.

Article VIII(6) of the ToR PoA allows the Panel, 'it may decide to stop the examination of the application, and dismiss it immediately, or if the application was examined'[1659], to 'require the applicant to pay all or part of the costs incurred'[1660] by the Organization in defending the case in addition to bearing the expenses of the Panel. In contrast to the former UNAdT[1661], the *Redesign* Panel suggested that '[t]he 'Dispute Tribunal should also have 'power to summarily dismiss matters that are clearly irreceivable or are frivolous or vexatious'[1662]. The Statutes of the UNDT and UNAT empower the Tribunals to award costs against a party it deems to have 'manifestly abused' the proceedings before it[1663].

5.5.14. Other prodecural matters relating to adjudication

5.5.14.1. Amicus curiae briefs

As with most other international courts and tribunals[1664], IATs generally[1665] allow indirect participation of non-parties in judicial proceedings through the filing of *amicus curiae* or 'friend of the court' briefs[1666]. Without necessarily having a legal interest in the dispute, such briefs seek to bring information and expertise before the tribunal that is relevant to the dispute before it. Significantly, *amicus* activity is also seen as contributing to different perspectives and increased transparency and legitimacy to international dispute settlement

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[1659] Ibid.
[1660] Article III(6) Adjudication decisions, Appendix 2, ToR PoA, SRSR.
[1661] Article 7(3) of the UNAdT Statute. ,In the event that the recommendations made by the joint body and accepted by the Secretary-General are unfavourable to the applicant, and insofar as this is the case, the application shall be receivable, unless the joint body unanimously considers that it is frivolous'.
[1662] *Report of the Redesign Panel, supra,* note 137, para. 84.
[1663] Article 10(6) of the UNDT Statute and Article 9(2) of the UNAT Statute.
[1664] While *amicus* participation has for some time been accommodated in tribunals dealing with issues such as human rights and international criminal law, the practice now extends to certain international trade and investment disputes, reflecting a trend towards greater participation and transparency. See A. Reinisch & C. Knahr, *supra,* note 134, (2008), at p. 478. See also P. J. Sands and R. Mackenzie, 'International Courts and Tribunals, Amicus Curiae', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008).
[1665] See O. Elias and M. Thomas., *supra,* note 804, (Martinus Nijhoff Publishers, 2012), at p. 170.
[1666] The Latin term *'amici curiae'* is the plural of '*amicus curiae'*, which means 'friend of the court'. A term applied to a bystander, who without having an interest in the cause, of his own knowledge makes a suggestion on a point of law or fact for the information of the presiding judge. See S. Krislov., 'The Amicus Curiae Brief: From Friendship to Advocacy', 72 *Yale Law Journal* (1963) 694. The expression is used more frequently in the international arena, although texts use other terms such as 'third-party intervention' or 'nondisputing party participation'.

processes[1667]. However, while the governing instruments of some administrative tribunals make express provision allowing for the submission of *amicus curiae* briefs by non-parties, it is generally at the discretion of the tribunal concerned. In terms of procedural rules and practice, the scope of *amicus* participation, where permitted, varies among the different IATs. For example, the WBAT permit a representative of the World Bank's Staff Association and 'any person or entity with a substantial interest in the outcome of a case to participate as a friend-of-the-court'[1668]. Though the *Redesign Panel* recommended the possibility of *amicus curiae* briefs[1669], the new UNDT Statute only permits staff associations to file a request to submit a friend of the court brief[1670] and UNAT Rules of Procedure is limited to '[a] person or organization for whom recourse to the Appeals Tribunal is available and staff associations'[1671]. On the one hand, since both statutes provide for the tribunal's power to regulate interventions 'if it considers that the filing of the brief would assist the [tribunals] in [their] deliberations'[1672], this is more likely to allow

[1667] See P. J. Sands and R. Mackenzie, *supra,* note 1665, (Oxford University Press, 2008), at para. 29. See also A. Reinisch & C. Knahr, *supra,* note 134, (2008), at p. 478. In addition, some commentators have cited *amicus* activity as a component of evolving global administrative law norms. See R. B. Stewart and M. Ratton Sanchez Badin., ‚The World Trade Organization: Multiple Dimensions of Global Administrative Law, *International Journal of Constitutional Law,* Volume 9, Issue 3-4, (Oxford, 1 October 2011), *556-586,* at *582* (‚The [Appellate Body's] embrace of amicus briefs reflects the adoption of [global administrative law] to boost organizational legitimacy…').

[1668] Rule 25(2) of the Rules of the WBAT. The WBAT noted in *The World Bank Staff Association v. International Development Association,* WBAT Decision No. 40 (1987) 'Even though the Staff Association may not appear as an applicant or as an intervenor before the Tribunal and, therefore, cannot submit pleas on its own, the Staff Association can indeed provide assistance to the Tribunal in rendering a full and considered decision of the issues raised in the various cases arising from the Bank reorganization. In those cases properly brought before the Tribunal by staff members alleging non-observance of their contracts of employment or terms of appointment, the Staff Association could, for example, usefully file briefs in support of the staff member's contentions regarding such matters as a Respondent's alleged failure to consult properly with the Staff Association or the allegedly arbitrary and unreasonable methods chosen by the Respondent to implement the reorganization plan'. See also *Lansky (No. 3) v. International Bank for Reconstruction and Development,* Decision No. 442 (2010), in which the WBAT decided to include into the record an *amicus curiae* brief submitted by a non-profit public interest organization.

