



SPECIAL REPORT

2301 Constitution Ave., NW • Washington, DC 20037 • 202.457.1700 • fax 202.429.6063

ABOUT THE REPORT

This report addresses the increasingly common practice of state-sanctioned civil defense groups—groups that governments have established or supported to provide security to communities when state security forces are unwilling or unable to do so. Given the perverse results that many communities experience from armed militias breaching domestic and international law, this report recommends developing better accountability of such groups. More specifically, it argues for developing an international normative instrument that enhances accountability of both states and civil defense groups by restating the rules of international law, establishing a due diligence policy, and developing a code of conduct.

ABOUT THE AUTHOR

Bruce “Ossie” Oswald is an associate professor at Melbourne Law School and the director of the Asia Pacific Centre of Military Law. This report is based on his research while at the United States Institute of Peace, where he was a Jennings Randolph Senior Fellow in 2012–13, and his military experience, serving on operations in Rwanda, East Timor, Iraq, and, most recently, Afghanistan.



© 2014 by the United States Institute of Peace.
All rights reserved.

SPECIAL REPORT 350

AUGUST 2014

CONTENTS

Engaging with Civil Defense Groups in Armed Conflict	2
Relevance and Application of Existing Law	4
Conclusion and Recommendations	7

Bruce “Ossie” Oswald

Civil Defense Groups

Developing Accountability

Summary

- Between 1981 and 2007, governments in eighty-eight countries established or supported more than three hundred armed militias to provide security to local communities. Such militias often directly engage in armed conflict and law-and-order activities.
- A number of state-supported civil defense groups make local communities less secure by refusing to respond to state direction, setting up security apparatuses in competition with state authorities, committing human rights violations, and engaging in criminal behavior.
- The doctrine of state responsibility and the application of international humanitarian law, international human rights law, and international criminal law obligate the state or states that establish or support civil defense groups to investigate, prosecute, punish, and provide reparations or compensate victims.
- In many cases, the domestic laws of states are ineffective at holding members of governments or civil defense groups accountable. Local law enforcement authorities also often fail to investigate or prosecute members of civil defense groups.
- At present there is no specific international legal instrument to guide the responsible management of relationships between states and civil defense groups. Thus, the international community should develop a legal instrument that specifies the rules and principles that apply to states and civil defense groups and that includes a due diligence framework that focuses on accountability and governance of both states and civil defense groups.
- Such a framework would enhance the protection and security of communities by setting accountability and governance standards, assisting in security sector reform by establishing benchmarks and evaluation processes, and contributing to the reinforcement of legal rules and principles that apply in armed conflicts.
- For fragile states or those in a postconflict phase of development, the better management of such forces is likely to build state legitimacy as a provider of security to vulnerable communities.

ABOUT THE INSTITUTE

The United States Institute of Peace is an independent, nonpartisan institution established and funded by Congress. Its goals are to help prevent and resolve violent conflicts, promote postconflict peacebuilding, and increase conflict management tools, capacity, and intellectual capital worldwide. The Institute does this by empowering others with knowledge, skills, and resources, as well as by its direct involvement in conflict zones around the globe.

BOARD OF DIRECTORS

Stephen J. Hadley, (Chair), Principal, RiceHadleyGates, LLC, Washington, DC • **George E. Moose** (Vice Chair), Adjunct Professor of Practice, The George Washington University, Washington, DC • **Judy Ansley**, Former Assistant to the President and Deputy National Security Advisor under George W. Bush, Washington, DC • **Eric Edelman**, Hertog Distinguished Practitioner in Residence, Johns Hopkins School of Advanced International Studies, Washington, DC • **Joseph Eldridge**, University Chaplain and Senior Adjunct Professorial Lecturer, School of International Service, American University, Washington, DC • **Kerry Kennedy**, President, Robert F. Kennedy Center for Justice and Human Rights, Washington, DC • **Ikram U. Khan**, President, Quality Care Consultants, LLC., Las Vegas, NV • **Stephen D. Krasner**, Graham H. Stuart Professor of International Relations at Stanford University, Palo Alto, CA • **John A. Lancaster**, Former Executive Director, International Council on Independent Living, Potsdam, NY • **Jeremy A. Rabkin**, Professor of Law, George Mason University, Fairfax, VA • **J. Robinson West**, Chairman, PFC Energy, Washington, DC • **Nancy Zirkin**, Executive Vice President, Leadership Conference on Civil and Human Rights, Washington, DC

MEMBERS EX OFFICIO

John Kerry, Secretary of State • **Chuck Hagel**, Secretary of Defense • **Gregg F. Martin**, Major General, U.S. Army; President, National Defense University • **Kristin Lord**, Acting President, United States Institute of Peace (nonvoting)

The views expressed in this report do not necessarily reflect the views of the United States Institute of Peace, which does not advocate specific policy positions.

