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Precision-Guided or Indiscriminate?

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

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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).

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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 NGOsⁱ 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.

Abstract

This article analyzes NGO reporting on compliance with the Laws of Armed Conflict (LOAC) by parties to hostilities. Although such reporting increasingly influences the policies of states and international actors, factual and legal claims made by international human rights NGOs have been subject to relatively little critical evaluation in the academic literature. The case selected for analysis is the 2008-2009 conflict in Gaza and Southern Israel, with a focus on reporting by Amnesty International (AI) and Human Rights Watch (HRW). The author argues that on the factual level, AI and HRW's depictions of the means and methods of warfare contain numerous unwarranted or unsubstantiated assertions, often contradicted by military sources. From the legal perspective, the author argues that AI and HRW's presentation of LOAC is in some cases inaccurate or incomplete; in others, the NGOs present controversial interpretations of LOAC treaties as widely accepted customary law. This therefore suggests that NGOs should carefully evaluate their areas of competency, take steps to ensure that ideological predispositions do not color their analyses, and avoid conflating *lex lata* with *lex ferenda*. Policy-makers, diplomats and others who rely on NGO-generated information should not allow the positive values associated with the promotion of human rights to preclude critical evaluation of the substantive claims made by the NGOs.

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Introduction

International non-governmental organizations (NGOs) have been at the forefront of efforts to make human rights a central factor in the foreign relations and domestic policies of Western governments. Policy-makers, media, and the public, who often lack the resources or expertise to learn the details of human rights issues, turn to NGOs for information and guidance. Directly through advocacy and consultations, and indirectly through press releases and member activism, human rights NGOs are playing a growing role in the policy decisions of national governments and international organizations.

One area in which large international human rights NGOs such as Amnesty International (AI) and Human Rights Watch (HRW) have been especially active is in monitoring adherence to the Laws of Armed Conflict (LOAC) during hostilities, often in tandem with local NGOs. Yet despite the growing importance of information generated by NGOs regarding the behavior of parties to conflicts, the content of NGO reports has been subject to relatively little scrutiny. It appears that the positive values associated with the mission to promote human rights, along with the idiom of international law, have a tendency to engender positive and uncritical judgments regarding the substantive claims made in these reports.

Given the growing impact of NGO activities, which can affect the security and standing of states, and criminal prosecutions against individuals, it is critical that careful analyses be undertaken of their reporting and claims.

Given the growing impact of NGO activities, which can affect the security and standing of states, and criminal prosecutions against individuals, it is critical that careful analyses be undertaken of their reporting and claims. Scholars have, to a large degree, ignored this path of inquiry, dedicating their attention instead to questions of NGO formation, activity, and impact on the international system (Keck and Sikkink, 1998; Welch, 2001; Mathews, 1997). This monograph will focus on the factual and legal claims made in NGO reports. Taking into consideration the vast scope of this topic, this work will focus on NGO reporting and campaigning regarding violations of LOAC in conflicts between Israel and its neighbors. Few other conflicts have generated as much NGO reporting or public interest relating to LOAC. The analysis will concentrate primarily on NGO activity surrounding the 2008-2009 conflict in the Gaza Strip and southern Israel. NGO reporting and advocacy regarding this conflict was particularly intense, and played a major role in significant international developments, including the

establishment of the Goldstone Commission and the 2009 British decision to revoke arms export licenses to Israel. Finally, this monograph will focus on the work of Amnesty International and Human Rights Watch. These are two of the largest and most influential international human rights NGOs, and their methods and products often complement one another.¹

It will be argued that in the case of their reporting on Israel, AI and HRW's claims regarding compliance with LOAC are problematic from both factual and legal perspectives. On the factual level, it will be shown that their descriptions of the means and

Modern warfare has only made General William Tecumseh Sherman's declaration that "war is hell" all the more true. However, true descriptions of the horrors inherent in all warfare should not be confused with evidence of unlawful behavior or war crimes.

Outline

Section 2 will discuss the growing role of NGOs in shaping the policies of more powerful actors such as states and international institutions. Given their influence, there is a pressing need to examine carefully the content of

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methods of warfare contain numerous unwarranted assertions and unsubstantiated claims. It is suggested that these result at least in part from a lack of expertise in relevant areas.

From the legal perspective, it will be argued that in a number of the instances analyzed, the NGOs'² presentation of LOAC is inaccurate or incomplete. In other cases, AI and HRW present controversial interpretations of LOAC treaties as widely accepted customary law.³ The analysis therefore suggests that it is necessary to subject the content of NGO reports to more careful scrutiny before allowing them to influence important policy decisions.

their claims. Section 3 presents the framework for an analysis of AI and HRW's claims regarding Israel's LOAC compliance. Sections 4 and 5 undertake critical analyses of AI and HRW's output regarding two subjects that featured prominently in their reports and statements on the 2008-2009 Gaza fighting (also known as Operation Cast Lead). Section 4 focuses on NGO claims surrounding Israel's allegedly unlawful use of white phosphorus (WP) and Section 5 on arguments relating to Israel's allegedly unlawful use of unmanned aerial vehicles (UAVs). The problematic nature of the reports from both factual and legal perspectives is demonstrated. In the conclusion, implications of this analysis for both human rights NGOs and policy-makers are noted.

