

June 2010

**PRECISION-GUIDED
OR INDISCRIMINATE?**

**NGO Reporting on Compliance with
the Laws of Armed Conflict**

ASHER FREDMAN



Jerusalem Center for Public Affairs
המרכז הירושלמי לענייני ציבור ומדינה

NGO MONITOR

Gerald M. Steinberg, Editor
NGO Monitor Monograph Series

Executive Summary

International human rights NGOs play an increasingly influential role in shaping the policies of states and international institutions. Directly through consultations and lobbying and indirectly through public advocacy and media campaigns, NGOs publicize their analyses and promote their policy recommendations. One area in which NGOs such as Amnesty International (AI) and Human Rights Watch (HRW) have been particularly active is in evaluating compliance with the Laws of Armed Conflict (LOAC) by parties to hostilities.

While scholars have dedicated attention to questions of NGO formation, activity, and impact on the international system (see Keck and Sikkink, 1998; Welch, 2001; Mathews, 1997), there has been relatively little critical evaluation of the factual and legal claims in NGO reports. It appears that the positive values associated with the promotion of human rights tend to engender positive and uncritical treatment of the NGOs' substantive claims. This monograph aims to take a first step toward adding a critical perspective.

The case selected for analysis is NGO reporting regarding the 2008-2009 conflict in Gaza and Southern Israel. Few other conflicts have generated as much NGO activity or public interest relating to LOAC. The study focuses on the information disseminated by two of the largest and most influential human rights NGOs, Amnesty International and Human Rights Watch. Their claims and conclusions are considered in light of the academic literature on LOAC, military sources, and state declarations and practice.

It is shown that the NGOs'ⁱ descriptions of the means and methods of warfare contain numerous unwarranted assertions and unsubstantiated claims. In other cases, the NGOs present unrealistic depictions of the nature of modern combat, leading them to problematic evaluations of Israeli actions. It appears that these result at least in part from a lack of expertise in relevant areas.

From the legal perspective, it will be argued that the NGOs' presentation of several key LOAC principles is inaccurate or incomplete. In other instances, AI and HRW present controversial interpretations of LOAC treaties as widely accepted customary law. This suggests that the NGOs may be engaged in "standard setting"ⁱⁱ rather than in objective evaluations.

Outline

Following the introduction, Section 2 discusses the growing role of NGOs in shaping the policies of more powerful actors such as states and international institutions. Section 3 presents the framework for an analysis of AI and HRW's claims regarding Israel's LOAC compliance.

Sections 4 and 5 present two case studies of NGO reporting. Each focuses on a topic that drew significant attention during and following the Gaza fighting: Israel's use of white phosphorus (WP) munitions and its use of unmanned aerial vehicles (UAVs). In each case, LOAC concepts and standards necessary for evaluating Israel's actions are explored, and the NGOs' claims and arguments are analyzed.

Section 4 examines the primary NGO assertions regarding Israel's use of WP: That Israel a) violated the LOAC requirement to take all feasible precautions to minimize civilian harm; b) violated the prohibition on indiscriminate attacks; and c) violated the proportionality requirement.

Among the findings are that:

- LOAC, as reflected in state declarations and practice, recognizes the right of a commander to consider military needs, particularly force protection, when evaluating what actions and precautions are feasible in a given situation.
- HRW's claim that Israel could feasibly have used a different type of smoke obscurant to the same

ⁱ Unless otherwise indicated, all references to "the NGOs" in this monograph refer to AI and HRW.

ⁱⁱ C. E. Welch (2001) uses the term "standard setting" to describe NGO involvement in the creation of human rights instruments. Here the term is expanded to include efforts to determine how those instruments should be interpreted.

effect as WP is contradicted on several counts by military sources and weapons experts.

- AI and HRW's arguments regarding the feasibility of using other means and methods to deliver WP are unsubstantiated and based upon information unavailable to the NGOs. Suggested alternatives may, in fact, have posed a greater danger to civilians.
- Contrary to the claim that Israel's use of WP was indiscriminate and hence unlawful per se, its use was "directed at a specific military objective" and therefore lawful under LOAC.

Section 5 examines the primary NGO arguments regarding Israel's use of UAVs: That Israel a) failed to take feasible steps to verify the status and nature of intended targets; and b) failed to distinguish between military and civilian persons and objects, or intentionally targeted civilians.

