



GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF  
ARMED FORCES (DCAF)

DCAF DOCUMENT - NO. 3

**THE OSCE CODE OF CONDUCT ON POLITICO-  
MILITARY ASPECTS OF SECURITY  
(3 DECEMBER 1994)  
A PARAGRAPH-BY-PARAGRAPH COMMENTARY  
ON SECTIONS VII AND VIII (DEMOCRATIC  
CONTROL AND USE OF ARMED FORCES)**

*Professor Victor-Yves Ghébal*  
*Graduate Institute of International Studies, Geneva*

Geneva, February 2003

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## EDITORIAL NOTE

The end of the Cold War, the resulting uncertainties of the security environment and the subsequent development of comprehensive security policies led to a broadening of the concept of confidence-building measures (CBM) to include, *inter alia*, the role of the security forces in the society. The development of post-Cold War CBMs in the Euro-Atlantic area resulted in a quantum leap from traditional military CBMs to so-called norm- and standard-setting measures, which include a wide variety of politico-military measures designed to enhance regional security – and could be termed ‘fourth generation CBMs’. In this regard, the OSCE Code of Conduct on Politico-Military Aspects of Security, which was adopted in 1994, is of particular interest because it places the concept of (national) democratic political control of the security forces in the context of (international) confidence-building measures. This holds particularly true for the sections VII and VIII of the Code which detail the principle of democratic control and use of armed forces. Since the end of the Cold War, the democratic control and use of armed forces has become one of the preconditions that emerging democracies have to meet in order to accede to European and Euro-Atlantic organizations. Indeed, European and Euro-Atlantic organizations other than the OSCE are using the OSCE Code of Conduct as a reference tool when it comes to defining the principle of democratic control and use of armed forces.

It is against this background that the Geneva Centre for the Democratic Control of Armed Forces (DCAF) has commissioned the OSCE Cluster of Competence at the Graduate Institute of International Studies, Geneva, to carry out a project on the OSCE Code of Conduct. In the framework of this project, Professor Victor-Yves Ghébal, one of the foremost experts on the OSCE, has drafted the first-ever paragraph-by-paragraph commentary on the Code of Conduct, and this will soon be published together with an analysis on the information exchange on the Code. Given the Code’s relevance for the discussion of issues related to the democratic control of armed forces, DCAF decided to publish those parts of the commentary which relate to the Code’s sections VII and VIII in a separate document, i.e. the DCAF Document no. 3. We thereby hope to contribute to the discourse on, and the practice of, the principle of democratic control of armed forces in the Euro-Atlantic Area and beyond.

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**THE CODE OF CONDUCT ON POLITICO-MILITARY  
ASPECTS OF SECURITY (3 DECEMBER 1994). A  
PARAGRAPH-BY-PARAGRAPH COMMENTARY ON  
SECTIONS VII AND VIII (DEMOCRATIC CONTROL AND USE  
OF ARMED FORCES)<sup>1</sup>**

*Victor-Yves Ghébal*

**Introduction to the *Commentary***

1. The "Code of Conduct on Politico-Military Aspects of Security" (1994) is the most important normative document adopted by the OSCE participating States since the 1975 Helsinki Final Act. It occupies, among the body of commitments developed within the politico-military dimension of the OSCE, a fundamental place for at least two basic reasons. First, it represents an instrument which has **no real counterpart in any other international organisation**; indeed, it can hardly be compared either to the *United Nations Code of Conduct for Law Enforcement Officials* (adopted by the United Nations General Assembly through Resolution 34/169 of 17 December 1979), or to some texts emanating from the Parliamentary Assembly of the Council of Europe such as Resolution 690 on a "*Declaration on the Police*" (8 May 1979) and Recommendation 1402 on "*Control of internal security services in Council of Europe member States*" (26 April 1999). Second, it intrudes into an area of state power which has hitherto been normally considered as taboo: armed forces; from this perspective, it fills a normative gap since it offers a series of provisions regulating **the role and use of armed forces** (at domestic as well as external level) in the context of States where the rule of law prevails.

2. The Code of Conduct is the offspring of a proposal put forward by France in view of a **pan-European Security Treaty** codifying the OSCE's existing security norms and spelling out fresh additional commitments in view of responding to the security vacuum concerns expressed by the former Warsaw Pact States and the

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<sup>1</sup> The Code of Conduct on Politico-Military Aspects of Security has been adopted in the framework of the Conference of Security and Cooperation in Europe (CSCE) – re-baptised, as from 1<sup>st</sup> January 1995 with retrospective effect, Organisation for Security and Cooperation in Europe (OSCE). *In the present commentary, the acronym "OSCE" will currently be used – except for official quotations which refer to the "CSCE". Likewise, the present commentary will normally refer to the "European Union" which, at the time, was performing as the "European Community".*

independent States left from the dissolution of the USSR<sup>2</sup>. Unsurprisingly, the French project was dismissed by the United States and the other Western Allies (with the sole exception of Germany) on the grounds that an instrument of that kind would, sooner or later, jeopardise NATO's political future.

3. Given that the principle of post-Cold War security norms of behaviour was meeting a favorable echo, Germany advocated the alternative idea of a politically binding instrument. Accordingly, France and Germany hammered out a proposal on a "**Code of Conduct on security relationships among participating States**". Officially submitted to the 1992 Helsinki Follow-up Meeting with the co-sponsorship of 11 other participating States<sup>3</sup>, the text proposed that such an instrument include three main building blocks :

- provisions reaffirming existing OSCE commitments related to the politico-military aspects of security (in particular the commitment to refrain from the threat or use of force) and developing them in the form of "concrete rules of behaviour";
- provisions defining new rules reflecting "the growing interaction between the domestic behaviour of States and their mutual relations"; and
- provisions aiming at strengthening "the decision-making and execution capabilities" of the OSCE<sup>4</sup>.

France and Germany also suggested that a thorough and open dialogue be conducted within the *Forum for Security Cooperation* (the OSCE specialised body for politico-military issues) under the following terms of reference: "the participating States will undertake consultations with a view to strengthening the role of the CSCE, by establishing a code of conduct governing their mutual relations in the field of security, which could, in time, be further developed into a CSCE security treaty"<sup>5</sup>.

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<sup>2</sup> During the second OSCE Ministerial Council Meeting, held in Prague in January 1992, France tabled a non-paper on the relevance of a pan-European security treaty. For general indications on the substance of the French proposal, see *The Helsinki Follow-Up Meeting of the Conference on Security and Cooperation in Europe (March 24 - July 8, 1992). A Report Prepared by the Staff of the Commission on Security and Cooperation in Europe*. Washington, Commission on Security and Cooperation in Europe, [1992], p. 32 – and also Jonathan Dean: "The OSCE Code of Conduct on Politico-Military Aspects of Security : A Good Idea, Imperfectly Executed, Weakly Followed-Up", *OSCE Yearbook*, Volume 1-2, 1995-1996, p. 292.

<sup>3</sup> The official co-sponsors were some European Union's members – Belgium, Greece, Ireland, Spain – , the Russian Federation, Bulgaria, Estonia, Malta, Poland, Romania (CSCE/HM/WG2/1 of 19 May 1992), as well as Kyrgyzstan (CSCE/HM/WG.2/1/Add. 1 of 16 June 1992). The full text of the proposal is reproduced in Annex 2 of the present *Commentary*.

<sup>4</sup> CSCE/HM/WG2/1 of 19 May 1992: paragraph 2.

<sup>5</sup> CSCE/HM/WG2/1 of 19 May 1992: paragraph 3 (author's italics). The *1992 Helsinki Summit Declaration* also commits the OSCE participating States "to consider new steps to further strengthen norms of behaviour on politico-military aspects of security" (third sentence of paragraph 22).

Cleared from any reference to a possible security treaty, that directive was inserted in item 12 ("Security enhancement consultations") of the Forum for Security Cooperation's "*Programme for Immediate Action*"<sup>6</sup>.

4. The negotiation of the Code of Conduct proceeded on the basis of four comprehensive draft texts.

First, a **Polish proposal** formulating guidelines for inter-State and intra-State relations. From the first angle, it contained provisions building upon and amplifying the principle of the non-use of force, as well as ensuring its full and effective implementation through a formal "solidarity principle". From the second angle, it offered a number of prescriptions concerning the democratic control and use of armed forces. At any rate, the Polish text probably represented the most ambitious of all other tabled proposals<sup>7</sup>.

Second, a "**European Union plus**" proposal largely similar, in its spirit and letter, to the Polish proposal – that is to say a paper focused on the politico-military aspects of security as well as on the democratic control and use of armed forces. Submitted *independently from NATO* on behalf of the European Union by Denmark plus Canada, Iceland and Norway, it represented one of the early expressions of the Common Foreign and Defence Policy (CFSP) of what was then the "European Community". More than that, it also reflected the common position of all NATO members except the United States and Turkey. Actually, discussions on the Code of Conduct were initiated within NATO in the fall of 1992, but stopped when the Europeans decided to treat the issue as an CFSP project<sup>8</sup>. For that reason, the "European Union plus" proposal, whose effect was to sideline NATO, generated American unease and displeasure throughout the whole drafting process.

Third, a **joint Austro-Hungarian proposal** which, while reflecting practically all the basic elements of the Polish and the "European Union plus" proposals, offered additional commitments with respect to the human dimension (in particular, a detailed section on the rights of national minorities), as well as the economic and

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<sup>6</sup> The "Programme for Immediate Action" represents the appendix to Chapter V of the *Helsinki Decisions 1992*.

<sup>7</sup> Jonathan Dean: "The OSCE Code of Conduct on Politico-Military Aspects of Security : A Good Idea, Imperfectly Executed, Weakly Followed-Up", *OSCE Yearbook*, Volume 1-2, 1995-1996, p. 292.

<sup>8</sup> Crispin Hain-Cole: "Negotiating the Code: A British View", *Cooperative Security, the OSCE and its Code of Conduct*. Edited by Gert de Nooy. The Hague, Kluwer Law International, 1996, pp. 29 and 31.



environmental dimension. The text illustrated a much broader security approach than the two other texts.

Fourth, a **Turkish proposal** apparently tabled to counterbalance (if not neutralise) the "European Union plus" text seen by Ankara as implying unwelcome duties vis-à-vis its Kurdish population<sup>9</sup>. Basically, it contained provisions of a general nature on "conditions for promoting peace, stability, security and cooperation", "norms of conduct with direct effect on mutual relations" and "cooperation with regard to crisis situations". It also included provisions of the same kind related to the human dimension, environment, migrant workers, terrorism, illicit arms and drugs trafficking – as well as scarce and timid elements concerning the democratic control and use of armed forces.

Besides, specialised proposals were jointly tabled by Austria, Hungary and Poland on **implementation arrangements** and by Hungary alone on the issue of the **democratic control and use of armed forces**. France also submitted a working document recalling - for practical methodological purposes - the structure of the European Union's proposal. The complete list of official draft proposals is shown on the next page.

Remarkably enough, no formal comprehensive draft proposal originated from either the Russians or the Americans. At the time, the **Russian Federation** lacked a clearly formulated security strategy and was preoccupied by different security issues<sup>10</sup>. As to the **United States**, its attitude reflected the displeasure of having being sidelined by the European Union<sup>11</sup>. The main American concern throughout the drafting process was to arrive at a substantial text focused on the democratic control of armed forces and to avoid anything leading towards some sort of a pan-European security system liable to encourage a diminution of NATO's or the United States' role in European affairs<sup>12</sup>. The coordination of the drafting process was, anyhow, devolved to an American diplomat, James E. Hinds.

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<sup>9</sup> Dean, *op. cit.*, p. 293. See also Adam Kobieracki: "Negotiating the Code: A Polish View", *Cooperative Security, the OSCE and its Code of Conduct*. Edited by Gert de Nooy. The Hague, Kluwer Law International, 1996, p. 16.

<sup>10</sup> Kobieracki, *op. cit.*, p. 20. However, the Russian Federation jointly tabled with Poland, on 23 March 1993, an informal food for thought paper concerning the "Possible Structure of the Code of Conduct".

<sup>11</sup> As stressed by Jonathan Dean, the members of the European Union were for the first time in the history of the pan-European process "caucusing separately from NATO members [and] wanted a text that defined norms of European security" (*op. cit.*, p. 292).

<sup>12</sup> Kobieracki, *op. cit.*, pp. 15-16. See also Hain-Cole, *op. cit.*, p. 31 and Dean, *op. cit.*, pp. 292 and 293.

AUTHOR (s)	TITLE	REFERENCE
Poland	CSCE Code of Conduct in the Field of Security.	CSCE/FSC/SC.5/Rev.1 of 18 November 1992 (1 <sup>st</sup> version: CSCE/FSC/SC.5 of 11 November 1992)
European Union, Canada, Iceland and Norway ( "European Union plus").	CSCE Code of Conduct Governing Mutual Relations Between Participating States in the Field of Security.	CSCE/FSC/SC.21 of 30 June 1993 (1 <sup>st</sup> version entitled "Elements for a CSCE Code of Conduct Governing Mutual Relations Between Participating States in the Field of Security: CSCE/FSC/SC.7 of 16 December 1992).
Turkey	Code of Conduct Governing the Mutual Relations of the CSCE Participating States in the Field of Security.	CSCE/FSC/SC.8 of 16 December 1992.
France	Working Document Regarding [the Structure of the European Union's Proposal for] a Code of Conduct.	CSCE/FSC/SC/B.2 of 3 June 1993.
Austria and Hungary	CSCE Code of Conduct Governing the Behaviour of the Participating States Towards Each Other and of Governments Towards Their Citizens.	CSCE/FSC/SC.22 of 15 September 1993.
Austria, Hungary and Poland	Implementation Provisions for a Code of Conduct.	CSCE/FSC/SC.17 of 5 May 1993.
Hungary	Democratic Control of Armed Forces and their Use.	CSCE/FSC/SC.25 of 23 February 1994.

5. The Code of Conduct was negotiated within the Vienna Forum for Security Cooperation, from November 1992 to late 1994. The three most **controversial issues** encountered during the drafting process concerned **the Code of Conduct's conceptual scope** (comprehensive security vs. politico-military aspects of security), the interface of the OSCE with the other European security organisations (the so-called issue of "**interlocking institutions**") and the question of the **stationing of armed forces on the territory of other participating States**<sup>13</sup>. The Forum for Security Cooperation, exceptionally sitting in Budapest, adopted a last version of the text on 3 December 1994<sup>14</sup>. The latter was then transmitted to the delegations of the Budapest Review Meeting which completed it at the last moment and handed it over to the Heads of State or Government gathered at the Budapest Summit. Finally, the Code of Conduct was included, as Chapter IV, in the *Budapest Decisions 1994*<sup>15</sup>.

