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Armed Groups Maintaining Law and Order Dealing with Reality

Summary

- In some situations armed groups engage in law and order functions and tasks.
- In situations where local communities have no access to official law and order, communities sometimes must rely on armed groups to protect them from crime. In such cases the international community must decide what their relationship is to be with the armed group and how best to manage that relationship.

At any one time, armed groups¹ might exist to support governments, to fight against governments or each other as rebel groups, or to conduct criminal activities. A recent study on pro-government militias found that, between 1981 and 2007, there were at least 331 pro-government militia groups functioning in 88 countries.² Another study, conducted by the International Committee of the Red Cross (ICRC), concluded that in places where the ICRC operates there were around 170 active armed groups engaged in a variety of conflicts, ranging from periods of sporadic violence to control of territory.³ Those numbers demonstrate that the existence of armed groups is a reality that many communities face around the world. Confronting that reality creates a fundamental dilemma: What should the relationship between governments and the international community be with armed groups, and how might that connection be managed responsibly?

There are at least three contexts in which armed groups engage in law and order functions or tasks. The first is when national governments or the international community supports, either formally or informally, an armed group to maintain law and order. Examples include the 'Sunni Awakening in Iraq,' and the French intervention in Mali. The second context is when armed groups undertake law and order where they are fighting against government forces or other armed groups. The conflicts in both Syria and Libya provide examples of that context. The third is when armed groups engage in criminal activities, such as the drug trade, kidnappings or extortions, but nonetheless act as a law and order authority in the territory in which they function. Examples of this exist or have existed in Afghanistan, the Balkans, the Democratic Republic of the Congo, and Iraq. In each of those contexts, there are both policy and legal issues that arise concerning the management of relationships between the government and the armed groups.

The Relationships

At the strategic level, engagements between governments and armed groups can lead to the end of conflict, provide a means to deal with the interests and grievances of the wider community represented by a militia, and maintain international peace and security by, for example, preventing a conflict from spreading more

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widely. At the local level, there is little doubt that where governments are unwilling or unable to act, armed groups can and do provide some level of protection to the local population.

There is a strategic paradox of supporting armed groups which impacts the ability of the host state or the international community to protect the local population by maintaining law and order. The paradox arises because either supporting or not supporting militias to undertake law and order can lead to questions of legitimacy and accountability for the host government or the international community. Allied to this paradox is the fact that any formal recognition of, or engagement with, such groups is likely to raise concerns about the legitimacy of the actions of the state or the international community. For example, support to an armed group might legitimize it to the extent that the national government's authority or influence is adversely impacted.

There are some potentially negative implications of engaging with armed groups and local communities may bear the brunt of these. The risks of supporting armed groups include the potential that they could, in fact, worsen security. They might commit gross human rights violations, become criminals, refuse to disarm, or further weaken formal government structures. In relation to weakening government influence, militias could make it more difficult for formal rule of law initiatives that reinforce accountability and transparency from emerging. Furthermore, groups that rule 'by the gun' are sometimes unwilling to surrender their power even when other formal or informal means and methods of dispute settlement are options that the local community would support.

Legal Concerns

One of the difficulties for host states and the international community in dealing with some of the policy concerns identified above is the extent to which international law applies. For example, which international law governs the activities of militia groups, and their interaction with that community? While it is clear that in all three contexts described above the primary law applicable to armed groups is the law of the host state it is less clear the extent to which international law applies to such groups. It is true that international law prohibits states from supporting rebel groups in another state. However, it is questionable whether such a prohibition should apply when a rebel group is fighting a government that violates fundamental human rights or the group is the only authority protecting the local population from the complete breakdown of law and order. For example, it is the case that in Syria some militia groups have set up prisons and court systems to maintain law and order in their communities because there is no other option available.⁴

International humanitarian law and international human rights law address the involvement of states in taking and handling individuals accused of committing crimes during armed conflict, but there is disagreement as to the extent to which those areas of law apply specifically to non-state actors such as armed groups.⁵ So, for example, what international legal standards apply to a rebel group detaining an individual for looting or committing a sexual assault? A human rights based approach requires that the detainee be 'brought promptly before a judge or other officer authorised by law to exercise judicial power and ... be entitled to trial within a reasonable time or to release.'⁶ And international humanitarian law provides that no 'sentence shall be passed and no penalty shall be executed on a person found guilty of an offense except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.'⁷ In a community where there are no officials authorized by law or there are serious questions of independence and impartiality of officials, is there a sliding scale of obligation that would be permitted?

International law is also generally silent on the requirement to vet and train armed groups. Furthermore, there is little guidance on the legal framework that should apply to ensure appropriate governance structures are in place for such groups. Finally, while the doctrine of state responsibility; international criminal law; and general principles of international humanitarian law and human rights law govern the accountability of states, and to a varying extents the accountability of international organizations and individuals, there is

little in those areas of law that specifically hold the state in which the conflict is occurring, interim governing councils, the international community, or individuals, accountable or responsible for the acts of armed groups that they support.

