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Engagement with armed groups?
General discussion and case study.

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Summary

This dissertation examines the legal accountability of armed opposition groups by looking at a range of different standards of accountability such as international human rights law, international humanitarian law, fundamental standards of humanity and national criminal law. The advantages and disadvantages of these different measures for the engagement with armed opposition groups are explored.

Following this legal analysis, the study examines which forms of engagement with abuses by armed groups have been shown to be successful in the past. As the multiplicity of different conflict situations does not allow for a general answer to this question this is done in way of a case study of the Northern Irish situation.

Having studied some of the more practical problems of engagement, notably resource aspects, and the public perception of such an engagement, there is an exploration of whether the earlier findings lead to any conclusions about the suitability or otherwise of human rights organisations engaging with paramilitaries in Northern Ireland. Again, this is done in way of a case study, examining the situation faced by Northern Ireland's primary human rights organisation, the Committee on the Administration of Justice.

Preface

The problem of accountability of armed opposition groups under international law and in particular international human rights law has been widely discussed within the international human rights community in the last decades. In recent years a growing number of human rights organisations have decided to engage with such abuses and have reported on the behaviour of armed groups.

Having spent the last year in Northern Ireland working with the Committee on the Administration of Justice as an intern I obtained an interesting insight into this discussion and some of the questions and problems that arise in the Northern Ireland context. The debate to me seemed particularly interesting as it covers the very fundamental notion of human rights as well as some of the very recent developments in international law, such as the re-emergence of international criminal law and the discussion around the development of fundamental standards of humanity. Also, in my work colleagues I had very interesting discussion partners.

In this respect I am particularly grateful to Maggie who spent hours discussing with me; starting off with questions related to my topic we ended up discussing all kinds of interesting human rights issues and I very much enjoyed these discussions. Also, she commented very kindly on earlier drafts of this dissertation, and so did Martin, Paul, Stephen, Kieran and Miriam. Kieran also brought to my attention a lot of interesting material related to my topic.

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Most grateful though I am to my parents who supported me in every way in my plans of doing the Master programme in International Human Rights Law in Lund as well as in my plans to spend my present time in Northern Ireland.

Finally, thanks to Alice who undertook a last attempt to polish some of my more severe linguistic and grammatical oddities.

Abbreviations

AI	Amnesty International
CAJ	Committee on the Administration of Justice
EPIC	Ex-Prisoners Interpretative Centre
FAIR	Families Acting for Innocent Relatives
FAIT	Families against Intimidation and Terror
FRG	Federal Republic of Germany
GA	General Assembly (of the United Nations)
GSA	Greater Shankill Alternatives
ICC	International Criminal Court
ICJ	International Commission of Jurists
I.C.J.	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
ICRC	International Committee of the Red Cross
INLA	Irish National Liberation Army
IPLO	Irish People's Liberation Organisation
IRA	Irish Republican Army
NATO	North Atlantic Treaty Organisation
NGE	Non-governmental entity
NGO	Non-governmental organisation
NIACRO	Northern Ireland Association for the Care and Resettlement of Offenders
PUP	Progressive Unionist Party
RHC	Red Hand Commando
RUC	Royal Ulster Constabulary
SICC	(Rome) Statute of the International Criminal Court
UDA	Ulster Defence Association
UFF	Ulster Freedom Fighters
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHCR	United Nations High Commissioner for Refugees
US	United States (of America)
UVF	Ulster Volunteer Force

1 Introduction

1.1 General outline

The recent decrease in the number of international armed conflicts has been offset by a dramatic increase in the number of civil wars and other situations of violence inside countries which cause a great threat to human dignity and freedom.¹ The reports prepared by or for United Nations human rights bodies repeatedly draw attention to the link between human rights abuses and ongoing violence and confrontation between armed groups and government forces, or simply between different armed groups.² Many of these conflicts have seen unimaginable atrocities in particular directed against the civilian population which has led to an increasing concern about the vulnerability of civilians in these kinds of conflicts. While human rights provide a very elaborate - if far from perfect - system of protection in times of peace, and international humanitarian law covers in quite some detail international and non-international armed conflicts, there is some confusion as to a common standard of accountability that can be used in situations of internal violence falling below the threshold of an armed conflict.

The applicability of both international human rights law and of international humanitarian law has been argued to be problematic in such situations. The issue for consideration therefore is the extent to which this is the case, and to identify problems concerning these norms and other standards suggested.

As regards human rights, there is a major concern as to the extent, if at all, to which armed groups can be held accountable under international human rights law. It is further argued that some human rights guarantees lack the specificity required to be applied effectively in situations where fighting is taking place, and that their application is further weakened by the possibility of derogating from many rights.³

As regards international humanitarian law, one major issue concerns the difficulties in determining in which situations the rules regulating non-international armed conflicts become operable, and the fact that some situations of internal violence fall outside of existing treaty law. In addition, there is the question of the adequacy of the existing rules of humanitarian law in non-international armed

¹ For figures and further references see *e.g.* Analytical report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/21, *Minimum humanitarian standards* (E/CN.4/1998/87), para. 18 [hereinafter: Secretary-General, *Minimum humanitarian standards*].

² For reports considering in particular the problems posed by situations of internal violence see *e.g.*: Report of Ms G. Machel, pursuant to General Assembly resolution 48/157, *The impact of armed conflict on children* (A/51/306), and: Supplement to *An Agenda for Peace*, position paper of the Secretary-General on the occasion of the fiftieth anniversary of the United Nations (A/50/60-S/1995/1), paras. 8-15.

³ R. Brett, "Non-governmental human rights organizations and international humanitarian law", *IRRC*, no. 324, pp. 532f; The issue will be explained in some more detail later.

conflicts, in particular in situations where only the threshold of Common Article 3 is met.

There are also some other standards that might be applied, such as national criminal law, crimes under international law or fundamental standards of humanity and the advantages and disadvantages of these will be discussed in the course of this paper.

In addition to what has been said above, in examining possible action on abuses by armed opposition groups, it will have to be decided which bodies are most appropriately placed to take action. Human rights organisations are often thought to have a possible role to play. Considering a possible role for human rights organisations one needs to keep in mind that in most instances they work in a rather difficult set of political circumstances and that besides the legal issues raised most often difficult political considerations will have to be taken into account.

In recent years many human rights organisations, national as well as international, have started to address the problem of accountability of armed opposition groups. They have come up with different conclusions and adopted different mandates towards such groups. Inevitably different means of engagement with armed groups have had and still have an impact on the public perception of the concept of human rights and therefore affect the work of other organisations in the field. Some of the different approaches taken will be discussed in more detail further on.

The problem of engagement with armed opposition groups is part of the much wider issue of the applicability of international law towards non-state actors⁴ in general.⁵ When the United Nations system was created, half a century ago, governments had far more control over the political, social, and economic conditions within their countries. States had the responsibility of guaranteeing human rights on the presumption that they, and they alone, were capable of doing so⁶. But, not only have former state bodies been privatised, but a number of state functions which had previously been conceived as quintessentially the responsibility of the state have also been tendered out to private firms.⁷ So today it is - besides states - not only armed opposition groups which threaten the

⁴ The term non-state actor does not seem to be clearly defined, but is generally used to include in particular multinational/transnational corporations, international financial institutions, armed groups and organised crime structures. Sometimes, the term has been used even broader comprising virtually every aspect of society including also *e.g.* churches, NGOs and individuals, with the only exception being the state.

⁵ The International Commission of Jurists dedicated a whole issue of its Review to "Globalisation, Human Rights and the Rule of Law"; the applicability of international law on non-state actors is one of the main aspects of the debate about human rights and globalisation; ICJ, *The Review*, no. 61, (1999).

⁶ R. Higgins, *International Law and How We Use It*, pp. 39ff.

⁷ As examples may be cited the privatisation in many states of health, policing and prison services. Clapham provides a very interesting and critical perspective on the distinction between private and public law and its implication for the application of human rights law; A. Clapham, *Human Rights in the Private Sphere*, pp. 6, 126ff.

enjoyment of human rights, but other non-state actors including multinational corporations or international financial institutions.⁸ With regard to inter-state cooperation, it has been noted that some functions which used to be carried out in that way have now been taken over by global or regional actors that are difficult to hold accountable under international procedures in general, and traditional human rights procedures in particular.⁹ If human rights are to be effectively protected in the future one has to find means of enforcing the rule of law against non-state actors more effectively, monitoring them and holding them accountable.¹⁰ With regard to large multinational corporations Andrew Clapham remarked, "[t]he question arises (...) as to whether to treat corporations (including the large multinational corporations) as large para-state entities to be held accountable under the same sort of regime as states themselves, or whether to start to look at the different sorts of codes that are promulgated by consumer groups and the corporations themselves and see whether these are in fact better suited to ensuring respect for human rights."¹¹

Although it is outside the scope of this paper to discuss the issue of non-state actors in general, this reference to the broader issue of non-state actors seems appropriate and indeed necessary as the issue of armed opposition groups cannot be totally separated from the wider issue of non-state actors. One important aspect, as we will see, is that some of the legal problems that arise concerning the applicability of human rights law towards armed opposition groups are similar to those concerning other non-state actors.

A second aspect of this is that one of the initial reasons for the engagement by some organisations with armed opposition groups was the state-like power some of them possess over at least parts of the population of a country. Similar statements can indeed be made with respect to some multinational companies operating in particular in developing countries.¹²

A third and last reason to be mentioned as to why the issue of armed groups and non-state actors in general are closely linked is the very practical aspect that it is not always easy to make a clear distinction between armed opposition groups and other non-state actors. Armed groups might, and often do engage in "common" criminal activity *e.g.* to finance their paramilitary activities,¹³ they might also have close links to other aspects of society such as companies, political parties or religious groupings. The other way round, organised crime structures might have particular political interests which they pursue by violent means.¹⁴ With

⁸ A. Clapham, *Human Rights in the Private Sphere*, p. 178; C. Jochnick, "Confronting the Impunity of Non-state Actors: New Fields for the Promotion of Human Rights", *Human Rights Quarterly*, vol. 21 no. 1, (1999), pp. 56ff, 68ff.

⁹ A. Clapham, "Globalisation and the Rule of Law", in: ICJ, *The Review*, No. 61, (1999), p. 18.

¹⁰ *Ibid.* at p. 27.

¹¹ *Ibid.* at p. 32.

¹² C. Jochnick, "Confronting the Impunity of Non-state Actors: New Fields for the Promotion of Human Rights", *Human Rights Quarterly*, vol. 21 no. 1, (1999), p. 58.

¹³ Secretary-General, *Minimum humanitarian standards*, para. 23.

¹⁴ One might think *e.g.* of a number of murders committed by the Italian Mafia against politicians and members of the judiciary or murders by Colombian drug cartels against politicians or journalists, to name but a few.

regard to long-lasting internal conflicts a recent report by the United Nations High Commissioner for Refugees noted, "[w]hile the parties to these conflicts may continue to evoke a social, political or ideological rationale for their struggle, their activities are actually aimed at the illicit accumulation of wealth. The line between political action, social banditry and organized crime has become very difficult to draw in many parts of the world ..."¹⁵

Having said that, and acknowledging the problems that might arise as a result of taking one aspect out of a wider issue, this paper simply cannot examine the vast field of issues around non-state actors, but will concentrate merely on one aspect, *i.e.* abuses by armed opposition groups. It will examine whether the concept of human rights and international humanitarian law can and should be applied to such groups and whether there are any other concepts that could and should provide a basis for a useful engagement with armed opposition groups. Due to the multiplicity of situations in different countries with differing forms of armed opposition, a varying degree of violence, different human rights organisations with different mandates, focus, and national or international structures there might not be the same answer for all situations.

The approach in this paper will therefore be twofold. There will be a summarised general discussion of the different aspects that have to be taken into account when deciding about a possible engagement with armed opposition groups and its basis, and there will be a more in depth analysis of one particular situation. By way of a case study we will look at the situation in Northern Ireland. And there, we will examine in some more detail what implications our findings have for Northern Ireland's primary human rights NGO, the Committee on the Administration of Justice (CAJ).

1.2 Terminology

Groups who have taken up arms against governments have been given a wide variety of titles, such as terrorist groups, guerrillas, resistance movements, freedom fighters, etc., each of the terms carrying different connotations. In this paper, the terms "armed (opposition) groups" or "paramilitaries" will be used to describe those who take up arms in pursuit of, broadly speaking, political objectives.¹⁶

¹⁵ United Nations High Commissioner for Refugees, *The State of the World's Refugees 1997-98, A Humanitarian Agenda*, p. 26.

¹⁶ The use of the term "political objectives" is not intended to confer any legitimacy on such objectives, but is rather used as a means of distinguishing these groups from other groups which might also be armed, for example those solely engaged in organised crime. The language used should not be construed as making any general judgements about the legitimacy or otherwise of such groups or their cause or aims.

Without prejudice to the later examination as to whether the concept of human rights can indeed be applied to armed opposition groups and whether therefore they can violate such rights, acts that if committed by states would be referred to as human rights *violations* will in the context of armed opposition groups be referred to as human rights *abuses*; most of the time, such abuses would also be crimes punishable under national criminal law.

Another issue of terminology concerns the manner in which to describe fighting and violence inside countries. Only “armed conflicts”, whether of an international or non-international character, are regulated by international humanitarian law. This law provides some criteria for determining whether violence inside a country amounts to an internal armed conflict so as to come within the scope of the relevant rules. However, there is often disagreement about the application of these criteria, and this can lead to misunderstandings about the use of terms such as “internal armed conflict” or even “internal conflict”. To avoid such misunderstandings, this paper will generally use the term “internal violence” to describe situations where fighting and conflict, of whatever intensity, is taking place inside countries, and without prejudice to any legal characterisation of the fighting for the purposes of applying international humanitarian law.

1.3 Introduction to the Northern Ireland Conflict

Since 1969 over 3600 people have been killed in Northern Ireland, over 40000 people been injured and the conflict has cost the British and Irish economy several billion pounds directly as a result of the conflict.¹⁷ Similarly, since 1973, police figures suggest that 2134 people have been the victims of paramilitary punishment shootings (usually in the knees, thighs, elbows, ankles or a combination) and since 1983, 1336 people have been the victim of paramilitary punishment beatings (involving attacks with baseball bats, hurley sticks studded with nails, iron bars and other heavy implements).¹⁸ The police figures also suggest a marked increase in beatings following the IRA and Loyalist cease-fires in 1994 as paramilitaries apparently became less ready to use firearms for such attacks.¹⁹

For the purpose of this paper, the Northern Ireland conflict can be described as involving three sets of protagonists, Nationalists/Republicans, Unionists/Loyalists, and the British State. Each set of protagonists have more

¹⁷ M.-T. Fay, M. Morrissey, M. Smyth, *Northern Ireland's troubles: The human costs*, p.121; D. McKittrick et al, *Lost Lives - The stories of the men, women and children who died as a result of the Northern Ireland troubles*, pp. 1473ff.

¹⁸ The RUC only began to systematically keep figures on punishment beatings by paramilitaries in 1983. RUC Figures; made available to K. McEvoy, *Holding Armed Opposition Groups Accountable: A Comparative Study of Obstacles and Strategies - The Northern Ireland Experience*, p.2; on file with author [hereinafter: K. McEvoy].

¹⁹ *Ibid.*

moderate exclusively "political" expressions of their ideology as well as more militant armed groupings. In addition, each of the protagonists have been guilty of violent acts which have been described by various commentators as either human rights or humanitarian violations/abuses.²⁰ As stated above, this paper focuses primarily on abuses by armed opposition groups, *i.e.* republican and loyalist paramilitaries.²¹

1.3.1 Republican Violence

The IRA is the largest and most important armed Republican grouping.²² The most recent IRA campaign of political violence started in the late 1960s. It has been interrupted by three cease-fires, the most recent called in July 1997 and essentially still in place. The IRA has carried out a campaign of bombings on economic and commercial targets designed to damage the British and Northern Irish economy, in their terms to "make the occupation of Ireland costly for the British".²³ This campaign has also included attacks on the security forces, political and judicial figures, Loyalist paramilitaries and civilians. Civilians killed have included those targeted deliberately, those viewed as "informers", and those guilty of anti-social activity such as drug dealing or joyriding, as well as numerous "mistakes" where civilians have been killed in reportedly botched attacks. In other instances people have been forced to leave their homes, their communities and often Northern Ireland under the threat of violence.²⁴ Punishment attacks and forcible expulsions for alleged anti-social activities have been carried out by a distinct IRA section known as the "civil administration" which "polices" alleged criminal activities. Irish Republicans have a well developed international constituency of support in the USA and elsewhere.²⁵

1.3.2 Loyalist Violence

Loyalist paramilitaries²⁶ have carried out a violent campaign to maintain the Union with Britain because of the perceived failure of the government to deal effectively

²⁰ *Ibid.* at p.3.

²¹ For a comprehensive analysis of state violence in Northern Ireland see: F. Ní Aoláin, *The Politics of Force - Conflict Management and State Violence in Northern Ireland*.

²² Other violent Republican groupings have included the Official IRA, the Irish National Liberation Army (INLA), the Irish People's Liberation Organisation (IPLO) and a number of groupings which have come to prominence in the wake of the IRA cease-fires, the "Continuity" IRA and the "Real" IRA.

²³ K. McEvoy, p. 3.

²⁴ Amnesty International, *Northern Ireland: Human Rights Abuses by Paramilitary Groups*, June 1995, EUR 45/03/95.

²⁵ K. McEvoy, Summary - *Holding Armed Opposition Groups Accountable: A Comparative Study of Obstacles and Strategies - The Northern Ireland Experience*, p. 1, on file with author.

²⁶ The main Loyalist paramilitary groupings are the Ulster Volunteer Force (UVF) and the Ulster Defence Association (UDA), with the Ulster Freedom Fighters (UFF) being a unit within the UDA. There is also a number of splinter groupings having been established during the peace process period including the Loyalist Volunteer Force. All Loyalist paramilitary groups are currently on cease-fire; Interview Debbie Waters, Training Support Worker, Greater Shankill Alternatives, 4 May 2000.

with Republican terrorism.²⁷ Their targets were often uninvolved Catholic civilians, economic or civilian targets in the Irish Republic or Republican activists.²⁸ Loyalist command structures are considerably looser and less centralised than Republican ones.²⁹ Loyalists paramilitaries have also been heavily involved in punishment attacks. As well as anti-social behaviour, these attacks have been concerned with internal discipline, territorial disputes, and drug related and factional disputes. There is a lack of formalism or systems in Loyalist shootings or beatings.³⁰ Loyalists have a much less developed international constituency.

1.4 Determining the stance on abuses by armed groups - key issues to consider

As outlined above, this paper will aim to raise the main factors that have to be taken into account when determining the approach of human rights organisations to abuses by armed opposition groups. In doing so, the paper will use as a case study the situation within Northern Ireland. Within that context then, we will examine in some more detail what options our findings suggest for Northern Ireland's primary human rights NGO, the Committee on the Administration of Justice (CAJ). Wherever considered useful, comparisons will be drawn to other human rights organisations such as Amnesty International, Human Rights Watch and the Lawyers Committee for Human Rights and their dealing with abuses by armed opposition groups. In the Northern Ireland context we will also look at the policy of other organisations concerned with abuses by armed groups.

1.4.1 The debate around human rights organisations and abuses by armed groups

Human rights organisations around the world were established to deal with human rights abuses by states and to act as independent watchdogs to hold states to account. Some human rights NGOs have retained this focus until today while others decided to additionally engage with abuses by armed opposition groups; most of them recently. Opinions about the genesis of this change vary, but some people believe that one of the main reasons for this change is governmental pressure for change. Whereas previously governments that wanted to avoid any recognition being awarded to paramilitary groups would have been rather hostile to any work on the violence of armed groups, they increasingly in recent years saw advantages in the shift of focus such monitoring would bring. Governments started to accuse human rights organisations that were focusing on state abuses only of not being impartial and only showing one side of the truth. Human rights

²⁷ S. Bruce, *The Red Hand: Protestant Paramilitaries in Northern Ireland*, pp. 2ff.

²⁸ J. Cusack, H. McDonald, *UVF*, pp. 1ff.

²⁹ K. McEvoy, p.8.

³⁰ K. McEvoy, Summary - *Holding Armed Opposition Groups Accountable: A Comparative Study of Obstacles and Strategies - The Northern Ireland Experience*, p.1.

NGOs know that they not only need to be impartial, but also to be seen to be impartial. Therefore such criticism was seen by some as requiring working on non-state abuses alongside state abuses. Alongside this political pressure, there was also a growing belief that one could not turn a blind eye to the grave infringements on the enjoyment of human rights posed by armed groups and that one had to help to change paramilitary behaviour and bring such abuses to an end. Also, "[g]overnments do not create human rights, they merely decide which of those rights they will guarantee. [...] So, just because paramilitaries have not "agreed" to certain standards, this does not mean that they should not be criticised for violating standards recognised by everyone but themselves."³¹

In favour of retaining the focus solely on state violations it has been argued that it was valuable in the work with governmental abuses of having objective external neutral standards of human rights measurement, and that it was difficult to find an appropriate standard against which to judge paramilitaries. While states bind themselves to uphold human rights and make themselves accountable to the international community, there is no similar equivalent against which to judge armed groups. Moreover, when considering the extension of the mandate from human rights to a broader humanitarian agenda, such a shift, apart from requiring a massive shift of resources and priorities, was seen as bringing about a number of disadvantages. For many aspects of humanitarian law it was seen necessary to take firm positions on controversial political debates about the nature of a conflict. Also, the engagement on a basis of the laws of armed conflict, and in particular the notion of legitimate targets that allows for the lawful killing of combatants, was seen as clearly unacceptable by organisations generally opposed to the use of violence for political ends. Organisations also wanted to avoid awarding legitimacy to any group using violence for political ends.

Given that abuses by paramilitaries have been an issue of major concern in Northern Ireland during the last decades, this debate has also been conducted there and the arguments brought forward very much mirror those outlined above. Given the ongoing abuses by paramilitaries, mostly in the form of punishment attacks, the issue of engagement with paramilitary abuses is still not resolved. However, considering the major shift of focus and resources an engagement with paramilitary abuses would necessitate, it is clear that a change in policy for any human rights organisation would need to be considered very carefully and a decision made quite consciously. To get a conceptual framework for such an engagement a number of questions around legal, technical, resource and other aspects need to be clarified and answered. The most important questions that arose in discussions and debates in different fora³² included:

³¹ B. Dickson, "Humanitarian Law - the case for a change of remit", *Just News*, February 1992, pp. 6f.

