

# State responsibility for community defence groups gone rogue

**Jemma Arman\***

Jemma Arman is a Regional Legal Adviser for the International Committee of the Red Cross based in Nairobi.

## Abstract

*In situations of national crisis, it is not uncommon to see community members join together to provide security services to their communities, gap-filling or supplementing the security services of the State. These “community defence groups” perform many roles, from operating checkpoints and conducting surveillance missions to patrolling roads and even participating in combined combat operations with the State. Unfortunately, while many community defence groups perform an important service for their community, some have been accused of serious human rights abuses or even war crimes. This article examines the circumstances in which a State might be responsible in relation to wrongful acts of community defence groups operating within their territory.*

*Each community defence group differs in its structure, its activities and its relationship with the State. As such, any assessment of the potential responsibility of the State will depend upon the particulars of each group and its operations. The contribution of this article is to provide a framework for assessing State responsibility in relation to community defence groups. It does so by examining the potential attribution of acts of the community defence group to the State, applying secondary rules of State responsibility. In addition, it also considers the potential responsibilities of the State under primary rules of international law, namely*

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*international humanitarian law and international human rights law, in circumstances where the primary wrongful act is not attributable to the State.*

**Keywords:** State responsibility, community defence groups, State organs, exercise of government authority, State control, common Article 1, aiding and abetting, due diligence.



## Introduction

During situations of national crisis, the security services of a State may be pushed to their limit and be unable to protect communities from encroaching violence and conflict. It is not uncommon in these circumstances to see community members join together to attempt to fill this gap and provide security services to their immediate community. Around the world, so-called “community defence groups” perform many roles, from operating checkpoints and conducting surveillance missions to patrolling roads and even participating in combined combat operations with the State. Unfortunately, while many groups perform an important service for their community, many have also been accused of serious human rights abuses or even war crimes. This article examines the circumstances in which a State might be held responsible in relation to wrongful acts of community defence groups operating within the State’s territory. It focuses on the relationship between the territorial State and the community defence groups, as the interest in protecting a community from violence is in principle shared by the State and those groups, and in practice this often results in complex relationships of support between the two.<sup>1</sup>

Noting that the nature of community defence groups varies from context to context, the aim of this article is to provide a framework for assessing the particular relationship between the community defence group, the State and the wrongful act, and the potential responsibilities that may arise from this. After providing a background to the phenomenon of community defence groups in the first section, the second section of the article discusses the potential attribution of acts of the community defence group to the State, applying secondary rules of State responsibility.<sup>2</sup> The third section discusses potential responsibilities of the State under the primary rules of international law, namely international humanitarian law (IHL) and international human rights law (IHRL), in circumstances where the primary wrongful act is not attributable to the State. The examples discussed

- 1 This article does not address potential responsibilities that might exist in relation to extraterritorial States providing support to community defence groups. The principles of attribution discussed in the second section of the article could similarly extend to extraterritorial States, but extraterritoriality adds additional complexities of jurisdictional scope in relation to IHL and IHRL that are not addressed here.
- 2 See definition and background on secondary rules in Marko Milanovic, “Special Rules of Attribution of Conduct in International Law”, *International Law Studies*, Vol. 96, 2020, p. 300. See also Claus Kress, “L’organe de facto en droit international public: Réflexions sur l’imputation à l’Etat de l’acte d’un particulier à la lumière des développements récents”, *Revue Générale de Droit International Public*, Vol. 105, No. 1, 2001, pp. 123–124.

in this article are predominantly from Africa, but the phenomenon is not limited to that part of the world.<sup>3</sup>

## The phenomenon of community defence groups

In Maiduguri, Nigeria, a young man attracted local notoriety in 2013 for pursuing a militant from the group commonly referred to in the media as Boko Haram<sup>4</sup> “with a stick, capturing him and delivering him to the authorities”.<sup>5</sup> Others followed his example, joining together to patrol the streets and establish checkpoints.<sup>6</sup> The group grew and called itself the Civilian Joint Task Force (CJTF), a name that intentionally referenced and indicated the group’s complementarity to the State’s Joint Task Force that was tasked with responding to the crisis in the northeast. As of 2020, the CJTF is said to have 30,000 members.<sup>7</sup>

In this article, the term “community defence group” is used to describe actors like the CJTF. This label neatly encapsulates three defining features. The first is that the group arises from or belongs to a community.<sup>8</sup> In defining the broader category of “community-based armed groups”, Schuberth notes their

eponymous embeddedness within the community in which they emerge. The boundaries of the community can be defined (1) by territory – such as an urban neighbourhood or a village; (2) by blood ties – as in a family or clan; or (3) by a shared identity – like in the case of ethnic groups.<sup>9</sup>

By way of example, in relation to the phenomenon of community defence groups in South Sudan, Jok notes that

3 See, for example, the discussion in relation to the Shabbiha in Syria and the Popular Mobilization Force in Iraq, in Jennifer Maddocks, “Outsourcing of Governmental Functions in Contemporary Conflict: Rethinking the Issue of Attribution”, *Virginia Journal of International Law*, Vol. 59, No. 1, 2019, pp. 80–82.

4 “Boko Haram” is not a label used by the group itself but is commonly used in media reporting to refer to the armed group People Committed to the Propagation of the Prophet’s Teachings and Jihad, or, less often, to the Islamic State West Africa Province. For more information, see International Crisis Group, *Facing the Challenge of the Islamic State in West Africa Province*, Africa Report No. 273, 16 May 2019, available at: [www.crisisgroup.org/africa/west-africa/nigeria/273-facing-challenge-islamic-state-west-africa-province](http://www.crisisgroup.org/africa/west-africa/nigeria/273-facing-challenge-islamic-state-west-africa-province) (all internet references were accessed in July 2021).

5 International Crisis Group, *Watchmen of Lake Chad: Vigilante Groups Fighting Boko Haram*, Africa Report No. 244, 23 February 2017, p. 4, available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/244-watchmen-of-lake-chad-vigilante-groups-fighting-boko-haram.pdf>.

6 *Ibid.*, p. 4.

7 Daniel E. Agbiboa, “The Precariousness of Protection: Civilian Defense Groups Countering Boko Haram in Northeastern Nigeria”, *African Studies Review*, Vol. 64, No. 1, 2020, p. 204. See also International Crisis Group, above note 5, p. 6.

8 David Pratten, “The Politics of Protection: Perspectives on Vigilantism in Nigeria”, *Journal of the International African Institute*, Vol. 78, No. 1, 2008, p. 4.

9 Moritz Schuberth, “The Challenge of Community-Based Armed Groups: Towards a Conceptualization of Militias, Gangs, and Vigilantes”, *Contemporary Security Policy*, Vol. 36, No. 2, 2015, p.299. See also D. Pratten, above note 8, p. 6, on the link between vigilantism and the “politics of belonging”.

[c]ommon to all of the groups is their roots in ethnic groups or region. ... [T]hey are responses to the localised nature of violence and a suspicion that the state has become monopolised by some ethnic groups while others are excluded, forcing them to rely on their own means of defence.<sup>10</sup>

The community link will often underpin the structure and function of the group and distinguish these actors from business-oriented groups, such as private military and security companies.<sup>11</sup>

The second defining feature is that the group is a “defence group” – it purports to serve a defensive purpose. This mirrors the so-called “conservatism” that is discussed in relation to “vigilantism”: the orientation of the group is towards the (re-)establishment of a form of existing social order.<sup>12</sup> Johnston, for example, suggests in relation to “vigilantes” that such groups act when “an established order is under threat from the transgression, the potential transgression, or the imputed transgression of institutionalized norms”.<sup>13</sup> For instance, the group known as the Arrow Boys in South Sudan was formed by Azande men responding to the threats posed to their community by the Lord’s Resistance Army in 2005.<sup>14</sup> This security orientation enables community defence groups to be distinguished from groups whose dominant orientation is political or economic.<sup>15</sup>

10 Jok Madut Jok, Mareike Schomerus, Luka Biong Deng Kuol, Ingrid Marie Breidlid and Michael J Arensen, *Informal Armies: Community Defence Groups in South Sudan’s Civil War*, Saferworld, February 2017, p. 3, available at: [www.saferworld.org.uk/resources/publications/1108-informal-armies-community-defence-groups-in-south-sudanas-civil-war](http://www.saferworld.org.uk/resources/publications/1108-informal-armies-community-defence-groups-in-south-sudanas-civil-war).

11 See the definition of private military and security companies provided at para. 9 of the Preface to 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*, International Committee of the Red Cross (ICRC), Geneva, August 2009 (Montreux Document), available at: [www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/20192511-montreux-document\\_EN.pdf](http://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/20192511-montreux-document_EN.pdf).

12 Les Johnston, “What is Vigilantism?”, *British Journal of Criminology*, Vol. 36, No. 2, 1996, pp. 229–230. In the present article, the term “community defence group” is preferred over “vigilantes” because in common parlance, and in some academic works, vigilantism is defined to exclude actors that operate with the support of the State. This is too narrow for our purposes. Many community defence groups are supported by the State, precisely because of their overlapping interests in protecting communities. See, for example, Chris A. M. Kwaja, “Non-State Armed Groups in Adamawa State”, in Freedom C. Onuoha and Chris A. M. Kwaja (eds), *Non-State Armed Groups in North East Nigeria: Challenges and Opportunities for Security Sector Governance*, Cleen Foundation, 2018, pp. 21–22, available at: <https://cleen.org/wp-content/uploads/2018/12/Armed-Groups-in-North-East-Nigeria-Challenges-and-Opportunities-for-Security-Sector-Governance.pdf>; D. E. Agbiboa, above note 7, p. 8.