¹ For example, while AI was the most influential NGO in the campaign to stop British arms sales to Israel following the Gaza fighting, HRW performed much of the detailed research underlying a number of AI's claims. This is not to suggest that the two organizations are formally working in concert, but simply that their products in a number of cases have a complementary character.

² Unless otherwise indicated, all references to "the NGOs" in this monograph refer to AI and HRW.

³ Of course, there are many debates as to what LOAC, both that deriving from treaty and from customary law, demands. Customary international law, however, requires a fairly high degree of consensus among practitioners in order to be considered binding, whatever the exact threshold may be (Dinstein, 2004; British FCO, 2009).

Human Rights NGOs and the Laws of Armed Conflict

In parallel to their increase in numbers and size, the influence of international human rights NGOs on the policy decisions of more powerful actors has grown as well.⁴ Keck and Sikkink (1998) have described the “boomerang effect” through which international NGOs, together with local groups, pressure unresponsive regimes engaged in human rights violations. The international NGOs engage in a form of “leverage politics,” whereby they persuade their own or other sympathetic governments and international organizations to apply pressure on the offending government. This pressure may be material – by threats to cut off military or economic aid, for example – or moral, by publicly “shaming” the offender (Ibid.).

Mutua (2001) sums up human rights NGOs’ main activities succinctly as “investigation, reporting and advocacy” (p. 156). The full breadth of their activities is much wider.⁵ Welch (2001) notes that NGOs also engage in “standard setting,” by which they work with state actors and international organizations to formulate new rules or to promote a certain understanding of customary law, which they then often seek to have enshrined in treaties. While NGOs have been criticized for promoting “Western” values or for serving neo-imperialistic ends (Shivji, 2007; Mutua, 2001; Nunnenkamp, 2008), and while the “democratic deficit” affecting these organizations has been noted (Upadhyay, 2003), there has been relatively little criticism

of the assumption that NGO research reports themselves are accurate and reflect a high degree of expertise.

Human rights NGOs have been very active in the development of, and in monitoring adherence to, LOAC, also referred to as international humanitarian law (IHL).⁶ LOAC is, in the words of Garraway (n.d., p. 2), based on “the balance between military necessity and humanitarian interests.” The two most important sources of LOAC are treaty law and customary international law (CIL). Prominent LOAC treaties include the Hague Conventions of 1899 and 1907, the four Geneva Conventions of 1949, and the two Additional Protocols to the Geneva Conventions, completed in 1977. As phrased in a Note from the British Foreign and Commonwealth Office (2009), CIL is comprised of rules “which have been created by widespread state practice coupled with a belief on the part of the State concerned that it has the right to act or is obliged to act in a certain way under international law.”

NGOs seek to monitor the means and methods used in armed conflicts, and to call attention to behavior that they claim does not accord with LOAC standards and principles. They call for other states and international players to act to change state behavior, to hold violators accountable, and to provide redress to victims. This is part of their wider efforts to regulate warfare, which include campaigns to ban different types of weapons,⁷ to establish a Global Arms Trade Treaty,⁸ and to promote the development of

⁴ For example, T. C. Van Boven, former director of the UN Division of Human Rights, estimated that 85% of the information used by that body came from NGOs (cited in Keck and Sikkink, 1998, p. 96).

⁵ H. Scoble identified six major types of NGO activities: information gathering, evaluation and dissemination; advocacy; humanitarian relief and/or legal aid to victims and families; building solidarity among the oppressed, and internationalizing the legitimating local concerns; moral condemnation and praise; and lobbying national and intergovernmental authorities (cited in Welch, 2001, pp. 9-10).

⁶ Dinstein (2004) has pointed out the potential obfuscating effects of the latter term. He explains, “The coinage IHL is liable to create the false impression that all the rules governing hostilities are – and have to be – truly humanitarian in nature, whereas in fact not a few of them reflect the countervailing constraints of military necessity” (p. 13).

⁷ For example, AI and HRW are leading members of the Cluster Munitions Coalition, which is orchestrating a campaign to ban the use of cluster bombs.

⁸ AI, along with Oxfam International and the International Action Network on Small Arms, runs the Control Arms campaign, which seeks to lay the groundwork for a Global Arms Trade Treaty.

international criminal law and enforcement mechanisms to prosecute suspected war criminals (Roth, 2001; AI, “Universal Jurisdiction,” Dec. 2001; Herzberg, 2008).