³² R. Brett, *Discussion paper on accountability for human rights* [hereinafter: R. Brett], result of Human Rights NGO Workshop on "Holding Non-Governmental Entities Accountable under International Law - Problems and prospects from an NGO perspective",

1.4.2 Basis for intervention

Do human rights and/or humanitarian law provide clear standards for the engagement with armed opposition groups or what are the conceptual or legal problems? Are any other concepts or standards necessary and/or available? What are the advantages and disadvantages of the different concepts? Is it important to rely on clear international legal standards or is it possible to rely on the "spirit" and principles of human rights/humanitarian law?

If human rights groups choose to move from a human rights to a humanitarian law framework, would there be any ancillary consequences to be aware of? Is there a "satisfactory" response to the gap between human rights and humanitarian law, which makes it feasible to criticise the killing of civilians but not of soldiers, and do NGOs have to engage with, or can they ignore the principle of "legitimate targets"; whom exactly does this concept cover? Moreover, if application of Article 3 implies that an armed conflict is underway, could this not legitimise the alleged "shoot to kill" policy of the government? Which groups and what activities by armed groups should be addressed? Is it valid to distinguish between armed opposition groups and other non-state actors? Would such an approach legitimise armed groups or be seen to do so?

1.4.3 Form of engagement

What sort of intervention would be most effective? Have interventions with respect to this type of problem been successful in the past? Might intervention help or hurt the victims? Are the members of the particular organisation/group receptive to initiatives from outsiders/our group?

What working structure does an organisation need to effectively address the problem? Are human rights and/or humanitarian organisations or others best placed to bring about behavioural and attitudinal change in the armed groups perpetrating violent acts? What other organisations are already working on the issue?

1.4.4 Institutional questions

What are or would be motives for (non-) engagement? Is there a specific contribution the organisation could make? What is the likelihood of a positive impact? Is a change of remit possible within existing working structures, especially regarding research and pressure building? Can additional resources be made available and/or is there a willingness to change priorities? Any implications on impartiality, mandate, cross-community membership, other areas of work? Are there any security implications for members/staff of the organisation? What are likely public responses to change of remit? Can organisation establish facts sufficiently well to permit intervention? Are there any implications on the work of other organisations one would have to be aware of?

London, September 1997; M. Posner, *Abuses by Opposition Groups: Key Issues for NGOs to Consider* [hereinafter: M. Posner], paper delivered to "Elimination and Terror - International Conference on Political Killings and 'Disappearances'", the Netherlands, September 1992.

It will be the aim of the following chapters to provide answers to at least most of these questions so as to allow a more well-founded decision as to any possible future engagement with armed opposition groups. While some of the questions will find a general answer others can only be answered in context; in this latter instances the focus will be on the situation in Northern Ireland.

2 Basis for Engagement

2.1 Human Rights

This sub-chapter will examine whether an engagement with armed opposition groups on the basis of human rights law seems feasible. First, the historical development of human rights and its underlying conceptual perspective will be looked at briefly. Then recent legal developments in international human rights law which impact on armed opposition groups will be examined and their suitability as basis for engagement considered.

2.1.1 Historical and conceptual perspective

The origin of a notion of human rights cannot be clearly defined.³³ There are a number of theories that have been used as a basis for human rights law, including those stemming from ancient philosophy and religion (e.g. the Christian dogma that human beings were made by the Creator in His own image and that everybody is born equal), the law of nature which is permanent and which should be respected, positivist utilitarianism and socialist movements.³⁴ However, most people would point to the theories by influential writers, such as John Locke or Jean-Jacques Rousseau, as having prompted the major developments in human rights in revolutionary constitutions from the eighteenth century on, such as Virginia's Bill of Rights of 1776, and also, for instance, the French Declaration of the Rights of Man and of the Citizen pronounced in 1789.³⁵ These theories of the natural law school pondered on the relationship between the government and the individual in order to define the basis for a just society. For the purpose of this paper we may conclude summarising that these rights, then referred to as 'Human rights' were primarily the historical response to the rise of the modern nation

³³ J. Shestack, "The Jurisprudence of Human Rights", in: T. Meron, (ed.), *Human Rights in International Law*, pp. 75ff.

³⁴ For a presentation of the different human rights theories: *Ibid.* at pp. 69ff.

³⁵ L. Doswald-Beck and S. Vité, "International Humanitarian Law and Human Rights Law", *IRRC*, no. 293, pp. 98ff [hereinafter: L. Doswald-Beck].

state.³⁶ In such states, government did not have an inherited legitimacy anymore, but, as Locke saw it, government was a "social charter" according to which people confer power on the state understanding that the government will retain its justification only if it protects those natural rights.³⁷ Positivist human rights theorists, on the other hand, have not felt bound by any overriding natural law but have rather based their advocacy for human rights protection on the ground that co-operation and mutual respect are the most advantageous behaviour for both individuals and society.³⁸ In any way, human rights were the limitations on the authority of the sovereign state over its subjects, and as the state became ever more powerful, so the demand for human rights became more insistent.³⁹ Similarly, with nation states developing across the globe, the protection of their human rights has been demanded correspondingly by citizens all over the world.⁴⁰

In their inception, human rights could have been defined merely as limitations on the authority of governments over their subjects. But the term has not remained static since. Nowadays, human rights are also imposing positive obligations on governments. Such obligations range from the prevention of actions by private persons capable of harming other private persons,⁴¹ to the provision of services and resources necessary for a decent life. The concept of human rights moved from its merely authority limiting notion to the broader concept of "rules that mediate the relationship between governments and their subjects." Furthermore, it has been argued that it was not necessary to insist on the use of the words "government" or "subject".⁴² If an entity exercising powers analogous to those of governments could be identified, as, for example, in a civil war between two equally-matched contending parties, where the insurrectionary party exercises government-like authority over a portion of the population, there would be no reason not to apply the notion of human rights to such an entity in its relation with those under its jurisdiction.⁴³ Under international law as a person of international law a state should possess three qualifications: a) a permanent population, b) a defined territory and c) an effective government.⁴⁴ Although there may sometimes be practical problems in determining whether these requirements are indeed met, this is not a key issue conceptually.⁴⁵ If a government exercises effective control

³⁶ N. Rodley, "Can Armed Opposition Groups Violate Human Rights?", in: K. Mahoney, P. Mahoney (eds.), *Human Rights in the 21st century*, p. 299 [hereinafter: N. Rodley].

³⁷ L. Doswald-Beck, pp. 98f.

³⁸ J. Shestack, "The Jurisprudence of Human Rights" in: T. Meron, (ed.), *Human Rights in International Law*, p. 79.

³⁹ N. Rodley, p. 299.

⁴⁰ *Ibid.*

⁴¹ This will be discussed in some more detail further on.

⁴² N. Rodley, pp. 299f.

⁴³ *Ibid.* at p. 300.

⁴⁴ K. Ipsen, *Völkerrecht*, § 5 at 2ff.

⁴⁵ Whether only customary human rights law, or, in addition human rights treaty law can be applied to such powers has to be determined in every single case with respect to the international rules of state succession; see K. Ipsen, *Völkerrecht*, § 25.

over a defined territory⁴⁶ with a permanent population, such an entity meets all the requirements necessary to be considered a state. This amends our definition to read as follows: "human rights are those rules that mediate the relationship between, on the one hand, governments or other entities exercising effective power analogous to that of governments and, on the other, those who are subject to that power".⁴⁷

But, could the concept of human rights not evolve further? It certainly will. One important development in the philosophy underlying human rights is the appearance of what are commonly referred to as "third generation" rights, such as the rights to development, to peace or to a decent environment.⁴⁸ It is beyond the scope of this paper to examine all developments in human rights. But, there are two aspects which are of particular importance in the context of the questions we are dealing with, which deserve some more analysis. While the question of the application of human rights in armed conflict situations will be discussed further on, at this point we should look at the question whether we should not allow the concept of human rights to evolve to cover abuses inflicted outside the domain of official action, *e.g.* by armed opposition groups other than the ones exercising government-like power? Or, to put it more bluntly, it does not make any difference to a victim of torture if the torture is inflicted by a policeman or someone else.

Nigel Rodley suggests a threefold answer to the question of conceptual applicability of human rights to armed groups:⁴⁹ 1. There is need for a term to cover the notion of rules mediating the relationship of those who govern with those who are governed and if we are to allow the term to describe only a particular kind of harm from the victim's perspective, we should have to find a new term to denote those rules. 2. There are various other appropriate terms to describe the harm when committed by others (with the necessary sense of opprobrium). 3. Each of those terms can and should be distinguished from human rights (and from each other), if they are not to become interchangeable and, ultimately, deprived of their own conceptually-specific meaning.

The first part of the answer speaks for itself; there do not seem to be alternative terms to denote human rights traditionally understood. The second and third part of the response require us to look at existing terms to describe torture (and other acts) which, if committed by governments or their ilk, would be categorised as human rights violations.

For example, in most, if not all, legal systems torture is a crime. The perpetrator may be a family member, a habitual criminal, a member of the mafia, a terrorist, a soldier, a policeman, or indeed, anyone. A crime is a very serious wrong, entitling the victim not only to claim a private right of redress, but to

⁴⁶ An exactly defined borderline is not necessary. It is sufficient that there be an undisputed core territory. K. Ipsen, *Völkerrecht*, § 5 at 4.

⁴⁷ N. Rodley, p. 300.

⁴⁸ L. Doswald-Beck, p. 102.

⁴⁹ N. Rodley, p. 300.

expect the repressive action of the state. The criminal law expresses, in practical terms, society's abhorrence of the acts by and against whomever committed. Moreover, it is hardly ever suggested that torture inflicted in the home or by a common criminal, or a gang of common criminals, is a human rights violation. Why then should it become one when inflicted by a politically-motivated criminal? Perhaps a proponent of such a notion would respond to this question that the essence lies in the aspiration of the politically-motivated criminal to govern?⁵⁰

Leaving aside the question of what to do with the politically-motivated criminals who do not want to govern and the individual political criminal (are they violating human rights) one has to ask what is the relevance of the aspiration to govern. Probably, the idea is that those who aspire to govern should be held to the same standard as those they claim to replace.⁵¹ This may be so, as a proposition of abstract political ethics. Yet in reality, governments - contrary to most armed opposition groups - committed themselves to be bound by international human rights. Also, the balance is implausible as governments have an administrative structure and a tremendous organisation for executing its policies. Armed opposition groups generally do not have the civilian structures in place necessary to implement human rights provisions regarding fair trial, not to mention the many positive obligations required to implement economic, social and cultural rights.⁵² Moreover, there is no reason why moral balance requires the appropriation of language that would disguise the practical imbalance.

Just as torture may be described as a crime, so it may be described as infringing or violating legal rights. It is evident that not every legal right is a human right. But then, what makes human rights distinct? One possible answer is that they are still what history led us to understand them to be, that is, rules mediating the relations between governors and governed. The other possible answer is that they are rights, the violation of which is seen as a particularly grave invasion of one's well being or one's "human dignity"- which brings us back what we have already seen when talking about crime. We would have to conclude that any murder is a violation of the right to life, that any theft is a violation to the right to property and any kidnapping a violation of the right to freedom from arbitrary arrest and detention, as well as freedom of movement, expression, association and assembly.⁵³

What is special about human rights therefore seems more rightly explained with the first answer offered, that is that the concept of human rights is best understood as the rules governing the relations between governors and governed.

Additionally, one might want to consider whether the original challenge we faced, that is the argument that, from the perspective of the victim it does not make any difference by whom the torture is committed, is indeed as self-evident as it first

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Where they do have government-like structures and authority it was concluded earlier that the human rights concept could indeed be applied.

⁵³ N. Rodley, p.301.

appears. In normal circumstances, for harm sustained one has a prospect of redress through the institutions of society, notably the police and the courts. May it not, then, follow that the torment is particularly aggravated when the agents of the pain or suffering are precisely those who are supposed to protect against or at least potentially provide relief from the acts causing the suffering?

In conclusion, it seems appropriate to state that, from a conceptual perspective, actions from armed opposition groups (without government-like power) should be seen as distinct from the concept of human rights and that, therefore, abuses by such groups should not be understood and referred to as violations of human rights.

2.1.2 Recent developments in international human rights law and today's legal meaning of human rights with regard to armed groups and internal violence

There exists an impressive body of international law concerning the protection of human rights and fundamental freedoms. Since the advent of the United Nations, covenants, conventions and declarations, as well as resolutions adopted by competent United Nations organs, have elaborated in considerable detail the scope of human rights protection. In addition there is a large number of standards adopted at a regional level. The breadth of the existing norms is impressive,⁵⁴ but further standard setting in the field of human rights protection continues, and will remain necessary to keep pace with a changing world. Human rights law is adapting to new circumstances not only through new standards, but through scholars, commentators, the work of human rights bodies and jurisprudence on a national, regional and international level.

Within this section we will consider a few of the more recent developments that are important in the context of opposition by armed groups and internal violence. Thereby we will try to establish whether international law, and human rights law in particular, is indeed legally binding on armed opposition groups. It has been widely acknowledged that measures taken by people and groups other than States can have a negative impact on the enjoyment of human rights and fundamental freedoms.⁵⁵ If the protection of human rights is not to be seriously flawed, this makes it necessary to make such behaviour in some way legally sanctionable. Traditionally, international law was the body of law binding on states in their relations with each other.⁵⁶ Human rights law goes beyond this to more generally address the behaviour of states in their internal affairs and their relations to their citizens. Human rights law, therefore, generally addresses the behaviour of

⁵⁴ For a summarised listing of UN documents guaranteeing human rights: General-Secretary, *Minimum humanitarian standards*, para. 47.

⁵⁵ United States Diplomatic and Consular Staff in Tehran (*United States of America v. Iran*) 1980 *I.C.J. Rep.* 4, 42, (Judgement of May 24; "Hostages case").

⁵⁶ R. Jennings, A. Watts, *Oppenheim's International Law - Peace: Introduction and Part I*, vol. 1, pp. 4f.

states, as personified by their governments. Human rights law deals with acts or omissions of government officials and state officials in general. There are, however, areas where international law is concerned with the behaviour of individuals or groups. In relation to the question of the applicability of international law on armed opposition groups there are four different legal approaches that are relevant in this context and which will be discussed in the following: 1) State responsibility for private actions; 2) crimes under international law; 3) duties on individuals and groups towards their community; 4) the last aspect to be discussed is whether, additionally, the direct applicability of human rights norms against armed opposition groups is legally possible.⁵⁷

2.1.2.1 State responsibility for private actions

The international responsibility of a state is generated when conduct attributable to the state under international law constitutes a breach of the international obligations of the state, *e.g.* those obligations encompassed within customary or conventional human rights law.⁵⁸ But when, under international law, is a certain conduct attributable to the state?

A state is responsible for the acts or omissions of members of its internal apparatus or organisation; *i.e.* its organs and agents.⁵⁹ The Inter-American Court of Human Rights held that this must apply even if they are acting outside the scope of their authority or in violation of internal law; intent or motivation is irrelevant.⁶⁰ However, a state is responsible neither for all acts or omissions taking place in its territory nor for acts or omissions of private individuals not acting on the state's behalf.⁶¹ But then, for which acts or omissions except the ones committed by its own agent is the state responsible? For our purposes we can concentrate on the question as to state responsibility for acts by armed groups. Terrorist acts that are organised, supported or condoned by states, and can thus be imputed to governments, violate the human rights of the victims to the extent that such acts are prohibited by the international obligations of governments concerned.⁶² This is true both of acts committed within and without the territory of the State concerned.⁶³ In the *Soering* case the European Court of Human Rights established that states can have a responsibility regarding torture or inhuman or degrading treatment or punishment inflicted on individuals outside their jurisdiction when a state extradites a fugitive when there is a real risk of such a treatment in

⁵⁷ International humanitarian law which as well is concerned with the behaviour of individuals and groups will not be discussed within the chapter on human rights, but rather under its own heading.

⁵⁸ T. Meron, *Human rights and humanitarian norms as customary law, I. Human rights, International legal aspects, I. Title*, p. 155, [hereinafter: T. Meron, *Human Rights*].

⁵⁹ *Ibid.* at pp. 155f.

⁶⁰ M. McClintock, "Establishing Accountability for State Violence", in: K. Maloney, P. Maloney (eds.), *Human Rights in the 21st Century*, p. 273.

⁶¹ T. Meron, *Human Rights*, p. 155.

⁶² T. Meron, "When do acts of terrorism violate human rights?", *Israel Yearbook of Human Rights*, (1990), p. 274.

⁶³ *Ibid.* at pp. 274f.

the receiving state.⁶⁴ The European Commission for Human Rights in *Altun v. FRG*⁶⁵ came to similar conclusions and held that this may even be so if the danger does not emanate from public authorities for whom the receiving state is responsible.⁶⁶ This extension of the persecuting entity, the so called 'agents of persecution' to include non-state actors does not only mean that states seeking to expel refugees have to take into account threats to the enjoyment of human rights by such entities, but this could also be a reason for non-governmental organisations concerned with the protection of refugees to examine the conduct of non-state actors and in particular armed opposition groups, as to be able to better argue for the protection of endangered persons.

The International Court of Justice in the *Hostages Case* held that the Iranian government was responsible for acts of Iranian militants against the US embassy in Tehran not because there was a general responsibility for private acts, but because of its failure to fulfil its own obligations to protect a foreign embassy.⁶⁷ This expresses a rejection of a general state responsibility for acts by armed groups. The extent of state responsibility was further elaborated by the Inter-American Court of Human Rights in the *Velasquez Rodriguez* case. The Court found that "the state has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."⁶⁸ Similarly, the European Court of Human Rights held that states have a positive duty to put in place a legal, judicial and administrative framework effectively protecting against violence, including violence committed by non-state actors.⁶⁹ This duty applies also where a violation was not committed on behalf of the state.⁷⁰

Where does this leave us? It could be concluded that states may be held responsible for human rights violations by armed groups in their own territory.⁷¹ But, while this will be difficult to determine regarding for example the prevention of certain violent acts, it is even more difficult to determine how culpable states

⁶⁴ European Court of Human Rights, Judgement of 19 July 1989, Series A, vol. 161.

⁶⁵ European Commission for Human Rights, *Altun v. FRG*, Applic. 10308/83, 36 D & R. 209.

⁶⁶ There is no general agreement as to the inclusion of persecution by non-state agents though; for more details: P. Kourula, *Broadening the Edges - Refugee Definition and International Protection Revisited, Refugees and Human Rights*, vol. 1, pp. 97ff.

⁶⁷ United States Diplomatic and Consular Staff in Tehran (*United States of America v. Iran*) 1980 *I.C.J. Rep.* 4, 42 (Judgement of May 24).

⁶⁸ *Velasquez Rodriguez* case, Annual Report of the Inter-American Court of Human Rights, OAS/Ser.L/V/III.19, doc. 13 (1988).

⁶⁹ P. Mahoney, F. Sundberg, "The European Convention on Human Rights: A Case Study of the International Law Response to Violence", in: K. Mahoney, P. Mahoney (eds.), *Human Rights in the 21st century*, p. 369.

⁷⁰ European Court of Human Rights, *Tanrikulu v. Turkey*, Judgement of 8 July 1999, Applic. 23763/94.

⁷¹ A. Clapham, *Human Rights in the Private Sphere*, p. 195.

are for internal terrorism, by virtue of their economic or political policies.⁷² Or, as Andrew Clapham put it: "That would be a brave court which tried to determine whether the British Government, through its policies, is indirectly responsible for the IRA."⁷³

It is therefore not suggested that human rights bodies like the Human Rights Committee dealing with complains about private violations and the state's failure to prevent or rectify them, would easily find the state had violated international human rights law.⁷⁴ The line of defence has been removed from states though that international human rights treaties have no relevance to the activities of private actors. States have to accept this 'privatisation' of human rights as a judicial fact.⁷⁵

2.1.2.2 Crimes under international law

One area of international law directly concerned with the behaviour of individuals and groups is international criminal law. It has long been recognised that certain acts committed by individuals can attract international criminal responsibility.⁷⁶ On 1 October 1946 the International Military Tribunal (at Nuremberg) delivered a judgement in which the concept of individual responsibility was clearly recognised. The Tribunal found that individuals had duties to obey international law: "[I]nternational law imposes duties and liabilities upon individuals as well as upon states ... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁷⁷ While it has been argued that the Nuremberg Principles applied only to crimes committed by or in collusion with state officials,⁷⁸ the very first United Nations-sponsored human rights treaty, the Convention on the Prevention and Punishment of the Crime of Genocide, clearly applies to "constitutionally responsible rulers, public officials or private individuals"(emphasis added).⁷⁹ With the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda and, now, the International Criminal Court (ICC), individuals and members of a group can attract international responsibility regardless of whether they are acting as official government agents or not.⁸⁰ In the light of these new developments in international law, it has become increasingly difficult for perpetrators of gross violations of human rights to escape liability simply by claiming to be a non-state actor. The

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.* at p. 111.

⁷⁵ *Ibid.*

⁷⁶ International Military Tribunal (at Nuremberg), Transcript of Proceedings (1 Oct. 1946), cited in: A. Clapham, *Human Rights in the Private Sphere*, pp. 95f.

⁷⁷ International Military Tribunal (at Nuremberg), Transcript of Proceedings (1 Oct. 1946), cited: *Ibid.* at p. 96.

⁷⁸ N. Rodley, p. 304.

⁷⁹ Convention on the Prevention and Punishment of the Crime of Genocide (1948), Article IV.

⁸⁰ Report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1998/29, *Fundamental standards of humanity*, (E/CN.4/1999/92), para.14 [hereinafter: Secretary-General, *Fundamental standards of humanity* (1999)].

