

Human Rights: From Practice to Policy

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The Human Rights Movement and International Humanitarian Law

Presentation by Kenneth Roth

International humanitarian law (IHL) has been around for well over a century, and the International Committee of the Red Cross was the treaty-designated body to deal with IHL issues. Although other human rights organizations did not use IHL as a basis for their advocacy work, very early in our history Human Rights Watch began to take it on.

I think the first human rights organization to refer to humanitarian law was actually a Salvadoran group. The context was the El Salvadoran war, in the 1980s. The San Salvador Archdiocese had a legal aid group known as *Socorro Jurídico*, which was severely criticized by both the Salvadoran and the US government for reporting only on government abuses. Of course human rights law, as we all know, addresses governments, not others. This presented a problem because it was very easy to portray *Socorro Jurídico* and others as biased. How can you have conflict abuses on both sides, but you're only reporting on one side? So the Archdiocese dissolved *Socorro Jurídico* and created *Tutela Legal*. *Tutela Legal* used humanitarian law to report not only on the Salvadoran government abuses but also on rebel abuses by the *Faribundo Martí Liberation Front (FMLF)*.

How Human Rights Watch Came To Rely on International Humanitarian Law

Human Rights Watch—at that point called Americas Watch—did the exact same thing. Beginning in 1982 or 1983, we began referring to common Article 3 of the 1949 Geneva Conventions. The 1949 Geneva Conventions still mainly dealt with governmental abuses. But within Common Article 3 it imposed certain basic duties on rebel groups. We saw Common Article 3, the so-called convention-within-a-convention, as supplying an overarching, general principle. That, for us, solved the problem of perceived partiality. We could effectively say we were neutral and we were looking at the most serious IHL violations on both sides. That became our standard procedure. In any war around the world, Human Rights Watch always reports on the worst violations of both sides.

In the 1980s, in addition to El Salvador, the most immediate application was in Nicaragua, where we were looking at both Sandinista abuses and Contra abuses but it became the standard way we operated everywhere. Part of our motivation was the extraordinary harm done to civilians or non-combatants in the context of war. There is much death and violence that is difficult to address through a pure human rights approach, focusing exclusively on human rights law.

It's important to note that Human Rights Watch never faced the conceptual limitations experienced by Amnesty, which had started off with a focus on custodial abuses. Human Rights Watch was born through a group of publishers and writers who were concerned more broadly about the health of civil society and the extent of censorship. Obviously imprisonment played a role in those kinds of human rights violations, but from the start we were concerned with a whole range of non-custodial abuses as well. The fact that in war the killing instrument may have been an airplane meant that you couldn't easily apply the standard concepts of custodial abuse. You certainly couldn't characterize the act as an execution, and even assassination could be difficult. You had to look at concepts such as indiscriminate bombardment or disproportionate impact on civilians, and these were by definition non-custodial. That didn't pose a problem for us at Human Rights Watch because we didn't start off with a prisoner orientation to begin with.

Quite apart from the neutrality issue, we were also driven to IHL by the fact that human rights law didn't provide much guidance about what constituted legitimate forms of violence in time of war. And here I should stress that we were always very careful not to be a peace group. We weren't against war per se. We never took up the issue of who is the aggressor, who is the defender, who was at fault for starting the war, who's in the right, who's in the wrong. We always did stay neutral on those issues. But, nonetheless, what does the right to life mean in the context of a war where you kill people? The International Covenant on Civil and Political Rights doesn't really provide an answer to that question. So we needed another body of law apart from human rights law. Now, this was not as radical as it might seem. If you think of the crowd control context, a similar issue arises. The human rights movement has become quite comfortable referring to police standards

that impose certain duties on the police—in terms of when it is appropriate or not to resort to lethal force. These standards are not conventionally considered part of human rights law, yet they are not seen as problematic. One way to understand IHL is that it simply fleshes out the right to life in a war context, and imposes various duties that in essence are pretty simple. You need to distinguish combatant from non-combatant. You need to take all reasonable precautions to avoid harm to non-combatants. You need to refrain from using non-discriminate means or methods. And you need to ensure the impact on civilians is not disproportionate to the anticipated military advantage. It's a little more complicated than that, but those are the core concepts, which, frankly, are not all that difficult to apply.

In addition to the means and methods of warfare, a number of other issues arose in El Salvador. One question concerned the displacement of civilians as part of a counter-insurgency strategy. Was it appropriate for the Salvadoran army to be bombing villages as part of their counterinsurgency effort—draining the sea in order to get the fish? This strategy involved a deliberate effort to displace civilian supporters of the rebels so the Salvadoran army could go after the rebels who remained in the territory. There were also questions of targeting. Is it appropriate to aim at a civilian sympathizer of the rebels? Is it appropriate to aim at a political official who may have sided with the rebels? These questions turned on the definition of who is a combatant and who is not a combatant, which again, required examination of the full body of IHL.

