

Chapter 5

Rethinking the Code of Conduct in the Light of Security Sector Reform¹

By David M. Law²

Introduction

The OSCE Code of Conduct on Politico-Military Aspects of Security (the Code), which was agreed to by the participating states of the OSCE in 1994 and entered into force the following year, opened a new era in our thinking about the relations between society and its various security forces. Politically binding in nature, the document codified several inter-state and intra-state norms of behaviour, including a number of highly innovative provisions concerning the democratic control of armed forces. In particular, the Code drew attention to the fact that public security issues could have as much impact on people's security as foreign threats (and possibly even more so), that a country's internal security situation could therefore have significant repercussions for regional and international security, and that domestic security issues were accordingly a legitimate matter for diplomatic scrutiny and consultation.

So seen, the Code has considerable potential for further development, both in the OSCE area and outside. Yet the standards it sets for security behaviour are poorly implemented by some of its signatory states, and certain of its provisions are simply ignored by others. The document, moreover, remains relatively unknown outside expert circles. The OSCE is thus failing to capitalise on one of its members' most important

¹ This article has been prepared with the assistance of Angela Barner and Oksana Myshlovska, respectively Intern and Research Assistant at the Geneva Centre for Democratic Control of Armed Forces (DCAF). It draws in part on an article published earlier this year in issue 2 of the *Helsinki Monitor* entitled 'Security sector reform and the future of the Code of Conduct'.

² Mr David Law is a Senior Fellow at DCAF, where he is involved in training and writing on security sector reform issues, and assisting international organisations in mainstreaming the concept in their activities.

accomplishments, one that, moreover, gives it a distinct niche among other security organisations in the Euro-Atlantic and Euro-Asian areas.

Security sector reform (SSR) is a more recent concept than the Code, and differs from it in several respects. Nevertheless, SSR builds on the fundamentals of the Code, and complements it in many ways. This article will argue that SSR can be used to help revitalise the Code, modernise it and enhance its relevance. The article will begin with a review of the antecedents of the Code and SSR. It will then expand upon the accomplishments of the Code, as touched upon in this introduction. In the third section, the article will explain how SSR represents a further development of the Code and holds the keys to what will be argued is a long overdue operational and conceptual revival. Finally, it will explore strategies for restoring the promise of the Code's formative years and for mainstreaming a revived Code in the work both of the OSCE and other organisations, in Europe as well as in other theatres.

1. The Code and SSR as Part of a Common Intellectual Tradition

The Code and SSR are part of a long tradition of reflection about the relations between society and those groups and institutions capable of using force on its behalf, or, as frequently happens, against it. Prior to their emergence, two other concepts addressed similar themes, albeit in a formative way. These concepts are civil–military relations (CMR) and democratic control of armed forces.

1.1. The antecedents of the Code and SSR

During the Cold War, CMR, the oldest discipline in the family of ideas addressing relations between society and its armed forces, offered the only overarching framework for thinking about this relationship.³ Essentially, CMR holds that the military has to be under the control and at the service of the civil authorities, and should not be a self-directing institution acting primarily on its own behalf.⁴ In the early thinking on CMR,

³ See Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil–Military Relations* (Cambridge, Mass., 1957).

⁴ Douglas Bland, 'A unified theory of civil–military relations', *Armed Forces and Society*, Vol. 26, No. 1, Fall 1999, pp. 7–26.

the nature of that civilian control, how it was constituted, and whether and how, in turn, it was subject to the control of society as a whole were not central concerns. This changed with the end of the Cold War and the new emphasis on the need for democratic oversight that came with the emergence of the concept of democratic control of armed forces. While CMR has been partly displaced by this and later thinking on related issues, it periodically returns to the forefront in countries (usually developing countries) where the relationship between the military and civil society is unbalanced. This can also be the case in developed countries where the influence of the military is deemed to have increased unduly and to have marginalised the role of civilians in decision-making affecting the military.⁵

The concept of democratic control of the armed forces took thinking about civil–military relations a decisive step further by introducing the notion that just as or even more important than the need for civilian control of the military was the need for this control to be democratically constituted. Generally, the concept proposes that the armed forces must be subordinated to a country’s elected authorities, and that all decisions regarding the defence of the country – the organisation, deployment and use of armed forces; the setting of military priorities and requirements; and the allocation of the necessary resources – need to be taken by a democratic leadership and scrutinised by a democratically elected legislature, if popular support and legitimacy are to be ensured.⁶

The central preoccupation of this concept has lost none of its significance as a vital point of reference for the relations between the armed forces and society. For example, in Myanmar, where the military controls the state, the former is not subject to any democratic control. This is also the case of the People’s Republic of China, as well as most Commonwealth of Independent States (CIS) countries, and most of the states of the African and Arab worlds, where the issue is not that the military controls the state, but that there is little or no democratic control of the military – or for that matter, any other governmental institutions. In a mature democracy, the issue is not whether the

⁵ This concern has, for example, surfaced in the recent debate in Canada, as there has been a movement to correct a long-lasting decline in the country’s military capabilities. See Lawrence Martin, ‘In defence, the civilian side is on the slide’, *Globe and Mail*, 7 September 2006, p. A21.

