

Ortwin Hennig<sup>1</sup>

## The Code of Conduct on Politico-Military Aspects of Security

### *Democratic Political Control of Armed Forces and Giving Concrete Form to the Prohibition of the Use of Force*

The "Code of Conduct on Politico-Military Aspects of Security" was worked out between September 1992 and the end of November 1994 in the CSCE Forum for Security Cooperation and approved on 6 December 1994 by the 52 Heads of State or Government assembled in Budapest for the CSCE Summit. It entered into force on 1 January 1995 as a politically binding document of the OSCE community of States.<sup>2</sup>

The name "Code of Conduct" makes one think of a "law book" or a compendium of norms. At first, a number of OSCE participating States did indeed have in mind the idea of creating a compendium of all norms relevant to the OSCE. But the Document which emerged from Budapest no longer reflects this objective.<sup>3</sup> In its present version the Code of Conduct takes the OSCE's comprehensive security concept as its point of departure but focuses on aspects of politico-military security. At its center are guidelines for tying armed forces into the democratic structures of a civil society characterized by separation of powers and the rule of law. At the same time it sets forth rules for the permissible use of armed forces, not only externally but also in domestic conflicts. The underlying thought is that the misuse of military force is extraordinarily dangerous, that military power is an essential element of

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<sup>1</sup> Ortwin Hennig, Minister Counselor, Deputy Head of the Permanent Mission of the Federal Republic of Germany to the Organization for Security and Cooperation in Europe, Vienna. The author is presenting his personal views.

<sup>2</sup> CSCE Budapest Document 1994, Towards a Genuine Partnership in a New Era, in: Helsinki Monitor 1/1995, pp. 79-106, Chapter IV, Code of Conduct on Politico-Military Aspects of Security, pp. 87-91. All quotes from the Code of Conduct in the present article are from this document.

<sup>3</sup> A detailed description of the Code of Conduct would go beyond the limits of this article. In early 1995, following the conclusion of the negotiations, the German Permanent Mission to the OSCE put together a Commentary on the Code of Conduct which, based on direct knowledge of the negotiations, provides background and a number of possible interpretations. This Commentary is available in manuscript form and can be obtained from the Foreign Office in Bonn, Referat 241. For a synopsis of the origins and content of the Code of Conduct, see: Klaus Achmann, Kooperative Sicherheit: Neue Grundsatzdokumente [Cooperative Security: New Basic Documents], in: Institut für Friedensforschung und Sicherheitspolitik an der Universität Hamburg/IFSH [Institute for Peace Research and Security Policy at the University of Hamburg/IFSH] (Ed.), OSZE-Jahrbuch [OSCE Yearbook] 1995, Baden-Baden 1995, pp. 307-320.

political power and that the latter takes concrete form in the armed forces. At the same time, the Code affirms and refines those OSCE norms designed to ensure security and stability in international relations. At the center is the prohibition of the use of force which is embodied in a number of fundamental security commitments.

#### *A Part of OSCE "Standard-Setting"*

The Code of Conduct seeks to elevate the standard of political civilization amongst OSCE participating States with regard to the use of military power and thus to fill a gap in collective norm-setting by the OSCE States. For this purpose, it connects the new rules on democratic political control of armed forces and their employment with the existing network of OSCE norms, without altering existing norms and standards. It seizes upon those norms which are related to this basic concern. It confirms the commonalities and the indivisibility of the politically binding OSCE norms as they relate to the legally binding norms of the United Nations and of the Geneva Conventions. In this way it gives greater regional and sub-regional effectiveness to the international norms which govern the politico-military activities of states and their use of military power.<sup>4</sup>

When bloc confrontation in Europe ended in 1989/1990 the CSCE was faced with the task of finding a new identity. It decided to turn itself into an instrument for channelling the effects of the changes in Europe, to which it had itself contributed.<sup>5</sup> The Code of Conduct is an integral part of this strategy of "management of change". The new security landscape in Europe and the security relations between participating States, which were perceived as new, needed to find expression in an appropriate document.<sup>6</sup>

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<sup>4</sup> Michael R. Lucas, *The Role of the OSCE Code of Conduct as an Instrument of Early Warning, Early Action, and Conflict Prevention*, Paper for the joint seminar organized by the Netherlands, Clingendale Institute of International Relations and Stiftung Wissenschaft und Politik at Ebenhausen, Germany, 11-12 December 1995, Peace Palace in The Hague, p. 5.

<sup>5</sup> Ortwin Hennig, *Die KSZE/OSZE aus deutscher Sicht - kein Wechsel der Unterstützung* [The CSCE/OSCE as Seen from Germany - No Modification of Support], in: *OSZE-Jahrbuch 1995*, cited above (Note 3), pp. 121-135, here p. 123.

