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## The OSCE Code of Conduct on Politico-Military Aspects of Security after the First Annual Discussion on Its Implementation (11 July 2012): State of Play and Prospects

The Code of Conduct on Politico-Military Aspects of Security (hereafter “the Code”) was adopted nearly 20 years ago at the 91st Plenary Meeting of the Special Committee of the CSCE/OSCE Forum for Security Co-operation (FSC) in Budapest, on 3 December 1994, after two years of negotiation. It entered into force as a politically binding document on 1 January 1995.<sup>1</sup>

Building on the guiding principles of the Helsinki Final Act (1975), the Charter of Paris for a New Europe (1990), and the Helsinki Document (1992), to which it makes repeated references, as well as other OSCE commitments relating to political and military aspects of security, the Code is a politically binding document that established new inter-state and intra-state norms of behaviour through a wide spectrum of themes covered by ten sections and 42 paragraphs.

At the inter-state level, sections I-VI of the Code give a renewed impetus to already accepted standards designed to ensure security and stability in international relations, such as sovereign equality and a co-operative approach to security relations (para. 4), the principle of solidarity (para. 5), the freedom to determine its own security interests, the right to freely choose its own security arrangements and to belong or not to belong to international organizations (paras 10 and 11), military capabilities commensurate with legitimate security needs (para. 12), and the renunciation of military domination over any other participating State (para. 13). It also prevents the stationing of armed forces on the territory of another participating State without its consent through freely negotiated agreement and in accordance with international law (para. 14). One might be surprised that the prohibition of the use of force is only mentioned indirectly through the condemnation of assistance or support to participating States “that are in violation of their obligation to refrain from the threat or use of force against the territorial integrity or political independence of any State”, but para. 8 makes a strong reference to the

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Note: The views expressed in this article are those of the author alone and do not necessarily reflect the official position of the OSCE and its participating States. The author warmly thanks Colonel Anton Eischer, former FSC Co-ordinator for the Code of Conduct, and Mr Fabian Grass, FSC Support Officer, for their kind and useful remarks and suggestions.

1 Code of Conduct on Politico-Military Aspects of Security, in: Conference for Security and Co-operation in Europe, *1994 Summit, Budapest, 5-6 December 1994, Budapest Document 1994 – Towards a Genuine Partnership in a New Era*, Section IV, at: <http://www.osce.org/mc/39554?download=true>.

Charter of the United Nations and the Helsinki Final Act, where this core principle is already embodied.

At the intra-state level, the Code brings up the idea that relations between states are not only affected by military, but also by various internal security forces whose behaviour has to be a legitimate subject of inter-state monitoring and oversight. Sections VI and VII include a number of highly innovative provisions in an area previously considered as a “political taboo”:<sup>2</sup> the democratic control of armed forces and other security forces, and their political neutrality, accountability, transparency, and integration within society, on which the Code provides the most comprehensive and detailed set of provisions ever adopted in a multilateral framework. It prescribes that each participating State must ensure that its military, paramilitary, and security forces personnel are able to enjoy and exercise their human rights and fundamental freedoms in conformity with international law and OSCE commitments. Therefore, being widely considered to be the normative cornerstone for the democratic control of armed forces, the Code is a founding document of security-sector governance and security-sector reform, which the OSCE acknowledged in 2007 as an important confidence- and security-building measure.<sup>3</sup>

Described on its adoption as a “landmark” and “groundbreaking” document,<sup>4</sup> and by one of the leading OSCE experts, and OSCE “spiritual father”, Professor Victor-Yves Ghebali, as the “jewel in the crown of the OSCE normative corpus”, the Code is a unique element of the OSCE *acquis*. It “seeks to elevate the standard of political civilization amongst OSCE participating States”.<sup>5</sup> It encompasses the entire security sector, including the police, the military,<sup>6</sup> internal security forces, and the intelligence sector. It embodies the OSCE’s cross-dimensional and comprehensive approach to se-

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2 The expression is quoted from Ortwin Hennig, *The Code of Conduct on Politico-Military Aspects of Security*, in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 1995/1996*, Baden-Baden 1997, pp. 273-289, here: p. 289.

3 Chairmanship’s Perception Paper on OSCE Basic Norms and Principles in the Field of Security Sector Governance/Reform, MC.GAL/9/07 of 30 November 2007, in: Organization for Security and Co-operation in Europe, *Fifteenth Meeting of the Ministerial Council, 29 and 30 November 2007*, Madrid, 30 November 2007, pp. 47-64, here: p. 47. On the links between security-sector reform and the Code, see, among many other contributions, David M. Law, *Rethinking the Code of Conduct in the Light of Security Sector Reform*, in: Daniel Warner (ed.), *Consolidating the OSCE*, PSIO Occasional Paper 4/2006, Geneva 2006, pp. 83-105.

4 Section VII on the democratic control of armed forces “has been deemed ‘revolutionary’ from an international customary law perspective”. Alexandre Lambert, in: FSC.DEL/401/06, 12 September 2006, p. 1.

5 Ortwin Hennig, cited above (Note 2), p. 274.

6 Sections VII and VIII of the Code, which concern the “security sector”, have therefore been seen as complementary to the 1999 Vienna Document regime on confidence- and security-building measures; see Victor-Yves Ghebali, *Recommendations on the Further Development of the OSCE Code of Conduct on Politico-Military Aspects of Security: The Development of the OSCE’s Role in Security Sector Governance*, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva 2006, p. 4.

curity by implicitly bridging the gap between the politico-military field and the human dimension of security and by addressing the “development of sound economic and environmental conditions, to counter tensions that may lead to conflict” (para. 17). It deals with the whole conflict cycle, from early identification of potential conflicts and conflict prevention (para. 18), to the conditions favourable to the political solution of the conflict, as well as humanitarian assistance (para. 19).<sup>7</sup> The 1994 document is equally applicable to long-term thinking about civil-military structures and to the conduct of military activities themselves. In addition, addressing norms for the use of armed forces in peace and war (section VIII), the Code adds substantive value to international humanitarian law and international human-rights law.