To request permission to photocopy or reprint materials, e-mail: permissions@usip.org

Engaging with Civil Defense Groups in Armed Conflict

Civil defense groups exist in many states where there is armed conflict or in many postconflict situations. The term “civil defense groups,” as used in this report, refers to civilians who are both armed and organized but who are not professional fighters in the same way as, for example, members of a state’s military are¹. Furthermore, the term refers to groups that are established and supported by states (either the territorial state or a third-party state with the consent of the territorial state) or tolerated or accepted by states. Civil defense groups might be used by states to provide local security and law and order by undertaking various functions and tasks. These include using armed force to protect the local community, manning road blocks, searching vehicles, undertaking joint patrols with state or third-party security organizations, detaining suspicious people, and providing information about local actors. While it is true that such groups can increase security, there is also a cost or dark side to supporting such groups. They could worsen security, commit serious violations of the law, or go rogue and become a part of the problem rather than the solution.

State support for the group might include members being paid when they undertake their functions and tasks and, in some cases, funds or resources might be allocated to the local community more generally for the work of the group. Such groups might also undertake activities for a variety of actors other than the state—such as private companies, local power brokers, criminal gangs, and businessmen. A study published in 2013 found that between 1981 and 2007 there were at least 331 groups affiliated to governments functioning in eighty-eight countries.² Those numbers demonstrate that the existence of civil defense groups is a reality that many communities face around the world.

Civil defense groups have existed in a number of states, including Afghanistan, the Central African Republic, the Democratic Republic of the Congo, Iraq, Libya, Mali, the Philippines, and Yemen. In Afghanistan, the village stability (VSO) program, involving the formation of civil defense groups, was created by U.S. Special Forces to provide protection to villages where Afghan law-and-order officials were unable to operate.³ The Sunni Awakening in Iraq cooperated with coalition forces to fight against al-Qaeda in Iraq. In Libya, armed groups control some communities and refuse to surrender their weapons to the new government.⁴ In Mali, the militia group, Azawad National Liberation Movement (MNLA), formerly aligned with Islamists before supporting the Mali government forces and the French military, has undertaken law-and-order functions by detaining militant Islamists.⁵ It has also been reported that “militia have emerged to fill the vacuum left by ineffective state security services and the weak rule of law in Mindanao [Philippines].”⁶ So-called popular committees in Yemen have developed “out of home-grown resistance to terrorist organizations such as Ansar al-Sharia and al-Qaeda in the Arabian Peninsula” and later fought alongside the Yemeni government forces to reassert government control in eastern Yemen.⁷ In some cases, such as Afghanistan and Yemen, the civil defense groups evolve into organizations that fall under government structures and therefore become formal representatives of the state. More recently there have been allegations concerning the extent of the support pro-Russian militia groups in the Ukraine are receiving from the Russian government. In some of these cases, it is difficult to conclude the extent to which states have established or supported groups and where they have tolerated or collaborated with groups.

Reasons for states to establish or support civil defense groups vary. A state might establish or support civil defense groups because they are the only means it has to provide a level of protection to communities that are geographically isolated, held by rebel groups, or dominated by lawlessness. In such situations, the reach of the state extends only as far as the resources it has to protect communities. There might also be a long tradition in some communities of taking

responsibility for their own safety, notwithstanding concerns about the effectiveness of the formal state authorities. In other situations, a state might establish or support civil defense groups because it wishes to use such groups to carry out illegal actions that the state itself does not wish to be directly associated with. There might also be cases where a third-party state (for example, during coalition operations) arms members of local communities to ensure that those communities take responsibility for their own protection, thus reinforcing a sense of “local ownership” for security and limiting allegations of foreign interference in community life. In some situations governments might also establish civil defense groups across their borders so as to protect those with ethnic or historic ties with communities within their own borders.

Engagements between governments and civil defense groups can bring about greater stability in areas where the government or the international community has little influence or effect. Such groups can, by representing the interests of their community, provide a means to deal with the interests and grievances of the wider community and limit what can sometimes be viewed as the blunt instrument of state authority in dealing with localized conflicts. The VSO program in Afghanistan, which was established in early 2010, is an example of how “local” protection might be effective. The program at that time was seen as a means of not only inverting Taliban strategy but also protecting villages from within rather than from the outside. As argued by Daniel Green, “Instead of utilizing a top-down heavily military approach where security was often something done to a village not with it, SOF [Special Operations Forces] inverted the strategy by replicating the Taliban’s methods of leveraging the population by using a bottom-up initiative that was decentralized and village-based.”⁸

Civil defense groups might also provide a fiscally sustainable and resource-efficient means for states to provide law and order to local communities. At the local level, there is little doubt that civil defense groups can benefit communities. At least one example of U.S. military doctrine states:

If adequate HN [host nation] security forces are not available, units should consider hiring and training local paramilitary forces to secure the cleared village or neighbourhood. Not only do the members of the paramilitary have a stake in their area’s security, they also receive a wage. Providing jobs stimulates the economy. Having a job improves morale and allows locals to become a potential member of the local government process.⁹