One area that has received much attention regarding adherence to LOAC has been the recent conflicts between Israel and various armed groups.⁹ There is some debate over the proportion of NGO attention dedicated to Israel, but there is no denying that the output by NGOs in this area has been voluminous. HRW’s chairman emeritus Robert Bernstein (2009), speaking of his own organization, stated that “in recent years Human Rights Watch has written far more condemnations of Israel for violations of international law than of any other country in the region.”¹⁰

While the reports and statements usually take care to criticize both Israel and its adversaries for unlawful behavior, the significant majority of space and wordage is dedicated to descriptions of alleged Israeli violations. A simple page count shows that in Amnesty’s (July 2009) 106-page (not including endnotes) report on the Gaza fighting, entitled “Operation ‘Cast Lead’: 22 Days of Death and Destruction,”¹¹ 60 pages are dedicated solely to descriptions of allegedly illegal aspects of Israeli actions, while 10 are dedicated to allegedly illegal aspects of Palestinian militant activities.¹² HRW released three major reports criticizing Israeli actions during Cast Lead, totaling 173 pages,¹³ while issuing one report critical of

Hamas’ attacks against Israel, totaling 31 pages¹⁴ (HRW also issued a 26-page report on Hamas killings of fellow Palestinians during the Gaza fighting).¹⁵ Mandel (2009), in her analysis of HRW’s Middle East reporting in the period from 2004-2008, concludes, “Israel consistently constitutes a higher research priority for HRW than any other country in the Middle East” (p. 44).

⁹ Including Hezbollah, Hamas, and Palestinian groups aligned with Fatah.

¹⁰ And see HRW’s response, “Why we report on ‘Open Societies.’” Available at <http://www.hrw.org/en/news/2009/10/20/why-we-report-open-societies>.

¹¹ Published 2009. All references to AI in this paper refer to “22 Days of Death and Destruction” unless otherwise specified.

¹² I have included in the count of space dedicated to condemning Palestinian actions Section 4.1 (Conduct of Palestinian armed groups) and Section 4.2.1 (Rocket launching, fighting and weapons storage in residential areas). I have not included Section 4.2.3 (Responsibility for the safety of Gaza’s civilian population), as approximately 90% of that section is devoted to explaining why Hamas *cannot* be held fully responsible.

¹³ Human Rights Watch, “Rain of Fire: Israel’s Unlawful Use of White Phosphorus in Gaza,” March 2009, 79 pages; HRW, “Precisely Wrong: Gaza Civilians Killed by Israeli Drone Launched Missiles,” June 2009, 39 pages; HRW, “White Flag Deaths: Killing of Palestinian Civilians during Operation Cast Lead,” August 2009, 63 pages.

¹⁴ HRW, “Rockets from Gaza: Harm to Civilians from Palestinian Armed Groups Rocket Attacks,” August 2009.

¹⁵ HRW, “Under Cover of War: Hamas Political Violence in Gaza,” April 2009.

AI and HRW's Claims of Israeli LOAC Violations: The Framework

P

NGO “Outsourcing”

oliticians, pundits, and even officials in international institutions are rarely international law experts. They therefore rely on NGOs such as AI and HRW to provide them with the underlying content for their statements. This can be conceived of as a type of “outsourcing,” whereby it is more efficient in terms of time and resources for decision- and opinion-makers to rely on raw data and interpretations supplied by NGOs. NGOs are willing and eager to provide this “service,” and at a low cost to the outsourcer. Given the many claims on their resources, and initial impressions derived from media and NGO reporting, decision-makers often have little time or inclination to subject the information they receive to critical examination.

However, as with every outsourcing operation, there must be a mechanism for quality control. This is especially true where the “service” is as complex as evaluating compliance with LOAC, and where the consequences can affect the security of states and the prosecution of individuals.

NGO Methodology for Establishing Claims of Israeli LOAC Violations

In generating claims of Israeli wrongdoing, AI and HRW generally take three steps: 1) They present the “evidence” – cases, testimony, the results of investigations, etc.; 2) They summarize the alleged demands and standards of relevant bodies of law; and 3) They conclude whether particular actions violated the law, cataloguing them as simply “unlawful behavior” or as something more severe such as “war crimes.” In practice, the first steps are usually presented in such a way that there can be little doubt as to the outcome.

Using this methodology, the NGOs arrive at far-reaching conclusions. AI’s finds that “all available information indicates that Israeli forces often acted recklessly and launched deadly attacks against anyone who came within their sight” (p. 10) while HRW identifies (“Rain of Fire,” March 2009, p. 2) a “pattern or policy” of unlawful conduct by the Israel Defense Forces (IDF). The claims underlying these conclusions will be analyzed in this work.

However, there appear to be several instances where HRW and AI perform little, if any, factual or legal analysis. The Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia,¹⁶ after studying numerous NGO documents including those submitted by AI and HRW, noted critically that “much of the material submitted to the Office of the Prosecutor (OTP) consisted of reports that civilians had been killed, often inviting the conclusion to be drawn that crimes had therefore been committed” (Review Committee, 2000, para. 51). This is an accurate description of parts of AI and HRW’s reports relating to Gaza. They contain a number of tragic and at times graphic descriptions of civilian harm, which serve well to illustrate the horrors of modern warfare, but which obfuscate questions central to an evaluation of LOAC compliance.

