II. The application of European confidence-building measures and confidence- and security-building measures in Ukraine

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The politico-military 'basket of measures' agreed by the Organization for Security and Co-operation in Europe (OSCE), a forum in which European states organize their security dialogue, represent key operational elements of the European confidence- and security-building regime.[1] Building on the work of its predecessor, the Conference on Security and Co-operation in Europe (CSCE), the OSCE has been the framework in which states have concluded a significant number of political agreements on military and non-military measures. Agreements cover a range of issues, including the management of small arms and light weapons and stockpiled ammunition, confidence-building measures in cyber security and support to the United Nations Security Council.[2] Certain aspects of the confidence- and security-building measures (CSBMs) agreed in the framework of the OSCE proved to be of the greatest relevance to the situation in Ukraine during 2014.

The Vienna Document 2011 on Confidence- and Security-building Measures is at the core of European CSBMs.[3] The Vienna Document includes chapters on the prior notification and observation of certain military activities, but the chapter on risk reduction was arguably the most in focus in 2014. While prior notification and subsequent observation of notified activities can be seen as regular and routine, the risk reduction chapter in the Vienna Document has been used only rarely. The risk reduction provisions were created for conditions where an OSCE participating state is concerned about unusual and unscheduled military activities.

According to the Vienna Document, in such circumstances a participating state can request an explanation and a meeting with the state it is concerned about. The document elaborates a mechanism for consultation and co-operation, and also envisages the voluntary hosting of visits to dispel concerns. In 2014 both of these provisions were invoked in connection with the Ukraine conflict, with mixed results.

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[1] The main European documents that establish the regime can be accessed at <http://www.osce. org/fsc/77039>. The OSCE also contributes to security building through its human dimension, and these aspects were also brought into focus in Ukraine in 2014. See chapter 14, section III, in this volume.

[2] E.g. the OSCE has elaborated measures related to United Nations Security Council resolutions, such as UN Security Council Resolution 1540 of 28 Apr. 2004 on the non-proliferation of weapons of mass destruction and reducing the risk from mass impact terrorism, and UN Security Council Resolution 1325 of 31 Oct. 2000 on women, peace and security.

[3] OSCE, Vienna Document 2011 on Confidence- and Security-building Measures, FSC.DOC/1/11, 30 Nov. 2011, <http://www.osce.org/fsc/86597>.

Consultation and cooperation

The Vienna Document states that 'Participating States will, in accordance with the following provisions, consult and co-operate with each other about any unusual and unscheduled activities of their military forces outside their normal peacetime locations which are militarily significant, within the zone of application for CSBMs and about which a participating State expresses its security concern'.[4]

The provisions specify that one participating state may transmit a request to the participating state in which the activity is taking place, asking for an explanation, stating the cause, or causes, of the concern and, to the extent possible, the type and location or area of the activity. The state to which the request is addressed must transmit a reply within 48 hours, providing answers to the questions raised along with relevant supporting information. On receiving the response, the state that made the original request may ask for a meeting with the responding state, which is to be convened within 48 hours and, if no location can be agreed, hosted by the OSCE Conflict Prevention Centre with the Chairman-in-Office as Chair. The request and the reply are transmitted to all other participating states, and either the requesting or responding states may ask other interested OSCE participating states to attend the subsequent meeting.

During March, April and May 2014 Russia received requests from Canada, Estonia, Ukraine and the United States for an explanation for the military activities of concern taking place in Russia, close to the Ukrainian border. The requesting states subsequently asked for meetings with Russia to discuss the activities of concern.[5] In response, Russia did not provide all of the requested information about the military activities near its border with Ukraine, and decided not to attend the meetings to discuss the activities. Russia argued that it had responded 'in sufficient detail to the first requests from Ukraine, the United States of America and Canada' and that 'the degree of detail in our responses was fully commensurate with the degree of specificity, argumentation and credibility of the requests themselves'.[6] The Russian response was criticized by other participating states, and labelled 'inconsistent with the letter and spirit of the Vienna Document' by the US delegation.[7]

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[4] OSCE, FSC.DOC/1/11 (note 3), para. 16.