In relation to security and dealing with insurgencies, the Philippines government has stated that certain civil defense groups can act as “force multipliers” to suppress insurgencies and other national security threats.¹⁰ Similarly, the Colombian government “encouraged the creation of “self-defense groups” among the civilian population... to help law enforcement agents during anti-subversive operation and to defend the civilian population from guerrilla groups.”¹¹

There are, however, dark sides to creating or dealing with civil defense groups. The costs of supporting civil defense groups include the potential that they could, in fact, worsen security. Researchers have documented gross human rights violations, criminal behavior, refusal to disarm, and actions that further weaken formal government structures and influence.¹² The use of civil defense groups “increases the risk of irresponsible behavior or moral hazard” between states and civil defense groups.¹³

Concerns have been expressed about the VSO program in Afghanistan, including its subsequent evolution to the Afghan Local Police (ALP) under the authority of the Ministry of Interior. For example, Human Rights Watch reported in September 2011 that soon after the VSO program began, there were allegations of abuse against members of that program.¹⁴ Erica Gaston, a human rights lawyer at the United States Institute of Peace, has argued that in Yemen there are fears

that civil defense groups “may become a part of the problem rather than the solution. They might turn into armed groups and engage in criminal activity or challenge government authority.”¹⁵ In situations where a state is fragile, the actions of such groups might add to the risk of the state falling back into conflict or create an environment where terrorism has fertile ground to grow both within the state and extraterritorially. Such risks might arise because of terrorist infiltration of the civil defense groups or because the members of the civil defense groups alienate the local population, which in turn leads members of that population to support terrorist or other criminal groups. There are also other policy concerns, such as having an exit strategy to determine when supporting civil defense groups is no longer warranted and making decisions about when, and how many, resources should be devoted to establishing and maintaining such groups rather than establishing and maintaining state-based law-and-order authorities.

The continuing existence of some militia groups in Libya is an example of some of the difficulties that arise when trying to disband civil defense groups. There have been numerous reports of civil defense groups refusing to disband or refusing to join the Libyan National Army or police force. In some situations, the civilian communities, which are supposed to be protected by the civil defense groups, have turned on the groups because they have become tired of the groups exercising power. In other cases, the groups have turned on each other violently, thus jeopardizing the security of the communities they are supposed to protect.¹⁶

There are also concerns about the physical security and stockpile management (PSSM) of small arms and light weapons when state authorities fail to account for the weapons they hand to civil defense groups or the groups acquire weapons outside the state system. For example, it has been reported that the PSSM practices of the Misrata militias in Libya were sometimes inadequate.¹⁷

In addition, states often find it useful to manipulate their relationship with civil defense groups to evade accountability by, for example, claiming that it is too difficult or dangerous to investigate the acts of such groups or that they have little control over such groups. They may also not disclose the extent of their relationship to limit the extent of state responsibility. Despite the concern about the existence of these groups and the risks they pose, “there has been little analysis or understanding of how best to mitigate the risks, and when or how such groups should be supported or disbanded.”¹⁹

So, in situations where states find that civil defense groups are a necessary means to maintain security, the primary question that arises is: How might the connection between states and civil defense groups be managed responsibly so as to enhance accountability and, therefore, mitigate the chance of negative consequences emerging?

States often find it useful to manipulate their relationship with civil defense groups to evade accountability by, for example, claiming that it is too difficult or dangerous to investigate the acts of such groups or that they have little control over such groups.

Relevance and Application of Existing Law

The primary legal regime that applies to the conduct of members of civil defense groups is the domestic law of their state. In most situations, that law will be sufficient to prosecute members of the group for serious violations, such as murder, kidnapping, serious assaults—including sexual assaults—and serious thefts. Unfortunately, the issue is often not about the adequacy of the domestic law but its enforcement. It is sometimes the case that local law enforcement authorities fail to investigate or prosecute members of civil defense groups, and therefore, such groups are left unchecked. The reasons for failing to investigate or prosecute might include limited resources to investigate breaches of the law, the local law-and-order authorities might be corrupt, or the local community could be fearful of making complaints against members of civil defense groups. In some situations, it might also be difficult to enforce domestic law against members of civil defense groups because they have become more powerful than the formal state representatives. There might also be arguments that the

extant domestic law is so far removed from the security realities facing the community that it is inappropriate to rely on it in situations of armed conflict. Reliance on the enforcement of the domestic law of the host state is therefore unlikely in many circumstances to govern the conduct of civil defense groups. There are also cases where domestic law in fact authorizes the establishment and support of civil defense groups and mandates such groups to support the work of government agencies in suppressing insurgencies or maintaining law and order. In such situations, concerns arise as to how best to ensure that the state and the group are held accountable for any illegal acts or omissions.