13 L. Johnston, above note 12, p. 229.

14 J. M. Jok *et al.*, above note 10, pp. 3–4; Carlo Koos, “Why and How Civil Defense Militias Emerge: The Case of the Arrow Boys in South Sudan”, *Studies in Conflict and Terrorism*, Vol. 37, No. 12, 2014, p. 1047. In relation to the establishment of the Volunteers for the Defence of the Homeland, in Burkina Faso, see Claire Zutterling, “Armer les civils: La loi des Volontaires pour la défense de la patrie au Burkina Faso”, *GRIP*, 30 October 2020, available at: <https://grip.org/https-grip-org-armed-civils-burkina-faso/>.

15 M. Schuberth, above note 9, p. 303. In practice, it can be difficult to separate the motivation of groups. See, for example, Johnston’s discussion of vigilantism as a reaction to crime and social deviance, and the complex overlaps that can exist with social control vigilantism, or even vigilantism seeking political power: L. Johnston, above note 12, pp. 228–230. David Pratten notes the disbanding of the O’dua People’s Congress and Bakassi Boys due to their promotion of political agendas, but also notes the

The security orientation also reflects that community defence groups are most active in circumstances where a State's own security institutions are not responding well to the threats posed to a community. The groups may have existed prior to a crisis, but then evolve to match an increasing threat. For example, in the northeast of Nigeria, traditional hunter groups were mobilized to respond to increasing attacks against civilian targets such as mosques, schools and marketplaces.<sup>16</sup> In Eastern Equatoria, South Sudan, community defence groups are said to be organized according to traditional "age sets" whereby young to middle-aged men "assume responsibility for the governance and security of the community for specific time periods".<sup>17</sup> These were mobilized during South Sudan's civil war to, *inter alia*, secure roads and protect the community from looting and violence.<sup>18</sup> The groups' foundations in the community often mean that they are less likely to be perceived as a threat to existing political or social structures, and they may receive support from the State for their complementary service to the community. This is a key theme that will be returned to later in this paper.

Finally, the term "community defence group" also highlights that these groups involve a collective enterprise. Johnston expresses this element in relation to vigilantism as the involvement of planning and premeditation by those engaging in it.<sup>19</sup> Rather than a spontaneous reaction to an imminent threat (perhaps akin to a *levée en masse*), a community defence group has at least a vague structure that allows for collective actions against a more generalized and not necessarily immediate threat. A community defence group may be, but is not necessarily, an "organised armed group" under IHL.<sup>20</sup> This article will highlight the implications of whether a group is considered an organized armed group in relation to State responsibility.

In the absence of functioning State security services, there is an obvious appeal to members of the community mobilizing to protect their community. Community defence groups may be in a better position to respond than the centralized government entities, whose personnel may not necessarily speak the local languages or understand well the dynamics of the area under threat. For example, the Titweng or Gelweng (cattle guards) in Bahr el Ghazal, South Sudan, were reported to wield a "greater legitimacy among local communities because of their respect for local norms, relationship with chiefs and elders, and their

reality of vigilante groups as a means for "poor, unemployed youth" to "insert themselves within political and economic niches of the state apparatus": D. Pratten, above note 8, pp. 5, 7.

16 C. A. M. Kwaja, above note 12.

17 Lucian Harriman with Ilona Drewy and David Deng, "*Like the Military of the Village*": Security, Justice and Community Defence Groups in South-East South Sudan, Saferworld, February 2020, p. 11, available at: [www.saferworld.org.uk/resources/publications/1245-alike-the-military-of-the-villagea-security-justice-and-community-defence-groups-in-south-east-south-sudan](http://www.saferworld.org.uk/resources/publications/1245-alike-the-military-of-the-villagea-security-justice-and-community-defence-groups-in-south-east-south-sudan).

18 *Ibid.*, pp. 24–28.

19 L. Johnston, above note 12, p. 220.

20 We are thus considering a broader category of actors than "community-embedded armed groups" per the ICRC's *Roots of Restraint in War* study, which is limited to groups that "lack an organizational structure and responsible command necessary to be considered an armed group under IHL". ICRC, *The Roots of Restraint in War*, Geneva, 2018, p. 54, available at: [www.icrc.org/en/publication/4352-roots-restraint-war](http://www.icrc.org/en/publication/4352-roots-restraint-war).

emphasis on protecting cattle”.<sup>21</sup> Community defence groups may benefit from existing social structures, informal taxation and other forms of community resourcing,<sup>22</sup> mystic beliefs about their role and abilities, and an innate understanding of the terrain on which they operate.<sup>23</sup>

Yet, the operation of community defence groups is not without risk. The gaps in the State security services from which such groups operate can mean that in practice, accountability to the State may be weak.<sup>24</sup> Certain community defence groups have been accused of demanding pay-offs in exchange for turning a blind eye to the behaviour they claim to be addressing, conducting raids against other communities, committing summary executions or vengeance killings of those suspected to be members of opposition armed groups, ill-treating or torturing suspects before handing them over to the police, and/or sexual violence against members of the vulnerable communities which they purport to serve.<sup>25</sup>

The second and third sections of this article discuss the potential responsibility that a State might have in relation to wrongful acts of a community defence group. This assessment depends upon a clear identification of the relationship existing between the State and the community defence group, which may vary significantly between contexts. States may have been involved in the

- 21 J. M. Jok *et al.*, above note 10, p. 21. See also the discussion on the “historical and spiritual legitimacy” of Nigerian vigilantism in D. Pratten, above note 8, p. 9; Kyle Dietrich, “*When We Can’t See the Enemy, Civilians Become the Enemy*”: *Living Through Nigeria’s Six-Year Insurgency*, Center for Civilians in Conflict, 2015, pp. 57–58, available at: [https://civiliansinconflict.org/wp-content/uploads/2015/10/NigeriaReport\\_Web.pdf](https://civiliansinconflict.org/wp-content/uploads/2015/10/NigeriaReport_Web.pdf); C. Zutterling, above note 14.
- 22 See, for example, C. A. M. Kwaja, above note 12, p. 21; J. M. Jok *et al.*, above note 10, p. 9.
- 23 For example, the Dozo or Traditional Hunters Society in Mali was said to employ hunting weapons and traditional magic against armed insurgent groups: Corinne Dufka, “*We Used to Be Brothers*”: *Self-Defense Group Abuses in Central Mali*, Human Rights Watch, 2018, available at: <https://www.hrw.org/report/2018/12/07/we-used-be-brothers/self-defense-group-abuses-central-mali>. See also Sam Mednick, “Victims or Villains? The Volunteer Fighters on Burkina Faso’s Front Line”, *The New Humanitarian*, 12 October 2020, available at: [www.thenewhumanitarian.org/news-feature/2020/10/12/Burkina-Faso-conflict-jihadist-vigilante-volunteer-fighters](http://www.thenewhumanitarian.org/news-feature/2020/10/12/Burkina-Faso-conflict-jihadist-vigilante-volunteer-fighters); D. E. Agbibo, above note 7, pp. 9, 12.
- 24 The existence of non-State accountability mechanisms of community defence groups varies from context to context. For example, the ICRC’s *Roots of Restraint in War* study notes as sources of influence and authority over the cattle-keeping groups of South Sudan (e.g. the Titweng and Gelweng discussed above) the role of chiefs and divine authority, in addition to politico-military elites: ICRC, above note 20, pp. 57–58. Community defence groups that are organized armed groups (as discussed below) by definition will have an internal means for regulating the conduct of their members: see International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, para. 195.
- 25 A recent United Nations Mission in South Sudan (UNMISS) report, for example, indicated that “[c]ommunity-based militias were responsible for 78 percent of killings and injuries caused to civilians as well as abductions and conflict-related sexual violence during attacks in pockets of South Sudan”. UNMISS, “Community-Based Militias Responsible for 78% of Victims of Violence in South Sudan”, 31 March 2021, available at: <https://tinyurl.com/4dnf4bfx>. See also L. Harriman, I. Drewy and D. Deng, above note 17, p. 11; “Mali Attack: Behind the Dogon-Fulani Violence in Mopti”, *BBC News*, 25 March 2019, available at: [www.bbc.com/news/world-africa-47694445](http://www.bbc.com/news/world-africa-47694445); Michael L. Fleisher, “Sungusungu: State-Sponsored Village Vigilante Groups among the Kuria of Tanzania”, *Africa*, Vol. 20, No. 2, 2000, p. 223; ICRC, above note 20, p. 58; Amnesty International, “Burkina Faso: Witness Testimony Confirms Armed Group Perpetrated Mass Killings”, 20 March 2020, available at: [www.amnesty.org/en/latest/news/2020/03/burkina-faso-witness-testimony-confirms-armed-group/](http://www.amnesty.org/en/latest/news/2020/03/burkina-faso-witness-testimony-confirms-armed-group/); D. E. Agbibo, above note 7, p. 18.

formation of these groups, and have promoted their recruitment;<sup>26</sup> they may acquiesce to the existence and activities of such groups, but otherwise have no direct involvement; they might actively cooperate with such groups and/or make regular payments to members of such groups; they may provide training, uniforms and/or equipment;<sup>27</sup> they may engage in the planning and coordination of activities for the group; they may carry out mandatory recruitment into community defence groups;<sup>28</sup> they may favourably comment on the activities of such groups;<sup>29</sup> and they may engage the group for the provision of a specific security service, or even formally incorporate the group within the State's own security apparatus.<sup>30</sup> Understanding these relationships is essential to identifying any existing responsibility, but it is not always easy. The relationships that can exist between States and community defence groups may be complex, non-transparent and evolving.