⁶ Simon Lunn, ‘The democratic control of armed forces in principle and practice’, in Philipp Fluri & Miroslav Hadzic (eds), *Sourcebook on Security Sector Reform* (Belgrade, 2004).

military is under democratic control but whether democratic institutions and practice are robust enough for that control to be exercised effectively.

1.2. The OSCE Code of Conduct on Politico-Military Aspects of Security

Democratic control of armed forces was originally understood as applying only to the various armed forces of the military, not the other armed groups in society capable of using force. The OSCE Code took this understanding significantly further by observing that it was not just the military that affected relations between states, but also various internal security forces, and that therefore their behaviour was a legitimate subject for inter-state monitoring and oversight. The Code thus gave expression to a shared realisation throughout the Euro-Atlantic area that with the dramatic changes that had occurred in the security environment after the end of the Cold War, domestic and external security issues could not be approached in isolation from one another. The Code was the world's first politically agreed set of norms on this subject and to date remains the only document of its kind. The third section of this paper will explore the historical accomplishments of the Code and take stock of its current status.

1.3. Security sector reform

The latest step in this process has come with the emergence of SSR. This concept is of a different inspiration from the Code and its antecedents. Unlike the three other phenomena under discussion, originally SSR was used mainly as an instrument for shaping the policies of development donor countries – essentially Organisation for Economic Co-operation and Development (OECD) members – in developing and transition states. It emerged in the late 1990s when donors realised that their efforts on behalf of development would be wasted unless the security sector in the countries where they were active was capable of operating efficiently, and was at the same time subject to democratic control. Long before that, the intellectual ground for SSR had been laid by donor experiences in such diverse settings as Cambodia, Haiti, and Bosnia and Herzegovina, and the realisation that military reform unconnected from effective police reform or from sound employment policies would constitute a recipe for the

failure of efforts to project a country on a path towards stability, growth and democratisation.

SSR offers major innovations that will be explored in detail in the fourth section of this paper. For the time being, it is sufficient to point out that SSR takes a holistic approach in its understanding of the security sector and of the actors that are involved in its oversight and monitoring. Furthermore, SSR brings together the concerns of the development, democratic governance and security agendas, thus providing a vehicle for coordinating programme efforts that are otherwise often unconnected. SSR is, furthermore, an evolving concept, as underscored by the changes in early SSR thinking that have come in the wake of the 9/11 attacks and the advent of strategic terrorism, as well as its evolution into a concept for considering how to approach the security sector in various country contexts. Like the Code, SSR is normative in nature in that it insists on the need for democratic oversight.

1.4. Comparison of the concepts

At first sight, it may seem inappropriate to juxtapose these four concepts (i.e. CMR, democratic control of armed forces, the Code and SSR), as they vary phenomenologically, and this from several perspectives. Firstly, the Code is the only politically binding instrument of the four, although recently the OECD and the European Union (EU) have agreed on documents that set out policy guidelines for SSR that may develop in this direction. Secondly, the concepts vary as they concern the security actors that they focus on. Thirdly, they set different accents with regard to the relationship between the security actors that they consider and society as a whole. Fourthly, they also differ in terms of whether they are interested in security as essentially an internal issue, or one that has both internal and external dimensions. The concepts have, moreover, contrasting potential for innovation. CMR and democratic control of armed forces remain relevant concepts, forming key dimensions of the subsequently emerging Code and SSR but, to a degree, they have been absorbed into the latter two constructs and have limited capacity for future development. As for the Code, the only constraint – but a major one – on its future development is political, a dilemma that will be explored further in a later section of this paper. SSR, as an evolving and unnegotiated concept,

has the greatest potential for evolution, but its application is also subject to political constraints. For example, the governments of many developed countries tend to consider that SSR is something they do only in and for developing and transition countries, not in their own.

Notwithstanding these differences, each of these concepts has changed our perceptions about the relationship between society and its armed forces – and this, moreover, in a way that has expanded our understanding of the phenomenon and adjusted it as a function of changing strategic circumstances. For an overview of how the concepts contrast with one another, see Table 1.

Table 1: Comparison of Certain Key Aspects of CMR, Democratic Control of Armed Forces, the Code and SSR

	What is its status?	Which security forces does it address?	What is its relationship with society?	What spatial parameters does it focus on?
CMR	Neither codified nor politically agreed principles	The military	Must be subordinated to the civil authorities	Internal
Democratic control of armed forces	Codified in the Code, but not politically agreed outside the OSCE area	The military	Must be under the control of the democratically constituted authority	Internal
The Code	Codified and politically binding norms	(Almost) all statutory security forces; less holistic than SSR	Must be under the control of the democratically constituted authority	Internal and external
SSR	Increasing norm- and standard-setting by inter-governmental organisations	All statutory and non-statutory security forces	Must be under the control of a democratically constituted authority, overseen by an independent judicial authority, directed by a capable executive, and monitored by an informed and free civil society	Internal and external