Statute of the ICC⁸¹ (SICC) clearly also holds non-state actors accountable for the commission of crimes of genocide (Article 6) and crimes against humanity (Article 7) under any circumstances, in times of peace and war.⁸² The Statute applies equally to all persons without any distinction based on official capacity (Article 27(1)). As for war crimes in non-international armed conflict listed in Article 8 (2) (e), the Statute specifies in Article 8 (2) (f) that it applies to "... armed conflict between governmental authorities and organized armed groups or between such groups". The Statute of the ICC thus extends accountability for war crimes under international law to non-state actors beyond Additional Protocol II to the Geneva Conventions of 1949 in two major ways. Firstly, there is no need to show that the organised groups are "under responsible command" and secondly, there exists no requirement of control over part of the territory as provided for under Article 1 of Protocol II.⁸³ However, war crimes explicitly do not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.⁸⁴

The Statute of the ICC ensures that "the most serious crimes of concern to the international community"⁸⁵ will be punished, irrespective of whether the crimes are committed by state or non-state actors. In this way, the Statute has criminalized acts perpetrated by individuals or members of a group that were previously considered by their very nature to be the responsibility of state officials or those acting with their consent or acquiescence.⁸⁶ This, most certainly, is a very important development. It should be noted however that the primary responsibility of punishing such crimes will remain with the states. A case brought before the ICC will only be admissible if the state in question is unwilling or unable genuinely to investigate and prosecute the crime (Article 17 (1) (a) SICC).

It is worth pointing out that although human rights violations may lead to criminal prosecutions (for example in the case of torture), the individual is tried for the criminal act, not for committing human rights violations. International criminal law is a distinct body of law; international criminal responsibility is limited to specific acts as defined in the Rome statute of the ICC and few other documents⁸⁷. International criminal law and human rights law, although related, should not be confused. States are responsible for human rights violations committed by its agents, whether or not the same acts at the same time can be or are punished as crimes under international law.

⁸¹ *Rome Statute of International Criminal Court*, (U.N. Doc. A/CONF.183/9*); According to Article 126 of the statute it will enter into force after ratification by 60 states. The document is available from the United Nations website on:

<http://www.un.org/law/icc/statute/romefra.htm>.

⁸² It is Articles 6 and 7 SICC dealing with Genocide and Crimes against humanity respectively.

⁸³ Secretary-General, *Fundamental standards of humanity* (1999), para. 16.

⁸⁴ Article 8 (2) (d), (f) SICC.

⁸⁵ Preamble, *Rome Statute of the International Criminal Court*, (U.N. Doc. A/CONF.183/9*).

⁸⁶ Secretary-General, *Fundamental standards of humanity* (1999), para. 15.

⁸⁷ See :T. Meron, "When do acts of terrorism violate human rights?", *Israel Yearbook of Human Rights*, (1990), p. 276.

At this point one can only speculate as to possible effects of this most recent development in international criminal law. It seems, though, that the Statute of the ICC, once entered into force, could provide a very useful and convincing tool for human rights organisations in their dealing with the most serious abuses committed by armed opposition groups. Even leaving aside legal difficulties in the application of human rights and humanitarian law with regard to certain actors or situations, there was not much in the past human rights organisations could threaten with if armed opposition groups chose to ignore them or international law altogether. With an ICC-Statute entered into force there will be at least the disturbing, live-long and global possibility of finally being prosecuted for crimes committed. Hopefully, some self-imposed travel restrictions of former heads of state we see at the moment are only a small taste of what is going to come.⁸⁸

One thing we should be aware of though is the fact that the prospect of individual international criminal accountability for certain acts is likely to make governments and armed opposition groups even more cautious as to effectively hide their responsibility for these crimes. This could mean a decreasing willingness to allow territorial access to human rights and even humanitarian organisations. It also does not seem unreasonable either, to fear that it could make life for human rights activists even more dangerous as they are likely to disturb such cover-up efforts.

⁸⁸ According to newspaper reports, the Iraqi foreign minister left Austria early after being denied an assurance by the Austrian government not to face prosecution for alleged involvement in massacres on Kurd civilians; an African ex-dictator after taking legal advice chose not to travel to Germany for medical treatment.

2.1.2.3 Duties towards the community

The Universal Declaration of Human Rights, as well as the two Covenants,⁸⁹ in their preambular paragraphs recognise duties on individuals to promote respect for human rights. The two Covenants include this statement in their preambles:

"Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under responsibility to strive for the promotion and observance of the rights recognized in the present Covenant ..." It has been argued that this should not be considered to be "without legal significance".⁹⁰ Even if we understand this as being the basis of an obligation, the content of that obligation is not far reaching. It is one of striving for the promotion and observance of human rights. It hardly supports an interpretation by which there would be imposed a direct obligation to refrain from committing acts which, if committed by government officials, would be considered human rights violations, and which are listed in great detail in the specific articles which follow.⁹¹ On the other hand it has been argued with reference to the *travaux préparatoires* that in drafting the ICCPR, states were concerned not only by governmental interference with the rights granted but that individuals as well would be obliged to respect the human rights contained in the Civil and Political Covenant.⁹² This is not contested. Indeed, this becomes clear also in the Covenant itself, for example in Article 20 ICCPR which requires states parties to prohibit incitement to racial hatred and war propaganda.⁹³ This means states are bound to ensure that they have legislation prohibiting the expression in question; it is true that this norm has an impact on the individual (at least if the state complied with its international obligation and prohibited the expression in question). But it only makes the individual responsible under national law, no responsibility under international law is created by this. In as far as states are obliged to constrain the behaviour of private individuals, we have seen earlier that a state may indeed fall foul of its human rights obligations by failing to create the conditions necessary for the enjoyment of human rights.

This examination indicates that it is not appropriate to draw concrete individual obligations from the cited documents, beyond at most that of striving for the promotion and observance of human rights. One additional very practical problem with any other conclusion will be spelled out here very briefly. As the duties referred to individuals are very general *e.g.* "having duties to other individuals and the community", would this mean it refers to all rights contained in the Covenants? If so, what does one make of a right to work, to a fair trial, a right

⁸⁹ *International Covenant on Civil and Political Rights (ICCPR)*, and *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.

⁹⁰ Daes, cited in: N. Rodley, p. 307

⁹¹ *Ibid.*

⁹² A. Clapham, *Human Rights in the Private Sphere*, pp. 97f.

⁹³ Article 20 ICCPR: "1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

to asylum or to a nationality in relation to other individuals or groups?⁹⁴ If it does not refer to all rights, how exactly and with respect to which principles would one make the distinction?

2.1.2.4 Direct applicability of international human rights law against armed opposition groups

Having seen a number of ways in which international law addresses the behaviour of armed groups, the question remains whether it might not be legally possible, additionally, to apply human rights law directly against armed groups.

Some writers appear to believe that terrorist acts always involve violation of human rights. Thus, Professor Jordan Paust argues that every act of terrorism involves a violation not only of the criminal law of the country in which it has been committed, but also of the human rights of the victims.⁹⁵ To establish whether this is correct indeed *de lege lata* we will have to examine some of the writing and jurisprudence on the subject.

Frequently cited in favour of this view is the 1987 UN Report by R. Galindo Pohl on the Human Rights Situation in the Islamic Republic of Iran.⁹⁶ The Report states that "[i]n recent decades it has been implicitly or explicitly accepted that organized or semi-organized political groups, particularly those engaged in insurgency or insurrection, may be responsible for violations of human rights and freedoms, mainly in respect to the right to life and personal freedom."⁹⁷ In opposition to that, in the *Tel-Oren v. Libyan Arab Republic* case the District of Columbia Circuit held that while there was a trend in international law towards more expansive allocation of rights and obligations to entities other than states, under current law terrorist attacks did not amount to law of nations violations.⁹⁸ The probably most important recent documents on the issue are the Reports of the Secretary-General on respectively Minimum humanitarian standards⁹⁹ and Fundamental standards of humanity¹⁰⁰ submitted to the Commission on Human Rights very recently which will be cited here in some more detail. In his first report in 1998 the Secretary-General acknowledged that "[i]t is clear that measures taken by other than States can have a negative impact on the enjoyment of human rights and fundamental freedoms. In particular, armed groups, operating at different levels of sophistication and organization, are often responsible for the

⁹⁴ The right to marry might seem another obvious example with potentially far reaching consequences. Paragraph 2 of Article 16 ICCPR though states: Marriage shall be entered into only with the free and full consent of the intending spouses.

⁹⁵ J. Paust, "The Link between Human Rights and Terrorism and Its Implications for the Law of State Responsibility", *Hastings Int'l. & Comp. Law Review*, vol. 11 no. 1, (1987), p. 41.

⁹⁶ UN Doc. E/CN.4/1987/23.

⁹⁷ *Ibid.* at para. 5.

⁹⁸ 726 F.2d 774 (D.C. 1984), discussed in: H. Koh, "The United States as World Forum, Civil Remedies for Uncivil Wrongs: Combating Terrorism through Transnational Public Law Litigation", 22 *Texas International Law Journal*, (1987), p. 169.

⁹⁹ Secretary-General, *Minimum humanitarian standards*.

¹⁰⁰ Secretary-General, Report submitted pursuant to Commission resolution 1998/29, *Fundamental standards of humanity*, (E/CN.4/1999/92) [hereinafter: Secretary-General, *Fundamental standards of humanity*, (1999)].

most grave human rights abuses." Turning to legal considerations, the report states that "[y]et these groups are not, strictly speaking, legally bound to respect the provisions of international human rights treaties which are instruments adopted by States and can only be formally acceded to or ratified by States. The supervisory mechanisms established by these treaties are not empowered to monitor or take action on reports on the activities of armed groups...[I]n situations where that [international humanitarian] law does not apply the international legal accountability of such groups for human rights abuses is unclear (although clearly such acts should be penalized under domestic criminal law). There are different schools of opinion regarding the proper standard of accountability. Some Governments argue that armed groups can commit human rights violations, and should be held accountable under international human rights law. Other Governments maintain that, while the abuses of armed groups are deserving of condemnation, they are not properly speaking human rights violations since the legal obligation which is violated is one that is only binding on Governments. This divergence of views is found also among scholars and commentators."¹⁰¹

In the follow-up report the Secretary-General noted: "While non-State actors should be punished under domestic law for criminal offences committed, *some* argue that non-State actors should also be held accountable under international human rights law, especially in situations where the State structures no longer exist ..."¹⁰² In this context it might be interesting to have a look at the stance that has been taken by different international human rights organisation confronted with abuses by armed opposition groups.

One organisation that over the last decades has influenced the public perception of human rights like few others certainly is Amnesty International. In 1991 on its biennial council in Yokohama it announced changes to its "human rights watchdog brief" condemning the "human suffering" caused by armed opposition groups and resolved to step up its reporting on their abuses.¹⁰³ Although mentioning that this focus will include such abuses as arbitrary killings and hostage-taking by armed opposition groups, it is quite remarkable that an organisation described as "bigger, richer, better organized, more representative and more influential than most other [human rights] groups together"¹⁰⁴, in the three page press release announcing the change of remit, does not mention at all what legal or other basis the organisation intends to engage with armed opposition groups.¹⁰⁵ Amnesty reports¹⁰⁶ and press

¹⁰¹ Secretary-General, *Minimum humanitarian standards*, para. 60.

¹⁰² Emphasis added; Secretary-General, *Fundamental standards of humanity* (1999), para. 13.

¹⁰³ Amnesty International press release, "Though stand against killings, hostage-taking by violent groups", 7 September 1991, ORG 50/14/91.

¹⁰⁴ P. Alston, "The Fortieth Anniversary of the Universal Declaration", in: J. Berting et al. (eds.), *Human Rights in a Pluralist World, Individuals and Collectivities 1*, p. 12.

¹⁰⁵ Amnesty International press release "Though stand against killings, hostage-taking by violent groups", 7 September 1991, ORG 50/14/91.

¹⁰⁶ e.g. Amnesty International, "Northern Ireland - Human Rights Abuses by Paramilitary Groups, Summary of Human Rights Concerns", EUR 45/03/95, June 1995.

releases¹⁰⁷ on armed opposition groups commonly refer to abuses or human rights abuses by armed groups but avoid calling them violations. An Amnesty leaflet entitled "Against Abuses by Opposition Groups" states that its policy on opposition groups is guided by humanitarian law standards, much as its work with governments is based on international human rights law.¹⁰⁸ It then breaks this down to the actual abuses Amnesty is opposing, limiting them to: "hostage taking, the torture and killing of prisoners and other arbitrary killings."¹⁰⁹ An exception applies only to "[s]ome groups in opposition to government hav[ing] acquired characteristics that in practice make them similar to governments. Amnesty International expects them to respect international human rights standards and appeals to them to do so."¹¹⁰ Factors taken into account are whether the group controls people in its territory in a way similar to the exercise of government jurisdiction; whether it is able to implement procedures for the protection of human rights and humanitarian law in its territory; whether it is recognised by governments and international organisations.¹¹¹

Human Rights Watch as well has been guided by humanitarian standards when reporting on abuses of human rights by armed opposition groups and avoided the use of human rights language.¹¹² More recently the organisation also made use of the Minimum humanitarian standards adopted at an expert meeting in Turku/Finland.¹¹³

Americas Watch, the American division of Human Rights Watch has long been very active in monitoring internal armed conflicts. Robert Goldman in an article on Americas Watch experience in monitoring such conflicts outlines the rules of engagement with armed opposition groups: "Those of us at Americas Watch who were directly involved with solving the legal problems associated with civilian fatalities soon realized, however, that existing human rights law provides little guidance and, ultimately, no solution for several reasons. ... [H]uman rights law was designed to govern in peacetime. Thus it contains no rules to regulate the means and methods of warfare."¹¹⁴ Goldman goes on to address the problem of derogation and then deals with the legal applicability: "Since only states are proper parties to human rights treaties, the governments of states alone are capable of committing and being internationally responsible for human rights violations. ... Americas Watch turned to the laws of armed conflict, *i.e.* international humanitarian law, to find a methodological basis for dealing with the problematic

¹⁰⁷ See for example Amnesty International press releases on Northern Ireland such as: 17 June 1996, EUR 45/09/96; 3 February 1999, EUR 45/06/99; 14 May 1999, EUR 45/27/99.

¹⁰⁸ Amnesty International, *Against Abuses by Opposition Groups*, July 1993, POL 30/03/03.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² Human Rights Watch, *World Report 1992*, p. 83.

¹¹³ Human Rights Watch, *Bangladesh: Political Violence On All Sides*, June 1996, Vol. 8 No. 6 (C); This issue will be dealt with in more detail further on in this text.

¹¹⁴ R. Goldman, "International Humanitarian Law: Americas Watch Experience in Monitoring Internal Armed Conflicts", *Am. U. I. Int'l. L. & Pol'y*, vol. 9, (1993), p. 50, [hereinafter: R. Goldman].

issue of civilian casualties and to judge objectively the conduct of military operations by the respective parties."¹¹⁵

The Lawyers Committee for Human Rights does not apply human rights law against armed groups.¹¹⁶ While in the past it did conduct limited fact-finding missions in armed conflict situations, and relied on humanitarian law as a basis for its reporting, since 1990 it has limited its monitoring to violations of human rights law by governments.¹¹⁷ Several factors precipitated this change, most importantly a decision to sharpen the Committee's focus on the administration of justice and related legal concerns. It does so, also, to maximise its effectiveness, given limited resources.¹¹⁸

This brief overview shows that the currently prevailing view among the large international human rights NGOs is that armed opposition groups can properly be held responsible only for breaches of the law of conflict and that they cannot be accused of human rights violations.¹¹⁹ The fact that even the very organisations concerned about the enjoyment and promotion of human rights are extremely reluctant to use human rights provisions against armed opposition groups has to be seen as a strong indicator as to how problematic even these organisations see the usefulness and legal applicability of human rights provisions in this context.

It is time to draw some conclusions as to the legal applicability of human rights against armed groups. While at least the human rights organisations examined seem to agree that such an application is not possible, state practice and academia are not as coherent. Does this mean we have to conclude that, currently, it can not be determined whether *de lege lata* armed groups can violate human rights? I submit that this is not the case. As the Secretary-General stated in his first report, armed groups "are not, strictly speaking, legally bound to respect the provisions of international human rights treaties which are instruments adopted by States and can only be formally acceded to or ratified by States." If armed groups are not accountable for human rights abuses according to international human rights treaty law, they could still be legally accountable by international customary law.¹²⁰ The requirements for the establishment of a provision as a rule of international customary law can be found in Article 38 (1) (b) of the Statute of the International Court of Justice. The Statute refers to "international custom, as evidence of a general practice accepted as law." So we need a general practice and, additionally, this practice must be accepted as law.

¹¹⁵ *Ibid.* at p. 51.

¹¹⁶ Lawyers Committee for Human Rights, *Draft position paper*, August 1992, p. 2 [on file with author].

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ Similar: R. Goldman, pp. 51ff.

¹²⁰ The international criminal responsibility of individual members of such groups has already been discussed earlier in this section.

While the position taken by human rights organisations certainly provides an important assessment of the international perception of human rights law, it seems appropriate to take the findings of the very recent reports of the Secretary-General as an authoritative basis for our examination¹²¹ as they do not seem to have been contested by any of the states commenting on the report.¹²² Summarising the most important observations from above, the Secretary-General found that the international legal accountability of armed groups for human rights abuses would be unclear in situations not covered by international humanitarian law; and that while some governments as well as some scholars and commentators were arguing in favour of such an applicability, other governments, scholars and commentators were maintaining that abuses by armed groups are not properly speaking human rights violations since the legal obligation which is violated is one that is only binding on governments. Comparing this with the requirements set out above for the creation of international customary law namely the need for a *general* practice we have to conclude that at present there is no such general practice on a state and UN level as to holding armed groups accountable under human rights law and no widely accepted *opinio juris* in this respect can be found.

I therefore do submit that so far no international customary law has been established which would allow the general direct application of international human rights norms against armed opposition groups in general.

One might argue for a different conclusion with regard to some groups under very specific circumstances. When groups exercise control over territory and people, and therefore have the attributes of government *de facto*, this has been argued to the extent they are able to implement the standards.¹²³ This is based on an analogy with Additional Protocol II, where the criteria are essentially the same and the opposition group is deemed to be bound by the Protocol though not a party to it.¹²⁴ Although the permissibility of the analogy in international public law is not undisputed,¹²⁵ this provides an arguable legal basis for the application of human rights law against government-like armed opposition groups.

Another example where the standards contained in human rights law might be applied is when the group in question has signed an agreement with the government or with an international organisation (for example under the Dayton

¹²¹ As this report does not refer to specific countries in its observations the following discussion does not, at least theoretically, exclude the possibility that there might be regional customary law differing from general international custom.

¹²² In accordance with GA resolution 1997/21 views and information from governments were sought already in preparation of the report (to be found in E/CN.4/1998/87). Additionally, states were explicitly invited to and did comment on the report. These comments were incorporated in the follow up report by the Secretary-General: *Fundamental standards of humanity* (1999).

¹²³ R. Brett, p. 1.

¹²⁴ *Ibid.*

¹²⁵ W. Heintschel v. Heinegg, in: K. Ipsen, *Völkerrecht*, § 19 at 5-7, giving an overview of the issues concerned and arguing for only a very restricted permissibility of analogies in international public law.

Agreement)¹²⁶, committing itself to uphold certain human rights standards. However, this is not without problems. While such an exercise may be valuable both as a means of education and as a means of bringing more standards into play, and thus providing greater protection for people, it is fundamental not to negotiate on the standards themselves, for example if the armed group agrees not to torture but insists on their need to be able to kidnap the failure to agree does not "bind" the NGO or prevent it from objecting to such behaviour.¹²⁷ A precondition for encouraging the signing of a document should be the demonstrated will and ability (including ability to control) of the armed opposition group to abide by the rules and standards in consideration.¹²⁸ Moreover, since such unilateral agreements can be revoked again it has to be decided very carefully whether to base the application of human rights standards simply on such an agreement.

2.1.2.5 Lack of specificity and derogation

Two other, more general issues with the application of human rights to situations of internal violence are to be mentioned very briefly for their practical importance.

The first concerns the lack of specificity of some of the most relevant rights and protections.¹²⁹ In contrast to international humanitarian law, human rights provisions do not speak in a direct and detailed manner of the abuses associated with conflict, thereby failing to offer potential victims clear guidance regarding their rights in specific circumstances. Neither do they spell out in detail duties and responsibilities of armed forces. To offer one example: human rights law recognises the right to life, but what does this tell us about the legality of the use of certain weapons or restrictions on the methods of attacks for the protection of civilians? With regard to state interference, principles have been elaborated at least in some areas of human rights law to provide a more detailed protection. For example, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials set out rules which are of direct relevance to the protection of the right to life in the context of domestic policing.¹³⁰ Similar codes or sets of principles elaborating on the protection on protection of the right to life and other key human rights, that could also be applied to armed opposition groups in the context of internal violence are so far non-existent.¹³¹

The other problem to be mentioned briefly is derogation.¹³² Some human rights treaties allow states, in exceptional circumstances, to take measures derogating from their obligations with regard to certain human rights commitments

¹²⁶ R. Brett, p. 1.

¹²⁷ *Ibid.* at p.3.

¹²⁸ *Ibid.*

¹²⁹ Secretary-General, *Minimum humanitarian standards*, paras. 66-69.

¹³⁰ Adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, cited in: Secretary-General, *Minimum humanitarian standards*, para. 69.

¹³¹ , para. 69.

¹³² For a short overview: *Ibid.* at paras. 50-58.

they have undertaken.¹³³ Theoretically, that does only apply in times of emergency "which threaten the life of the nation"; in practice states have sometimes used emergency legislation very extensively.¹³⁴ However, states may not derogate from several of the rights protected for example in the ICCPR; these so-called non-derogable rights include the right to life, the prohibition of torture, slavery and retrospective criminal legislation or punishment.¹³⁵ The other rights do not thereby cease to be applicable though, but must be respected in so far as this is possible in the circumstances.¹³⁶ While this poses in situations of internal violence problems with the application of human rights against the state - how does one determine what is possible in the circumstances - this would be even more difficult with respect to armed opposition groups. Should one apply all rights against these groups, or accept some kind of derogation (if so, in which form and on which basis), or rely on the "hard-core" rights only?

Having examined different possible approaches offered within the field of human rights to hold armed opposition groups accountable we should now turn to the provisions of international humanitarian law.

2.2 Humanitarian Law

As we have seen above, abuses by armed groups generally do not constitute human rights violations. For this reason some human rights organisations turned to the laws of armed conflict, *i.e.* international humanitarian law, to find a methodological basis for dealing with abuses committed by armed groups in situations of internal violence. This shift of focus and legal basis has not always been unproblematic.