Managing the Reality

Accepting that in some circumstances armed groups might be the only form of security for the local population, it seems reasonable to expect states and the international community to have policy frameworks, concerning when support is given, what support is reasonable to provide, the scale of support provided, and what accountability mechanisms should be in place when providing support. For example, 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.⁸

If one reads the reference to 'secure the cleared village above' to include maintaining law and order then one reflection that arises is whether the operational approach taken by the U.S. military should be translated into strategic policy.

Another issue is the extent to which a state's strategic policy should take into account the fact that 'parties to an armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians.'⁹ Might ensuring the protection of civilians be enhanced by using armed groups in some conflict or post-conflict situations? Clearly, one concern in using armed groups to protect civilians is ensuring that there are appropriate frameworks, including legal frameworks, to be confident that armed groups will not commit gross violations of human rights.

In relation to legal frameworks special agreements, unilateral declarations, deeds of commitment and codes of conduct have been used by the international community to seek the commitment of armed groups to fundamental norms. The use of *Geneva Call's Deed of Commitment for Adherence to a Total Ban on Anti-personnel Mines and for Cooperation in Mine Action* as a means to ensure respect of humanitarian norms through monitoring, reporting and verification is one example of the international community engaging with armed actors. There is no similar deed of commitment concerning armed groups that carry out functions related to maintaining law and order.

In a number of cases armed groups have developed codes of conduct as a means of increasing their members respect for the law. A recent example of such a code is the rebel Free Syrian Army's code of conduct, which requires its members to adhere to fundamental principles of international human rights.¹⁰ Such codes appear to be developed on an ad hoc basis and there is little research concerning matters such monitoring and adherence to them.

In the interest of considering how states or the international community might best manage their relationship with armed groups it is worth reflecting on the extent to which states and the international community should develop:

- (1) A general policy framework concerning issues such as the conditions for supporting armed groups to maintain law and order and the types of support that should be provided; and
- (2) A generic code of conduct, or some other similar legal mechanism, which describes both realistic standards of behavior expected of armed groups and fundamental rules which armed groups must adhere to.

ABOUT THIS BRIEF

This Peace Brief is based on the author's research concerning armed groups in places such as Afghanistan and the Democratic Republic of the Congo. Bruce 'Ossie' Oswald is an associate professor of Law at Melbourne Law School and Jennings Randolph senior fellow (2012-2013). Oswald's interest in armed groups stems from his military service in places such as Rwanda, East Timor, Iraq, and Afghanistan. His academic research interests are in international humanitarian law, international human rights law, and post-conflict state-building. The author would like to thank Erica Gaston, Vivienne O'Connor and Beth Wellington for their very helpful comments on earlier drafts of this brief.

Endnotes

1. The term "armed group" as used here refers to civilians who are both armed and organized; and have the capacity to carry out sustained violence within a state so as to further a political, religious or cultural agenda. They are not professional fighters in the same sense as members of a state's military. They act outside formal state law and order authorities such as the military and police. Armed groups therefore might include pro-government militia, civil defense groups (sometimes also referred to as village self-defense forces), and armed opposition groups. For the purposes of this paper they do not include private military companies or organizations that have a purely criminal agenda. The terms militias, non-state armed actors, and paramilitary are often used to refer to the category of armed groups that is the focus of this paper.
2. Sabine Carey, Neil Mitchell and Will Lowe, "States, the Security Sector, and the Monopoly of Violence: A New Database on Pro-Government Militias" (2013) 5(2) *Journal of Peace Research* 249-258, 251.
3. Vincent Bernard: Editorial: understanding armed groups and the applicable law (2011) 882 *IRRC*, 261 at 262.
4. "Syrian rebel courts restore order of life in Aleppo." *The Daily Star*, Lebanon, April 13, 2013 at www.dailystar.com.lb/News/Middle-East/2013/Apr-13/213532-syrian-rebel-courts-restore-order-to-life-in-aleppo.ashx#axzz2QYrvh7GR.
5. See for e.g. A. Clapham, "Weapons and armed non-state actors" in S. Casey-Maslen (ed) *Weapons under International Human Rights Law*, forthcoming in 2013.
6. The International Covenant on Civil and Political Rights, (1976) art. 9(3).
7. Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977) art 7.
8. U.S. military manual, *Tactics in Counter-Insurgency* (2009), para. 3-125.
9. Security Council Presidential Statement, February 12, 2013.
10. R Dominic Evans and Mariam Karouny, "Syrian rebels sign battle-field code of conduct," *Reuters*. August 8, 2012.



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