2. The Current Status of the Code

2.1. The Code and its accomplishments

In addition to introducing a new generation of security norms and helping set the stage for the emergence of SSR, the Code has some other very impressive accomplishments to its credit. Putting public security concerns firmly on the diplomatic agenda, it has laid out a series of standards for the behaviour and control of the range of armed forces. The implementation of these standards has been crucial to the prospects for delivering more and better human security, a concept that at about the same time as the Code began to be implemented was entering the international security discourse in a significant way. The Code has also helped shape the post-Cold War security agenda of all major European and Euro-Atlantic institutions. The main protagonist for the Code in the negotiations leading to its agreement was the EU, which saw in its norms a vehicle to address the new security responsibilities that it would have to assume as the expected expansion of membership materialised. Similarly, the Code would inspire NATO's various outreach programmes designed to facilitate both partnership and preparation for membership – from the Euro-Atlantic Partnership Council to the Membership Action Plan to the various Partnership for Peace programmes such as PAP-DIB (Partnership Action Plan on Defence Institution Building).

Since the Code was elaborated, thirteen OSCE participating states have joined the EU. The ten new states that NATO has taken in since 1994 are also OSCE members. Most of the new adherents – eight in the case of the EU, all ten in the case of NATO – are former Communist states that, as part of their efforts to integrate into transatlantic and European institutions, have had to show themselves capable of meeting the Code's standards for inter-state and intra-state security behaviour, even though this has not always been an explicit condition for membership. Other states that wish to follow them in the membership process are now subject to similar considerations.

As for the OSCE, the Code represented a defining moment in its development as an organisation, with the agreement on the Code coinciding with its transition to the Organisation's new status and new name. In addition, the Code has acted as a source of

inspiration for similar norm-setting exercises elsewhere, most notably in West Africa, where a sub-regional Code of Conduct is in the process of being created.⁷ What is more, the security profiles of the fifty-six OSCE member states are broadly representative of those of UN members as a whole. Such diversity underscores that the Code is a significant achievement and points to there being considerable potential for it to be emulated outside the OSCE area. Table 2 gives an overview of the security norms developed under the auspices of the OSCE.

⁷ See Adedeji Ebo, *Towards a Code of Conduct for Armed and Security Forces in Africa: Opportunities and Challenge*, DCAF Policy Paper (Geneva, March 2005), at http://www.dcaf.ch/_docs/pp05_towards-code.pdf.

Table 2: OSCE Security Norms⁸

The Helsinki Decalogue	The OSCE Code of Conduct on Politico-Military Aspects of Security		
	Inter-state norms <i>Reaffirmation of previous OSCE norms:</i>	Inter-state norms <i>New norms:</i>	Intra-state norms <i>New norms:</i>
1. Sovereign equality: respect for the rights inherent in sovereignty	1. Respect for the Helsinki Final Act principles and their primary significance, as well as their full and equal implementation	1. Solidarity principle (if OSCE norms and principles are violated)	1. Democratic political control of military, paramilitary, internal security forces, intelligence services and police
2. Non-threat or use of force	2. Concept of comprehensive security	2. Maintenance of military capabilities commensurate with individual or collective security needs	2. Integration of armed forces with civil society
3. Inviolability of frontiers	3. Indivisibility of security	3. Determination of military capabilities on the basis of democratic procedures	3. Effective guidance to and control of military, paramilitary and security forces by constitutionally established authorities vested with democratic legitimacy
4. Territorial integrity of states	4. Co-operative approach to security	4. Non-imposition of military domination over other OSCE states	4. Legislative approval of defence expenditures
5. Peaceful settlement of disputes	5. Commitment not to support terrorist acts and to take appropriate measures to prevent and combat terrorism in all its forms	5. Stationing of armed forces on the territory of another state in accord with freely negotiated agreements and international law	5. Restraint in military expenditure
6. Non-intervention in internal affairs	6. Non-provision of assistance to states that violate the obligation to refrain from the threat or use of force		6. Transparency and public access to information related to the armed forces
7. Respect for human rights and fundamental freedoms, including freedom of thought, conscience, religion and belief	7. Right to individual and collective self-defence		7. Political neutrality of armed forces
8. Equal rights and self-determination of peoples	8. Right for a country to choose freely its security arrangements and memberships in international organisations and treaties.		8. Measures to guard against accidental or unauthorised use of military means
9. Co-operation among states	9. Right to neutrality		9. No toleration or support for forces that are not accountable to or controlled by their constitutionally established authorities
10. Fulfilment in good faith of obligations under international law	10. Pursuit and implementation in good faith of arms control, disarmament and confidence- and security-building measures		10. Paramilitary forces not to be permitted to acquire combat capabilities in excess of those for which they were established
	11. Co-operation in countering tensions that may lead to conflict		11. Recruitment or call-up to be consistent with human rights and fundamental freedoms
	12. Early identification of potential conflicts		12. Reflection in laws or other relevant documents of the rights and duties of armed forces personnel
	13. Co-operation in conflict prevention, crisis management and peaceful settlement of disputes		13. Armed forces' compliance with the provisions of international humanitarian law
	14. Co-operation in the event of armed conflict		14. Armed forces personnel's individual accountability under national and international law
	15. Provision of humanitarian assistance to parties in conflict		15. Protection of the rights of personnel serving in the armed forces

⁸ The author is indebted to Professor Victor-Yves Ghebali of the Geneva Graduate Institute of International Studies for his research on the OSCE. See, *inter alia*, his *The OSCE Code of Conduct on Politico-Military Aspects of Security (1994): A Paragraph-by-Paragraph Commentary on Sections VII and VIII*, DCAF Document, No. 3 (Geneva, 2003).