[1669] *Report of the Redesign Panel, supra,* note 137, para 84. 'It should also have the power to make its own rules, including with respect to interveners and *amici curiae* (friends of the court)'.

[1670] Article 2(3) of the UNDT Statute, '[t]he Dispute Tribunal shall be competent to permit or deny leave to an application to file a friend-of-the-court brief by a staff association'; Article 24(1) of UNDT Rules of Procedure provides that '[a] staff association may submit a signed application to file a friend-of-the-court brief […]'.

[1671] Pursuant to Article 6(2)(g) of the UNAT Statute, 'The rules of procedure of the Appeals Tribunal shall include…The filing of friend-of-court briefs, upon motion and with the permission of the Appeals Tribunal…'; According to Article 17(1) of the UNAT Rules of Procedure, '[a] person or organization for whom recourse to the Appeals Tribunal is available and staff associations may submit a signed application to file a friend-of-the-court brief…'.

[1672] Article 24(2) of the UNDT Rules of Procedure provides that 'The President or the judge hearing the case

amicus participation compared to the Draft Statutes of the UNDT and Appeals Tribunal[1673]. On the other hand, it may be argued that this is still not a very strong assertion of *amicus curiae* rights given the high degree of discretion left to the tribunals. Despite the recent growth in transparency in international dispute settlement processes, *amicus curie* briefs are not expressly addressed in the ToR PoA. While the lack of such an express rule is not unusual in the statutes of IATs, tribunals usually make some provision to seek or receive information relevant to the dispute before it from entities or individuals that are not parties to the dispute. Although PoA of the OSCE has the authority under Article VII(2)(c) of the ToR PoA to determine 'other matters relating to adjudicaton'[1674], the scope of *amicus* participation in external appeal proceedings is unclear. This raises questions as to whether the term itself is explicitly used in the Rules of Procedure of the PoA, whether *amicus* participation is limited, like the UNDT, to Staff Committees and Staff Representatives, and in practice, the number cases where leave to intervene as *amici* before the Panel has actually been granted [1675].

5.5.14.2. Oral hearings

After the close of the written procedure and the application is transmitted to the Chairperson of the Panel in order for the Panel to decide on the application[1676], Article II(2)(c) of the ToR PoA gives authority to the Panel to 'determine [,*inter alia,*] whether oral hearings shall be held or whether the application shall be decided on the basis of the documents submitted only[1677]'. As with most IATs, such hearings are at the discretion of the Panel rather than a right of the parties[1678]. As there would seem to be no question that

may grant the application if it considers that the filing of the brief would assist the Dispute Tribunal in its deliberations…'; in an almost identical provision, Article 17(2) of the UNAT Rules of Procedure provides that 'The President or the panel hearing the case may grant the application if it considers that the filing of the brief would assist the Appeals Tribunal in its deliberations…'

[1673] Article 7(2)(d) of the proposed UNDT statute, which provided that the rules of procedure, to be adopted by the UNDT, should include provisions concerning: 'Intervention by persons not a party to the case whose rights may be affected by the judgment'.

[1674] Article VII(2)(c) Adjudication Procedure, Appendix 2, ToR PoA, SRSR.

[1675] See P. J. Sands and R. Mackenzie., *supra,* note 1665, (Oxford University Press, 2008), at para. 3.

[1676] See OSCE Staff Rule 10.02.2(a)(ii) Applications, Article X Appeals, SRSR.

[1677] Article VII(2)(c) Adjudication Procedure, ToR PoA, Appendix 2, SRSR.

[1678] See C. F. Amerasinghe, *supra,* note 1179, (Martinus Nijhoff Publications, 2009), at p. 51.

proceedings are predominantly in written form, a key issue in relation to the proper administration of justice at the OSCE is the absence or presence of oral hearings. Given that the text of adjudication decisions are only made available to OSCE staff/mission members and delegations, as a practical matter this creates problems in ascertaining the proportion of cases where oral hearings were either rejected, ignored or accepted by the Panel. While it is conceded that oral hearings are 'not always necessary or unnecessary'[1679], the '*de facto* absence of any oral hearings'[1680] of some IATs, including the fomer UNAdT, ILOAT, WBAT, and the administrative tribunals of the IMF and the Asian Development Bank has nonetheless attracted strong criticism by staff unions and outside counsels representing staff members[1681]. Thus, the *Redesign Panel* emphasized the importance of oral hearings generally[1682], and stated that they should be a requirement when there existed disputed issues of fact[1683]. Significantly, however, this clear mandate in favour of oral hearings was not expressly incorporated into the statutes of both UN tribunals. Although the statutes provide that oral hearings should in principle be held in public[1684], that the tribunals may require the personal appearance of the applicant[1685], and the tribunals are empowered to establish their own rules of procedure in relation to oral hearings[1686], there

