



Report to the Ministerial Council on the Strengthening of the Legal Framework of the OSCE in 2011

Introduction

The legal framework of the OSCE has remained on the agenda of the CSCE/OSCE since the decision taken in 1993 at the Rome meeting of the Ministerial Council. Since then, discussions have taken place with a view to providing the CSCE/OSCE with a clear international legal status. In 2007, a breakthrough draft convention on international legal personality, legal capacity and privileges and immunities (draft convention) was finalized, albeit with 3 footnotes added at the request of two participating States that linked the adoption of the draft convention to the simultaneous adoption of a charter for the OSCE.

The text of the draft convention was attached to the final statement of the Spanish Chairman-in-Office at the Ministerial Council meeting in Madrid in November 2007.

Adoption of the draft convention has not been possible to date due to a lack of consensus. However, the text of the draft convention continues to enjoy broad support among participating States, with a common understanding that its negotiation should not be reopened.

Since the finalization of the text of the draft convention, discussions among participating States to resolve the issue of the lack of legal status of the OSCE (and at the same time the lack of a uniform set of privileges and immunities) have so far not resulted in any conclusion on the way forward. The discussions have focused on possible means of providing the OSCE with the legal status necessary to fulfil its mandates effectively and efficiently and gain universal recognition of its legal personality. In this context, three different positions have crystallized among participating States.

- A majority of the participating States consider that the adoption of the 2007 draft convention would be sufficient for addressing the problems and challenges the OSCE faces, in particular in its field operations, due to the lack of clarity in its legal status, and they have called for its early adoption; many of these participating States are, however, ready to begin a discussion on a constituent document or charter for the OSCE, as long as the political character of the OSCE principles and commitments is maintained and its present autonomy and flexibility are not restricted.
- A number of participating States consider that the OSCE, in addition to adopting the convention (the draft text of which they agree to), should also adopt a charter or constituent document. They argue that, in accordance with their internal legislative and constitutional procedures, privileges and immunities cannot be granted to an international organization without the adoption of a charter or constituent document.

These participating States were also the authors or supporters of the text of a draft charter for the OSCE distributed in September 2007.

- One participating State is not persuaded of the need for a constituent document or charter and is not ready to enter into discussion of such a document at this time. It supports the adoption of the convention and has called for the immediate removal of the three footnotes that make the adoption of the draft convention dependent on the simultaneous adoption of a charter or constituent document.

Meetings of the Informal Working Group

On the basis of Decision No. 4/08, adopted by the meeting of the Ministerial Council in Helsinki, in 2010, the Kazakh Chairmanship established an Informal Working Group on Strengthening the Legal Framework of the OSCE (IWG), chaired by the Personal Representative of the Kazakh Chairmanship on Strengthening the Legal Framework of the OSCE, Ambassador Ida Van Veldhuizen. Four meetings of the IWG were held in Vienna in 2010. The meetings of the IWG in 2010 were convened in order to consider whether a consensus could be achieved among the participating States to begin technical work on a constituent document for the Organization. In the event, a number of States expressed concerns about the content of a constituent document, and some participating States indicated that they were yet to be convinced of the need for such a document.

In paragraph 12 of the Astana Commemorative Declaration of 3 December 2010 (SUM.DOC/1/10), the Heads of States and Government tasked the incoming Lithuanian Chairmanship with organizing “a follow-up process within existing formats, taking into consideration ideas and proposals put forward by the participating States, including in the framework of the Corfu Process and in the preparation of the Astana Summit”. It further pledged to do everything possible to assist the incoming Chairmanships-in-Office in developing a concrete action plan based on the work done, the progress of which was to be reported to the OSCE Ministerial Council meeting in Vilnius.

Following up on this tasking, the Lithuanian Chairmanship decided to organize a meeting of the Informal Working Group on Strengthening the Legal Framework of the OSCE on 13 May 2011 and recirculated, as a basis for discussions, the non-paper on a draft constituent document that had been issued by the Kazakh Chairmanship in 2010. This non-paper sketched out elements for a constituent document that would codify already existing OSCE principles, structures and rules, provisions such as are often found in the constituent documents of many other international organizations. Moreover, the draft constituent document circulated was deliberately of a procedural nature, without any reference to issues of substance, thus preserving the political character of the Organization. Both the Co-Chairpersons of the IWG, Ambassador Helmut Tichy, Legal Adviser of the Austrian Ministry of European and International Affairs, and the Adviser on the OSCE Legal Framework, Ambassador Ida Van Veldhuizen, introduced the topic and gave an historical overview of the issue. The Senior Legal Adviser of the OSCE explained the practical, frequently negative, implications of the lack of an OSCE legal status on the day-to-day work of the Organization’s executive structures.

During the discussions, however, it was evident that not all the participating States were prepared to embark on a substantive discussion on a draft constituent document without first defining a basic understanding for such a discussion. As a result, the Lithuanian Chairmanship, together with the legal experts, developed a second non-paper, entitled “Principles for a discussion on a constituent document for the OSCE”, which was circulated

in September (CiO.GAL/169/11), a copy of which is annexed to this report. This document was intended to pave the way for a possible decision by the Ministerial Council meeting in Vilnius to establish a technical working group to consider the feasibility of a constituent document for the OSCE in accordance with the commonly agreed principles. Specifically, the non-paper outlined the basic understanding of the discussions, the objectives of a drafting exercise, the principles that should guide a drafting exercise, and the basic structural elements of a constituent document.