Stepping outside the domestic law arena, international law also creates obligations for states in relation to their dealings with civil defense groups. The level of control a state has over a civil defense group is relevant in determining the extent to which that state will be responsible for the conduct of that group. Where civil defense groups or their members act, for example, “on the instructions of, or under the direction or control of” a state,²⁰ that conduct will be considered the act of that state. However, it is “clear the instructions, direction or control must relate to the conduct which is said to have amounted to an intentionally wrongful act.”²¹ Therefore, the threshold of the responsibility of states in relation to attribution for the acts carried out by nonstate entities is set high. That high threshold standard reflects the International Court of Justice majority decision in the Nicaragua case, where the court found that the “participation...in financing, organizing, training, supplying and equipping the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself” to directly attribute responsibility to the United States for the acts committed by the Contras during their military and paramilitary operations.²² A stricter test applies in situations where civil defense groups or their members are empowered by a state to exercise aspects of governmental authority. In such cases, the conduct of the members or the group “shall be considered an act of State under international law, provided the person or entity is acting in that capacity in the particular instance.”²³ As civil defense groups generally operate on their own territory, it seems likely that the stricter test will be applied.

There might be circumstances where the conduct of a group or its member goes beyond that authorized by the government. In such cases, much will depend on the facts and whether the conduct was incidental to what was authorized or went beyond the authorization. However, states will need to be cognizant that they might still bear responsibility for unlawful acts of civil defense groups or their members if the state has effective control over them, “even if particular instructions may have been ignored.”²⁴ Such responsibility might arise, for example, where a state delegates some aspects of governmental authority, such as the maintaining of law and order, to the group. The state’s responsibility for acts carried out by civil defense groups might also be raised where “there is a pattern of killings and the Government’s response (in terms of prevention or of accountability) is inadequate...[since] the State...must meet its due diligence obligations to take appropriate measures to deter, prevent, investigate, prosecute and punish perpetrators.”²⁵ In the infamous case of the Pueblo Massacre in Colombia, the Inter-American Court of Human Rights reinforced the general principle that a state’s responsibilities may arise even where the acts or omissions of civil defense groups are not attributable to the state because states have obligations to guarantee the rights of individuals even from the acts or threats of third parties who are not affiliated directly to the state.²⁶

More narrowly there are other areas of international law, such as international humanitarian law, international human rights law, and international criminal law that govern to varying extents the accountability of states and civil defense groups. International humanitarian law, the body of law that applies during armed conflicts, has Common Article 1 to the Four Geneva Conventions: “To respect and ensure respect for the...[Conventions] in all circumstances.”

The level of control a state has over a civil defense group is relevant in determining the extent to which that state will be responsible for the conduct of that group.

There is some disagreement as to the exact scope and content of that article, but it has been argued that all states and parties to an armed conflict have an obligation “to refrain from encouraging violations of international law by any party to an armed conflict and to exert their influence, to the degree possible, to prevent and end violations. . .in accordance with international law.”²⁷ The obligation to respect and ensure respect would therefore require states to make sure that civil defense groups are, for example, adequately vetted, trained, and provided with resources that are necessary and appropriate for them to conduct their functions and tasks. If that article applies, states would also be required to ensure that civil defense groups apply legal principles concerning proportionality, necessity, and humanity and that obligations relating to such matters as targeting and detention are adhered to. As all individuals have obligations under international humanitarian law, it is clear that members of civil defense groups are also subject to the grave breaches regime found in international humanitarian law and are therefore subject to prosecution for acts such as willful killing, torture, or inhuman treatment.

In situations where the law of occupation applies,²⁸ international humanitarian law requires the occupying power to restore and maintain public order and civil life.²⁹ That aim might clearly be achieved in some circumstances by an occupying power establishing or supporting civil defense groups to provide protection to communities geographically isolated or dominated by lawlessness. If the law of occupation is used as a justification, then the obligations discussed above concerning the application of Common Article 1 to the Four Geneva Conventions will apply to the occupying force.

International human rights law also applies to states that establish or support civil defense groups. The territorial state that establishes or creates such groups will certainly be required to comply with its obligations under international human rights law.

International human rights law also applies to states that establish or support civil defense groups. The territorial state that establishes or creates such groups will certainly be required to comply with its obligations under international human rights law. Consequently, the territorial state will need to comply with its general obligation to respect, protect, and fulfill human rights. Outside states operating in the host state that establish or support civil defense groups will also be subject to their international obligations to the extent that those obligations apply extraterritorially.³⁰ More specifically, the territorial state will have obligations under the *International Covenant on Civil and Political Rights* (ICCPR). Article 6(1), for example, requires the state to protect the right to life and prohibits the arbitrary deprivation of life. States would also have a duty to ensure that members of civil defense groups do not carry out arbitrary and unlawful arrests and detention and that they do not subject any person to torture or to cruel, inhuman, or degrading treatment or punishment.

Recent investigations by international bodies have made clear that the combination of the doctrine of state responsibility and the application of international humanitarian law, international human rights law, and international criminal law reinforces the obligation of the state or states that establish or support civil defense groups to investigate, prosecute, punish, and provide reparations or compensate victims. Reports by international commissions of inquiry, such as those established for Libya and Syria, have emphasized that the obligations to investigate, prosecute, punish, and provide reparation or compensation “lie at the heart of human rights protection and are binding on UN members in that they have been relied upon and further developed in the jurisprudence of UN-backed international courts and also have been agreed upon by the States represented within relevant United Nations bodies.”³¹

In addition to issues concerning accountability raised above there are other questions left unresolved by the lack of a discrete language governing civil defense groups. For example, are they civilians or combatants? Questions arise as to whether members of civil defense groups should be considered as direct participants in hostilities or as part of an opposition organized armed group when they are carrying out their functions. Are the members of civil defense groups entitled to prisoner of war status if captured by opposing forces? When and where

might they be attacked? Does the doctrine of command responsibility extend to them? The blurring of lines between combatants and civilians also extends to creating vulnerabilities for local communities, particularly where members of those communities provide intelligence or information against insurgency groups.