<sup>6</sup> It was on 30 January 1992 that the Federal Republic of Germany, at the CSCE Ministerial Council, for the first time proposed a norming of state behavior with a view to strengthening security, both internally and externally. On 19 May 1992, at the Preparatory Meeting for the CSCE Summit, France and Germany then tabled a formal proposal for a Code of Conduct, with the support of ten additional countries. As a result of this initiative the Helsinki Summit Document of 1992, in Point 12 of the "Programme for Immediate Action", ordered the newly-created Forum for Security Cooperation to take up consultations on "(...) establishing a code of conduct governing their mutual relations in the field of security". Cf. CSCE Helsinki Document 1992, *The Challenges of Change*, Helsinki, 10 July 1992, in: Arie Bloed (Ed.), *The Conference on Security and Co-operation in Europe. Analysis and Basic Documents, 1972-1993*, Dordrecht/Boston/London 1993, pp. 701-777, Annex: Programme for Immediate Action, pp. 739-743, here: p. 742.

Between 1973 and 1992 the CSCE had worked out, in the human dimension, increasingly detailed and competent standards for the behavior, both internal and external, of states. Setting standards in the area of the human dimension was the main business of the CSCE for as long the relationship between the state and the individual remained at the center of the debate between CSCE participating States. Since 1992 the use of military power for domestic purposes as well as externally has become another important subject between them. After the end of the confrontation between blocs and the fragmentation of the security landscape that accompanied the political upheaval it became easier to employ military force and it has been done more frequently. At the same time a need has become apparent for assistance to numerous newly established or reestablished countries in building up their military forces and tying them into democratic political systems.

Hitherto, the CSCE's framework of norms, created over almost twenty years, has largely omitted statements on dealing with military power. It was only after the end of the bloc confrontation that it became possible, and at the same time necessary, for OSCE participating States to go beyond standards for the protection of the individual or of national minorities and make the effort to find multilateral norms for an area at the heart of their sovereignty by establishing politically binding rules for the politico-military aspects of their conduct, both internally and externally.

#### *The Expression of a Collective Political Interest in the Post-Confrontation Phase*

The Code of Conduct thus accords with the collective political interest of the OSCE community in the post-confrontation phase in Europe, and does this in a variety of ways:

- It establishes the OSCE's normative foundation for responsible and cooperative behavior in security matters. Thus it represents the specific answer of security policy to the new causes of (mainly domestic) conflict that have appeared since the beginning of the nineties.
- It creates a solid framework for contacts and cooperation in security matters between the transition states and their OSCE partners. It builds a security-policy bridge between East and West with the objective of improving the security of participating States and preventing armed conflicts. As such it is an important building stone in the growing system of cooperative security.

- With its cooperative and comprehensive view of security, it reflects in particular the security needs of the new or the reborn states. At the beginning of the nineties it was essential to secure what had been achieved politically in the Charter of Paris and to promote and strengthen the building of democratic states in the enlarged OSCE area. A necessary part of this is to ensure that the armed forces, as an important instrument of state power, are subject to civilian control.
- It was the first norm-setting OSCE document to give new participating States the opportunity to play an active and creative role in the negotiations. Its negotiation by all OSCE participating States thus represented a practical offer of cooperative security.<sup>7</sup>

Conceptually, the OSCE States did not plough any new ground with the Code of Conduct. It fits neatly into the OSCE's philosophy of military transparency. The creation of military transparency through CSBMs and, later, the reduction of military forces by the CFE Treaty were, along with the human dimension, of central importance to the overall OSCE process in overcoming the division of Europe. In the same way, the Code of Conduct, along with other instruments of conflict prevention, is intended to help stabilize tense situations in and between participating States and thus to contribute to greater stability in the entire OSCE area.

#### *Why are there Provisions for Democratic Political Control of Armed Forces?*

Armed forces are an important part of the way in which sovereign states express their power. They are a significant power factor internally and externally. The building and strengthening of democratic structures to which the OSCE participating States committed themselves in the Charter of Paris in 1990 can only succeed if the armed forces are a part of them. In a democratically organized polity there can be no elements of sovereignty which are withdrawn from democratic control and legitimation. The dictum which states that "all state power is derived from the people" must also apply - must in particular apply - to the armed forces which states use to ensure their capacity to engage in armed struggle.<sup>8</sup>

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<sup>7</sup> While the Eastern and Central European countries, along with Russia, made active use of this offer and influenced the negotiations with their ideas, the CIS states unfortunately played a marginal role in working out the Code of Conduct.