The vital role the Code played in the consolidation of the Euro-Atlantic zone of security and in the transformation and adaptation to the new politico-military realities in Europe has been acknowledged for a long time, as has its contribution to the widespread adoption by the OSCE participating States (especially those that were transitioning from closed systems of government to open democracies) of the standards governing international relations and internal regulations concerning their armed forces. In the Balkans, for instance, the Code entered into force in the same year in which the Dayton Peace Accords were signed (December 1995), and the history of the Code has thus coincided with the remarkable developments that have taken place since then; it played an important role in the OSCE’s unique mandate under Annex 1-B of the Dayton Peace Accords, the Agreement on Regional Stabilization;<sup>8</sup> it has assumed an important role in terms of the normative standards that all participating States are politically committed to uphold. As the democratic and civilian control of armed forces has become a major element of both NATO and EU membership in the post-Cold War era, the Code has also played an important role in the enlargement process. Alexandre Lambert, one of the leading scholars on the Code, is right to say that “the Code therefore provides an important norm-setting function within the evolving political and security architecture in Europe”.<sup>9</sup>

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7 Although the Code is clearly identified in Ministerial Decision No. 3/11 adopted in Vilnius on 7 December 2011 on “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”, it is apparent that it has not been at the heart of the OSCE’s reflections on implementing this important decision.

8 On the impressive action carried out by the OSCE Mission to Bosnia and Herzegovina in order to promote the implementation of the Code through awareness-raising and training activities, see: *FSC Chairperson’s Progress Report to the Eighteenth Meeting of the Ministerial Council on Efforts to Further Improve the Implementation of the Code of Conduct on Politico-Military Aspects of Security*, MC.GAL/3/11 of 14 November 2011, p. 3. At the first annual discussion on the implementation of the Code, on 11 July 2012, the delegation of Montenegro distributed the new law on parliamentary oversight in the area of security and defence adopted by the Parliament of Montenegro on 22 December 2010 (see FSC.DEL/93/12/Add.1, 9 July 2012).

9 Alexandre Lambert, *Implementation of Democratic Control of Armed Forces in the OSCE Region: Lessons Learned from the OSCE Code of Conduct on Politico-Military Aspects of*

As for the OSCE, as David Law points out well, the Code represented a defining moment in its development as an organization, with the agreement on the Code coinciding with its transition to the Organization's new status and new name.<sup>10</sup> The Code had a major influence on the Charter for European Security adopted at the OSCE Summit in Istanbul in 1999.

Although negotiated in the early 1990s under the circumstances that prevailed in that early post-Cold War period, the Code remains a unique landmark document, still valid after 18 years in effect and highly relevant to the current security challenges of the 21st Century. The implementation of this pioneering document was supported by the adoption, on 8 July 1998, of the OSCE Questionnaire on the implementation of the Code of Conduct, which has since been updated twice.<sup>11</sup> The annual exchange of information on its basis is the major tool for implementing the Code: It provides transparency among OSCE participating States with regard to armed forces and their control by constitutionally established authorities; it also allows them to identify common practices, general trends, and useful comparative elements that can be used to improve national implementation and multilateral cooperative procedures. Since its most recent update in 2009,<sup>12</sup> the Questionnaire currently consists of three sections related to inter-state and intra-state elements as well as to public access and contact information; it contains 24 questions directly related to provisions of the Code and participating States' implementation commitments on a broad variety of principles and norms inherent to the Code. Since 2002, the Questionnaire has placed special emphasis on the struggle against terrorism, and contributes to co-operation in this regard.<sup>13</sup>

Since the adoption of the Code in 1994, only three follow-up conferences have been organized: in September 1997, June 1999, and September 2002. A meeting was held by the OSCE FSC on 27 September 2006 in order to review the implementation of the Code. Since then, the successive chair-

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*Security*, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper No. 11, Geneva, July 2006, p. 1.

10 Cf. Law, cited above (Note 3), p. 89.

11 Cf. Organization for Security and Co-operation in Europe, Forum for Security Co-operation, *Decision No. 4/03, Technical Update of the Questionnaire on the Code of Conduct*, FSC.DEC/4/98, 9 April 2003.

12 See Organization for Security and Co-operation in Europe, Forum for Security Co-operation, *Decision No. 2/09, Technical Update of the Questionnaire on the Code of Conduct*, FSC.DEC/2/09, 1 April 2009.

13 Following the third follow-up conference on the Code, which was held in September 2002, the participating States decided to expand question 1 of the Questionnaire which dealt with national and international measures to combat terrorism (FSC.DEC/16/02, 27 November 2002); this new requirement was implemented for the first time in the information exchange of April 2003. The new simplified Questionnaire introduced by FSC.DEC/4/03 (9 April 2003) also focused on national measures for combating terrorism. Although the debate would take us far beyond the limits of this article, one can question this emphasis given to the counterterrorism issue within the Code; Alexandre Lambert is just one of many experts who believe that the few provisions on terrorism within the Code do not add value to already existing international instruments in the framework of the United Nations, cf. Lambert, cited above (Note 9), p. 2.

manships of the Forum and their Co-ordinators for the Code have remained committed to organizing regular briefings and presentations on this important issue.<sup>14</sup> But no real technical discussion of the Code had been held since a special meeting of the FSC's Working Group "A" on this issue, on 23 May 2007, when the Forum decided in 2011, on the basis of the mandate given by the Ministers in Athens,<sup>15</sup> to regularize a focused discussion on implementation of the Code by devoting an annual special one-day meeting to this document. The first annual discussion on the implementation of the Code therefore took place on 11 July 2012 in Vienna.

Almost 20 years after its adoption, awareness and outreach of the Code has reached a reasonably satisfactory level. Due to the numerous seminars and trainings organized by the OSCE Conflict Prevention Centre (CPC) and field missions, the Code is now a well-known instrument and has influenced a number of national legislations. However, the Code's shortcomings and imperfections remain unresolved in 2012, while any renegotiation of its provisions seems to be out of reach in the current political context. As a result, the Code could be at risk of being pushed off the OSCE's evolving security agenda. Nevertheless, some "narrow paths" can be taken in order to keep the instrument's relevance in today's environment; in particular, a more "qualitative" approach could be implemented through the annual information exchange, and the Code could serve as a "transmission belt" beyond the OSCE region. Finally, the 1994 document should offer the Organization a security model for the 21st Century: The Code could be among the "building blocks" for realizing the vision of a security community.