Such concerns have also been raised in relation to the private military and security companies (PMSCs).³² In the context of PMSCs, a number of states and the ICRC have developed a nonbinding instrument that addresses the legal status of PMSCs under the 1949 Geneva Conventions, the individual accountability of members of PMSCs, and the duties of authorities to oversee the acts of PMSCs. The instrument, referred to as the Montreux Document, was finalized in 2008.³³ It was followed in 2010 by the International Code of Conduct for Private Security Service Providers, known as the PSSP Code. The PSSP Code provides principles for private security providers to comply with and governance and oversight mechanisms relating to their conduct.

It is useful to use the Montreux Document and the PSSP Code as a foundation for developing an accountability regime to responsibly manage the relationship between states and civilian defense groups because both PMSCs and civilian defense groups undertake similar functions and tasks. Both groups might provide security, undertake patrols to establish and maintain security, provide information to the government authorities, engage in armed attacks, and take detainees. There are, however, two key differences: First, PMSCs are engaged by states on a contractual and commercial basis—they are, in fact, often private business entities. The practical effect of the contractual and commercial basis of engagement is that in many cases the PMSCs will be subject to commercial law governance obligations, which in turn reinforce accountability. Civil defense groups may have a financial interest because, for example, they receive a stipend while they undertake their defense functions and tasks, but that interest is often not enough to have a positive impact on their behavior. Second, PMSCs might come from a variety of states, whereas civil defense groups are usually citizens of the territorial state. The differences however are not so fundamental as to make irrelevant the use of the Montreux Document and the PSSP Code by way of analogy when addressing the relationship between states and civil defense groups.

Conclusion and Recommendations

Many communities in armed conflict situations face the daily reality of dealing with civil defense groups. It is also a fact that often members of those groups and the states that support them are not held accountable for violations committed by members of the group. To better protect the local population, reinforce both domestic and international law and procedure, and develop effective security sector reform programs, it is recommended that the international community should be guided by the Montreux Document and the PSSP Code to accomplish the following:

- create a nonbinding legal instrument to establish a framework that formalizes the normative values that must, or should, apply to the relationship between states and civil defense groups;
- create a due diligence policy that requires states to take appropriate steps such as deterring and preventing civil defense groups from committing crimes; and
- create a generic code of conduct applicable to civil defense groups that not only restates the relevant legal rules that such groups must adhere to but also reinforces good practice standards concerning matters like the command and control arrangements for the group.

An instrument that is not legally binding but which nonetheless restates the rules of international law that apply to states in their relations to civil defense groups would go a considerable way to reminding states about their legal obligations.

A Nonbinding Legal Instrument

An instrument that is not legally binding but which nonetheless restates the rules of international law that apply to states in their relations to civil defense groups would go a considerable way to reminding states about their legal obligations under areas of law such as the doctrine of state responsibility, international humanitarian law, and international human rights law. The instrument would also add to the endeavors of the international community to implement security sector reform plans and programs by ensuring that all stakeholders better understand the applicable rules and principles, risk mitigation strategies, and accountability mechanisms when engaging with civil defense groups. A rule-of-law-focused, transparent, and pragmatic instrument will also assist in better protecting communities from civil defense groups that go rogue or that have members who are criminals.

To achieve the above results, the instrument must clearly state both the rules and principles that apply to civil defense groups and their relationships with states. Furthermore, the instrument should include a due diligence framework that sets up, among other things, appropriate procedures to ensure that risk assessments, risk mitigation, and accountability are undertaken when states engage with defense groups. The instrument should also have a code of conduct that establishes a normative framework to regulate the behavior of the group. The framework and code might also be developed as stand-alone documents. The instrument (and the framework and code if created as stand-alone documents) would not diminish existing legal obligations of states but either restate those obligations or develop additional principles and standards that are necessary to ensure that the risks of having civil defense groups is mitigated.

Using the Montreux Document as a template would provide a solid foundation for developing the instrument. Accepting that a provision-by-provision analysis for compatibility is required, it is nonetheless clear that the Montreux Document would be relevant to the relationship between states and civil defense groups. For example, Part I, which deals with the legal obligations of states to ensure respect for international humanitarian law by PMSCs and the responsibility of states to implement their obligations under international human rights law, would also apply to civil defense groups. Similarly, obligations to investigate—and where appropriate—prosecute, extradite, or surrender persons suspected of international crimes would apply. The general recognition in law is that where the acts of PMSCs or their personnel are attributable to the state, those acts would also extend to acts carried out by civil defense groups and their members.