<sup>13</sup> These issues are addressed in the commentary on the Code of Conduct 's title, and on paragraphs 4 and 14.

<sup>14</sup> FSC/Journal No 94 of 3 December 1994.

<sup>15</sup> The *1994 Budapest Summit Declaration* confirmed that "continuing the CSCE's norm-setting role", the participating States have established a Code of Conduct "that, *inter alia*, sets forth principles guiding the role of the armed forces in democratic societies" (paragraph 10).

6. Opened by a short preamble, the operative text of the Code of Conduct consists of 42 provisions structured into 10 untitled sections which actually group three sets of provisions respectively related to **inter-State norms** (Sections I-VI, paragraphs 1-19), **intra-State norms** (Sections VII-VIII, paragraphs 20-37) and **implementation arrangements and final clauses** (Sections IX-X, paragraphs 38-42).

7. In the field of **inter-State norms**, the Code of Conduct does not add much with regard to the *Helsinki Final Act's Decalogue* (1975) and the *Charter of Paris for a New Europe* (1990). It can even be said that its added value is marginal. Indeed, the paragraphs constituting Sections I to VI are overwhelmingly made up of restatements of existing OSCE principles, norms or commitments – what the diplomats call in their jargon "**the OSCE acquis**". The Code of Conduct reaffirms or confirms the wholesale OSCE commitments (paragraph 1), the comprehensive security concept (paragraph 2), the indivisibility of security in the OSCE area and beyond (paragraph 3), the cooperative security approach (paragraph 4), the commitment to take appropriate measures to prevent and combat terrorism in all its forms (paragraph 6), the equal value of the Helsinki Final Act's Principles (paragraph 7), the commitment of non assistance or support to an aggressor State (paragraph 8), the right to self-defence (paragraph 9), the right to free choice of security arrangements (paragraph 10), the good faith implementation of arms control, disarmament and CSBM commitments (paragraph 15), the necessity to pursue arms control, disarmament and CSBM measures (paragraph 16), the countering of economic/environmental and human dimension tensions conducive to conflicts (paragraph 17), the equal importance of cooperation in the various phases of the conflict management cycle (paragraph 18) and, finally, the relevance of cooperation for peaceful resolution and humanitarian assistance support in armed conflicts (paragraph 19).

8. Only a handful of provisions related to inter-State norms bring **more or less innovation** in the OSCE context. These provisions concern the solidarity principle (paragraph 5), the maintenance of only such military capabilities as are commensurate with individual or collective security needs (paragraph 12), the determination of military capabilities through national democratic procedures (paragraph 13), the renunciation of military domination in the OSCE area (paragraph 13) and the authorisation to station armed forces on the territory of another participating State in accordance with freely negotiated agreement as well as international law (paragraph 14).

9. By contrast, as regards **intra-State relations**, the Code of Conduct breaks real new ground. Sections VII-VIII, which are related to the **democratic control and use of armed forces**, represent the real added value to the Code of Conduct. The latter can claim to be the first multilateral instrument embodying rules regulating a central area of political power – the deployment of armed forces, at both internal and international levels. The provisions concerning the democratic control and use of armed forces can be summarised through a comprehensive question – **"Who must control what, how and why ?"**:

Who	What	How	Why
Constitutionally established authorities vested with democratic legitimacy (§ 21). Specific role of the legislative branch : (§ 22).	Military forces, paramilitary forces, internal security forces, intelligence services and the police (§ 20).  First three categories only (§§ 21, 27, 32) .  Paramilitary forces (§ 26).  Irregular forces (§ 25).  "Armed forces" (§§ 22, 23, 28, 30, 31, 34, 35, 36, 37).	Primacy of constitutional civilian power over military power (§§ 21, 22, 23, 24, 25, 26).  Subjection of armed forces to international humanitarian law (§§ 29, 30, 31, 34, 35).  Respect of the human rights of servicemen (§§ 23, 27, 28, 32, 33).  Commensurability of the domestic use of force with the needs for enforcement (§ 36) and prohibition of a use of force aimed at restricting the peaceful and lawful exercise of human rights or at depriving people of their individual or collective identity (§ 37).	"An indispensable element of stability and security", as well as "an important expression of democracy" (§ 20).

10. The **"Who"** element refers to **"constitutionally established authorities"**. However, this necessary condition is not sufficient; such authorities must also be **"vested with democratic legitimacy"** (paragraph 21), that is to say representing the true will of the people. The competent authorities are the executive branch and the legislative branch of government operating in the context of a system of true separation of powers and, more broadly, of rule of law. The provisions developed in Sections VII and VIII of the Code of Conduct concern (without explicitly mentioning it) the **executive branch**. Only one provision, that of paragraph 22 related to defence expenditures, refers to the **legislative branch**.

11. The **"What"** element concerns the **"armed forces"**, a concept that the Code of Conduct does not define in any way because of the diversity of national traditions and practices in the OSCE area. Nevertheless, the concept is illustrated in paragraph

20 by five (equally undefined) categories: **military forces, paramilitary forces, internal security forces, intelligence services** and the **police**. The subsequent paragraphs of Section VII and Section VIII mention either the first three categories only (thus excluding intelligence services and the police) or just the "armed forces" – a general expression logically applicable to the regular forces of a national army. Besides, special provisions are devoted to paramilitary forces (paragraph 26) and "forces that are not accountable or controlled by (...) constitutionally established authorities" (paragraph 25) – a phrase obliquely referring to *irregular forces*.

12. The "**How**" element is related to four core aspects which actually represent, as seen from the OSCE, the fundamentals of the democratic control and use of armed forces:

a) **The primacy of democratic constitutional civilian power over military power.** The Code of Conduct commits the OSCE participating States to ensure that, at all times, their constitutionally established authorities vested with democratic legitimacy provide for and maintain effective guidance to and control of their military, paramilitary and security forces (paragraph 21) and that its military establishment is "politically neutral" (paragraph 23). It also commits them to provide for legislative approval of military defence expenditures, as well as restraint in, transparency of and public access to those expenditures (paragraph 22). Finally, it formulates specific prescriptions concerning "accidental or unauthorised use of force" (paragraph 24), irregular forces (paragraph 25) and paramilitary forces (paragraph 26).

b) **The subjection of armed forces to the norms and prescriptions of international humanitarian law.** The Code of Conduct confirms three specific legally binding obligations of international humanitarian law. The first emphasises the obligation of States to respect the corpus of international humanitarian law which must govern armed forces at the level of command, manning, training and equipment in time of peace as in wartime (paragraphs 29, 34 and 35). The second is related to the obligation to promote knowledge of that corpus within the military establishment and the entire population (paragraphs 29 and 30). The third has to do with the obligation to hold all military persons responsible for serious violations, whether commanders or subordinates, accountable for their action under national and international law (paragraphs 30 and 31).

c) **The respect of the human rights and fundamental freedoms of the armed forces personnel.** While unequivocally implying that the armed forces "as

such" (that is to say the military as a collective entity) cannot pretend to be above the law, the Code of Conduct admits that human rights do not stop at the barracks. In other terms, individual servicemen are citizens and, as such, entitled to the *exercise of civil rights* (paragraph 23). Therefore, it prescribes to each OSCE participating State to 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 CSCE commitments (paragraph 32) – in particular that the *recruitment or call-up* of servicemen is consistent with the obligations and commitments concerning human rights and fundamental freedoms (paragraph 27). The OSCE participating States are also committed to reflect in their *laws* or other relevant documents the rights and duties of armed forces personnel (paragraph 28), as well as to provide appropriate legal and administrative *procedures* to protect those rights (paragraph 33).

d) **The regulation of the use of armed forces for internal security purposes.**

The Code of Conduct establishes that the domestic use of armed forces must remain subject to the rule of law and that international law and international humanitarian law provisions must be observed in the course of such use of force, as in the case of inter-State armed conflicts. It spells out four conditions regulating the domestic use of force: a constitutionally lawful decision, respect of the rule of law during operational performance, commensurability with the needs for enforcement and care to avoid excessive injury to civilians and their property (paragraph 36). Going a step further, it prohibits a domestic use of force aimed at restricting human and civil rights when peacefully and lawfully exercised or at depriving people of their individual or collective identity (paragraph 37).

13. Finally, the "**Why**" element is expressed through a provision specifying that the democratic control of armed forces represents "**an indispensable element of stability and security**" as well as "**an important expression of democracy**" (paragraph 20). The democratic control of armed forces is certainly, to quote one of the negotiators of the Code of Conduct, "a way to guarantee the internal stability of the State, its responsible behaviour towards its own citizens and other States, and as an instrument aimed increasing the predictability of the State's actions"<sup>16</sup>. Indeed, as put by another negotiator, it brings an important contribution to internal and international stability because democratically controlled armed forces "pose a considerably smaller risk of threatening international posturing and of internal

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<sup>16</sup> Kobieracki, *op. cit.*, p. 19.

abuse"<sup>17</sup>. Furthermore, the democratic control of armed forces represents, admittedly, a key element in the transition from authoritarian to democratic political systems; the building and strengthening of democratic structures can only succeed if armed forces enjoying true legitimacy and respectability are part of them<sup>18</sup>. In a mature rule of law State, no important political issue should be allowed to escape effective democratic control. The ultimate aim of Sections VII and VIII taken as a whole is to promote an ethics, even a "consciousness", of the rule of law, human rights and international humanitarian law in the military establishments of the OSCE participating States.

14. Given the diversity of national traditions and practices in the OSCE area, Sections VII and VIII do not propose a detailed or a specific type of model for the democratic control of armed forces<sup>19</sup>. They only spell out the main general guidelines. Actually, a number of **shortcomings or gaps** can be accounted for in the Code of Conduct's regime:

First, the latter provides only for executive and legislative control – thus omitting the **judicial** branch.

Second, while committing the OSCE participating States to "reflect in their laws or other relevant documents" the **rights and duties of armed forces personnel** (paragraph 28), it does not offer any list, even of a general type, of these rights and duties and does not develop the concept of "citizen in uniform"<sup>20</sup>.

Third, it fails to establish that in the case of **usurpation of political control by armed forces** in any participating State, the other governments will consider such an action as "a source of concern" and take urgently some appropriate action including at least (in the spirit of the 1991 *Moscow Document on the Human Dimension*) the non recognition of the legitimacy of a usurper government<sup>21</sup>.

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<sup>17</sup> Peter von Butler: "Negotiating the Code: A German View", *Cooperative Security, the OSCE and its Code of Conduct*. Edited by Gert de Nooy. The Hague, Kluwer Law International, 1996, p.26.

<sup>18</sup> Ortwin Hennig: "The Code of Conduct on Politico-Military Aspects of Security", *OSCE Yearbook*, Volume 1-2, 1995-1996, pp.273-289).

<sup>19</sup> For an overview of the existing literature see Hans Born's contribution ("Democratic Control of Armed Forces. Issues, Problems and Agenda") in the forthcoming *Handbook of the Sociology of the Military*. Edited by Giuseppe Caforio. New York, Kluwer Academic, 2003.

<sup>20</sup> As referred to in the commentary of paragraph 28, this is basically due to the sensitiveness of the issues raised by the rights and duties of the "citizens in uniform" that servicemen are supposed to be.

<sup>21</sup> Provisions of that kind were envisaged during the drafting process; see commentary of paragraphs 21 and 23. In the *Moscow Document on the Human Dimension* (1991), which was adopted in the aftermath of the failed coup against Mikhail Gorbachev, the OSCE participating States committed themselves to "support vigorously", in case of overthrow or attempted overthrow of a legitimately elected

Fourth, although some of its provisions are related to defence expenditures (paragraph 22) and defence policies and doctrines (paragraph 35), there is no conceptual linkage between the Code of Conduct and the **Vienna Document on CSBM**.

Fifth, its single explicit provision on the category of **paramilitary forces** is weak; it does not even commit the OSCE participating States (as it had suggested during the drafting process) not to use paramilitary organisations to circumvent limitations related to the use and size of their armed forces under arms control agreements<sup>22</sup>.

Sixth, its provisions dealing with **international humanitarian law**, especially those referring to the individual accountability of the command and rank and file personnel of armed forces are considerably weaker than those of the 1949 Geneva Conventions which commit the Contracting Parties to enact penal legislation directed against persons responsible of grave breaches, as well as to search for and bring such persons (regardless of their nationality) before national or even foreign courts<sup>23</sup>.

Seventh, it does not contain provisions expressly regulating the use of armed forces during a **state of public emergency** – a situation nevertheless partially addressed in the *Moscow Document on the Human Dimension* (1991)<sup>24</sup>.

Eighth, it does not oblige the OSCE participating States to provide **information on domestic use of force** – such as the size, organisation, role, objectives and activities of armed forces involved<sup>25</sup>.

Finally, and as already mentioned above, while the Code of Conduct formally refers to five categories of armed forces (military forces, paramilitary forces, internal security forces, intelligence services and the police), it does not contain any operative

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government of a participating State by undemocratic means, "the legitimate organs of that State upholding human rights, democracy and the rule of law..." (paragraph 17.2).

<sup>22</sup> See commentary of paragraph 26.

<sup>23</sup> See commentary of paragraph 31.

<sup>24</sup> See commentary of paragraph 36. In the *Moscow Document on the Human Dimension* (1991), the OSCE participating States affirmed that "a state of public emergency may not be used to subvert the democratic constitutional order, nor aim at the destruction of internationally recognised human rights and fundamental freedoms" (second sentence of paragraph 28.1). They also agreed that if a state of public emergency may be proclaimed by a constitutionally lawful body duly empowered to do so, subject to approval in the shortest possible time or control by the legislature (paragraph 28.2), it will have to be lifted as soon as possible in order not to remain in force longer than strictly required by the exigencies of the situation (paragraph 28.3). More significantly, they decided that when a state of public emergency is declared or lifted, the government concerned will immediately inform the OSCE of this decision, as well as any derogation made from its international human rights obligations (paragraph 28.10).

<sup>25</sup> See commentary of paragraph 36.



provision whatsoever on **intelligence services or the police**<sup>26</sup>. Besides, it ignores another important element of the so-called security sector: *border guards*<sup>27</sup>.

15. The Code of Conduct has been referred to in situations related to **disproportionate and indiscriminate use of force** in Croatia (1995) and, especially, in Chechnya since 1995 – as well as **undue stationing of foreign armed forces** in Moldova<sup>28</sup>. Although some of its basic provisions (in particular paragraphs 14 and 36) are currently still being violated in the OSCE area, the Code of Conduct's continuing relevance could not be doubted; as Jonathan Dean put it, Europe is better off with a violated Code of Conduct than with no such instrument<sup>29</sup>. Furthermore, since the collapse of Communism, the democratic control of armed forces, which is at the heart of security sector reform, has become one of the preconditions that emerging democracies have to meet in order to accede to European and transatlantic organisations.