2.2. The challenges facing the Code

Notwithstanding its contribution, the Code's work remains unfinished. For example, there are still countries in the OSCE area where the central government:

- faces serious threats to the state's monopoly of force on the part of armed, non-state or foreign groups; or
- faces no such threat, but where its security forces' behaviour is subject to little or no democratic control; and/or
- is seen by part or most of the population as representing a serious security threat, not its primary source of protection.

The costs of such pathologies in terms of peace and development, stability and prosperity can be enormous. But while the Code's work in the OSCE area remains incomplete, whether it will be able to meet the continuing challenges is unclear. Notwithstanding the historic importance of the Code, its status a decade after being agreed to leaves much to be desired. There are a number of reasons for this.

- Firstly, the Code has not evolved to take into account changes that have intervened in the security environment over the last decade or so.
- Secondly, the Code's provisions are very unevenly respected, in part because of a lack of capacity in a number of OSCE member states; in part also because of the lack of attention the document has received in OSCE consultations. It is indicative of the Code's current status in Vienna that the 2005 report *Common Purpose: Towards a More Effective OSCE*, which the OSCE commissioned to address the serious divergences that had emerged among members, makes no mention of the Code.⁹ Similarly, the Forum for Security Co-operation (FSC), the OSCE body that is mandated with organising the exchange of information among members on the Code's implementation, has in recent years devoted very little time to reviewing

⁹ See OSCE Panel of Eminent Persons, *Common Purpose: Towards a More Effective OSCE*, Final Report and Recommendations (Vienna, 27 June 2005), at http://www.osce.org/documents/cio/2005/06/15432_en.pdf

implementation, reserving for this purpose only a small part of the agenda of its one-day Annual Assessment Implementation Meeting.¹⁰

- Thirdly, the document remains little known outside the circles that deal with the OSCE. Civil society bodies, not to mention the general public, are hardly aware of the Code's existence, let alone active in monitoring its implementation. The contrast with the Helsinki Final Act, which spawned substantial non-governmental activity during the Cold War, is striking.
- Fourthly, the Code is in danger of losing its niche in the area of democratic control issues to other institutions. SSR has been rapidly gaining ground as a policy framework at OSCE sister institutions.¹¹ After first being adopted by the OECD and the UN Development Programme, SSR has more recently been introduced into the security discourse of the Council of Europe (CoE) and the EU. For example, in 2005 the Parliamentary Assembly of the CoE passed a recommendation on the Democratic Oversight of the Security Sector in Member States, which takes a substantially broader approach than the Code.¹² As for the EU, the Commission and the Council have drafted an SSR concept, and the EU has now developed an overarching EU SSR concept to guide its work in this area.¹³ These are welcome developments, but it is regrettable that the OSCE has not kept pace.¹⁴
- Finally, and most importantly, under the impact of recent changes in the security environment, respect for the provisions of the Code on the part of OSCE member states has become noticeably weaker. This is in large part a reflection of the overall state of Euro-Atlantic and Euro-Asian security, which affects the OSCE in all aspects

¹⁰ Alexandre Lambert, *Implementation of Democratic Control of Armed Forces in the OSCE Region: Lessons Learned from the OSCE Code of Conduct on Politico-Military Aspects of Security*, DCAF Occasional Paper, No. 11, July 2006, p. 21, at http://www.dcaf.ch/_docs/op11_implementationdemoccontrol.pdf.

¹¹ Victor-Yves Ghebali, *Recommendations on the Further Development of the OSCE Code of Conduct on Politico-Military Aspects of Security: The Development of the OSCE's Role in Security Sector Governance*, DCAF Food for Thought Paper (Geneva, 2006).

¹² Recommendation No. 1713, adopted by PACE on 23 June 2005, at <http://assembly.coe.int/documents/AdoptedText/TA05/EREC1713.htm>.

¹³ Council of the European Union, *EU Concept for ESDP Support to Security Sector Reform (SSR)*, Brussels, 13 October 2005, 12566/4/05 REV 4, at <http://register.consilium.europa.eu/pdf/en/05/st12/st12566-re04.en05.pdf>; European Commission, *A Concept for European Community Support for Security Sector Reform*, Brussels, 24 May 2006, COM(2006)253F, at http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0253en01.pdf

¹⁴ Professor Ghebali also suggests in his Food for Thought Paper that an updated Code could be a basis for giving more focus to the OSCE's already substantial activities in the area of SSR and greater coherence to the work of the OSCE Secretariat. See Ghebali, *Recommendations on the Further Development of the OSCE Code of Conduct on Politico-Military Aspects of Security*, *op. cit.*

of its work.¹⁵ Thus, the future of the Code hinges to a great extent on the way the ongoing crisis in OSCE ranks is addressed.