The reference in the Montreux Document to the obligations of all other states to ensure, when in their power to do so, respect for international humanitarian law would also be relevant to engaging with civil defense groups. The provisions dealing with other states would therefore apply to third-party states that use civil defense groups for security purposes. Finally, the provisions relating to superior responsibility that concern government officials being liable for crimes under international law could also apply to the relationship between government officials and civil defense groups. In relation to the obligations of civil defense groups and their members, the provisions in the Montreux Document that concern PMSCs and their personnel would also be applicable. Thus, the obligations of PMSCs to comply with international humanitarian law, or human rights law that arise from domestic law, and the provisions that PMSCs cannot be attacked unless and for such time as they are directly taking part in hostilities, would translate to applying to civil defense groups as well. However, the references in Part I to contracting states and home states would not be as relevant to civil defense groups.

Part II of the Montreux Document deals with good practices relating to PMSCs and is intended to provide states with guidance. It covers specific issues, such as procedures for selecting and contracting with PMSCs, criteria for selecting PMSCs, monitoring compliance,

ensuring accountability, and rules for the provision of services by PMSCs and their personnel. The specific provisions concerning training, use of force and firearms, and the accountability for, and return of, weapons and ammunition would be applicable to civil defense groups as well. Further, the provisions relating to accountability could also lead to a more refined due diligence framework that ensures appropriate processes are in place to control the existence and development of civil defense groups. Details concerning good practices in determining contractual relationships would not be directly applicable to civil defense groups.

Due Diligence Policy

Neither the Montreux Document nor the PSSP Code have a developed due diligence framework. This is not unusual in light of the fact that the principle of due diligence is still evolving in a number of areas of international law. Broadly, due diligence refers to “an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain th[e] result... [it is] an obligation of ‘conduct’ and not of ‘result.’”³⁴ In line with the obligation of conduct, the principle of due diligence as used here emphasizes good governance through developing appropriate processes for dealing with accountability. Thus, a due diligence policy would start with the steps necessary to deter and prevent violations of the law. If violations occur, then due diligence requires investigation of the alleged violation—and where there is sufficient evidence as to who committed the violation, to prosecute and appropriately punish the offender. Due diligence also requires victims to be compensated for any harm caused to them or their property.

While the exact scope and content of due diligence policy is still evolving, it is not unreasonable to expect that states that have established or support civil defense groups have obligations to react promptly to reliable reports of serious violations by those groups, that states must have in place appropriate legal remedies for those violations, and that they must have effective laws to hold individuals responsible for committing violations. Put another way, due diligence has a great deal to do with setting up appropriate procedures to ensure that appropriate risk assessments are undertaken, that the key elements of the policy are transparent to all the stakeholders, and that the policy framework is effectively implemented.

In developing a due diligence policy in the context of applying international humanitarian law and international human rights law to states that establish or support civil defense groups, there must first be a framework to deter and prevent civil defense groups from committing crimes. Deterrence and prevention would require, for example, effective vetting procedures before recruiting members to join civil defense groups, appropriate training in both law and the use of force, the allocation of appropriate resources so as to ensure that the group has the right tools to carry out their tasks, and domestic laws to ensure that members of civil defense groups are held individually responsible for the violations that they commit.

If crimes are committed, states will need to have appropriate investigation procedures, and where the evidence reaches the appropriate threshold, the perpetrator must be prosecuted, and if found guilty, punished. The process of investigations, prosecutions, and punishment not only requires having appropriate laws but also providing the relevant law and order authorities with the necessary resources to carry out those functions. It is sometimes overlooked that an important component of due diligence is not only to engage victims in the process of investigation, prosecution, and punishment but also to provide victims with appropriate compensation for the loss or damage that they have suffered. The principles relating to compensation for the acts of nonstate actors is still evolving, so a due diligence policy that grapples with that issue will make a positive normative contribution to the overall protection of victims.

A further aspect of due diligence is to ensure that internal and external accountability mechanisms governing the behavior of civil defense groups are mutually supporting. Internal

It is sometimes overlooked that an important component of due diligence is not only to engage victims in the process of investigation, prosecution, and punishment but also to provide victims with appropriate compensation for the loss or damage that they have suffered.

accountability mechanisms require a state's domestic criminal law to have appropriate criminal offenses and relevant investigatory powers to effectively prosecute members of civil defense groups for serious crimes or breaches of human rights. There must also be appropriate laws and procedures in place to investigate and prosecute members of the military or police who are supporting or encouraging civil defense groups to violate the law. Investigations carried out by states must, at a minimum, be official, timely, independent, open, and effective.³⁵ Such internal accountability measures must also be matched by external accountability measures such as allowing independent international or local individuals or agencies to monitor, report, and investigate the behavior of civil defense groups and those that support them. The effectiveness of both internal and external accountability measures will depend on their ability and the state's commitment to make recommendations and take preventative measures.