[5] The meetings took place on 7, 17 and 30 April 2014.

[6] OSCE, 'Statement by the Delegation of the Russian Federation', *OSCE Forum For Security Cooperation Journal*, no. 777, 19 Nov. 2014, p. 2.

[7] US Mission to the OSCE, 'On Russian Military Activities Near Ukraine's Border', Statement by Ambassador Daniel B. Baer to a special joint-session of the Forum for Security Cooperation and Permanent Council, Vienna, 30 Apr. 2014, <http://osce.usmission.gov/apr_30_14_ukraine fscpc.html>.

Voluntary hosting of visits

To help dispel concerns about any military activities, the Vienna Document encourages OSCE participating states to host visits to particular areas where there may be cause for concern.

In March 2014, in response to a Ukrainian invitation, 30 OSCE participating states agreed to undertake in voluntary visits, along with one representative from the OSCE Conflict Prevention Centre.[8] Subsequently, mixed nationality teams drawn from the participating states visited Ukraine on 5–12 March, intending to visit Crimea, and on 12–20 March, to visit the south and east of the country. Subsequent reports on these visits noted that the teams 'could not dispel concerns resulting from increased Russian military activities in the Ukrainian region of Crimea as the team was consistently denied access to the peninsula by armed personnel'.[9]

Compliance and verification

Every year, OSCE participating states report a wide range of data as part of the Annual Exchange of Military Information (AEMI). For the purpose of verification, participating states have agreed that they will accept on-site inspections and evaluation visits. Specified areas within OSCE states may be inspected three times each year with no right of refusal, although access to sensitive parts of a specified area can be denied. Formations or units declared by states in the AEMI are subject to between 1 and 15 evaluation visits each year, but access can be refused to a specific formation or unit if it is not available—for example, if the unit in question is deployed abroad at the time.

Although the number of inspections and evaluations a state is obliged to accept within a calendar year is constrained, there is no limit on the number a state can accept on a voluntary basis. Between March and December 2014, Ukraine accepted 17 inspections from unarmed military experts from 24 countries.[10] These visits became the focal point of attention when a German-led inspection team, consisting of eight foreign inspectors and four Ukrainian escorts, was detained in the eastern part of

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[8] The states were Albania, Austria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Turkey, the UK and the USA. OSCE, 'OSCE to send military and civilian personnel to Ukraine', Press release, 5 Mar. 2014, <http://www.osce.org/sg/116093>.

[9] OSCE, 'EU statement on the situation in Ukraine', *OSCE Forum for Security Cooperation Journal*, no. 750, 26 Mar. 2014.

[10] The countries were: Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Hungary, Latvia, Lithuania, Luxembourg, Moldova, Montenegro, the Netherlands, Poland, Romania, Slovakia, Slovenia, Sweden, the UK and the USA.

Ukraine by supporters of the Donetsk People's Republic between 25 April and 3 May.[11]

The reasons for the detention have not been fully explained. The motive may have been to use the detainees as a bargaining chip to secure the release of individuals held by the Ukrainian authorities. The action may also have been taken to deter efforts by the international community to establish a presence on the ground in the south and east of Ukraine by demonstrating that Ukraine could not guarantee the safety and security of inspectors.

The Russian Foreign Ministry highlighted that the Ukrainian authorities were responsible for the 'safety of the inspectors in the areas where these authorities do not control the situation and where a military operation against the citizens of their own country has been launched'.[12]

The Code of Conduct on Politico-military Aspects of Security

Although it lacks the verification measures of the Vienna Document, the 1994 Code of Conduct on Politico-military Aspects of Security nonetheless addresses an important element of confidence building.[13] The politically binding code of conduct reinforces many of the principles and commitments intended to reduce the risk of inter-state conflict that are found in other OSCE documents, but adds an explicit commitment among participating states to cooperate to prevent and combat terrorism. Described in 2014 as the first 'toolkit for soft security', the code of conduct also includes commitments related to internal security.[14]

The code of conduct requires participating states to put in place a system and procedures to ensure that in any internal security mission, 'recourse to force . . . must be commensurate with the needs for enforcement. The armed forces will take due care to avoid injury to civilians or their property'.[15] 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

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[11] 'Pro-Russian separatists present detained OSCE observers to the media', Deutsche Welle, 27 Apr. 2014, <http://www.dw.de/pro-russian-separatists-present-detained-osce-observers-to-the-media/a-17594446>.