In the course of this sub-chapter we will discuss the international humanitarian law regime applicable to the different situation of internal violence. Advantages of and problems with the application of international humanitarian law will be discussed; in particular the distinction between civilians and combatants

¹³³ *e.g.* Article 4 ICCPR.

¹³⁴ In Northern Ireland, for example, emergency legislation has been in force for more than 70 years without interruption; Committee on the Administration of Justice, *No Emergency, No Emergency Law: Emergency Legislation in Northern Ireland - the case for repeal*, pp. 6f.

¹³⁵ For principles to guide governments and inter-governmental monitoring bodies during emergencies see: *Paris Minimum Standards of Human Rights Norms in a State of Emergency*, approved by the International Law Association in 1984, reprinted at 79 *American Journal for International Law*, (1985), pp. 1072ff, this document contains a list of 16 non-derogable rights derived *i.a.* from treaties and customary law; *Siracusa Principles on Derogation Provisions in the International Covenant on Civil and Political Rights*, adopted at an international conference sponsored by several NGOs in 1984, reprinted at 7 *Human Rights Quarterly*, (1985), pp. 7ff; Conclusions of the International Commission of Jurists in its 1983 study of "States of Emergency: Their Impact on Human Rights", pp. 459-464; discussed in: J. Fitzpatrick, *Setting Standards for Protection of Human Rights During States of Emergency*, Workshop on States of Emergency, Queen's University of Belfast, Human Rights Centre, 5 April 1991, on file with author.

¹³⁶ L. Doswald-Beck, pp.103f.

and the notion of "legitimate" targets will be explored. To better understand this last notion, and the laws of armed conflict more generally we will start with a short introduction to the historical origins and conceptual basis of international humanitarian law.

2.2.1 Conceptual basis of international humanitarian law

Restrictions on hostile activities are to be found in nearly all great civilisations, already in ancient times and in the Middle Ages.¹³⁷ Laws for the protection of certain categories of persons can be traced back to the Persian, Greeks and Romans, as well as to India, Islam, Ancient China, Africa and the Christian States.¹³⁸ Those categories included women, children and aged people, disarmed combatants and prisoners.¹³⁹ Attacks against certain objects - places of worship for example - and treacherous means of combat, such as the use of poison in particular were prohibited.¹⁴⁰ The extent to which these customs resemble each other is of particular interest and in general their similarities relate both to the expected behaviour of combatants between themselves and to the need to spare non-combatants.¹⁴¹ Traditional manuals of humanitarian law cite the basic principles of this law as being those of military necessity, humanity and chivalry.¹⁴² The last criterion seems out of place in the modern world, but it helps in understanding of the origin and nature of humanitarian law. It is also important to note that humanitarian law was developed at a time when recourse to force was not illegal as an instrument of national policy, and there was no disgrace in beginning a war.¹⁴³ The motivation for restraint in behaviour during war stemmed from notions of what was considered to be honourable and, in the nineteenth century in particular, what was perceived as civilised.¹⁴⁴ The law was based on what was considered necessary to defeat the enemy and what was outlawed what was what was perceived as unnecessary cruelty. The Liber Code of 1863¹⁴⁵, which was used as the principal basis for the development of the Hague Conventions of 1899 and 1907 which in turn influenced later developments, describes military necessity as follows: "Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war. ..." The

¹³⁷ D. Schindler, "The separate evolution of international humanitarian law and of human rights", *IRRC*, no. 208, p. 3.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ A survey of these customs from different parts of the world can be found in: UNESCO, *International Dimensions of Humanitarian Law*, Part 1, Henry Dunant Institute.

¹⁴² See e.g.: L. Oppenheim, *International Law - Disputes, War and Neutrality*, vol. II, pp. 226f.

¹⁴³ L. Doswald-Beck, p. 95.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Instructions for the Government of Armies in the Field*, 24 April 1863, prepared by Francis Lieber during the American Civil War, and promulgated by President Lincoln as General Orders No 100. The *Lieber Code* was regarded at the time as generally reflecting customary law. Reproduced in D. Schindler, Toman (eds.), *The Laws of Armed Conflicts*.

fundamental concepts of the laws of war have remained essentially unchanged since and are still based on the balance between military necessary and humanity, although less reference is now made to chivalry.¹⁴⁶

When considering the application of humanitarian law it is important to bear in mind the origins of this law. Humanitarian law generally accepts that the killing of enemy forces is "legitimate". To base one's interventions in a conflict on humanitarian law means to accept, legally, the resort to violence - while noting that some limitations should be imposed on its use to spare civilians and avoid unnecessary suffering.

With this understanding of the very different conceptual basis of humanitarian law in comparison with human rights law we will now turn to examine the present scope and meaning of international humanitarian law with a focus on situations of internal violence.

2.2.2 Issues regarding international humanitarian law and its applicability in situations of internal violence

The principal sources of the present international humanitarian law are to be found in the "law of The Hague", the "law of Geneva", and the customary laws of war.¹⁴⁷

The Peace Conferences at The Hague in 1899 and 1907 adopted conventions defining the laws and customs of warfare and declarations forbidding certain practices. While these conventions¹⁴⁸ can become extremely important in certain circumstances, *e.g.* they prohibit the use of poisonous gases, they generally do not offer many rules for situations of internal violence and, therefore, will not be dealt with in more detail in the course of this analysis.¹⁴⁹

The main sources of the "law of Geneva", negotiated under the auspices of the International Committee of the Red Cross are the four 1949 Geneva Conventions¹⁵⁰ and the two 1977 Additional Protocols¹⁵¹ thereto.¹⁵² While the

¹⁴⁶ L. Doswald-Beck, pp. 98f.

¹⁴⁷ The ICRC is currently undertaking a major research into customary rules of international humanitarian law applicable in international and non-international armed conflicts; the findings of the ICRC Study on Customary International Law will be published early in 2001 (information by Jean-Marie Henckaerts, ICRC legal division, April 2000).

¹⁴⁸ For a listing of the Hague conventions see: R. Goldman, p. 52 fn. 17.

¹⁴⁹ A very interesting though critical analysis of The Hague law, doubting its effectiveness has been undertaken by C. Jochnick, R. Normand, "The Legitimation of Violence: A Critical History of the Laws of War, *Harvard International Law Journal*, vol. 35 no. 1, (1994).

¹⁵⁰ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

¹⁵¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

four 1949 Conventions generally regulate international conflicts, in their Common Article 3 they establish minimum rules to be observed in internal armed conflicts. Of the two Protocols, developed to adapt humanitarian law to the changing nature of armed struggle after World War II, Protocol II concerns internal armed conflict, namely those between the armed forces of a government and dissidents of other organised groups which control part of its territory.

When discussing the legal regime governing situations of internal violence, it is necessary to distinguish three different legal regimes applicable in different levels of violence.¹⁵³

The first category are situations of internal tensions and disturbances. The ICRC describes internal disturbances as involving: "... situations in which there is no non-international armed conflict as such, but there exists a confrontation within a country, which is characterized by a certain seriousness or duration and which involves acts of violence ... In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order."¹⁵⁴ Examples of tensions and disturbances are riots, such as demonstrations without a concerted plan from the outset, isolated sporadic acts of violence, as opposed to military operations carried out by armed forces or armed groups.¹⁵⁵ "A serious situation of internal disturbance [...] characteristically involves large-scale arrests, a large number of political prisoners, probable existence of ill-treatment or inhuman conditions of detention, the suspension of fundamental judicial guarantees."¹⁵⁶ Internal tensions and disturbances are *not* presently governed by international humanitarian law¹⁵⁷, they are only covered by universal and regional human rights instruments. However, as these instruments are considered as not providing adequate protection in such situations¹⁵⁸ and apply only to governments, new initiatives have been taken in recent years to better protect human values in such situations. These different approaches, including the development of minimum humanitarian standards or fundamental standards of humanity, will be discussed further on within a separate chapter.

¹⁵² For an overview of the recent history of international humanitarian law and the growing involvement of the United Nations, see: United Nations Centre for Human Rights, *Fact Sheet No. 13, International Humanitarian Law and Human Rights*, in: Raoul Wallenberg Institute of Human Rights and Humanitarian Law (publ.), *Fact Sheets 1-23*, pp. 198ff.

¹⁵³ One could add the category of "armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination". In these conflicts, referred to in Protocol I, Article 1 (4) the rules for international armed conflicts are applicable; they will therefore not be dealt with in this examination of humanitarian law applicable in situations of internal violence.

¹⁵⁴ International Committee of the Red Cross, "Protection and Assistance in Situations Not Covered by International Humanitarian Law", *IRRC*, no. 262, pp. 9, 13.

¹⁵⁵ R. Goldman, p. 54.

¹⁵⁶ *Ibid.*

¹⁵⁷ Protocol II, Article 1 (2); Common Article 3 para. 1 of the Geneva Conventions.

¹⁵⁸ As discussed above; see also: D. Momtaz, "The minimum humanitarian rules applicable in periods of internal tension and strife", *IRRC*, no. 324, pp. 456f.

The second category of internal conflict is the one governed by Common Article 3 to the four 1949 Geneva Conventions amounting to non-international armed conflicts.¹⁵⁹ Article 3 does not actually define "an armed conflict of a non-international character." But, in both fact and practice, Article 3 is applicable to low intensity, open, and armed confrontations between relatively organised armed forces or armed groups occurring exclusively within the territory of a particular state.¹⁶⁰ Typically, Article 3 applies to armed clashes between governmental forces and organised dissidents. It also governs cases in which two or more armed factions within a country violently confront one another without the involvement of governmental forces; the application of Common Article 3 is automatic as soon as a situation of armed conflict exists objectively.¹⁶¹

The third category of internal violence is conflict "which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups", Protocol II, Article 1 (1).¹⁶² Protocol II does

¹⁵⁹ Article 3 Common to the four 1949 Geneva Conventions reads as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

¹⁶⁰ J. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Geneva Convention Relative to the Treatment of Prisoners of War*, p. 37.

¹⁶¹ R. Goldman, p. 57.

¹⁶² Protocol II, Article 1 (Material field of application) reads as follows:

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a

not alter Article 3, but rather the two apply collectively and in conjunction with each other. The scope of Protocol II is within the broader scope of Common Article 3 as Protocol II additionally contains objective qualifications for its application, such as the requirement that dissident groups must be under responsible command and maintain control of part of the state's territory.¹⁶³ Furthermore, the control must be sufficient to enable the rebels to carry out "sustained and concerted military operations."¹⁶⁴ Accordingly, the rebels, *inter alia*, must be able to detain prisoners, treat them humanely and give adequate care to the wounded and sick.¹⁶⁵ These requirements very much limit the application of Protocol II to situations at or near the level of a full-scale civil war, and certainly few governments are prepared to admit the application of the Protocol II to situations of lesser intensity.¹⁶⁶

This means that most situations of internal violence are governed, if at all, only by Common Article 3 and some rules of customary law, providing only a minimum of protection. There is some uncertainty as to the precise scope of customary law in non-international armed conflict. The ICRC Study on Customary International Law will hopefully bring some more clarity as to its actual content. Interestingly, the ICRC has indicated already that "there are more rules of customary international law relating to non-international armed conflict than originally expected. Given the particular characteristics of non-international armed conflicts, there are even some rules of customary international law which apply specifically thereto."¹⁶⁷

Besides customary law, Common Article 3 contains obligations for "each party to the conflict". These obligations are to "Persons taking no active part in the hostilities" as well as to the "wounded and sick". Briefly, the actual prohibitions include: attacks or cruel treatment, the taking of hostages, humiliating and degrading treatment, and sentences or executions without judicial safeguards. Lastly, the Article includes a positive obligation to collect and care for the sick and wounded. But it does not, for example, explicitly prohibit forced expulsions and relocations, the arbitrary detention of people on account of their political opinion, religion, ethnic origin, etc.; it does not prevent the recruitment of children (even below the age of 15), or arbitrary restraints on people's freedom of expression, religion or conscience.

part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ R. Goldman, p. 63.

¹⁶⁶ Secretary-General, *Minimum humanitarian standards*, para. 79.

¹⁶⁷ J.-M. Henckaerts, "Study on customary rules of international humanitarian law: Purpose, coverage and methodology", *IRRC*, no. 835, pp. 660ff.

It should be mentioned though that by customary law "in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience." Although only providing a very basic level of protection the Martens Clause referred to for example in the Preamble of Protocol II reminds us that the means and methods of warfare are not unlimited even when there are no provisions to outlaw a certain conduct.

It is not the aim of this chapter to study in detail the provisions of international humanitarian law applicable in situations of internal violence.¹⁶⁸ Rather this discussion will focus on some critical aspects of humanitarian law that need to be addressed when deciding about whether to engage with non-state violence on the basis of international humanitarian law. Experiences made with regard to the situation in Northern Ireland will be used to highlight some of the issues.

2.2.2.1 Threshold of applicability

One of the first and often most difficult problems in relation to applying international humanitarian law is to determine whether the law of armed conflict is indeed applicable, and if so, which of its provisions. Internal conflicts where Protocol II is applicable are rare.¹⁶⁹ More often only Common Article 3 is applicable, but in other instances even its application is in doubt. Northern Ireland is a classic example for such a situation. While both Amnesty International and Human Rights Watch/Helsinki¹⁷⁰ report on Northern Ireland on a basis of humanitarian law, they are not very consistent with its application.

Human Rights Watch/Helsinki in a 1991 report on the situation in Northern Ireland starts off by stating that "[t]he application of Common Article 3 to the conflict in Northern Ireland is debatable",¹⁷¹ only to find a few pages later that "[t]he conflict in Northern Ireland may be described as one of "internal strife," rather than "internal armed conflict." The term "internal strife" is used to describe conflict situations that are below the level of violence required for the applicability of Common Article 3. It is generally used for situations that are not as intense as civil wars, or as well-organized as armed insurrections, and for situations involving sporadic actions, rather than sustained conflict. There are as yet no international agreements regarding internal strife.¹⁷² In a 1994 report on Northern Ireland Human Rights Watch/Helsinki, without citing any legal (or other) basis, generally

¹⁶⁸ For a more detailed discussion see: Secretary-General, *Minimum humanitarian standards*, paras. 70-88; also, R. Goldman, pp. 53ff; interesting as well the "Declaration on the Rules of international humanitarian law governing the conduct of hostilities in non-governmental armed conflicts", *IRRC*, no. 278.

¹⁶⁹ See for example: R. Goldman, p. 63, analysing the situation in the Americas.

¹⁷⁰ Earlier reports on Northern Ireland refer to the organisation as Helsinki Watch; this later changed to Human Rights Watch Helsinki.

¹⁷¹ Helsinki Watch, Report on *Human Rights in Northern Ireland*, October 1991, p. 111.

¹⁷² *Ibid.* at pp. 114f (footnote omitted).

called on paramilitary organisations "to order an end to the use of violence for political ends."¹⁷³

Amnesty International in a major report on political killings in Northern Ireland in 1994 "... calls upon armed political groups to observe minimum humane standards."¹⁷⁴ The report cites norms of international humanitarian law which apply certain minimum limitations on all parties to internal conflict, but does not give any support to their assertion as to the applicability of such standards in Northern Ireland. Other Amnesty International comments on the situation in Northern Ireland condemn or call for an end of arbitrary and deliberate killings of civilians and torture without providing a legal basis for such claims¹⁷⁵ or refer to humanitarian standards without naming specific norms.¹⁷⁶ Reports also refer generally to human rights abuses by armed groups.¹⁷⁷

The debate in academic literature as to whether Northern Ireland falls within the notion of an "internal armed conflict" mainly seems to come to the conclusion that it is rather a situation of civil disturbances and internal tensions¹⁷⁸, with one researcher concluding that "[i]t is generally agreed that Northern Ireland comes under this latter category [of civil disturbances and internal tensions], to which human rights law is applicable."¹⁷⁹

Northern Ireland is only one example for a wider problem, as a recent report by the Secretary-General confirms: "international humanitarian law can be applied to non-State armed groups, and its rules are specific and detailed, but its application in many internal situations is hampered by troublesome threshold tests."¹⁸⁰

An additional part of the problem of the threshold of applicability is that the designation of a situation as "an armed conflict not of an international character" so as to trigger the application of Common Article 3 is an act of considerable political importance for all sides to a conflict.¹⁸¹ Despite the fact that Common Article 3 ends with the sentence: "The application of the preceding provisions shall

¹⁷³ Human Rights Watch/Helsinki, *Northern Ireland - Continued Abuses by all Sides*, vol. 6 no. 4, March 1994, p. 3.

¹⁷⁴ Amnesty International, *Political Killings in Northern Ireland*, February 1994, EUR 45/01/94, p. 34.

¹⁷⁵ Amnesty International press release, *AI condemns killings by armed groups in Northern Ireland*, 8 July 1992, EUR 45/WU 05/92.

¹⁷⁶ Amnesty International press release, *"Punishment" shooting of Edward Kane by the IRA*, 24 June 1993, EUR 45/WU 02/93

¹⁷⁷ Amnesty International, *Northern Ireland, Human Rights Abuses by Paramilitary Groups*, June 1995, EUR 45/03/95; Amnesty International, *AI Concerns in Europe, January - June 1997*, September 1997, EUR 01/06/97

¹⁷⁸ For example: G. Hogan, C. Walker, *Political Violence and the Law in Ireland*; K. Boyle, C. Campbell, *Human Rights in Situations of Armed Conflict and Political Violence*; R. Brett, "Non-governmental human rights organizations and international humanitarian law", *IRRC*, no. 324, pp. 534f.

¹⁷⁹ P. Casey-Vine, "Acting as a catalyst for the development of international humanitarian law", in: *Irish Times*, Dublin, 17 October 91.

¹⁸⁰ Secretary-General, *Minimum humanitarian standards*, para. 105.

¹⁸¹ A. Clapham, *Human Rights in the Private Sphere*, p. 112.

not affect the legal status of the Parties to the conflict", armed opposition groups often welcome the designation of their attacks as constituting armed conflict as this confers a curious sort of international recognition on them.¹⁸² On the other hand governments often are less willing to acknowledge the situation as one of armed conflict, preferring instead to portray it as a fight against criminals and terrorists.¹⁸³ Because the decision is a highly politicised one, international organisations are precluded from applying the standards of humanitarian law without implicitly passing judgement on the type of armed conflict concerned, and conferring a sort of recognition on the armed opposition group.¹⁸⁴

2.2.2.2 Parallel application of human rights and humanitarian law

Human rights and humanitarian law are generally applicable side by side¹⁸⁵ and share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity.¹⁸⁶ The Geneva Conventions (and Protocols) and the human rights conventions may often be applied in cumulative fashion.¹⁸⁷ It has even been argued that, as one of the major factors in the development of humanitarian law, namely the perception of honour in combat, has lost influence in modern society, that a perception of human rights protection provides a motivation force to fill this void.¹⁸⁸

The parallel application of human rights and humanitarian law is obviously an attractive way of maximising international protection for individuals affected by internal or international conflicts. But it is not without its conceptual and practical problems. One conceptual problem, pointed out earlier, is the right in humanitarian law to attack and kill combatants, whereas the right to life is granted a high degree of protection in human rights law. Also, there is an express provision in Protocol II calling on the authorities in power to endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict¹⁸⁹ while human rights lawyers typically take the view that all serious human rights violations should result in the prosecution and punishment of the individuals

¹⁸² *Ibid.*

¹⁸³ *Ibid.* at p. 113.

¹⁸⁴ *Ibid.* at pp. 114ff; This is even more true as to the application of Protocol I to wars of national liberation. Suffice it to say that no government has yet been prepared to characterise itself as colonial, racist, or in alien occupation; Human Rights Watch/Helsinki applied certain provisions of Protocol I to the Northern Ireland conflict but pointed out: "Protocol I may not be strictly applicable to the conflict in Northern Ireland: Britain has not ratified Protocol I, and it is beyond the mandate of Helsinki Watch to judge whether this conflict involves a fight against colonial determination. Nevertheless, Protocol I [with the prohibition of the resort to perfidy] embodies a principle of customary international law of general application." (Helsinki Watch, *Human Rights in Northern Ireland*, October 1991, p. 116).

¹⁸⁵ D. Schindler, "The International Committee of the Red Cross and human rights", *IRRC*, no. 208, p.8.

¹⁸⁶ R. Goldman, p. 53.

¹⁸⁷ D. Schindler, "The International Committee of the Red Cross and human rights", *IRRC*, no. 208, p.8.

¹⁸⁸ L. Doswald-Beck, p. 117.

¹⁸⁹ Protocol II, Article 6 (5).

responsible. This latter approach has been given some backing by international human rights courts and commissions in decisions requiring states to investigate and bring to justice those responsible for disappearances and other serious human rights abuses.¹⁹⁰

In more practical terms the separate status and formulations of the two branches of law often make it difficult to provide a straightforward account of the international rules and standards for those working on the ground in conflict situations.¹⁹¹

It has been argued that states derogating from certain human rights standards to apply emergency legislation should at the same time accept the applicability at least of Common Article 3 and it was even proposed to directly link derogation and applicability of humanitarian law.¹⁹² This could mean, however, that an organisation applying humanitarian law with respect to a certain conflict might not, at the same time, be in the very best position to urge the state in question to end the application of emergency legislation.

2.2.2.3 Legitimate targets

As stated above, international humanitarian law generally allows for the killing of combatants as legitimate targets. At the same time, Protocol II¹⁹³ and the customary laws of armed conflict forbid attacks against the civilian population in non-international armed conflicts¹⁹⁴ requiring belligerents to distinguish between civilians and combatants.¹⁹⁵

There has been some uncertainty as to the definition of the terms "civilian" and "legitimate target" as they are not clearly defined in either Protocol or the Geneva Conventions.

Based on a detailed discussion of relevant legal rules and principles Robert Goldman established the following rules regarding the application of international law to internal armed conflicts which include a definition of these terms:¹⁹⁶

¹⁹⁰ See, for example, the opinion of the Human Rights Committee in *Suarez de Guerrero v. Columbia*, No 45/1979 (1982).

¹⁹¹ Also, most practice and training manuals deal separately with the two sets of rules, leaving it to those concerned to work out which rules to seek to apply. See, for example, United Nations Centre for Human Rights, *Human Rights and Law Enforcement: A Manual on Human Rights Training for the Police*.