A Code of Conduct

One important debate to be had is the extent to which the relationship between states and civil defense groups can be enhanced through a generic code of conduct that regulates the behavior of the group and its relationships with other stakeholders, such as the local community and state authorities. To that end, the code should focus on the relevant principles, rules, and standards applicable to civil defense groups and the good practices that have been developed in places such as Afghanistan, where civil defense groups work closely with formal state authorities. The code should therefore deal with, among other things, the legal authority of members of the group, the functions and tasks of the group, command and control aspects for the group, and accountability mechanisms should the code be violated by members of the group. To govern the group's relationship with the community and government authorities, the code should also have provisions as to who can disband the group and set limits to the group's authority. While there is some debate as to whether such a code is best developed on an ad hoc basis, it seems that its effectiveness will, at the very least, depend on its being understood by fighters. It must also be short, clear, and relevant; have leadership backing; and be appropriately disseminated to members of the group.³⁶ Dissemination might involve state authorities, international organizations, or nongovernmental organizations providing practical "in the field" training for such groups. Some of the provisions of the PSSP Code, such as those dealing with rules for the use of force, detention, sexual exploitation, and abuse of gender-based violence and prohibition of torture or other cruel, inhuman, or degrading treatment or punishment, would be relevant to civil defense groups as well. Furthermore, the provisions of the code must be transparent and publicly known so as to ensure that communities and activist groups are able to reinforce the due diligence framework.

When developing the instrument, the wider international community should be involved. Therefore, negotiations should take place between not only states but also international organizations, such as the United Nations and the International Committee of the Red Cross and nongovernmental organizations—particularly those like Geneva Call—which have considerable experience working with nonstate armed actors. Ideally, civil defense groups should also be involved, but there might be pragmatic issues, such as finding appropriate representatives from such groups to hold negotiations with.

In tandem with developing an instrument, states—especially those specifically affected by civil defense groups—should begin or continue to develop their own internal rules, principles, due diligence framework, and code of conduct for their relations with civil defense groups. Such development could occur within the military or executive branch or through encouraging engagement with civil defense groups and the communities they work with.

The code of conduct should therefore deal with, among other things, the legal authority of members of the group, the functions and tasks of the group, command and control aspects for the group, and accountability mechanisms should the code be violated by members of the group.

The author would like to thank Professor Marco Sassoli, Erica Gaston, Jonathan Somer, and Dr. Rain Liivoja for their guidance with this report, and Maria Glenna, his research assistant at the United States Institute of Peace, for her research. He is grateful to the two anonymous reviewers of this report for their excellent suggestions. He would also like to thank Natasha Robbins for her editorial assistance.