[1679] Ibid.
[1680] See A. Reinisch & C. Knahr., *supra,* note 134, (2008), at p. 479.
[1681] While the ILOAT provides for the possibility of an oral hearing under Article V of its Statute, the tribunal however, declines in consistent case law to hold oral hearings. With regard to this practice, it has been remarked that 'all human rights treaties require a 'fair and public hearing' for disputes concerning civil obligations: a fortiori they are breached by a Tribunal which offers no hearings at all. There may be cases where the facts are not in dispute and the legal issues can be satisfactorily adumbrated on paper…to deprive all complainants of a hearing to which they are presumptively entitled cannot be justified…[ILOAT must adopt a rule that] makes pellucidly clear that any party is entitled to an oral hearing on request, which may only be refused in limited and defined circumstances and with a reasoned decision that such circumstances exist'. See Opinion prepared by G. Robertson QC, , *supra,* note 134, Doughty Street Chambers.
[1682] *Report of the Redesign Panel, supra,* note 137, para 10. 'To guarantee due process and to facilitate decisions, oral hearings should be promoted and accepted'.
[1683] Ibid, paras. 10 and 92.
[1684] Article 9(3) of the UNDT Statute, 'The oral proceedings of the Dispute Tribunal shall be held in public unless the Dispute Tribunal decides, at its own initiative or at the request of either party, that exceptional circumstances require the proceedings to be closed'; Article 8(4) of the UNAT Statute, 4. The oral proceedings of the Appeals Tribunal shall be held in public unless the Appeals Tribunal decides, at its own initiative or at the request of either party, that exceptional circumstances require the proceedings to be closed'.
[1685] Article 9(2) of the UNDT Statute, 'The Dispute Tribunal shall decide whether the personal appearance of the applicant or any other person is required at oral proceedings and the appropriate means for satisfying the requirement of personal appearance'; Article 8(2) of the UNAT Statute, 'The Appeals Tribunal shall decide whether the personal appearance of the appellant or any other person is required at oral proceedings and the appropriate means to achieve that purpose'.
[1686] Article 7(2)(e) of the UNDT Statute, 'The rules of procedure of the Dispute Tribunal shall include provisions concerning:…Oral hearings'; Article 6(2)(h) of the UNAT Statute, 'The rules of procedure of the

is no express rule that would require them to hold such hearings. In consequence, the combination of unfettered discretion to have or not to have oral hearings and past practice of not holding such hearings, does not seem to offer 'sufficient guarantees of applicant's rights'[1687]. On the other hand, with the UN bearing the 'necessary costs associated with the travel and accommodation of the party or other person', when the UNDT requires an oral hearing[1688], and having adopted technology as a means of conducting oral hearings[1689], it has been argued that in practice this gives 'little reason for judges to refuse to conduct hearings when necessary and appropriate'[1690]. Although the statutes of IATs regularly provide for oral proceedings to be held in public as a general rule'[1691], the ToR PoA contains no express provision in this regard. Thus, it can be surmised that the requirement of transparency and the principle of open justice appears[1692] not to have been followed at the PoA[1693], where a party wishes to have an open hearing; and it would therefore seem that the Rules of Procedure of the PoA require all such hearings by the Panel to be held 'in

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Appeals Tribunal shall include provisions concerning:… Oral proceedings'; Article 18(1) of the UNAT Rule of Procedure, 'The judges hearing a case may hold oral hearings on the written application of a party or on their own initiative if such hearings would assist in the expeditious and fair disposal of the case'.

[1687] See A. Reinisch & C. Knahr, *supra,* note 134, (2008), at p. 480. See also C. Treichl., 'The Denial of Oral Hearings by International Administrative Tribunals as a Factor for Lifting Organizational Immunity before European Courts: *A(nother) Critical View, International Organizations Law Review,* 16 (Brill Nijhoff, 2019), at p. 407. ('[I]n principle, the denial or oral hearings by international administrative tribunals results in the duty of states to afford individuals access to a court.')

[1688] Article 16(5) of the Rules of Procedure of the UNAT, 'If the Dispute Tribunal requires the physical presence of a party or any other person at the hearing, the necessary costs associated with the travel and accommodation of the party or other person shall be borne by the Organization'.

[1689] Article 16(4) of the Statute of the UNDT, 'The parties or their duly designated representatives must be present at the hearing either in person or, where unavailable, by video link, telephone or other electronic means'; Article 18(2) of the Rules of Procedure of the UNAT, '…If appropriate in the circumstances, the oral hearing may be held by electronic means'.

[1690] R. Gulati., 'The Internal Dispute Resolution Regime of the United Nations', (2011) 15 *Max Planck Yearbook of United Nations Law* 489, at 528.

[1691] See A. Reinisch & C. Knahr, *supra,* note 134, (2008), at p. 479. See Report of the Internal Justice Council, Administration of justice at the United Nations, (UN Doc. A/66/158 of 19 July 2011). See UN website. https://undocs.org/A/66/158. Last accessed on 15 January 2020.