## Attribution pursuant to secondary rules of State responsibility

This section examines the circumstances in which acts of a community defence group may be attributable to the State, pursuant to the principles of State responsibility articulated in the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility, ASR).<sup>31</sup> It will consider situations where a community defence group and/or certain of its members is an organ of the State (Article 4), where the community defence group is exercising governmental authority (Articles 5 and 9), and where the community defence group is acting under the

- 26 For example, military officers are said to have visited communities in order to encourage recruitment of people into the CJTF in 2013: see International Crisis Group, above note 5, p. 6. In recognition of the apparent effectiveness of the Arrow Boys' response to the Lord's Resistance Army, US and Ugandan soldiers were said to have regularly consulted the group and "periodically furnished them with equipment in exchange for information": J. M. Jok *et al.*, above note 10, p. 9.
- 27 For example, the Borno Youth Empowerment Scheme provided some military training and uniforms to a select group of young men in the CJTF: see International Crisis Group, above note 5, pp. 5, 9.
- 28 For example, service in the Sungusungu of Nyaheiya, Tanzania was said to be compulsory: M. L. Fleisher, above note 25, p. 216; Suzette Heald, "State, Law and Vigilantism in Northern Tanzania", *African Affairs*, Vol. 105, No. 419, 2005, p. 273.
- 29 See, for example, J. M. Jok *et al.*, above note 10, p. 9.
- 30 Romane Da Cunha Dupuy and Tanguy Quidelleur, *Self-Defence Movements in Burkina Faso: Diffusion and Structuration of Koglweogo Groups*, Noria, 15 November 2018, available at: [www.noria-research.com/self-defence-movements-in-burkina-faso-diffusion-and-structuration-of-koglweogo-groups/](http://www.noria-research.com/self-defence-movements-in-burkina-faso-diffusion-and-structuration-of-koglweogo-groups/); L. Harriman, I. Drewy and D. Deng, above note 17, p. 11.
- 31 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, in *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN Doc. A/56/10 (*Yearbook of the International Law Commission*, Vol. 2, No. 2), 2001 (Articles on State Responsibility), pp. 26–143, available at: [https://legal.un.org/ilc/documentation/english/reports/a\\_56\\_10.pdf](https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf). The Articles on State Responsibility are not a treaty but nevertheless are widely relied upon as the articulation of customary international law in relation to State responsibility. See, for example, International Court of Justice (ICJ), *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro)*, Judgment, 2007, *ICJ Reports* 2007 (*Bosnian Genocide*), paras 385, 398.

instruction, direction or control of the State in carrying out that conduct (Article 8).<sup>32</sup>

## Responsibility for community defence groups or members of community defence groups as organs of the State

Article 4 of the ASR states that “[t]he conduct of any State organ shall be considered an act of that State under international law”.<sup>33</sup> This extends to “all the individual or collective entities which make up the organization of the State and act on its behalf”.<sup>34</sup>

In principle, a State could legally incorporate a community defence group into the State security apparatus.<sup>35</sup> This is rare, presumably because there is little advantage for the State to assume unequivocal responsibility for groups outside of its already existing security institutions. Further, for the community groups themselves, direct incorporation into the State’s institutions would result in the loss of their independence and potentially also their community-based identity.

The International Court of Justice (ICJ) has in addition considered that in exceptional circumstances, “persons, groups of persons or entities” may be considered an organ of the State even in the absence of domestic incorporation, if there is “proof of a particularly high degree of State control over them”, so much so that the persons or entities operate in “complete dependence” on the State.<sup>36</sup> The author is not aware of any community defence groups that would fall under this category. The characteristics of community defence groups tend to run counter to absolute State control, including their creation and foundations in the community (suggesting some degree of autonomy) and that they are most active in situations where the State security apparatus is not meeting the security needs of the community (suggesting a possible incapacity for the State to exercise absolute control).<sup>37</sup> Situations where the State exercises control at a level that results in less than complete dependence are discussed below in relation to Article 8 of the ASR.

32 This article does not consider responsibility on the basis of conduct acknowledged and adopted by the State as its own. It would seem far-fetched that a State would ever accept and adopt as its own the type of conduct of community defence groups described in this article that would form the basis of the wrongful act.

33 Articles on State Responsibility, above note 31, Art. 4(1). The ICJ considered Article 4 as reflecting customary law: ICJ, *Bosnian Genocide*, above note 31, para. 385.

34 Articles on State Responsibility, above note 31, p. 40.

35 The Volunteers for the Defence of the Homeland, in Burkina Faso, warrants further study in this respect. A decree was passed in 2020 on the group’s status that provides, *inter alia*, that the command of the group is assured by the command of the armed forces, and that the group benefits from the protection of the State in the execution of its missions. *La loi portant institution des Volontaires de la défense de la Patrie*, Decree No. 2020-0115, 12 March 2020, available at: <https://tinyurl.com/kd76jwbv>.

36 ICJ, *Bosnian Genocide*, above note 31, paras 392–393. See also ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 1986, *ICJ Reports 1986*, paras 109–114.

37 In relation to the relevance of the State’s role in the creation of the group as a factor indicating control, see ICJ, *Nicaragua*, above note 36, paras 93–94; C. Kress, above note 2, pp. 106–107.



An apparently simpler solution for the State than expressly incorporating the whole group would be to incorporate or recruit certain members into the State's existing security institutions.<sup>38</sup> In November 2020, for example, 400 members of the CJTF were reported to have been formally recruited into the Nigerian Armed Forces.<sup>39</sup> Yet, even this is not common. Employing members of the community defence group requires a greater financial contribution by the State, including regular salaries and possibly health insurance, pensions and other benefits.<sup>40</sup> Incorporation of community defence group members may also be difficult as these individuals may not fulfil the educational requirements for recruitment.<sup>41</sup> In Nigeria, constitutional requirements of geographical representation intended to address overrepresentation of certain regions in recruitment were also reported to be a challenge for recruitment.<sup>42</sup> Further, a practice of employing community defence group members might be perceived as creating an incentive for their operation.<sup>43</sup>

The domestic employment law of a State will be relevant, as will any regulations that apply to recruitment in the specific institutions in question, to determine as a matter of fact whether members of a community defence group have become employees of the State.<sup>44</sup>

For community defence group members who are also employees of the State, the State will be responsible for their acts “[w]here such a person acts in an apparently official capacity, or under colour of authority”, even if that person is exceeding their authority or contravening their instructions.<sup>45</sup> This would cover situations where an employee commits misdeeds while in uniform, even if outside of working hours, because of the air of authority that comes with wearing that uniform.<sup>46</sup> It could also cover instances where an employee is using a security

38 In relation to “incorporation”, Cameron and Chetail give the example whereby by act of contract, the State of Papua New Guinea purported to bestow upon members of a private security firm the status of “special constables”, a classification within the national police force. See Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law*, Cambridge University Press, Cambridge, 2013, pp. 140–141.

39 “Ohanaeze, Afenifere, ACF Disagree Over Civilian JTF’s Recruitment into Army”, *Punch*, 13 November 2020, available at: <https://punchng.com/ohanaeze-afenifere-acf-disagree-over-civilian-jtfs-recruitment-into-army/>. See also International Crisis Group, *Double-Edged Sword: Vigilantes in African Counter-Insurgencies*, Africa Report No. 251, 7 September 2017, available at: [www.crisisgroup.org/africa/west-africa/sierra-leone/251-double-edged-sword-vigilantes-african-counter-insurgencies](http://www.crisisgroup.org/africa/west-africa/sierra-leone/251-double-edged-sword-vigilantes-african-counter-insurgencies).

40 M. L. Fleisher, above note 25, p. 210. Payments made to community defence group members (if any) who are not employed by the State vary between contexts. For example, the chairman of the Anambra Vigilante Services suggested that his members were paid only “a token amount”: see Human Rights Watch, *The Bakassi Boys: The Legitimization of Murder and Torture*, May 2002, available at: [www.hrw.org/reports/2002/nigeria2/index.htm#TopOfPage](http://www.hrw.org/reports/2002/nigeria2/index.htm#TopOfPage). See also International Crisis Group, above note 5, p. 12.

41 International Crisis Group, above note 5, p. 21.

42 *Ibid.*

43 J. M. Jok *et al.*, above note 10, pp. 4, 6, 23.

44 See the discussion on the relevance of domestic law in L. Cameron and V. Chetail, above note 38, p. 137. In practice, determining whether an employment relationship exists can be difficult, as a person may receive a regular paycheck pursuant to a contract, and insurance, and be subject to a clear chain of command, yet the State may characterize the relationship as “volunteerism”. See, for example, Decree No. 2020-0115, above note 35.