Notes

1. The terms militias, progovernment militias, and paramilitary are also often used to refer to such groups. Civil defense groups must be distinguished from nonstate armed actors, who are usually antigovernment.
2. Sabine Carey, Neil Mitchell, and Will Lowe, "States, the Security Sector, and the Monopoly of Violence: A New Database on Pro-Government Militias," *Journal of Peace Research* 50, no 2(2013): 249–58, 251.
3. For a brief history of the United States' development of supporting civil defense groups, see, for example, Mark Brown, "Village Stability Operations: An Historical Perspective from Vietnam to Afghanistan," *Small Wars Journal*, March 28, 2013.
4. Mathieu Galtier, "Militias Are Taking Over in Post-Gadhafi Libya," *USA Today*, January 3, 2013, www.usatoday.com/story/news/world/2013/01/03/libya-militias/1802523/.
5. "French Mission Has Killed Hundreds of Islamists: Minister," *Space War*, February 5, 2013, www.spacewar.com/reports/French_mission_has_killed_hundreds_of_Islamists_minister_999.html.
6. Institute of Bangsamoro Studies and the Centre for Humanitarian Dialogue, "Armed Violence in Mindanao: Militia and Private Armies," July 2010, 9.
7. Erica Gaston, "Sustainable Security in Yemen: Popular Committees in Abyan," United States Institute of Peace, June 14, 2013, www.usip.org/publications/sustainable-security-in-yemen-popular-committees-in-abyan.
8. Daniel Green, "It Takes a Village to Raze an Insurgency," *Foreign Policy*, South Asia Channel, May 29, 2013, [afpak.foreignpolicy.com/posts/2013/05/29/it_takes_a_village_to_raz_e_an_insurgency](http://foreignpolicy.com/posts/2013/05/29/it_takes_a_village_to_raz_e_an_insurgency).
9. *Tactics in Counterinsurgency*, FMI no. 3-24.2 (Washington, DC: Department of the Army, 2009), 3–125, <http://fas.org/irp/doddir/army/fmi3-24-2.pdf>.
10. Executive Order no. 546, Directing the Philippine National Police to Undertake Active Support to the Armed Forces of the Philippines in Internal Security Operations for the Suppression of Insurgency and Other Serious Threats to National Security, Amending Certain Provisions of Executive Order No. 110 Series of 1999 and for Other Purposes, dated 14 July 2006.
11. Inter-American Court of Human Rights, *Case of The Pueblo Bello Massacre v Colombia*, January 31, 2006, para. 95(3).
12. Philip Alston, "Report of the Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions," A/HRC/14/24, May 20, 2010, para. 73.
13. Neil Mitchell, Sabine Carey, Christopher Butler, "Delegating Repression: Pro-Government Militias and Human Rights Violations" (working paper, University of Mannheim, July 2012), 4, www.sowi.uni-mannheim.de/lspol4/?page_id=41.
14. Human Rights Watch, "Just Don't Call It a Militia: Impunity, Militias, and the 'Afghan Local Police,'" September 2011; President Hamid Karzai also allegedly objected to the program from its inception—see, for example, Joshua Partlow and Karen DeYoung, "Gen. Petraeus Runs into Resistance from Karzai over Village Defense Forces," *Washington Post*, July 10, 2010, www.washingtonpost.com/wp-dyn/content/article/2010/07/09/AR2010070905599.html.
15. Gaston, "Sustainable Security in Yemen."
16. See *Report of the International Commission of Inquiry on Libya*, UN Doc. A/HRC/19/68 (2 March 2012); "Dozens Killed as Tripoli Residents Clash with Militias," *France 24*, November 16, 2013, www.france24.com/en/20131115-libya-militia-open-fire-protesters-tripoli/?ns_campaign=editorial&ns_fee=&ns_linkname=20131115_libya_militia_open_fire_protesters_tripoli&ns_mchannel=reseaux_sociaux&ns_source=twitter&utm_medium=twitter&utm_source=dlvr.it.
17. *Ad Hoc Arsenal: PSSM Practices of Selected Non-State Actors*, Armed Actors Issue Brief no. 2 (Geneva: Small Arms Survey, May 2013), 2–6.
18. *Ibid.*, 25.
19. Alston, "Report of the Special Rapporteur," para. 72.
20. International Law Commission (ILC), "Draft Articles on Responsibility of States for Internationally Wrongful Acts" [2001] II(2), *Yearbook of the International Law Commission* 26, art. 8, http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.
21. James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), 113.
22. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* (Merits) [1986] ICJ Rep 14, para.114.
23. ILC, "Draft Articles on Responsibility," art. 5.
24. Crawford, *The International Law Commission's Articles on State Responsibility*, 113.
25. Alston, "Report of the Special Rapporteur," para. 46.
26. Inter-American Court of Human Rights, *Case of The Pueblo Bello Massacre v Colombia*, paras. 111–114.
27. International Committee of the Red Cross, "Resolutions of the 2007 Delegates," 30th International Conference of the Red Cross and the Red Crescent, Geneva, November 26–30, 2007, resolution 3, para. 2.
28. The law of occupation is that law that applies in international armed conflicts when the territory of a state is actually placed under the authority of another state's hostile army.

eISBN: 978-1-60127-232-4

An online edition of this and related reports can be found on our Web site (www.usip.org), together with additional information on the subject.

29. *Hague Convention (IV) Respecting The Law and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land* (1907), art. 43.
30. When states enter into international obligations, they generally do so with the understanding that those obligations will bind them in respect to their territory. However, in some cases, states agree to apply their obligations outside their territory, such as in the territory of another state or on the high seas.
31. See, for example, Human Rights Council, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic," August 19, 2012, para. 24.
32. See, for example, Louise Doswald-Beck, "Private Military Companies under International Humanitarian Law," in *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, ed. Simon Chesterman and Chia Lehnardt (Oxford, Oxford University Press, 2007), 115–138; and Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (Cambridge: Cambridge University Press, 2013).
33. *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict* (September 17, 2008) was accepted by consensus. It sets out both the law and the good practice standards that are generally accepted by over forty-five states as practical and realistic contributions to promoting both international humanitarian law and human rights.
34. *Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion), International Tribunal for the Law of the Sea Seabed Dispute Chamber, Case no. 17, February 1, 2011, para. 110.
35. See, for example, the United Kingdom High Court case, *Al-Skeini v Secretary of State for Defence* [2004] EWHC 2911, para. 322.
36. See Olivier Bangerter, *Internal Control: Codes of Conduct within Insurgent Armed Groups*, Occasional Paper 31 (Geneva: Small Arms Survey, 2012), 51–58.

Of Related Interest

- *Yemen in Transition: Between Fragmentation and Transformation* by Philip Barrett Holzapfel (Special Report, March 2014)
- *Waiting for Change: The Impact of Transition on Local Justice and Security in Yemen* by Erica Gaston and Nadwa al-Dawsar (Peaceworks, April 2013)
- *Domestic Barriers to Dismantling the Militant Infrastructure in Pakistan* by Stephen Tankel (Peaceworks, September 2013)
- *Detention Standards and Non-State Armed Groups* by Bruce 'Ossie' Oswald (Peace Brief, July 2013)
- *Armed Groups Maintaining Law and Order: Dealing with Reality* by Bruce 'Ossie' Oswald (Peace Brief, May 2013)



**United States
Institute of Peace**
2301 Constitution Ave., NW
Washington, DC 20037
www.usip.org