3. How can SSR be Used to Rethink the Code?

Central to the approach of the Code and SSR to the security sector are three overriding considerations. Firstly, both concepts stress the importance of taking a comprehensive approach to security. This encompasses such notions as:

- security being not just about the military dimension, but consisting of a broad array of factors – environmental, economic, humanitarian, etc.;
- security not having solely an external focus, but being shaped by a seamless continuum of internal and external factors; and
- security actors not being solely those forces with a capacity to use force, but all other groups and institutions in society with a significant security role, whether this be in the area of management, oversight, policy formulation or education.

Secondly, both concepts insist on the need to ensure that those responsible for a country's security can do their work efficiently and effectively. And thirdly, both concepts stipulate that the security sector is to be accountable to a representative, democratic authority.

In 1994, when the Code was elaborated, it was ahead of its time in developing norms for inter- and intra-state behaviour around these three ideas. As a document subject to the consensus agreement of OSCE members, it was understandably difficult to obtain agreement on everything that every country might have wished to include in the Code, or, once it was agreed, to adjust the document to ensure that it stayed abreast of new developments. One of the Code's provisions foresees, however, that the Code's implementation is subject to review, and three Follow-Up Conferences have been held to do just that. Moreover, the questionnaire used by OSCE member states to report on implementation of the Code has been modified on two occasions, once to give a larger

¹⁵ Pál Dunay, *The OSCE in Crisis*, Chaillot Paper, No. 88, April 2006, at <http://www.iss-eu.org/chaillot/chai88.pdf>.

place to the issue of terrorism after the events of 9/11, and a second time in an effort to facilitate more focused reporting.¹⁶

Generally, however, it has been left to SSR, as an evolving concept not subject to the constraints imposed by consensus politics, to develop the ideas behind the Code. From the perspective of SSR, there are several areas where the Code displays shortcomings. These are discussed below under the following headings:

- broadening the understanding of the security sector;
- enhancing norms on domestic security activity;
- rethinking the notion of sufficient expenditure;
- reinforcing the rights and responsibilities of armed forces personnel; and
- reviewing issues of accountability.

3.1. Broadening understanding of the security sector

As a developing concept, SSR has taken the need for a holistic approach significantly further than the Code. The latter's shortcomings in this regard are addressed below.

SSR includes all statutory security forces in its approach and subjects them all to the need to be both efficient and democratically governed. The Code addresses the military, the police, the paramilitary and the intelligence services but makes no mention of border guards and customs officers, who have become increasingly important for national security in recent years. The Code also fails to refer to penal institutions, whose proper functioning is a matter of considerable concern in several OSCE countries.

SSR also addresses the role of various non-statutory security forces, in particular such entities as private military and security companies which are, with only very few exceptions, generally not subject to democratic oversight and control.¹⁷ The Code only deals with these bodies superficially – and not by name – when it stipulates that 'the

¹⁶ Lambert, *op. cit.*

¹⁷ DCAF has done substantial research on this issue. See *Private Military Companies*, DCAF Backgrounder, April 2006, at http://www.dcaf.ch/_docs/bg_private-military-companies.pdf; and Fred Schreier & Marina Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, DCAF Occasional Paper, No. 6, March 2005, at http://www.dcaf.ch/_docs/op06_privatising-security.pdf.

participating States will not tolerate or support forces that are not accountable or controlled by their constitutionally established authorities.’¹⁸

SSR stresses the crucial role played by civil management authorities – departments and ministries – in giving direction to and managing the security sector, and the need to ensure that they receive the necessary training and resources to be able to perform professionally. Since 9/11, it has become clear that government departments not traditionally associated with security issues, such as ministries of health, agriculture and transport, can also have significant security responsibilities. Civil management authorities are not explicitly mentioned in the Code.

SSR sees an important role for the judiciary and legal institutions – the courts, ombudsmen,¹⁹ human rights commissions and the like – in overseeing, along with the legislature and the executive, the security sector. The judicial dimension is not included in the Code.

SSR envisages a vital function for civil society organisations, such as the media and think-tanks, in monitoring the security sector, conducting research, advising governments on policy, and training both specialists and the general public. Also included in the security sector are political parties, which in certain aspects of their activities – primarily security policy formulation – play a key role. The Code’s only reference to civil society comes with its call for ‘the integration of ... armed forces with civil society as an important expression of democracy’, which addresses an important but limited dimension of the civil society role.²⁰

Similarly, SSR acknowledges that the business community also has its place in the security sector. The corporate sector produces the lion’s share of equipment for the security forces, plays a leading role in the protection of vital civilian infrastructure and, like political parties, can have a decisive influence on security policy formation. This aspect is also not mentioned in the Code.

¹⁸ Code, Article 25; the text of the Code can be accessed at http://www.osce.org/documents/sg/1994/12/702_en.pdf.

¹⁹ See *Military Ombudsman*, DCAF Backgrounder, May 2005, at http://www.dcaf.ch/_docs/bg_military-ombudsman.pdf.

²⁰ Code, Article 20.