<sup>8</sup> The argument which also a number of Western delegations used during the negotiations, that "democracies do not wage war against one another" can scarcely be sustained. Linking a democratic or republican form of polity with peaceableness is a relatively new and specifically "liberal economic" viewpoint. In this connection, see: Panajotis Kondylis, *Ein so schlimmes Spiel. Das Prinzip "Demokratien bekriegen sich nicht" [Such a Nasty Game. The Principle that "Democracies do not Wage War Against Each Other"]*, in: Frankfurter

"Democratic political control" is meant to describe the primacy of civil institutions, legitimized by the will of the people, in making decisions on defense and security matters. It does not mean that "civilians" decide better than soldiers. Democratic political control also is intended to mean that soldiers, like all others, are not above the law. Success or lack of success in establishing democratic control of the armed forces in Russia, Eastern and Central Europe and the CIS states represent important factors and conditions in determining the outcome of the democratization processes there. These processes, for their part, influence the security situation in the Western part of Europe and the integration of the Eastern states into Western institutions. It is not without reason that both the EU and NATO make democratic control of the armed forces a criterion for the admission of new members. It is a key element, particularly in the transition from authoritarian forms of rule to democratic constitutions.

After the confrontation between the blocs ended, control of the armed forces acquired an additional dimension because military forces give up their traditional view of their role only with difficulty and resist taking on new responsibilities in a changed security environment.<sup>9</sup> Russia is a particularly difficult case in this regard. As a result of the former Soviet Union's role as a world power, the Russian military had a highly developed sense of their political and social importance. Hence the attitude of the Russian military toward the transformation going on in Russian society remains a decisive factor in the general political evolution of the country.<sup>10</sup>

In the Code of Conduct, Russia, the Central and Eastern European countries and the CIS states have accepted democratic political control of the armed forces as a goal of their policy and, in so doing, have underlined the importance of democratizing the armed forces as part of the overall transformation of their societies. Obviously the speed and seriousness with which this is being pursued varies from one country to another.

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Allgemeine Zeitung, 17 April 96, p. N5. After the hiatus of 1989/1990 this view once again gained some currency and made itself felt in the negotiations on the Code of Conduct.

<sup>9</sup> For a detailed account of the difficulties of Central and Eastern European states in restructuring the civilian-military relationship, including the question of democratic political control of the armed forces, see: Rudolf Joó, The Democratic Control of Armed Forces, The Experience of Hungary, Chaillot Paper 23, February 1996, Institute for Security Studies, Western European Union, p. 12 ff.

<sup>10</sup> Cf. *ibid.*, p. 25.

*The Nature of Democratic Political Control of Armed Forces*

Differences between the OSCE countries of a historical, political, constitutional, cultural and social nature will result in different answers to the question of how democratic political control of the armed forces is to be accomplished. The Eastern and Central European countries will surely have different priorities and options than do countries without any democratic tradition such as, for example, Russia and the other countries that have come into being on the territory of the former Soviet Union. For that reason the Code of Conduct does not offer any model for democratic control of the armed forces. It provides a framework containing the necessary elements for linking the armed forces to the structures of a democratic state.

The Code of Conduct obligates the states to subject their military and paramilitary forces, internal security forces, as well as the forces of police and of intelligence services to democratic control and to integrate them into civil society. At the same time it offers advice as to how this can be done.

Three levels of control need to be distinguished:

a) *The constitutional and political position of the armed forces in the state*  
This category includes obligations with respect to the creation of the legal and political conditions needed to ensure democratic political control of armed forces. Among them are:

- Justifying and defining constitutional responsibilities with regard to legislation for and administration of the armed forces: In a democratic form of government, democratic political control means responsibility. Democratic responsibility assumes a constitutional basis for the state functions and the organs which must carry them out responsibly. The constitutional order must justify and at the same time limit responsibilities for legislation affecting the armed forces and for their administration.
- Linking the political leadership and administration to the constitution, the system of justice and the law: In a democratic state based on the rule of law, government and administration are bound to justice and law. They are subject to the control of the constitutional organs. The linkage of the armed forces to justice and law can be ensured by subjecting them to civilian control.
- Democratic legitimation of the civilian Commander in Chief of the armed forces: The Commander in Chief of democratically controlled armed forces belongs to the civilian political leadership. Because it is democratically legitimated, democracies give the civilian political leadership priority over the military order.

- Ensuring the political neutrality of all armed forces: At the same time, the civilian Commander in Chief of the armed forces embodies the primacy of the political element over the military. In a democratic state, the military is an instrument of the political system. Its relationship to that system is of an executive, serving nature. All of the armed forces are expected to observe political neutrality. Armed force is not entitled to intervene in political disputes. That does not at all mean, however, that members of the armed forces may not exercise their rights as citizens.
- Parliamentary control of the armed forces: The primacy of the political element is also expressed in parliamentary control of the armed forces. Parliaments exercise this control mainly through their responsibility for the budget. The annual budgeting gives them the ability to control and co-determine the strength of the armed forces and the essentials of their organization and thus the basic lines of defense policy. Through their allocation of funds, parliaments have an effective instrument for controlling the armed forces.

b) *Internal conditions in the armed forces, i.e. their internal order and the rights and duties of soldiers*

The objective here, among other things, is:

- to provide a legal foundation for the rights and duties of soldiers,
- to make sure that soldiers have the legal means to claim their rights,
- to ensure that soldiers enjoy all of the rights of citizens provided for under international law and in OSCE documents.