[12] '"NATO spies"? Slavyansk self-defense forces keep foreign military inspectors detained', Russia Today, 26 Apr. 2014, <http://rt.com/news/155056-ukraine-military-observers-slavyansk>; and 'Ukraine says OSCE hostages used as "human shields"', France 24, 27 Apr. 2014, <http://www.france24.com/en/20140426-russia-ukraine-detained-osce-observers-nato-spies>.

[13] OSCE, Code of Conduct on Politico-military Aspects of Security, DOC/FSC/1/95, 3 Dec. 1994, <http://www.osce.org/fsc/41355>.

[14] Chaudhuri, P., Lambert, A. and Schmidt, T. (eds), *20 Years of OSCE Code of Conduct on Politico-military Aspects of Security: A Commemorative Study on the History, Development, Achievements and Outreach of the OSCE Key Document for Politico-military Norms and Principles on Armed and Security Forces* (OSCE: Nov. 2014).

[15] OSCE, DOC/FSC/1/95 (note 13), para. 36.

national, religious, cultural, linguistic or ethnic identity'.[16] According to the code of conduct, participating states 'will not tolerate or support forces that are not accountable to or controlled by their constitutionally established authorities'.[17]

The relevance of the provisions in the code of conduct related to accountability and control was underlined during the Ukraine conflict. The issue of the chain of command for foreign fighters had important implications for the classification of the conflict by the International Committee of the Red Cross (ICRC) and for establishing accountability for the behaviour of foreign fighters with respect to international humanitarian law (see section I). International bodies with a presence on the ground, including the United Nations and the OSCE, reported an increasing number of foreign fighters participating in the fighting. Foreign fighters supporting the Ukrainian authorities have been incorporated into special units of volunteers. Some of the volunteer units, known as territorial battalions, were under the command of the Ministry of Defence while others, known as special police battalions, were under the command of the Ministry of Internal Affairs.

Implementation of the code of conduct is more difficult to assess with respect to opponents of the Ukrainian Government, partly because it is difficult to be certain about the status of forces claiming allegiance to the self-proclaimed Donetsk and Luhansk People's Republics (see section I). While the Russian Government did not deny that Russian citizens were fighting alongside armed units in eastern Ukraine, these individuals were described as volunteers, and those in uniform were not wearing insignia identifying them as members of Russian military units.[18]

Analyses of national reports, which are published on the OSCE website, have revealed that a number of the issues arising in Ukraine are of widespread concern, and in need of further elaboration.

In 2010 the OSCE Conflict Prevention Centre published an analysis by two academic authors that highlighted the diversity of national approaches to non-military security forces.[19] The authors found that reporting on paramilitary and internal security forces was far less clear and harder to interpret than reporting on military forces. Many states reported that they had no paramilitary forces and failed to differentiate between internal security

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[16] OSCE, DOC/FSC/1/95 (note 13), para. 37.

[17] OSCE, DOC/FSC/1/95 (note 13), para. 25.

[18] Flintoff, C., 'Russia reports troop deaths in Ukraine, but calls them "volunteers"', National Public Radio, 8 Sep. 2014, <http://www.npr.org/blogs/parallels/2014/09/08/346735504/some-in-russia-admit-their-troops-volunteer-in-ukraine>.

[19] OSCE, *Report of the Academic Study on the 2010 Information Exchange of the Code of Conduct on Politico-military Aspects of Security* (OSCE Conflict Prevention Centre: Vienna, 13 Sep. 2010), pp. 7–8.

forces and various types of specialist police forces operating under a different set of laws and regulations.