SSR emphasises the need for effective communication, co-operation and co-ordination among security sector actors in both the domestic environment and the regional and international contexts. This is a crucial aspect from several vantage points, but is also not reflected in the Code.

Similarly, in SSR thinking, the security sector has significant regional and international dimensions, which the Code does not address. Regional co-operation in security sector activities and the co-ordination of neighbouring states' policies have been demonstrated to be vital for crisis-management and -resolution efforts. Effective international co-operation and co-ordination has become increasingly important as security has become globalised, and traditional boundaries between domestic and external issues have faded.

3.2. Enhancing norms on domestic security activity

From the perspective of SSR, the Code is deficient in its provisions for reporting on an array of domestic security activities. Five issues stand out:

- The Code provides for 'democratic political control' of the military, the paramilitary, internal security forces, intelligence services and the police,²¹ but for 'effective guidance to and control' only of the military, the paramilitary and security forces.²²
- The Questionnaire on the Code obliges the participating states to provide information on 'constitutionally established procedures ensuring effective democratic control of the military, paramilitary, and internal security forces, as well as intelligence services, and the police'²³ and 'roles and missions of the military, paramilitary and security forces as well as controls to ensure that they act solely

²¹ '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' (Code, Article 20).

²² '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 fulfil 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' (Code, Article 21).

²³ Article 3 (a) of the Questionnaire on the Code stipulates that the participating States shall provide description of 'constitutionally established procedures ensuring effective democratic control of the military, paramilitary, and internal security forces, as well as intelligence services, and the police'; and Article 3 (c) requires a description of the 'roles and missions of the military, paramilitary and security forces as well as controls to ensure that they act solely within the constitutional framework' (FSC.DEC/4/03, 9 April 2003, Decision No. 4/03, Technical Update of the Questionnaire on the Code of Conduct, at http://www.osce.org/documents/fsc/2003/04/825_en.pdf).

within the constitutional framework'.²⁴ However, the reference to the implementation of these aspects in the Code is not similarly comprehensive.

- The Code fails to commit OSCE members to refrain from using organisations to circumvent limitations under arms control agreements related to the use and size of their armed forces. This has been a particular problem in the Russian Federation with the deployment of paramilitary units in Chechnya.
- The Code only deals with the use of armed forces in peacetime, ignoring the issue of their role in states of emergency and crisis.²⁵
- The Code does not address the responsibilities of OSCE participating states in those instances when the government of a member country has come under the control of its armed forces.²⁶

3.3. Re-evaluating the notion of sufficient expenditure

In addressing the issue of expenditure on security, the Code was above all concerned about overspending.²⁷ This was in response to the fact that during the Cold War and until serious downsizing of the military sector began in the 1990s, the formerly Communist members of the OSCE tended to entertain grossly inflated and non-transparent military budgets, a situation that Western donors also faced in developing countries. The concern was that over-expenditure could take away resources from internal development, as well as signal aggressive intentions abroad.

Some OSCE members, of course, continue to have security budgets that go beyond reasonable needs for self-defence. For SSR, however, sufficiency is about not only too many resources being dedicated to the security sector, but also too few. This underscores the fact that several countries do not possess the necessary resources to

²⁴ *Ibid.*, Article 3 (c).

²⁵ On states of emergency see *States of Emergency*, DCAF Backgrounder, October 2005, at http://www.dcaf.ch/_docs/bg_states-emergency.pdf.

²⁶ Thailand, where a military coup in September 2006 deposed a democratically elected government, is an OSCE partner country, and as such not a signatory of the Code. Still, if the OSCE had a proactive approach to the Code, it would have been logical for the Organisation to condemn the events in Thailand as a breach of OSCE norms, and to suspend the country's partner status until this situation had been rectified.

defend themselves properly and, in particular, to deal with the new security challenges that have emerged, whether they be the insurgencies in Iraq and Afghanistan, large-scale environmental disasters such as Hurricane Katrina and the South Asian tsunami, or conflict in various parts of Africa. Countries that do not have the necessary resources to defend their people from foreign aggression or to protect them in the street can be as much a cause of concern as those that misuse their national wealth for illegitimate or improper security activities.

3.4. Reinforcing the rights and responsibilities of armed forces personnel

One of the most important dimensions of the Code relates to the rights and responsibilities of individuals serving in the armed forces.²⁸ In the light of developments in the SSR approach, there are a number of areas where the Code displays shortcomings. For example, it does not make reference to the need for armed forces to ensure equal opportunity for members of minorities and both genders. In addition, the Code's provisions on the responsibility of individuals serving in the armed forces are weak, certainly much weaker than those of the 1949 Geneva Conventions that commit the contracting parties to enact penal legislation addressing grave crimes as well as to bring the perpetrators of such crimes – regardless of their nationality – before national and, as appropriate, foreign courts. These are matters that have gained in importance for OSCE members in the years intervening since the Code was agreed to. They constitute the kind of issue that might usefully be subject to a set of guidelines enumerating the rights and responsibilities of armed forces personnel, separate from but linked to the Code.²⁹

²⁷ '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' (Code, Article 22).

