Non-governmental human rights organizations and international humanitarian law

by Rachel Brett

At the heart of human rights work is the attempt to protect individuals from the abuse of power or neglect on the part of their own governments. At the international level, this translates into State responsibility for the way in which the government treats its own people, supplementing the older international law regarding the treatment of aliens and the law of war which also (originally) addressed only the treatment of non-nationals.

It is therefore not surprising that non-governmental organizations (NGOs) involved in safeguarding human rights have always focused on the implementation (or violation) of universal or regional human rights standards by governments. This reflects the traditional view of governments as the centres of power and responsibility as well as the general principle that States are bound by international law (either by virtue of becoming party to a treaty or because the rule is recognized as a norm of customary international law) and the classic human rights view that governments and only governments can violate human rights. Killings committed by individuals or groups are crimes. Such acts become violations of human rights if the perpetrator is the agent of a State or if the State fails in its duty to protect the individual or to prosecute the alleged perpetrator.[1]

Rachel Brett, LL.M., is associate representative (human rights and refugees) at the Quaker United Nations Office, Geneva, and a fellow of the Human Rights Centre of the University of Essex, United Kingdom.

[1] See the judgment of the Inter-American Human Rights Court in *Velasquez-Rodriguez v. Honduras*.

Today's problem

However, the world has changed and the law along with it. The growing number of internal (non-international) armed conflicts and the attention they receive internationally has produced a number of developments. International humanitarian law has moved from its exclusive concern for international armed conflict to active interest in internal armed conflicts as well. The first of this was Article 3 common to the 1949 Geneva Conventions. The second came in 1977 with Additional Protocol II, which is applicable to non-international armed conflict. Humanitarian law has thus moved into the human rights arena, as it were, in the sense that it now addresses the relationship between those in authority and the people they govern. This raises the question of the relationship between international humanitarian law and human rights law, since human rights law continues to apply (though with limitations) in time of armed conflict. This same development raises questions about some of the fundamental tenets of international humanitarian law: the equal standing of the parties to an armed conflict and the reciprocal nature of their obligations. Finally, the regulation of internal armed conflicts raises the whole question of accountability on the part of non-State entities under international law.

The response of human rights NGOs

Traditionally, human rights NGOs have tended to feel that international humanitarian law was the province of the International Committee of the Red Cross and that it was complicated, containing as it does all sorts of strange and ambiguous (at least to human rights people) concepts such as "collateral damage" and "military necessity", so that even something as apparently straightforward as the killing of civilians might, though regrettable, not constitute a violation of international humanitarian law. For human rights NGOs, there have been questions about how to interpret the law and whether there is a danger of lowering standards by applying international humanitarian law rather than human rights law.

However, the proliferation of armed conflicts — in particular internal armed conflicts — and the apparent convergence of human rights law and international humanitarian law[2] has led certain human rights NGOs to

[2] For an example of such convergence, see the "Guiding Principles on internal displacement", prepared under the auspices of the Representative of the UN Secretary-General on internally displaced persons, UN Doc. E/CN.4/1998/53/Add.2, see *infra* p. 545, and "Compilation and analysis of legal standards", UN Doc. E/CN.4/1996/52/Add.2.

reconsider their position. A basic principle for human rights NGOs is that it is unacceptable to ignore violations on the grounds that they occur during armed conflicts. How then can these organizations respond effectively to such violations? Does international humanitarian law provide a useful framework? These questions will be examined with respect to two issues: applicable standards and the accountability of non-State forces.

The question of applicable standards

Where the government accepts that it is involved in an armed conflict and, therefore, that international humanitarian law applies, there is an advantage in holding the government to the standards established by that law. This avoids any argument about the yardstick: since government and NGOs refer to the same law, they may focus the debate on the facts and their interpretation in relation to that law. A classic example of this is Amnesty International's report on Israel's "Grapes of Wrath" operation in southern Lebanon.[3]

This was in fact the first time that an Amnesty International report used international humanitarian law to assess a governmental military operation. The alternative approaches of either seeking to apply human rights law to this military action or to ignore it completely obviously would have been unsatisfactory.

Furthermore, as knowledge of international humanitarian law has grown among human rights NGOs, there has been an increasing recognition that at least some of the standards provide a degree of specialization and specificity that human rights standards lack, even in relation to internal armed conflicts. A notable example of this is the rules governing displacement of the civilian population. Such displacement is a common phenomenon in internal armed conflicts but one on which human rights law provides little assistance. By contrast, Article 17, paragraph 1 of Additional Protocol II provides that people may be relocated only for their own security or for "imperative military reasons", and specifies that "all possible measures" must be taken to ensure "satisfactory conditions of shelter, hygiene, health, safety and nutrition" for those displaced. This provision was used by Human Rights Watch in its recent report on Burundi as the yardstick for judging the camps set up by the government.[4]

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[3] *Israel/Lebanon, Unlawful killings during operation "Grapes of Wrath"*, Amnesty International, London, July 1996 (AI Index MDE 15/42/96).

[4] *Proxy targets: Civilians in the war in Burundi*, Human Rights Watch, New York, 1998.