#### *Fairly Satisfactory Levels of Awareness and Outreach*

The adoption of the Reference Guide on the Questionnaire by the FSC on 13 July 2011,<sup>16</sup> which provided the participating States with a tool for comprehensive and structured reporting, also closed a lengthy chapter of efforts to promote greater awareness of the Code at the national and international level and within other institutions, and to improve its relevance and its implementation.

Following the adoption of FSC Decision No. 1/08 on awareness raising and outreach of the Code (27 February 2008), five regional seminars have

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14 Such as the round table held on 24 February 2010 and the "Security Dialogue" on the contribution of the Code to the security environment past and today, held on 22 June 2011.

15 "[The Ministerial Council] calls on the FSC [...] to [...] continue to explore ways in which to improve implementation of the Code of Conduct on Politico-Military Aspects of Security, and contribute to discussions on the principles inherent in the Code", Decision No. 16/09, Issues Relevant to the Forum for Security Co-operation, MC.DEC/16/09 of 2 December 2009).

16 Cf. Organization for Security and Co-operation in Europe, Forum for Security Co-operation, *Decision No. 5/11, Reference Guide on the Questionnaire on the OSCE Code of Conduct on Politico-Military Aspects of Security*, FSC.DEC/5/11, 13 July 2011.

been organized by the CPC in 2008 (Kazakhstan), 2009 (Bosnia and Herzegovina), 2010 (Belarus), 2011 (Ukraine), and on 18 June 2012 in Riga, Latvia. In December 2010, the OSCE Office in Yerevan organized a workshop on the implementation of the Code, and in June 2011, the OSCE Mission to Bosnia and Herzegovina also held a seminar on that issue. On 22 June 2011, the FSC convened a special meeting on the Code. The OSCE Mediterranean Conference held from 10 to 11 October 2011 in Budva, Montenegro, focused among other topics on “Democratic Control of the Armed Forces” and, *ipso facto*, on the principles of the Code and its benefits for the OSCE security community; in March 2012, the Contact Group with the Mediterranean Partners for Co-operation devoted a discussion to the Code. In parallel with the above-mentioned substantive discussions on the Code held in 2006, 2007, and 2012, the FSC hosted a number of one-off presentations on this issue.<sup>17</sup> Constant and better communication is of course still needed to promote a greater awareness of the Code at the national and international level and within other institutions, and dialogue between international experts and national representatives responsible for implementing the Code (especially members of parliamentary assemblies and ombudspersons, as major stakeholders and “end users” of the Code)<sup>18</sup> remains more indispensable than ever. But the assessment made by Alexandre Lambert at the FSC special meeting on the Code in 2006 of a “failure to raise awareness on the Code”<sup>19</sup> has been, in our opinion, largely corrected since then.

The number of participating States that provide information has remained more or less the same these past few years, at around 50.<sup>20</sup> Thanks to the efforts of the CPC, 2012 has been an even more “excellent vintage”: By the end of August 2012, 53 participating States had submitted their Questionnaire and, out of these 53 submissions, 50 were provided in conformity with the new format introduced in the most recent update of the Questionnaire in 2009.<sup>21</sup>

#### *Facing Reality: 18 Years After Its Adoption, the Code Needs to Be Revisited*

Almost 20 years after its adoption, the Code would benefit from an update. A changed security architecture in Europe, new forms of conflict and new threat scenarios, but also intrinsic shortcomings, have called the adequacy and effectiveness of this instrument into question.

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17 The last one being the presentation made on 6 June 2012 by Ernst-Reinhard Beck, Member of the German Bundestag, on “*Die Demokratische Kontrolle von Streikkräften als integraler Bestandteil des OSZE-Verhaltenskodex*” [Democratic Control of the Armed Forces as an Integral Component of the OSCE Code of Conduct].

18 A good vector for this could be the OSCE Parliamentary Assembly.

19 FSC.DEL/401/06, cited above (Note 4), p. 2.

20 The numbers were 52 in 2003, 49 in 2004, 51 in 2005, 48 in 2006, 52 in 2010, 52 in 2011, and 53 in 2012.

21 See SEC.GAL/136/12, 11 July 2012.

“The Code lacks coherence”, as Jonathan Dean already observed in 1996.<sup>22</sup> Many of its provisions are vague and imprecise, and remain subjective (typified by paragraph 12, which requests that each participating State “maintain only such military capabilities as are commensurate with individual or collective security needs”)<sup>23</sup> to such an extent that one expert concluded that the Code was “for the most part a ‘cosmetic exercise’”.<sup>24</sup>

The Code’s sections are not titled. The acronym “CSCE” is still used throughout the document.<sup>25</sup> The CPC notes that eight different words are used to designate different categories of armed forces, which can give rise to divergent interpretations by participating States.<sup>26</sup> In an intervention in June 2011, Wolfgang Zellner provided the FSC with examples of “vague language” in the Code (regarding paragraph 12, in a complete departure from other instruments such as the adapted Treaty on Conventional Armed Forces in Europe), of tensions between specific norms (between paragraph 3 on cooperative and indivisible security and the so-called clause of solidarity in paragraph 5, or between the “ideal world” evoked in paragraphs 3 to 5 of the Code and the legitimization of the military alliance in paragraph 11).<sup>27</sup> Paragraph 6 on terrorism remains structurally isolated within the document. As Crispin Hain-Cole, a former negotiator of the Code, highlighted while opening the 2006 special meeting, one might argue that section VII, devoted to the democratic control of armed forces, is disproportionately long in comparison with the treatment of other issues.<sup>28</sup> The “structural imbalance”<sup>29</sup> between the historical main added-value of the Code (democratic control of armed forces) and the new emphasis on the fight against terrorism in the aftermath of 11 September 2001 has never been completely addressed.

Moreover, the Code pays insufficient attention to paramilitary forces, border guards (a category which did not draw the attention of the promoters of the Code in the 1990s, but which became more important in light of the OSCE’s recent involvement on the borders of Afghanistan), and private military and security companies. It includes no operative provisions on in-

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22 Jonathan Dean, *The OSCE “Code of Conduct on Politico-Military Aspects of Security”: A Good Idea, Imperfectly Executed, Weakly Followed-Up*, in: *OSCE Yearbook 1995/1996*, cited above (Note 2), pp. 291-298, here: p. 291. The author describes in detail the rather complicated and controversial circumstances of the Code’s negotiation, which according to him deprived it of clear thrust and purpose.