²⁸ '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' (Code, Article 28); 'Each participating State will provide appropriate legal and administrative procedures to protect the rights of all its forces personnel' (Code, Article 33).

²⁹ DCAF and the OSCE Office for Democratic Institutions and Human Rights are jointly working on a publication project entitled *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel*. For more information, see http://www.dcaf.ch/odihhr/_index.cfm?navsub1=24&navsub2=1&nav1=3.

3.5. Strengthening accountability

Both the Code and SSR stress the importance of the security sector being accountable to a country's democratically elected authorities. There are several issues particular to today's security environment that point to the need to strengthen such accountability. Two deserve special mention. One concerns the stationing of troops on foreign soil. The Code stipulates that 'a participating state may station its armed forces on the territory of another participating State in accordance with their freely negotiated agreement'.³⁰ This makes, however, no reference to the need for the parties entering an agreement on stationing troops to be accountable to a democratic authority in the deploying country or in that of deployment. This problem has gained in prominence in recent years in the CIS, where what once appeared to be temporary troop-stationing arrangements have been perpetuated, in some cases with little or no host country consent and without a democratic mandate.

A second problem involves the new generation of concerns regarding the accountability of those who manage and take decisions for the security sector that have surfaced since 9/11. The advent of strategic terrorism has spawned a number of new initiatives to enhance governments' capacities to gather information that can help them anticipate and prevent terrorist attacks, and prosecute suspected perpetrators of such acts. While such initiatives can be justifiable and necessary, they have frequently not been accompanied by measures to ensure that governments uphold commitments regarding civil liberties and human rights. Similarly, the alleged misuse or manipulation of intelligence in the conduct of the war in Iraq points to the need to enhance the accountability of government in decisions and actions that necessitate a degree of secrecy.³¹

³⁰ Code, Article 14.

³¹ See *Parliamentary Oversight of Intelligence Services*, DCAF Backgrounder, March 2006, at http://www.dcaf.ch/_docs/bg_intelligence_oversight.pdf; and *Contemporary Challenges for the Intelligence Community*, DCAF Backgrounder, March 2006, at http://www.dcaf.ch/_docs/bg_intelligence_challenges.pdf.

3.6. General considerations

To summarise: the Code is out of date; its understanding of the security sector has been left in the dust by developments intervening since it was agreed to; and it lacks clear definitions. SSR cannot fix all these problems but it can provide impulses for updating the Code and expanding its perspectives. With its insistence on a clear delineation of roles and responsibilities for security sector actors, SSR also acts as an admonishment to the guardians of the Code to inject greater clarity into its definitions and provisions.

In addition, there are clearly issues that were not on the radar screen of the Code's negotiators but that have since moved to the centre of states' preoccupations: the threat spectrum has evolved in spectacular fashion; key actors have changed; liberty and security now need to be reconciled anew. These are all issues that a code that aspires to be in tune with the features and challenges of the security environment of the twenty-first century ought to address.

4. How to Move the Agenda Forward

The Code has set the stage for SSR. The latter has taken the Code's concerns forward and complemented them in several ways. The SSR approach takes a broader view of the security sector, the actors that are involved in it, and the mechanisms required for it to be both efficient and accountable. The Code has, however, its own strong points and advantages. It is politically agreed, has been in force for over a decade and – for all the weaknesses of its implementation and reporting mechanisms – has a practice of state-to-state accountability that is absent from SSR. The states subject to the Code's provisions represent a microcosm of the world's states, whether they be developing, transitional, developed, or post- or non-conflict, and represent roughly a third of its membership. The fact that the Code has been agreed by such a diversified and representative community of states holds promise for its future. But what of the present, in view of the reigning difficulties in forging agreement on new political initiatives in the OSCE context?

There are several different initiatives that can be envisaged. The priority for the OSCE should be to enhance implementation of the Code's existing provisions. An initial step in this direction has been taken with the decision to hold a day-long meeting of the FSC to discuss implementation and review the Code. This meeting, to be held in September 2006, provides for substantially more time for consultations on the Code than has been available in recent years. It should become a regular fixture of the OSCE annual schedule. It could set the stage for a new Follow-Up Conference on the Code, the last having been held in 2002.

A second measure would be to launch a programme designed to enhance awareness of the Code in OSCE member states and improve their capacity to complete the Questionnaire in an adequate manner. This could involve holding workshops in member countries that could bring together representatives of the various parts of the security sector that are affected by the Code's implementation and develop a framework for co-ordinating the inputs of all security actors addressed by the Questionnaire.