Applicable Law in the Israeli Case

The core documents of LOAC are the Geneva Conventions of 1949 and their two Additional Protocols completed in 1977. Additional Protocols I and II (AP-I and AP-II), which deal with the laws of international and non-international armed conflicts respectively, give expression to the laws of targeting that lie “at the very core of the balance between military necessity and humanitarian interests on which international law is based” (Garraway, n.d., p. 2). These documents contain the most relevant

¹⁶ Established by the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia. “The Committee Established to Review the NATO Bombing Campaign” will henceforth be referred to as the “Review Committee.”

rules for determining whether Israel complied with LOAC. However, while Israel signed the Geneva Conventions, it is not a party to the Additional Protocols and is therefore not bound by their rules.

Nevertheless, many of the *principles* expressed in the Additional Protocols are generally considered to be part of CIL, and, like most CIL, they are binding on all parties to an armed conflict.¹⁷ In order to demonstrate that Israel failed to comply with LOAC, it must be shown that Israel either violated a provision of a treaty to which it is party or a principle actually established as CIL.¹⁸ It is not enough to rely upon a possible interpretation of the language in the Additional Protocols.

¹⁷ In the words of Garraway, “What has emerged is that the principles contained in Additional Protocol I are for the most part fully reflective of customary international law. This is not surprising but of course much of Additional Protocol I contains language that is at best vague and in some cases ambiguous” (p. 2).

¹⁸ It will therefore be unnecessary to decide whether the conflict in Gaza should be defined as international or non-international, at least insofar as the question of which of the two Additional Protocols applies.

Case 1: White Phosphorus



One aspect of the fighting in Gaza that received a great deal of NGO and media attention was Israel's use of white phosphorus. Prior to Cast Lead, neither AI nor HRW had seen reason to dedicate attention to WP, despite its use by militaries worldwide.¹⁹ In no case had either organization previously described its use as illegal when employed as a smoke obscurant.

However, once dramatic photographs of WP exploding over Gaza began appearing in the media, Israel's WP use became the subject of much attention and punditry.²⁰ AI dedicated significant sections to WP in all of its major reports on the Gaza fighting,²¹ while HRW on March 25, 2009 published a 71-page report entitled "Rain of Fire: Israel's Unlawful Use of White Phosphorus in Gaza."²²

The two most frequent charges leveled at Israel relating to WP were that its use in Gaza: a) violated the LOAC requirement to take all feasible precautions to minimize incidental civilian losses;²³ and b) violated the prohibition on indiscriminate attacks.²⁴ AI states that "although using WP as an obscurant is not forbidden under international humanitarian law, air-bursting WP artillery shells over densely populated areas of Gaza violated the requirement to take necessary precautions to protect civilians. The cases ... indicate that Israeli forces violated the prohibition on indiscriminate attack" (p. 31) and hence committed war crimes (AI, "Fueling Conflict," Feb. 2009, p. 10). HRW likewise argues that the use of WP "in densely

populated neighborhoods ... violated international humanitarian law (the laws of war), which requires taking all feasible precautions to avoid civilian harm and prohibits indiscriminate attacks" (p. 1). This "indicates the commission of war crimes" (Ibid.). Additionally, HRW

Prior to Cast Lead, neither AI nor HRW had seen reason to dedicate attention to WP, despite its use by militaries worldwide.¹⁹

claims that Israel's use of WP in some cases violated the prohibition on disproportionate attacks, and that the evidence "strongly suggests" that the substance was used unlawfully as an incendiary. These various claims will be addressed in turn.

Feasible Precautions in Attack

Article 57(2) of AP-I gives expression to the LOAC requirement to exercise precautions in attacks by taking all feasible steps to ensure that civilian objects are not directly attacked, and that incidental civilian loss ("collateral damage") is avoided or minimized. It states:

2. With respect to attacks, the following precautions shall be taken:
 - (a) those who plan or decide upon an attack shall:
 - (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are

¹⁹ A search of the documents available on the HRW website (<http://www.hrw.org>) shows that the substance did not receive a single mention before Cast Lead. A similar search of AI's website (<http://www.amnesty.org>) turns up a single sentence on the US's admission that it had used WP in an anti-personnel capacity in Fallujah, Iraq and one paragraph on its alleged use by Ethiopian troops against Somali militants. (Searches carried out in June 2010).

²⁰ Several high-profile incidents in which UN and medical facilities were damaged by fires apparently caused by WP further contributed to the amount of attention that the substance received.