45 Articles on State Responsibility, above note 31, pp. 42, 47, and Art. 7.

46 *Ibid.*, p. 46.

vehicle outside of work operations where the use of that vehicle would also give the appearance of authority.<sup>47</sup> The “colour of authority” may also extend to off-duty security-related work of the employee with the community defence group, where such work benefits from wide-ranging support or endorsement from the State.<sup>48</sup> Essentially, the critical question would be whether the activities of the employee, engaged with the community defence group while “off-duty”, can be clearly distinguished from his or her official function.<sup>49</sup>

Finally, the responsibility of States is arguably broader in relation to the acts of community defence group members who are also members of the armed forces during international armed conflicts. Article 91 of Additional Protocol I to the Geneva Conventions provides: “A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed force.”<sup>50</sup> This is understood by some commentators as a *lex specialis* rule of State responsibility under IHL whereby the distinction between private and public acts is either not maintained at all or is at least not maintained “in wartime and with regard to acts governed by international humanitarian law”.<sup>51</sup> That being said, none of the examples of community defence groups discussed in this article were mobilized as a result of international armed conflicts.<sup>52</sup>

## Exercising governmental authority

Article 5 of the ASR provides that the conduct of persons or groups that are not organs of the State but which are “empowered by the law of the State to exercise elements of the governmental authority shall be considered as an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

47 Alexis P. Kontos, “Private Security Guards: Privatized Force and State Responsibility under International Human Rights Law”, *Non-State Actors and International Law*, Vol. 199, No. 4, 2004, p. 213.

48 For example, the endorsement and support given by the Borno State governor to the CJTF: Eromosele Ebhomele, “Boko Haram: Civilian-JTF Gets Pay Rise from Borno Governor Zulum, Now to Earn N20,000”, *Legit*, 5 June 2019, available at: [www.legit.ng/1241882-boko-haram-civilian-jtf-pay-rise-borno-governor-zulum-earn-n20000.html](http://www.legit.ng/1241882-boko-haram-civilian-jtf-pay-rise-borno-governor-zulum-earn-n20000.html).

49 Articles on State Responsibility, above note 31, p. 46.

50 See also Hague Convention IV, Art. 3.

51 Marco Sassòli, “State Responsibility for Violations of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 84, No. 846, 2002, pp. 405–406. See also Marco Longobardo, “The Relevance of the Concept of Due Diligence for International Humanitarian Law”, *Wisconsin International Law Journal*, Vol. 37, No. 1, 2019, p. 57; L. Cameron and V. Chetail, above note 38, pp. 161–164. Note that the Commentaries to the ASR consider Article 91 of Additional Protocol I to be the articulation of the general rule in ASR Article 7: see Articles on State Responsibility, above note 31, p. 46.

52 See, for example, the discussion above in relation to the mobilization of the CJTF in northeastern Nigeria and the Arrow Boys in South Sudan. This is consistent with global trends whereby the “vast majority” of conflicts are non-international: see Annysa Bellal, *The War Report: Armed Conflicts in 2018*, Geneva Academy of International Humanitarian Law and Human Rights, 3 June 2019, available at: [www.rulac.org/news/the-war-report-armed-conflicts-in-2018](http://www.rulac.org/news/the-war-report-armed-conflicts-in-2018).

For a community defence group's activities to be attributed to the State under Article 5, the group must be an entity capable of being empowered by law to exercise governmental authority. The Commentaries to the ASR make it clear that the definition of "entity" is to be broad: "The generic term 'entity' reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority."<sup>53</sup> In order to be "empowered", the group needs to be capable of definition and most likely would require legal personality under the domestic legal framework of the State.<sup>54</sup> This is not unheard of; for example, the Vigilante Group of Nigeria was registered in 1999 as a not-for-profit organization.<sup>55</sup>

Second, the community defence group must exercise elements of governmental authority. The ASR Commentaries suggest that "what is considered 'public power' depends on the society in question, its history and traditions".<sup>56</sup> Cameron and Chetail conclude on review of the drafting history, as well as domestic and international law approaches to defining governmental authority, that "it appears that the notion of elements of governmental authority is entirely linked to the exercise of the special powers of the state and not to the general public interest or the goal of a given activity".<sup>57</sup> This would likely encompass many activities of community defence group of a policing character, such as manning checkpoints on public roads, arresting persons suspected to be involved in organized armed groups, and engaging in interrogations.<sup>58</sup> The Commentaries provide the example of private security firms contracted as prison guards and consider that in this capacity they may "exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations".<sup>59</sup> It would not, on the other hand, extend to other peripheral activities of community defence groups that do not require "elements of government authority", such as translating services or community liaison work.<sup>60</sup>

53 Articles on State Responsibility, above note 31, p. 43.

54 This is consistent with the examples provided in the ASR Commentaries, namely public corporations, semi-public entities, public agencies of various kinds, and private companies: *ibid.*, p. 43.

55 Ernest Ogbozor, "Understanding the Informal Security Sector in Nigeria", ETH Zurich Centre for Security Studies, 4 October 2016, available at: <https://tinyurl.com/btbtda2c>. See also International Crisis Group, above note 5, p. 7, in relation to the regional decrees creating *comités locaux de vigilance* in Cameroon.

56 Articles on State Responsibility, above note 31, p. 43.

57 L. Cameron and V. Chetail, above note 38, p. 198. See also J. Maddocks, above note 3, pp. 62–77, and in particular her discussion of "quintessentially" government functions. For a discussion on the meaning given in the United States to tasks that are "inherently governmental" and may only be performed by members of the US Armed Forces or civilian employees of the Department of Defence, see Emanuela-Chiara Gillard, "Business Goes to War: Private Military/Security Companies and International Humanitarian Law", *International Review of the Red Cross*, Vol. 88, No. 863, 2006, pp. 550–551.

58 Katja Nieminen, "Rules of Attribution and the Private Military Contractors at Abu Ghraib: Private Acts or Public Wrongs?", *Finnish Year Book of International Law*, Vol. 289, No. 15, 2004, p. 299. Note, however, that many countries provide for a "citizen's arrest" that does not involve the exercise of public authority, usually limited to stopping a person in the commission of a serious offence: see, for example, France, Criminal Procedure Code, Art. 73; Indonesia, Criminal Procedure Code, Art. 18(2). See also Articles on State Responsibility, above note 31, p. 43.

59 Articles on State Responsibility, above note 31, p. 43.

60 K. Nieminen, above note 58, p. 300.

Third, the community defence group must be “empowered by the law of the State” to exercise the governmental authority.<sup>61</sup> There is some uncertainty about what is required by this. As Cameron and Chetail identify, the expression “by the law of the State” is ambiguous in English because it could refer to a specific law or more generally to a legal order. The French version’s usage of the expression *le droit interne* (as opposed to *lois internes*) is consistent with the broader interpretation, whereby delegation of authority would be possible provided it was undertaken within the legal order of the State.<sup>62</sup>

The ASR Commentaries do not definitively address “whether such authority must be granted through a concession of legislative power, or, for example, through an executive act, as it could be a contract between a government and a private entity to perform public functions”.<sup>63</sup> The Commentaries refer to entities that are “empowered by internal law to exercise government authority”, which might be understood to refer to a legislative or regulatory act, but, as mentioned above, they give as an example private security firms contracted to act as prison guards.<sup>64</sup>

The Montreux Document on private military and security companies, a document finalized on 17 September 2008 and to date supported by fifty-six States,<sup>65</sup> states that under customary international law, attribution would only occur in this respect where private military and security companies are “empowered to exercise elements of governmental authority if they are acting in that capacity (i.e. are formally authorized by law or regulation to carry out functions normally conducted by organs of the State)”.<sup>66</sup> In its discussion of circumstances where State responsibility might be attracted, it also specifies that “entering into contractual relations does not in itself engage the responsibility of Contracting States”.<sup>67</sup> If this is to be extended to responsibility under Article 5 of

61 Note that the Iran–US Tribunal considered that express authorization of the exercise of government authority was not required for the establishment of State responsibility, but instead considered that the exercise of government authority by the “Komitehs” or “Guards” created a reserve presumption whereby “the Respondent has the burden of coming forward with evidence showing that members of the ‘Komitehs’ or ‘guards’ were in fact *not* acting on its behalf, or were not exercising elements of government authority, or that it could not control them”. Iran–United States Claims Tribunal, *Kenneth P. Yeager v. The Islamic Republic of Iran*, Judgment, 1987, paras 43–45. This case is discussed further below in relation to Article 9 of the ASR.

62 L. Cameron and V. Chetail, above note 38, p. 168.

63 Vanessa Ballesteros Moya, “The Privatization of the Use of Force Meets the Law of State Responsibility”, *American University International Law Review*, Vol. 30, No. 4, 2015, pp. 800–801.

64 Articles on State Responsibility, above note 31, p. 43. The ICRC’s Customary Law Study also refers to responsibility for persons or entities “which [States] have empowered, under their internal law”: Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 149, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>. See also L. Cameron and V. Chetail, above note 38, pp. 168–169.

65 Swiss Federal Department of Foreign Affairs, “Participating States of the Montreux Document”, available at: [www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html](http://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html).

66 Montreux Document, above note 11, Part 1, para. 7.

67 *Ibid.*, Part 1, para. 7. See also E.-C. Gillard, above note 57, pp. 554–555. However, see also Cameron and Chetail’s discussion of decisions by both the Iran–US Tribunal and the ICJ in which neither body required

the ASR generally, the circumstances attracting responsibility under Article 5 will be rare, as it would require a State to provide in its laws or regulations for the delegation of authority to community defence groups.<sup>68</sup>

Finally, the wrongful act must have been committed by the community defence group or its member while acting in an “empowered” capacity.<sup>69</sup> The extension of responsibility to *ultra vires* acts under Article 7 of the ASR (and the discussion of this provision in relation to responsibility under Article 4, above) is equally applicable here.