[1692] In *Dumornay v. Secretary-General of the United Nations* Judgment No. UNDT/2010/004, para. 4, it was stated that 'The principle of open justice is a fundamental element of the Tribunal's exercise of its jurisdiction', and as the 'General Assembly has given the Tribunal the attributes of a court', there is an 'expecation that its proceedings will be open to the public unless there is good reason otherwise. In this context, the rule that justice must not only be done, it must be seen to be done...'. The Internal Justice Council also considered that, in the light of the principle of open justice, 'where a party wishes to have an open hearing, such a hearing should be held, unless there are good reasons for not doing so'. Report of the Internal Justice Council, Administration of justice at the United Nations, (UN Doc. A/66/158 of 19 July 2011), para. 29.

[1693] Ibid.

camera' or behind closed doors[1694], excluding non-party third persons and public scrutiny. The *Redesign Panel* stated that 'all judgments should be delivered in public, either orally or in writing'[1695]. Like the old UN system, given that the incidence of oral hearings is left to the discretion of the Panel, it may be suggested that the OSCE is required to ensure that its staff/mission members are provided with sufficient guarantees of access to an oral hearing, especially where there are disputed facts[1696], and adjudication decisions should be given publicly. Considering the difficulties in always holding oral hearings in the context of the OSCE, whose staff are deployed across a vast geographic area, technology may enhance the process of holding a hearing even when the parties are in different locations. Yet, this requires considerable funds, and, as indicated, the present low levels of funding from the OSCE Unified Budget for the PoA at the OSCE militates against such hearings.

5.5.14.3. Publication of final adjudication decisions

As has been noted, a defining feature of the formal dispute resolution mechanisms of the OSCE is the general confidential nature of proceedings. Article VIII(7) of the ToR PoA states that 'the Secretariat…shall publish the adjudication decision electronically in a location accessible by staff/mission members and delegations'. To the extent that adjudication decisions 'stat[ing] the reasons on which [they are] based'[1697] are not made public at the OSCE, this seems to be at odds with the practice of many other IATs[1698]. Moreover, such wording is neither in line with the provisions of Article 14(1) of the

[1694] *Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb)*, Council of Europe/European Court of Human Rights, 2013, p. 46. See ECHR CoE website: https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf. Last accessed on 15 January 2020.
[1695] *Report of the Redesign Panel, supra,* note 137, para. 94.
[1696] Specifically, this should include disciplinary cases. Pursuant to Article 16(2) of the Rules of Procedure of the UNDT, 'A hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure'.
[1697] Article VIII (3) Adjudication decisions, Appendix 2, ToR PoA, SRSR.
[1698] See e.g., Article VI of the ILOAT Statute, adopted by the International Labour Conference on 9 October 1946 and amended by the Conference on 29 June 1949, 17 June 1986, 19 June 1992, 16 June 1998, 11 June 2008 and 7 June 2016; Art. XI of the WBAT Statute; Art. XIII of the IMFAT Statute, Commentary on the Statute, Resolutions of the Board of Govenors, Washington, 2009. See 'Internet Sites of International Administrative tribunals', CoE website: https://www.coe.int/en/web/tribunal. Last accessed on 15 January 2020.

ICCPR[1699], requiring judgments be made public in a suit at law, nor with the wider fundamental principle of access to justice and fair trial[1700], such as Article 6(1) of the ECHR[1701]. As Reinisch and Knahr have observed, public scrutiny is 'an important element in creating confidence in any judicial system. This requires access to sufficient information to form a reasonable opinion that justice is being served. Such information includes not only judgments but also information as to the details of the cases, and how the court deals with these matters'[1702]. Notably, the former UNAdT Statute only provided for the communication of judgments to the parties in the case and that copies be made available 'to interested persons' upon request[1703]. An increased level of transparency was recommended by the *Redesign Panel*, who suggested that judgments of the UNDT and the UNAT 'should be delivered in public and published on the Intranet and internet in English and French'[1704]. The Statutes of the UNDT[1705] and UNAT[1706], while not expressly referring to the Internet, codify existing practice and provide in identical wording that '[t]he judgements of the [Dispute and Appeals Tribunals] shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal'. In 2010, the OAJ launched a comprehensive website hosted on the Internet[1707], which provides

[1699] Article 14(1) ICCPR Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49 See United Nations Human Rights Office of the High Commissioner website: https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx. Last accessed on 15 January 2020.

[1700] *Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb)*, Council of Europe/European Court of Human Rights, 2013, p. 46. See ECHR CoE website: https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf. Last accessed on 15 January 2020.

[1701] According to the ECtHR, '…Article 6 § 1 concerning the public pronouncement of judgments is satisfied where anyone who can establish an interest may consult or obtain a copy of the full text of the decisions, those of special interest being routinely published, thereby enabling the public to study the manner in which the courts generally approach such cases and the principles applied in deciding them'. Ibid, para. 266.

[1702] See A. Reinisch & C. Knahr, *supra,* note 134, (2008), at p. 480.

[1703] Article 11(5) of the UNAdT Statute. 'A copy of the judgment shall be communicated to each of the parties in the case. Copies shall also be made available on request to interested persons'.