²¹ See AI, "The Conflict in Gaza: A Briefing on Applicable Law, Investigations and Accountability," January 2009, pp. 20-21; "Fueling Conflict: Foreign Arms Supplies to Israel/Gaza," February 2009, pp. 9-11; "Operation 'Cast Lead': 22 Days of Death and Destruction," July 2009, pp. 27-36.

²² All references to HRW in Section 4 refer to "Rain of Fire" unless otherwise specified.

²³ Based primarily on Additional Protocol I, Art. 57(2). The Additional Protocols, as well as state declarations and reservations regarding them, can be found on the website of the International Committee of the Red Cross (ICRC), available at <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>.

²⁴ Based primarily on AP-I, Art. 51 (4-5).

military objectives within the meaning of paragraph 2 of Article 52²⁵ and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.²⁶

57(3) adds, “When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.”

The first step in evaluating the NGO claim that Israeli actions violated the feasibility standard is to examine the meaning of the term “feasible” under LOAC. What considerations may a commander take into account when deciding which of all theoretically possible options are feasible? It will be shown that LOAC recognizes the right of a commander to give significant weight to military considerations, particularly to force protection, when making this determination.

When signing AP-I, Britain declared that it understood “feasible” to mean that “which is practicable or practically possible, taking into account all circumstances at the time including those relevant to the success of military operations.”²⁷ At ratification, this was modified to “including humanitarian and military considerations.” British Defence Doctrine JWP 0-01, issued in 1996, clarifies the scope of the military considerations that may

be taken into account. A commander “is entitled to take into account factors such as his stocks of different weapons and likely future demands, the timeliness of attack and risks to his own forces” (as cited in Rogers, 2000). Belgium, upon ratifying AP-I, declared that the factors determining what type of precautions are feasible “include military considerations as much as humanitarian ones.” In fact, 10 countries (Algeria, Belgium, Canada, France, Germany, Ireland, Italy, the Netherlands, Spain, and the United Kingdom (UK)) made declarations to the effect that “feasible” means that which is practically possible given both military and humanitarian considerations.

For states not party to AP-I, the customary law standard regarding precautions in attack has not been well defined. It is “certainly not higher than the ‘do everything feasible’ standard imposed by Protocol I” (Rogers, 2000). The United States (US) Navy’s *Commander’s Handbook on the Law of Naval Operations* (2007) provides its own formulation of the feasibility standard, requiring commanders to “take all reasonable precautions, taking into account military and humanitarian considerations,

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to keep civilian casualties and damage to a minimum consistent with mission accomplishment and the security of the force” (para. 8.1.2.1). It is therefore clear that both AP-I and customary law allow commanders to take into account military needs, along with humanitarian considerations, when evaluating the means and methods feasible in a given situation.

The military consideration most often at play in the decision to deploy smoke obscurants is force protection. This tactic serves to obscure troops, disrupt enemy lines

²⁵ Para. 2 of Art. 52 reads, “Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

²⁶ Sub-article iii reiterates the rule of proportionality in terms of precautions that must be taken when planning an attack. The rule is first presented in Art. 51(5)(b), as a type of (prohibited) indiscriminate attack.

²⁷ Quoted in J. Gaudreau, “The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims,” *International Review of the Red Cross*, No. 849, March 2003, p. 156.

of sight, and, depending on the substance, block enemy tracking systems. Force protection is recognized in LOAC as a military consideration of prime importance. Australia declared, when ratifying AP-I, “that the term ‘military advantage’ involves a variety of considerations including the security of attacking forces.” New Zealand made an identical declaration. As quoted above, UK and US defense doctrines state that a commander should take into account “risks to his own forces” and “the security of the force” when weighing courses of action. The UK and France both presented reservations to AP-I expressing their intention to apply the rule granting a presumption of civilian status in cases of doubt (AP-I, Article 52(3)), “only in cases of substantial doubt still remaining after the assessment referred to ... above has been made, and not as overriding a commander’s duty to protect the safety of troops under his command ...”²⁸ In their commentary on AP-I, Boethe, Partsch, and Solf (1982) conclude, “The concept of military advantage involves a variety of considerations including the security of the attacking force” (p. 311). Rogers (2000) adds that any tribunal evaluating whether a commander had properly weighed military advantage against the potential risks to civilians would have to recognize that “the risk to attacking forces is an important factor to be taken into consideration.”

It can therefore be concluded that when commanders consider what means and methods are feasible to employ, with the overall aim of reducing collateral damage, they are entitled to take military considerations, and particularly the protection of their forces, fully into account. The legality of Israel’s decision to employ WP in order to protect its troops must be considered in this light.

Yet if another means can accomplish the same military end while causing less incidental damage, then the feasibility principle may render the use of the more harmful means unlawful. AI and HRW claim that in Gaza, Israel could have used less harmful means to achieve the same ends.

An analysis of their arguments, however, reveals several problematic assertions regarding military smoke and its use on the modern urban battlefield.