23 See David M. Law’s remarks on the notion of sufficient expenditure, in: Law, cited above (Note 3), pp. 98-99.

24 Hennig, cited above (Note 2), p. 284.

25 By comparison, another important politically binding document of the OSCE, the Vienna Document (VD), has been regularly updated, at least “cosmetically” and particularly in terms of the use of OSCE instead of CSCE. The latest version of the VD was adopted on 30 November 2011.

26 Forces/services, armed forces, military (forces), paramilitary forces, internal security forces, security forces, intelligence services, police; see FSC.GAL/74/06.

27 Cf. Wolfgang Zellner, *The Code of Conduct on Politico-Military Aspects of Security, Special Meeting of the FSC*, FSC.DEL/114/11, 24 June 2011.

28 See FSC.DEL/433/06.

29 The expression is from Lambert, cited above (Note 9), p. 29.

ternal security forces, intelligence services, and police forces, even if paragraph 20 refers to these particular categories of armed forces. It is not detailed enough when it addresses the use of armed forces for internal purposes (state of emergency).<sup>30</sup> It does not make clear the linkages between itself and the Vienna Document (VD), even if paragraphs 22 (military expenses) and 35 (military doctrine and defence policy) refer to issues covered by the VD 1999. It only provides for executive and legislative control of armed forces, but makes no formal reference to the judiciary.<sup>31</sup> Regarding international humanitarian law, the Code has been deemed inferior to the Geneva Conventions in most regards.<sup>32</sup>

Therefore, “the Code needs to be revisited”, as Victor-Yves Ghebali stated in 2005, making a number of proposals in that regard.<sup>33</sup> But reopening the Code has always been considered with great reluctance by the participating States. As the representative of one delegation at the 2012 annual discussion pointed out, the consensus on the Code in 1994 has been seen “as a kind of miracle [...] The question to be asked at the present time was whether it would be wise or too risky to open up the Code of Conduct in order to develop it further.”<sup>34</sup> Due to its cross-dimensional nature and provisions, the Code is not a politico-military document *stricto sensu*. Reopening it for ne-

30 This is a paradoxical omission, as the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (Moscow Document, 1991) recognizes that “a state of public emergency may not be used to subvert the democratic constitutional order, nor aim at the destruction of internationally recognized human rights and fundamental freedoms” (para. 28.1). Contrary to the Moscow Document (para. 17.2), the Code also failed to address the issue of usurpation of political control by armed forces.

31 However, paragraph 36 prescribes that internal security missions have to be performed under the effective control of constitutionally established authorities vested with democratic legitimacy and “subject to the rule of law”, which implies the effective supervision of judicial as well as political civilian authorities.

32 In particular, the Code’s provisions on the individual accountability of armed forces personnel vested with command authority (para. 31) are considered much weaker than those of the 1949 Geneva Conventions, which commit the States Parties to enact penal legislation directed against persons responsible for significant breaches, as well as to apprehend and bring such persons (regardless of their nationality) before national or even foreign courts; see Ghebali, cited above (Note 6), p. 5.

33 Victor-Yves Ghebali, “*Expanding the Code of Conduct: Perspectives and Possibilities*”, Workshop on the 10th Anniversary of the OSCE Code of Conduct, organized by the Geneva Center for the Democratic Control of Armed Forces, Vienna, 28 January 2005, p. 3. The proposals made by Ghebali include: a new provision reconciling the two cardinal principles of territorial integrity of states and self-determination of peoples; developing provisions relating to border guards, judicial control of the armed forces, and the use of armed forces during a state of public emergency; better enumeration of the rights and duties of armed forces personnel; creation of a military ombudsman by the participating States; paying more detailed attention to paramilitary forces, internal security forces, intelligence services, and the police; requiring the participating States to provide information on the use of force at domestic level; and improving links between the Code and the Vienna Document 1999; see *ibid.*, pp. 4-5. The suggestion of a “European Ombudsman” was reformulated on 11 July 2012 by Paul Kiss, Executive Chairman of the Austrian Parliamentary Commission for the Federal Armed Forces, cf. OSCE Forum for Security Co-operation, *Consolidated Report*, FSC.GAL/96/12, 1 August 2012, p. 16. On Ghebali’s suggestions, see also Lambert, cited above (Note 9), pp. 18-22.

34 OSCE Forum for Security Co-operation, *Consolidated Report*, cited above (Note 33), p. 21.



gotiations would therefore go beyond the responsibility of the states' defence departments and would require an inter-departmental process as well as a meaningful co-ordination with relevant non-governmental institutions and civil society. The degree to which the Code should be updated (standardization of terminology, adding new operative paragraphs, deleting others, etc.) would also need to be considered. And the final result could be deeply inferior to the initial text and could endanger the fundamental *acquis* of the Code. All in all, a consensus on the modernization of an important OSCE instrument would be difficult to achieve, as shown by the current stalemate over the Vienna Document updating process.<sup>35</sup> Technically, paragraph 38 of the Code establishes that "appropriate CSCE bodies, mechanisms and procedures will be used to assess, review and improve if necessary the implementation of this Code". But none of its provisions addresses how to review the substance of this instrument, and not only its implementation.

At the first Follow-Up Conference, held in Vienna in September 1997, although a few suggestions were made with a view to refining the conceptual structure of the Code or amending some of its provisions, the majority of the participating States took the view that the integrity of the Code in its present form should be preserved.<sup>36</sup> At the third Conference, held in September 2002, the participating States agreed that the Code should not be reopened, but merely that some of its aspects could be emphasized further.<sup>37</sup> In an identical manner, at the special meeting in 2006, delegations stressed that "the fundamental *acquis* of the Code of Conduct must be preserved under any circumstances and that it should consequently not be reopened, reviewed or renegotiated as such".<sup>38</sup> But the question remains open: In its report from this year's annual discussion, the CPC noted that, though participating States recognized that negotiations to change the Code were expected to be difficult, there remained an appetite among many delegations to evolve and update the Code (or at least its Questionnaire) to avoid stagnation.<sup>39</sup>

However, alternative options have been formulated in order to try to convey necessary adjustments of the Code's substance without reopening the document itself. Some participating States suggested reviewing the Code through separate documents.<sup>40</sup> One of the conclusions drawn up at the third Follow-Up Conference in 2002 was the need for a separate document on pre-

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35 Despite receiving repeated mandates from the highest levels to do so (Athens Ministerial Council in 2009, Astana Summit in 2010), the FSC has so far failed to bring the VD into conformity with current military patterns. A few decisions of a technical and procedural nature have been taken and incorporated into the version adopted by the Forum on 30 November 2011, but they leave untouched the need for a strategic update of the document.