### Attribution of responsibility for the acts of community defence groups under the instruction, direction or control of the State

Article 8 of the ASR provides for State responsibility for wrongful acts committed if a State instructs a member of a community defence group, or the group itself, to commit that wrongful act, or when groups or their members are acting under the direction or control of the State in carrying out that act.<sup>70</sup>

In relation to attribution on the basis of control, preliminary questions in relation to the degree of control required must be addressed. As is well known and often repeated, the ICJ in the *Nicaragua* decision considered that the United States’ support for the Contras (a non-State armed group operating in Venezuela) could give rise to legal responsibility on the part of the United States if it was “proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed”.<sup>71</sup>

The International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber reached a different conclusion in the *Tadić* case when examining the internationalization of conflicts, considering that conduct of military or paramilitary groups was attributable where “the State wields *overall control* over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.”<sup>72</sup> The approach in *Tadić* has been adopted by the International Criminal Court (ICC) in relation to the internationalizing of armed conflicts.<sup>73</sup> The ICJ continues to

a finding that group was empowered by the domestic legal order in finding the State responsible: L. Cameron and V. Chetail, above note 38, pp. 169–170.

68 See the discussion of the Anambra State Vigilante Services per Law No. 9, Anambra State Vigilante Services Law, 2000, in Human Rights Watch, above note 40.

69 Articles on State Responsibility, above note 31, Arts 5, 7.

70 The ICJ considered Article 8 as reflecting customary law: ICJ, *Bosnian Genocide*, above note 31, para. 398. For a critique of this finding, see Antonio Cassese, “The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia”, *European Journal of International Law*, Vol. 18, No. 4, 2007, p. 651.

71 ICJ, *Nicaragua*, above note 36, para. 115 (emphasis added).

72 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1, Judgment (Appeals Chamber), 2 October 1995, para. 131 (emphasis added).

73 ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2842, Judgment (Trial Chamber), 5 April 2012, para. 541; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment (Trial Chamber III), 21 March 2016, para. 130. See also ICRC, *Commentary on the First Geneva Convention*:

prefer and apply the effective control test.<sup>74</sup> This article will consider both the ICJ and the ICTY's approach.<sup>75</sup>

### *Overall control of the group*

First, as posited in *Tadić*, the overall control test applies in relation to the State's relationship with military or paramilitary groups. For individuals or groups not organized into military structures, "courts ... have instead insisted upon specific instructions or directives aimed at the commission of specific acts, or have required public approval of those acts following their commission".<sup>76</sup>

Not all community defence groups are organized militarily.<sup>77</sup> Many community defence groups operate informally and lack an effective centralized command. The Arrow Boys, for example, have been described as "a network of mobilized community members rather than a military-style hierarchical armed organization".<sup>78</sup> As described by Koos:

Some overarching positions (e.g., county-level commander, information officer) were established to facilitate coordination between local [Arrow Boys] groups across Western Equatoria. However, these functions were not endowed with commanding power as they would have been in an army or other military-like organizations. Core decision-making power regarding operational decisions and cooperation among local groups remained with

*Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), paras 271–273.

74 ICJ, *Bosnian Genocide*, above note 31, paras 404–407.

75 Alternative tests for attribution have been applied by other international and regional decision-makers. The European Court of Human Rights (ECtHR), for example, considered that acts of the Turkish Republic of Northern Cyprus could be attributed to Turkey on the basis of "effective overall control": ECtHR, *Loizidou v. Turkey*, Appl. No. 15318/89, 18 December 1996, para. 49; and see discussion in C. Kress, above note 2, pp. 107–109, 127–128; M. Milanovic, above note 2, pp. 345–346. The World Trade Organisation Appellate Body applies a test of "sufficient involvement" to determine whether acts of private entities may be considered "governmental": see Alberto Alvarez-Jimenez, "International State Responsibility for Acts of Non-State Actors: The Recent Standards Set by the International Court of Justice in Genocide and Why the WTO Appellate Body Should Not Embrace Them", *Syracuse Journal of International Law and Commerce*, Vol. 35, No 1, 2007, pp. 15–18. See also the discussion in Kristen E. Boon, "Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines", *Melbourne Journal of International Law*, Vol. 15, No. 2, 2014, pp. 349–351, with regard to the applicability of control tests in relation to attributing acts of terrorism. In relation to the merits of the effective and overall control tests, the present author does not take a position on which test is to be preferred and refers readers to the differing views taken on this topic in M. Milanovic, above note 2, pp. 317–324; A. Cassese, above note 70; ICRC Commentary on GC I, above note 73, Art. 2, paras 268–271; M. Milanovic, "State Responsibility for Genocide", *European Journal of International Law*, Vol. 17, No. 3, 2006, pp. 585–588; M. Sassòli, above note 51, p. 408.

76 ICTY, *Tadić*, above note 72, paras. 130–131. See also A. Cassese, above note 70, pp. 659–661.

77 See ICTY, *Boškoski*, above note 24, paras 194–206, for a description of the indicators that a group is an organized armed group.

78 C. Koos, above note 14, p. 1047. See also C. Dufka, above note 23, p. 28.

the local chairman and, by extension, the traditional community leaders in the village.<sup>79</sup>

If a community defence group is an organized armed group, according to *Tadić*, its conduct can be attributed to a State if the

State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.<sup>80</sup>

The “overall control” test is less onerous than the effective control test, but the level of control required is still high and goes beyond cooperation as allies.<sup>81</sup> Example indicators of a State’s overall control over a community defence group might include:

- the State is paying stipends for the members, is providing uniforms and engaging in training activities and is engaged in the coordination and planning of the group’s activities;
- the State determines the direction that the community defence group takes – it decides the activities that the community defence group will undertake, and the community defence group depends upon the State to guide it as to what activities to pursue and what not to pursue; and
- funding and other support provided by the State is conditional upon the community development group following the plans provided by the State; the State supervises the activities and operations.<sup>82</sup>

The overall control test does not, however, require that “the particular acts in question should be the subject of specific instructions or directives by a foreign State to certain armed forces in order for these armed forces to be held to be acting as de facto organs of that State”.<sup>83</sup> As posited in *Tadić*, the conduct of a group under the overall control of the State is attributable to the State as though its members were “agents” of the State,<sup>84</sup> and the State is responsible “even when they act contrary to their directives”.<sup>85</sup>

79 C. Koos, above note 14, p. 1048. See also the description of the Titweng and Gelweng in ICRC, above note 20, p. 57.

80 ICTY, *Tadić*, above note 72, para. 137.

81 *Ibid.*, para. 151; ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, Judgment (Appeals Chamber), 24 March 2000, paras 138–145.

82 Examples of the ICTY’s findings on overall control include ICTY, *Prosecutor v. Rajić*, Case No. IT-95-12, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (Trial Chamber), 13 September 1996, paras 13, 26, 32; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14, Judgment (Trial Chamber), 3 March 2000, paras 83–123; ICTY, *Tadić*, above note 72, para. 156; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, Judgment (Trial Chamber), 26 February 2001, para. 145; ICTY, *Prosecutor v. Mucić et al.*, Case No. IT-96-21, Judgment (Appeals Chamber), 20 February 2001, paras 46–47; ICTY, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34, Judgment (Trial Chamber), 31 March 2003, paras 198–201.

83 ICTY, *Tadić*, above note 72, para. 156.

84 *Ibid.*, para 137; ICRC, Commentary on the First Geneva Convention, 2016, Article 2, para. 273.

85 ICTY, *Tadić*, above note 72, paras 121–122. For a critique of this aspect of the *Tadić* decision, see C. Kress, above note 2, pp. 128–129, 135–136; M. Milanovic, above note 2, pp. 319–320.

### *Effective control over the acts*

Pursuant to the effective control test, the State is responsible where it directs or has control over the operation in which the wrongdoing has occurred.<sup>86</sup> This might include where the operation is being conducted according to a plan established and led by the State, the community defence group members accept orders from the State in relation to the operation, and the State has the capacity to change its plans and the community defence group members will respond accordingly.

For example, the description given of the Yobe Peace Group by Kwaja would raise questions of potential responsibility. As described by Kwaja, members of the Yobe Peace Group “are attached to military battalions and deployed to flash points where army battalions are stationed”, and the State is “wholly responsible for the funding, allowance and maintenance” of the group.<sup>87</sup> It would be useful to understand more precisely what is meant by “attached” and “deployed.” If the group is receiving orders and command from the armed forces for specific operations, its acts during such operations would be attributable to the State.<sup>88</sup>

As with responsibility under Article 4 of the ASR, an additional question arises regarding the extent of the State’s responsibility. The State is responsible when it instructs a person or entity to commit the wrongful act. In relation to circumstances where the State exercises control, the situation is less clear. The ICJ refers to the State having control over “operations” rather than acts, which has been interpreted by some to include *ultra vires* acts committed in the course of the operation.<sup>89</sup> In the ASR Commentaries, it is suggested that “[s]uch cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it”.<sup>90</sup>

86 Articles on State Responsibility, above note 31, p. 47. In practice this may be difficult to determine in the absence of express instructions. See discussion in Oona A. Hathaway, Emily Chertoff, Lara Dominguez, Zachary Manfredi and Peter Tzeng, “Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors”, *Texas Law Review*, Vol. 95, No. 3, 2017, p. 552; K. Nieminen, above note 58, pp. 307–308; K. E. Boon, above note 75, p. 338.