Participating States have regulated the internal order of their armed forces and the rights and duties of soldiers to varying degrees. It is common to all democratically constituted states, however, that certain elements of democracy and the rule of law also apply to the internal organization of the armed forces. The soldier is neither above the law nor an instrument lacking legal rights. On the contrary, with some restrictions - e.g. regarding freedom of movement or the right of free speech - he enjoys fundamental freedoms and human rights. It should be difficult, in a democracy, for the soldier who is aware of his fundamental rights and responsibilities to be misused for the illegal schemes of power politics. The soldier has to know what his duty of obedience entails and what its limits are. When he is put in the position of refusing to obey orders whose execution would result in a crime or other legal offense, he is eligible for the protection of the state.<sup>11</sup>

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<sup>11</sup> In the Federal Republic of Germany, the concept of "citizen in uniform" solves the problem of defining the legal status of the soldier in such a way that he does not get caught be-

Of particular importance are the clear references to the personal responsibility of the members of the armed forces for their behavior with respect to national and international law. To be sure, the negotiators did not succeed in including a specific statement to the effect that soldiers may not carry out any orders that violate national or international law, but this idea finds expression in an indirect way. A soldier cannot put the responsibility on his superior when he carries out an order which violates national or international law.

Also worthy of note is the continuing obligation of OSCE States to familiarize the members of their armed forces with the provisions of international humanitarian law.

c) *Criteria limiting internal security missions*

The participating States are to ensure that their armed forces, both in wartime and time of peace, are led, staffed and equipped in accordance with the provisions of international law. The principle of individual responsibility of commanders is identified as a basis for observance of this requirement. The States further obligate themselves to adopt rules for the internal use of military force which would prevent harm to the civilian population or the suppression of civil rights.

These rules are of special importance for the internal stability of OSCE countries. The idea is to make sure in peacetime that the armed forces will prove themselves in times of crisis. This is particularly important for internal security missions. The Code of Conduct explicitly mentions the commitments of States not to use their armed forces to limit the exercise of their legitimate rights by citizens or groups of citizens. For cases when internal missions are undertaken, it gives first priority to the rule of appropriateness and protection of the civilian population.

The Code of Conduct's rules on democratic political control of armed forces do not go as far as does the concept of "*Innere Führung*" as it is known in Germany. Still, it is noteworthy how far the Code's norms do go in approaching the terms of this concept.

*Expanding the OSCE's General Framework of Norms for Security Policy*

Along with democratic political control of armed forces, the strengthening and refinement of the OSCE's norms for creating security and stability in international relations is another essential part of the Code of Conduct.

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tween the military system of which he is a part and the free and democratic political system he is expected to defend.



It supplements the accomplishments of arms control by taking a new approach which looks at the *intentions* of states and seeks to strengthen the prohibition against the use of force through a number of fundamental security obligations. Its centerpiece is the prohibition of the threat or use of force (the UN's monopoly on the use of force is an exception) against the territorial integrity or the political independence of another state.

The Code of Conduct not only condemns open violence but also every kind of indirect manifestation thereof when it is directed against the territorial integrity or the sovereignty of other States. Particularly noteworthy here is the emphasis put on the principle that a country may station its armed forces on the territory of another only with that second country's express agreement. Equally important is the provision which enjoins the states to offer no support to irregular forces, which nowadays threaten the integrity of many countries and seek to overthrow legitimate governments.

Terrorism represents another new threat to the community of states. The Code of Conduct deals with this problem as well. Its statements on irregular forces and on fighting terrorism lend weight to the cooperative approach of the Code and constitute a principle of active solidarity.<sup>12</sup>

Also worthy of mention is the new obligation, which applies to all OSCE countries, to develop military capabilities in conformity with the principle of sufficiency and to determine the level on the "basis of national democratic procedures".<sup>13</sup> What this means is that the autonomy of OSCE States in matters of security policy has for the first time been given some limits. They are no longer entirely free to decide on the strength and equipment of their armed forces. The legitimate interests of the other OSCE participating States have now been added to the equation as a criterion for determining the adequacy of these forces. These new norms could, for example, provide the basis for any OSCE State to ask another for an explanation of how it arrived at a given level of strength and equipment for its forces. This assumes, of course, that the state putting the question has got the impression that the other, in establishing and equipping its forces, has violated the principle of sufficiency, or that the decisions were not reached through "national democratic procedures".