One of the centerpieces of HRW’s argument, made on the first page of its “Rain of Fire” report and repeated several times, is that when Israel “wanted an obscurant for its forces, the IDF had a readily available and non-lethal alternative to white phosphorous – smoke shells produced by an Israeli company. The IDF could have used those shells to the same effect and dramatically reduced the harm to civilians.” Developing the point, HRW contends that “the IDF possessed alternatives to the highly incendiary white phosphorous; namely, 155mm smoke projectiles, which produce the equivalent visual screening properties without the incendiary and destructive effects” (p. 4). This alternative is identified (p. 13) as the M116A1 155MM shell produced by Israel Military Industries.²⁹

This claim reveals HRW’s apparent lack of expertise in the means and methods of modern combat. Its unqualified assertions are contradicted by the public statements of numerous military experts, the practice of Western armies, and the organization’s own reports.

HRW’s suggested alternative, the M116A1 shell, projects hexachloroethane (HC) smoke. As the *American Army Field Manual 3-6* (1986) succinctly states, “Phosphorous compounds are considered to be better screening agents than HC” (chap. 2, “Weather Effects”).³⁰ WP produces a smokescreen that lasts between 5 and 15 minutes (Globalsecurity.org, “Smoke Projectiles”). The HC round, in contrast, “expels smoke canisters that emit smoke for a period of 40 to 90 seconds” (Ibid.). In terms of yield (the percentage of material contained in a round that will contribute to smoke generation), WP is considered to be approximately 42% more efficient than HC. It therefore allows for better smoke generation using lighter munitions.³¹ Because WP smoke is more efficient and

²⁸ The British reservation continues, “... or to preserve his military situation, in conformity with other provisions of the Protocol.”

²⁹ Besides showing that Israel failed to take all feasible steps to protect civilians, the choice to use WP where alternatives were readily available, claims HRW, indicates that the substance was employed for its incendiary effects.

³⁰ “Field Behavior of NBC Agents (Including Smoke and Incendiaries),” in *American Army FM 3-6*, available at http://www.globalsecurity.org/wmd/library/policy/army/fm/3-6/3-6ch2.htm#s_21.

³¹ WP takes advantage of water vapor found in the air to produce smoke. It therefore requires less material in each round (*Field Manual 3-6*, chap. 2, “Weather Effects”).

longer-lasting, fewer rounds need to be fired, thereby reducing the potential for injury from smoke-carrying shells. Furthermore, WP has an advantage over other types of smoke obscurants in that it ignites spontaneously on contact with oxygen, creating the almost instantaneous smokescreen required in combat, particularly in an urban setting. In light of all these factors, it is difficult to accept HRW's claim that "the only unique benefit provided by WP is the ability to interfere with the infra-red spectrum" (p. 13, n. 6).

The clear superiority of WP over other smoke munitions was confirmed by Lt. Col. Raymond Lane, who was called upon by the UN Fact Finding Mission on the Gaza Conflict (the Goldstone Commission) to provide his "expert views on the technical characteristics of the weapons and ammunition reportedly used by the parties to the armed conflict in Gaza." He testified that "the quality of smoke produced by white phosphorous is superb. You will never match it. So, if you want real smoke for real coverage, white phosphorous will give it to you. I don't think that's heresy"

He testified that "the quality of smoke produced by white phosphorous is superb. You will never match it. So, if you want real smoke for real coverage, white phosphorous will give it to you. I don't think that's heresy" ("Public Hearings-Geneva," July 7, 2009).

("Public Hearings-Geneva," July 7, 2009). While militaries tend not to reveal their exact procedures for the tactical deployment of WP (or for any other munition), anecdotal evidence suggests that in the case of the British army, for example, it is used frequently,³² including on missions to populated areas (Yates, 2009; Lamb, 2006).³³

Furthermore, in arguing that Israel's WP use in the context of the Gaza operation violated the feasibility requirement, HRW explicitly judges Israel's actions based on hindsight. This is in contradiction to LOAC standards, which require that a commander's actions be judged based on the information "reasonably available to him at the relevant

time."³⁴ HRW (p. 13, n. 6) notes that WP is advantageous due to its ability to interfere with the infrared spectrum, thus blocking the "infra-red tracking systems used in anti-tank guided missiles (AGTMs)." Its report continues, "However, ... HRW found no evidence that Hamas fired AGTMs." Even assuming it is correct, this contention is based on an analysis of the fighting carried out once the fog of war had cleared. It was public knowledge that the Israeli defense establishment had reason to assume that Hamas had acquired AGTMs employing laser and infrared targeting systems prior to the Gaza fighting (Eshel, 2007; Harel, 2007). It was therefore perfectly reasonable under LOAC for Israeli commanders to employ means capable of disrupting AGTM targeting mechanisms.