Among the findings are that:

- The evidence AI and HRW present to establish their claims regarding the weapons platforms and munitions allegedly used is rendered questionable by military and defense industry sources. In a number of instances, the witness testimony relied upon heavily by the NGOs is contradicted by widely published media reports or the NGOs themselves.
- AI and HRW present an unrealistic depiction of the factors influencing targeting decisions on the modern battlefield. They fall prey to the "allure of precision" that leads "those beyond the battlefield [to] impose unreasonable demands on the military or postulate norms that go beyond treaty or custom" (Schmitt, 2004, p. 466).
- Israeli actions are judged based on hindsight, in contrast to LOAC standards as affirmed by the declarations of 13 countries when ratifying Additional Protocol I to the Geneva Conventions.
- The NGOs misrepresent LOAC definitions of legitimate military objectives. On the basis of this misrepresentation, they presume the absence of

legitimate military objectives in the vicinity of a strike.

- Once presuming the absence of legitimate military objectives, the NGOs assume that civilians injured in a strike were deliberately targeted. This allows them to ignore LOAC's recognition of the possibility and lawfulness of proportional collateral damage in attacks on military objectives.

The findings of this study indicate that at least in their reporting on the Israeli-Palestinian conflict, AI and HRW's reports contain many factual inaccuracies and problematic presentations of international law. It is therefore suggested that AI and HRW, as well as other NGOs dealing with similar issues, carefully evaluate their areas of competency, and ensure that factual and legal assertions are made with the proper degree of expertise. It is further suggested that the NGOs take steps to maintain standards of objectivity and ensure that ideological predilections do not color their analyses. When claiming to evaluate the lawfulness of a party's actions, the NGOs must not conflate *lex lata* (the law as it exists) with their preferred *lex ferenda* (what the law should be).

Policy-makers, diplomats, and journalists should more carefully scrutinize NGO-generated information. Subjecting NGO reports and statements to careful analysis will help ensure that these documents are produced at the highest standards. This would enable NGOs such as AI and HRW to most effectively fulfill their mission of promoting and protecting human rights.

REFERENCES

- Keck, M. E., & Sikkink, K. (1998). *Activists beyond borders: Advocacy networks in international politics*. Ithaca, NY: Cornell University Press.
- Mathews, J. (1997). Power shift. *Foreign Affairs*, 76(1), 50-66.
- Schmitt, M. N. (2005). Precision attack and international humanitarian law. *International Review of the Red Cross*, 859, 445-466.
- Welch Jr., C. E. (2001). *Introduction*. In C.E. Welch Jr. (Ed.), *NGOs and Human Rights: Promise and Performance* (pp. 1-24). Philadelphia, PA: University of Pennsylvania Press.

NGO Monitor Monograph Series:

- Precision-Guided or Indiscriminate? NGO Reporting on Compliance with the Laws of Armed Conflict* (June 2010)
Scandinavian NGO Funding: Promoting Boycotts, "Lawfare," and the Rhetoric of Conflict (March 2010)
Experts or Ideologues? A Systematic Analysis of Human Rights Watch's Focus on Israel (September 2009)
Trojan Horse: The Impact of European Government Funding for Israeli NGOs (Hebrew, September 2009)
The NGO Front in the Gaza War: The Durban Strategy Continues (February 2009)
NGO "Lawfare": Exploitation of Courts in the Arab-Israeli Conflict (September 2008, revised 2nd edition, June 2010)
Europe's Hidden Hand (April 2008; revised 2nd edition, March 2009)

Jerusalem Center Programs:

- Global Law Forum - (www.globallawforum.org)*
Iran and the New Threats to the West
Defensible Borders Initiative
Institute for Contemporary Affairs (ICA)
Anti-Semitism After the Holocaust Global Terrorism
Jerusalem in International Diplomacy
New Models for Economic Growth in Israel

NGO MONITOR

Making NGOs Accountable

1 Ben-Maimon Blvd.
Jerusalem 92262 Israel
Phone: 972-2-566-1020
Fax: 972-77-511-7030
mail@ngo-monitor.org
www.ngo-monitor.org

NGO Monitor's mission is to provide information and analysis, promote accountability, and support discussion on the reports and activities of NGOs claiming to advance human rights and humanitarian agendas in the framework of the Arab-Israeli conflict. NGO Monitor is a project of the Amutah for NGO Responsibility (R.A. 580465508).

NGO Monitor was founded jointly with the Wechsler Family Foundation.



Jerusalem Center for Public Affairs
המרכז הירושלמי לענייני ציבור ומדינה

13 Tel Hai St
Jerusalem 92107 Israel
Phone: 972-2-5619281
Fax: 972-2-5619112
jcpa@netvision.net.il
English: www.jcpa.org
Hebrew: www.jcpa.org.il
French: www.jcpa-lecape.org
German: www.jer-zentrum.org

The Jerusalem Center for Public Affairs is a leading independent research institute specializing in public diplomacy and foreign policy. Founded in 1976, the Center has produced hundreds of studies and initiatives by leading experts on a wide range of strategic topics. Dr. Dore Gold, Israel's former ambassador to the UN, has headed the Jerusalem Center since 2000.