36 Cf. *Summary*, in: FSC.GAL/15/97, 30 September 1997.

37 Cf. Chairperson's Perception Paper, in: Organization for Security and Co-operation in Europe, Forum for Security Co-operation, *Third Follow-up Conference on the OSCE Code of Conduct on Politico-Military Aspects of Security*, FSC.GAL/122/02, 8 October 2002.

38 FSC.DEL/435/06, 27 September 2006.

39 See *Consolidated Report*, cited above (Note 33), p. 24.

40 See FSC.DEL/392/04, 16 September 2004, and FSC.DEL/456/04, 3 November 2004.

venting and combating terrorism,<sup>41</sup> an issue that has never been considered to be a core concern by the promoters of a Code focused on democratic control of the armed forces.<sup>42</sup> Such an “autonomization” was also suggested by Victor-Yves Ghebali regarding the Code’s provisions on the democratic control of armed forces.<sup>43</sup> In 2006, one participating State suggested that the following possible topics could be addressed in an additional protocol: reference to the judicial branch, which, contrary to the executive and legislative control of armed forces, is not subject to any provision in the Code; compatibility between national counter-terrorism measures and human rights and fundamental freedoms; improving the categorization of forces (for instance, this delegation noticed that the category of border guards is not mentioned in the Code); addressing states of emergency/crisis and the related use of force.<sup>44</sup>

At a lower level, Ghebali also proposed to improve the coherence between the various OSCE instruments (interconnecting the Code and the Vienna Document, interconnecting the Code and the OSCE Document on Small Arms and Light Weapons) which converge in many areas.<sup>45</sup>

None of these ideas seem entirely realistic in 2012, due to the political context and the high sensitivity of any attempt to update each of these documents.

Can the OSCE community live with an imperfect Code? The answer is probably yes. As David Law rightly assesses, organizations such as the United Nations and NATO have managed to make several modifications of the scope and methods of their operations without amending the UN Charter or the Washington Treaty. However and although “it can be fairly safely concluded that it would be impossible to agree to update the existing Code under today’s strategic circumstances”,<sup>46</sup> this unsatisfactory situation might prevent the Code from maintaining its pioneering role in the new OSCE security environment.

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41 See *Survey of Suggestions*, in: FSC.GAL/123/02, 8 October 2002.

42 Alexandre Lambert suggested removing counter-terrorism to a separate code of conduct or at least a separate questionnaire, cf. Lambert, cited above (Note 9), pp. 2 and 4.

43 Ghebali, cited above (Note 6), pp. 8-9. The author proposes some “preliminary elements for an integrated OSCE concept for security sector reform and governance”.

44 See FSC.DEL/435/06, cited above (Note 38), p. 2.

45 Cf. Ghebali, cited above (Note 6), p. 6. For instance, the inclusion of Code issues (like the democratic control of armed forces) in the Vienna Document verification and evaluation process could help cross-implementation and add a “verification component” to the Code; this suggestion has been made repeatedly at the Annual Implementation Assessment Meetings; see, in particular, FSC.AIAM/4/12, 2 March 2012, p. 2.

46 Law, cited above (Note 3), p. 103. However, the alternative options that Law proposes (to draft a protocol addressing new developments not currently taken up in the Code and/or to develop special instruments for issue areas that are insufficiently elaborated in the Code, such as a separate code devoted to terrorism or to the rights and responsibilities of armed forces personnel) may appear to be as difficult to implement as the reopening of the Code.

*An Out-of-Date Code?*<sup>47</sup> *How to Bring the 1994 Acquis in Line with the OSCE's Evolving Security Agenda*

Considering various developments that have intervened in the security field over the two last decades, it could be worth considering the adaptation of the Code in order to take into account the new roles and missions assigned to armed and security forces in combating transnational threats, as already suggested by some experts.<sup>48</sup> It is interesting to note, *en passant*, that our article coincides with the adoption by the Permanent Council of the OSCE, on 26 July 2012, of two important draft Ministerial Decisions in view of the Ministerial Council in Dublin at the end of this year: one on police-related activities, and one on combating the threat of illicit drugs and the diversion of chemical precursors. At the annual discussion on July 2012, it was suggested that discussions be held on how the Code and its Questionnaire could be further enhanced and developed to address new challenges, such as cyber-security;<sup>49</sup> the Code could indeed well support the elaboration of confidence-building measures in this field. Equally, the suggestion of a new code of conduct on terrorism, or at least a separate questionnaire related to terrorism only, could help the OSCE to cope with its new involvement in the fight against terrorism.

But is it still timely to act? The current incompleteness and shortcomings of the Code already have some implications for its ability to regain its role of “‘normative compass’ for security sector reform and security sector governance within and beyond the OSCE area”, as Alexandre Lambert urged at the 2012 discussion.<sup>50</sup> Pointing out that security-sector reform had been rapidly gaining ground as a policy framework for the OECD, UN, EU, and Council of Europe, David Law regretted a few years ago that the Code was in danger of losing its *niche* in this area.<sup>51</sup> Indeed, as Ambassador Theodor Winkler, Director of the Geneva Centre for the Democratic Control of Armed Forces (DCAF) stated clearly at this year annual discussion, “while the Code could be considered a founding document for SSG [security sector governance], the concept of SSG had moved beyond the principles embodied in the Code”.<sup>52</sup> Preserving a contribution for the Code in this area would need to take into account “a broader understanding of the term [security sector], including more actors, such as elements of the judicial sector or even non-State actors”,<sup>53</sup> two categories that are specifically not yet included in the scope of the document.

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47 This is David Law's clear opinion, cf. *ibid.*, p. 101.

48 Cf. Lambert, cited above (Note 9), p. 47.

49 Cf. FSC.DEL/94/12, 11 July 2012.

50 *Consolidated Report*, cited above (Note 33), p. 18.