The **European Union** adopted accession criteria (referred to as the "Copenhagen Criteria") in 1993 – that is to say before the adoption of the OSCE Code of Conduct which took place in late 1994; these criteria set up a number of economic and political conditions, among which were the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of national minorities.

**NATO** has expressed even greater concern over the issue. Under the Partnership for Peace's Framework Document (January 1994), the subscribing States undertook to cooperate with NATO in the pursuit of several objectives, *inter alia* that of "ensuring democratic control of defence forces"<sup>30</sup>. Consequently, and building upon the OSCE measures on defence planning, they agreed to "exchange information on the steps they have taken or are being taken to promote transparency in defence planning and budgeting and to ensure the democratic control of armed forces"<sup>31</sup>. The "Framework

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<sup>26</sup> See commentary of paragraph 20.

<sup>27</sup> On the issue of border guards, see Alice Hills: *Consolidating Democracy. Professionalism, Democratic Principles and Border Services* (14 p.) and *Border Control Services and Security Sector Reform*. (32 p.). Geneva, Geneva Centre for the Democratic Control of Armed Forces, 2002, Working Papers No 27 and No 37.

<sup>28</sup> And also (by Russia and Belarus) concerning NATO's military intervention in Kosovo; see commentary of paragraph 38.

<sup>29</sup> Jonathan Dean: "The OSCE Code of Conduct on Politico-Military Aspects of Security: A Good Idea, Imperfectly Executed, Weakly Followed-Up", *OSCE Yearbook*, Volume 1-2, 1995-1996, p. 297. Indeed, "every norm raises the moral cost of its own violation" (Hennig, *op.cit.*, p. 284).

<sup>30</sup> Partnership for Peace's Framework Document: paragraph 3 b.

<sup>31</sup> *Ibid.*: penultimate "tick" of paragraph 6.

Document" did not mention the Code of Conduct for the bare reason that the latter was still, at the time, under negotiation within the Forum for Security Cooperation. References to the Code of Conduct appeared in subsequent texts such as the Partnership for Peace's Work Programme for 2000-2001 whose item 6 (defining the scope and objectives of activities to be pursued in the area of "democratic control of forces and defence structures") includes discussions on "progress in the implementation of the OSCE Code of Conduct". However, in the 1999 "Membership Action Plan" (MAP), a document designed to put in place a programme of activities to assist aspiring countries in their preparations for possible future membership in NATO, there is no explicit mention of the Code of Conduct; in its Section I, the MAP expects from aspiring countries to settle ethnic or external territorial disputes by peaceful means "according to OSCE principles" (paragraph c) as well as "to establish appropriate democratic and civilian control" of their armed forces (paragraph d).

Once a State has been admitted to NATO and/or the European Union, there is apparently little incentive to ensure continuous and sustainable long-term improvements in the democratic control of its armed forces. Fortunately, it happens that all former and potential candidates belong to the OSCE. Being OSCE participating States, they are bound by the provisions of its Code of Conduct and their compliance record is subject to scrutiny.

16. The present component part of paragraph-by-paragraph *Commentary* of the Code of Conduct is based on two main sets of primary sources. The first one consists of the **official draft proposals** on the basis of which the negotiation of the Code of Conduct was undertaken<sup>32</sup>. The second set includes the numerous **papers issued by the Coordinator of the drafting process**, James E. Hinds. This set is made of "perception papers" and "drafting suggestions" either of a comprehensive scope or offering compilations on special topics such as arms control and disarmament, democratic control of armed forces, etc. While being of a basically informal nature, a number of them have been issued under an official serial classification number ("DOC").

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<sup>32</sup> All of them are reproduced as Annexes 3 to 9 in this *Commentary*.

<b>Summary Contents of the Code of Conduct on Politico-Military Aspects of Security</b>
<b>Preamble:</b> Parties to the Code (1 <sup>st</sup> paragraph). The Code of Conduct's rationale (2 <sup>nd</sup> paragraph). Undiminished status of international law principles (3 <sup>rd</sup> paragraph). Undiminished status of OSCE commitments (4 <sup>th</sup> paragraph). Adoption of the Code of Conduct (5 <sup>th</sup> paragraph).
<b>I. Reaffirmation of comprehensive security and cooperative security, and enunciation of the principle of solidarity:</b> Wholesale reaffirmation of OSCE commitments (§ 1). Reaffirmation of the comprehensive security concept (§ 2). Reaffirmation of indivisibility of security in the OSCE area and beyond (§ 3). Reaffirmation of the cooperative security approach (§ 4). Enunciation of the solidarity principle (§ 5).
<b>II. Reaffirmation of the commitment to cooperate against terrorism:</b> Reaffirmation of the commitment to take appropriate measures to prevent and combat terrorism in all its forms (§ 6).
<b>III. Reaffirmation of the equal value of the Helsinki Final Act's Principles and of the commitment of non-assistance to aggressor States:</b> Reaffirmation of the equal value of the Helsinki Final Act's Principles (§ 7). Reaffirmation of the commitment of non assistance or support to an aggressor State (§ 8).
<b>IV. Security rights and obligations of OSCE participating States:</b> Reaffirmation of the right to self-defence (§ 9). Reaffirmation of the right to freely choose security arrangements (§ 10). Reaffirmation of the right to belong to alliances and the right to neutrality (§ 11). Obligation to maintain only such military capabilities commensurate with individual or collective security needs (§ 12). Obligation to determine military capabilities through national democratic procedures; renunciation of military domination in the OSCE area (§ 13). Authorisation to station armed forces on the territory of another participating State in accordance with freely negotiated agreement as well as international law (§ 14).
<b>V. Confirmation of the importance of the process of arms control, disarmament and CSBM:</b> Importance of a good faith implementation of arms control, disarmament and CSBM commitments (§ 15). Reaffirmation of the commitment to pursue arms control, disarmament and CSBM measures in the OSCE area (§ 16).
<b>VI. Reaffirmation of commitments to cooperate for conflict prevention and crisis management:</b> Cooperation to counter economic/environmental and human dimension tensions conducive to possible conflicts (§ 17). Reaffirmation of the equal importance of cooperation at the various phases of the conflict management cycle (§ 18). Cooperation for peaceful resolution and humanitarian assistance support in armed conflicts (§ 19).
<b>VII. Democratic control of armed forces:</b> Rationale for the democratic control of armed forces (§ 20). Primacy of the constitutionally established authorities vested with democratic legitimacy over military power (§ 21). Legislative approval of, as well as restraint in, transparency of and public access to military defence expenditures (§ 22). Political neutrality of armed forces and respect of civil rights of their individual members (§ 23). Safeguards against military incidents due to accident or error (§ 24). Inadmissibility of forces that are not accountable to or controlled by their constitutionally established authorities (§ 25). Prohibition of acquisition by paramilitary forces of combat mission capabilities in excess of those for which they were established (§ 26). Consistency with human rights of recruitment or call-up of military, paramilitary and security forces (§ 27). Rights and duties of armed forces personnel, including possibility of exemptions from or alternatives to military service (§ 28). Promotion of the knowledge of international humanitarian law and reflection of its commitments in military training programmes and regulations (§ 29). Instruction of armed forces personnel in international humanitarian law, including awareness of individual accountability at domestic and international level (§ 30). Individual accountability of commanders and subordinates of armed forces under national and international law (§ 31). Exercise of their human rights by the personnel of military, paramilitary and security forces (§ 32). Legal and administrative national procedures for the protection of the rights of all forces personnel (§ 33).
<b>VIII. Democratic use of armed forces:</b> Consistency of the command, manning, training and equipment of armed forces with international humanitarian law (§ 34). Consistency of defence policy and doctrine with international humanitarian law with the Code of Conduct (§ 35). Subjection of the domestic use of force to the rule of law and commensurability of such use with the needs for enforcement (§ 36). Non use of force to limit either the peaceful and lawful exercise of the human and civil rights or to deprive people of their identity (§ 37).
<b>IX. Implementation arrangements:</b> Accountability for implementation (§ 38).
<b>X. Final clauses:</b> Politically binding nature of the Code of Conduct and date of its coming into force (§ 39). Undiminished value of existing OSCE commitments (§ 40). Reflection of the Code's commitments in relevant national internal documents, procedures or legal instruments (§ 41). Publication and widespread dissemination of the Code at national level (§ 42).

## Section VII. Democratic Control of Armed Forces

*Rationale for the democratic control of armed forces (§ 20). Primacy of the constitutionally established authorities vested with democratic legitimacy over military power (§ 21). Legislative approval of, as well as restraint in, transparency of and public access to military defence expenditure (§ 22). Political neutrality of armed forces and respect of civil rights of their individual members (§ 23). Safeguards against military incidents due to accident or error (§ 24). Inadmissibility of forces that are not accountable to or controlled by their constitutionally established authorities (§ 25). Prohibition of acquisition by paramilitary forces of combat mission capabilities in excess of those for which they were established (§ 26). Consistency with human rights of recruitment or call-up of military, paramilitary and security forces (§ 27). Rights and duties of armed forces personnel, including possibility of exemptions from or alternatives to military service (§ 28). Promotion of the knowledge of international humanitarian law at national level and reflection of its commitments in military training programmes and regulations (§ 29). Instruction of armed forces personnel in international humanitarian law, including awareness of individual accountability at domestic and international level (§ 30). Individual accountability of commanders and rank and file servicemen of armed forces under national and international law (§ 31). Exercise of their human rights by the personnel of military, paramilitary and security forces (§ 32). Legal and administrative national procedures for the protection of the rights of all forces personnel (§ 33).*

Section VII of the Code of Conduct is devoted, together with Section VIII, to the civilian democratic control of armed forces – or, in more updated terms, of what is now referred to as the "security sector"<sup>33</sup>. The issue was not totally novel at the OSCE:

a) In the *Copenhagen Document on the Human Dimension* of 29 July 1990, the OSCE participating States recognised that the rule of law required, among many other elements, that "*military forces and the police (...) be under the control of, and accountable to, the civil authorities*" (paragraph 5.6).

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<sup>33</sup> As underscored by Theodor H. Winkler (*Managing Change. The Reform and Democratic Control of the Security Sector and International Order*. Geneva, Centre for the Democratic Control of Armed Forces, "Occasional paper" No 1, 2002, p. 5), the concept of "security sector" emerged by 1997 in British academic circles. For analysis of the concept, see the following working papers issued by the Geneva Centre for the Democratic Control of Armed Forces in 2002 by Timothy Edmunds (*Security Reform. Concepts and Implementation*), Hans Born (*Democratic Oversight of the Security Sector. What Does it Mean?*) and Wilhelm Germann (*Evaluation of Security Sector Reform Criteria of Success. Practical Needs and Methodological Problems*).

b) In the *Moscow Document on the Human Dimension* of 3 October 1991, the OSCE participating States adopted some general obligations as regards their *military and paramilitary forces, internal security and intelligence services and police activities*. They committed themselves to ensure that those forces, services and activities are subject to the effective direction and control of the appropriate civil authorities (paragraph 25.1), to maintain (and, where necessary, strengthen) executive control over the use of those forces, services and activities (paragraph 25.2) and to take appropriate steps to create (wherever they do not already exist) and maintain effective legislative supervision over all such forces, services and activities (paragraph 25.3). Those obligations were formulated on the basis of a proposal concerning "civilian control over military and security forces", jointly tabled by Hungary and the United States; they reflected all of the provisions of the proposal with the only exception of a prescription forbidding the OSCE participating States "to create or permit such forces, services or activities to function beyond the reach of executive"<sup>34</sup>.

Section VII of the Code of Conduct represents an elaboration and development of the Moscow Document's commitments. Given the diversity of national traditions and practices in the OSCE area, it does not propose a specific model for either an "objective" or and a "subjective type" of democratic control of armed forces<sup>35</sup>. Paragraphs 20 to 33, supplemented by paragraphs 34 to 37 which form Section VIII, only spell out the general basic features of such a regime – namely the *primacy of democratic constitutional civilian power over military power* (paragraphs 21 to 26), the *subjection of armed forces to the norms and prescriptions of international humanitarian law* (paragraphs 29, 30, 31, 34 and 35), the *respect of the human rights and fundamental freedoms of the armed forces personnel* (paragraphs 23, 27, 28, 32, 33) and the *regulation of the use of armed forces for internal security purposes* (paragraphs 36 and 37).

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<sup>34</sup> CSCE/CHDM.43 of 26 September 1991. The text of the proposal, which was co-sponsored by Albania (CSCE/CHDM.43/Add. 1 of 30 September 1991), is reproduced as Annex 1 in the present *Commentary*.

<sup>35</sup> The standard distinction between "objective" and "subjective" civilian control over the military was proposed by Samuel P. Huntington in *The Soldier and the State. The Theory and Politics of Civil-Military Relations*. Cambridge, Belknap Press of Harvard University Press, New York, 1957, xiii-534 p. According to Hans Born, *op. cit.*, p. 6, the objective control model (which implies a highly-professional military establishment and clear-cut separation between political and military decision-making) functions in the United States and many other Western countries, while the subjective control model (where democratic political loyalty prevails over professionalism) operates, for instance, in Switzerland. For an overview of the existing literature see Hans Born's contribution ("Democratic Control of Armed Forces. Issues, Problems and Agenda") in the forthcoming *Handbook of the Sociology of the Military*. Edited by Giuseppe Caforio. New York, Kluwer Academic, 2003.

Beyond the prevention of unconstitutional use of armed forces for both internal and external purposes, the aim of Sections VII and VIII taken as a whole is to promote a "consciousness" of the rule of law, human rights and international humanitarian law in the military establishments of the OSCE participating States. Outlawing the practices of the Nazi and Soviet regimes to use armed forces to dominate other European States and to intimidate their own populations (as well as the kind of abuses perpetrated in the then ongoing Yugoslav conflict) directly motivated the drafting of these portions of the Code of Conduct. The provisions of Sections VII and VIII reflected the quintessence of the lessons drawn from the experience of the Western democracies with the intention of passing them on to the new democratic regimes emerging in the former Soviet and Balkan geopolitical space<sup>36</sup>.

Paragraph 20

[Rationale for the democratic control of armed forces]

The participating States consider the democratic political control of military, paramilitary and internal security forces as well as of intelligence services and the police to be an indispensable element of stability and security. They will further the integration of their armed forces with civil society as an important expression of democracy.

This paragraph introduces the concept of "democratic political control of armed forces" to which the 1991 Moscow Document did not *explicitly* refer. It also justifies its rationale and enumerates the categories concerned by it. Neither paragraph 20, nor any other in the Code of Conduct, however, offers a definition of the concept as such. The democratic political control of armed forces is presented as including the same five categories that had been mentioned in the 1991 Moscow Document: *military forces*, *paramilitary forces*, *internal security forces*, as well as *intelligence services* and the *police* – or, in other words, the essential elements of the security sector excepting *border guards*<sup>37</sup>.