¹⁹² Such a direct linkage was proposed by the Friends World Committee for Consultation (FWCC) in their comment on resolution 1996/26, available from Quaker UN Office, Geneva; it was also endorsed by the Swiss government; see: R. Brett, *Report on the International Workshop on Minimum Humanitarian Standards*, Cape Town, Quaker UN Office, October 1996.

¹⁹³ Protocol II, Article 13.

¹⁹⁴ R. Goldman, p. 61.

¹⁹⁵ Recognised in General Assembly Resolution 2444, *Respect for Human Rights in Armed Conflicts*.

¹⁹⁶ R. Goldman, detailed discussion: pp. 54ff, summary: pp. 84ff.

"The following persons generally should be considered civilians and, thus, not subjected to individualised attack:

1. The peaceful population not directly participating in hostilities, even though their activities contribute to the war effort.
2. (a) Persons providing only indirect support to a party to the conflict by, *inter alia*, working in defense plants, distributing or storing military supplies outside of combat areas, supplying labor and food, serving as messengers, or disseminating propaganda. These persons may not be subject to direct individualized attack because they pose no immediate threat to the adversary. However, if they are present in or near military targets, they implicitly assume the risk of death or injury incidental to direct attacks against such military targets.
(b) Persons providing such indirect support to dissident forces are clearly subject to prosecution by the government of giving aid and comfort to the enemy. Such prosecutions must conform to the obligatory fair trial guarantees set forth in common article 3 and, where applicable, article 6 of Protocol II.
3. Persons, other than members of a party to the conflict's armed forces, who take a direct part in the hostilities. They, however, temporarily lose their immunity from attack while they assume a combatant's role.¹⁹⁷

The following persons and objects generally constitute "legitimate military objects subject to direct attack in internal armed conflicts:

1. Members of a party to a conflict's armed forces and groups.
2. Civilians while they assume a combatant's role.
3. Weapons, other war material, army, navy and air force establishments, ...
4. Dual use objects that effectively contribute to military operations in the circumstances ruling at the time, such as transportation and communication systems and facilities, airfields and ports.
5. ...¹⁹⁸

Although this listing of civilians versus legitimate attacks is not an authoritative document it is quite useful. However it does not solve all practical problems. When, to pick but a few examples, does a transport or communication system effectively contribute to military operations, when is the contribution still not big enough to render it a legitimate target? When a member of the ICRC's legal division was asked to give the ICRC's view on NATO bombings in Kosovo she found it very difficult to explicitly state whether attacks were in conformity with humanitarian law or not.¹⁹⁹ Particularly in war situations it can be extremely difficult to determine whether a bridge, a power plant, a factory, etc. effectively

¹⁹⁷ *Ibid.* at p. 84.

¹⁹⁸ *Ibid.* at p. 85.

¹⁹⁹ Silvia Schaller, Principal Legal Advisor, International Committee of the Red Cross; "Some Considerations Concerning Recent Conflicts in the Federal Republic of Yugoslavia", Talk given at Conference of British and Irish Red Cross Societies: "The Geneva Conventions of 1949: Do They Protect War Victims Today?", 21 October 1999.

contributed to military operations. Was there an important military supply that needed to be stopped, whom did the power plant supply with energy, what and for whom was produced in the factory? Another example is the rule of proportionality in attacks, which accepts that civilians will suffer "incidental damage", but that such attacks must not take place if the incidental damage would be excessive in relation to the value of the target.²⁰⁰ Human rights organisations would presumably find it very difficult to defend the argument that a certain number of deaths was justified in relation the nullification of an important military target.

That the resort to humanitarian law with its notion of legitimate targets is inherently problematic has been noted earlier. But this becomes even more problematic in a conflict which involves two sets of paramilitary protagonists, one of whom generally targets security forces and the other civilians. Such is the case in Northern Ireland.

Human Rights Watch/Helsinki have attempted to steer around this difficulty in Northern Ireland by (arguably) stretching the concept of "perfidy". In a 1991 report they argued that the prohibition of perfidy contained in Article 37 of Protocol I²⁰¹ was part of customary law and that "[i]n the political violence in Northern Ireland members of paramilitary groups do not wear uniforms, do not bear arms openly and frequently kill by assassination. Such killings may be properly characterized as being carried out "by resort to perfidy".²⁰² In 1993 and 1994, Human Rights Watch/Helsinki called for all paramilitaries in Northern Ireland to refrain from the use of violence for political ends and called for an end to punishment shootings, assaults and banishments.²⁰³ In effect, in these various reports Human Rights Watch/Helsinki made no ultimate distinction between attacks on civilians and combatants (because of the "perfidy" argument), and expanded the notions of customary norms of international humanitarian law to preclude all politically motivated violence by paramilitaries in Northern Ireland.²⁰⁴ One formulation of this stance was very much to the point: "In effect, Human Rights Watch have arguably collapsed humanitarian law into pacifism."²⁰⁵

One last observation can be made on the notion of legitimate targets. While security forces provide "legitimate targets" for armed opposition groups, the same applies the other way round. Judging by humanitarian law a "shoot-to-kill" policy

²⁰⁰ L. Doswald-Beck, pp. 99f.

²⁰¹ Article 37 of Protocol I notes that "[i]t is prohibited to kill, injure or capture an adversary by resort to perfidy." Perfidy is defined in Article 37 (c) as the feigning of civilian, non-combatant status.

²⁰² Helsinki Watch, *Human Rights in Northern Ireland*, October 1991, p. 116.

²⁰³ Helsinki Watch, *Northern Ireland: Human Rights Abuses by All Sides*, May 1993, vol. 5 no. 6; Helsinki Watch, *Northern Ireland: Human Rights Abuses by All Sides*, vol. 6 no. 4, March 1994.

²⁰⁴ K. McEvoy, p. 14.

²⁰⁵ K. McEvoy, Summary, *Holding Armed Opposition Groups Accountable: A Comparative Study of Obstacles and Strategies - The Northern Ireland Experience*, p. 2.

by the security forces where it is carried out against members of armed groups cannot be contested. But, as we have seen above, humanitarian law and human rights provisions can be applied side by side. As governments cannot derogate from certain "hard-core" rights including the right to life, such a "shoot-to-kill" policy would therefore still be illegal by human rights standards.

2.2.2.4 Working practices

As we have seen, the principles of human rights law and those of humanitarian law are different. Human rights law recognises the authority of the state, humanitarian law imposes certain legal constraints on behaviour while seeking to avoid vesting any of the parties to the dispute with legitimacy. Human rights activists, because they are insisting that states do what they have freely signed up to do, essentially seek to embarrass the state into living up to its duties. Most human rights organisations work in a very transparent and open way. Indeed human rights groups often secure their safety and their integrity by being deliberately open in their exchanges across the political spectrum.²⁰⁶ In contrast to the public avenues of influence and pressure used by human rights groups, humanitarian organisations, the International Committee of the Red Cross is the primary example, generally work under the principle of confidentiality. Their basis of intervention is one of humanitarianism; if it is not to be exploited for political gain by any of the parties to the conflict, it seems that interventions would be more effective if treated with absolute confidence.²⁰⁷ There is also another reason for the resort to confidentiality. Human rights law has reasonably effective enforcement machinery (the European Court of Human Rights, for example), humanitarian law does not. There is (under humanitarian law) no way of making armed opposition groups legally accountable for their actions.²⁰⁸ Also, much of the work of the ICRC and other humanitarian organisations is carried out in difficult and dangerous circumstances. In highly polarised armed conflict situations, active investigations of abuses by armed opposition groups can be particularly dangerous. While some organisations apparently recruited and used different researchers, others felt unable to do this type of monitoring, in part because of the constant threats to the security of the staff.²⁰⁹ Such problems are particularly acute for indigenous organisations whose members live and work in the areas where conflicts are occurring.²¹⁰ Humanitarian organisations are often also dependent on the consent of the parties for their work. It is for their better results that the ICRC works confidentially in its mediation, visits to places of detention and the communication of its reports.²¹¹

²⁰⁶ *Ibid.* at p. 5.

²⁰⁷ *Ibid.*

²⁰⁸ C. Campbell, "Humanitarian law: not as simple as it seems", *Just News*, December 1991, p. 7.

²⁰⁹ M. Posner, p. 4.

²¹⁰ *Ibid.*

²¹¹ D. Schindler, "The International Committee of the Red Cross and human rights", *IRRC*, no. 208, pp. 13f.

Public opinion, both national and international, is the main forum in which human rights violations are judged. Governments know, whether or not they admit it, that their international reputation is a factor in their long-term legitimacy.²¹² And, increasingly, governments that are seen to deal with other governments regardless of the latter's non-respect for human rights are becoming aware that their own reputation may be adversely affected, in both domestic and international terms.²¹³

This brings us to situations where the public reporting of abuses of humanitarian law committed by armed groups might actually have some impact. Armed opposition groups that are fairly successful militarily often get into a government-like position. Trying to gain wider internal and international recognition, they then become more vulnerable to public reporting of their abuses as they have to build internal legitimacy as well as avoid damaging international publicity damaging in their foreign relations. One example for that is the reporting of Americas Watch on abuses committed by the Nicaraguan *Contras*. Robert Goldman concluded about their reporting that it had "a positive impact, at times, on persuading the contending parties [...] to modify their conduct of military operations. Moreover it was able to shape public opinion in the United States and have an impact on the debate in the United States Congress over funding and arming that force."²¹⁴ "[P]ublic knowledge of contra abuses from the outset of their insurgency, documented in [Americas Watch] reports and those of other groups, constituted a blow from which the *Contras* never fully recovered, despite President Reagan's fervent propagandizing on their behalf."²¹⁵

2.3 Fundamental standards of humanity and similar concepts

2.3.1 Development

The discrepancy between the scale of abuses perpetrated in situations of internal violence, and the apparent lack of clear rules, seen above, has been the inspiration for numerous efforts to draw up "minimum humanitarian standards" or "fundamental standards of humanity". The most notable effort in this regard has been the elaboration, by a group of non-governmental experts, of the Declaration on Minimum Humanitarian Standards in Turku/Åbo, Finland, in 1990.²¹⁶ The

²¹² N. Rodley, "The work of non-governmental organizations in the world-wide promotion and protection of human rights", *Bulletin of Human Rights*, 90/1, p. 89.

²¹³ *Ibid.*

²¹⁴ R. Goldman, pp. 90, 93.

²¹⁵ *Ibid.* at p. 93.

²¹⁶ The full text of the Declaration can be found in the annex to document E/CN.4/1996/80, also in: *IRRC*, no. 282, pp. 330-336. The idea for such a declaration was first developed in the early 1980s; see: T. Meron, "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument", *77 American Journal of International Law*, (1983), pp. 589ff; other initiatives comparable can be found in the International Review of the

declaration reaffirms an irreducible core of humanitarian norms and human rights, seeks to bind "all persons, groups and authorities", and is to be applicable in peacetime and wartime, "including internal violence, disturbances, tensions, and public emergency" thereby avoiding any problems of thresholds of application. The document has already been used by human rights organisations²¹⁷ and even referred to by UN bodies²¹⁸ when commenting on situations of internal violence. The document was considered by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities for the first time in 1991. It was finally transmitted to the Commission on Human Rights "with a view to its further elaboration and eventual adoption".²¹⁹ The Commission, in resolution 1995/29, recognised the need to address principles applicable to situations of internal and related violence, disturbance, tension, and public emergency. A conference was organised by the Nordic countries, in co-operation with the ICRC, in Cape Town, South Africa, in September 1996, and a report of the workshop was made available to the Commission on Human Rights in its fifty-third session in 1997.²²⁰ The Commission in that session passed a resolution requesting the Secretary-General, in co-ordination with the ICRC, to submit to the Commission in its following session an analytical report on the issue of fundamental standards of humanity, and requested that the Secretary-General, in preparing his study, seek the view of and information from, *inter alia*, governments, United Nations bodies and NGOs.²²¹ The report²²², and the views and information received²²³, were submitted to the Commission on Human Rights in April 1998 and followed up by reports by the Secretary-General submitted to the Commission in its sessions in April 1999²²⁴ and 2000²²⁵.

Red Cross, H.-P. Gasser, "Code of Conduct in the Event of Internal Disturbances and Tensions", *IRRC*, no. 262, pp. 38-58, T. Meron, "Draft Model Declaration on Internal Strife", *IRRC*, no. 262, pp. 59-76; *ICRC*, "Declaration on the Rules of international humanitarian law governing the conduct of hostilities in non-governmental armed conflicts", *IRRC*, no. 278, pp. 404-408; also: A.-L. Svensson-McCarthy, "Minimum Humanitarian Standards: From Cape Town Towards the Future", *ICJ, The Review*, No. 59, (1997), pp. 1ff.

For a summary of the Turku Declaration and its consideration by international bodies see: A. Eide, T. Meron A. Rosas, "Combating Lawlessness in Gray Zone Conflict Through Minimum Humanitarian Standards", 89 *American Journal of International Law*, (1995), p. 215.

²¹⁷ See for example a 1991 Helsinki Watch report on Northern Ireland (Helsinki Watch, *Human Rights in Northern Ireland*, October 1991) and a Human Rights Watch report on Bangladesh (Human Rights Watch, *Bangladesh: Political Violence On All Sides*, vol. 8 no. 6 (C), June 1996).

²¹⁸ Sub-Commission on Prevention of Discrimination and Protection of Minorities in resolution 1192/106 on the human rights situation in Iraq; the document apparently has also been referred to by the International Tribunal on the Former Yugoslavia (R. Brett, *Report on the International Workshop on Minimum Humanitarian Standards*, Cape Town, October 1996).

²¹⁹ Sub-Commission on Prevention of Discrimination and Protection of Minorities, resolution 1994/26.

²²⁰ E/CN.4/1997/77/Add.1.

²²¹ Commission on Human Rights, resolution 1997/21, 11 April 1997.

²²² Secretary-General, *Minimum humanitarian standards*.

²²³ E/CN.4/1998/87/Appendum.

²²⁴ Secretary-General, *Fundamental standards of humanity* (1999).

Although this debate has been going on for a number of years by now it is so far not clear whether any official document defining fundamental standards of humanity (the term has widely replaced the expression "minimum humanitarian standards")²²⁶ will be developed in the near future. As the debate seems of considerable interest in the context of our study the principal reasons for this uncertainty will be briefly summarised.

2.3.2 Purposes of fundamental standards of humanity

One certainly important aspect is that the purpose of the debate is not entirely clear. The debate about fundamental standards of humanity is not merely about holding armed opposition groups accountable. It has indeed been suggested that many purposes could be envisaged: a document meant to facilitate the dissemination of the relevant norms, an instrument aimed at clarifying the substance of international humanitarian law applicable in non-international armed conflicts, a text aimed at clarifying the responsibilities of non-state actors, or a document aimed at bridging the gap (if one existed) between international humanitarian law and human rights law in situations of internal violence.²²⁷ The contents of fundamental standards of humanity and their status would obviously vary depending on whether they are meant to serve as a dissemination or standard-setting tool.

2.3.3 Desirability of identifying fundamental standards of humanity

2.3.3.1 Advantages

As set out above, there are problems with the scope and application of the existing law in situations of internal violence and fundamental standards of humanity might provide a more effective protection in such situations. Such standards would avoid the lengthy debates on the definition of armed conflicts, the threshold of applicability of humanitarian law, the prerogatives in international law for derogations and the applicability of the law to armed opposition groups.

It has been acknowledged though that more analysis is needed to identify where exactly further elaboration and clarification of the existing law is needed.²²⁸

2.3.3.2 Disadvantages and problems

While sharing the concerns about the protection of human rights in situations of internal violence, doubts have been raised from different sources as to whether

²²⁵ Secretary-General, Report submitted pursuant to Commission on Human Rights resolution 1999/65, *Fundamental standards of humanity*, (E/CN.4/2000/94) [hereinafter: Secretary-General, *Fundamental standards of humanity* (2000)].

²²⁶ This is due to criticism regarding *inter alia* the use of the qualifying word "minimum" and the phrase "humanitarian standards" which might give the impression that the exercise was solely concerned with international humanitarian law; Secretary-General, *Minimum humanitarian standards*, para. 5.

²²⁷ Secretary-General, *Fundamental standards of humanity* (2000), para. 13.

²²⁸ Secretary-General, *Minimum humanitarian standards*, para. 89.

fundamental standards of humanity are the best way forward.²²⁹ It has been raised whether an attempt to merge norms of international humanitarian and human rights law would not risk confusing two distinct, albeit complementary, areas of the law to the detriment of the legal obligations contained in each.²³⁰ A principal fear is that these rules, rather than providing a fundamental minimum protection, will be considered as the norm, diluting current obligations provided for in both human rights and humanitarian law. Another objection is that if created by means of negotiation, the standards set will be below existing minimum obligations. Additionally, the question needs to be answered whether existing and future mechanisms of international criminal responsibility might obviate the need for an elaboration of fundamental standards of humanity, given that non-state actors could be held criminally responsible for abuses of international human rights and humanitarian law as having committed international crimes. Also, some of the problems could be addressed by a statement of customary international humanitarian law applicable in all armed conflicts or in all internal armed conflicts which would apply to all parties to a conflict; the study of customary international humanitarian law being undertaken by the ICRC would be likely to provide an extremely useful tool in such a possible undertaking.

Separate from the legal point, a key issue to consider is the more practical point as to the impact a statement of fundamental standards of humanity would have on actually reducing or preventing abuses. It has repeatedly been argued that the biggest problems are not the standards but the implementation of them.²³¹ In other words, such a statement should not be viewed as an end in itself.

For these different reasons it has been argued that any answer as to the desirability of fundamental standards of humanity would necessitate a more detailed analysis first of different types of situations of international and internal violence as well as of the causes of violations of existing legal rules and the practical problems encountered in applying those standards.²³²

2.3.4 Nature of a statement of fundamental standards of humanity

As stated above, the nature or status of such a statement would depend very much on the purposes it is intended to serve. There are several options with respect to the form a statement on fundamental standards of humanity could take if it were ever to be developed. Previously, sets of principles and standards in the human rights field have normally been developed in working groups established by the Commission on Human Rights, and then forwarded to the General Assembly for adoption through a GA resolution.²³³ But it has also been suggested though that the standards should be elaborated in the form of an international convention²³⁴ or a "Universal Declaration of Fundamental Standards of

²²⁹ Secretary-General, *Fundamental standards of humanity* (2000), paras. 9-12.

²³⁰ The question was raised by the ICRC: *Ibid.* at para. 9.

²³¹ For example: R. Brett, p. 3.

²³² Secretary-General, *Fundamental standards of humanity* (2000), para. 9.

²³³ Secretary-General, *Minimum humanitarian standards*, para. 101.

²³⁴ This was proposed by the Institute of Inter-Balkan Relations; in: Secretary-General, *Fundamental standards of humanity* (2000), para. 6.

Humanity".²³⁵ Given the close relationship with issues of humanitarian law and the ICRC's acknowledged expertise in this field, it seems to be desirable that the ICRC should be closely involved in any efforts to develop these standards.²³⁶

2.3.5 Analysis

The outcome of the debate on fundamental standards of humanity is still hard to determine and given that it was repeatedly stressed that any decision needed to be preceded by careful considerations it might still be a while until any such decision. It may be suggested, however, that an official document containing explicit demands as to the behaviour of armed opposition groups (as well as states) that would be applicable in all circumstances could provide a useful tool for human rights organisation dealing with such abuses. It will have to be seen however how such a document would deal for example with the problem of a distinction between civilians and combatants thereby implying legitimate targets.

Whether in the end it will be found that the benefits mentioned earlier can outweigh the different disadvantages likely to be attached to such a documents, will have to be seen. In any way, it seems as if, whatever the outcome, the discussion is a useful one for human rights organisations dealing with human rights abuses in situations of internal violence. Reason is that the ongoing extensive international debate is stipulating increased research into the legal regime governing situations of internal violence which will help to at least clarify the law currently applicable; this would at least solve one of the problems faced by human rights organisations considering the extension of their mandate to armed opposition groups.

2.4 National Criminal Law

When national criminal law is compatible with international standards human rights organisations are, of course, free to use them when commenting on abuses by armed opposition groups.²³⁷ In certain circumstances to do so might indeed help the organisational image. Generally however the application of national criminal law rather seems to be the responsibility of the state. There is little point in duplicating with the normally very limited resources of an human rights organisation the job of the security forces and the administration of justice. One role human rights organisations should, and normally do play, is to ensure that the national criminal law is compatible with international standards such as the right to a fair trial, and that the law is equally applied to all aspects of society, private individuals, members of the police forces and indeed any public authority, as well

²³⁵ Suggested by Poland: *Ibid.* at para. 29.

²³⁶ Secretary-General, *Minimum humanitarian standards*, para. 101.

²³⁷ Indeed they sometimes do refer, normally rather generally, to national criminal law; see for example: Helsinki Watch, *Human Rights in Northern Ireland*, October 1991, p. 115.

as members of armed opposition groups, and that all abuses of human rights are punished according to the law.

2.5 Morality

After having examined in quite some length the applicability of different international and national standards on armed opposition group, establishing which of these standards are, legally, applicable on armed opposition groups, we will now turn to the question whether the engagement without such a legal basis, based on moral values might provide a solid basis for engagement with armed opposition groups.

One of the main arguments stressed by human rights organisations all over the world when applying human rights standards against governments is that they are only holding governments accountable to a standard they have themselves agreed to be bound by, whether as regards a specific treaty or, for example, the Universal Declaration, through agreeing to join the United Nations, sign the UN Charter, and thus taking up UN commitments in the field of human rights.²³⁸ Therefore, when arguing against the direct applicability of human rights law against armed opposition groups one of the main arguments put forward was that they had not signed up to any such agreements. But then that is true for Common Article 3 as well. Why in an internal armed conflict should any armed opposition group should feel bound by Common Article 3? Or, if their government - which they might not even recognise - were to ratify Protocol II, why would they have to live up to these standards as well? The technical, legal answer is very easy. By ratifying the Geneva Conventions, their Government made Common Article 3 applicable to any armed conflict inside their country and the same would apply if Protocol II were ratified. While this may make legal sense, one would not want to rely too heavily on this point if meeting the leader of an armed group involved in human rights abuses and seeking a justification for them to respect humanitarian law. Even if one were to argue that Common Article 3, or any other provision, apply as customary law, the basis of argumentation would not primarily be grounded in a positivist theory that the armed opposition group, through their government, had consented to be bound.