51 Cf. Law, cited above (Note 3), p. 93.

52 *Consolidated Report*, cited above (Note 33), p. 19. It is interesting to note that the Centre's creation was directly inspired by the Code of Conduct, which lent it the name of one of its main aims, the democratic control of armed forces.

53 *Ibid.*

*A Narrow Path: What Can Be Done in 2012 to Safeguard the Code's Relevance and Added Value?*

*The Code's Substance and Legal Status Need to Stay Untouched, but Participating States Should not Be Prevented from Moving Forward*

For the reasons mentioned above, renegotiating the Code to ensure this instrument is commensurate with the requirements of the 21st Century appears to be out of reach. Equally, the Code's status should not be modified. In contrast to the prominent Helsinki Decalogue, the Code was simply integrated in the 1994 Budapest Document and adopted as a section under chapter 4 of this document. Using the image conjured up by an expert in 2006, "the Code is still a gentlemen's agreement".<sup>54</sup> Already in 1992, France, eager to consolidate post-Cold War security arrangements and prevent backsliding, proposed that CSCE commitments be codified in the form of a treaty; this proposal was thwarted by the United States, in the context of NATO reaffirmation.<sup>55</sup> Although time has passed since then, considering the possibility to enhance the status of relevant provisions of the Code in order to promote compliance with the standards of responsible inter-state co-operative conduct by the states in the politico-military sphere, as brought forward by a participating State in 2010 before the Astana Summit, would certainly give rise to more difficulties than solutions. The Code's added value in the 21th Century also consists in its "soft power" of influence: Above all, it is a "Code" corresponding to an optimal final state, and not a set of legal obligations.

However, there are two indirect ways that could help to move things forward while leaving the Code untouched.

The first would be to encourage participating States, in the framework of the annual information exchange on the Code, to consider supplementary measures and to provide additional information on a voluntary basis on issues which are not sufficiently covered by the Questionnaire. Statistical analysis of the 2012 information exchange shows that some participating States provided additional voluntary information on private military and security companies, while 27 gave information on women, peace, and security along the lines of United Nations Security Council Resolution 1325 (2000).<sup>56</sup> Nevertheless, one should consider this approach with caution: On the one hand, this "variable geometry approach such as the one practised in certain areas of the EU" that David Law proposes to implement among the states that want to go

54 FSC.DEL/401/06, cited above (Note 4), p. 8.

55 Cf. Dean, cited above (Note 22), p. 292.

56 See *Consolidated Report*, cited above (Note 33), p. 24. On 1 April 2009 and 13 July 2011, some OSCE participating States declared their intent to expand the scope of their replies to the Questionnaire to include information about women, peace, and security; see the interpretative statements attached to FSC.DEC/2/09, cited above (Note 12), and to FSC.DEC/5/11, cited above (Note 16). In the same way, in 2009, five participating States called on the states to include statements on the democratic political control of private military and security companies in their replies to the Questionnaire; see the interpretative statement attached to FSC.DEC/2/09, cited above (Note 12).

further than the consensus of all the OSCE States permits,<sup>57</sup> would certainly generate a “mass effect” which would pave the way for others to follow when their situation allows; but on the other, it would also create a risky situation of an OSCE “*à deux vitesses*” that would endanger the indivisibility and coherence of the OSCE normative *corpus*.

The second would be to create a mechanism inspired by the “VD PLUS” procedure that was implemented from 2010 to incorporate into the Vienna Document the decisions adopted by the FSC, thereby updating some of the 1999 VD’s existing provisions.<sup>58</sup> As in the case of VD PLUS, the CPC could be tasked with keeping a record of all valid “CoC PLUS” decisions, and a special FSC meeting could take place every five calendar years to consider updating the Code.

*Updating the Practice of the Code, Rather than the Document Itself: From “Quantitative” to “Qualitative”*

Following the technical update of the annual Questionnaire in 2009, the FSC developed a reference guide to assist the participating States in preparing their national submissions. Beyond this important milestone towards improving the implementation of the Code, more could be done to enhance the practice of the 1994 document. Indeed, though the level of submissions in 2012 has been remarkably high, and though the CPC observes a continuous upward trend, it still acknowledges that the replies it receives range from a mere list of laws and relevant documentation, to comprehensive reports giving detailed information on policies, procedures, and progress made.<sup>59</sup>

As one participating State suggested at the first annual discussion of 11 July 2012, more “user friendly” guiding principles for implementation could be developed; to this end and following the successful elaboration of the OSCE best practice guides for small arms and conventional ammunition, this state proposed to draft such a guide for the implementation of the Code, according to international standards.<sup>60</sup> At the Riga seminar in 2012, and at the first annual discussion, several delegations also advocated a more “qualitative” and meaningful assessment and analysis of the annual exchange of information based on the Code, which would go beyond the purely statistical data the CPC is currently requested to provide.<sup>61</sup> The information provided by the participating States could be then used more effectively. Although it might be time- and money-consuming, it could be worthwhile to repeat the experience of 2010, when an academic study of the information provided by

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57 Law, cited above (Note 3), p. 104.

58 Cf. Organization for Security and Co-operation in Europe, Forum for Security Co-operation, *Decision No. 1/10, Establishing a Procedure for Incorporating Relevant FSC Decisions into the Vienna Document*, FSC.DEC/1/10, 19 May 2010.

59 Cf. SEC.GAL/135/12, 11 July 2012.

60 Cf. FSC.DEL/95/12, 11 July 2012.

61 Cf. FSC.DEL/94/12, cited above (Note 49), and FSC/GAL/96/12, cited above (Note 33).

the OSCE States was issued by two experts following the first information exchange based on the newly updated Questionnaire.<sup>62</sup>

Guidelines for the implementation of the Code itself could be elaborated with respect to categories such as private military and security companies, border guards, internal security forces, intelligence services, and police forces, following Victor-Yves Ghebali's suggestion.<sup>63</sup>

In the same way, information exchange could be further streamlined to take account of information provided under other mechanisms, notably the United Nations.<sup>64</sup> Yet in 2006, an expert noted that, although amended in 2003, only sub-item 5(e) in item 1 of the Questionnaire regarding the fight against terrorism added value over and above the existing UN anti-terrorism questionnaire.<sup>65</sup> This suggests that the CPC would do well to replicate its considerable accomplishments of the past two years in the field of small arms and light weapons, where the states' reporting burdens were reduced by implementing a standardized reporting template harmonized with that of the UN.<sup>66</sup> The questions could be rationalized so as to minimize repetition and avoid cross-referencing in responses. This could contribute to diminishing the "reporting fatigue" that a former head of the Anti-Terrorism Unit (ATU) of the OSCE already noted among participating States six years ago in the area of counter-terrorism, due to the number of reports already required in other forums.<sup>67</sup>

Last but not least, the CPC should focus on the very few OSCE States that persistently stay outside the exchange of information (three in 2012). Any lack of capacity on their part should be addressed, and they should be provided with the appropriate technical assistance (as well as with peer pressure, as the lack of political will might be deemed sometimes a more relevant issue to address than the lack of technical capacity) in order that 2013 might be the first "100 per cent participation" year in the history of the Code.