Another innovation with regard to the threat of violence is to be found in the treatment of the problem of military imbalance. The Code of Conduct obli-

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<sup>12</sup> Dr. Rüdiger Hartmann, Ambassador and Government Commissioner for Disarmament and Arms Control, Lecture at the OSCE Seminar "Code of Conduct" on 7 May 1996 at the *Zentrum Innere Führung* of the *Bundeswehr* in Koblenz, unpublished manuscript, p. 19.

<sup>13</sup> Points 12 and 13 provide a formulation of the sufficiency rule. Point 12 contains a highly subjective text. The reference in Point 13 to national democratic procedures is meant to introduce a more objective element for determining the adequacy of forces and thus to balance Point 12. The Points are complementary.

gates the states to eschew activities that might cause the superior military power of one country to turn into domination over its neighbors.

The Code of Conduct makes a connection between the OSCE principle of "indivisible security" and the observance of arms control obligations in good faith. This shows the importance which is attached to arms control: the Code of Conduct makes observance and implementation of arms control obligations a test of cooperative behavior on the part of states.

There is a close logical relationship between the commitment of States to refrain from any threat or use of force in their mutual relations and the requirement that disputes be settled only by peaceful means. In addition to reaffirming the prohibition against the use of force, the Code of Conduct obligates OSCE States to take a cooperative approach to solving conflicts. A concrete example of this might be entering into consultations in threatening situations and making active use of the range of instruments the OSCE has developed for early warning, conflict prevention, crisis management and peaceful settlement of disputes.

The OSCE has entered into new territory with the commitment to cooperate in the provision of humanitarian aid. It was the conflict in Bosnia and Herzegovina which occasioned this new commitment.

Also new in the Code of Conduct are the statements regarding solidarity with those participating States which want to make use of their right of individual and collective self-defense. These were adopted primarily at Poland's instance. They provide, over and above the security dialogue and arms control measures, a framework for action in crisis situations. The reciprocal assurance "to act in solidarity if CSCE norms and commitments are violated and to facilitate concerted responses to security challenges" is expressed here more clearly than ever before in an OSCE document. And this statement is reinforced by the commitment that the participating States "will consider jointly the nature of the threat and actions that may be required in defence of their common values".<sup>14</sup>

At first blush these commitments do not seem to go very far. But they represent a first step toward a concrete mutual commitment of countries to support each other in warding off attacks against their security. They in no way alter the fact that for the foreseeable future the OSCE will not be able to offer its participants the protection of a functioning system of collective security since it, unlike the UN, does not have the means to put the violator in his place with coercive force when a breach of law has occurred. Indivisible security, which really does apply to all OSCE States, is an objective but, as Bosnia and Herzegovina as well as the Caucasus have demonstrated, still not the reality. Even so, the call for solidarity in the Code of Conduct offers a usable normative basis for the possible expansion of the OSCE into a system of

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<sup>14</sup> Budapest Document 1994, cited above (Note 2), Point 5.

collective security which, when there is a threat of military force, guarantees a certain level of solidarity from the other participating States.<sup>15</sup>

The Code of Conduct also contains carefully balanced formulations which in effect relate to the right of states to join international organizations or to quit them. This is a right which Poland and others appeal to in their argument with Russia over the question of joining NATO.

Finally, the Code of Conduct also touches on the important question of the OSCE's relationship to other security institutions. A "key role" is assigned to the OSCE for a system of cooperative security in the OSCE area. But the fact that the OSCE States have agreed to go on developing "complementary and mutually reinforcing institutions" makes clear that there is to be no hierarchical order amongst the various security institutions.<sup>16</sup>

Especially the last-mentioned commitments (solidarity, right to belong to international organizations, relationship of the OSCE to other security institutions) show that the Code of Conduct also provides a sound basis for a Security Model for the 21st Century, which is being discussed at the present time in OSCE fora on Russia's initiative.

### *Presumed Weak Points*

Critics of the Code of Conduct point in particular to the following weak points:

- It cannot prevent armed conflict between OSCE States nor can it stop the employment of military force in internal conflicts of individual OSCE participating States. The involvement of Russian forces in Chechnya is cited again and again as the most striking example of this.
- Many of its provisions are vague and imprecise. There are no objective and quantifiable criteria for their fulfillment and they remain for the most part subjective. Not the least of the Code's weaknesses is its language,

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<sup>15</sup> This does not assume any autonomous system of collective security for Europe. But the OSCE, as a regional arrangement of the United Nations, could be used as an instrument to apply the *global* system of collective security provided for in the UN Charter more effectively in the *OSCE area*. Point 5 of the Code of Conduct offers a *normative* basis for this purpose but the *institutional* aspect is contained in the Kinkel-Kooijmans initiative ("OSCE first") with its effect of coupling the OSCE with the UN Security Council, an initiative which one hopes will be successfully adopted at the Lisbon Summit in 1996. Cf. Ortwin Hennig, Die KSZE/OSZE aus deutscher Sicht - kein Wandel der Unterstützung, cited above (Note 5), p. 132.