Without wanting to push this point too far, it might be worth asking the basis for saying armed opposition groups are bound by any standard of international law. Rather than stressing technical legal arguments we might want to go back (only very briefly) to the moral philosophy behind the law. Most people would say in some comfort that certain acts are wrong, regardless of who does them and

²³⁸ Some of the considerations that are going to follow go back to ideas developed by David Petrasek in his introductory remarks at a workshop on "Holding Non-Governmental Entities Accountable under International Law - Problems and prospects from an NGO perspective" in September 1997.

of whether a particular treaty that outlaws such acts is applicable. We have seen that humanitarian law has its foundations in such notions of right and wrong, in a notion of humanity prohibiting certain acts even in the most dreadful of circumstances, in situations of fighting and killing, in war. Indeed, any law to last needs a moral foundation. But then there is a difference between the need of law to have some moral basis and holding somebody accountable by moral standards. When justifying the need of specified provisions of humanitarian law being respected by armed groups we might help our argumentation with the reference to a certain notion of humanity that has been widely agreed on (and a violation of which might therefore discredit their cause). But, while we all have a notion of moral right and wrong, they are not all quite the same.

Human rights organisations show a striking positivist inclination when applying international human rights law to governments stressing that they agreed to be bound. While theoretically the same might be true with regard to armed groups, in practice, this last argument is missing when dealing with armed groups. To also leave aside the second argument, the one of clear legal obligation under international law as it the case in the provisions of humanitarian law, and only to rely on moral considerations of "humane conduct" or "humanitarian principles" as it has occasionally be done by groups seeking to influence paramilitary behaviour does not seem to strengthen the argumentation when trying to convince such groups to stop certain practices.

Where does this leave us? I think when considering the use of the application of moral standards against armed groups we need to clearly distinguish two aspects; the impact the use of such standards can have on the public appearance of the organisation using the standard and any possible impact it might have on paramilitary groups.

From what has been said above it is suggested that the engagement with armed opposition groups on a moral basis is promising only under exceptional circumstances; this might be the case when the armed group in question and the "moralising" group or individual share a common moral system, in particular if the latter is of recognised high moral authority. This may be so for example in the case of some religious leaders, in particular where armed groups fight (or at least claim to fight) for the cause of that religion; it might also be appropriate for some local NGOs, much less for international NGOs.²³⁹

A moral foundation (which is accepted by society) might be more helpful though with respect to the organisational image in the public. For example, public criticism as to not addressing abuses by armed groups can be more easily defused if one is in the position to clearly condemn such violence. Once the rejection of all violence for political ends is made clear, it will be much easier to constructively engage with the practical and legal difficulties of a direct engagement with armed opposition groups.

²³⁹ R. Brett, p. 2.

3 Effective work and structures for approaching armed opposition groups in Northern Ireland

When considering the engagement with armed opposition groups, one may search for a solid legal basis on which to engage; this is what we have done above though not with overwhelming success. So why not turn round and see which ways of engagement with armed groups have been tried in the past and examine which ones were successful - on whatever basis or not they have relied.

The question of how most successfully to bring to an end abuses by armed groups is an extremely complex one. What actions are likely to be successful depends on a multitude of factors such as the aims and ideology of the group in question, its leadership, openness, (military) structure, and economic resources.²⁴⁰ It is important whether there are any constituencies or sponsors, within or outside the country likely to be influential on the group's behaviour; what role does the civil society in the country play in the conflict, what is the position of religious congregations, trade unions, business guilds, sports club, Bar Councils?²⁴¹ Actions taken in the past varied very much between different countries and also within countries between different groups.²⁴² Human rights organisations have shamed armed groups by using the media, calling for sanctions, engaging constituencies and sources of support; they have entered in dialogue, assisted in reforms, developed codes of conducts; they have called for international prosecutions, engaged in conflict resolution and campaigns for peace.²⁴³

Until very recently little attempt had been made to undertake an assessment of successful strategies for encouraging armed opposition groups to respect human rights and humanitarian norms.²⁴⁴ It was only in the beginning of 1999 that the International Council on Human Rights Policy (ICHRP) undertook an international study on "Holding Armed Opposition Groups Accountable: A

²⁴⁰ International Council on Human Rights Policy, *Ends & Means - Human rights approaches to armed groups*, Draft report, paras. 44-95.

²⁴¹ *Ibid.* at paras. 96-133.

²⁴² The main approaches taken within Northern Ireland will be examined further on.

²⁴³ International Council on Human Rights Policy, *Ends & Means - Human rights approaches to armed groups*, Draft report, paras. 150-235.

²⁴⁴ International Council on Human Rights Policy, *Project Design: Armed Opposition Groups*, pp. 1f.

comparative review of obstacles and strategies" which deals with three main questions:

- How have human rights and humanitarian actors in different countries tried to influence the behaviour of armed opposition groups?
- When have these steps been successful in persuading armed groups to stop abusive practices, and why?
- What are the obstacles to taking action, or to make that action effective, and how might these obstacles be overcome?

Researchers wrote reports on ten different countries, including Northern Ireland, covering the main research questions. Findings were compared and a draft report circulated for comment. The final report is due to be published in July 2000.

This paper does not aim to engage in the impossible and unnecessary task of replicating the work undertaken in this major research project. Having, above, briefly hinted only to a few of the considerations to be taken into account when deciding whether and how to engage with armed opposition groups, it will now concentrate on the Northern Irish situation. In doing so, the case study on Northern Ireland undertaken by Kieran McEvoy within the ICHRP project will certainly provide some useful guidelines.²⁴⁵

The conflict in Northern Ireland has been outlined in some detail above. There are a variety of armed groups which can be divided into republican and loyalist paramilitaries. These groups generally speaking have engaged in two main sets of violent actions; "military" attacks carried out on security forces or civilians, and punishment attacks, in most cases on members of their own communities.

In seeking to address these abuses a number of NGO's have developed various styles of intervention which have been categorised as:²⁴⁶

1. Interventions by international human rights NGOs based upon international humanitarian law principles
2. Interventions by anti-terrorism lobby groups using a human rights framework
3. Service provision and direct engagement by humanitarian groupings seeking to change paramilitary behaviour
4. State focused human rights NGOs and creating a human rights culture.

We will now examine the main characteristics of these different approaches and their success or possible obstacles in aiming to bring paramilitary "military" and punishment attacks to an end.

3.1 Interventions by international human rights NGO's based upon international humanitarian law principles

²⁴⁵ K. McEvoy.

²⁴⁶ *Ibid.* at p. 2.

Some aspects of Human Rights Watch/Helsinki's and Amnesty International's engagement with armed opposition groups on the basis of humanitarian law, including problems with its applicability and the notion of legitimate targets, have been examined earlier in the context of international humanitarian law as legal basis for engagement; at this point only references will be made to these earlier findings.

From the early 1980s Human Rights Watch /Helsinki and in 1991 Amnesty International adapted their monitoring role to include abuses perpetrated by armed opposition groups.²⁴⁷ A combination of a number of reasons including growing governmental pressure to engage with paramilitary abuses; moral outrage at the abuses perpetrated by some NGE's; a sense that by ignoring the actions of armed groups they were not acting impartially; and, more recently, the suggestion that traditional notions within international law of "the state" and "armed conflicts" were both dated and limiting with regard to protecting the rights of citizens led to the expansion of the mandate of both organisations.²⁴⁸

3.1.1 "Military" attacks

Both organisations have criticised paramilitaries in Northern Ireland for their "military" attacks, while often remaining vague as to distinctions under humanitarian law as to military targets regarded as acceptable and civilian targets regarded as unacceptable under humanitarian law. The political difficulties posed by sticking more closely to the actual requirements of humanitarian law have been highlighted on a few occasions where more precise determinations were made. For example, when the IRA detonated a car bomb in the Headquarters of the British Army in Northern Ireland killing one soldier and injuring almost thirty civilians,²⁴⁹ Amnesty International released a statement condemning the injuries to the civilians but were immediately branded partial and biased by Unionist Security Spokesperson Ken Magginis for their failure to explicitly condemn the wounding of the British soldier who died a number of days after the attack.²⁵⁰ Similar criticism arose when Amnesty International in their 1994 report concluded their section on paramilitary attacks by urging the leadership of armed political groups to take steps to ensure that their members "don't torture, don't kill prisoners, don't kill civilians, don't take hostages."²⁵¹ The then Secretary of State Sir Patrick Mayhew responded to this report by saying: "*Why do you call on the*

²⁴⁷ *Ibid.* at p. 12.

²⁴⁸ *Ibid.*, with further references.

²⁴⁹ "Blasts Rock Army HQ: Two Fight for Lives After Double Attack", Irish News, Belfast, 8 October 1996.

²⁵⁰ K. McEvoy, p. 17; It might be noted here that under international humanitarian law even the condemnation of the killing of civilians is not always as straight forward as it might seem *e.g.* as persons providing indirect support to the armed forces implicitly assume the risk of death or injury incidental to direct attacks against military targets (R. Goldman, p. 85).

²⁵¹ Amnesty International, *Political Killings in Northern Ireland*, February 1994, EUR 45/01/94, p. 48.

*paramilitaries only to desist from killing civilians? Are human rights denied by you, as well as by the terrorists, to police officers? ... Will you now additionally call on the paramilitaries to stop killing police officers and the military who support them?"*²⁵²

This shows how obviously problematic it is to apply the distinction between military and civilian targets which is at the very core of the application of humanitarian law principles. The very concept of a "legitimate" target is unacceptable to a majority of the community. On the other hand, to expand customary humanitarian law to such an extent that it levels all acts of political violence onto a single plain is both illogical and self-defeating.²⁵³ It leaves protagonists with a choice of either stopping political violence entirely or simply ignoring any international strictures since all violent activities are deemed to breach humanitarian standards.

3.1.2 Punishment attacks

Not only was the condemnation of "military" attacks in Northern Ireland problematic, the condemnation of punishment beatings and shootings has not been without political difficulties either. These punishment attacks became of increased political significance in the wake of the Republican and Loyalist cease-fires of 1994. In February 1999, while highly sensitive inter-party negotiations were underway with Unionist and Conservative politicians seeking to link an end to punishment attacks to the early release of prisoners under the Good Friday Agreement, Amnesty International and Human Rights Watch/Helsinki were requested by Unionist leader David Trimble to "... give us the help needed to ensure the conditions of non-violence they [Sinn Fein] signed up to in the Agreement."²⁵⁴ The invitation was extensively covered in the British print and broadcast media, and while Human Rights Watch/Helsinki were able to reply that they would "not normally send a delegation to investigate one single aspect of a complex human rights situation", Amnesty found that the public perception of their long planned mission to Northern Ireland, covering the entire remit of Amnesty's human rights concerns, "had been totally skewed by the Trimble invite."²⁵⁵

While human rights work is always carried out in a political environment, it was a deeply unpleasant position for a major human rights organisation to be placed in the role of a "cease-fire monitor". While critical human rights reports conducted by international NGO's are often used for propagandist purposes and NGO's cannot be held responsible for the political uses of their reports, the Northern Ireland experience is a reminder of the potential of monitoring of armed

²⁵² Northern Ireland Information Service press release, "Secretary of State Responds to Amnesty International Report", 9 February 1994.

²⁵³ K. McEvoy, p. 15.

²⁵⁴ One critical view expressed with regard to this invitation was that the request to the international NGOs had less to do with a genuine concern to end punishment attacks, and more to do with a political point scoring exercise against political parties associated with paramilitaries, in particular Sinn Fein; "Watchdog's company requested but mixed welcome is expected", Irish Times, Dublin, 13 February 1999.

²⁵⁵ K. McEvoy, pp. 18f.

opposition groups to be used by those whose interests are not necessarily in securing the most effective protection of human rights in a given jurisdiction.²⁵⁶

3.1.3 International human rights organisations as norm creators

One point to be mentioned only briefly as it concerns less the success of Amnesty's and Human Rights Watch's monitoring work than their implications on the work of others is their function as "norm creators". The large international human rights organisations, through their weight and credibility, to a large extent define what human rights are to the public. When such organisations include armed opposition groups in their remit of work this has implications on the work of local human rights groups. While it might be perfectly sensible to apply humanitarian law in a full scale civil war, international NGO's should at least be aware of the impact of their policy decisions in other circumstances and on smaller organisations and consult with relevant local NGO's before taking a position on human rights abuses by armed opposition groups.²⁵⁷

3.1.4 Impact of monitoring armed groups by international NGO's in Northern Ireland

Having examined the major obstacles that have faced Amnesty International and Human Rights Watch/Helsinki with respect to their armed groups-monitoring operation in Northern Ireland we will now turn to the very difficult task of measuring the impact of these monitoring operations on the activities of armed groups in Northern Ireland. Fortunately, a thorough investigation of this impact was done only recently in the ICHRP case study of Northern Ireland. It concluded that "[t]he use of humanitarian law by NGO's to condemn "military" attacks carried out by Republicans and Loyalists on security forces or civilians had no discernible impact on the targeting policy of either set of protagonists. In both instances, such policy was dictated by the ideology, practices and operational capacities of the respective organisations. However, with regard to the monitoring of paramilitary abuses such as punishment beatings and shootings, it is arguable that the work of Amnesty and Human Rights Watch contributed significantly to the increased public awareness and political importance of the phenomenon in the 1990's."²⁵⁸ The study finds, however, that this impact was greater on Republican than on Loyalist paramilitaries. As reasons for that the study suggests that Republicans had a more positive attitude to international human rights organisations as they saw their human rights reports highlighting state abuses as underlining their position about the illegitimacy of the British state in Ireland while that alienated Loyalists supportive of that state.²⁵⁹ Also, the looser organisational structure of Loyalists, a differing range of reasons for such activities and a less developed international political constituency seem to have minimised

²⁵⁶ *Ibid.* at p. 19.

²⁵⁷ R. Brett, p. 2.

²⁵⁸ K. McEvoy, p. 20.

²⁵⁹ *Ibid.*

the impact on their activities.²⁶⁰ Republicans on the other hand, for their more politicised and more disciplined organisation with an international organisation to be nurtured, were more likely to be impacted by international monitoring.²⁶¹

²⁶⁰ *Ibid.* at p. 21.

²⁶¹ *Ibid.*

3.2 Interventions by anti-terrorism lobby groups using a human rights framework

During the 1990's a number of lobbying groups emerged in Northern Ireland, describing themselves as human rights groups, campaigning against various abuses by paramilitary groups and the IRA in particular; the best known and longest standing of these groups was FAIT (Families against Intimidation and Terror) which we will use as a heuristic device to examine some of the broader themes concerning interventions by such groupings on paramilitary abuses.²⁶²

3.2.1 Publicly highlighting abuses by paramilitaries

FAIT was established in 1990 by a former member of the Official IRA²⁶³ and the mother of a petty criminal who had been the victim of an IRA punishment attack; initially focused upon punishment attacks by the IRA, they soon expanded their mandate to include criticism of Loyalist violence as well.²⁶⁴ The organisation described itself as "an anti-sectarian, non political group which is committed to the preservation of human rights with their main focus being geared towards an end to all forms of terrorist beatings shootings and intimidation."²⁶⁵ FAIT argued that the beatings would only stop when there was enough public pressure and when victims and their families spoke out.²⁶⁶ For this purpose the organisation attacked the political wings of Republicanism and Loyalism by highlighting the abuses of the victims of punishment attacks. They issued almost daily press releases, placarded political meetings and annual conferences of Sinn Fein and the Loyalist parties, shadowed high profile figures such as Gerry Adams on visits to the USA by bringing victims to major meetings and speaking engagements and generally seeking to create maximum political embarrassment for such figures through extensive coverage of the punishment beatings issue.²⁶⁷ Additionally to their publicity efforts, FAIT put people under threat that contacted the organisation in touch with agencies that might help with relocation or similar services.²⁶⁸ The organisation closed in October 1999 after its director resigned due to bad health.²⁶⁹

²⁶² Other groups included campaigned to highlight Republican attacks on economic targets such as the cross border railway (Peacetrain) or attacks on Protestant members of the security forces and their families in border areas (FAIR - Families Acting for Innocent Relatives); *Ibid.*

²⁶³ The IRA in 1970 split in the Provisional IRA and the Official IRA, more Marxist oriented. The Provisional IRA quickly became the larger of the two groupings and inherited the mantle of "the IRA".

²⁶⁴ K. McEvoy, p. 22.

²⁶⁵ Website of Families against Intimidation and Terror, <http://www.fait.org>, (1999).

²⁶⁶ M. O'Halloran, "Paramilitary beatings put at 124 since ceasefires", in: Irish Times, Dublin, 27 June 1995.

²⁶⁷ K. McEvoy, p. 22.

²⁶⁸ The work of one such agency, Base 2, will be examined further on.

²⁶⁹ M. Anderson, "Fait closes as director quits post", in: Irish News, Belfast, 4 October 1999.

Although describing itself as human rights group, FAIT made no usage of international human rights or humanitarian law standards in their literature or press releases, they did not work on state violations of these rights and also opposed, for example, any notion of distinguishing between military and civilian targets.²⁷⁰ FAIT had established international networks with victims and anti-terrorist groups,²⁷¹ rather than with the international human rights community and were almost entirely funded by government - which seriously undermined their credibility when criticising paramilitary groups.

Instead, their work was described as one of a political lobbying group working within a human rights framework.²⁷² The origins of FAIT, their work programme, and their operational methods, had a clear objective - which was to put an end to all paramilitary activity. It was argued that the category of groups that FAIT belonged to challenges the very existence of paramilitaries and they were therefore operating to a pre-eminently political agenda, albeit addressing human rights abuses or humanitarian concerns *en route* to that goal.²⁷³ While it is probably true that paramilitaries giving up all violent activities would be deprived very much of their military element one could also see the *goal* in bringing to an end paramilitary abuses and the challenge to the very existence of paramilitaries as being *en route* to that goal. However, this may be in theory, in practical terms groups like FAIT challenge the very existence of paramilitaries while human rights groups work within the political realm to promote human rights objectives and this requires that they not challenge the state, nor indeed the government, per se, but only challenge any behaviour by that state or government that is in violation of human rights standards. While human rights organisations regularly directly engage with the government in power to bring about change, this was avoided by FAIT with respect to paramilitaries, as its last director pointed out, for fear that paramilitaries and their political representatives would co-opt or usurp the focus of the group.²⁷⁴

3.2.2 Assessment of impact

When assessing the successfulness of the work of FAIT two main issues have to be distinguished; the ability to raise public awareness and the ability to prevent human rights abuses through changing the behaviour of paramilitaries.

There is no doubt that FAIT was highly successful in attracting media publicity to the issue of paramilitary attacks.

However, FAIT and similar groups do not seem to have been quite as successful in changing paramilitary behaviour. It is suggested that there are a number of factors that minimised its success in doing so. As a group founded mainly by government money, they were consistently criticised by Republican and

²⁷⁰ Website of Families against Intimidation and Terror, <http://www.fait.org>, (1999).

²⁷¹ FAIT established networks with the Association for the Victims of Terrorism (Spain), the Algerian Collective (Algeria) and SOS Attentats (France), K. McEvoy, p. 22.

²⁷² *Ibid.* at p. 23.

²⁷³ *Ibid.*

²⁷⁴ *Ibid.* at p. 26; Interview Kieran McEvoy with Sam Cushman, Director of FAIT, 1 July 1999.

also Loyalist commentators as being a propagandist organisation for the Northern Ireland Office, they were attacked as being *'more interested in scoring cheap political points against Republicans than in dealing with the issues of the attacks on the nationalist people by criminal elements. ... Those genuinely involved in the real work on the ground within the community ... will question the sole aim and only purpose of this group, those behind it and those who fund it.'*²⁷⁵

Also, FAIT had numerous organisational and personnel difficulties. The group's co-founder Nancy Gracey was forced to resign from the Executive after she allegedly used FAIT resources for a three week paid holiday in the USA; she promptly established a rival group called "United Against Intimidation and Violence", later renamed "Outcry".²⁷⁶ Financial and managerial irregularities have also led to several investigations by their statutory funder the Northern Ireland Central Community Relations Unit and the RUC.²⁷⁷ In addition, despite its self-description as a non-political group, several leading staff members left the organisation after engaging in explicit political activities. Former Spokesperson Glyn Roberts, an Alliance Party activist, resigned after accusations that he was using the group as a political platform for himself.²⁷⁸ His successor, Vincent McKenna who had himself previously stood as independent candidate, was in turn dismissed after he had explicitly aligned the group with the Unionist anti-agreement camp,²⁷⁹ campaigned against prisoner releases and named a number of suspects he claimed responsible for the Omagh bombing.²⁸⁰ McKenna then also established his own lobby group, the "Northern Ireland Human Rights Bureau".²⁸¹ FAIT's high media profile has ensured that these organisational and personnel difficulties have been extensively reported by the local media. FAIT has also been accused of breaching the confidentiality of victims of terrorist abuses.²⁸²

Interviewed by Kieran McEvoy, the last director of FAIT candidly linked the organisations failings to their fixation upon accessing the media: *'There were two downsides to our success in gaining such access to the media. Firstly was that it encouraged an obsessive interest in us to that all of our mistakes were aired very publicly. Secondly that the guaranteed access attracted a*

²⁷⁵ Comments by Sinn Fein Councillor following FAIT allegations of IRA involvement regarding a shooting incident in West Belfast in which a young man was shot in both legs; in: Irish News, Belfast, 16 February 1996.

²⁷⁶ "Nancy Gracey sets up new group", in: Belfast Telegraph, Belfast, 14 May 1996; "Outcry to tell First Lady of attacks", in: Irish News, Belfast, 29 August 1997.

²⁷⁷ "Union asks for NIO to investigate FAIT", in: Belfast Telegraph, Belfast, 21 October 1998.

²⁷⁸ "FAIT is rocked by former director's attack", in: Belfast Telegraph, Belfast, 28 September 1998.

²⁷⁹ "Yes voters 'cheated' - FAIT man could not back deal", in: News Letter, Belfast, 15 January 1999.

²⁸⁰ Jonathan Turner, "'I was wrong' admits McKenna", in: Irish News, Belfast, 12 February 1999.