#### *A Transmission Belt Beyond the OSCE*

"Despite imperfect application in the OSCE area, the OSCE Code of Conduct could with benefit also be discussed and applied outside the OSCE area", suggested one expert a year after the adoption of the document.<sup>68</sup> The 2010 Astana Declaration emphasized that "the security of the OSCE area is inex-

62 See FSC.GAL/99/10, 13 September 2010.

63 Cf. Ghebali, cited above (Note 6), p. 7.

64 In 2006, Alexandre Lambert suggested that the Code should be brought to the attention of the United Nations; see FSC.DEL/401/06, cited above (Note 4), p. 4.

65 Cf. *ibid.*, p. 7.

66 See Organization for Security and Co-operation in Europe, Forum for Security Co-operation, *OSCE Meeting to Review the OSCE Plan of Action on Small Arms and Light Weapons and OSCE Expert Level Session on Small Arms and Light Weapons Stockpile Management, Surplus Reduction and Destruction, Vienna, 22 to 24 May 2012, Consolidated Report*, FSC.GAL/86/12, 4 July 2012, p. 23.

67 See FSC.DEL/361/06, 19 July 2006, p. 3.

68 Dean, cited above (Note 22), p. 298.

trically linked to that of adjacent areas, notably in the Mediterranean and in Asia”.<sup>69</sup> In this context, the Code may effectively serve as a “transmission belt [...] in and beyond the OSCE”, as Alexandre Lambert suggested at the first annual discussion of July 2012.<sup>70</sup> It should constitute one of the primary tools in the OSCE politico-military dimension to be promoted among OSCE Partners for Co-operation. It could also play an important role in stepping up political consultations between the OSCE and other organizations as well as possibly strengthening co-operation across all three security dimensions.

The OSCE should be ready and willing to help other regional or sub-regional organizations to draft their own documents, inspired by the OSCE Code but also tailored to local requirements. A few years ago, the DCAF worked together with the Economic Community of West African States (ECOWAS) for this purpose.<sup>71</sup> In light of the “Arab Spring” and the current developments in the Mediterranean region, the relevance of the Code could be underlined with regard to its intra-state elements, such as civilian and parliamentary oversight of the security sector or the political neutrality of armed forces.<sup>72</sup> In that regard, the initiatives aiming at increasing awareness and outreach of the Code could now focus on the OSCE Mediterranean Partners; the idea of a joint conference on the Code, as well as its ongoing translation into Arabic, following the interest expressed by the Secretary-General of the League of Arab States, Ambassador Nabil Elaraby, were warmly welcomed at the 11 July 2012 meeting. The Code could also play an important role in the follow up of the Istanbul Process on Regional Security and Co-operation for a Secure and Stable Afghanistan.

The accession of Mongolia to the OSCE, which became effective on 20 November 2012 at midnight, will of course offer a good case study for the implementation of the Code in the enlarged OSCE region.

As suggested at the first Follow-up Conference in 1997, the Code of Conduct could also be reflected in regional/bilateral agreements.<sup>73</sup> Indeed, as an expert wrote in 1996, the Code “gives greater regional and sub-regional

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69 Organization for Security and Co-operation in Europe, Summit Meeting, Astana 2010, *Astana Commemorative Declaration – Towards a Security Community*, SUM.DOC/1/10/Corr.1, 3 December 2010, para. 10, p. 3, at: <http://www.osce.org/cio/74985>.

70 Alexandre Lambert, Implementation of the OSCE CoC: Lessons Learned & the Way Ahead, in: *Annual Discussion on the Implementation of the Code of Conduct*, FSC.NGO/1/12, 4 July 2012.

71 A draft Code of Conduct for Armed and Security Forces in Africa was discussed at an Experts’ Workshop held in Lomé, Togo, on 27-29 May 2002. On this document, see Lambert, cited above (Note 9), pp. 10-11.

72 The requirements made by the Code with regard to the use of armed forces for internal security missions, as well as the commitments it contains not to use armed forces to limit the peaceful and lawful exercise of human and civil rights, not to strengthen the security of one state at the expense of others, or to maintain only military capabilities that are commensurate with individual or collective legitimate security needs are also highly relevant for the region.

73 Cf. *Survey of Suggestions*, FSC.GAL/24/97, 14 October 1997.

effectiveness to the international norms which govern the politico-military activities of states and their use of military power”.<sup>74</sup>

*The Code as a Security Model for the 21st Century: A “Building Block” for Helsinki +40*

“Since adoption of the Code, there has been little discussion of its potential as a focus for discussion of a possible pan-European defense community”, noted Jonathan Dean with regret as early as 1996.<sup>75</sup> Against this trend, the Code of Conduct should be considered part of the ongoing discussions regarding the future of security in Europe, especially along the line of the “Helsinki +40” process that was launched in 2012 by the Irish OSCE Chairmanship.<sup>76</sup> At the first Follow-Up Conference on the Code of Conduct, several delegations had already considered that the Code’s *acquis*, especially the inter-state standards formulated in sections I-VI, “could in any case be used as by now uncontroversial building blocks of the Security Model for Europe for the twenty-first century. Hence, this statement of norms and values could well serve as a catalyst for perhaps equally important deliberations, the outcome of which was still unclear.”<sup>77</sup>

With regard to the broader discussions of the European security architecture, the principles stipulated in the Code – including the indivisibility of security, the non-use of force against the territorial integrity of any state, the right of individual or collective self-defence, the right of any state to choose its own security arrangements, and respect for the legitimate security concepts of other states – are highly significant. Some of these principles are reaffirmed in the Astana Commemorative Declaration “Towards a Security Community”. Paragraph 4 of the Code, which assigns a “key role” to the CSCE/OSCE and calls upon the participating States to “continue to develop complementary and mutually reinforcing institutions that include European and transatlantic organizations, multilateral and bilateral undertakings and various forms of regional and subregional co-operation”, could itself be sufficient to provide the Euro-Atlantic community with a strong and well-grounded security architecture in the 21st Century. Thus, “the Code of Conduct also provides a sound basis for a Security Model for the 21st Century”.<sup>78</sup> As suggested by the Director of the Office of the Secretary General at the an-

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74 Hennig, cited above (Note 2), p. 274.