And I should say here that Human Rights Watch always took a fairly flexible approach to interpreting IHL. Common Article 3 of the Geneva Conventions supplies basic principles but doesn't provide all the answers. We would thus typically look to instruments like the first Additional Protocol to the Geneva Conventions, which technically applies only to international armed conflict but sets forth a number of principles that were widely accepted as customary international law. Basically, we applied those provisions to internal conflicts—recognizing that this wasn't technically right from a legal perspective but we weren't going to court. These were not legal arguments needed to convince a judge. Rather, we needed to refer to a set of norms that would persuade public opinion that certain military conduct was wrong. If we could do

that successfully, it didn't matter whether the law technically applied or not. Very frequently we would use this broader principled approach to push the boundaries of the law, even where the law had not caught up.

In recent years, international tribunals have done the same thing that we were doing at an informal level in the 1980s. This has become a less radical proposition than it may have appeared in an earlier time, which I'll get to in a moment. It's the approach we used with the Landmines Convention and the Cluster Munitions Convention. It has been a very deliberate approach all the way along.

Now, one last reason we felt it was important to rely on international humanitarian law was that the traditional human rights law framework looked exclusively at how a government treated people within its own country. You needed IHL if you were going to look at how a government acted outside of its territory. This was less of an issue in the early- to mid-1980s than it became with the Panama invasion to get Noriega. It became even more important in the first Gulf War with the kind of military means that we saw deployed there. Human rights law didn't help you address that situation. We needed IHL if we were going to make arguments to address the United States and the other major Western militaries, which we thought was important to do.

In sum, these were the reasons that Human Rights Watch took up international humanitarian law. As I think many of you know, our decision to rely on humanitarian law was very controversial in the 1980s. There were in fact a variety of reactions from other parties, ranging from skepticism to hostility. Amnesty was skeptical; the Ford Foundation was quite hostile; the Lawyers Committee for Human Rights was actively hostile. And just as a historical note, the Ford Foundation commissioned Pepé to write a paper about this. My sense was that the aim of this was to show this was a bad idea and to rein us in. I don't know, maybe not. I've gone back to review that paper, and it provides a great snapshot of the arguments, which can be inferred in editorial inserts from Amnesty and the Lawyers' Committee.

Objections to Human Rights Groups Referring to IHL

There were several arguments against human rights groups referring to international human rights law. First, there was the argument that the standards of IHL were too vague or too complicated to apply using the standard human rights methodology. My sense is that this argument was really about *campaigning*. I acknowledge that these are complicated issues to convey to a mass public. Not all of them, of course. The public does understand the idea of indiscriminate warfare and they understand what's wrong with targeting civilians. Some of the IHL topics are not that difficult. But there was a reluctance to build a case on complicated arguments if you're planning to use them for campaigning purposes. This was less of an issue for Human Rights Watch because we tended to operate much more through the press or through influential governments, rather than through membership. So the problem just didn't stand in our way.

Secondly, there were objections to the difficulty of fact-finding in a war context. I don't want to minimize those concerns, but here again, I think the methodological differences between Human Rights Watch and Amnesty took us in different directions regarding IHL. As you may know, HRW doesn't ask permission to go into places where we conduct investigations. We are perfectly comfortable sneaking in. We conduct investigations all the time without seeking permission. While it can be dangerous, it is not impossible. Despite the passions of war, despite conflicting accounts, it is possible to talk to eye-witnesses and you can figure out what happened. I think time has proven that fact-finding in the context of war is entirely doable. Back in the 80s, people weren't sure. Given Amnesty's policy of seeking advance permission to conduct research, they often had difficulties arriving on the scene if they didn't have governmental permission. The idea of trying to correspond by mail or telephone to try to figure out what had happened must have made the problems of investigating abuses in a war situation seem insurmountable. At Human Rights Watch we overcame such problems by sneaking in.

Thirdly, the issue of reciprocal abuses came up. The concern was whether it was a good idea to report on rebel abuses because that might provide the government an excuse to say, "Well, if they're committing

violations, so can we.” That was a legitimate concern and it’s one that we get even today when Israel says, “What do you want us to do, when Hamas...?” But it’s an easy enough question to answer by resorting to the mantra that violations by one side don’t justify violations by the other. That is an idea the public understands. While this is an ongoing concern, it’s one that is surmountable.

There also was a concern--much more in the past than these days--about legitimizing rebel groups by addressing them. The question here was whether the application of IHL to a rebel group in and of itself constituted a political act, with the effect of raising the stature of the FMLN (Farabundo Martí National Liberation Front) or the Contras or whatever rebel group. Again, the Geneva Conventions are quite explicit that this is not the case and we often recite the relevant section of common Article 3. This has not turned out to be a major concern. We occasionally get criticism from governments that we are legitimizing rebel groups or that we are sympathizing with rebels by talking to them, but it’s easy to explain our rationale for doing so. In the first place, the law itself makes clear that’s not the case. And secondly, what would you want us to do, ignore the violations the rebels are committing? This criticism just doesn’t get that far.