<sup>36</sup> Jonathan Dean: "The OSCE Code of Conduct on Politico-Military Aspects of Security: A Good Idea, Imperfectly Executed, Weakly Followed-Up", *OSCE Yearbook*, Volume 1-2, 1995-1996, pp. 291 and 295.

<sup>37</sup> However, since the adoption of the Code of Conduct, the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) has launched a number of democratisation programmes providing for training in human rights for the border guards of a number of participating States. On the issue of border guards, see Alice Hills: *Consolidating Democracy. Professionalism, Democratic Principles and Border Services* (14 p.) and *Border Control Services and Security Sector Reform*. (32 p.). Geneva, Geneva Centre for the Democratic Control of Armed Forces, 2002, Working Papers No 27 and No 37.

In this enumeration, the first three categories are intentionally separated from the last two by the expression "as well as". Indeed, paragraph 20 fulfils the purpose of a mini-preamble. It is the only one which makes reference to *all five* categories. The following paragraphs of Section VII, which are of an operative nature, mention either the first three categories simultaneously (paragraphs 21, 27, 32 and first sentence of paragraphs 20) or just the "armed forces" (paragraphs 22, 23, 28, 30, 31 and second sentence of paragraph 20)<sup>38</sup>. For most of the OSCE participating States, the categories of intelligence services and the police were too sensitive. Therefore there was no consensus for mentioning them elsewhere than in an introductory paragraph of a general declaratory character. Given the diversity of national practices and historical traditions in the OSCE area, the Code of Conduct does not provide in paragraph 20 (or elsewhere) a definition for any of the five categories. In sum:

- When the expression "armed forces" is used in the Code of Conduct, it is reasonable to consider that it only refers to the regular forces of the army, and not to all of the five categories<sup>39</sup>.
- The category of "paramilitary forces" is addressed specifically in paragraph 26 and, somewhat implicitly, in the oblique provision referring to "forces that are not accountable to or controlled by their constitutionally established authorities" (irregular forces).
- The categories of "internal security forces", "intelligence services" and the "police" do not appear outside the boundaries of paragraph 20<sup>40</sup>. However, paragraph 36 interestingly refers to "armed forces" entrusted with "internal security missions". It is also worth mentioning here the existence of some (non-legal) norms framed within the United Nations and the Council of Europe concerning these same three categories.

At universal level, the General Assembly of the United Nations issued a *United Nations Code of Conduct for Law Enforcement Officials* (1979) as a recommendation

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<sup>38</sup> In addition, the vague notion of "forces" is used in paragraphs 25 and 33. In Section VIII (paragraphs 34 to 37), reference is only made to "armed forces".

<sup>39</sup> In its proposals on the "Democratic Control of Armed Forces and their Use", Hungary however used the expression "armed forces" as covering military and paramilitary forces, as well as internal security, intelligence services and the police (CSCE/FSC/SC.25 of 23 February 1994).

<sup>40</sup> In these categories, see Geneva Centre for the Democratic Control of Armed Forces: *Intelligence Services and Democracy*. Geneva, Geneva Centre for the Democratic Control of Armed Forces (DCAF Working papers No 13), Hans Born: *Democratic and Parliamentary Oversight of the Intelligence Services. Best practices and procedures*. Geneva, Geneva Centre for the Democratic Control of Armed Forces, 2002, 21 p. (DCAF Working Papers No 20) and James Sheptycki: *Accountability Across the Policing Field. Towards a General Cartography of Accountability for Post-Modern Policing*, Geneva, Geneva Centre for the Democratic Control of Armed Forces, 2002, 25 p. (DCAF Working Papers No 35).

for governments to use it within the framework of national legislation or practice as a body of principles for observance by law enforcement officials. This instrument prescribes that all officers of the law who exercise military as well as civilian police powers should "respect and protect human dignity and maintain and uphold human rights of all persons" (article 2) while empowering them to use force "only when strictly necessary and to the extent required for the performance of their duty" (article 3)<sup>41</sup>.

As to the Council of Europe, its Parliamentary Assembly adopted a "*Declaration on the Police*" (1979) laying down guidelines for the behaviour of police officers in case of war and other emergencies, including in the event of occupation by a foreign power. All of the Declaration's provisions (except those related to occupation) concern "individuals and organisations, including such bodies as secret services, military police forces, armed forces or militias performing police duties, that are responsible for enforcing the law, investigating offences and maintaining public order and State security"<sup>42</sup>. Subsequently, a "European Code of Police Ethics" was drafted under the aegis of the Council of Europe's Committee of Ministers and submitted, in 2001, for opinion to the Parliamentary Assembly. The expected Code of Police Ethics is supposed to supersede the 1979 Declaration<sup>43</sup>.

In 1981-1982, some MPs raised the idea of a "*European Code of professional ethics for the armed forces*". However the Parliamentary Assembly did not follow suit<sup>44</sup>. In the next decade, the Parliamentary Assembly considered the issue of *intelligence services*. It therefore adopted *Recommendation 1402 (1999) on "Control of internal security services in Council of Europe member States"* providing guidelines for ensuring equitable balance between the right of a democratic society to national

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<sup>41</sup> Resolution 34/169 adopted by the United Nations General Assembly on 17 December 1979. According to the commentary appended to that short instrument, the definition of "law enforcement officials" includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention and, in countries where police powers are exercised by military uniformed/non-uniformed authorities or by State security forces, all officers of such services.

<sup>42</sup> The Parliamentary Assembly adopted Resolution 690 (and Recommendation 858) on the "*Declaration on the Police*" on 8 May 1979. See also Doc. 4212 of 15 January 1979 (Report by John Watkinson), Doc. 5523 of 29 January 1986 (written question to the Committee of Ministers) and Doc. 5554 of 21 April 1986 (Committee of Ministers' reply). At an earlier stage, in 1970, the Parliamentary Assembly adopted Recommendation 601 concerning the application of the 4<sup>th</sup> Geneva Convention (1949) to police officials.

<sup>43</sup> Council of Europe's Parliamentary Assembly: Doc. 8923 of 15 January 2001 (Draft text submitted to the opinion of the Parliamentary Assembly) and Doc. 8994 of 9 March 2001 (Report by Kevin McNamara containing the Parliamentary Assembly's reply).

<sup>44</sup> Doc. 4719 of 12 May 1981 (Motion for a Recommendation) and Doc. 4963 of 28 September 1982 (Motion for an Order). On 29 September 1982, the Parliamentary Assembly adopted Order 411 (1982) in which it deplored the decision of its Bureau to take no action on the matter and instructed the legal Affairs Committee to consider the possibility of drafting a European Code of professional ethics for the armed forces.



security and the rights of the individual. The text requested the Committee of Ministers to elaborate a *framework convention* regulating the way internal security services should be organised, conduct their operations and be effectively controlled – which means that the concerned services should be organised on strictly legal bases and preferably not within a military structure, remain under the effective (*a priori* and *ex post facto*) control of the executive, legislative and judiciary branches, be funded exclusively through the State budget and in conformity with the national parliament's current procedures, perform in compliance with the obligations of the European Convention on human rights and not be used as a political tool to oppress the opposition, national minorities and other groups or take a normal part in the fight against organised crime<sup>45</sup>. The Committee of Ministers rejected the idea of a framework convention. However, it decided to consider setting up a new committee of experts ("Group of Specialists for Internal Security services") with a view to preparing a report and, if appropriate, putting forward relevant recommendations<sup>46</sup>.

Through paragraph 20, the OSCE participating States recognise that the democratic political control of the five above-mentioned categories of armed forces forms "an indispensable element of stability and security" (first sentence) and that the further integration of those armed forces with civil society constitutes "an important expression of democracy" (second sentence)<sup>47</sup>. The key words *stability, security and democracy* represent the basic justifications for a democratic political control of armed forces. Indeed, democratic regimes contribute to international stability and security better than any others because of their normally peaceful and reasonably predictable behaviour. As democratic control of armed forces requires transparency, this certainly allows for reducing a neighbour's suspicions or defusing international tensions. Anyhow, establishing a direct link between armed forces and democracy, paragraph 20 reflects the cross-dimensional character nature of the Code of Conduct, which is a politico-military normative instrument including large portions (Sections VII and VIII) pertaining to the human dimension.

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<sup>45</sup> The Parliamentary Assembly adopted Recommendation 1402 on "*Control of internal security services in Council of Europe member States*" on 26 April 1999. See also Order No 550 (1999), Doc. 7104 of 13 June 1994 (motion for a resolution) and Doc. 8301 of 23 March 1999 (Report by György Frunda ).

<sup>46</sup> *Parliamentary Assembly of the Council of Europe*: Doc. 8907 of 14 December 2000 (Reply from the Committee of Ministers to Recommendation 1402).

<sup>47</sup> Language suggested by Austria and Hungary that the democratic control of armed forces contributes to stability, security and democracy "in the CSCE area as a whole, within regions and within States" (CSCE/FSC/SC.22 of 15 September 1993, p. 17 and CSCE/FSC/SC.25 of 23 February 1994, p. 1) was not retained.

The second sentence of paragraph 20 ("they will *further* the integration of their armed forces with civil society...") seems to imply that a civil society already functions in all of the OSCE participating States – which was certainly not the case in 1994 and, to a large extent, even today (2003).

Paragraph 21

[Primacy of the constitutionally established authorities vested with democratic legitimacy over military power]

Each participating State will at all times provide for and maintain effective guidance to and control of its military, paramilitary and security forces by constitutionally established authorities vested with democratic legitimacy. Each participating State will provide controls to ensure that such authorities fulfill their constitutional and legal responsibilities. They will clearly define the roles and missions of such forces and their obligation to act solely within the constitutional framework.

The present paragraph affirms what the OSCE participating States consider to be the essence of the democratic control of armed forces – the primacy of "constitutionally established authorities vested with democratic legitimacy" over military power<sup>48</sup>. The responsibility of "constitutionally established authorities" represents a necessary but not a sufficient condition: such authorities must also be "vested with democratic legitimacy". The democratic political control of the armed forces has therefore to be executed, on the basis of the Constitution, by constitutionally established organs sanctioned by the democratic will of the people. All this means that the authorities concerned must operate in a system of true separation of powers and in the broad context of the rule of law. Except for paragraph 22, which deals with the legislative approval of defence expenditures, all the provisions of Sections VII and VIII of the Code of Conduct concern (at least implicitly) the executive branch of government and do not make any reference to the *judicial branch*<sup>49</sup>.

The first sentence of paragraph 21 enunciates in general terms the fundamental requirement that each of the OSCE participating States' constitutionally established authorities vested with democratic legitimacy must provide for and maintain effective

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<sup>48</sup> This is in line with paragraph 25.1 of the *Moscow Document on the Human dimension* (1991) in which the OSCE participating States acknowledged the necessity of subjecting their military forces, services and activities "to the effective direction and control of the appropriate civil authorities" (paragraph 25.1).

<sup>49</sup> Likewise, the *Moscow Document on the Human dimension* (1991) prescribed that the OSCE participating States ensure only "executive control" (§ 25.2) and "legislative supervision" over the use of military forces, services and activities (paragraph 25.3).

guidance of the military establishment at all times: the expression "to provide for and *maintain*" means that such guidance and control must be not only achieved, but also sustained. "At all times" refers to peacetime and wartime. Noticeably, only the first three categories of armed forces listed in paragraph 20 (military, paramilitary and security forces) are here concerned<sup>50</sup>.

The second sentence commits each of the OSCE participating States to take measures to guarantee that the constitutionally established authorities vested with democratic legitimacy do fulfil their responsibilities. At first sight, it just seems to restate, with no useful purpose, the substance of the first sentence. Actually, it means that the OSCE participating States are committed to providing control systems so that the democratic constitutional authorities do not *abdicate* their responsibility to control the military establishment.

The third sentence prescribes that the constitutionally established authorities vested with democratic legitimacy clearly define the role, missions and obligations of the above-mentioned categories of armed forces in order that the latter act at all times only within the rule of law and be legally accountable for their actions.

In short, paragraph 21 rules out any possibility for the military establishment of the OSCE participating States to form, so to speak, a State within the State. However, it fails to establish, following the "European Union plus" proposal, that if the armed forces *usurp* political control in any participating State, the other governments will urgently consider *appropriate action* in the framework of the OSCE<sup>51</sup>. In the course of the drafting process, the negotiators considered that such "appropriate action" could include the non recognition of the legitimacy of any usurper government and the restoration of democratic constitutional order<sup>52</sup>. In this connection, it is worth recalling that in the 1991 *Moscow Document*, adopted in the aftermath of the failed coup against Mikhail Gorbachev, the OSCE participating States condemned "unreservedly forces which seek to take power from a representative government of a participating

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<sup>50</sup> Austria and Hungary suggested, in vain, that intelligence services and the police be added to the list (CSCE/FSC/SC.22 of 15 September 1993, p. 17).

<sup>51</sup> CSCE/FSC/SC.21 of 30 June 1993, p. 12 (author's italics). The Austro-Hungarian proposal contained also a provision stating that if armed forces usurp political control in any participating State, the other participating States will consider it as "a source of concern" (CSCE/FSC/SC.22 of 15 September 1993, p. 17).

<sup>52</sup> Article 3 of the Turkish proposal (CSCE/FSC/SC.8 of 16 December 1992), paragraph 2.13 of the Hungarian proposal (CSCE/FSC/SC.25 of 23 February 1994), paragraph (cc) of DOC.337 (Coordinator's Perception of 3 June 1994), paragraph 16 of DOC.551 (Coordinator's 4<sup>th</sup> revised version of the Code of Conduct), paragraph 26.3 of the Coordinator's Draft Perception of 11 November 1994 and paragraph 26.3 of the Coordinator's Working paper of 15 November 1994.

State against the will of the people as expressed in free and fair elections and contrary to the justly established constitutional order"; accordingly, they committed themselves to "support vigorously", in case of overthrow or attempted overthrow of a legitimately elected government of a participating State by undemocratic means, "the legitimate organs of that State upholding human rights, democracy and the rule of law..."<sup>53</sup>.

Under a decision taken in July 1998 by the Forum for Security Cooperation, the OSCE participating States established a procedure providing for an exchange of information on the Code of Conduct's implementation through a standard questionnaire including 10 items <sup>54</sup>. Two elements of the questionnaire refer to paragraph 21: *item No 4* (which also covers paragraph 20) requires information on "constitutionally established authorities and procedures to ensure effective democratic control of armed forces, paramilitary forces, internal security forces, intelligence services and the police" and *item No 5* on the "role and missions of military, paramilitary forces and internal security forces as well as controls to ensure that they act solely within the constitutional framework".

