

Forum for Security Co-operation

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The Code of Conduct on Politico-Military Aspects of Security and Its Possible Contribution to the Corfu Process

Excellencies, Ladies and Gentlemen,

Fifteen years after its adoption, the Code of Conduct on Politico-Military Aspects of Security is still a surprisingly modern and innovative document. Written on five brief pages, it contains the most comprehensive compilation of OSCE norms related to security and the use of armed forces within and between states. As its preamble states, the Code of Conduct provides “norms of responsible and co-operative behaviour in the field of security”. Jonathan Dean, a US arms control negotiator in the 1970s takes a longer view: “the overriding motivation of the Code of Conduct on Politico-Military Aspects of Security is to prevent repetition of the abuses of the Nazi and Soviet regimes, [...], their use of national armed forces to intimidate and dominate other European states and their own populations”.

The Code of Conduct consists of two major parts, one dealing with inter-state behaviour (sections I to VI), and one with intra-state behaviour, that is to say, the democratic control of the armed forces and their use in internal security missions (sections VII and VIII). The Code thus represents, to quote paragraph 2, a “comprehensive concept of security, as initiated in the Final Act, which relates the maintenance of peace to the respect for human rights and fundamental freedoms.” What I would like to do in my presentation is to have a brief look at both parts of the Code of Conduct, and consider the degree to which the Code’s normative substance might be relevant for the discussion we are having within the framework of the Corfu process.

I shall start with sections VII and VIII of the Code – democratic control of the armed forces and their use in internal security missions. According to Victor-Yves Ghebali and Alexandre Lambert, one can subdivide the intra-state part of the Code into four subsections.

First, norms governing the constitutional and political position of the armed forces in a democratic polity. States, to quote paragraph 20, “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.” This is the only paragraph within the Code where the five elements of the armed forces are defined in more detail. In the following paragraphs, this basic commitment to the democratic control of the armed forces is more specifically related to defence expenditure, and the norms which specify that “armed forces as such are politically neutral” (para. 23) and that states will not accept forces that are not controlled by constitutionally established authorities (para. 25).

The **second** subsection deals with the subjugation of any state action under international humanitarian law and stipulates, in paragraph 30 among others, that armed forces personnel must be “aware that they are individually accountable under national and international law for their actions.”

The **third** stipulates that “military, paramilitary and security forces personnel will be able to enjoy and exercise their human rights and fundamental freedoms” (para. 32). This includes a call for that States to “consider introducing exemptions from or alternatives to military service.” (Para. 28).

Perhaps the most far-reaching and sensitive commitments are contained in the **fourth** subsection, which deals with internal security missions. Such missions have to be implemented, to quote paragraph 36, “in conformity with constitutional procedures”, and any use of force “must be commensurate with the needs for enforcement”. And paragraph 37 stipulates that 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”. We all know that these commitments have been severely violated several times by several states.

The implementation mechanisms for the Code of Conduct are significantly weaker than those of comparable OSCE documents. They consist merely of information exchange based on a questionnaire and periodic meetings to discuss this information. Furthermore, it is deplorable that the particularly sensitive commitments under paragraphs 36 and 37 – internal security missions – are not covered by the questionnaire.

In spite of these deficiencies in implementation, the Code's norms related to intra-state behaviour are absolutely groundbreaking. And what is more, these norms are no longer solely domestic norms, as they should be in any civilized state. By means of the Code of Conduct, they have become international norms, "a matter of direct and legitimate concern" of all participating States, as paragraph 2 stipulates. This is the key to the whole document.

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In the following, I would like to turn to the first part of the Code dealing with inter-state security behaviour. Mainstream literature on the Code of Conduct ascribes its innovative character solely to the second part dealing with the democratic control of the armed forces and internal security missions. Although I do not fully share this assessment, one has to admit that the Code's first part contains a number of principles deriving from the Helsinki Decalogue or the Charter of Paris. Examples include the principles of "sovereign equality" and "territorial integrity", the concepts of the indivisibility of security and co-operative security, and the sovereign right of states embodied in paragraph 11: "to belong or not to belong to international organizations, and to be or not to be a party of bilateral or multilateral treaties, including treaties of alliance; they also have the right to neutrality."

But there are other norms, less frequently quoted, that are more innovative and might even be relevant for the current discussion taking place within the framework of the Corfu process.

For example, paragraph 12 stipulates that states "will maintain only such military capabilities as are commensurate with individual or collective legitimate security needs". With this stipulation, the Code introduces a sufficiency rule, something we know from the CFE Treaty as a specific rule that was abandoned in the ACFE Treaty, but here a general OSCE norm. This way of thinking might be fruitful for defining a kind of balance between NATO states

and the Russian Federation. The fact that NATO is stronger than Russia is unavoidable. On the other hand, Russia demands balance between itself and NATO. Balance, however, does not necessarily mean parity, equal ceilings. Sufficiency is another, far more flexible and hence more negotiable meaning of balance, The fact that the Code of Conduct contains a general sufficiency rule is therefore highly relevant.