[1704] *Report of the Redesign Panel, supra,* note 137, para 94.

[1705] Article 11(6) of the UNDT Statute, as adopted by the General Assembly in resolution 63/253 on 24 December 2008, amended by resolution 69/203 adopted on 18 December 2014, amended by resolution A/70/112 adopted on 14 December 2015 and amended by resolution 71/266 on 23 December 2016.

[1706] Article 10 (9) of the UNAT Statute, As adopted by the General Assembly in resolution 63/253 on 24 December 2008 and amended by resolution 66/237 adopted on 24 December 2011, resolution 69/203 adopted on 18 December 2014 and resolution 70/112 adopted on 14 December 2015.

[1707] Administration of Justice at the UN website: Office of Administration of Justice (OAJ): https://www.un.org/en/internaljustice/oaj/. Last accessed on 15 January 2020.

information on how the internal justice system works at the UN[1708] and what to do[1709], as a staff member, in case of a dispute. It also includes, *inter alia*, links to a fully web-based court case management system (the eFiling portal) [1710], the websites of the OSLA[1711], the Dispute[1712] and Appeals[1713] Tribunals, and the Judgments rendered by them[1714], as well as important time limits and activity reports from the OAJ[1715]. As the latter includes not only information about the total number of cases filed, but also the nature and outcome of cases, this serves as an important accountability function. Accordingly, the OSCE must without delay publish its written decisions to be accessed by interested individuals and the public at large with strictly defined exceptions. As all its previous adjudication decisions will likely have been digitized for internal use, they could easily be made accessible to the public on the OSCE's website through a dedicated portal on the PoA with similar search features to the UN Tribunals. As indicated, since not all 'fixed-term staff/mission members' under the jurisdiction of the Panel may enjoy Intranet access[1716], this is one additional reason for the site to be hosted on the Internet. For any tribunal, of course, adequate data protection in the case at hand is essential, but this cannot however be taken to justify lack of transparency of adjudication decisions in the OSCE. Moreover, since lack of knowledge of the internal dispute resolution system among staff/mission members seriously affects the integrity of the system, easier access by OSCE officials to all relevant

[1708] UN OAJ website: Why the UN Needs an Internal System of Justice: https://www.un.org/en/internaljustice/. Last accessed on 15 January 2020.
[1709] UN OAJ website Toolkit for self-represented litigants: https://www.un.org/en/internaljustice/index.shtml. Last accessed on 15 January 2020.
[1710] The eFiling portal encourages UN staff members at any duty station to file their submissions electronically to the UNDT and UNAT and allows parties to monitor their cases electronically, regardless of their geographical location. See UN OAJ website eFiling: https://efilinginternaljustice.un.org/taskspace/component/main/?appname=oaj_ccm&&__dmfClientId=1579097431433&__dmfTzoff=-60. Last accessed on 15 January 2020.
[1711] UN Office of Staff Legal Assistance (OSLA) website: https://www.un.org/en/internaljustice/osla/. Last accessed on 15 January 2020.
[1712] UN OAJ website UNDT: https://www.un.org/en/internaljustice/undt/. Last accessed on 15 January 2020.
[1713] UN OAJ website UNAT: https://www.un.org/en/internaljustice/unat/. Last accessed on 15 January 2020.
[1714] UN OAJ website Judgments and Orders: https://unitesearch.un.org/results.php?tpl=oaj. Last accessed on 15 January 2020.
[1715] UN OAJ website Activity Reports: https://www.un.org/en/internaljustice/oaj/activity-reports.shtml. Last accessed on 15 January 2020.
[1716] Since the Panel is competent to decide on final appeals filed by a 'former fixed-term staff/mission member and any person on whom the fixed-term staff/mission member's rights are devolved on his/her death or who can show that he/she is entitled to some right under the Staff Regulations and Staff Rules or the letter of appointment or terms of assignment of a deceased fixed-term staff/mission member'. Article 1(2) Competence of the Panel of Adjudicators, ToR PoA, Appendix 2, SRSR.

information, perhaps via a user-friendly handbook[1717] that describes the various procedural options open to staff, about the internal dispute resolution system is essential. Following the good UN example, this includes how to contest an administrative decision and file an internal and external appeal, which could be made available through a fully web-based electronic case management system. Such tools are available and only need to be used.

5.5.15. Problems of enforcement

Article VIII(8) states that the 'Secretary General or the respective head of institution/mission, as the case may be, shall inform the Chairperson of the Panel of the execution of its decision within the same time frame' [1718]. While, as indicated, compensation must be paid by the OSCE upon the decision of the Panel, no enforcement procedures are foreseen, however. However, the general lack of machinery among IATs or mechanisms within international law to enforce judgments against IOs, is clearly not limited to the OSCE. However, it has been seen that judgments are seldom disrespected[1719], but a problem may exist in the enforcement of orders for the production of documents or for the appearance of witnesses if such an order is refused.

