

# *Court of Conciliation and Arbitration within the OSCE*

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(translation)

## **OPENING REMARKS**

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I wish to thank President Christian Tomuschat very warmly for passing over the baton in this way. I am touched by the goodwill shown; in some ways, it's symbolic of the new Europe of which we are now the custodians. I'd like to express the gratitude of all of us for what he has accomplished over the last six years, and I look forward to his presence in the new Bureau which has just been set up. It's a great honour, and a great responsibility, to have been elected President of the OSCE Court of Conciliation and Arbitration, alongside distinguished diplomats and jurists, and following a tradition which now goes back over a quarter of a century...

I thank the members of the Court for this mark of confidence and I wish to assure them of my personal commitment to fulfilling this unanticipated mission of whose difficulties, as well as of whose potential, I am aware. I will undertake the mission in the spirit of teamwork and in the search for consensus; the hallmarks of "*the spirit of Helsinki*". I hope that strong working links will be established between all the members of the office, and I am delighted to note outgoing members in the new team as this testifies to the collective will for change within continuity which must be our guide. I also want to thank our registrar, who has always been on hand to ensure an effective transition. We also owe an immense debt of gratitude to the Court's founding fathers, by which I mean President Robert Badinter and Professor Lucius Caflisch in particular, whose advice will always be very valuable to us.

I intend to listen to all members of the Court — conciliators and arbitrators — who, by combining expertise and know-how, represent a very useful pool of expertise for collective reflection on the ways and means of raising awareness of the Court. Because it must be recognised that, in spite of all our predecessors' efforts, the Court is not just little known, it's still unknown; it's not just neglected, it seems to be forgotten! We must, twenty-five years after the Stockholm Convention came into force on 5 December 1994, demonstrate coherence, moderation and determination and regain the initial inspiration. We need to take stock, ask ourselves what the Court of Conciliation and Arbitration represents in today's Europe and, above all, ask ourselves what we can do actually do in concrete terms.

## WHAT THE COURT IS

Rather than the major political and legal texts, practical arrangements and technical mechanisms which constitute the framework for our work, I would like to emphasise some simple convictions today, in order to underline the Court's "strengths". The system in place is very original, in that it combines a solid institutional framework, and thus a guarantee of legal certainty, with flexible methods, in the interests of quiet diplomacy.

### *A legal base*

The first conviction is that the Court of Conciliation and Arbitration must be at the heart of the OSCE. It extends the now multi-century European dream of arbitration and conciliation and is wholly in keeping with meetings about peaceful dispute settlements, notably the 1991 meeting in Valetta and the 1992 meeting in Geneva. However, these mechanisms are not an "empty shell"; they reflect the principles of international law and OSCE's commitments. It's the purpose of conciliation, as stated in Article 24 of the Treaty: "*The Conciliation Commission shall assist the parties to the dispute in finding a settlement in accordance with international law and their CSCE commitments*". As for an arbitral tribunal, its role is defined in Article 30 as "*to decide, in accordance with international law, such disputes as are submitted to it*", without excluding the ability, "*to decide a case ex aequo et bono, if the parties to the dispute so agree*". The Court is thus based on strong principles: it's firmly anchored in public international law, notably the respect for States' sovereignty, while at the same time it's inspired by OSCE standards, principles and commitments.

### *A solid framework*

The Court is also a solid legal framework because it's an institution both desired and created by the States parties. It has the enormous advantage, in comparison to improvisation and bargaining in a crisis in a sort of heedless, headlong rush, of being pre-established, with a legal regime and "mode of operation" established "coolly" in advance. There is no risk of one party benefiting to the detriment of another. It can thus be operational immediately and in comparison to other *ad hoc* procedures, it guarantees speed, confidentiality, efficiency and, I would add, simplicity and likewise economy. Moreover, its institutional nature guarantees its pluralism, independence and impartiality. In this respect, we need to better highlight the wealth of experience and expertise, and the diversity of backgrounds and skills, which the members of the Court, arbitrators and conciliators, together provide. It's a very valuable, collective asset, just like our Europe, and it has exceptional potential for concrete, balanced, workable solutions.

### *A flexible system*

However, it seems to me that the Court's main added value is the great flexibility of the mechanisms for implementing the Stockholm Convention. We are the "Swiss army knife" of conciliation and arbitration! There's no single way, no single operating mode, no mandatory menu. It's worth remembering that there are multiple formulas:

- Conciliation between States parties at the request of one or more States party to the Convention (Art. 20, paragraph 1).
- Conciliation on the basis of an agreement between the parties to the dispute. Conciliation is thus open — on a voluntary basis — to all OSCE participating States (Art. 20, paragraph 2).
- It's useful for this conciliation phase to focus on the establishment of the facts, on fact-finding, thus acting as a commission of inquiry, as specified in the rules of procedure.

- Arbitration may also be initiated by a special agreement between the parties to a dispute, and this option is open to all participating States (Art. 26, paragraph 1).
- The arbitration may be compulsory arbitration for States parties who have made a unilateral declaration to this effect, subject to reciprocity (Art. 26, paragraph 2).
- Lastly, it can be enlarged to a procedure *ex aequo et bono*, if the parties to the dispute so agree (Art. 30).

This great flexibility also allows conciliation or arbitration to be offered to third States to the Convention, with all the guarantees of a fair procedure that the link between compulsory conciliation and compulsory arbitration offers the States parties, in conjunction with the OSCE Permanent Council (Art. 26, paragraph 3). Other advisory functions in matters of legal assistance have been mentioned in the past, notably by Robert Badinter, and all these doors are still open, in the interests of quiet diplomacy, ranging from crisis prevention to dispute resolution.