87 C. A. M. Kwaja, above note 12, pp. 64–65.

88 Articles on State Responsibility, above note 31, p. 47.

89 O. A. Hathaway *et al.*, above note 86, pp. 552–553. Kress, on the other hand, notes that Article 7 does not address *de facto* organs and highlights an absence of international practice extending it thus: C. Kress, above note 2, pp. 135–136.

90 Articles on State Responsibility, above note 31, p. 48. See also the discussion by Cameron and Chetail, who suggest that “the incidental character of the unlawful act regarding the particular mission can be determined by weighing whether or not the unlawful act was done to assist in the accomplishment of the mission, which can then help to answer the question of whether the instructing state had accepted the likelihood of its occurrence”: L. Cameron and V. Chetail, above note 38, pp. 207–208.



## Responsibility when exercising elements of government authority in the absence of the exercise by regular authorities

Article 9 of the ASR states:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

The ASR Commentaries suggest three conditions for attribution under Article 9: that the conduct must involve the performance of governmental functions; that it must be in the absence or default of the State; and that “the circumstances must have been such as to call for the exercise of elements of the governmental authority by private persons”.<sup>91</sup> As discussed above in relation to Article 5, it is foreseeable that some acts of community defence groups may involve the exercise of governmental authority, particularly those of a policing character, such as manning checkpoints on public roads, arresting persons suspected to be involved in organized armed groups, or engaging in interrogations.<sup>92</sup> Further, in relation to the requirement of an “absence or default of the State” as discussed in the first part of this article, many community defence groups are created and/or mobilized as a result of the absence of functioning State security operations.<sup>93</sup>

What is more difficult to ascertain is whether the circumstances would be such as to call for the exercise of elements of governmental authority by private persons. The ASR Commentaries suggest that such cases are “exceptional” and that “the principle underlying article 9 owes something to the old idea of the *levée en masse*” – a phenomenon that is narrowly defined.<sup>94</sup> Yet, the examples given by the Commentaries of the “exceptional nature of the circumstances envisaged in the article” include situations which unfortunately are quite common – namely, situations of “armed conflict” and situations “where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative”.<sup>95</sup>

An additional challenge in identifying the limits of attribution under Article 9 is posed by the reference in the ASR Commentaries to the *Yeager* decision of the Iran–United States Claim Tribunal. In that case, the Tribunal found

91 Articles on State Responsibility, above note 31, p. 49.

92 See, for example, C. Dufka, above note 23, p. 26, in relation to activities of the Dozo in Mali; D. E. Agbiboa, above note 7, pp. 14–16, in relation to the CJTF in Nigeria.

93 See, for example, C. Dufka, above note 23, pp. 15, 18, 19, in relation to Dogon and Bambara self-defence groups in Mali; C. A. M. Kwaja, above note 12, p. 28.

94 Articles on State Responsibility, above note 31, p. 49. For a discussion on the meaning of *levée en masse*, see ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020, Art. 4, paras 1064–1068.

95 Helmut Phillip Aust, “Complicity in Violations of International Humanitarian Law”, in Heike Krieger (ed.), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region*, Cambridge University Press, Cambridge, 2015, p. 463.

sufficient evidence on the record to establish a *presumption* that the revolutionary ‘Komitehs’ or ‘Guards’ after 11 February 1979 were acting in fact on behalf of the new government, or at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government *must have had knowledge and to which it did not specifically object*.<sup>96</sup>

If this was applied as a test for Article 9, it would create a low threshold for attribution, namely by the State’s “tolerance” of the activities of the group, even in the absence of an assessment of whether the State was capable of controlling the behaviour of the group.<sup>97</sup> Without a clear definition of the limits of this basis for attribution, it is difficult to entertain detailed analyses of its applicability.

## State responsibilities under primary rules of international law

This section addresses the potential responsibility of States that arises from so-called primary rules of international law.<sup>98</sup> The discussion invites closer examination into the acts and obligations of the State that are triggered by the conduct of community defence groups, even where the primary conduct of a group is not directly attributable to the State. The sources of primary responsibility discussed are IHL and IHRL.

### Responsibility for aiding and abetting human rights abuses; or encouraging aiding and assisting IHL violations

Article 16 of the ASR provides that

a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.

In the words of the Commentaries, there are three elements that would need to be established:

First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State

<sup>96</sup> Iran–United States Claims Tribunal, *Yeager*, above note 61, para. 104 (emphasis added).

<sup>97</sup> C. Kress, above note 2, pp. 130–131. The ECtHR’s jurisprudence on “connivance” and “acquiescence” is discussed below in relation to aiding and abetting.

<sup>98</sup> In the discussion of “aiding and abetting” that follows, we see overlaps between “primary” and “secondary” rules. See M. Milanovic, above note 2, pp. 229–301, for a discussion on the history and utility of these labels; and Bernhard Graefrath, “Complicity in the Law of International Responsibility”, *Belgian Review of International Law*, Vol. 29, No. 2, 1996, pp. 372–373, specifically in relation to aiding and abetting.

internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.<sup>99</sup>

The first two elements create a high threshold for triggering responsibility, as they require the assisting State to have knowledge of the wrongful circumstances and to have intended to aid or assist in the wrongful conduct.<sup>100</sup> In addition, the aid or assistance provided must have “caused or contributed to the internationally wrongful act”. In this respect there is still ambiguity as to the threshold of support that triggers responsibility.<sup>101</sup> The Commentaries suggest a low threshold, with even “incidental support” potentially triggering responsibility.<sup>102</sup>

The level of intention or knowledge required for State responsibility for the acts of a non-State entity is not clear.<sup>103</sup> When examining the question of whether Serbia was “complicit” in the genocidal acts of Bosnian Serb proxies, the ICJ considered the test as equivalent to “aiding and abetting” as provided for under Article 16, and that for an assisting State to be responsible, it must be proven that at the time the assistance was provided, the State had knowledge of the genocidal intent of the perpetrators.<sup>104</sup>

It is not clear whether or how IHRL derives from the aiding and abetting rule provided in Article 16. The UN Human Rights Committee held in 2006 that “a State party is responsible for acts of foreign officials exercising acts of sovereign authority on its territory, if such acts are performed with the consent or acquiescence of the State party”.<sup>105</sup> It did not, however, make reference to the ASR, and it is difficult to pinpoint whether this was because the Human Rights Committee considers that IHRL provides a modified knowledge/intent standard in relation to the general rule for aiding and abetting, or that IHRL provides an alternative basis for attribution of responsibility, or that responsibility stems from the primary wrong under IHRL (e.g. the obligation to prevent abuses, discussed below). Similarly, in relation to the European human rights framework under the

99 Articles on State Responsibility, above note 31, p. 66.

100 The text of Article 16 does not refer to intent, but the Commentaries are explicit in their inclusion of this requirement, which has also been adopted by the ICJ in the *Bosnian Genocide* case, above note 31, para. 431. See also H. P. Aust, above note 95, pp. 451–452; Erika de Wet, “Complicity in Violations of Human Rights and Humanitarian Law by Incumbent Governments through Direct Military Assistance on Request”, *International and Comparative Law Quarterly*, Vol. 67, No. 2, 2019, p. 301. Jackson and Moynihan, on the other hand, reject that “intent” is required under Article 16: see Miles Jackson, *Complicity in International Law*, Oxford University Press, Oxford, 2015, pp. 159–161; Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, Chatham House, Royal Institute of International Affairs, London, 2016, p. 20.

101 H. P. Aust, above note 95, pp. 449–450. See also B. Graefrath, above note 98, p. 374; E. de Wet, above note 100, pp. 299–301.

102 Articles on State Responsibility, above note 31, p. 67.

103 In relation to the scope of Article 16 and the non-inclusion of non-State actors, see Richard Mackenzie-Gray Scott, “State Responsibility for Complicity in the Internationally Wrongful Acts of Non-State Armed Groups”, *Journal of Conflict and Security Law*, Vol. 24, No. 2, 2019.

104 ICJ, *Bosnian Genocide*, above note 31, paras 420, 423.

105 Human Rights Committee, *Alzery v. Sweden*, Communication No. 1416/2005, UN Doc. CCPR/C/88/D/1416/2005, Merits, 25 October 2006, para. 11.6.