75 Dean, cited above (Note 22), p. 297.

76 At the very heart of the “Helsinki +40” concept, which aims at realizing the common vision of a “security community” agreed upon at the OSCE Summit in Astana, is the idea of using the 40th anniversary of the Helsinki Final Act in 2015 as a “*rendezvous*” at which the participating States could measure progress towards this security community. It would rely on a “building-blocks” approach; see CIO.GAL/49/12, 25 April 2012.

77 *Summary*, in: FSC.GAL/15/97, cited above (Note 36).

78 Hennig, cited above (Note 2), here: p. 283.



nual discussion on the implementation of the Code on 11 July 2012, it should serve as a basis for discussions on these important inter-state principles.<sup>79</sup>

In particular, the “principle-based approach” followed by the Code could help to revive the negotiations on a future arms control regime in Europe. Paragraph 16 of the Code establishes that “with a view to enhancing security and stability in the CSCE area, the participating States reaffirm their commitment to pursue arms control, disarmament and confidence- and security-building measures”. Such a provision should encourage the participating States to resume their discussions, which have currently reached an impasse. The Code could provide them with solid references for concepts such as “indivisible security” (see para. 15) or “host nation consent” (see para. 14), whose definitions have been stumbling blocks in these past few years.

### *Conclusion*

By adopting the Code of Conduct in 1994, the OSCE could legitimately claim to have advanced beyond the normative accomplishments of other international organizations. As Crispin Hain-Cole noted in 2006, the Code “represents a civilised method of seeking to regulate relations between States through the negotiation and implementation of binding multilateral agreements voluntarily accepted, in good faith”.<sup>80</sup>

It is easy to stress that this “good idea” has been imperfectly executed and rather weakly followed up by the OSCE and its participating States. The mantra, often repeated on 11 July 2012, according to which the Code should be regarded as an important instrument for confidence building and conflict prevention, needs to be honestly questioned. The Code cannot prevent armed conflicts between OSCE States, nor can it stop the employment of military force in internal conflicts by individual OSCE participating States. Russia’s military action in Chechnya began only five days after the conclusion of the OSCE Summit in Budapest on 6 December 1994, and has been described as “a negative ‘test case’ for the use of the Code of Conduct as an instrument for early warning and conflict prevention”.<sup>81</sup> In a declaration of 27 September 2006, the Finnish Presidency of the European Union, in allusion to the events of the previous year in Uzbekistan, had to recognize: “We note with regret that questions asked with regard to those tragic events on the basis of the Code’s provisions at the FSC meetings remain unanswered.”<sup>82</sup> As Wolfgang Zellner accurately pointed out, paragraph 14 of the Code on the stationing of armed forces on the territory of participating States did nothing to resolve

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79 Cf. *Consolidated Report*, cited above (Note 33), p. 11.

80 FSC.DEL/433/06.

81 Hennig, cited above (Note 2), p. 284.

82 FSC.DEL/429/06/Corr. 1.

existing disputes between the Russian Federation and Moldova, on the one hand, and between the Russian Federation and Georgia, on the other.<sup>83</sup> Equally, paragraphs 15 and 16 did not stop the Russian Federation from suspending the Treaty on Conventional Armed Forces in Europe in 2007,<sup>84</sup> nor the member States of NATO, as well as Georgia and Moldova, from proceeding in the same way vis-à-vis Russia in 2011; these provisions were also not sufficient to give impetus to the VD updating process, which, three years after the mandate given to the FSC by the ministers in Athens, has reached a stalemate, despite the adoption of some technical and cosmetic amendments in 2011.

That might be the reason why this “revolution had fallen asleep since then”.<sup>85</sup> With the exception of the annual exchange of information based on its Questionnaire, the Code itself has taken on the shape of a “historical ornament” on the OSCE’s shelves. It is indicative to note that the 36-page report made by the OSCE Panel of Eminent Persons in 2005 did not mention the Code once.<sup>86</sup>

However, nobody should undervalue the importance of the Code for the OSCE: As underlined in our introduction, the Code has an essential link to the Vienna-based Organization, with its adoption coinciding with the OSCE’s transition to a new status and a new name. Inevitably, its strength is linked to that of the OSCE: As have others of the OSCE’s instruments, the Code has, since the beginning, been “waiting for the day when OSCE gains sufficient weight to put more energy and authority behind implementing its own decisions and principles”.<sup>87</sup>

Is it “time to wake it up”, as Alexandre Lambert asked on 11 July 2012?<sup>88</sup> The “Helsinki +40” process, relying on the active engagement of think tanks and academic institutions, could well provide the OSCE community with such an impetus.

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83 Cf. Zellner, cited above (Note 29).

84 Cf. Loïc Simonet, *Trois ans après la suspension du Traité sur les forces conventionnelles en Europe par la Fédération de Russie: Retour sur les fondements juridiques d’un acte controversé* [Three years after the suspension of the Treaty on Conventional Armed Forces in Europe by the Russian Federation: back to the legal basis of a controversial act], in: *Revue générale de droit international public* 1/2011, pp. 157-173.

85 *Consolidated Report*, cited above (Note 33), p. 18.

86 *Common Purpose. Towards a More Effective OSCE*, Final Report and Recommendations of the Panel of Eminent Persons On Strengthening the Effectiveness of the OSCE, 27 June 2005, available at: <http://www.osce.org/cio/15805>.

87 Dean, cited above (Note 22), p. 298.

88 *Consolidated Report*, cited above (Note 33), p. 18.