<sup>16</sup> Budapest Document 1994, cited above (Note 2), Point 4.

which is indefinite and imprecise. All of this means that the Code is for the most part a "cosmetic exercise".<sup>17</sup>

- It lacks any precise mechanism of implementation going beyond a vague obligation to provide information when it is requested.

The Code of Conduct has acquired practical importance as a reference document more quickly than expected, not least owing to evaluations of the Russian action in Chechnya. The resolution of 2 February 1995 in the OSCE Permanent Council<sup>18</sup> focusses explicitly on the violation by Russian forces of the principle of appropriateness in the application of force to internal conflicts - and does this with the agreement of Russia. The Russian military action in Chechnya, which began on 11 December 1994, only five days after conclusion of the CSCE Summit in Budapest on 6 December 1994, has unfortunately been cited frequently as a negative "test case" for the use of the Code of Conduct as an instrument for early warning and conflict prevention. Russia is subject to three kinds of limitations on its choice of military approaches to the action in Chechnya:

- The Code of Conduct reaffirms applicable international humanitarian law, including the Geneva Red Cross Conventions of 1949, the 1977 Protocols Additional thereto, as well as the 1980 Convention on the Use of Certain Conventional Weapons. Article 3 of all Geneva Conventions (minimum humanitarian standard), the II. Protocol Additional thereto (ratified by Moscow in 1989) and the 1980 Convention all apply to the fighting in Chechnya as a non-international conflict.
- It prescribes appropriateness of means for such cases in which recourse to force cannot be avoided in performing internal security missions.
- It prohibits participating States from using their armed forces to limit the exercise of their human and civil rights to persons as individuals or as representatives of groups or to deprive them of their national, religious, cultural, linguistic or ethnic identity.<sup>19</sup>

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<sup>17</sup> For example: The CSCE Review Conference and Summit: Decisions made and deferred, in: Basic Papers, published by the British American Security Information Council, 7/1995, p. 4.

<sup>18</sup> OSCE Document PC.Dec/10 of 2 February 1995.

<sup>19</sup> Budapest Document, cited above (Note 2), Points 34, 36 and 37. For the rest, Point 25 contains a passage to which Moscow might appeal in connection with its action. According to it, no participating State will "tolerate or support forces that are not accountable to or controlled by [its] constitutionally established authorities". Point 21 requires to "provide for and maintain effective guidance to and control of (...) military, paramilitary and security forces by constitutionally established authorities vested with democratic legitimacy". In Chechnya this has not been the case since 1991.

In other words, Russia is allowed to use no more than the mildest methods needed to achieve the desired success in dealing with the rebels. To that extent it is true that there are no objective, quantifiable criteria for deciding whether or not there has been a violation of the Code of Conduct.

Nevertheless, it would be a mistake to create a credibility problem for the OSCE and the Code of Conduct by entertaining false expectations. All of our experience shows that the behavior of states cannot be regulated by international laws or even by politically binding multilateral standards of conduct, particularly when it comes to their own populations. The rules of the Code of Conduct, however perfect they might be, cannot in themselves eliminate tensions and conflicts, especially when one considers that almost all armed conflicts in the OSCE area involve the collision of two fundamental principles: the right of self-determination versus the territorial integrity of states. The objective is, rather, to persuade the states by means of a purposeful dialogue using concrete examples - for which the OSCE is the most suitable forum - that it is in their own interest to observe the OSCE's politically binding rules of conduct (for example as a criterion on which extent and intensity of the special partnership that Russia seeks with the Western Alliance might be made to depend). The provisions of the Code of Conduct, in this particular case, at least force Russia to explain and justify its behavior - which looks very much like a violation of the principle of appropriateness - almost weekly in OSCE bodies. This exposes its activities in Chechnya to widespread international attention and creates transparency.<sup>20</sup> The result: the OSCE lacks any means of enforcing the observance of its norms, but every norm at least raises the moral cost of its own violation.