### ***An original way***

The last key idea which I'd like to stress is the Court's radical nature. It should be understood as being complementary to other OSCE institutions, but also being separate from them, as the Convention's Preamble expressly remind us when it mentions the major international and European courts. When faced with the stalemate of bilateral, often confrontational, negotiations over a legal dispute, the original formula of conciliation, whether spontaneous or "directed", may be an honourable way out of a crisis for all interested parties. In some ways it constitutes a "middle way", between the excessive haste of diplomacy on the edge of the chasm, and the inexorable slowness of jurisdictional litigation. It offers a healthy phase of de-escalation in which all the protagonists save face. In this sense, conciliation or arbitration should be thought of as being complementary to, rather than in opposition to, other methods of peaceful settlement; as being opportunities, steps or way stations working towards shared responsibility. It should also be repeated that recourse to the Court's mechanisms, whether unilaterally or on through compromise, would not be considered an "unfriendly" act but rather as a mark of confidence in justice.

In this respect, some important anniversaries in the next few years will remind us of our peoples' commitment to a "Europe whole and free". The OSCE Court of Conciliation and Arbitration must play a full part in the ongoing reflections on the significance of the 30th anniversary of the *Paris Charter for a New Europe*, signed by our heads of State and government on 21 November 1990. Similarly, the 30<sup>th</sup> anniversary of the adoption of the Stockholm Convention on 15 December 1992 must be an occasion not only for us all to take stock but, more especially, the occasion for a new impetus.

### **WHAT WE CAN DO**

Our generation's collective challenge, having directly witnessed the rapid transformations in European and likewise in the world at the turn of the nineties, is to be equal to this new appointment with history rather than utopia or giving up, we must rediscover the European virtue that the great British historian Theodor Zeldin calls "*the art of disagreement*" in a more modest fashion. With brutality and unilateralism seemingly marking international relations as a result of "*an ever more violent world*", it's my deeply-held conviction that it's essential for our continent's States to be offered institutional spaces for negotiation, conciliation and arbitration.

Paradoxically, the time of crises, confrontations and break-ups that we are facing makes an institution anchored in law, such as the Court of Conciliation and Arbitration, more necessary than ever. In its unique position, the Court of Conciliation and Arbitration can promote "confidence-building measures" and strengthen the spirit of "good neighbourliness" between States parties, and likewise between participating States, through its "good offices" and in accordance with OSCE's principles. The Court must be ready to face this existential challenge for Europe by being alert, responsive, and even proactive, at all times. We must be vigilant and attentive to the "slightest signals". Together, we must mobilise our efforts, drawing inspiration from William of Orange: "*One need not hope in order to undertake, nor succeed in order to persevere*".

I believe in a strategy of small, cautious, reasoned yet dynamic steps. We will have to identify good practice through consultations, and I hope that these will be as open and inclusive as possible. However, right now, I'd like to highlight four areas of work.

– It seems to me desirable for us to improve internal communication within the Court, in order to strengthen the sense of belonging of all our members, and to make better use of our entire institution's potential. This will undoubtedly happen through more regular and more fluid exchanges between us thanks to new technology, in a way which is both simple yet secure. Each member of the Court should therefore feel like an "*ambassador-at-large*", charged with making the Court known in the outside world, through articles, debates or conferences...

– We must extend the scientific work carried out over the last few years on the initiative of Christian Tomuschat, with two significant symposia, that of Vienna in 2015 and that of Geneva in 2018. The publication of this new collective work, which is planned for 2020, will be an opportunity to raise awareness among specialists in the peaceful settlement of disputes, but I hope also among universities, diplomatic academies, think tanks and international relations research centres. A network of partners could be set up for case simulations illustrating the "added value" of institutional conciliation.

– At the same time, we must develop external communication, by diversifying our objectives. In addition to these high-level publications, it would be useful to also address a wider audience with simple tools, such as a "practical kit", an information brochure with all the relevant documents and useful information. A redesign of the website would also serve to highlight our history and our potential, with testimonials and messages, if only by presenting the members of the Court, conciliators and arbitrators more vividly. There should also be greater diversification as regards languages on the website, to reflect the cultural and geographical diversity of the OSCE area.

– Finally, it would seem appropriate to strengthen the Court's visibility among all European institutions and international jurisdictions, in particular "within the OSCE". The option of "judicial diplomacy" dates back, I believe, to President Jean-Paul Costa. While fully complying with our obligation for independence, neutrality and impartiality, and without giving up any of our dignity — of our *gravitas*, you might say — and being aware of the limitations on our skills and of our responsibilities under the Stockholm Treaty, we should make our presence more felt in judicial discussions in order to overcome competition or indifference. In addition to the diplomats whom we have been asked meet with in Vienna, when we present the reports of the Court's activities to the OSCE Permanent Council, should we not also raise the awareness of jurists by making use of their meetings in Strasbourg on the occasion of the

CAHDI [Committee of Legal Advisers on Public International Law], or in conjunction with the International Law Commission sessions in Geneva?

These are just a few of the avenues which we'll be able to explore together at future Bureau meetings. Once again, I thank you very warmly for your presence and your availability, and I hope that these six years will be fruitful in serving a cause which is greater than us, that of a Europe based on the rule of law.

When passing on a cordial message of encouragement, President Robert Badinter reiterated that "*The Court has housed the Sleeping Beauty since its creation*". We should none of us be content to just watch over her; we should make every effort to try and wake her up...