There was a real concern about the vulnerability of local NGOs, that if HRW or the international movement took on rebel groups, it might obligate local NGOs to take on rebel abuses and endanger them. This was based on a conception of the local NGOs and the requirements for carrying out work in rebel territory. The belief was that the only way that NGOs could conduct an investigation in war zones was to portray themselves as rebel sympathizers or sympathizers at least with the population the rebel group was representing. It turns out that that’s not the case. It is perfectly possible to conduct an investigation by presenting yourself as neutral. Human Rights Watch does this all the time and it is an accepted thing. Again, the idea that local NGOs would be endangered--either for not reporting on rebel abuses, allowing the government to portray them as politicized, or for reporting on rebel abuses and thereby making it harder for them to appear sympathetic to the affected population--it just didn’t work out that way. Local NGOs today routinely report on both sides.

Finally, there was concern that international humanitarian law required a context of confidentiality reserved for the Red Cross. The irony of this argument is that where Red Cross confidentiality really matters is in the treatment of prisoners—and of course, Amnesty had no trouble dealing with prisoner issues. ICRCs confidentiality is irrelevant to the conduct of warfare. It is not as if it is confidential, for example, that an aerial bombardment has occurred. That kind of information is not shared by militaries anyway. In such cases, the only way to figure out what happened is to conduct an investigation. When HRW took up such issues, the International Committee of the Red Cross at first wasn't quite sure what we were doing. Very quickly, though, they became an extraordinarily close ally. They recognized that while institutional constraints meant that they couldn't be speaking out about these things, it was great that we could. To this day there is recognition that we have different roles to play.

The Impact of IHL on Advocacy Practices

One final point about IHL, generally, concerns the ways in which the use of IHL has affected our advocacy work. Obviously, we still do advocacy in the traditional sense of dealing directly with the relevant governments, and we obviously build relations with relevant militaries. But what has been most interesting is that up until the time that human rights groups began taking on IHL, militaries loved the fact that this was a special domain. There were only a handful of people in the world who had any idea what this specialized body of law meant and it was very comfortable for militaries because military lawyers interpret IHL in a way that is deferential to the military. What began to change was the knowledge and understanding of the broad categories, such as indiscriminate warfare. Military lawyers had been perfectly comfortable interpreting landmines or cluster bombs as compatible with the prohibition against indiscriminate warfare. To challenge that interpretation, it took human rights groups going to the press and building public recognition that a landmine sitting on the ground is completely dumb, with no idea who will step on it: that's an indiscriminate weapon. Likewise, a cluster bomb used in a populated area that spreads out hundreds of sub-munitions and is impossible to fix on a military target is by definition an indiscriminate weapon. The public grasped that very quickly. The military hated this intervention by

human rights groups because suddenly they had lost their monopoly over the interpretation of humanitarian law. The military now had to deal with groups that had developed quite a bit of military expertise and which they used through the press to convince the public that the nice comfortable definitions propounded by the military lawyers were not justified. As a result, we now have a much more pluralistic environment in which these terms are interpreted. And that's all to the good in terms of defending human rights in warfare.

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Glossary

AI (and Amnesty) – Amnesty International. Founded in 1961, AI is one of the oldest and most prominent transnational human rights organizations, with international headquarters in London. The organization relies on 3 million members and supporters in 150 countries to carry out its work, and policies are vetted through complex processes and structures that involve membership in the decisions. (See *ICM, IEC, IS, AI mandate, and Secretary General* below.)

AI Mandate - For many years, an internal “mandate” limited Amnesty International’s work to a relatively small number of issues, including the release of prisoners of conscience, fair trials for political prisoners, opposition to torture, disappearances and the death penalty. The mandate was amended several times, and was ultimately replaced in 2002 with a broader mission statement linking AI’s work to the full spectrum of rights enshrined in the UDHR.

Secretary General – AI’s executive director of worldwide operations.

FMLN – Farabundo Martí National Liberation Front. One of the main participants in the civil war that gripped El Salvador in the 1980s. Founded in 1980 in El Salvador as a coalition of left-wing guerilla organizations, since 1992 it has become one of the country’s major political parties.

HRW – Human Rights Watch. A prominent international human rights NGO that originated as a series of US-based “watch committees.” The first such committee was charged to monitor Soviet compliance with the 1975 Helsinki Accords. Subsequent committees were formed to monitor human rights concerns in Latin America, Asia, Africa and the Middle East. Before consolidating as “Human Rights Watch” in 1988 the organization was known as the Watch Committees.

ICCPR – International Covenant on Civil and Political Rights. A core human rights treaty that together with the UDHR and the ICESCR comprise the bedrock of international human rights law. It commits ratifying countries to respect, protect and fulfill civil and political rights. Adopted by the UN General Assembly in 1966 and in force since 1976.

IHL – International Humanitarian Law (or *laws of war, international humanitarian law of war*), the body of customary and treaty law that defines the conduct and responsibility of nations at war, relative to each other and to civilians. It includes most prominently the Geneva Conventions and the Hague Conventions, but also the 1997 Landmine Treaty.

Treaty body – A committee of independent experts charged to monitor implementation of the core human rights treaties, such as the ICCPR and the Convention Against Torture.