[1717] For recent example, Report of the Internal Justice Council, *Administration of justice at the United Nations*, UN General Assembly, (UN. Doc. A/72/210 of 24 July 2017), para. 12.
[1718] Article VIII(8) Adjudication decisions, Appendix 2, ToR PoA, SRSR.
[1719] See Letter from CERN Staff Association to SUEPO Munich dated 13 December 2017. '[…] Once again, we are appalled by the fact that the EPO does not enforce a judgment of ILOAT, which it has itself chosen and recognised to settle disputes between the Organization and its officials'. See SUEPO: Staff Union of the European Patent Office (EPO): https://www.suepo.org/documents/44516/56942.pdf. Last accessed on 20 January 2020.

P A R T 6

CONCLUSION

6. Conclusion

It will be apparent from the above discussion that the devastating conclusions of the *Redesign Panel* regarding the former UN internal justice system are, in many respects, almost identical to those made by the present thesis. Thus, as has been seen, despite the pre-existence of a decentralized system of internal justice at the OSCE, the internal justice regime (to borrow the words of the *Panel* itself) would seem to be 'neither professional nor independent', it is 'under-resourced' and fails 'to meet many basic standards of due process established in international human rights instruments'. These findings are also broadly consistent with those of the *IJS Legitimacy Index* which ranks the OSCE lowly among other IOs against such norms. As there would appear to be an absence of the rule of law in respect of the management of internal disputes at the OSCE, the consequent question is whether the regime itself commands the support of staff/mission members, managers and other stakeholders of the Organization. As has also been seen, according staff members their due process rights in cases of internal disputes within IOs is necessary to ensure that an IO operates within the rule of law. In the context of administrative law, the rule of law manifests itself in the form of due process, which is a set of principles that includes giving adversely affected parties an opportunity to seek review of an adverse decision at an independent and impartial tribunal; a right to appeal; a right to a reasoned judgment; a right to be heard; and a right to legal representation. Furthermore, given the inability of OSCE officials to seek justice in certain municipal courts due to the immunity enjoyed by the Organization, it is of great importance that the internal dispute resolution mechanisms within the Organization constitute a reasonable alternative means of resolving internal disputes. It is of note that the OSCE, tasked with assisting its participating States to ensure full respect for human rights and to abide by the rule of law, seems to be in manifest breach of the due process rights of its own officials. This is somewhat ironic given the OSCE's long-standing commitment to promoting the inherent dignity of the individual, as embodied in his or her fundamental freedoms and human rights, since its creation as the CSCE back in 1975[1720]. As the '"heart", the "cornerstone" or the "overarching principle"

[1720] In the Helsinki Final Act, a group of thirty-five countries pledged to 'promote and encourage the effective exercise of the civil, political, economic, social, cultural and other rights and freedoms, all of which derive

of all human (fundamental rights)',[1721] human dignity 'must be respected and protected in the employment relationship between an IO in its capacity as a substitute state and its staff'[1722]. Rather curiously, however, such weaknesses seem to have drawn very little attention and almost no debate from within the OSCE itself and its participating States; and, as indicated, despite Decision No. 705 of the OSCE Permanent Council on the CRMS, which states that 'the Organization shall continue to incorporate relevant modern management practices and relevant new technical developments, and that the Secretary General shall report regularly to the Permanent Council on progress in this field and propose ways to further improve the Organization's management and the [CRMS]', the internal dispute resolution processes at the OSCE appear to have undergone little, if any, change since their establishment. Moreover, since the meetings of OSCE's decision-making bodies (unless otherwise decided by the participating States[1723]) normally meet behind closed doors without media access, it is particularly difficult to gain access to information on such issues related to the internal justice system of the OSCE. On the one hand, a fundamental 'overhaul'[1724] of the internal justice regime of the OSCE, as proposed by the *Redesign Panel*, is ultimately very desirable, and the attractiveness of the newly created models in the new UN system, in particular, a second appellate instance and other reforms targeted at improving administrative proceedings, is beyond dispute. On the other

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from the *inherent dignity of the human person* and are essential for his free and full development'. The notion of human dignity is generally referred to in the case law of the international administrative tribunals of the national constitutional courts and in the doctrine as the 'heart', 'the cornerstone' or the 'overarching principle' of all human (fundamental) rights. It is enshrined as a core value in the various national constitutions and international conventions on human (fundamental) rights (Preamble of the UNHR: 'Whereas recognition of the inherent dignity…'; Art 1 of the CFREU: 'Human dignity is inviolable. It must be respected and protected'. The ECHR does not explicitly refer to human dignity. Nevertheless, the ECHR recognises the respect for human dignity as the 'very essence of the Convention', see, eg., ECHR Judgment of 11 July 2002, I v. United Kingdom, Appl. No. 25680/94 para. 70; see also German Basic Law (Grundgesetz)). The human dignity is not only inherent to the very essence of all human rights but is considered as a fundamental right in itself. G. Ullrich, *supra,* note 540, (Duncker & Humblot, Berlin, 2018), 'B. The application of human (fundamental) rights in the international civil service', at p. 100-101.

[1721] Ibid, G. Ullrich, (Duncker & Humblot, Berlin, 2018), at p. 100.

[1722] Ibid, at p. 101.