#### Paragraph 22

[Legislative approval of, as well as restraint in, transparency of and public access to military defence expenditures]

Each participating State will provide for its legislative approval of defence expenditures. Each participating State will, with due regard to national security requirements, exercise restraint in its military expenditures and provide for transparency and public access to information related to the armed forces.

Paragraph 22, which refers to the global category of "armed forces" (the regular forces of the army) deals with *defence and military expenditures*.

In line with paragraph 25.3 of the *Moscow Document* (1991) which prescribes "effective legislative supervision" over armed forces, the first sentence commits each of the OSCE participating States to provide for *legislative approval* of its defence

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<sup>53</sup> *Moscow Document* (1991): paragraphs 17.1 and 17.2.

<sup>54</sup> FSC.DEC/4/98 of 8 July 1998.

expenditures – a normal requirement in any effective representative democracy<sup>55</sup>. A Parliament resulting from free and fair elections represents indeed, due also to its budgetary competences, a key instrument for the control and accountability of the armed forces<sup>56</sup>.

The second sentence contains two different kinds of commitments.

On the one hand, each OSCE participating State is committed to exercising *restraint* in its military expenditures, "with due regard to national security" – an expression introducing a subjective limitative element. During the drafting process, Poland suggested a stronger commitment, prescribing that governments "approach with restraint their defence needs in planning military expenditures, arms procurement and infrastructure upgrading and in other aspects of the maintenance and development of their military potential"<sup>57</sup>. Anyhow, in established parliamentary democracies, this is often a quasi routine consequence of budgetary deliberations. This provision on restraint has also to be appreciated against the background of paragraph 12 of the Code of Conduct under which each participating State must "maintain only such military capabilities as are commensurate with individual or collective legitimate security needs, taking into account its obligations under international law".

On the other hand, each OSCE participating State is committed to providing for *transparency of and public access to information* related to its armed forces. The relevance of transparency to information on military budgets does need to be elaborated; in mature democracies, critical media and the pressure of public opinion represent a major element of accountability and control. Inexplicably, paragraph 22 does not make any reference whatsoever to the detailed commitments of the OSCE's Vienna regime on CSBM related to "Defence Planning"<sup>58</sup>.

Under a decision taken in July 1998 by the Forum for Security Cooperation, the OSCE participating States established a procedure providing for an exchange of information on the Code of Conduct's implementation through a standard

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<sup>55</sup> Besides, paragraph 13 of the Code of Conduct commits each OSCE participating State to "determine its military capabilities on the basis of national democratic procedures ...".

<sup>56</sup> David Greenwood: *Transparency in Defence Budgets and Budgeting*. Geneva, Geneva Centre for the Democratic Control of Armed Forces, 2002, 13 p. (DCAF Working Papers, No 73).

<sup>57</sup> CSCE/FSC/SC.5/Rev.1 of 18 November 1992, p. 3.

<sup>58</sup> The commitments related to defence planning are embodied in paragraphs 15 to 15.10 of the latest version of the *Vienna Document on CSBM* (1999).

questionnaire including 10 items<sup>59</sup>. Item No 2 is related to "National planning and decision making-process for the determination of the military posture, including (a) the role of Parliament and ministries and (b) public access to information related to armed forces"; it concerns paragraph 13 as well.

#### Paragraph 23

##### [Political neutrality of armed forces and civil rights of their individual members]

Each participating State, while providing for the individual service member's exercise of his or her civil rights, will ensure that its armed forces as such are politically neutral.

Paragraph 23, which refers to the global category of "armed forces" (the regular forces of the army), confirms that in a rule of law regime, armed forces are just an instrument of the politico-civil power. Hence the provision affirming one of the most fundamental elements of the primacy of the civilian power over the military: the political neutrality of the military establishment in national life. It does not however specify, as suggested in all the official basic proposals, that armed forces must not serve the interests of "particular groupings" or "ideological systems"<sup>60</sup>. However, and as emphasised by the Greek delegation at the opening of the 3<sup>rd</sup> Follow-up conference on the Code of Conduct, only "those who have experienced the oppression of a dictatorship or the horrors of war" can appreciate in full measure the importance of having the armed forces remain neutral<sup>61</sup>.

Regrettably, paragraph 23 fails to establish, following the "European Union plus" proposal, that if the armed forces *usurp* political control in any participating State, the other governments will urgently consider *appropriate action* in the framework of the OSCE<sup>62</sup>. In the course of the drafting process, the negotiators considered that such "appropriate action" could include the non-recognition of the legitimacy of any

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<sup>59</sup> FSC.DEC/4/98 of 8 July 1998.

<sup>60</sup> CSCE/FSC/SC.5/Rev.1 of 18 November 1992, p. 3 (Poland), CSCE/FSC/SC.21 of 30 June 1993, p. 11 ("European Union plus" proposal), CSCE/FSC/SC.22 of 15 September 1993, p. 17 (Austria and Hungary) and CSCE/FSC/SC.25 of 23 February 1994, p. 2 (Hungary). Paragraph 15.5 of the Coordinator's 4<sup>th</sup> revised and still bracketed version of the Code of Conduct also suggested that each participating State will, at all times, provide for "means ensuring that armed forces do not serve the interests of political groups or others seeking power in order to impose a particular programme or ideological system contrary to the democratic will of the people and not act on their own behalf to usurp power for similar purposes" (DOC.551 of 22 July 1994).

<sup>61</sup> FSC.DEL/212/99 of 29 June 1999.

<sup>62</sup> CSCE/FSC/SC.21 of 30 June 1993, p. 12 (author's italics). The Austro-Hungarian proposal contained also a provision stating that if armed forces usurp political control in any participating State, the other participating States will consider it as "a source of concern" (CSCE/FSC/SC.22 of 15 September 1993, p. 17).

usurper government and the restoration of democratic constitutional order<sup>63</sup>. In this connection, it is worth recalling that in the 1991 *Moscow Document*, adopted in the aftermath of the failed coup against Mikhail Gorbachev, the OSCE participating States condemned "unreservedly forces which seek to take power from a representative government of a participating State against the will of the people as expressed in free and fair elections and contrary to the justly established constitutional order"; accordingly, they committed themselves to "support vigorously", in case of overthrow or attempted overthrow of a legitimately elected government of a participating State by undemocratic means, "the legitimate organs of that State upholding human rights, democracy and the rule of law..."<sup>64</sup>.

While unequivocally implying that the armed forces "as such" (that is to say the military as a collective entity) cannot pretend to be above the law, paragraph 23 also recalls that individual servicemen are citizens and, therefore, entitled to the exercise of *civil rights*. Separate provisions of the Code of Conduct prescribe that each participating State ensure that its military, paramilitary and security forces personnel enjoy and exercise their *human rights and fundamental freedoms* as reflected in CSCE documents and international law (paragraph 32), including at the level of recruitment or call-up (paragraph 27)<sup>65</sup>. Other provisions commit the OSCE participating States to reflect in their *laws or relevant documents* the rights – and also duties – of armed forces personnel (paragraph 28) as well as to provide appropriate legal and *administrative procedures* to protect the *rights* of the latter (paragraph 33).

#### Paragraph 24

##### [Safeguards against military incidents due to accident or error]

Each participating State will provide and maintain measures to guard against accidental or unauthorised use of military means.

Paragraph 24 concerns incidents of a military nature due to accident or error. It commits each OSCE participating State to elaborate (undefined) "measures" against

<sup>63</sup> Article 3 of the Turkish proposal (CSCE/FSC/SC.8 of 16 December 1992), paragraph 2.13 of the Hungarian proposal (CSCE/FSC/SC.25 of 23 February 1994), paragraph (cc) of DOC.337 (Coordinator's Perception of 3 June 1994), paragraph 16 of DOC.551 (Coordinator's 4<sup>th</sup> revised version of the Code of Conduct), paragraph 26.3 of the Coordinator's Draft Perception of 11 November 1994 and paragraph 26.3 of the Coordinator's Working paper of 15 November 1994.

<sup>64</sup> *Moscow Document on the Human dimension* (1991): paragraphs 17.1 and 17.2.

<sup>65</sup> In the same spirit, each OSCE participating State is committed to ensure that its armed forces are "commanded, manned, trained and equipped in ways that are consistent with the provisions of international law..." (paragraph 34 of the Code of Conduct).

an accidental or unauthorised use of (equally undefined) "military means" taking place within its jurisdiction; the phrase "to provide for and maintain" requires that such measures be not only taken, but also sustained.

At the OSCE, the issue of "*accidental use of military means*" was not an unfamiliar one. The 1990 Vienna regime on CSBM addressed it under the heading of "cooperation as regards hazardous incidents of a military nature". In its latest version (1999), the Vienna Document on CSBM commits the OSCE participating States to cooperate "by reporting and clarifying hazardous incidents of a military nature within the zone of application for CSBMs in order to prevent possible misunderstandings and mitigate the effect on another participating State". The government whose military forces is involved in an incident of that type must "provide the information available to other participating States in an expeditious manner", being also understood that any participating State affected by such an incident may directly request clarification as appropriate<sup>66</sup>. Inexplicably, paragraph 24 does not make any reference whatsoever to the Vienna Document on CSBM.

The issue of an "*unauthorised use of military means*" represents a different aspect of the problem. Indeed, an incident of a military nature could be the result of political dysfunction or even mischievous error. In both cases, it would mean that the State's monopoly in "the legitimate use of violence", *inter alia* through military means, is defective. Hence the relevance for each OSCE participating State to provide and maintain appropriate measures, in conformity with paragraph 21 of the Code of Conduct which prescribes effective guidance to and control of armed forces at all times and establishes the obligation of those armed forces to act solely within the constitutional framework.

Paragraph 25

[Inadmissibility of forces that are not accountable to or controlled by their constitutionally established authorities]

The participating States will not tolerate or support forces that are not accountable to or controlled by their constitutionally established authorities. If a participating State is unable to exercise its authority over such forces, it may seek consultations within the CSCE to consider steps to be taken.

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<sup>66</sup> Vienna Document 1999 on CSBM: paragraphs 17 and 17.2.



Paragraph 25 was supposed to address the issue of "*irregular armed forces*". In this connection, the "European Union plus" text proposed to commit each OSCE participating State to refrain from encouraging, supporting, aiding or protecting irregular forces using violence *on its own territory*, as well as from training, arming, equipping, financing, supplying or otherwise encouraging, supporting and aiding irregular forces using violence *on the territory of another participating State*<sup>67</sup>.

Unproductive discussions during which some delegations attempted to establish a distinction between "legal" and "illegal" irregular armed forces compelled the negotiators to drop the concept of "irregular armed forces" and make oblique reference to "forces that are not accountable to or controlled by their constitutionally established authorities".

In conformity with the basic prescription of paragraph 21 of the Code of Conduct, the first sentence of paragraph 25 stipulates that such forces must not be "tolerated" (within a participating State) or "supported" (outside a participating State)<sup>68</sup>.

The second sentence envisages the case where, contrary to the fundamental requirement of paragraph 21, a participating State is not able to exercise its authority over forces of that kind. In such a case, it offers to the concerned government just the faculty to "seek consultations" with the other participating States and only "to consider" what steps could be taken to redress the situation.

#### Paragraph 26

[Prohibition of acquisition by paramilitary forces of combat mission capabilities in excess of those for which they were established]

Each participating State will ensure that in accordance with its international commitments its paramilitary forces refrain from the acquisition of combat mission capabilities in excess of those for which they were established.

<sup>67</sup> CSCE/FSC/SC.21 of 30 June 1993, p. 13. Similar provisions were also included in the Austro-Hungarian draft (CSCE/FSC/SC.22 of 15 September 1993, p. 17) and the Hungarian draft (CSCE/FSC/SC.25 of 23 February 1994, paragraph 2.9).

<sup>68</sup> During the drafting process, stronger formulations *prohibiting* the organisation of any irregular force that is not accountable to constitutional authority and stressing that "international law cannot limit the liability or responsibility of participating states or individuals acting as members of irregular forces for illegal acts committed under international or national law" were discussed: see paragraphs (kk) and (ll) of DOC. 337 (Coordinator's Perception of 3 June 1994).

Paragraph 26 offers the only provision in the Code of Conduct specifically dedicated to *paramilitary forces*.

During the drafting process, Poland proposed in vain a commitment under which "each participating State will refrain from allowing paramilitary organisations to be established or to serve the particular political aims of a grouping or organisation or to gain or maintain political power". It also suggested that "the participating States will not use paramilitary organisations to circumvent limitations concerning the use and size of their armed forces"<sup>69</sup>.

Because of Russian objections, the final compromise embodied in paragraph 26 does not refer to the general problem of circumvention, but just to a specific aspect of it: "acquisition of combat mission capabilities in excess of those for which [paramilitary forces] were established". In addition, the expression "in accordance with [the participating States'] international commitments" introduces an unhappy escape qualification.

The issue of paramilitary forces is a sensitive one. So far, the OSCE participating States have not been able to agree, as suggested during the 2<sup>nd</sup> Follow-up Conference on the Code of Conduct, on the possible "inclusion of paramilitary forces in the exchange of information in order to keep track of their integration into the system of parliamentary control"<sup>70</sup>.

Paragraph 27

[Consistency with human rights of recruitment or call-up of armed (military, paramilitary and security) forces]

Each participating State will ensure that the recruitment or call-up of personnel for service in its military, paramilitary and security forces is consistent with its obligations and commitments in respect of human rights and fundamental freedoms.

Paragraph 27 refers only to the first three categories of armed forces listed in paragraph 20: military, paramilitary and security forces.

<sup>69</sup> CSCE/FSC/SC.5/Rev.1 of 18 November 1992, p. 4.

<sup>70</sup> FSC.GAL/84/99/Rev.1 of 19 July 1999.

In line with other provisions of the Code of Conduct, which stress that servicemen are, as citizens, entitled to exercise their civil rights (paragraph 23) and overall human rights and fundamental freedoms (paragraph 32), the present paragraph prescribes that each of the OSCE participating States ensure that the personnel of military, paramilitary and security forces are *recruited* and *called up* in a way consistent with OSCE and other international human rights obligations and commitments<sup>71</sup>. It means that, for instance, recruitment and call ups must be performed on the basis of equality of treatment and non-discrimination.

The expression "consistent with..." is aimed at allowing those participating States which do not accept conscientious objection to military service (an issue evoked in paragraph 28) to proceed with regular enlistment and call-ups.

Under a decision taken in July 1998 by the Forum for Security Cooperation, the OSCE participating States established a procedure providing for an exchange of information on the Code of Conduct's implementation through a standard questionnaire including 10 items<sup>72</sup>. Item No 6 requires information on the "procedures for the recruitment or call-up of personnel in the military, paramilitary forces and internal security forces".