As for the criticism of its imprecise language, we should remember that the Code of Conduct is a political document whose prospects for further political development actually depend on rather loose formulations. The political innovation intended in and by the Code would have suffered from legally unimpeachable and clear terms. The ambivalent formulations are thus a reflection of its purpose in seeking political commitment. One advantage of political commitment over legal obligation lies in the fact that its terminology leaves room for creativity which is sometimes desirable with a view to exploring more freely the various political developmental options in Europe. In working out the Code of Conduct the participating States were not under any

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<sup>20</sup> The OSCE Assistance Group in Chechnya should be recalled in this connection. The example of Chechnya shows that Russia is prepared to grant the OSCE a role in settling an internal conflict. It is not possible for Russia alone, without the participation of an international body, to solve problems such as Chechnya through negotiations, not least because there is no Chechen leader who would negotiate directly with Russia without a multilateral corrective of this kind. This realization has led Moscow actively to seek the involvement of the OSCE as corrective in the Chechnya conflict.

compulsion to formulate texts requiring approval by national parliaments. Even so, political innovation did suffer during the negotiations from the desire of some delegations to work out a legally unimpeachable text. This legalistic approach of many participating States to a political text designed to obtain political commitment often led to compromises which, as viewed by the EU, were only second-best solutions.

It was particularly the United States that saw the texts not so much from the standpoint of their value for political development in the European OSCE area but from the standpoint of their congruence with America's extra-European, world-wide commitments. An example: The EU tried hard to have Point 9 ("The participating States reaffirm the inherent right, as recognized in the Charter of the United Nations, of individual and collective self-defence.") concluded with the words "if an armed attack occurs". Otherwise an important condition of the right of self-defense in conformity with Article 51 of the UN Charter would go unmentioned, the use of military force would be made easier and the threshold for its use lowered. The United States rejected this proposal. It justified its action by appealing to its world-wide interests which did not allow an abbreviation of the right of self-defense through the condition "if an armed attack occurs". The EU was not indifferent to the argument that self-defense in some parts of the world might call for the deterrent use of force (e.g. against an acute threat of the use of weapons of mass destruction) but thought that it could exclude such situations in the OSCE area and that it ought to do so.

Another problem in the negotiations was the attempt of a number of Central and Eastern European states to use the Code of Conduct to overinsure themselves against a still perceived Russian threat. This led either to Russia's blocking certain texts or to compromise formulations which had been more or less denuded of the content originally intended by these states. In this connection there were also efforts to make use of certain subjects to promote important national or regional political principles (e.g. minority issues, NATO enlargement). These efforts failed in the face of resistance from other interested participating States. It became evident that the Code of Conduct, as a "global" OSCE document, was not a suitable instrument for pursuing specific national or regional political interests.

More generally, the price for the OSCE's pioneer work in norm-setting has always been the acceptance of formulations which are often still imprecise, weak or spongy. One might recall the first CSCE texts on the human dimension and the right of free movement, or the rudimentary initial decisions in the Final Act on Confidence-Building Measures. So we should not put our expectations too high. We cannot, for example, expect the CIS states to take over our concept of the "citizen in uniform". But it certainly can be seen as a political success when a document to which all OSCE participating States

have agreed simply takes up the subject of the "fundamental rights of the soldier". This is a foundation on which we must continue to build. It is a fact that, despite all inadequacies of formulation, limits have for the first time been put on freedom of military action in the OSCE framework. Beyond that, OSCE participating States have, in the Code of Conduct, committed themselves for the first time to lay out their internal rules for armed forces in accordance with agreed international guidelines and, to that extent, to permit themselves to be monitored.

What applies to all OSCE norms also applies to the Code of Conduct: it can only contribute to internal and external stabilization if all OSCE States strive to meet the commitments set forth in it. Its value will stand or fall with the determination of the participating States to implement and monitor it. To the critics of inadequate implementation mechanisms in the Code of Conduct one can say that it is clearly different from other arms control arrangements in the OSCE area. The CFE Treaty, the Vienna Document and the Treaty on Open Skies all contain very concrete rules of implementation whose fulfillment can be checked by exchanges of information and by verification. But the provisions of the Code of Conduct are in very large part not accessible to this kind of procedure. Accordingly, there is no detailed section on implementation.<sup>21</sup>

In the end, the dilemma of providing for implementation of norms in a document that is only politically binding proved unsolvable. The effort of a number of states to create stricter implementation arrangements for the Code of Conduct than for other OSCE norms<sup>22</sup> failed in the face of resistance from those countries which rejected any special mechanism as an excessively legalistic element that had no place in a politically binding document.<sup>23</sup> As things now stand the appropriate bodies, mechanisms and procedures of the OSCE are to be used for its implementation. The Forum for Security Cooperation could, for example, be used more intensively to monitor compliance with the

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<sup>21</sup> Dr. Rüdiger Hartmann, Ambassador and Government Commissioner for Disarmament and Arms Control, cited above (Note 12), p. 26.

<sup>22</sup> On 5 May 1993, Austria, Hungary and Poland tabled a proposal to apply the consensus-minus-one principle to cases in which the Code of Conduct was violated; CSCE/FSC/FC.17, I, 3. The problem with the consensus-minus-one procedure is well known: compliance requires the cooperation of precisely the state which has refused its consent. A system of cooperative security calls especially for the cooperation of the problematic participating States if it is to be politically meaningful and effective. Despite this field of tension the German delegation took a friendly view of this proposal. The option of making a decision without the agreement of the state which is breaking the rules can increase the chances of the rule-breaker altering his conduct.