A second meeting of the Informal Working Group was convened in Vienna on 23 September 2011 in order to ascertain reactions to the new non-paper and to consider whether it could serve as a basis for moving forward with a discussion on the drafting of a constituent document. Statements were made by 17 participating States and the Parliamentary Assembly. In his introductory remarks, the Chairperson of the Permanent Council noted that there was a willingness on the part of the majority of the participating States to begin a discussion on a constituent document. The representative of the Parliamentary Assembly supported the idea that the draft convention should be adopted as soon as possible in order to resolve the practical difficulties that the OSCE was facing. Nevertheless, he did not see any harm in discussing a constituent document for the OSCE in the future.

Overall, the response to the draft principles contained in the document was very positive. Several participating States indicated their willingness to enter into a discussion of a constituent document on the basis of the Chairmanship's non-paper, while again reaffirming their view that adoption of the draft convention would suffice to give the OSCE a legal personality. A number of other participating States which welcomed the document considered that the composition of the proposed technical working group was too limited and should be expanded to include political as well as legal experts. The desirability of a Ministerial Council decision mandating the upcoming Chairmanship to initiate discussion of a constituent document was mentioned by several participating States. However, several other participating States expressed the view that there was no need for a new decision by the Ministerial Council in order for discussion of the issue to continue. One participating State, which welcomed the non-paper as a basis for discussion, noted that it had, with a number of other participating States, submitted its own draft for an OSCE charter in 2007 and that its acceptance of the non-paper as a basis for discussion represented a step towards compromise which it hoped would be reciprocated.

However, one participating State stated that it was not yet persuaded of the need for a constituent document. That participating State expressed the concern that discussion on a constituent document would be a protracted process and would not address the immediate practical issues the Organization was facing (in particular the lack of privileges and immunities, such as tax exemptions for OSCE field operations). It strongly advocated delinking the adoption of the draft convention on legal personality, legal capacity and privileges and immunities from the issue of devising a draft constituent document for the Organization. It also questioned the correctness of the three objectives set out in the non-paper, which argued that the OSCE already had a legal framework, that the lack of a charter had not prevented the OSCE from evolving over the years, and that the removal of obstacles for some States to the adoption of a convention was not an adequate reason to begin discussions of a constituent document.

Nevertheless, that participating State also indicated that it was not in a position to say that there should not be a charter or constituent document, but called upon other participating States to rather identify how the practical problems could be resolved in the immediate future, until the development of a constituent document was feasible.

Conclusion

At this time, the dialogue between the participating States is continuing. The obstacles preventing the adoption of a convention and/or a constituent document are as much or more political than they are technical. After all these years, however, there is still no easy, straightforward solution. Nonetheless, the continuing interest of the participating States to contribute to the discussions, and the efforts of Chairmanships, as well as the continuous practical input from legal experts, demonstrate that endowing the OSCE with a separate legal status should remain a priority for the participating States. This even more the case, as otherwise the OSCE could face serious risks, not only in its operational efficiency and effectiveness, but also in the area of security for its personnel. To avoid these problems, it should be endowed with legal personality as soon as possible.

Principles for a discussion on a Constituent Document (CD) for the OSCE

Introduction

The purpose of this paper is to set out the basic framework on the basis of which a CD could be elaborated by the participating States (pS).

It would be useful for the OSCE to have a CD to position the organisation as an equal and reliable partner in the international community, capable of fully exercising its rights and assuming its responsibilities, and to provide legal personality for the OSCE.

Basic understanding on the discussions

- The holding of any negotiation or deliberation on a CD is not to be used in other OSCE negotiations or deliberations nor in other fora, multilaterally or bilaterally, and
- Not be used to question or cast doubt on any OSCE commitments made.
- Nothing is agreed until everything is agreed.
- Discussions should be conducted by a technical working group consisting of legal experts. The results should be brought to the attention of the Informal Working Group and, if necessary, to the Permanent Council with a view to reaching consensus.

Objectives of a drafting exercise

- To provide a legal framework for the OSCE without changing the political nature of its principles and commitments.
- To allow for a continuous development of the OSCE, its decision making process and its executive structures.
- To remove the obstacles for some pS to adopt the Draft Convention on Legal Personality, Legal Capacity and Privileges and Immunities of the OSCE, allowing the removal of the footnotes to the Draft Convention while keeping its text untouched.

Principles guiding a drafting exercise

- To maintain the political character of the OSCE principles and commitments.
- To reaffirm the commitment to the consensus principle in all its existing forms.
- To codify the existing practice of the running of the OSCE's day-to-day business.
- To preserve the functioning of the executive structures in accordance with their mandates.
- To strengthen the flexibility and adaptability of the OSCE to respond to any situation that may arise in the future.

Basic structural elements of a CD

- Preamble
- General Provisions [Definitions; Legal Personality & Capacity, seat]
- Principles/Objectives [consensus, political nature of the OSCE]
- Participation [membership such as participating States, Partners for Co-Operation, observers, third parties]

Decision-Making Bodies /Subsidiary Bodies [MC, PC, FSC etc]

- Executive Structures/Bodies [CiO, PR, and SR, Troika, SG, Institutions, FO, Autonomous Bodies PA]
- Common Provisions [official languages, Privileges and Immunities]
- Financial/Budgetary Issues [UB, XB, Financial Regulations]
- Final provisions [entry into force, amendments, etc]