#### Paragraph 28

[Rights and duties of armed forces personnel, including possibility of exemptions from or alternatives to military service]

The participating States will reflect in their laws or other relevant documents the rights and duties of armed forces personnel. They will consider introducing exemptions from or alternatives to military service.

In line with other provisions of the Code of Conduct stressing that servicemen are, as citizens, entitled to exercise their civil rights (paragraph 23), as well as overall human rights and fundamental freedoms (paragraphs 27 and 32), the present paragraph prescribes that the OSCE participating States inject in their *laws or other relevant documents* provisions governing the rights and *duties* of the personnel of the global

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<sup>71</sup>Each OSCE participating State is also committed to ensure that its armed forces are "commanded, manned, trained and equipped in ways that are consistent with the provisions of international law..." (paragraph 34). Other provisions commit the OSCE participating States to reflect in their laws or relevant documents the rights and duties of armed forces personnel (paragraph 28) as well as to provide appropriate legal and administrative procedures to protect the rights of the latter (paragraph 33).

<sup>72</sup> FSC.DEC/4/98 of 8 July 1998.

category of "armed forces". According to paragraph 33, the rights (with no mention of "duties") of all armed forces personnel must also be protected through appropriate *legal and administrative procedures*.

In the first sentence, the expression "*in their laws or other relevant documents*" refers to legislative texts and, given the practice of countries (such as the United Kingdom) where non-legislative means are used for the same purpose, texts of other nature. The notion of "*duties*" of servicemen which appears here along with that of rights is used for the first and last time in the framework of the Code of Conduct. The very general terms in which the sentence has been formulated reflect the sensitiveness of the issues raised by the rights and duties of the "citizens in uniform" that servicemen are supposed to be.

The difficulties encountered by the Parliamentary Assembly of the Council of Europe in promoting norms in this field are particularly illuminating. In 1998 this body signaled considerable differences between member States (all of whom belong to the OSCE) regarding the legal status of conscripts and the rights they enjoy. It deplored the existence within the armed forces of situations and practices in direct contravention of the obligations of the European Convention on Human Rights, especially those related to forced labor (article 4), fair trial (articles 5 and 6), free speech (article 10) or free association (article 11), and even to cruel treatment (article 3) – a reference to extreme form of harassment imposed by older servicemen on new conscripts, notably illustrated by the Russian practice of *dedovshchina*<sup>73</sup>. Accordingly, it adopted *Resolution 1166 (1998)* inviting the member States to promote the application of *civil and social rights* which conscripts should enjoy in peacetime and, as far as possible, in time of war<sup>74</sup>.

Subsequently, the Parliamentary Assembly focused on one particular aspect of the matter: the *right of association* for members of the professional staff of the armed forces, which belong to the category of civil and political rights as well as of that of economic and social rights. Taking stock of the tendency of governments to convert armies from a conscription system to a purely professional system, the Parliamentary

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<sup>73</sup> On the *dedovshchina* practice see Ilona Kiss: "Rights of Conscripts in Peacetime: Obstacles to and Opportunities for Providing Judicial and Non-Judicial Solutions in east European and Central Asian Countries", *Legal Framing of the Democratic Control of Armed forces and the Security Sector. Norms and Reality/ies*. Edited by Biljana Vankovska. Beograd, Geneva Centre for the Democratic Control of Armed forces/Belgrade Centre for Civil-Military Relations, 2001, pp. 45 & ff.

<sup>74</sup> *Resolution 1166 (1998) on human rights of conscripts* was adopted on 22 September 1998. In certain countries, some armed forces personnel even still have to seek permission from their superiors before

Assembly considered in *Resolution 1572 (2002)* that the Committee of Ministers should call on the governments of the member States to allow members of the armed forces and military personnel to organise themselves in representative associations (with the right to negotiate on matters concerning salaries and conditions of employment), to lift the restrictions on their right to association, to allow them to be members of legal political parties and to incorporate all the appropriate rights in military regulations<sup>75</sup>.

Anyhow, today, the basic rights of military personnel in many members of the Council of Europe (and hence the OSCE) are still "seriously limited"<sup>76</sup>. In the specific case of freedom of association, some States do not impose any restrictions whatsoever (Austria, Denmark, Finland, Norway, Sweden and Switzerland), while others allow servicemen to actively participate in professional associations, but regulate their membership of political parties (Germany, Hungary, Netherlands, Luxembourg). Other States (such as Azerbaijan, the Czech Republic, Romania, Slovenia and Ukraine) forbid membership of political parties and authorise the right to association only in restricted forms. Finally, Croatia, France, Italy, Poland and Yugoslavia prohibit servicemen from setting up trade unions and political parties in the armed forces<sup>77</sup>.

At non-governmental level, the *European Council of Conscripts Organisations* (ECCO), created in Sweden as a youth organisation in 1979, advocates the recognition of all basic human rights, safe working and living conditions, fair legal procedures and acceptable social and economic conditions for the "citizens in uniform" – with particular focus on the situation of conscripts in Central and Eastern Europe. ECCO's demands have been submitted under the form of a *European Charter on the Rights of Conscripts* adopted in September 1991 (as a "European Social Charter for Conscripts") and revised in September 1996 – and whose provisions are applicable in time of peace.

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marrying. See Parliamentary Assembly of the Council of Europe: paragraph 5 of Doc. 9532 of 2 September 2002 (Opinion submitted by Francisco Arnau).

<sup>75</sup> *Resolution 1572 on the right to association for members of the professional staff of the armed forces* was adopted on 3 September 2002. This text actually replaced *Resolution 903 (1998) on the right to association for members of the professional staff of the armed forces*, adopted on 30 June 1998 (see also Doc. 5875 of 12 April 1988: Report submitted by Georg Apenes). In 2001, the Parliamentary Assembly noted that, despite Resolution 903 (1988), still less than half of the Organisation's membership did not recognise the right to association for members of the professional staff of their armed forces: Doc. 9080 of 4 May 2001 (motion to the Committee of Ministers for a Recommendation on the matter).

<sup>76</sup> Paragraph 1 of the second part of Doc. 9518 of 15 July 2002 (Report submitted by Agnes van Ardenne-van der Hoeven).

<sup>77</sup> Paragraphs 19 to 23, *ibid.*

The second sentence of paragraph 28 of the Code of Conduct commits the OSCE participating States to "consider" introducing exemptions from or alternatives to military service. Contrary to what was suggested in the "European Union plus" proposal<sup>78</sup>, the Code of Conduct does not accept conscientious objection as an established right. It is consistent with the *Copenhagen Document* (1990) where the OSCE participating States, after taking note that the United Nations Commission on Human Rights had recognised the right of everyone to conscientious objection to military service, agreed "to consider introducing, where this has not yet been done, various forms of alternative service, which are compatible with the reasons for conscientious objection, such forms of alternative service being in principle of a non-combatant or civilian nature, in the public interest and of a non-punitive nature" (paragraph 18.4)<sup>79</sup>.

Under a decision taken in July 1998 by the Forum for Security Cooperation, the OSCE participating States established a procedure providing for an exchange of information on the Code of Conduct's implementation through a standard questionnaire including 10 items<sup>80</sup>. Item No 7 requires information on "legislation or other relevant documents governing exemptions from, or alternatives to, compulsory military service".

#### Paragraph 29

[Promotion of the knowledge of international humanitarian law and reflection of its commitments in military training programmes and regulations]

The participating States will make widely available in their respective countries the international humanitarian law of war. They will reflect, in accordance with national practice, their commitments in this field in their military training programmes and regulations.

Paragraph 29 inaugurates a series of five provisions committing the OSCE

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<sup>78</sup> "Each participating States will *embody in legislation* or other appropriate documents the rights and duties of members of the armed forces as well as the *right to refuse to render military service on the grounds of conscientious objections* (CSCE/FSC/SC.21 of 30 June 1993, p. 12; author's italics). See also the Austro-Hungarian proposal (CSCE/FSC/SC.22 of 15 September 1993, p. 18) and the Hungarian proposal (CSCE/FSC/SC.25 of 23 February 1994, paragraph 4.2).

<sup>79</sup> The United Nations Commission on Human Rights recognised the right to conscientious objection in its Resolution 1989/59 of 8 March 1989. The Council of Europe did the same through the Committee of Ministers' Recommendation No R (87) 8, as well as the Parliamentary Assembly's Order 132 (1997) and Recommendation 1518 (2001). The right to conscientious objection is also enshrined in paragraph 2 of article 10 of the European Union's Charter on Fundamental Rights (2000).

<sup>80</sup> FSC.DEC/4/98 of 8 July 1998.

participating States to subject their armed forces to the obligations of international humanitarian law – whose basic instruments are enumerated in paragraph 34<sup>81</sup>.

In the spirit of the relevant provisions of the four 1949 Geneva Conventions and their two Additional Protocols of 1977, the first sentence of paragraph 29 requires from the OSCE participating States to promote a *widespread knowledge* of international humanitarian law "in their respective countries". Broached in such broad terms, this obligation means that dissemination concerns not only the armed forces personnel (those expected to apply it primarily and who remain accountable for its application), but the entire civilian population whose protection is also provided for by international humanitarian law<sup>82</sup>. The aim of dissemination is to raise consciousness of the existence of so-called principles of humanity and to guarantee their effective respect through preventative means.

Proceeding from the same source of inspiration but with a more direct practical purpose, the second sentence of paragraph 29 requires from the OSCE participating States to ensure, in accordance with national practice, that their *military training programmes and regulations* are in conformity with the relevant commitments of international humanitarian law<sup>83</sup>. The expression "in accordance with national practice" takes into account, as in paragraphs 28 and 33, the diversity of existing practices at domestic level in the OSCE area.

Under a decision taken in July 1998 by the Forum for Security Cooperation, the OSCE participating States established a procedure providing for an exchange of information on the Code of Conduct's implementation through a standard questionnaire including 10 items<sup>84</sup>. Item No 8 requires information related to "instruction on international humanitarian law and other international rules, conventions and commitments governing armed conflict included in military training programmes and regulations"; it concerns paragraph 30 as well.

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<sup>81</sup> The subjection of armed forces to the obligations of international humanitarian law is established by five provisions located in Section VII (paragraphs 29-31) and Section VIII (paragraphs 34-35).

<sup>82</sup> The obligation to disseminate international humanitarian at domestic level, which must be complied with both in time of peace and war, is included in article 47 of the 1<sup>st</sup> Convention, article 48 of the 2<sup>nd</sup> Convention, article 127 of the 3<sup>rd</sup> Convention and article 144 of the 4<sup>th</sup> Convention – as well as in article 83 of Additional Protocol I and article 19 of Additional Protocol II. Annexed to the Protocols, Resolution 21 suggests a general programme of dissemination to be undertaken with the possible cooperation of the International Committee of the Red Cross (ICRC).

<sup>83</sup> A comparable obligation is provided for in article 47 of the 1<sup>st</sup> Convention, article 48 of the 2<sup>nd</sup> Convention, article 127 of the 3<sup>rd</sup> Convention, article 144 of the 4<sup>th</sup> Convention and article 83 of Additional Protocol I which refer to programmes of *civil instruction* as well as of military instruction.

Paragraph 30

[Instruction of armed forces personnel in international humanitarian law , including awareness of individual accountability at domestic and international level]

Each participating State will instruct its armed forces personnel in international humanitarian law, rules, conventions and commitments governing armed conflict and will ensure that such personnel are aware that they are individually accountable under national and international law for their actions.

Paragraph 30 is the second in a series of five provisions committing the OSCE participating States to subject their armed forces to the obligations of international humanitarian law – whose basic instruments are enumerated in paragraph 34<sup>85</sup>. It deals with two intertwined issues: instruction of the global category of "armed forces" personnel in international humanitarian law and individual accountability of such personnel at both internal and international level. As a logical consequence of the provision concerning the inclusion of international humanitarian law obligations in military training programmes and regulations (second sentence of paragraph 29), the first sentence of paragraph 30 requires the OSCE participating States to provide their armed forces personnel with *direct instruction* on the rules, conventions and commitments governing armed conflict.

The second sentence of paragraph 30 stresses that such instruction includes making the members of armed forces aware that they are ultimately *responsible*, on an individual basis, for actions taken in contravention of the relevant norms of domestic and international law. This additional commitment is more specifically developed in paragraph 31.

Under a decision taken in July 1998 by the Forum for Security Cooperation, the OSCE participating States established a procedure providing for an exchange of information on the Code of Conduct's implementation through a standard questionnaire including 10 items<sup>86</sup>. Item No 8 requires information related to "instruction on international humanitarian law and other international rules, conventions and commitments governing armed conflict included in military training programmes and regulations"; it concerns paragraph 29 as well.

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<sup>84</sup> FSC.DEC/4/98 of 8 July 1998.

<sup>85</sup> The subjection of armed forces to the obligations of international humanitarian law is established by five provisions located in Section VII (paragraphs 29-31) and Section VIII (paragraphs 34-35).

<sup>86</sup> FSC.DEC/4/98 of 8 July 1998.



Paragraph 31

Individual accountability of commanders and rank and file servicemen of armed forces under national and international law]

The participating States will ensure that armed forces personnel vested with command authority exercise it in accordance with relevant national as well as international law and are made aware that they can be held individually accountable under those laws for the unlawful exercise of such authority and that orders contrary to national and international law must not be given. The responsibility of superiors does not exempt subordinates from any of their individual responsibilities.

Paragraph 31 is the third in a series of five provisions committing the OSCE participating States to subject their armed forces to the obligations of international humanitarian law – whose basic instruments are enumerated in paragraph 34<sup>87</sup>.

Drafted against the background of atrocities perpetrated in Bosnia and Herzegovina, paragraph 31 represents a development of paragraph 30. It concerns the individual accountability of the command and rank and file personnel of the global category of "armed forces". Being just limited to *accountability*, it is less explicit than the regime of the 1949 Geneva Conventions which commits the Contracting parties to enact penal legislation directed against persons responsible for grave breaches, as well as to search for and bring such persons (regardless of their nationality), before national or even foreign courts<sup>88</sup>. However, the Code of Conduct and the Geneva Conventions proceed from the same spirit; they both state that violations should not be left or remain unpunished.

The first sentence of paragraph 31 concerns the "armed forces personnel vested with command authority". Broached in broad terms, this expression does not specify, as suggested by Sweden during the drafting process, that officers are also directly concerned. The reason is that the concept of command has different definitions in the armies of the respective OSCE participating States. However, the expression used in this context is general enough to include officers too, since command authority can be delegated to them in specific circumstances. Therefore it is reasonable to

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<sup>87</sup> The subjection of armed forces to the obligations of international humanitarian law is established by five provisions located in Section VII (paragraphs 29-31) and Section VIII (paragraphs 34-35).

