

Chairmanship: Ukraine

**REPORT TO THE MINISTERIAL COUNCIL
ON STRENGTHENING THE LEGAL FRAMEWORK OF
THE OSCE IN 2013**

Introduction

The issue of the international legal personality, legal capacity, and privileges and immunities of the OSCE has been on the agenda of the OSCE for the last 20 years. The lack of a clear legal framework entails negative legal, political, administrative and financial implications. The legal status of the Organization is directly linked to the privileges and immunities the States are willing to grant to the OSCE and its staff. The general intention expressed in several CSCE/OSCE political decisions and declarations was to remove such uncertainty with the development of a legal instrument. Therefore, the text of the Draft Convention on international legal personality, legal capacity and privileges and immunities of the OSCE (Draft Convention) was negotiated in 2007.

The Draft Convention text obtained general support, but three footnotes were added to the text, linking the adoption of the Convention to the adoption of an “OSCE Charter”. The status of the Draft Convention has remained unchanged, and the footnotes have not been removed, while, on the other hand, one participating State opposes the adoption of a Constituent Document of the OSCE. Meanwhile, the adverse practical effects of the uncertainty of the legal status of the OSCE continue to negatively impact the effectiveness and efficiency of the OSCE.

The Ukrainian Chairmanship focused its efforts on fostering dialogue in order to bring the positions of the participating States closer with a view to addressing the key issues underlying the current stalemate. To this end, the Chairmanship-in-Office extended the mandate of Ambassador John Bernhard as Chairperson of the open-ended Informal Working Group on Strengthening the Legal Framework of the OSCE.

The Ukrainian Chairmanship established contacts with various delegations of participating States in order to explore opportunities for identifying an appropriate way forward in this issue and also prepared and circulated two reflection documents that were considered by the participating States at a meeting of the Informal Helsinki+40 Working Group and of the Informal Working Group on Strengthening the Legal Framework of the OSCE.

Informal Helsinki+40 Working Group

In July 2013 the Chairmanship-in-Office circulated its food-for-thought paper on Strengthening the Legal Framework of the OSCE (CIO.GAL/93/13).

At the meeting of the Informal Helsinki+40 Working Group on 16 July 2013 devoted to the broad topic of strengthening the OSCE effectiveness and efficiency Ambassador John Bernhard reiterated the main challenges faced by the OSCE with regard to the current uncertainties as to the legal status of the Organization and presented three proposals of the food-for-thought paper to address the situation.

The paper underscored that the appropriate legal status for the OSCE is not an aim in itself, but a means for the Organization to fulfil the mandates entrusted to it by the participating States effectively and efficiently. The paper recapitulated the status quo on the issue:

1. Despite the general support to the provisions of the 2007 Draft Convention, it has not been possible to reach consensus on the removal of the three footnotes, subsequent adoption of the Convention and its opening for signature;
2. There is no consensus among participating States on the need to have a Constituent Document for the OSCE;
3. The majority of participating States continue to support the immediate adoption and opening for signature of the Draft Convention, without footnotes, and are open to continuing discussions on a draft Constituent Document;
4. A group of participating States stressed that the adoption of the Convention and the adoption of a Constituent Document must be parallel processes and that no progress could be made on one without corresponding progress on the other;
5. A participating State expressed the opinion that there was no need for a Constituent Document and that even a discussion on it might be counterproductive for the OSCE.

To overcome existing differences and obstacles, the food-for-thought paper presented several possibilities:

The first proposal consisted in the adoption of a declaration on this issue. Although a declaration would not tackle the issue of the appropriate legal status for the OSCE, it would show a sign of good will and continued interest among participating States. It would also facilitate the process of reaching a compromise and give political momentum to this subject. Furthermore, a declaration would allow the States to reaffirm their commitment to resolve the issue of legal personality without any legal obligations arising from it.

The second proposal consisted in addressing the challenges from the uncertainty of the legal status of the OSCE through a multilateral agreement: the adoption of the Convention or the adoption of the Convention coupled with the negotiation on a Constituent Document of the OSCE.

In terms of the second proposal, a possibility would be to split up the process leading to the entry into force of the Convention into two stages, namely the adoption and signing stage and the ratification stage. This “splitting up” option would preserve and solidify the Convention text and allow the ratification stage to be determined at a later date by a separate consensus decision. This would enable certain participating States to prevent the ratification of the Convention until a Constituent Document is agreed upon. The main advantage of this approach is that the Draft Convention text would change its status from a draft to an adopted text. However, should such an approach be adopted, all three footnotes would have to be removed from the text of the Draft Convention.

Another possibility would be to raise the threshold for entry into force of the Convention from the currently applicable two-thirds majority to whatever majority the States may deem necessary, e.g. three-fourths or four-fifths. This option could however lead to wider renegotiation of the already agreed text.

The above-mentioned proposals would offer a guarantee for a continuation of discussions about the need for and potential development of a draft Constituent Document while allowing an early adoption of the Draft Convention. The three elements which could constitute a “triple lock” because of the need of the consent of all participating States are:

1. The adoption and opening for signature of the Convention;
2. A separate decision at a later stage on opening the Convention for ratification;
3. A higher threshold for the entry into force of the Convention.

A third proposal might be to call for the adoption of national legislation implementing the 1993 CSCE Council Decision on Legal Capacity and Privileges and Immunities and to recognize the legal status of the OSCE.

At the meeting of the Informal Helsinki+40 Working Group on 16 July 2013, a number of delegations reiterated their support to the 2007 Draft Convention and expressed interest for the idea of separating adoption and ratification of the Convention as a possible way forward though most had a preference for the unconditional adoption of the Draft Convention. However, no consensus emerged.

Views were also still divergent regarding the adoption of a Constituent Document. Whereas several delegations reiterated their support to the adoption of such a Document and others were ready to discuss it on the condition that it would not change the nature of OSCE’s principles and commitments, one delegation reiterated that it did not see any need for a Constituent Document.

Informal Working Group on Strengthening the Legal Framework of the OSCE

In July 2013 the Ukrainian Chairmanship circulated a non-paper proposal for further work on strengthening the legal framework of the OSCE in 2013 (CIO.GAL/118/13) for the attention of the Informal Working Group on Strengthening the Legal Framework of the OSCE.

At the meeting of the Informal Working Group held on 17 September 2013, participating States reiterated their points of views, leaving room for further negotiations. Notably, a group of participating States stressed that the Draft Convention should be adopted without further delay. The same group also manifested readiness to consider a Constituent Document that would purely codify existing principles and would not affect the nature of the OSCE and the commitments undertaken in its framework. One delegation underlined its opposition to discuss any Constituent Document, while another firmly advocated for its adoption, whereby the document should set out the objectives, principles and functions of the OSCE, identify criteria for membership etc. Several delegations were positive towards the idea of separating adoption and opening for ratification of the Convention.

Conclusion

A comprehensive solution and compromise on this issue may be difficult to achieve in the near future, but it is of crucial importance for the OSCE and its effective and efficient functioning to continue the efforts. It is therefore recommended to continue deliberations through both informal consultations and in the format of the Informal Working Group. The aim should be to achieve a balanced solution which could satisfy the diverging positions among participating States, and in addition to exploring further some of the ideas already discussed this year, it might be useful also to consider alternative models. It is, however, the view of the Ukrainian Chairmanship that the efforts to have the Draft Convention adopted will only be successful if a Constituent Document for the OSCE is also being discussed. During the process towards a comprehensive solution the adoption of a declaration confirming the States' commitment to resolving the issue could give added political impetus and stimulus to the continuation of negotiations and achievement of a solution.