²⁸¹ A. Erwin, "McKenna leaves Fait to set up new group", in: Irish News, 2 May 1999.

²⁸² "FAIT faces breakup after scandal: Future of group is bleak says member", in: Irish News, Belfast, 29 July 1997.

*certain kind of people to our staff, people on an ego trip or building their own political career, and they did a lot of damage to our credibility.*²⁸³

Despite these difficulties FAIT were clearly a political irritant to the leadership of both factions. In a few instances they seem to have reversed through public embarrassment, decisions taken by paramilitaries,²⁸⁴ but generally, as suggest their own statistics, FAIT did not succeed in altering the behaviour of paramilitaries.²⁸⁵ A Republican spokesperson suggested that "... *they [FAIT] were only interested in anti-Republican propaganda, Our ones [the IRA] would have thought they were a bit of a joke. They did not provide any realistic alternative to punishments other than saying support the RUC.*"²⁸⁶ On the Loyalist side, one former activist also highlighted their lack of credibility and also suggested that FAIT may have exacerbated the situation in some instances with regard to Loyalist paramilitaries; asked how the UVF view FAIT he stated: "*They would laugh at them ... They are sitting in a city centre office, generally middle class people that haven't experienced life in working class neighbourhoods, trying to moralise on issues that effect them without realising that it is the community people themselves who are approaching the paramilitaries ... They did everything in a very public way. They used the media a lot for condemnations, but you are never going to get honest dialogue with the paramilitaries when you take that kind of approach. In actual fact some people would say that it had the opposite effect where the paramilitaries say 'stuff them, well shown (sic) them'.*"²⁸⁷

This analysis of FAIT's work may provide us with a few more general conclusions as to the engagement with paramilitaries.

The lack of an acknowledged external reference point, such as international human rights or humanitarian law, in particular in conjunction with government funding, will make any lobby group susceptible to the charge of being politically

²⁸³ Interview Kieran McEvoy with Sam Cushnahan, Director of FAIT, 1 July 1999, in: K. McEvoy, p. 24.

²⁸⁴ One example is the case of Micky Williams, an Englishman married to a Derry woman. He interfered with an IRA operation when calling the police thinking his neighbour was being assaulted by hooligans, which led to the arrest of one IRA member. The IRA "passed a death sentence" on him, though secretly warning him to leave Ireland in time. FAIT assisted the family to mount a major campaign and it seems that provided the publicity campaign stopped, the IRA, that were raising a number of human rights issues themselves at the time, were prepared to review the situation and, ultimately, cancel the threat of death. In: J. Lampen, *Building The Peace - Good Practice in Community Relations Work in Northern Ireland*, p. 92.

²⁸⁵ According to a report in the Irish Times, FAIT statistics, authenticated from official agencies, confirm that, in 1998, more incidents of beatings, shootings, intimidations and exiles occurred than at any time in the past 30 years; "North's hope of a bright future is fast becoming a nightmare" in: Irish Times, Dublin, 12 January 1999.

²⁸⁶ Interview Kieran McEvoy with Republican spokesperson, 1 July 1999, in: K. McEvoy, p. 25.

²⁸⁷ *Ibid.* Interview Kieran McEvoy with former UVF prisoner, 29 June 1999.

motivated, and will diminish their own credibility as an impartial player in this highly politically contentious arena.

Also, while the media will often happily reproduce criticisms of the activities of armed groups, over exposure to the media may have negative consequences on the quality of staff and the organisational image.²⁸⁸ Additionally, the only alternative provided by FAIT to punishment attacks was the use of the current judicial system;²⁸⁹ this has been seen as clearly unacceptable by the communities most affected by punishment attacks.

Finally, the focus on public condemnation rather than open dialogue with such groups, while having an impact on the political context of paramilitary behaviour, apparently provides little in terms of influencing the policies or practices of such groupings.²⁹⁰

3.3 Service provision and direct engagement by humanitarian groupings seeking to change paramilitary behaviour

With paramilitary groupings being a material reality in many working class Protestant and Catholic areas in Northern Ireland, it has often been necessary for groups who work in such areas to have at least the acquiescence of the paramilitaries to carry out their work properly. But there have also emerged a number of programmes that have engaged deliberately in direct contact with paramilitaries, leading to the provision of services to those under paramilitary threat, and ultimately a number of initiatives emerged designed to alter paramilitary behaviour. We will briefly examine the work of three such organisations that have engaged directly with paramilitaries.²⁹¹

3.3.1 Base 2: Providing assistance to persons under paramilitary threat

The Base 2 Project was established in 1990 by a largely state funded non-governmental organisation, the Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO). The project is essentially a humanitarian crisis intervention response to the threat of physical injury or possibly death by paramilitary groups²⁹² and provides a discreet and confidential service to those presenting as being under threat, operating within the parameters of the criminal justice system and child care legislation of Northern Ireland.²⁹³

²⁸⁸ *Ibid.*

²⁸⁹ Tony Bailie, "Fait to meet loyalists prisoners in the Maze", in: Irish News, 12 November 1997.

²⁹⁰ K. McEvoy, p. 26.

²⁹¹ For a more thorough examination: *Ibid.* at pp. 27-36.

²⁹² Base 2, *Annual Report 1997*, p. 2.

²⁹³ P. Conway, *Towards Community Policing in Ireland: Beyond the Policies of Law and Order*, p. 115.

Base 2's service to persons under threat has included clarifying with paramilitaries the nature of the threat, providing advice and financial help regarding transport and accommodation out of the community as well as help with reintegration if a paramilitary banishment is time limited.²⁹⁴ More recently the organisation has begun quite successfully to also provide mediation support aimed at the lifting of threat.²⁹⁵ While staff sought to clarify that a threat was indeed real with paramilitaries, no negotiation with regard to tariffs (*e.g.* shooting in one leg as opposed to both) has been permitted and the organisation's opposition to punishment attacks has been acknowledged in the relationship with the paramilitary groupings.²⁹⁶

Handling an average 200 clients a year up until 1994, their numbers have more than tripled since as paramilitaries appeared to make greater use of banishments from the community rather than physical punishments during the peace process area.²⁹⁷ While Base 2 has largely eschewed publicity or media discussion of their work lest it interfere with their ability to work with the paramilitary groups it has clearly had an impact in assisting far more than 3000 individuals under threat of being beaten, shot or killed over the last decade.²⁹⁸ Paramilitaries have increasingly come to view it as "a resource" which prevents them from otherwise carrying out punishment attacks. Within statutory, voluntary and community organisations many have suppressed their professional and ideological misgivings of collusion with the violent and unlawful system of paramilitary violence, as the alternative was to leave many individuals at the mercy of the paramilitaries.²⁹⁹

3.3.2 Community Restorative Justice: An Intervention with Republicans

Community Restorative Justice projects are non-violent and lawful community based alternatives to punishment beatings and shootings. In the context of the Troubles in Northern Ireland they are only a very recent phenomenon, going back to an initiative of a number of republican activists in 1996. Four pilot projects have been running in Republican areas since the end of 1998 (with demands for the establishment of further pilot projects in 10-12 areas across Northern Ireland) and the IRA has expressed its support for such programmes, acknowledging that "punishment shootings are not a solution to the problem of petty crime and anti-social behaviour"³⁰⁰ and that they are in a "no win situation"³⁰¹ on punishment

²⁹⁴ Base 2, *Annual Report 1997*, pp. 2ff.

²⁹⁵ In 1999 mediation efforts were successful in 32 of 67 cases of such support (47%); Base 2, *Annual Report 1999*, p. 11.

²⁹⁶ K. McEvoy, p. 28.

²⁹⁷ Referrals to Base 2 in 1999: 624; Base 2, *Annual Report 1999*, pp. 1, 3.

²⁹⁸ *Ibid.*

²⁹⁹ K. McEvoy, p. 28.

³⁰⁰ Interview with senior Republican, "IRA pledges support for 'community justice' plan", in: *Andersonstown News*, Belfast, 20 March 1999.

³⁰¹ A. Cadwallader, "Beatings admitted by IRA in North", in: *Irish Times*, Dublin, 22 March 1995.

attacks.³⁰² Republicans see it as a mechanism for their "responsible disengagement" from punishment attacks saying publicly that they will not carry out punishments in areas where such schemes are established.³⁰³ That moratorium was largely maintained, but there have been a few incidents after the collapse of the Northern Ireland Executive in early 2000.

The installation of the pilot projects was preceded by an intensive process of training and a lengthy process of consultation with Republicans, statutory agencies, community representatives, political parties and others on a document outlining the principles of a model of restorative justice which in the end was fully endorsed by Sinn Fein; the party now even cites restorative justice as organisational policy on the question of punishment beatings and shootings.³⁰⁴

The range of solutions offered under the programme include mediated agreement; involvement of the family of the offender (and potentially the victim); apology, restitution and/or reparation to victim and community; payment of damages; referral to a community based or statutory programme or targeted intervention regarding particular problems (*e.g.* parenting skills, drugs or alcohol related problems) and community boycott.³⁰⁵

A last interesting element to be mentioned about the Programme is the Community charter. The draft community charter suggests that it be presented to all community members either to sign or abide by.³⁰⁶ It should contain an affirmation of collective and individual rights including a non-discrimination clause, freedom from torture, inhuman and degrading treatment as well as a commitment to desist from violence as means of resolving disputes; the draft charter also suggests that community members be asked to formally acknowledge their responsibilities to desist from crime, anti-social behaviour and other activities which prevent or impede their neighbours from enjoying their collective or individual rights.³⁰⁷

3.3.3 Greater Shankill Alternatives: An Intervention with Loyalists

The project programme of the Greater Shankill Alternatives (GSA) is not dissimilar to the restorative justice programmes in the Republican areas with complaints being investigated, mediation sessions established between victims, offenders and families, a system of mentoring and support for offenders going through the system. The GSA is focusing on young people providing an intensive support and mentoring scheme. In its first year of work the programme prevented punishment attacks on 25 young people with only two punishment attacks for anti-social behaviour taking place in the area. Additionally the project is engaged in a crime prevention project for young people at risk engaging almost 200

³⁰² See also: D. Keating, "Provos may be guided by Amnesty", in: Sunday World, 16 February 1992.

³⁰³ Interview with senior Republican, "IRA pledges support for 'community justice' plan", in: Andersonstown News, Belfast, 20 March 1999.

³⁰⁴ K. McEvoy, p. 29.

³⁰⁵ *Ibid.* at p. 32.

³⁰⁶ J. Auld et al., *Designing a System of Restorative Community Justice in Northern Ireland: A Discussion Document*.

³⁰⁷ *Ibid.*

people.³⁰⁸ The project goes back to a piece of research commissioned by NIACRO and carried out by Tom Winston, a former UVF prisoner; examined were punishment beatings and shootings by Loyalist paramilitaries in the Greater Shankill area of West Belfast, the "heart of Loyalism in Northern Ireland".³⁰⁹ The research was facilitated by EPIC, the Ex-Prisoners Interpretative Centre, a self-help reintegration project which works with the UVF and Red Hand Commando (RHC) prisoners.³¹⁰ From the statement of an ex-prisoner closely involved in setting up the research project it becomes clear that Winston's position as an ex-prisoner was crucial in gaining access to the leadership and activists of the UVF as well as their political wing the Progressive Unionist Party (PUP): "*An outsider couldn't have done it. Absolutely not. For a start they wouldn't have been talking to anyone, no one [from the UVF] would speak to them. It had to come from the ranks of former combatants of the organisation, it had to come from people who had credibility within the organisation, people who wouldn't have been seen as suspicious, whose motives were not in question.*"³¹¹

There was a general willingness on the part of the UVF leadership as well as the PUP to explore viable alternatives to punishment attacks. But, as Debbie Waters points out, "*[the] only remit is anti-social behaviour at the lower end at the scale.*"³¹² The paramilitaries made clear that interfactional disputes, matters of internal discipline, sexual offences, drug related activities and particularly violent attacks could not be dealt with by the scheme.³¹³ In liaising directly with the relevant paramilitary groups and striking a balance in maintaining the support of the paramilitaries and of the broader legitimacy in the wider community, a key strategy is openness, transparency and inclusivity in terms of management committee, staff and others involved in the project, but at the same time confidentiality is crucial for establishing trust with the young people and there is no reporting on cases either to paramilitary groups or the police.³¹⁴ Debbie Waters acknowledges that this a "*sticking point*" in their relationship with the police and that they were sometimes "*walking a fine line, fulfilling a juggling act*".³¹⁵

The UDA, the other major paramilitary group in the Shankill, seeing the success to date of the Alternatives Programme, and the resultant positive publicity for those involved, has now began to get involved in a similar programme, and the project is also now considering expansion to a number of other different venues across Northern Ireland.³¹⁶

³⁰⁸ Interview Debbie Waters, Training support worker, Greater Shankill Alternatives, 4 May 2000.

³⁰⁹ T. Winston, "Alternatives to Punishment Shootings and Beatings in a Loyalist Community in Belfast", *Critical Criminology*, 8 (1), p. 122.

³¹⁰ The RHC is a small Loyalist paramilitary group closely aligned to the UVF.

³¹¹ Interview Kieran McEvoy with former UVF prisoner, 29 June 1999, in K. McEvoy, p. 33.

³¹² Interview Debbie Waters, Training support worker, Greater Shankill Alternatives Programme, 4 May 2000.

³¹³ *Ibid.*

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

3.3.4 Analysis of the direct engagement by humanitarian groupings

The three programmes examined share a number of common characteristics which allow for a few more general conclusions.

One important common approach is their willingness to pragmatically engage with paramilitary groupings and to do so in private, largely avoiding media attention. While emphasising their concern with the protection of the rights of their clients and making clear their opposition to punishment attacks, they accepted as a reality the place of paramilitaries in the local communities involved and the more complex dialectic between the paramilitaries and their communities.³¹⁷ While repression, control and fear play their part in this relationship, it also involves notions of responsibility on the part of the paramilitaries for protection of the community and on the other side a notion by the community that anti-social crime in the area should be "resolved" by the paramilitaries.³¹⁸ Additionally, it was recognised that to a greater or less extent, the formal policing by the state is problematic in both Loyalist and Republican communities.³¹⁹

In addition to the private nature of the engagement, the involvement and support of former prisoners has been crucial in the development of the Community Restorative Justice and Greater Shankill Alternatives programmes. Many of the about 25000 paramilitary ex-prisoners in Northern Ireland³²⁰ are highly respected within their communities³²¹ and have credibility within their paramilitary organisations, making them invaluable in gaining access to such groups and lobbying within paramilitary circles for less violent forms of actions.

We have seen above that the public embarrassment for human rights abuses is a much less promising tool with paramilitaries than with governments and states or even political parties like Sinn Fein, which are depending on electoral votes and keen to polish their international reputation. However, that does not mean, that paramilitaries are totally independent of outside opinion. It is important to remember, though, that for paramilitary groups notions of "stakeholders" are considerably more localised, with their primary interaction with other paramilitaries and with members of their own community, many of whom supportive of their activities.³²² A key strategy employed by the Community Restorative Justice project has therefore been to utilise community structures such as local community newspapers, churches, residents groupings and local organisations to explain the concept and content of the restorative justice

³¹⁷ K. McEvoy, p. 34.

³¹⁸ C. Thornton, "Is this justice?", in: Belfast Telegraph, Belfast, 17 February 1999.

³¹⁹ For the Shankill area Debbie Waters explains that there are several thousand political ex-prisoners in the area and "police still beat and harass people", Interview 4 May 2000; For a detailed examination: R. McVeigh, *"It's part of life here ..." The Security Forces and Harassment in Northern Ireland*, pp. 103ff, 114ff.

³²⁰ Y. Jennerjahn, "Ein Job für alte Kämpfer", in: Der Tagesspiegel, Berlin, 25 April 2000.

³²¹ This may be illustrated by a little example. A boy from the Shankill area, when asked what he would like to be answered that he would like to become an ex-prisoner; Example given by Debbie Waters, Talk at Mediation Network for Northern Ireland Seminar, 2 December 1999.

³²² Interview Debbie Waters, Training support worker, Greater Shankill Alternatives Programme, 4 May 2000.

programme and also for Republicans to underline that they were not "abandoning" their responsibility to protect their community but were rather empowering them to tackle these issues themselves.³²³ It is also interesting to note that since the Greater Shankill Alternatives programme gained increased credibility at a local and national level, the UDA began a process of establishing a similar programme.³²⁴ Involved with the same community in a relatively small area, it clearly did not which to be viewed out of step with the successful activities of another paramilitary group.³²⁵

In the course of this discussion of successful methods of engagement with paramilitaries one should also note what such an engagement asks of the organisation engaging with the paramilitaries. When engaging in such politically sensitive activities there must be a clear rationale based on agreed principles of engagement and a willingness to counter any inevitable negative media or governmental comment in pursuit of those objectives. For NIACRO as a mainly state funded NGO that was closely involved in all three of the projects, this required considerable organisational self-confidence - compared for example to FAIT wherein such engagement was eschewed because of the dangers of co-option.³²⁶

³²³ K. McEvoy, pp. 35f.

³²⁴ C. Thornton, "Is this justice?", in: Belfast Telegraph, Belfast, 17 February 1999.

³²⁵ Interview Debbie Waters, Training support worker, Greater Shankill Alternatives Programme, 4 May 2000.

³²⁶ K. McEvoy, p. 35.

3.4 State focused human rights NGO's and creating a human rights culture

Having examined the work and impact of a number of organisations directly involved with paramilitary abuses we will now turn to Northern Ireland's primary human rights NGO and its position on paramilitary abuses.

3.4.1 The work of CAJ

The Committee on the Administration of Justice (CAJ), is a Belfast based human rights organisation affiliated to the International Federation of Human Rights.³²⁷ It was established in 1981 and is “a non-governmental organisation which draws its membership from across the communities of Northern Ireland and beyond. The Committee works to ensure that the government complies with its obligations under international human rights law. CAJ is opposed to the use of violence for political ends and takes no position on the constitutional status of Northern Ireland.”³²⁸ The organisation has worked on a wide variety of rights' issues including prisoners' rights, emergency laws, children's rights, gender equality, racism, disability, a campaign for a bill of rights, policing and the operation of the criminal justice system. In common with an increasing number of local and international human rights groups, CAJ works not only on civil and political, but also on economic, social and cultural rights. CAJ works closely with other domestic and international human rights organisations such as Amnesty International, the Lawyers Committee for Human Rights and Human Rights Watch, and makes regular submissions to a number of United Nations and European bodies working on human rights. CAJ lobby government by drafting and commenting on proposed legislation, monitoring and critiquing governmental human rights activities. The organisation has issued a wide range of publications and generally seeks to develop public opinion around human rights issues. The organisation also deals with a considerable amount of individual case work.

3.4.2 CAJ's position on paramilitary abuses

Having been set up, like most other human rights organisations around the world, to deal with human rights violations by states and to act as an independent civil liberties watchdog to hold the state to account CAJ has retained this focus until today. As an organisation evolving from Northern Ireland's pacifist movement of the 1970's, CAJ is concerned at the violence exhibited by armed groups and the organisation always pointed out that it condemned violence, whatever its source.³²⁹ However, it did not actively engage in work or comment on actions by paramilitaries and in the local press CAJ has occasionally been "branded" for

³²⁷ The organisation and its director have been awarded several international human rights prizes, including the Reebok Human Rights Award and the 1998 Council of Europe Human Rights Prize.

³²⁸ Organising Principles, contained in CAJ Membership leaflet.

³²⁹ CAJ website: <http://www.caj.org.uk> (2000).

that.³³⁰ Also the fact that some international human rights NGOs as Amnesty International have engaged with abuses by armed groups sometimes brought about the need to justify its position of non-engagement.

The reasons for CAJ's non-engagement very much reflect the ones heard earlier and therefore they are only to be briefly summarised here. They include the apparent lack of objective external standards of human rights measurement against which to judge paramilitary behaviour³³¹ and the fact that paramilitary groups did not bind themselves to uphold human rights. To work on a broader humanitarian agenda, apart from requiring a massive shift of resources and priorities was seen as necessitating to position on controversial political debates about the nature of the conflict in Northern Ireland, and to bear the risk of awarding legitimacy to groups using violence for political ends.³³² Also, the engagement on a basis of the laws of armed conflict, and in particular the notion of legitimate targets that allows for the lawful killing of combatants, was seen as clearly morally and politically unacceptable for an organisation opposed to the use of violence for political ends.³³³

Although the Committee on the Administration of Justice deliberately decided not to engage directly with paramilitary groups. It might nevertheless be interesting to examine whether the state-focused work of CAJ has had any impact on the behaviour of paramilitary groups in Northern Ireland.

3.4.3 Creating a human rights culture

Besides highlighting governmental human rights violations, CAJ has focused on trying to create a human rights culture in Northern Ireland, developing networks and relationships with a wide variety of political parties including the political representatives of Republicanism and Loyalism.³³⁴ The importance such groups now see in the protection of human rights became clear in the negotiations for the Good Friday Agreement. As Maggie Beirne, CAJ's Research and Policy Officer pointed out: *'Regarding the Good Friday Agreement, if it wasn't that Sinn Fein and the Loyalist parties had been made such a big deal about human rights, then its difficult to believe that you would have got such strong human rights protection in the Agreement.'*³³⁵

While Maggie Beirne acknowledges that it is difficult to say to what extent the human rights debate concerning the agreement may have influenced the behaviour

³³⁰ Most recently by A. Morgan, "Dangerous liaisons", *Fortnight*, no. 384, Belfast, April 2000, accusing the CAJ that "(despite its opposition to political violence) [it] continues to refuse to acknowledge that paramilitaries have been the greatest abusers of human rights."

³³¹ C. Campbell, "Humanitarian Law - not as easy as it seems", *Just News*, December 1991.

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ P. Mageean, M. O'Brien, "From the margins to the Mainstream: Human Rights and the Good Friday Agreement", *Fordham International Law Journal*, vol. 22 no. 4, pp. 1499ff.