<sup>88</sup> Articles 49-51 of the 1<sup>st</sup> Geneva Convention and articles 50-53 of the 2<sup>nd</sup> Geneva Convention. Under Additional Protocol I, commanders are required to prevent breaches from being committed in making their subordinates aware of their international humanitarian obligations, to suppress breaches when they have been committed through disciplinary or penal action and, in such a case, to report breaches to the competent national authorities (article 87).

consider it as covering all persons who retain a command responsibility, whatever its level. In any case, command must be exercised "in accordance with relevant national as well as international law", that is to say in ways consistent with the requirements of the rule of law and of international humanitarian law – which means that "orders contrary to national and international law must not be given". By means of consequence, and given its special responsibilities, each member of the personnel vested with command authority is individually accountable under domestic and international for the unlawful exercise of such authority.

The second sentence of paragraph 31 concerns the rank and file servicemen. It clearly states that the latter cannot invoke orders emanating from people vested with command authority to escape individual accountability for acts committed by any of them in contravention of the rule of law and international humanitarian law. During the drafting process, some delegations envisaged including in the Code of Conduct a provision stipulating that unlawful orders shall not have to be executed by subordinates<sup>89</sup>. The suggestion was rejected by the Russian Federation on the ground that it would open the door to a process of refusal of obedience and that in any case ordinary soldiers would not always be able to evaluate fairly the lawfulness or unlawfulness of a specific order.

#### Paragraph 32

[Exercise of their human rights by the personnel of military, paramilitary and security forces]

Each participating State will ensure that military, paramilitary and security forces personnel will be able to enjoy and exercise their human rights and fundamental freedoms as reflected in CSCE documents and international law, in conformity with relevant constitutional and legal provisions and with the requirements of service.

In line with other provisions of the Code of Conduct stressing that servicemen are, as citizens, entitled to exercise their civil rights (paragraph 23) as well as human rights and fundamental freedoms with regard to recruitment or call-up (paragraph 27), the present paragraph prescribes that each of the OSCE participating States ensure that

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<sup>89</sup> DOC. 337: "... military personnel are obliged to follow lawful orders only; acts contrary to national and international law, rules of war, as well as criminal or delinquent acts cannot lawfully be ordered, and military personnel cannot be obliged to obey orders of this kind; the responsibility of subordinates does not exempt superiors from any of their responsibilities" (paragraph (ii) of the Coordinator's Perception of 3 June 1994, DOC.337 of 8 June 1994).

the personnel of the first three categories of armed forces listed in paragraph 20 (military, paramilitary and security forces) be able to enjoy and exercise *overall human rights and fundamental freedoms*.

The expression "*CSCE documents and international law*" just reflects the distinction between politically-binding fact and legally-binding instruments.

"*In conformity with relevant constitutional and legal provisions and with the requirements of service*" means that the rights in question can be restricted by the Constitution and the law in order to take due account of the particular requirements of the military service – for instance, the necessity of daily life in barracks restricts the freedom of the individual to choose the place of his residence.

Separate provisions of the Code of Conduct commit the OSCE participating States to reflect in their legislative or equivalent texts the rights and duties of armed forces personnel (paragraph 28), as well as to provide appropriate legal and administrative procedures to protect the rights of the latter (paragraph 33)<sup>90</sup>. The difficulties encountered by the Parliamentary Assembly of the Council of Europe in promoting norms in this field are referred to in the commentary of paragraph 28 of the Code of Conduct.

#### Paragraph 33

[Legal and administrative national procedures for the protection of the rights of all forces personnel]

Each participating State will provide appropriate legal and administrative procedures to protect the rights of all its forces personnel.

The present paragraph is a direct complement to paragraph 32, which prescribes that each of the OSCE participating States ensure that the personnel of military, paramilitary and security forces be able to enjoy and exercise overall human rights and fundamental freedoms. It complements paragraph 28 under which they are committed to reflect in their *laws or other relevant documents* the rights and duties of armed forces personnel.

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<sup>90</sup> In Section VIII, each OSCE participating State is also committed "to ensure that its armed forces are "commanded, manned, trained and equipped in ways that are consistent with the provisions of international law..." (paragraph 34).

Paragraph 28 commits each of the OSCE participating States to ensure the protection of the rights of their servicemen by means of appropriate legal and administrative *procedures* – entitling servicemen, for instance, to means of remedy in support of the full exercise of their rights. The expression "*appropriate (...) administrative procedures*" takes into account the case of those participating States (such as the United Kingdom) where there are administrative rather than formally legal procedures.

Under a decision taken in July 1998 by the Forum for Security Cooperation, the OSCE participating States established a procedure providing for an exchange of information on the Code of Conduct's implementation through a standard questionnaire including 10 items<sup>91</sup>. Item No 9 requires information on "legal and administrative procedures protecting the rights of all forces personnel".

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<sup>91</sup> FSC.DEC/4/98 of 8 July 1998.

## Section VIII. Democratic Use of Armed Forces

*Consistency of the command, manning, training and equipment of armed forces with international humanitarian law (§ 34). Consistency of defence policy and doctrine with international humanitarian law and the Code of Conduct (§ 35). Subjection of the domestic use of force to the rule of law and commensurability of such use with the needs for enforcement (§ 36). Non use of force to limit either the peaceful and lawful exercise of human and civil rights or to deprive people of their identity (§ 37).*

Section VIII is a natural extension of Section VII. It consists of four paragraphs. The first two (paragraphs 34 and 35) are related to the subjection of armed forces to the norms and prescriptions of international humanitarian law – an issue also addressed in paragraphs 29 to 31 in the framework of Section VII. Much more importantly, the two others (paragraphs 36 and 37) concern the democratic use of armed forces in the performance of internal security missions. By contrast with the provisions of Section I to VI of the Code of Conduct which are basically aimed at hindering the use of force *between* OSCE participating States, paragraphs 36 and 37 set forth rules restricting the use of force *within* each participating State.

### Paragraph 34

[Consistency of the command, manning, training and equipment of armed forces with international humanitarian law]

Each participating State will ensure that its armed forces are, in peace and in war, commanded, manned, trained and equipped in ways that are consistent with the provisions of international law and its respective obligations and commitments related to the use of armed forces in armed conflict, including as applicable the Hague Conventions of 1907 and 1954, the Geneva Conventions of 1949 and the 1977 Protocols Additional thereto, as well as the 1980 Convention on the Use of Certain Conventional Weapons.

Paragraph 34 is the fourth in a series of five provisions committing the OSCE participating States to subject their armed forces to the obligations of international humanitarian law<sup>92</sup>. It contains two general indications.

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<sup>92</sup> The subjection of armed forces to the obligations of international humanitarian law is established by five provisions located in Section VII (paragraphs 29-31) and Section VIII (paragraphs 34-35).

First, paragraph 34 specifies that each of the OSCE participating States is required to organise its armed forces, in peace and wartime, in accordance with international law and international humanitarian law commitments, at four basic levels: command, manning, training and equipment.

Second, paragraph 34 enumerates a number of relevant international instruments in accordance with which the OSCE participating States are expected to organise their armed forces – "as applicable", that is to say to the extent that each of them is legally bound by the instruments in question. The listing mentions the basic elements of the general corpus of international humanitarian law, namely the *Geneva Conventions of 12 August 1949* (whose regime is applicable to inter-State wars waged between the regular armed forces of sovereign States)<sup>93</sup> and the two *Additional Protocols of 8 June 1977 to the Geneva Conventions* which take into account the evolution of armed conflicts since 1949<sup>94</sup>. It also includes the *Geneva Convention on prohibition or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects* (10 October 1980), which also belongs to the realm of arms control. Also known as the "Inhumane Weapons Convention", this instrument fills a gap of the Additional Protocols which did not restrict or forbidden the use of any specific weapon<sup>95</sup>.

The phrase "the Hague Conventions of 1907 and 1954" is rather elliptic. It actually refers to the numerous instruments of 18 October 1907 resulting from the historic Second Peace Conference, as well as the UNESCO-sponsored *Convention for the protection of cultural property in the event of armed conflict* of 14 May 1954).

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<sup>93</sup> The Geneva regime is based on four instruments: a Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (I), a Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of armed forces (II), a Convention relating to the treatment of prisoners of war (III) and, finally, a Convention relating to the protection of civilian persons in time of war (IV).

<sup>94</sup> Protocol I is related to the protection of victims of international (inter-state) armed conflicts and Protocol II concerns the protection of victims on non-international armed conflicts.

<sup>95</sup> The Inhumane Weapons Convention is supplemented with additional texts on non-detectable fragments Protocol I, 1980), prohibitions or restrictions on the use of mines, booby-traps and other devices (Protocol II, 1980, amended in 1996), prohibitions or restrictions on the use of incendiary weapons (Protocol III) and on blinding laser weapons (Protocol IV, 1995).

Paragraph 35

[Consistency of defence policy and doctrine with international humanitarian law and the Code of Conduct]

Each participating State will ensure that its defence policy and doctrine are consistent with international law related to the use of armed forces, including in armed conflict, and the relevant commitments of this Code.

Paragraph 35 is the last in a series of five provisions committing the OSCE participating States to subject their armed forces to the obligations of international humanitarian law<sup>96</sup>. It requires that each individual OSCE participating State make its "defence policy and doctrine" conform to the obligations of international humanitarian law and to the relevant commitments of the Code of Conduct.

During the drafting process, Poland suggested that the OSCE participating States undertake to base their *military doctrines* on defensive principles and that "the structure, equipment, state of readiness and training of the armed forces in Europe (...) be oriented to serve defensive purposes"<sup>97</sup>. As demonstrated by two special Seminars successively held in 1990 and 1991, military doctrines in the OSCE area have already been leaning in that direction since the end of the Cold War<sup>98</sup>. However, and although the Code of Conduct included provisions committing the OSCE participating State to maintain only such military capabilities commensurate with individual or collective security needs (paragraph 12), not to impose military domination over each other (paragraph 13) and to exercise restraint in military expenditures (second sentence of paragraph 22), the Polish proposal was not retained.

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<sup>96</sup> The subjection of armed forces to the obligations of international humanitarian law is established by five provisions located in Section VII (paragraphs 29-31) and Section VIII (paragraphs 34-35).

<sup>97</sup> CSCE/FSC/SC.5/Rev.1 of 18 November 1992, p. 3). A more or less similar provision was offered by the Turkish proposal (CSCE/FSC/SC.8 of 16 December 1992., 3<sup>rd</sup> sentence of article 8) and the Hungarian proposal (CSCE/FSC/SC.25 of 23 February 1994, paragraph 9.1). At a certain stage of the drafting process, the following provision was considered: "The military doctrine of (...) armed forces is defensive/non-aggressive in character and is reviewed periodically with a view to eliminating features that may not be in conformity with the relevant principles of the Code and international law" (paragraph 23.3 of the Coordinator's 4<sup>th</sup> revised version of the Code of Conduct: DOC. 551).

<sup>98</sup> The first Seminar on Military Doctrines took place prior to the dissolution of the USSR (Vienna, 16 January-5 February 1990). It produced no final text, but its proceedings inspired two elements which were embodied in the *Vienna Document 1990* on CSBM: annual exchange of information on military budgets and annual implementation assessment meetings. The second Seminar was held in 1991 (no summary of proceedings) and the third in 1998 (FSC.MD.GAL/3/98 of 9 February 1998) – both in Vienna. All speeches and contributions to the 1990 and 1991 Seminars have been published by the Vienna *Institut für Sicherheitspolitik und der Landesverteidigungsakademie* in March 1990. Under paragraph 15.7 of the *Vienna Document 1999 on CSBM*, the OSCE participating States are now encouraged to hold "high-level military doctrine seminars similar to those already held". On that basis, a new Seminar took place, in Vienna, from 11 to 13 June 2001 (FSC.GAL/78/01 of 6 July 2001).

Paragraph 36

[Subjection of the domestic use of force to the rule of law and commensurability of such use with the needs for enforcement]

Each participating State will ensure that any decision to assign its armed forces to internal security missions is arrived at in conformity with constitutional procedures. Such decisions will prescribe the armed forces' missions, ensuring that they will be performed under the effective control of constitutionally established authorities and subject to the rule of law. If recourse to force cannot be avoided in performing internal security missions, each participating State will ensure that its use must be commensurate with the needs for enforcement. The armed forces will take due care to avoid injury to civilians or their property.

Paragraph 36 offers (together with paragraph 37) standards on the *use of force for internal security purposes*. It establishes that the domestic use of armed forces must remain subject to the rule of law and that international law and international humanitarian law provisions must be observed in the course of such use of force as in the case of inter-State armed conflicts.

The provisions of paragraph 36 formally refer to "internal security missions" performed by "armed forces". The Austro-Hungarian proposal considered "armed forces" as including all five categories enumerated in paragraph 20 – namely *military forces*, *paramilitary forces*, *internal security forces*, *intelligence services* and the *police*<sup>99</sup>. The "European Union plus" proposal limited the same concept to the first three categories, while adding *irregular forces*<sup>100</sup>. From a more sophisticated perspective, the Hungarian proposal suggested that if civilian authorities were unable to restore democratic order by political means, they could make use in the first place of the *police* and *internal security forces* and then, if the latter failed, turn to "*military forces*" specially trained for that purpose – as a last resort and only for the protection of the civilian population and the restoration of democratic legality<sup>101</sup>. As no consensus could be achieved on the issue, only the general broad expression "armed forces" was retained. Despite its lack of precision, it can reasonably be assumed that it basically concerns the police and/or the internal security forces – and, in more exceptional circumstances, the paramilitary or even military forces.

<sup>99</sup> CSCE/FSC/SC.22 of 15 September 1993, p. 18.

<sup>100</sup> CSCE/FSC/SC.21 of 30 June 1993, pp. 13-14.

<sup>101</sup> CSCE/FSC/SC.25 of 23 February 1994, paragraphs 7, 8 and second sentence of paragraph 6.3.



Paragraph 36 refers to "armed forces" assigned to "internal security missions" and not to *internal security forces* as such; however, the latter are evidently subsumed<sup>102</sup>. The first sentence of paragraph 36 establishes that any decision through which an OSCE participating State assigns to its armed forces an internal security-type mission must be taken and formulated in conformity with the procedures established by the Constitution of the country. It does not provide for, as suggested by Hungary, the *accountability* of political decision-makers and commanders of such missions<sup>103</sup>.

The second sentence requires that internal security missions be performed under the effective control of constitutionally established authorities and subject to the rule of law. This requirement is in line with the fundamental provision of paragraph 21 prescribing that "each participating State will at all times provide for and maintain effective guidance to and control of its military, paramilitary and security forces by constitutionally established authorities vested with democratic legitimacy". The only difference is that paragraph 36 refers to the broad concept of "*rule of law*" which implicitly covers the notion of "authorities vested with democratic legitimacy". In any case, the expression "subject to the rule of law" means that internal security missions must permanently be performed under the effective control of judicial as well as political civilian authorities. It is worth recalling that according to paragraph 2 of the *Copenhagen Document on the Human Dimension* (1990) the rule of law "does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression"<sup>104</sup>.