AI is much less detailed than HRW in explaining what feasible alternatives to WP Israel could have employed in pursuing the objective of force protection. It does, however, point several times to Israel's decision to air-burst rather than ground-burst WP as a violation of the feasibility requirement. HRW makes this claim as well. A report

from the AI fact-finding team sent to Gaza following Cast Lead declares, "[T]he fact that these munitions, which are usually used as ground-burst, were fired as air-bursts increases the likely size of the danger area" (AI, "Israel Used White Phosphorus in Gaza Civilian Areas," Jan. 2009). Therefore, its repeated use in such a manner "is a war crime" (Ibid.). HRW explains that the concern generated by Israel's WP use "is amplified given the method of ... air-bursting white phosphorus projectiles. Air-bursting spreads burning wedges in a radius up to 125 meters from the blast point, thereby exposing more civilians and civilian objects to potential harm than a localized ground burst" (p. 64).

³² Yates notes that WP is "used almost daily by British forces in Afghanistan."

³³ Professor Steven Haines, head of the Security and Law Programme at the Geneva Centre for Security Policy, expressed to the author his understanding that the official position of the UK is that WP should not be used directly against enemy combatants, but can be used against appropriate military objectives, including those located in populated areas (personal communication, Jan. 17, 2009).

³⁴ See Section 5.1 (UAVs; Feasible Steps) below for a more expansive discussion of the LOAC principle whereby a commander's decision must be judged in light of the information reasonably available at the time, rather than with hindsight.

The NGOs' arguments that the decision to air-burst rather than ground-burst WP violated the feasibility principle reveal once again their lack of expertise in the use of military means, or at best their willingness to make sweeping claims without the information necessary to support them. Ironically, in the case of HRW, this leads the organization on the one hand to accuse Israel of using WP for its incendiary effect, and on the other to argue that Israel should have used the type of shell most appropriate for harnessing WP's incendiary capabilities.

The WP projectiles photographed exploding over Gaza were M825 shells, which employed a base-ejection mechanism to disperse their payload. This means that at a certain altitude, the 116 phosphorus-impregnated felt wedges were ejected from the base of the shell and fell to the ground. Ground-bursting WP would usually require a shell with a point-detonating fuze, i.e., one that explodes when hitting the ground. Point-detonating fuzes are generally used not in M825 WP shells but in burster-type WP (Globalsecurity.org, "Smoke Projectiles").

While the dispersal radius of ground-burst WP is more restricted, it would have created a significantly greater danger for civilians in the vicinity of the blast. Rather than the felt wedges ejected from air-burst WP, which generally do not penetrate walls or ceilings, a point-detonated WP shell would send tiny metal phosphorus-contaminated fragments flying at high velocity in all directions. These would be much more likely to pierce civilian structures, become deeply imbedded in bystanders, and would be more difficult to remove than the felt wedges.³⁵ Furthermore, it is precisely burster-type WP that is normally used when WP is employed as an incendiary. Therefore, assuming that AI and HRW were referring to the way WP is normally used, it appears that the organizations actually contend that Israel should have used WP in a manner that would have increased its incendiary effects and likely collateral damage.³⁶

Even if AI and HRW would claim that their reports were referring to the less common type of ground-burst WP shell, which uses a base-ejection rather than a point-detonation mechanism, they offer no evidence that ground-bursting would have been effective for force protection purposes. As HRW ("Q&A on Israel's Use of White Phosphorus in Gaza," Jan. 2009) admits, "When air-burst, [WP] covers a larger area than ground-burst and is useful to mask large troop movements." The NGOs present no evidence that the smaller smokescreens produced by ground-

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burst WP would have sufficed on the complex battlefields Israel faced. Additionally, because such smokescreens cover smaller areas, more shells – with their potentially dangerous components – would have had to be used.

The bottom line seems to be that air-burst WP poses a certain risk because of its wider dispersal radius, and ground-burst WP poses a certain risk because its concentrated blast may cause greater harm to civilians and property in the vicinity. On the tactical level, smokescreens produced by air-burst and ground-burst WP behave somewhat differently and one or the other may be more appropriate depending on the specific military maneuver and battle conditions. However, to claim that ground-burst WP would have been sufficient, much less better, than air-burst WP would require one to know the constellation of military forces, the objective in employing WP, the information available to the commanders at the time, and weather conditions, information that neither AI or HRW possess. It is therefore unclear how the NGOs can conclude with any degree of certainty that in air-bursting rather than ground-bursting WP, Israel did not comply with the feasibility requirement.

³⁵ The M825 shell itself does create a danger to those on the ground by breaking into two or three parts and falling from a high altitude. The threat from the falling shell would have to be weighed against that from the numerous metal fragments of the exploding ground-burst phosphorus shell.

³⁶ The fact that Israel did use base-ejection white phosphorus shells, whose felt wedges do not penetrate hard structures and which give off most of their potentially incendiary material during their descent, strongly indicates that Israel was not intending to use WP as an incendiary.