Accountability of non-State forces

The reality of today's world is that there are countries with no government or with titular governments only partially in control of the territory. Can (or should?) human rights NGOs either ignore such situations or go on considering only governments accountable under human rights law?

The legal and conceptual ambivalence about non-State forces is not exclusive to NGOs. It is also nicely reflected in the proposed optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflict (another example of convergence of human rights and international humanitarian law) in the latest draft of that text's provision on military recruitment by non-States forces. The preambular paragraph recalls "the obligation of each party to an armed conflict to abide by the provisions of international humanitarian law", while draft Article 3, paragraph 1 balances the moral (not legal) obligation not to recruit children under 18 with a legal obligation on States to prevent such recruitment: "Persons under the age of 18 years should not be recruited into armed groups, distinct from the armed forces of a State, which are parties to an armed conflict. States Parties shall take all feasible measures to prevent such recruitment."[5]

For human rights NGOs, therefore, it might seem that the obvious solution to the problem of non-State entities is to use international humanitarian law. However, it is not as simple as that. Firstly, humanitarian law applies only if there is an armed conflict, and there are situations in which non-State entities are involved without there being an armed conflict. Still other situations are simply difficult to define. Secondly, even where there unequivocally is an armed conflict, human rights law continues to be binding on governments, although in certain circumstances they are permitted to derogate from some of its provisions. Human rights NGOs could, therefore, find themselves invoking both human rights law and international humanitarian law vis-à-vis the government while referring only to international humanitarian law vis-à-vis armed opposition group. Does it matter whether the government is held to higher or different standards than the opposition? Furthermore, Protocol II only applies if the State concerned is party to it. Should the non-adherence of a government prevent

[5] Report of the Working group on a draft Optional Protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts on its fourth session, Annex II, Chairman's Perception, UN Doc. E/CN.4/1998/102.

human rights NGOs from insisting that its provisions be complied with by non-State entities to whom those provisions would otherwise apply?

The disparity between the standards laid down by human rights law and international humanitarian law is greatest where only common Article 3 applies but not Protocol II. This "inequality" of standards may present a problem from the perspective of international humanitarian law. However, for human rights NGOs the application of international humanitarian law standards to the armed opposition group does not amount to putting them on a par with the government. It merely lays down a generally accepted yardstick for their conduct. Applying both sets of standards to the government precludes the risk that the standards to which it is being held will be diluted. In Northern Ireland, for example, to oppose the killing of "civilians" (those not taking active part in the conflict) by the IRA on the basis of common Article 3 could be seen as legitimizing IRA killings of members of the British armed forces. Moreover, if application of Article 3 implies that this is an armed conflict, could it not also legitimize the alleged "shoot to kill" policy of the government, since international humanitarian law permits members of the armed forces to kill members of opposing armed forces? For human rights NGOs, the possibility of legitimizing killings is an issue even if there is definitely an armed conflict. But the question becomes thornier if, as in the example of Northern Ireland, there is not in fact an armed conflict, or where the situation is in doubt. In such circumstances, human rights NGOs are invoking the *principles* of common Article 3 in their dealings with the non-State entities involved in the situation, rather than the provision itself. This avoids the problem of having to hold the government to this same standard and it ensures that certain conduct, such as deliberately killing innocent bystanders, is condemned.

Conclusion

The increasing interest in international humanitarian law on the part of human rights NGOs highlights the problems with which they are wrestling: in particular, how to maintain or improve protection of human rights in armed conflicts and internal disturbances. It is in the nature of NGOs that there will be no unified response to these problems though a number of key points on which they agree emerge from their work and from their discussions. They are as follows.

1. International humanitarian law provides agreed standards specifically designed to address issues arising in armed conflict. On the basis

of these, NGOs can hold governments and armed opposition groups alike accountable for their actions.

2. In the event of non-international armed conflict, NGOs can remind the warring parties of the provisions of Protocol II even where the State is not bound by that treaty or where it is not applicable (because a condition for its applicability is not met, e.g. control of territory), since the Protocol provides authoritative guidance regarding humane treatment. Moreover, at least part of its provisions belong to international customary law.

3. In addition to including violations committed by non-State entities in their reports on government violations, human rights NGOs need to engage non-State entities and to be able frankly to condemn violations committed by them. There are at least four possible bases for such action by human rights NGOs. Their use would depend on various factors, including the sensitive problem of possibly giving "recognition" to such groups, and the body of law which the individual NGO considers most appropriate or with which it feels most comfortable. These bases are:

— *morality* (provided that the human rights NGO and the non-State entity concerned share a common moral system, which is more likely at local or national level than in an international context);

— the *principles of Article 3* common to the Geneva Conventions;

— the *principles of human rights law* (though that law itself binds only States);

— *domestic criminal law* (when compatible with international standards).

Human rights NGOs are unlikely ever to feel completely at ease with international humanitarian law. Its concepts, language and approach are different from those of human rights. However, the strength of the human rights movement is its ability to learn and to adapt on order to meet the changing challenges of the world while guarding the integrity of the human rights concept in the face of pressure from governments and the public. International humanitarian law provides valuable tools for human rights NGOs in their struggle to safeguard human rights.