<sup>23</sup> The United States, in particular, took the position that the Code of Conduct needed no implementation mechanism because that would give it a legal rather than political character. See: "Food for Thought Paper" of the US Delegation, "Principles for Consideration in Development of a Code of Conduct", 23 March 1994, Point V, p. 4.

Code of Conduct.<sup>24</sup> In any event, the provisions for implementation of the Code of Conduct remain open. If in the future farther-reaching arrangements for the implementation of all OSCE norms should be introduced, they would apply to the Code of Conduct as well.

There is growing awareness throughout the OSCE States that the Code of Conduct needs to be implemented by way of a purposeful and open dialogue between the participating States in the course of which experience and information on each country's implementation efforts would be exchanged. This takes place at seminars and symposia, for example, at which military people, politicians and government representatives from all of the OSCE participating States meet.<sup>25</sup> In tandem with the OSCE such efforts are also undertaken in the framework of the Partnership for Peace program (PfP) and the North Atlantic Cooperation Council (NACC) on securing and expanding democratic control of the armed forces in partner states, all of which are OSCE participating States. They represent a welcome reinforcement of the OSCE's own implementation efforts with respect to the Code of Conduct.

### *A Process*

The Code of Conduct provides an individual and also international basis of appeal on politico-military aspects of security. It is at once an additional instrument for early warning and an orientation aid for developing democracies that are looking for an internationally accepted model of how to organize and lead their armed forces. In places where democratic constitutions are still too

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<sup>24</sup> Thus, in a proposal of the EU for discussion of the Security Model for the 21st Century entitled "Contribution of the EU to the Discussion on a Security Model", REF.PC/252/96 of 17 April 1996, Point 12: "It would be also advisable to link the Code of Conduct to the OSCE Vienna Institutions by deciding specific procedures for reviewing the Code's commitment within the FSC." The Parliamentary Assembly has also spoken out in favor of stronger implementation efforts within existing fora: "The OSCE should work for full implementation of the politically binding Code of Conduct on Politico-Military Aspects of Security and consolidate further the control mechanisms for its implementation by making full use of the existing appropriate OSCE control bodies, mechanisms and procedures", Ottawa Declaration of the PA of the OSCE 1995, Chapter I, Point 22, quoted in: Contribution of the PA to the Discussion on a Security Model, REF.PC/231/96 of 3 April 1996.

<sup>25</sup> The *Zentrum Innere Führung* of the *Bundeswehr* held a second OSCE Seminar on 7-9 May 1996 in connection with a German-Dutch initiative (Document OSCE/FSC 1 of 24 May 1995) on the linkage of armed forces with democracies and parliamentary control of them. There had been an initial event on 10-11 December 1995 in The Hague on the status of the Code of Conduct in international law. Sweden will hold another such OSCE Seminar in the second half of 1996 in Stockholm on aspects of implementation of the Code of Conduct.



weakly developed, it can be used as a guide in the process of further developing such constitutions.

The period since the Code of Conduct entered into force on 1 January 1995 is too short to permit a comment on the influence it has so far had on the politico-military situation in the OSCE area or its individual regions. Awareness of it in OSCE States and in OSCE activities could certainly be improved. Its possibilities are being used only hesitatingly and sporadically. This may be one reason why the Code of Conduct has remained virtually unknown to any substantial number of people in the OSCE countries. Still, significant developments in the OSCE have always come about as the result of a process, not as unique events. The same holds true for the norms of the Code of Conduct. They can only be realized through a long process of education and learning involving the political elites, military commanders and ordinary soldiers and taking into account the historical, political, constitutional and socio-cultural peculiarities of the OSCE participating States. We should not forget that many of these countries are just at the beginning of such a process.

Thus the Code of Conduct marks the beginning, not the end, of a long political discussion which will take up, among other things, the way states deal with military force and link their armed forces politically to the society. It provides a basis and a starting point for a purposeful dialogue among all OSCE States which should culminate in a common understanding of the interpretation to be given to its norms.

Until recently any international discussion of the organization and social position of the armed forces in a state was a political taboo. Today we talk openly about creating common military structures. The Code of Conduct further represents a first hesitant attempt to develop common political structures in the constitutions of OSCE States with the goal of helping to put their military forces into a democratic framework. Some people may regard this, and indeed the whole Code of Conduct, as getting ahead of the game. But with growing willingness and determination on the part of the participants to change their thinking and the rules of their behavior there is perhaps some reason to hope that realities will gradually begin to move in the direction indicated by the Code of Conduct.