A related initiative would be to work with model answers to the Questionnaire, as already suggested in FSC consultations in 2003, to ensure greater uniformity in national replies and increase the comparability of submitted data.³² There is also a need to review the present structure of the Questionnaire to ensure that it takes a balanced approach to the various themes addressed by the Code and solicits all relevant information. For example, there is some concern in Vienna that the Questionnaire currently places too much emphasis on reporting related to terrorism.³³

A third idea would be to use the Code and SSR as a framework for structuring the various activities carried out by the OSCE as they concern relations between society and its armed groups. These currently tend to be disconnected and lack policy coherence. Such a mapping exercise has already been carried out in the EU context, and is under

³² Alexandre Lambert (*op. cit.*, p. 2) argues that 'national replies address issues of high complexity that reach far beyond the competencies and responsibilities of ministries of defence (which are usually in charge to gather that information and submit the national reports to the other participating States)'. In 2003, the participating states came up with the idea of developing 'model answers' to guide national governments in their responses to the Questionnaire, but this has never been implemented. See Victor-Yves Ghebali & Alexandre Lambert, *The OSCE Code of Conduct on Politico-Military Aspects of Security: Anatomy and Implementation* (Leiden, 2005), p. 361.

way at the UN. It is assisting these organisations to give clearer orientation and coherence to their work.³⁴ It could prove particularly useful to the OSCE as a way of underscoring the special role the Organisation has played in developing norms pertaining to intra- and inter-state security, and help reinforce its position as a key player in Euro-Atlantic security.

Fourthly, the OSCE could consider highlighting the Code in its outreach activities beyond the Euro-Atlantic area. In addition to the above-mentioned efforts to develop a West African code of conduct, there is interest in the Code and similar initiatives in Asia and Latin America, and in Africa as a whole.³⁵ Such codes are bound to differ in content and style from that of the OSCE. Still, there are a number of core ideas that are germane to all theatres, and where the *acquis* of the OSCE and its experience with implementation may hold useful lessons for others.

A fifth area for reflection concerns ways and means of updating the Code to take into account changes in the strategic environment and the innovations of SSR. In an ideal world, it might be possible and desirable to renegotiate the Code. In the real world, there is little likelihood of this. What is more, it may not be necessary. Organisations such as the UN and NATO have managed to make several modifications to the scope and methods of their operations without reopening the UN Charter and the Washington Treaty, which, even if there had been a consensus for doing so, would have likely created more problems than it would have solved. It can be fairly safely concluded that it would be impossible to agree to update the existing Code under today's strategic circumstances.

Well short of this option, however, there are various avenues for updating, if not the Code's articles, then the way the provisions of the Code and the innovations of SSR are implemented under existing circumstances. One is to revise the Questionnaire, as last

³³ DCAF, *The OSCE Code of Conduct on Politico-Military Aspects of Security Revisited*, Workshop Report (Geneva, 3 July 2006).

³⁴ Professor Ghebali suggested in his Food for Thought Paper that an updated Code could serve as a framework for the OSCE's already substantial activities in the area of SSR, and give greater coherence to the work of the OSCE Secretariat. See Ghebali, *Recommendations on the Further Development of the OSCE Code of Conduct on Politico-Military Aspects of Security*, *op. cit.* DCAF has carried out a mapping exercise on the EU approach to SSR, and it is currently involved in a similar exercise on behalf of the UN.

³⁵ Lambert, *op. cit.*, pp. 10–12.

happened in 2003. A second is to draft a protocol addressing new developments not currently taken up in the Code. Another is to develop special instruments for issue areas that are insufficiently elaborated in the Code. For example, it might be useful to draft a separate code devoted to terrorism that would allow for a more focused approach to this issue, at the same time helping to unburden current consultations on the implementation of other aspects of the Code.³⁶ As mentioned above, a code on the rights and responsibilities of armed forces personnel is a further possibility.

Perhaps the most promising course for modernising the practice of the Code is for OSCE states to adopt a differentiated approach to implementation. Several members are clearly not ready or even opposed to assuming any new commitments. Others are open to enhancing their obligations. Why not then adopt a variable geometry approach such as the one practised in certain areas of the EU? Here, states that want to go further than a consensus of all 25 states permits can agree to do so within a smaller grouping of states with like-minded ideas, and, in the process, possibly pave the way for others states to follow when their situation allows. Such a peer pressure approach has not worked altogether badly for the EU and may be worth reflection in OSCE circles.

A differentiated approach would allow states that were so motivated to decide voluntarily to expand the range of issues on which they were prepared to give account to other OSCE members and to use the innovations of SSR to reinforce the relevance of the Code. There is plenty of precedent for such an approach. For example, the last item in the currently used Questionnaire for reporting implementation invites participating states to report other information as they see fit. Similarly, while a decision of all 56 participating states to render public information on implementation is not presently on the cards, there are several OSCE states that might consider taking such a step on a national or multilateral basis. Sweden has been the first to do so.

A transparent approach would enhance the visibility of the Code and open the door to engaging civil society in monitoring and publicising its provisions. It is incongruous that a foreign state should have easier access to information about a country's security practices than the citizens of that country. By turning what has been an exclusively

³⁶ See Ghebali, *Recommendations on the Further Development of the OSCE Code of Conduct on Politico-Military Aspects of Security*, *op. cit.*

governmental construct into a device for public diplomacy, this practice can be made to change. The Code should cease to be under the exclusive jurisdiction of the chancelleries of OSCE governments and become co-owned by the civil societies of as many of its members that are ready and willing to go public with their implementation records. This would be the most important single step that could be taken to improve the Code's accountability in implementation and to enhance its credibility. It would also set the stage for more a more ambitious rethinking of the Code on the part of all OSCE member states when prevailing strategic storms have passed and new political winds have risen.