Paragraph 12 is supported by paragraph 13, which states that “[n]o participating State will attempt to impose military domination over any other participating State.” And both stipulations are backed up by the commitment that the stationing of armed forces on the territory of participating States is only possible “in accordance with their freely negotiated agreement” (para. 14). Paragraph 5 also belongs to this specific group of commitments. It reads as follows: “They [the participating States] will consult promptly, [...], with a participating State seeking assistance in realizing its individual or collective self-defence. They will consider jointly the nature of the threat and actions that may be required in defence of their common values.”

From their negotiating history, these stipulations aim at the protection of smaller states vis-à-vis larger states. And if there is a CFE-3 – in view of the fact that the Adapted CFE Treaty, although not yet in force, is already outdated in some aspects – then much of this effort will be on the regulation of sub-regional balances including those between small and large states, for example the Baltic States and Russia. The Code of Conduct contains some of the principles on which we can build possible future treaty rules. And what is true for the relationship between small and large States can also be applied to relations between one large state – Russia – and NATO. I therefore believe that the Code of Conduct has much to contribute to the normative basis of future arms control in Europe, which will be an essential element of the Corfu process.

Against this background, it is not surprising that paragraph 15 stipulates the following: “The participating States will implement in good faith each of their commitments in the field of arms control, disarmament and security-building as an important element of their indivisible security.” If this commitment is taken seriously, the 30 CFE States Parties should resume negotiations on the ratification and entry into force of the Adapted CFE Treaty and on follow-up talks as soon as possible. The Russian Federation should facilitate this process by suspending its suspension of CFE, at least in part.

Finally, these commitments are completed by the Code of Conduct's obligation that the "participating States stress the importance both of early identification of potential conflicts and of their joint efforts in the field of conflict prevention, crisis management and peaceful settlement of disputes." (Para. 18). And while this stipulation, which is contained in many OSCE documents, is by no means new, it might nonetheless remind us that one key reason for unresolved conflicts remaining unresolved is the lack of co-operation between major participating States.

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One of the negotiators of the Code of Conduct, Ortwin Hennig from Germany, wrote on the political background of this unique document that "[t]he new security landscape in Europe and the security relations between participating States, which were perceived as new, needed to find expression in an appropriate document."

While the situation in the early 1990s is not entirely comparable to the present, there might at least be some parallels. In the early 1990s, the states faced a new political landscape and were looking for new principles and norms on which they could focus their expectations. This led to original documents such as the Code of Conduct. The situation today is also characterized by a number of novel elements. Above all, after a decade of increasing tensions, the Obama administration has pressed the 'reset button' and is striving for better relations with Russia.

In this new situation, some are striving to bring about the adoption of new documents – the Russian President Dmitri Medvedev has called for a new European Security Treaty. Others, while not sharing the view that new documents are necessary, agree on the need for a broad and open-ended discussion on all major aspects of European security, such as is now being conducted in the framework of the Corfu process. Both efforts represent different paths, but share the same vision. Both can profit from the normative *acquis* of the Code of Conduct. And, what is more, with its principles and norms, the Code of Conduct might even give us guidance on the question of whether we need new documents or not.

Comparing the Code of Conduct to President Medvedev's draft European Security Treaty of the 29th November 2009, I came to the surprising conclusion that at least one vital element of the draft Treaty resembles the Code of Conduct. Article 5, paragraph 1 of the draft Treaty reads as follows:

Should a Party to the Treaty determine that there exists a violation or a threat of violation of the Treaty by any other Party or Parties, or should it wish to raise with any other Party or Parties any issue relating to the substance of the Treaty and requiring, in its opinion, to be considered jointly, it may request consultations on the issue with the Party or Parties which, in its opinion, might be interested in such consultations.

The Code of Conduct's corresponding paragraph 5 reads as follows:

They [the participating States] are determined to act in solidarity if CSCE norms and commitments are violated and to facilitate concerted responses to security challenges that they may face as a result. They will consult promptly, in conformity with their CSCE responsibilities, with a participating State seeking assistance in realizing its individual or collective self-defence. They will consider jointly the nature of the threat and actions that may be required in defence of their common values.

Although the wording is different, the substance is similar: In case of a violation of commitments, States should engage in consultations in order to find joint solutions. As this example shows, we come back, again and again, to the same OSCE principles and norms. In the field of security, both within and between states, almost all of them are contained in the Code of Conduct. That makes it a key document for the current Corfu process.

I thank you for your attention.