

Human Rights: From Practice to Policy

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**Edited by
Carrie Booth Walling
and
Susan Waltz**

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contact Susan Waltz at swaltz@umich.edu.

International Human Rights, Rebel Forces and Non-Governmental Entities

Presentation by Wilder Tayler

The treatment of non-governmental actors is a very complex subject and involves a mix of ethical, political, and legal dimensions. This discussion took place in the 1980s and 1990s, and it was almost contemporary with the discussion on impunity—though somewhat curiously, these two very passionate discussions within the human rights movement were largely unconnected. Amnesty International (AI) began using the term NGE (non-governmental entity) in the mid-1980s, and I have been asked whether this was the first explicit effort to apply international human rights law to groups or non-governmental actors. I think the question should instead be “was this the first attempt *to deal* with non-governmental groups or entities as a *human rights problem*?” This is an important modification because the question of whether international human rights *law* applies directly to non-governmental groups is a current and unsettled debate, and this was not the debate of the 1980s and 1990s. (The current debate mostly concerns armed groups.) The truth is that the most interesting part of the debate about the application of international law lies ahead of us, whereas the broader questions of whether and how to *deal with* the human rights problems associated with non-governmental groups is something that we can examine

As I mentioned, there were both ethical and political dimensions to the question, and these dimensions were intertwined. By the late 1980s members of the human rights movement were becoming increasingly aware that they would be running a risk if they did not begin to deal with non-governmental entities—and that risk involved both ethical and political considerations. The work of human rights organizations, then as now, was typically focused on violations by the state. The risk in not dealing with NGEs was that we would give the impression that we did not sufficiently value the suffering of individuals who were victims of NGEs—that their suffering could evoke compassion, but it would not prompt us to take action. This was problematic—and arguably unethical—because it was inconsistent with a principle that had become rooted in many segments of the human rights movement at that time: the victim’s rights approach. The victim’s right approach placed the

individual who had suffered at the center of concern and things then moved around that individual victim. The problem with our approach at the time was that, in reality, NGE victims were obviously not the center of concern, because no campaigning activities, for example, were taken on their cases. There was a genuine concern about this among Amnesty's membership in its national sections, but the human rights movement as a whole—and Amnesty in particular—had been developing techniques to confront state terror and not acts by NGEs or terrorist groups. As a result, the focus, the leitmotif, of their work was human rights violations committed by the state. Looking back, this makes sense, even in relation to the victims. The vast majority of human rights violations—then and now—continue to be committed by state agents. This is important to remember, even while we engage in this important part of the debate.

Until the problem of NGEs came up for discussion within Amnesty International and Human Rights Watch (HRW) began investigating abuses in Central America, the human rights movement had been relatively quiet on the issue. Although Amnesty started using the term and developed some basic policies for commenting on abuse by NGEs in the early 1980s, reports on abuse by non-state actors were sporadic and reactive. This approach dominated the world of standard-setting as well. During the late 1980s and early 1990s the idea that human rights law should apply to non-governmental entities never actually made it into human rights standards. This is still true today. For example, fairly recently, a provision of Article 2 of the 2007 Convention on Disappearances identified the issue of disappearances by non-governmental entities or private individuals as a matter of municipal (domestic) law [i.e., not international human rights law]. The article does not even use the word “disappearances”; it refers to “acts contemplated in Article 1...” and sends you back to the definition article. That language was agreed after a debate on this issue during which Russia, Turkey, Sri Lanka and Peru (the latter breaking ranks with other Latin American countries) pushed to make the convention not applicable to non-governmental entities. The NGOs (non-governmental organizations) were quite discreet on that discussion—they passively allowed it to take place without making major interventions. In fact, the NGOs were themselves divided on the issue. Organizations like Amnesty and ICJ (International Court of Justice)

were on one side, reluctant to include NGEs, and Human Rights Watch was more open to discuss the idea. Together with Manfred Nowak, I would personally have liked to see a more generous provision on NGEs. (I was actually representing HRW on this at the time, and Nowak was serving as a UN expert on disappearances and acting as advisor to the UN Working Group drafting a treaty on Involuntary and Enforced Disappearances.) I thought the outcome was very restrictive.

This debate—which played out in negotiations over the 2007 UN Convention on Enforced Disappearances—started several years ago, and as is often the case, the dynamics were readily manifest within the UN. Thus, one important development on the question of NGE accountability for human rights was the adoption by the UN of a resolution in 1990: “Consequences of Acts of Violence Committed by Irregular Armed Groups and Drug Traffickers that Affect the Enjoyment of Human Rights.” There are a number of things to notice here. For one thing, the resolution avoids the term *human rights violations*, and instead uses the phrase *affect the enjoyment of* when speaking about human rights problems. The resolution also groups together armed opposition groups and drug traffickers in the same package. The sensibilities were rather different than today. Colombia, Peru (to a lesser extent), Sri Lanka, Turkey and India pushed for this. Afterwards, the UN Special Rapporteurs were asked to bear in mind the adverse effect that acts of violence could have on “the enjoyment of human rights” as they carried out their mandates. At the time, most NGOs and Western states opposed the original wording of the resolution, which was more directly related to *human rights violations*, and the convoluted language is the result of compromise. It wasn’t until later that the concept of human rights violations by NGEs became accepted by some. It continues to be controversial, however.

Although I worked at HRW for several years, I will skip over the experience of HRW, as Ken has already spoken to this issue and my knowledge of the early debates is mainly from the archives and from talking to those who were on some of those early missions. First, however, I want to draw attention to some of the early arguments for and against applying human rights law to NGEs because they were reproduced later, in different stages of the debate. When Human Rights Watch started conducting missions in Central America, they were

looking at the actions of non-governmental armed groups like the Contras and the FMLN (Farabundo Martí National Liberation Front), as well as the governments. At the time, some argued that attempts to hold non-state entities accountable to international law might dilute the claim that upholding human rights was primarily a responsibility of *states*. This same argument was later raised in the UN, and from that context, it appears to have been a genuine concern.