[1723] In the OSCE Permanent Council, the OSCE Chairperson may invite high-level officials from the participating States and other international organizations, institutions and initiatives to address a meeting as a guest speaker. While the Chairperson may allow the presence of the press during presentations of guest speakers, the press is requested to leave the room immediately after the presentation. The Chairperson may allow the presence of a limited number of visitors upon request of a participating State or the Secretariat. Such a presence is announced at the beginning of the meeting.

[1724] *Report of the Redesign Panel, supra,* note 137, 'Overview', para 5. ('The time has come to overhaul the system rather than seek to make marginal improvements.')

hand, over and above their radical nature, implementation of reforms along the lines of the new UN system is not realistic and does not fit the organizational reality of the OSCE. In effect three profound obstacles may be identified. First, significant difficulties may be encountered in attempting to garner the support of the OSCE Secretary General, Heads of Mission/Institution, who may defend their wide discretionary powers, as well as inevitable concerns about funding of a new system and political will from the OSCE's decision-making bodies. In this latter respect, the OSCE's weakness in comparison with organizations such as the OECD, the EU, and the CoE, is that in the last decade, there have been conflicting views of its 57 (very diverse) participating States on the importance of the OSCE's common values and principles of human rights and the rule of law[1725]; and it may perhaps therefore be regarded as difficult to make meaningful progress internally. Second, there are also challenges of balancing the very significant additional resources required for such reform (i.e., new regular budget posts allocated to both formal and informal system), against major budgetary constraints, including further calls for savings and efficiency gains from the OSCE participating States. There are however, different ways to measure administration and costs. In making this rather pessimistic assessment, it would be unfair to single out the OSCE alone for criticism in its shortcomings and lack of resources. Many other IOs are refusing to face up to the immense challenges posed by the management of internal employment disputes, who maintain similar internal structures, but this should not be an excuse for doing nothing. In consequence, some ingenuity will be necessary if the internal justice regime at the OSCE is to develop progressively. Awareness of such problems are very evident in the report of the *Redesign Panel*. A novel feature of the stance of the UN Advisory Committee on Administrative and Budgetary Questions (ACABQ) at a Fifth Committee meeting in 2007 on the significant financial implications of the redesign of the UN system, has been the argument that, such a 'system should be implemented in prudent and gradual manner which gave effect to the principles expressed by the General

[1725] It has been observed that '[t]he OSCE itself has become a victim of the international power struggle as those participating States have turned from its common values of democracy and *human rights* now receive these values as the ideological underpinnings of an international order designed by the West to ensure continued Western dominance'. See T. Tiilikainen (ed), *Reviving Co-operative Security in Europe through the OSCE*, 'Introduction – The Political Context for the Strengthening of the OSCE', (Contribution of the OSCE Network of Think Tanks and Academic Institutions to the Panel of Eminent Persons, 2015), at p. 12.

Assembly while permitting further development in the light of experience'[1726]. However, a different view was taken by the Under-Secretary-General for Management, who stated that changing the system proposed by the Secretary-General, 'however incrementally, risked harming its integrity and adversely affecting the delivery of justice'[1727]. One of the ways for reducing the financial requirements of any new system would be to reallocate 'existing [human] resources' through redeployment of staff positions[1728]. A good first step is to establish a panel of external, independent, experts to perform an in-depth review of internal justice system of the OSCE involving all major stakeholders. It can also draw inspiration from the experiences of other regional IOs (which maintain the first administrative review of decisions and similar mechanisms of peer review with recourse to the ILOAT or have their own administrative tribunals) with similarly deficient internal justice regimes as well as domestic law experiences. That said, as smaller IOs like the OSCE have arguably not faced the same level of scrutiny as the UN, it has been suggested that such organizations are more likely to continue operating 'deficient [internal justice

[1726] As stated by the chairman of the ACABQ at the Fifth Committee meeting on 5 November 2007 on the financial implications of the Secretary-General' proposals. See Fifth Committee, Summary record of the 15th meeting held on 5 November 2007, (UN Doc. A/C.5/62/SR.15 of 13 December 2007), pages 5-6, para. 30. According to Rule 157 of the Rules of Procedure of the UN General Assembly, n 16, the ACABQ is responsible for 'expert examination of the programme budget of the [UN]'. It conducts its reviews on the basis of documents, but it also holds hearings and asks questions of Secretariat officials, and assists the Fifth Committee in conducting in-depth questioning of the Secretariat and detailed line item analysis. The ACABQ submits a detailed report on the proposed programme budget for the biennium to the General Assembly. According to the UN website, '[t]he Advisory Committee is an expert Committee of sixteen Members elected by the General Assembly for a period of three years'. See UN website, 'ACABQ': https://www.un.org/ga/acabq/node/114. Last accessed on 15 January 2020.

[1727] Ibid, page 2, para. 6.