Contrary to what had been envisaged in the course of the drafting process, paragraph 36 does not indicate that use of force may *legitimately* be used at

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<sup>102</sup> So far, the OSCE participating States have not been able to agree, as suggested during the 2<sup>nd</sup> Follow-up Conference on the Code of Conduct, on the idea of revising the 1998 Questionnaire in order to introduce a differentiation between "armed forces" and "internal security forces" (FSC.GAL/84/99/Rev.1 of 19 July 1999).

<sup>103</sup> CSCE/FSC/SC.25 of 23 February 1994, paragraph 6.4.

<sup>104</sup> From that premise, the *Copenhagen Document on the Human Dimension* (1990) identifies a large number of basic elements (paragraphs 5.1 to 5.20) – among which are control by and accountability to the civil authorities (paragraph 5.6) of military forces and the police. Subsequent OSCE texts reaffirmed, more or less, parts of that nomenclature. A new element, anti-corruption, was introduced in the 1999 *Istanbul Charter for European Security* (paragraph 33) and the 1999 *Istanbul Summit Declaration* (paragraph 37).

domestic level for specific reasons including, for instance, the performance of relief operations or the maintenance and restoration of democratic public order<sup>105</sup>.

It does not either foresee that "armed forces may also be called upon for other assistance during a *state of public emergency*" and that in such a case the relevant commitments of the *Moscow Document on the Human Dimension* (1991) apply<sup>106</sup>. In the latter, which was adopted in the aftermath of the failed coup against Mikhail Gorbachev, the OSCE participating States affirmed that "a state of public emergency may not be used to subvert the democratic constitutional order, nor aim at the destruction of internationally recognised human rights and fundamental freedoms" (second sentence of paragraph 28.1)<sup>107</sup>. They also agreed that if a state of public emergency may be proclaimed by a constitutionally lawful body duly empowered to do so, subject to approval in the shortest possible time or control by the legislature (paragraph 28.2), it will have to be lifted as soon as possible in order not to remain in force longer than strictly required by the exigencies of the situation (paragraph 28.3). More significantly, they decided that when a state of public emergency is declared or lifted, the government concerned will immediately inform the OSCE of this decision, as well as any derogation made from its international human rights obligations (paragraph 28.10)<sup>108</sup>.

However, by stating that "if recourse to force cannot be avoided...", the third sentence of paragraph 36 obliquely but clearly legitimises the domestic use of force

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<sup>105</sup> First sentence of paragraph 19 of DOC. 551 of 22 July 1994 (Coordinator's 4<sup>th</sup> revised version of the Code of Conduct) and paragraph 29.2 of the unnumbered *Coordinator's Perception and Suggestions* of 10 November 1994.

<sup>106</sup> Second sentence of paragraph 19 of DOC. 551 of 22 July 1994 (Coordinator's 4<sup>th</sup> revised version of the Code of Conduct) and paragraph 26.4 of the *Coordinator's Perception* of 11 November 1994 (unnumbered document). The issue of state of public emergency was addressed in the "European Union plus" proposal (CSCE/FSC/SC.21 of 30 June 1993, p. 12), the Austro-Hungarian proposal (CSCE/FSC/SC.22 of 15 September 1993, pp. 17-18) and the Hungarian proposal (CSCE/FSC/SC.25 of 23 February 1994, paragraph 2.12).

<sup>107</sup> At the same time, they condemned "unreservedly forces which seek to take power from a representative government of a participating State against the will of the people as expressed in free and fair elections and contrary to the justly established constitutional order" (paragraph 17.1) and accordingly, committed themselves to "support vigorously", in case of overthrow or attempted overthrow of a legitimately elected government of a participating State by undemocratic means, "the legitimate organs of that State upholding human rights, democracy and the rule of law..." (paragraph 17.2).

<sup>108</sup> Subsequently, the *Helsinki Decisions 1992* specified that the ODIHR will act as clearing-house for the information related to declaration and lifting of a state of public emergency (first "tick" of chapter VI's paragraph 5 b). Until 2001, the commitment contained in paragraph 28.10 of the *Moscow Document on the Human Dimension* (1991) was hardly complied with (see Victor-Yves Ghebali: "The Issue of the State of Emergency in the Context of the OSCE", *Non-Derogable Rights and States of Emergency*. Edited by Daniel Prémont. Brussels, 1996, pp.317-330. In the aftermath of the 11 September terrorist attacks against the United States, several governments of the OSCE informed the ODIHR about the measures taken in the framework of the state of public emergency (ODIHR.GAL/3/02 of 31 January 2002, PC.DEL/49/02 of same date and ODIHR.GAL/8/02 of 5 March 2002).

from a general and more broad perspective<sup>109</sup>. It introduces here the subjective criterion of "*commensurability*" with the needs for enforcement – which does not exist in the Geneva Conventions (1949) or their Protocols (1977)<sup>110</sup>. It does not specify that armed forces will be used only "in case of absolute necessity" (as wished by Hungary) or "only when strictly necessary" as tabled in the "European Union plus" proposal<sup>111</sup> – or also "after civil means of enforcement have been exhausted"<sup>112</sup>.

It is from the angle of commensurability (or proportionality) that the behaviour of the Russian armed forces in *Chechnya* has been questioned at the OSCE<sup>113</sup>. The first Chechnya war started on 11 December 1994, eight days after the adoption of the Code of Conduct and three weeks before its coming into effect. On 2 February 1995, the Permanent Council adopted (with Moscow's full agreement) a decision which, without directly referring to the Code of Conduct, expressed "deep concern over the disproportionate use of force by the Russian armed forces" in Chechnya<sup>114</sup>. At the 1995 Annual Assessment Implementation Meeting, Sweden requested clarification from Moscow<sup>115</sup>. Time and again, the European Union called on Russia to fulfil its obligations under the Code of Conduct<sup>116</sup>.

Drafted in non-constraining language ("take due care to avoid"), the fourth and last sentence of paragraph 36 hints that commensurability implies avoiding to the extent possible damage to civilians persons and their property. The notion of "*unlawful injury*", raised during the drafting process<sup>117</sup>, did not gain consensus. The idea that any OSCE participating State resorting to a domestic use of force could provide

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<sup>109</sup> Through the *Moscow Document on the Human Dimension* (1991), the OSCE participating States also agreed that, in the framework of a state of public emergency, "if recourse to force cannot be avoided, its use must be reasonable and limited as far as possible" (last sentence of paragraph 28.1).

<sup>110</sup> The criterion of commensurability also appears in paragraph 12 of the Code of Conduct under which each OSCE participating State is committed to "maintain only such military capabilities as are commensurate with individual or collective legitimate security needs, taking into account its obligations under international law".

<sup>111</sup> CSCE/FSC/SC.25 of 23 February 1994, paragraph 6.3 and CSCE/FSC/SC.21 of 30 June 1993, p. 14.

<sup>112</sup> Paragraph 24.2 of DOC. 551 of 22 July 1994 (Coordinator's 4<sup>th</sup> revised version of the Code of Conduct).

<sup>113</sup> On the angle of human rights, see Nicolas M. L. Bovay: "The Russian Armed Intervention in Chechnya and its Human Rights Implications", *Review of the International Commission of Jurists*, No 54, June 1995, pp. 29-56.

<sup>114</sup> PC.DEC/10 of 2 February 1995.

<sup>115</sup> DOC.467 of 15 March 1995.

<sup>116</sup> For instance see FSC.AIAM/10/00 of 28 February 2000. On the issue of democratisation of Russian armed forces, see Yuri Fedorov: *Democratic Transformation of the Security Sector in Russia. A Sad Saga of Failure*. Geneva, Geneva Centre for the Democratic Control of Armed Forces, 2002, 20 p. (DCAF Working Papers, No 98).

<sup>117</sup> Paragraph 29.2 of the unnumbered Coordinator's Perception and Suggestions of 10 November 1994.

*information* on the size, organisation, role and objectives and the activities of involved armed forces was equally rejected<sup>118</sup>.

In short, paragraph 36 spells out four conditions regulating the domestic use of force: a constitutionally lawful decision, the respect of the rule of law during operational performance, commensurability with the needs for enforcement and the care to avoid excessive injury to civilians and their property.

As stressed by David Raic, to a limited but real extent paragraph 36 provides for "the regulation of conduct not covered by humanitarian law and the law regarding human rights" since "in an international context, norms for the use of force internal conflicts are virtually non-existent, the only relevant example being the *Code of Conduct for Law Enforcement Officials* adopted by the UN General Assembly in 1979". Likewise, paragraph 36 establishes "a link between the application of force and individual human rights; a link not explicitly mentioned in human rights treaties"<sup>119</sup>.

#### Paragraph 37

[Prohibition of a domestic use of force aimed at restricting the peaceful and lawful exercise of human and civil rights or at depriving people of their individual or collective identity]

The participating States will not use armed forces to limit the peaceful and lawful exercise of their human and civil rights by persons as individuals or as representatives of groups nor to deprive them of their national, religious, cultural, linguistic or ethnic identity.

Along with paragraph 36, paragraph 37 establishes standards on the *use of force for internal security purposes*. The notable difference between the two paragraphs is that the former is permissively drafted ("if recourse to force cannot be avoided in performing internal security missions (...), each participating State will ensure that its

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<sup>118</sup> This idea was included in the "European Union plus" draft proposal (CSCE/FSC/SC.21 of 30 June 1993, p. 14) and reflected in the Hungarian draft proposal (CSCE/FSC/SC.25 of 23 February 1994, paragraphs 7 and 8).

<sup>119</sup> David Raic: "The Code, Humanitarian Law, and Human Rights", *Cooperative Security, the OSCE and its Code of Conduct*. Edited by Gert de Nooy. The Hague, Kluwer Law International, 1996, pp. 51 and 53. Paragraph 29.3 of the unnumbered Coordinator's Perception and Suggestions of 10 November 1994 contained a provision committing the participating States to ensure that "any armed forces assigned to internal security missions will be specially trained in the implementation of such tasks, that they are aware that where police powers are exercised by military or security forces, officers of such organisations are regarded as "law enforcement officials and, as such, are to be guided by the United Nations Code of Conduct for Law Enforcement Officials". On the 1979 United Nations Code, see paragraph 20 of the present *Commentary*.

use must be commensurate with the needs for enforcement"), while the latter contains a *prohibition*: "the participating States will *not* use armed forces...". The philosophy of paragraph 37 is to prohibit a domestic use of force aimed at restricting human and civil rights when peacefully and lawfully exercised or at depriving people of their individual or collective identity. Similarly to paragraph 36, paragraph 37 formally concerns "*armed forces*" but without explicitly referring to "internal security missions"; however, the latter are evidently subsumed.

Paragraph 37 prohibits the domestic use of force for the sake of "*persons as individuals or as representatives of groups*" – an expression wide enough to cover all individuals and groups living in the State, including persons belonging to a *national minority and minority groups*. However, it deliberately avoids referring to the concept of "national minority" which appeared in the Polish, "European Union plus", Austro-Hungarian and Hungarian draft proposals<sup>120</sup>.

The expression "*peaceful and lawful exercise of their human and civil rights*" is the remnant of proposals aimed at committing the OSCE participating States to respect the right of citizens to advocate constitutional change by peaceful and legal means, and not to use force against those who do so<sup>121</sup>.

The expression "*nor to deprive them of their national, religious, cultural, linguistic or ethnic identity*" is the remnant of other proposals prohibiting the domestic use of force contrary to the principle of *self-determination of peoples*, when pursued peacefully<sup>122</sup>. The specific terms it uses ("national", "religious", "cultural", "linguistic", "ethnic") are somewhat redundant: the umbrella concept of culture encompasses religion, language and ethnicity; besides, a "national minority" is in fact an "ethnic minority" characterised either by religion and/or language.

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<sup>120</sup> In their joint draft proposal, Austria and Hungary suggested (in vain) a provision considering that deprivation of national minorities of the free exercise of their rights posed "a special threat to security within and between States and thus to the stability of the whole CSCE area" (CSCE/FSC/SC.22 of 15 September 1993, p. 15).

<sup>121</sup> CSCE/FSC/SC.5/Rev.1 of 18 November 1992, p. 5 (Polish proposal), CSCE/FSC/SC.21 of 30 June 1993, p. 15 ("European Union plus" proposal), CSCE/FSC/SC.22 of 15 September 1993, p. 18 (Austro-Hungarian proposal) and CSCE/FSC/SC.25 of 23 February 1994, paragraph 6.5 (Hungarian proposal). The "European Union plus" proposal also suggested a commitment concerning the respect of the peaceful evolution of States: "The participating states will respect and encourage peaceful evolution in the constitutions of all PS in accordance with international law, the principles laid down in the Code and the democratic wishes of the people (CSCE/FSC/SC.21 of 30 June 1993, p. 5).

<sup>122</sup> Polish proposal: "Accordingly, the participating states will refrain from undertaking any use of force or acts of coercion contrary to the principle of self-determination of peoples, when pursued peacefully. The use of force to deprive peoples of their national identity constitutes a violation of their inherent rights (CSCE/FSC/SC.5/Rev.1 of 18 November 1992, p. 5).

Two particular suggestions evoked during the drafting process have not been retained. The first one concerned the prohibition of *modification by force of internal boundaries* and the *forceful resettlement of populations*<sup>123</sup>. The second one was the non-use of armed forces for *reprisal purposes*<sup>124</sup>.

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<sup>123</sup> CSCE/FSC/SC.21 of 30 June 1993, p. 14 ("European Union plus" proposal), CSCE/FSC/SC.22 of 15 September 1993, pp. 16 and 18 (Austro-Hungarian proposal) and CSCE/FSC/SC.25 of 23 February 1994, paragraph 6.5 (Hungarian proposal).

<sup>124</sup> CSCE/FSC/SC.25 of 23 February 1994, paragraph 6.3 (Hungarian proposal) and CSCE/FSC/SC.8 of 16 December 1992, article 21 (Turkish proposal).



Established in 2000 on the initiative of the Swiss government, the Geneva Centre for the Democratic Control of Armed Forces (DCAF) encourages and supports States and non-State governed institutions in their efforts to strengthen democratic and civilian control of armed and security forces, and promotes international cooperation within this field, initially targeting the Euro-Atlantic regions.

The Centre collects information, undertakes research and engages in networking activities in order to identify problems, to establish lessons learned and to propose the best practices in the field of democratic control of armed forces and civil-military relations. The Centre provides its expertise and support to all interested parties, in particular governments, parliaments, military authorities, international organisations, non-governmental organisations, academic circles.

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