Court of Conciliation and Arbitration

INFORMATION MEETING OF THE BUREAU OF THE COURT
WITH REPRESENTATIVES OF STATES PARTIES
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Address of Professor Christian TOMUSCHAT
Member of the Bureau and former President of the Court

Conciliation under the Convention on Conciliation and Arbitration within the OSCE

Our Court, with its high-sounding name, is a strange animal. On the one hand, as its name suggests, it constitutes a judicial body, but at the same time it has been entrusted with conciliatory functions of a largely different nature. Our legal position is not unique: In many instances, to resolve a controversy, judges are at a first stage charged with bringing about a compromise between the contending parties. In our case, according to the text of the Stockholm Convention, conciliation enjoys even a higher profile than settlement by arbitration since everywhere it is mentioned in the first place where the two terms appear together.

Nobody here needs to be informed about the fundamental difference between conciliation and arbitration. Conciliation within the OSCE frame under the Stockholm Convention has no complex jurisdictional requirements other than for States to be a party to the Convention or to be related to another CSCE instrument. No further conditions for requesting a Conciliation Commission must be fulfilled. The doors are wide open for conciliation. One may call this openness an explicit invitation to seek the settlement of any disputes by recourse to the most flexible method of peaceful resolution – apart from diplomatic negotiation which is always possible, many times preferred by diplomats to any formalized method. Indeed, the Convention explicitly provides that recourse to conciliation is specifically designed for disputes that have not been settled within a reasonable time (Art. 18 (1)). No other "préalables" exist. Thus, this is an easy procedure lacking any lawyers' intricacies. No such request may come out of the blue. Since the parties must have negotiated beforehand, they know one another as swell as the subject-matter of their divergent views. The only relevant obligation of the initiation of a conciliation procedure is the duty of the respondent party to accept its duty of cooperation in fulfilling the procedural requirement of responding in substance to the requests made.

Of course, no demand for the establishment of a Conciliation Commission may be taken *à la légère*. It introduces a formal proceeding. Conciliation proceedings have a special flavour. Indeed, conciliation is janus-faced. On the one hand, the outcome of a conciliation proceeding is not binding under law. It may be accepted or rejected. It boils down to no more than a suggestion or recommendation. A serious effort has in any event been made to leave the existing impasse, time and money have been spent on the controversial issue. The relevant

recommendations bear therefore a considerable political weight. Nonetheless, sometimes a frustrating outcome may be welcomed by one of the litigant parties or even by both of them. The sole fact of discussing the relevant issues may already have put an end to the existing tensions. In any event, the unsuccessful end of a proceeding will serve as an indication that more efforts must be made to clear the controversial ground.

The length of the proceedings is not as such a bad sign in any event. Let me give an illustrative example in the neighbouring field of peace negotiations. In the heart of Europe in the 17th century the representatives of the parties of the War of Thirty Years that had started in 1618 eventually came together for final negotiations in 1643. Through resolution and firmness they managed to conclude the Westphalian Peace in the two cities of Münster and Osnabrück on 24 October 1648 – after five lengthy years.

Only a few words on the composition of a Conciliation Commission that shall finally have to lay down its views in a report to the parties and lastly also to the OSCE Council. The parties enjoy almost complete freedom as to the choice of the members of any such Commission. There is no predetermined bench like in the case of the permanent international tribunals operating on the European level. The applicant as well as the respondent are each entitled to one conciliator according to the inherent logic of conciliation. The Bureau of the Court provides its services to assist in the completion of a Commission, which will invariably consist of five members, three members being chosen by the Bureau in addition to the two members selected by the litigant parties. Being selected as a member of a Commission is not confined to members of the Court. Essentially, what the Court has to do is contribute to the establishment of a Commission, but its members may of cause be chosen for that purpose as well.

The present circumstances in Europe and elsewhere in the world do not augur well for the upcoming work of the Court. The Court is a modest – and extremely cheap - institution whose members trust in peaceful cooperation, far away from the unilateralisms that at the present time characterize all too many of the international relationships between States where even an inter-state solidarity program like USAID was blamed as a "criminal organization … run by a bunch of radical lunatics". Peaceful conciliation of international controversies is a bulwark against aggression and destruction which has already cost tens of thousands of lives on the European soil. Thus, it is more than a pity that the Court still stands in abeyance waiting for its first call. Members of a judicial institution are normally prevented from intervening actively in a pending proceeding. This tacit rule arose from the fear not to imperil the impartiality of the judicial process. Yet in conciliation things can be valued differently. In the practice of other conciliatory bodies, it has turned out how fruitful cooperation of the conciliators with the contending parties can be. The outstanding example of such a positive experience is the dispute between Timor-Leste and Australia – which could be resolved particularly through the untiring efforts of the conciliation commission seized with the case. Thus, those traditional fears should be thrown overboard. In general, the States of the OSCE should do their best to overcome their differences, revitalizing the organization with its judicial and conciliatory machinery that stands ready to lend its hands to any attempt to reach a constructive solution to any occurrences that threaten European stability!