Secondly, there was also a pragmatic fear that research on NGEs would involve serious problems with security. In practice, however, those concerns seem to have been allayed by the practical experience of Human Rights Watch researchers. It is difficult to find reports better than those written by Human Rights Watch on Southern Lebanon and the Eastern Congo. And that research on NGEs caused some headaches, but without casualties.

Finally, there were concerns about the vagueness of IHL (international humanitarian law) standards. This was a concern in the initial debate about NGEs, and it is arguably even more important today because concerns about vagueness extend to states as well as NGEs. Obviously, when you apply international humanitarian law, you apply it to both sides, not just to non-governmental entities. I emphasize this point because in recent years the West has begun to push the boundaries of IHL, arguing for broader scopes of targetability. This is particularly worrisome given the amount of killing that can already take place and is considered permissible within the bounds of IHL norms. I predict that the time will soon come when we in the human rights movement will have to reconsider how we use IHL. In that regard, I want to draw attention to the current debate over the definition of “direct participation in hostilities.” Attempts are being made to broaden the scope of lawful targets to include civilians or individuals who are not actually fighting or participating in hostilities. Such individuals could be targeted, and killed directly. In effect, the civilian standing next to a fighter (even one who is not participating in the battle) would be considered collateral damage. That is of great concern to us.

These, then, are the arguments and considerations raised in the discussion about applying human rights law to NGEs. I turn now to the experience of Amnesty International. Amnesty took a different path

than Human Rights Watch with regard to NGEs. As a general approach to its work, Amnesty understood itself as working on individuals and basically holding governments accountable for very specific violations. That is not to say, however, that suffering by individual victims at the hands of non-governmental entities was not a matter of concern for Amnesty. It was a matter of concern; it was just not a matter of *equal* concern. Within Amnesty, the issue was further complicated by a distinction the organization made between NGEs and QGEs (quasi-governmental entities). (I still remember Claudio Cordone's first efforts to explain the concepts to me!) Through the 1980s, AI did address QGEs—entities that held territory or had a certain degree of control over the population—but only in a discrete way. Amnesty's classical techniques of mass mobilization and membership action, for example, were not used to pressure them. This changed in 1991, however, for a variety of reasons. In the first place, Amnesty at that time was undergoing a review of its mandate, which ultimately served as an instrument for changing Amnesty's internal policy on NGEs. (Pepé—who served on the Mandate Review Committee—had an influence on this process.) It was during this mandate review that the distinction between NGEs and QGEs was eliminated. Amnesty formally decided to recognize that human rights suffering caused by acts against individuals in contravention of fundamental standards of humane behavior that are perpetrated by political non-governmental entities would be a matter of concern for the organization, and thus could be worked on by Amnesty researchers and campaigners. At the same time, though, Amnesty's ICM decision stated that "AI should continue to regard human rights as individual rights in relation to government authority." The latter statement was a reaffirmation of the old orthodoxy in relation to human rights law. On balance, though, the decision extending from the 1991 mandate review opened the door for Amnesty to take specific actions related to NGE abuses.

The challenge then became to explain the policy change to the world outside Amnesty. Neither NGEs nor governments responded favorably to the shift. NGEs felt somewhat let down because Amnesty had for a long time worked on behalf of victims of government torture and killings who were sometimes associated with an NGE, and now Amnesty positioned itself to oppose the actions of these NGEs. More interesting was the reaction from armies. I remember that the armies,

and the governments, of particularly Colombia and Sri Lanka disliked the policy because they understood it as providing an element of recognition for the NGEs, *who were their opponents and whom they saw as illegitimate insurgent groups*. It was very interesting that after years of receiving letters from governments complaining that Amnesty was not working on NGE human rights violations, when the organization actually started working on them we got a reaction against the policy by governments. They argued that Amnesty had elevated the status of organizations that they considered bandits, thugs, terrorists, and the like. From NGOs there was a mixed reaction that varied by location. In Sri Lanka, local human rights groups accepted Amnesty's new approach but did not adopt it for themselves, with the eventual exception of one NGO in Jaffna. In Colombia, civil society organizations mostly opposed Amnesty's shift in policy. This was a common position at the time in Latin America: except for organizations associated with the Catholic Church, which generally tended to take a broader view, people did not understand why Amnesty wanted to actively oppose abuses committed by NGEs.

The policy Amnesty adopted in the early 1990s, allowing it to address human rights violations by NGEs as well as governments, remains in place today. I believe that it was a good move by the organization and one that has been relatively successful.

Wilder Tayler is Secretary General of the International Commission of Jurists and a member of the UN Sub-Committee on the Prevention of Torture. He previously worked as Legal and Policy Director at Human Rights Watch and as a Legal Advisor and then Program Director with the Americas Program at Amnesty International. Tayler is the former Executive Director of the Institute for Legal and Social Studies (IELSUR) in Uruguay, a legal NGO that specializes in litigating human rights cases.

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.)

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.

ICJ (sometimes called the World Court) – International Court of Justice. The main judicial body of the United Nations, it addresses legal disputes and questions submitted to it by states and IGOs. (Not to be confused with the International Criminal Court, see *ICC*.)

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.

NGO – Non-governmental organization. In the human rights context, NGOs are organizations comprised of private individuals working to protect and promote human rights, either domestically or internationally.

Special Rapporteur – An individual charged by the United Nations Human Rights Council to investigate a specific set of human rights concerns. (See *Thematic mechanisms*.)