The authors noted the difficulty that participating states seem to encounter in reporting on internal security missions. The additional difficulty of reporting information on non-military security forces, including in some countries reporting on the rules governing private sector security companies, underlines that there is still no agreed definition of the security sector in Europe.

An assessment of the application of confidence- and security-building measures in Ukraine

In 2013 Russian officials asserted that, while structural conventional arms control no longer had a meaningful purpose, CSBMs still played a useful role in regulating security relationships in Europe.[20] By the end of 2014, however, Russian officials were expressing limited confidence in the utility of CSBMs, which were said to be characterized by a 'bloc bias'.[21]

Russia claimed in 2014 that the use of the Vienna Document did not contribute to a reduction in tension, and in a statement to the OSCE Forum for Security Cooperation in November 2014 the Russian delegation referred to a 'crisis of confidence in the area of arms control and confidence- and security-building measures'.[22]

Russia complained about the political use of CSBMs to support one party to a conflict and exert pressure on another, and argued that measures were not being used for the purpose for which they were created. For example, inspections and evaluations in Ukraine were not motivated by concerns about Ukrainian compliance with the Vienna Document, but instead being used to signal political support for the Ukrainian authorities in an ongoing conflict. Russia alleged that inspection reports were biased in the favourable way they portrayed the actions of Ukrainian forces and the negative way they described the actions of opposition forces, and included information that was not collected during the inspections or verified by inspectors. The underlying Russian complaint was that inspection reports had ceased to be part of improving transparency or predictability, but instead become a political commentary on the ongoing conflict.

Russian complaints of unfairness also reflected the uneven distribution of compliance monitoring. The average number of inspection and evaluation activities would suggest a rate of 2 inspections and 1 evaluation per country per year, but Russia received 6 such visits in 2014. Altogether,

[20] Anthony, I. and Grip, L., 'Conventional arms control and confidence- and security-building measures in Europe', *SIPRI Yearbook 2013*.
[21] OSCE, Statement by the Delegation of the Russian Federation (note 6).
[22] OSCE, Statement by the Delegation of the Russian Federation (note 6).

Russia received 37 visits of one kind or another within the framework of CSBM agreements during 2014.

Other Russian assertions highlighted long-standing concerns. For example, the way Russia responded to requests for consultation in 2014 corresponded broadly with the way Western countries reacted in 1999, when Belarus and Russia invoked the risk reduction chapter of the Vienna Document in connection with the Kosovo crisis. At that time, the USA argued that complying with CSBM requests would be a threat to North Atlantic Treaty Organization (NATO) operational security.[23]

It has long been the Russian view that CSBMs under the Vienna Document are 'fair weather instruments' that will inevitably break down in a crisis or conflict because confidence is bound to evaporate quickly in such conditions. Past experience of CSBMs at times of conflict, such as in the South Caucasus and Kosovo, as well as current experience in Ukraine, tend to support this view.

The logic of the CSBM regime is that by combining information generated in different ways—and the Vienna Document recognizes that national technical means can also play a role in monitoring compliance with agreed CSBMs—the regime can contribute to predictability by giving states the best possible information about what is happening in a given security environment. However, if states do not seek transparency or predictability, but instead see advantages in deception and uncertainty, the utility of the CSBM regime is called into question.

From this point of view, the application of Europe-wide CSBMs to the specific conditions of Ukraine in 2014 made at best a limited contribution to reducing the negative impact of the conflict. The information yielded by visits, inspections and evaluations did not produce clarity about events unfolding on the ground, remained highly contested and did not provide any basis for further dialogue.

The application of CSBMs in crisis and conflict situations requires further discussion among OSCE participating states. The dialogue should include discussion on how to make better use of elements of the existing Vienna Document—in particular the regional measures envisaged in the document—as well as the need to combine local application of Europe-wide CSBMs with the use of dedicated measures developed for localized crisis situations. Whether and how CSBMs can apply to non-state armed actors within the OSCE area is another aspect that requires more analysis.

[23] Lachowski, Z., *Confidence- and Security-Building Measures in the New Europe*, SIPRI Research Report no. 18 (Oxford University Press: Oxford, 2004), pp. 93–95.