European Charter of Human Rights (ECHR), the European Court of Human Rights (ECtHR) considered in *Ilaşcu v. Moldova and Russia* that a State's responsibility could be engaged in relation to the acts of third parties if "the acts were performed with the acquiescence or connivance of the authorities of the contracting State" – however, the Court did not expressly identify whether it was determining that the ECHR's rule on aiding and abetting is *lex specialis* to the general rule in Article 16.<sup>106</sup>

If the requirement of knowledge and intent from Article 16 is imputed into the test for State responsibility for aiding and assisting human rights abuses of non-State actors such as community defence groups, it is unlikely to be satisfied.<sup>107</sup> It would require that the State knew, when providing support, that the community defence group was intending on committing the abuses, that it provided the support with this in mind, and that it materially contributed to the wrongful act. It seems highly difficult to prove the wrongful intent of the State beyond reasonable doubt, and contrary to a State's likely assertion that the support offered was intended for lawful activities of the community defence group.<sup>108</sup>

In relation to IHL, Article 1 common to the Geneva Conventions provides that States must "respect and ensure respect" for the Conventions.<sup>109</sup> The obligation to "ensure respect" has been interpreted to include an obligation to act (a positive obligation) and to cease to act (a negative obligation) in relation to the conduct of others.<sup>110</sup> In the *Nicaragua* case, the ICJ considered that the negative

106 ECtHR, *Ilaşcu and Others and Romania (Intervening) v. Moldova and Russian Federation*, Appl. No. 48787/99, Admissibility, Merits and Just Satisfaction, 8 July 2004, para. 318. See also ECtHR, *El-Masri v. Former Yugoslav Republic of Macedonia*, Appl. No. 39630/09, Merits and Just Satisfaction, 13 December 2012, para. 211; ECtHR, *Al Nashiri v. Poland*, Appl. No. 28761/11, Merits and Just Satisfaction, 24 July 2014, para. 517; ECtHR, *Husayn (Abu Zubaydah) v. Poland*, Appl. No. 7511/13, Merits and Just Satisfaction, 24 July 2014, paras 512–513; and discussion in Stephen Allen, "The Scope of Third-Party Responsibility for Serious Human Rights Abuses under the European Convention on Human Rights: Wrongdoing in the British Indian Ocean Territory", *Human Rights Law Review*, Vol. 16, No. 4, 2016, p. 778–779; Nina H. B. Jørgensen, "Complicity in Torture in a Time of Terror: Interpreting the European Court of Human Rights Extraordinary Rendition Cases", *Chinese Journal of International Law*, Vol. 16, No. 1, 2017, pp. 31–34.

107 However, see Berenice Boutin, "Responsibility in Connection with the Conduct of Military Partners", *Military Law and Law of War Review*, Vol. 56, No. 1, 2017–18, pp. 68–69. Boutin contends that the prohibition on aiding and abetting human rights violation is *lex specialis* and is triggered by the lower threshold of "actual or constructive knowledge". The obligation to protect against and prevent human rights violations is discussed separately below.

108 B. Graefrath, above note 98, pp. 375–376; H. P. Aust, above note 95, p. 452.

109 See also ICRC Customary Law Study, above note 64, Rule 144.

110 See, for example, ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, *ICJ Reports* 136, para. 158; ICJ, *Nicaragua*, above note 36, para. 220; ICRC Commentary on GC I, above note 73, Art. 1, para. 145. See also Theo Boutruche and Marco Sassòli, "Expert Opinion on Third States' Obligations vis-à-vis IHL Violations under International Law, with a Special Focus on Common Article 1", 8 November 2016, p. 21; Knut Dörmann and Jose Serralvo, "Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations", *International Review of the Red Cross*, Vol. 96, No. 895–896, 2014, pp. 727, 734; Catherine Drummond, "Ensuring Respect for IHL by, and in Relation to the Conduct of, Private Actors", in Eve Massingham and Annabel McConnachie (eds), *Ensuring Respect for International Humanitarian Law*, Routledge, London, 2020, pp. 66–67; Tom Ruys, "Of Arms, Funding and Non-Lethal Assistance: Issues Surrounding Third-State Intervention in the Syrian Civil War", *Chinese Journal of International Law*, Vol. 13, No. 1, 2014, p. 26. See, by contrast,

obligation derives not only from common Article 1, but also “from the general principles of humanitarian law to which the Conventions merely give specific expression”.<sup>111</sup> The International Committee of the Red Cross (ICRC) considered this negative obligation to be triggered in relation to common Article 1 if the State becomes “aware of the commission of violations of IHL by the supported forces” or if “there is an expectation, based on facts or knowledge of past patterns” that a specific operation would violate the Conventions.<sup>112</sup> Under such an interpretation, common Article 1 is treated as a *lex specialis* whereby unlike the general rule, there is no requirement of “intent”.<sup>113</sup>

The circumstances creating an awareness or expectation will depend upon the regularity or predictability of the community defence group’s activities and the nature of the relationship between the State and the group. For example, if the State regularly receives into its custody persons who have been captured and ill-treated by a community defence group, this should create an expectation of continuing abuses in similar situations.<sup>114</sup> A State might also acquire knowledge through other sources, such as receiving complaints about the group (e.g. complaints to the police) or through credible public channels of information such as investigative reporting by the media or international or non-government organizations.<sup>115</sup> One interesting dynamic in relation to the knowledge trigger is that the obligations of the State as a whole may be triggered by the knowledge of just one of its agencies.<sup>116</sup> For example, if the police investigate reports of abuses on the part of a community defence group that establish a predictable pattern of behaviour, all agencies of the State will be required to desist from providing support for the wrongful act.

An additional limitation in IHL is that both the negative and positive obligations (discussed below) are directed towards IHL violations. In relation to negative obligations, the State cannot encourage, aid or abet a third party to commit IHL violations. This would extend to any acts of members of community defence groups which amount to war crimes.<sup>117</sup> It would also apply in circumstances where a community defence group has IHL obligations as an organized armed group and as a party to the conflict.<sup>118</sup>

Riccardo Pisillo Mazzeschi, who considers that in the few areas of international law where due diligence obligations could be considered to exist, there is no corresponding obligation to abstain: Riccardo Pisillo Mazzeschi, “The Due Diligence Rule and the Nature of the International Responsibility of States”, *German Yearbook of International Law*, Vol. 35, 1992, p. 43.

111 ICJ, *Nicaragua*, above note 36, para. 220; ICRC Commentary on GC I, above note 73, Art. 1, para. 158.

112 *Ibid.*, para. 184.

113 *Ibid.*, para. 159. See also H. P. Aust, above note 95, pp. 457–458. This is not uniformly accepted – see, for example, the discussion in T. Ruys, above note 110, pp. 27–28.

114 The obligation on States to prevent unlawful detention of persons by non-State entities is discussed below.

115 E. de Wet, above note 100, pp. 302–303, gives examples of knowledge triggers for States supporting other States.

116 Articles on State Responsibility, above note 31, Art. 4.

117 ICRC Commentary on GC I, above note 73, Art. 50, paras 2929–2930; ICRC Customary Law Study, above note 64, Rule 158, “ii. Perpetrators”.

118 See the above section entitled “Overall Control of the Group” for a discussion on community defence groups as organized armed groups. See also C. Drummond, above note 110, p. 65.

## Obligation to prevent abuses and violations of IHRL and IHL

IHRL and IHL both require States to take protective measures to prevent abuses or violations of their respective bodies of law by private persons. In IHRL, the obligation to prevent violations of rights specified in the International Covenant on Civil and Political Rights (ICCPR) stems from Article 2, which provides an obligation on each State Party to “respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”.<sup>119</sup> This requires States to respond not only to the acts of State agents, but also to the acts of private persons.<sup>120</sup>

The obligation to prevent human rights abuses by third parties has been interpreted as a “due diligence” obligation, requiring States “to undertake reasonable positive measures, which do not impose on them disproportionate burdens, in response to reasonably foreseeable threats to life originating from private persons and entities, whose conduct is not attributable to the State”.<sup>121</sup>

In IHL, similarly, a due diligence obligation to prevent IHL violations is considered to exist, stemming “from the general principles of humanitarian law”<sup>122</sup> as well as common Article 1.<sup>123</sup> As in IHRL, this obligation has been interpreted as extending to preventing IHL violations by private persons whose conduct is not attributable to the State.<sup>124</sup> In IHL, the obligation is similarly

119 See also African Commission on Human and Peoples’ Rights (ACHPR), *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/02, 39th Ordinary Session, 11–15 May 2006, para. 143; and the ECtHR’s invocation of the obligation on States to “secure to everyone within their jurisdiction the rights and freedoms” defined in the ECHR as underpinning the obligation to prevent violations, in ECtHR, *El-Masri*, above note 106, para. 198.

120 Human Rights Committee, General Comment No. 31, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 8. See also Monica Hakimi, “State Bystander Responsibility”, *European Journal of International Law*, Vol. 21, No. 2, 2010, p. 351.

121 Human Rights Committee, General Comment No. 36, “Article 6: Right to Life”, UN Doc. CCPR/C/GC/36, 3 September 2019, para. 21. See also Inter-American Court of Human Rights (IACtHR), *Velásquez Rodríguez v. Honduras*, 29 July 1988, para. 174; ECtHR, *Osman v. United Kingdom*, Case No. 23452/94, Merits, 28 October 1998, para. 116. By contrast, see ICJ, *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, 1949, *ICJ Reports 1949*, pp. 22–23, where the ICJ considered responsibility for the failure to act (omission) to be triggered by Albania’s knowledge of the laying of landmines. See, further, Articles on State Responsibility, above note 31, p. 35; ICJ, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Merits, Judgment, 2010, *ICJ Reports 2010*, para. 101.

122 ICJ, *Nicaragua*, above note 36, p. 114.

123 ICRC Commentary on GC I, above note 73, Art. 1, para. 167. See also K. Dörmann and J. Serralvo, above note 110, pp. 727–730. Other more specific due diligence obligations exist in IHL, for example in relation to situations of occupation under Article 43; the wounded, sick and shipwrecked in international armed conflicts; and prisoners of war: see L. Cameron and V. Chetail, above note 38, pp. 236–243. Not all accept that common Article 1 carries with it positive obligations. See, for example, Brian Egan, “International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations”, *International Law Studies*, Vol. 92, No. 1, 2016, p. 245; but also Oona A. Hathaway and Zachary Manfrei, “The State Department Adviser Signals a Middle Road on Common Article 1”, *Just Security*, 12 April 2016, available at: [www.justsecurity.org/30560/state-department-adviser-signals-middle-road-common-article-1/](http://www.justsecurity.org/30560/state-department-adviser-signals-middle-road-common-article-1/).