[1728] II, para. 5 OSCE Permanent Council Decision No. 1252 Approval of the 2017 Unified Budget (PC.DEC/1252/Corr.1 of 1 June 2017), states ,[t]aking into consideration financial constraints faced currently by the participating States and reiterating that any request for a supplementary budget during a financial year shall be met, wherever reasonable, by reallocating existing resources […]. 1. Undertakes to continue efforts, including throughout the Unified Budget cycle in 2017, to focus, streamline and prioritize the work of the OSCE across the three dimensions in those areas where it has comparative advantage […]. According to OSCE Staff Regulation 1.07 Reallocation of post table positions, Article I General, SRSR: 'Fund managers have the authority to reallocate, on an emergency and temporary basis and within the mandate of a given OSCE Fund up to 10 per cent of post table positions across and within programmes, allowing flexibility to address exceptional situations, particularly with regard to tasks […] *allowing a more efficient management of human resources*. […] Such reallocations will be mindful of the professional experience, background and training of the staff to be reallocated, and can only take place for a maximum of six months, after which they must be approved by the Permanent Council as part of the regular budget process or mid-year budget review and be in line with the relevant financial regulations, in particular regulation 3.02. *Such reallocations shall not increase the overall budget level of any given OSCE Fund*. Heads of institutions and missions shall carry out the reallocations in consultation with the Secretary General'.

systems] in the shadows'[1729]. However, in this era of increased accountability, over and above pressure from domestic courts, states and civil society, there is a very real possibility that the ECtHR will strike down one of these regional organizations as falling short of guaranteeing the right to a fair hearing and due process. All these factors may yet prove to generate sufficient pressure on the OSCE to begin remedying the faults of its system.

[1729] See R. Silverstein., *supra,* note 1628, (2017), at p. 425.

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P A R T 8

ABSTRACT

8. Abstract

As the the Organization for Security and Co-operation in Europe (OSCE) enjoys jurisdictional immunities in national courts and thus cannot be sued domestically, like most other international organizations (IOs), it has set up an internal justice system, providing for the settlement of disputes between itself and its officials. However, despite the presence of dispute resolution machinery in such organizations, frequent denials of justice prevail at the institutional level for large sections of the international civil service, who do not have access to justice in cases of internal disputes and where access exists, some do not render justice to IO staff members, denying them their most basic due process rights as enshrined in the various human rights treaties. With increasing attention being paid to the absence of the rule of law of the most prominent internal justice regimes at IOs over the last two decades, particularly the pre-reform United Nations (UN) system, by an independent panel of specially appointed experts, the *Redesign Panel on the United Nations System of Administration of Justice* (the so-called *Redesign Panel*), which led to a follow-up process that resulted in a comprehensive reform, assessing the compliance of dispute resolution mechanisms at other organizations which have not faced the same level of scrutiny as the UN thus becomes crucial. The thesis engages in a detailed analysis of the workings and flaws of the OSCE's internal dispute resolution processes using the findings and recommendations of the *Redesign Panel* as the principal comparative focus. It concludes that significant deficits exist in the delivery of justice to its officials and if a fair trial is to be guaranteed, significant structural reforms to its regulatory regime are necessary.

8. Zusammenfassung

Da die Organisation für Sicherheit und Zusammenarbeit in Europa (OSZE) – wie die meisten anderen internationalen Organisationen (IO's) – vor den nationalstaatlichen Gerichten Immunität genießt und dort folglich nicht geklagt werden kann, hat sie ihr eigenes internes Rechtsschutzsystem zur Streitbeilegung zwischen sich und ihren Amtsträgern eingerichtet. Obwohl ein solcher Streitbeilegungsmechanismus in solchen Organisationen besteht, wird der Rechtsschutz auf institutioneller Ebene großen Teilen der internationalen Zivilangestellten verweigert. Diese haben bei internen Streitigkeiten keinen Zugang zu Rechtsschutz, und dort wo Zugang besteht, wird er Angestellten der IO's nicht gewährt, wodurch ihnen ihre grundlegendsten Rechte auf ein rechtmäßiges Verfahren, wie es in den verschiedenen Menschenrechtsverträgen verankert ist, vorenthalten wird. In den letzten zwei Jahrzehnten wird der fehlenden Rechtsstaatlichkeit in den bekanntesten internen Rechtssystemen der IOs, insbesondere dem System der Vereinten Nationen (UNO) vor der Reform, von einem unabhängigen Gremium speziell ernannter Experten zunehmend Aufmerksamkeit geschenkt. Dieses *„Redesign Panel on the United Nations System of Administration of Justice"* (das so genannte Redesign Panel), veranlasste einen wichtigen Folgeprozess, der zu einer umfassenden Reform führte. Entscheidend dafür ist die Beurteilung auf Grundlage der Einhaltung der Streitbeilegungsmechanismen anderer Organisationen, die bisher nicht mit der gleichen Genauigkeit wie die UNO geprüft wurden. Diese Arbeit befasst sich mit einer detaillierten Analyse der Funktionsweise und der Mängel der internen Streitbeilegungsverfahren der OSZE, wobei die Erkenntnisse und Empfehlungen des Redesign-Panels als wichtigster vergleichender Schwerpunkt herangezogen werden. Sie kommt zu dem Schluss, dass es erhebliche Rechtsschutzdefizite für ihre Beamten gibt und dass, wenn ein faires Verfahren gewährleistet werden soll, bedeutende strukturelle Reformen ihres Regulierungssystems erforderlich sind.