³³⁵ Interview Kieran McEvoy with Maggie Beirne, Research and Policy Officer CAJ, 28 June 1999, in: K. McEvoy, p. 39.

of Republicans and Loyalists on the ground, she suggests that "[h]owever it was interesting that Gerry Adams referred to the question of the disappeared as a human rights issue which had been perpetrated by Republicans and which needed to be acknowledged and rectified."³³⁶ This refers to a number of individuals, who were abducted by the IRA in the 1970's and early 1980's, interrogated and murdered and their bodies not returned to their families but secretly buried.³³⁷ For Gerry Adams, renowned of his care of language to suggest that the matter was "a human rights issue" was indeed potentially significant. For most of the Troubles, abuses by Republican paramilitaries have either been justified, described as wrong, contextualised or explained by Sinn Fein leaders³³⁸ and this seems to have been the first time that a senior Republican figure has acknowledged that a Republican act constituted a human rights abuse.³³⁹ While this is not to suggest detailed considerations of specific international human rights provisions it seems to reflect a certain degree of internalisation of human rights discourses.

3.4.4 Assessment of impact

Many of the political parties in Northern Ireland made use of CAJ materials in the negotiations which led to the Good Friday Agreement, with at least two of those parties being the political wings of paramilitary organisations.³⁴⁰ This, and the important stance human rights protection was finally awarded in the Good Friday Agreement, can be taken as a clear indication of the success of human rights organisations and in particular the CAJ, in working to create a human rights culture in Northern Ireland. The adoption by such political parties of the human rights agenda has arguably done much to both highlight the disparity between their own political rhetoric regarding such discourses and the practices of their military wings as well as leaving such armed groups more amenable to seeking alternative and more humane ways of conducting their affairs.³⁴¹ Also, a main focus of the work of CAJ is to ensure the fair and equal treatment of all citizens and to hold authorities accountable. Human rights abuses have done much to fuel the conflict which Northern Ireland experienced during the last three decades. Fair and equal treatment by state authorities will arguably make them more acceptable to all sections of the population. This is true particularly for the lack of confidence by

³³⁶ *Ibid.*

³³⁷ Following a high profile campaign for the return of the bodies, legislation was introduced North and South of the border guaranteeing that the bodies would not be tested for forensic evidence ("Disappeared legislation within weeks", Belfast Telegraph, Belfast, 16 April 1999). The IRA announced that a specialist unit tasked with pulling together information on the matters had gathered knowledge on the whereabouts of nine bodies. Whilst a number of bodies have been uncovered during a massive excavation operation, others are still missing. Search continues at the time of writing.

³³⁸ See for example: S. Breen, "SF defends 'punishments'", in: Irish Times, Dublin, 24 September 1994.

³³⁹ K. McEvoy, p. 40.

³⁴⁰ P. Mageean, M. O'Brien, "From the Margins to the Mainstream: Human Rights and the Good Friday Agreement", in: *Fordham International Law Journal*, vol. 22 no. 4, pp. 1499ff.

³⁴¹ K. McEvoy, p. 41.

parts of the population for the current police service. To make communities feel confident and comfortable enough to solve their policing problems in co-operation with the institutions of the state, notably the police and the administration of justice is arguably the most promising way to stop paramilitary action on anti-social behaviour.

4 Resource aspects in relation to the engagement with armed opposition groups

Most human rights organisations fulfil their work with rather limited resources. In deciding whether to extend their work beyond state abuses they will therefore need to look at this issue very carefully. While limited resources should not generally exclude changes in remit or adaptation to changing circumstances any such shift of resources implies a change in priority with regard to the work taken on. As Robert Goldman observed on Americas Watch engagement in El Salvador a change of remit towards holding armed opposition groups accountable under international humanitarian law implies far reaching shifts of resources: "Investigation and ultimately attributing responsibility for violations of humanitarian law, apart from requiring a working knowledge of the law, is methodologically more sophisticated than establishing infractions of human rights law. Such investigations generally require on-site investigation and extensive testimony from victims and witnesses. These requirements figured prominently in the Americas Watch decision to open an office in San Salvador ..."³⁴²

More generally and rather critical about the engagement by human rights organisations with armed opposition groups, Andrew Clapham observed: "Not only is conceptual clarity at stake but expanding activities to cover terrorist acts disproportionately stretches resources towards an area where reporting can have little effect ... and governments are unlikely ever to be satisfied that the organisation has achieved the correct 'balance'.³⁴³ While this might not necessarily be so in all circumstances, it points to the fact that a change of focus towards armed opposition groups is a very critical step that should only be adopted after careful examination and with a clear analysis of chances of success of such a work.

³⁴² R. Goldman, p. 89.

³⁴³ A. Clapham, *Human Rights in the Private Sphere*, p.123.

5 Public perception

For human rights organisations the public perception of the organisation and their work is very important. Not being equipped with any formal means of power they heavily rely on being seen as impartial and trustworthy for their work on a national and international level. Concerned about their public appearance it is difficult for such organisations to simply ignore public and governmental criticism of not being impartial in their work by ignoring atrocities committed by armed opposition groups. Human rights organisations not only have to be impartial, but they also need to be seen to be. Concerns regarding the moral integrity of their message have often done more than the expectation of changing the behaviour of armed groups to lead human rights organisations to engage with the behaviour of armed opposition groups.³⁴⁴ Yet, engaging with abuses by armed groups does not necessarily resolve the problem, as Andrew Clapham observed: "They are criticized by governments for failing to detail and publicize abuses by 'terrorists', yet, when they do address these groups, they are accused by the same governments of encouraging the international recognition of insurgents."³⁴⁵ Or, as Michael McClintock observed with respect to Amnesty International: "Even where AI has undertaken major initiatives regarding opposition group abuses, governments have often chosen to disregard or object this as falling short of their own positions."³⁴⁶ That they might also get in other unpleasant situations is illustrated by the invitation to Amnesty International and Human Rights Watch to act as a cease-fire monitor in Northern Ireland.

It does not seem too brave to suggest that human rights organisations are always likely to get some blame, one way or the other. Governments faced with sometimes severe criticism by human rights groups may try to pass the buck to someone else; it is all too natural to occasionally try to pass it back to the one criticising them.

Also, not engaging with abuses by armed opposition groups does not necessarily mean turning a blind eye on atrocities committed by such groups and to ignore the difficulties of official security forces called upon to confront such groups. Human rights reporting need not and should not be so narrowly focused as to be misleading. The ethos of such reporting is that of shedding the light of truth on areas that human rights violators normally seek to conceal.³⁴⁷ Where human rights

³⁴⁴ K. McEvoy, p. 20.

³⁴⁵ A. Clapham, *Human Rights in the Private Sphere*, p. 117 fn. 123.

³⁴⁶ M. McClintock, "Amnesty International and Non-governmental Entities", quoted in: M. Posner, p. 5.

³⁴⁷ N. Rodley, p. 318.

abuses occur in the context of and in response to armed opposition, it is not in keeping with that ethos to fail to acknowledge the situation as a whole, including abuses or atrocities committed by the opposition. Putting in context, albeit refraining from categorising such abuses or atrocities as human rights violations, makes it much harder for governments to reproach human rights reporters with moral selectiveness and undermines attempts implicitly to excuse the behaviour of their own agents.³⁴⁸ It also makes it more difficult for any opposition cynically to exploit the human rights issue without regard to their own behaviour.

6 Analysis of implications for CAJ

Having examined in general the different aspects that need to be taken into consideration when deciding about a possible engagement with abuses by armed opposition group we will now turn to examine the implications the conclusions reached above have for human rights organisations operating in the Northern Ireland context, taking as a case study the Committee on the Administration of Justice.

6.1 Basis for engagement

In the course of this study a number of different bases for engagement with abuses by armed groups have been examined. We should now reflect whether it would be suitable for the CAJ to engage with paramilitaries on any of those.

Within the chapter on human rights we examined different developments in international human rights law. We have seen that it is appropriate, both conceptually and legally, to (directly) apply human rights standards only to the relations between, on the one hand, governments or maybe groups having power similar to that of governments and, on the other those over whom the governments or groups exercise that power. We have also concluded that the notion of duties towards the community does not provide a solid basis for the determination of specific duties or obligations of armed opposition groups or indeed any non-state actor. The third possibility, to hold the state responsible for private actions is somewhat outside the initial focus of our study. While it might be a useful tool to attack non-action by state agents or collusion between armed opposition groups and state officials and has indeed been used for that purpose

³⁴⁸ *Ibid.*

by the CAJ,³⁴⁹ it is not going to remedy wrong public perceptions of impartiality and is more likely to change governmental behaviour than that of any armed group.

There remains one last basis of engagement discussed within the chapter on human rights: crimes under international law. While not in a legal sense addressing human rights abuses, this legal concept protects human rights by holding individuals responsible for some of the worst crimes known to mankind - which reflect some of the most severe infringements of human rights. Having been off the international agenda for decades due to the Cold War, the concept re-emerged with the establishment of the war tribunals for the former Yugoslavia and Rwanda. With the establishment of the International Criminal Court it will become a realistic option for holding any individual, whether state official, private individual or member of an armed opposition group accountable for the crimes enumerated in the Rome statute of the court. However, war crimes will be punishable only in situations of armed conflict, bringing us back to the problem of thresholds of applicability and making them, as discussed earlier, inapplicable to the present situation in Northern Ireland. Crimes against humanity and genocide will always be punishable, in peacetime and wartime. Once the Rome statute enters into force and is ratified by the government of the United Kingdom, any such crimes committed in Northern Ireland, or indeed anywhere in the United Kingdom from then on, will be punishable not only nationally, but also internationally. However, due to the limitation of crimes under the SICC to the most serious of crimes these provisions will only be applicable in extreme cases and whether any crime committed does indeed amount to one of the crimes spelled out above will require careful consideration in every single instance. It has been noted before that the primary responsibility to deal with such crimes will rest with the national administration of justice.³⁵⁰

With respect to international humanitarian law we have seen that its very fundamental notion of a distinction between civilians and combatants, the latter generally being legitimate targets, is highly problematic generally in low intensity conflicts as Northern Ireland and for a organisation committed to non-violence in particular. Also, its applicability in the Northern Ireland context is, at least, highly disputable. The impact of such interventions is as we have seen earlier, difficult to measure. It seems to have been very limited as to the "military" activities though. Regarding punishment attacks the publicity created by international human rights organisations and local organisations together with the public pressure created through the peace process seems likely to have had some impact as to pave the

³⁴⁹ A recent case the CAJ brought before the European Court of Human Rights is concerned with the killing of Patrick Shanahan. He was murdered by Loyalist paramilitaries, but there are strong indications of possible state collusion in the killing. The case was declared admissible by the Court in April 2000 and has been discussed on its merits. Judgement is awaited.

³⁵⁰ Article 17 (1) (a) SICC.

way for projects directly engaging with paramilitaries and providing alternatives to such attacks.

Also, to intervene in a way that would be seen as being impartial might be more difficult for a local organisation. As a Republican spokesperson notes with regard to Amnesty International's shift of policy towards armed opposition groups: *"I suppose we would have been more suspicious if it had been a local group, you know they would be more open to the charge of coming at it from an anti-Republican or a propagandist position."*³⁵¹ This suggests that at least in Northern Ireland paramilitaries may, if at all, be more willing to accept the intervention of larger international human rights organisations, but would be more suspicious of local organisations.

The possible elaboration of fundamental standards of humanity certainly is a very significant development. In particular, such standards would avoid debates about thresholds of applicability, derogation and the lack of accountability of non-state actors. It is difficult to imagine though how such standards could solve the problem of legitimate targets outlined above; and the application of any such notion is neither likely to help the CAJ with problems in its public perception nor is it acceptable for a non-violent organisation. However, not to preclude the further developments in this debate it will be worth to rather closely follow it over the next years.

The application of national criminal law in reporting on paramilitary abuses is generally unproblematic; but, while it might sometimes be useful regarding public appearance, for human rights organisations to rely on such norms is not likely to have any impact on paramilitary or indeed make any valuable contribution to the enjoyment of human rights. Human rights organisations should rather monitor the fair and just application of the law.

It has been suggested that morality as a basis of intervention is likely to be successful only where "moraliser" and offender share common moral values. CAJ strongly opposes and condemns political violence whatever its justification, paramilitaries in Northern Ireland have long considered them as a legitimate means of influencing decisions; CAJ does not take a stance on constitutional issues, both sets of paramilitaries have very strong if conflicting views on this question. A CAJ intervention based on morality is unlikely to be successful.

The very indirect process of engaging in paramilitary abuses through the development of a human rights culture that renders such behaviour more and more unacceptable is obviously no process that, as humanitarian crisis intervention sometimes can, provide solutions overnight. To change the attitude of people generally is a slow process requiring a lot of patience. It has been argued that the CAJ together with other organisations has come quite some way already and indeed the degree to which people make use of a "rights" language in Northern

³⁵¹ Interview Kieran McEvoy with Republican spokesperson, 1 July 1999, in: K. McEvoy, p. 40.

Ireland seems quite remarkable. However, seeing the persisting level of human rights violations and abuses, Northern Ireland still has some way to go. Recognising that the strength of human rights lies in building up the attitudes of the people it seems worthwhile though to press ahead with the promotion of a human rights culture and - as far as limited resources allow - to even broaden the work as to engage people that have not yet come in closer contact with the idea of human rights.

6.2 Effective work and structures

The organisations most effective addressing abuses by paramilitaries in Northern Ireland have been humanitarian groups and restorative justice projects, both Loyalist and Republican. Other groups influencing the wider setting of society in Northern Ireland have been mediation and reconciliation groups. All of these groups work very differently from human rights groups and therefore have developed distinct structures and working mechanisms. While this kind of work is extremely important, it is suggested that rather than trying to solve the immense diversity of problems in a divided society within one organisation, it is useful to split up work so as to allow for different bodies to most effectively adjust their working structure to their remit. Indeed, it seems that CAJ might have its part to play where the state in co-operation with community groups makes use of *e.g.* mediation or restorative justice as to ensure the protection of rights of the different parties involved in such processes.

CAJ with its focus on the development of a culture of human rights and their protection has made an important contribution to the improvement of human rights protection in Northern Ireland. However, it might be both helpful and necessary in this context to acknowledge the limitations of the human rights paradigm. In situations of internal violence there is sometimes a tendency to conflate human rights with conflict resolution. While human rights abuses are often at the heart of violent conflicts or at least add to them, and creating a just and fair society that protects the rights of all its citizens is an intrinsic part of peace-building, it would be wrong to overstate at least the short term peace-making potential of the human rights framework.

Also, human rights work generally is not without its risks. The murders of the human rights lawyers Patrick Finucane and only recently Rosemary Nelson are only too sad reminders of the fact that this is not any different in Northern Ireland. In particular local organisations deciding to engage with paramilitary abuses would therefore at least have to examine how to minimise possible risks for staff members and activists of the organisation.

6.3 Resource aspects

For a small organisation as the CAJ the effort to develop humanitarian expertise would inevitably divert energy and attention from work they do holding government accountable. In Northern Ireland there are already "numerous organisations who say it is their task to call the paramilitaries to account - the British government, the RUC, the British Army, dozens of politicians, interest groups and churches etc."³⁵² Indeed, due to its limited resources CAJ's engagement in any issue seems appropriate only if other organisations are not dealing with the issue already or, where there are, if there is a special contribution the CAJ can make with its engagement. Even then, the organisation needs to prioritise due to the vast work load. Also, if one choose to engage with paramilitary abuses one would need to consider whether that would not imply a need to work on abuses by other non-state actors as well; this would lead to extreme stretching of resources.

6.4 Public perception

CAJ's present position of condemning paramilitary abuses, but not actively working on them is likely to attract some criticism also in the future. There can be different reasons for such criticism.

One reason can be a lack of knowledge; either generally about CAJ's opposition to political violence or why CAJ is not actually directly engaging with such behaviour. As far as criticism is based on a lack of knowledge and there is a willingness for discussion it should be possible to defuse criticism by pointing out legal and practical problems. Also, it should be made clear that CAJ's position is in fact more far reaching than any approach that could be based on human rights or humanitarian law. While human rights law is generally silent on paramilitary behaviour, humanitarian law allows for the killing of combatants. CAJ in contrast is clearly opposed to and expressly condemns any form of political violence. It is suggested that this should be pointed out more publicly and that CAJ should not be defensive as to its position on paramilitary abuses. A way of pointing out this position would be a CAJ position paper on the issue outlining the reasoning of the position. Such a paper and possibly some further information could be made available at the office and *e.g.* also through the CAJ website.

Other criticism, based on a general rejection of any human rights agenda, will be harder to deal with. If criticism is really only about political point scoring and there is no willingness for any constructive debate it will only be of limited success to patiently explain the position and its background. But then, looking at the publicity international human rights organisations have received for their monitoring of paramilitary abuses in Northern Ireland it seems that at least an intervention on the basis of international humanitarian law with its notion of

³⁵² Letter to CAJ Chair in context of CAJ general meeting about possible change of remit, 5 November 1991, on file with author.

legitimate targets is certainly not going to help that perception. Anybody seeing human rights as another tool of Republican propaganda, will rather feel reassured in their dismissive perspective if the killing of civilians, more often by Loyalists, is strongly condemned, but killings of members of security forces committed by Republicans are not objected to.

7 Conclusions

This paper cannot and did not claim to provide a general solution to the question of engagement with armed opposition groups; for every human rights group and situation. Conflict situations world-wide are just too diverse and so are the different violent groups involved as well as the wide range of NGOs' trying to stop the suffering of people. It might well be that in situations of open civil war humanitarian law provides invaluable guidelines as how to best limit human suffering. NGOs concerned with the protection of asylum seekers might well need to establish human rights abuses by non-state actors, so-called agents of persecution, as to establish reasons for persecution.

Not providing a general solution to the question of engagement this paper does intend to point out important aspects that human rights organisations should take into account when deciding whether to engage with armed groups. In addition, it tried to provide necessary information and analysis regarding the situation in Northern Ireland to allow for the determination of any future stance on paramilitary abuses in that context.

7.1 Position on abuses by paramilitaries in Northern Ireland

If we try to summarise some of the main conclusions we will find that there is currently no legal basis in international law on which in the context of the Northern Irish situation a human rights organisation could easily engage with paramilitary abuses. The two concepts that seem most suitable for this context are fundamental standards of humanity and crimes under international law. The latter concept will really become relevant once the Statute of the International Criminal Court is applicable to Northern Ireland. However, it will only cover crimes reflecting the very gravest infringements on human rights and therefore be applicable only in very exceptional circumstances. Fundamental standards of humanity would at least solve the main legal problems with respect of holding armed opposition groups accountable in situations of internal violence. It might not

solve some of the "political" problems around a notion of legitimate targets. However, it will certainly be worthwhile to follow the international debate around the wider issue.

Turning to the likely success of any engagement we have seen that the organisations that are currently dealing in different ways, but most successfully with paramilitary abuses are organisations engaging on a humanitarian basis, entering in a direct dialogue with victims, communities and paramilitaries, working on a confidential basis. This work is extremely important, but for human rights organisations to engage in similar work would in fact mean to create a separate organisation within the organisation; certainly CAJ's current structures and working mechanisms are just too different from these organisations. In addition, the contribution human rights organisations as the CAJ's make to the protection of human rights, their work to create a human rights culture in Northern Ireland, are too important as to allow for a dramatic re-allocation of financial, personnel and other resources.

Finally, regarding public perception it has been argued that human rights organisations will always get some blame; whether or not they engage with paramilitaries and on whatever international legal basis. Where the reason for criticism really is political point scoring the dismissal of not intervening is just as handy as the criticism that reporting on abuses would not be far reaching enough, not involve all abuses or victims and additionally provide legitimacy to "terrorists".

For these considerations I suggest that CAJ's present position of working to establish a human rights culture, but not directly to engage with paramilitaries, is most appropriate for a human rights organisation in the Northern Ireland situation. Moreover, the conceptual and legal problems of applying international human rights law against armed groups are of a general nature and independent of any particular situation. Also, the difficulties faced in Northern Ireland when using international humanitarian law as a basis of intervention will be similar in other low intensity conflicts.

This is not to suggest that any different stance would be totally inappropriate in the Northern Ireland context; without having examined it more closely it might well be that an international human rights NGO having to strike the balance between finding the most appropriate form of engagement in many different situations and the need to have a coherent policy towards armed opposition groups will conclude that the latter is more important even if it leads to difficult conclusions in some instances. However, in the Northern Ireland context there does not seem to be a sensible way of engagement with paramilitary abuses for a human rights organisation that is likely to have a significant positive impact on paramilitary behaviour or at least to solve the problem of possible criticism for non-engagement. For CAJ some of the criticism, based on a lack of knowledge and understanding, seems to be avoidable through a more public and assertive explanation of its position; a position paper outlining and explaining CAJ's policy on the issue should therefore be drafted and be made publicly available. A way to do this easily would be, for example, through the website of the organisation.

7.2 General observations

In the section on international human rights law and its applicability on armed opposition groups it has been observed that legally only states are bound by human rights law and that this makes indeed sense conceptually. Human rights law should therefore be applied to governments and bodies with government-like power only. If human rights law be allowed to include armed opposition groups where would one draw the line to organised crime structures, companies involved in corruption or other illegal conduct, maybe businesses generally, also churches and other organisations, even individuals. By doing this the concept of human rights would lose any distinct notion and human rights work would lose its particular focus. While abuses by non-state actors clearly need to be addressed for human rights organisations to do so in addition to their work must almost inevitable overburden themselves and their limited resources.

But, while there should be a clear distinction as to other groups that does not mean they should not be burdened with any responsibility. Indeed, responsibility should correspond roughly to an actor's influence and proximity to human rights abuses. One recent development acknowledging this is the establishment of the International Criminal Court, another is the debate about fundamental standards of humanity. However, there is still a long way to go to make armed opposition groups and other non-state actors more accountable. Human rights are not just about restricting state power, but primarily about protecting human freedoms and dignity. If they are, as they are, more and more endangered by non-state actors concepts have to be developed to counter this development. Whether this should actually take the form of treaty obligations signed up to by different non-state actors or what other forms are likely to provide the best protection for the enjoyment of human rights has still to be determined.

Regarding situations of internal violence we have seen that the legal regime as it is applied today does not provide adequate protection to the civilian population. Current discussions about ways to close this gap between the protection offered by human rights and humanitarian law therefore are highly welcome and although the precise outcome of the debate is still very much uncertain it will hopefully provide a promising way forward.

However, at the same time that we are working to limit human suffering in situations of violence we have to work for peace, the only condition under which we can ever achieve the full enjoyment of fundamental human rights and freedoms for all people.

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