124 ICRC Commentary on GC I, above note 73, Art. 1, para. 172. See also V. Ballesteros Moya, above note 63, pp. 831–832; M. Longobardo, above note 51, p. 59; L. Cameron and V. Chetail, above note 38, p. 245; B. Boutin, above note 107, p. 273; K. Dörmann and J. Serralvo, above note 110, 708–709.

considered to be triggered when there is a “foreseeable risk” that violations will be committed.<sup>125</sup>

The threshold for prompting the State to respond to prevent an IHL or IHLR violation is lower than that required for it to desist from “aiding and abetting” (as set out in Article 16 at least). For example, if a police station receives sporadic reports of human rights abuses by community defence groups, this may not, without further investigation, amount to “knowledge” of abuses requiring the immediate cessation of “aid or assistance”.<sup>126</sup> However, it would prompt an obligation to act in response to the identified risk.<sup>127</sup>

The response required under both IHL and IHRL is one of conduct, not result. Under IHRL, in response to a real and immediate risk, authorities are required to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.<sup>128</sup> The response to risk has been similarly interpreted in IHL as being dependent upon the specific circumstances, “the gravity of the breach, the means reasonably available to the State and the degree of influence it exercises over those responsible for the breach”.<sup>129</sup>

So, for example, the activities of a community defence group operating under the guise of (if not the actual) authority of the State may carry a generalized risk of harassment or exploitation of vulnerable communities. Examples of responses to reduce that risk could include strict arms control, vetting, making funding/partnerships/joint military operations conditional on compliance with a code of conduct, appropriate supervision, training, compliance mechanisms and sanctions.<sup>130</sup> In circumstances where a community defence group has a practice of detaining persons to then hand them over to the State, the State would be required to address this, as this would *prima facie* involve an infringement of the detained person’s right to liberty.<sup>131</sup> If the State wished for this practice to continue, it would need to provide appropriate protections, such

125 ICRC Commentary on GC I, above note 31, Art. 1, para. 186. Akin to the test applied in the *Bosnian Genocide* case, above note 31, para. 431.

126 But see the discussion above in relation to the ECtHR’s view of responsibility on the basis of “acquiescence or connivance”.

127 M. Hakimi, above note 120, p. 354.

128 ECtHR, *Osman v. United Kingdom*, Case No. 23452/94, Merits, 28 October 1998, para. 116; Human Rights Committee, above note 121, para. 21; Committee Against Torture, General Comment No. 2, “Implementation of Article 2”, UN Doc. CAT/C/GC/2, 24 January 2008, para. 18; IACtHR, *Velásquez Rodríguez*, above note 121, para. 175.

129 ICRC Commentary on GC I, above note 73, Art. 1, para. 187. See also M. Longobardo, above note 51, p. 62; K. Dörmann and J. Serralvo, above note 110, pp. 724–725.

130 ICRC Commentary on GC I, above note 73, Art. 1, para. 214; O. A. Hathaway *et al.*, above note 86, pp. 585–589.

131 Human Rights Committee, General Comment No. 35, “Article 9: Liberty and Security of Person”, UN Doc. CCPR/C/GC/35, 26 December 2014, para. 7. See also ACHPR, *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, Communication No. 74/92, Finding, 1995, para. 22; and discussion in Tilman Rodenhäuser, *Organising Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law and International Criminal Law*, Oxford University Press, Oxford, 2018, pp. 139–143. See also A. I. L. Campbell, “Positive Obligations under the ECHR: Deprivation of Liberty by Private Actors”, *Edinburgh Law Review*, Vol. 10, No. 3, 2006, pp. 149–151. discussing the ECtHR’s decision in *Storck v. Germany* wherein the Court considered the lack of State

as a meaningful regulatory framework, vetting of persons or groups authorized to conduct the “arrest”, and ensuring accountability equivalent to that demanded of members of the State’s security services.<sup>132</sup>

If the State is providing firearms to community defence groups, this too should be considered a risk and should be accompanied with appropriate vetting of individuals, training and accountability.<sup>133</sup> If the State authorizes a community defence group to use force, this increased risk must be matched with a commensurate response to address that risk—namely, ensuring that “strict and effective measures of monitoring and control, as well as adequate training, are in place in order to guarantee, inter alia, that the powers granted are not misused and do not lead to arbitrary deprivation of life”.<sup>134</sup>

Where community defence groups are operating without government support, the ability of the government to prevent abuses may be limited to generalized law enforcement activities. On the other hand, where the State and community defence groups are coordinating and meeting regularly and the State is providing financial support, the State can be expected to use its weight to protect people from foreseeable, immediate and real risks posed by the community defence group to the wider community.<sup>135</sup> The greater the risk, and the greater the consequence of the risk, the greater the response required from the State within the means reasonably at its disposal.

## Obligation to investigate and prosecute abuses and violations

The obligation to investigate and punish non-compliance can be seen in both IHRL and IHL as an extension of the obligation to prevent abuses and violations of these two bodies of law.<sup>136</sup> In IHRL, this obligation is also considered implicit in the obligation to provide an effective remedy to victims of human rights violations.<sup>137</sup> In IHL, States are obliged to investigate war crimes allegedly committed by their nationals or on their territory, and if appropriate, to prosecute the suspects.<sup>138</sup>

control as key to Germany’s non-fulfilment of its obligations to prevent the deprivation of liberty by non-State actors as well as the right to private life.

132 See O. A. Hathaway *et al.*, above note 86, pp. 585–587; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 1984, Art. 10. For an example of a regulatory framework provided for community defence groups in Burkina Faso, see Decree No. 2020-0115, above note 35. Note that the training requirement for such “volunteers” is only two weeks.

133 Human Rights Committee, above note 121, para. 21.

134 *Ibid.*, para. 15. In relation to best practice regarding training, see O. A. Hathaway *et al.*, above note 86, pp. 586–587. See Brian Finucane, “Partners and Legal Pitfalls”, *International Law Studies*, Vol. 92, 2016, p. 426, in relation to the risks associated with partners that engage in the conduct of hostilities, including the absence of effective commanders or leaders able to exercise effective command and control over their members.

135 B. Boutin, above note 107, p. 74.

136 Human Rights Committee, above note 121, para. 21. See also Human Rights Committee, above note 120, para. 8; Inter-American Court of Human Rights, *Velásquez Rodríguez v Honduras*, 29 July 1988, para 176; ACHPR, above note 131, para. 22.

137 Human Rights Committee, above note 121, para. 27.

138 ICRC Customary Law Study, above note 64, Rule 158.



In IHL and IHRL, any investigation of violations must be independent, impartial, prompt, thorough, effective, credible and transparent.<sup>139</sup> As the ICRC and Geneva Academy's recently published *Guidelines on Investigating Violations of International Humanitarian Law* acknowledge, “[t]here should be no fundamental difference between the general principles of an effective investigation in armed conflict and outside it, as their application will depend on what is feasible in each situation”.<sup>140</sup>

## Conclusion

Developing a framework for assessing the potential responsibility of States in relation to the acts of community defence groups is not simply an academic exercise. In some contexts, community defence groups have become an important part of the security framework. Having a greater understanding of the State's potential responsibility in relation to these groups can serve as an additional tool for mobilizing the State to reduce the risks associated with the work of such groups.

Quite reasonably, the instinct in assessing the obligations of a State in times of national crisis is to acknowledge the practical limitations that the State faces. Would it not be naive to expect a State to robustly recruit, train and hold to account members of community defence groups, given that such groups are often most active when the security apparatus of the State is not well functioning? This article does not ignore the challenges that a State faces, but simply demonstrates that the operation of community defence groups providing security services is not necessarily a “simple solution” for the State. In certain circumstances addressed above, the acts of a community defence group may be directly attributable to the State. More commonly, a State will incur its own due diligence obligations to prevent IHRL and IHL violations in response to reasonably foreseeable risks associated with the community defence groups' activities, and to investigate and, if appropriate, prosecute any violations.

In addition to reducing the risks associated with the work of community defence groups, increased State engagement with such groups may prevent them from becoming a source of future instability—another potential uncontrolled armed actor in a volatile security situation.<sup>141</sup> Engaging in discussions about the State's responsibilities can encourage from the outset a more forward-thinking assessment regarding the role of community defence groups in addressing both the immediate and future security needs of the community and the State at large.

139 Human Rights Committee, above note 121, para. 28; ECtHR, *Finogenov and Others v. Russia*, Appl. Nos 18299/03, 27311/03, Judgment, 20 December 2011, paras 270–272; ECtHR, *El-Masri*, above note 106, paras 186–189; ICRC and Geneva Academy, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy and Good Practice*, Geneva, 2019, para. 32.

140 ICRC and Geneva Academy, above note 139, para. 34. See also the discussion in T. Rodenhäuser, above note 131, p. 198.

141 L. Harriman, I. Drewy and D. Deng, above note 17, p. 13; D. E. Agbiboa, above note 7, pp. 18–19.