Prohibition on Indiscriminate Attacks

Another frequent claim in NGO reports regarding WP is that its use in Gaza violated the prohibition on indiscriminate attacks. Article 51(4) of AP-I provides that:

Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) those which are not directed at a specific military objective;
 - (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
 - (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;
- and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

AI (“Fueling Conflict,” p. 10) states that it “considers that the repeated use of white phosphorus in this way in densely-populated civilian areas constitutes a form of indiscriminate attack, and amounts to a war crime.” HRW opines, “even if intended as an obscurant rather than as a weapon, the IDF’s repeated firing of air-burst white phosphorus shells from 155mm artillery into densely populated areas was indiscriminate and indicates the commission of war crimes” (p. 65). The claim that the use of WP violated a LOAC principle prohibiting indiscriminate attacks was repeated many times in various forums. However, as in other instances, AI and HRW’s use of LOAC terminology here is imprecise and inaccurate.

The legal claim underlying the NGOs’ description of Israel’s WP use as indiscriminate is not entirely clear. Possibly they mean to claim that in pursuing a military advantage, the IDF used a method that could have been expected to harm civilians as well. This would lead to the proportionality test, in which the anticipated civilian harm would have to be weighed against the anticipated military advantage. AP-I, somewhat confusingly, in fact lists disproportionate

attacks as a type of indiscriminate attack.³⁷ However, it is clear from HRW and AI’s reports on WP that they consider the prohibition on indiscriminate attacks which they accuse Israel of violating to be separate and distinct from the prohibition on disproportionate attacks, as well as from the feasibility principle.

Indiscriminate attacks, like attacks that target civilians *per se*, are always unlawful. Rather than the calculation of collateral damage versus military advantage required by the proportionality principle or an examination of what is actually “feasible” under the duty to minimize civilian harm, indiscriminate attacks are *a priori* prohibited. Indiscriminate attacks are those which are not directed at any specific military objective, either because the launcher does not aim them at a specific (and legitimate) target, or because the weapon used is incapable of being so aimed. The classic example of such a weapon, highlighted by the ICRC in its commentary to AP-I, is the V2 rocket used by Germany in WWII. These rockets could not be aimed accurately and were simply pointed in the general direction of Allied cities. Other examples include the Qassam rockets fired by Palestinian militants and Hezbollah’s Katyusha rockets.

In describing Israel’s use of WP as indiscriminate, AI and HRW misrepresent international law and the nature of modern combat. It is true that WP smoke munitions are not aimed at a very narrow target. However, rather than being indiscriminate, they are in fact “directed at a specific military objective,” to use the language of Article 51(4). This military objective is force protection, and achieving it depends precisely on the diffuse nature of WP smoke. Force protection, as shown above, is considered by LOAC to be an important military consideration. While this military objective is somewhat different than the “classic” objectives of killing combatants or damaging infrastructure, the deployment of smoke obscurants to protect troops and against enemy lines of sight is considered a “directed” use. This is why countries all over the world are able to consider the use of WP smoke lawful, despite its diffuse nature. Its targeted use to protect troops means that it is aimed at a specific end and is not indiscriminate.

³⁷ Art. 51(5)(b) lists as a type of indiscriminate attack “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

Proportionality

While Israel's employment of WP cannot be said to have been indiscriminate, its use would still have to pass the proportionality test. The proportionality test is relevant to precisely those instances in which it is anticipated that there will be incidental civilian casualties from an attack. The Rome Statute of the International Criminal Court (Article 8 (2)(b)(iv)) lists the launching of an attack in which the anticipated civilian losses are "clearly excessive" to the anticipated military advantage as a war crime.³⁸

When weighing expected military advantage against expected incidental civilian harm, the importance of force protection is two-fold. Firstly, many countries, as reflected in their state declarations and defense doctrines, explicitly list force protection as an important element of military advantage in itself. Force protection is even more important when viewed through the lens of the overall success of a mission. Obviously a position cannot be held and a battle cannot be won without troops. Ten countries (Australia, Belgium, Canada, France, Germany, Italy, the Netherlands, New Zealand, Spain, and the UK) declared that the term "military advantage" used in the Protocol referred to "the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack." *The US Army Operational Law Handbook* states that "'military advantage' is not restricted to tactical gains, but is linked to the full context of war strategy. Balancing between collateral damage to civilian objects and collateral civilian casualties may be done on a target-by-target basis ... but also may be weighed in overall terms against campaign objectives." The ICC statute defines as a war crime attacks likely to cause damage that would clearly be excessive to the "concrete and direct overall advantage anticipated" (Ibid.).

There is a debate among scholars whether military advantage in AP-I should be understood as referring to the attack as a whole or only to a particular action or movement (Neuman, 2004). Nevertheless, given state positions and doctrines, it seems clear that customary law recognizes the legitimacy of weighing military advantage from the point of view of the overall operation.³⁹ Therefore, it seems Israel was justified in giving significant weight to the importance of moving troops safely on the battlefield when making its proportionality calculations regarding WP use.

It also should be noted that it is unclear how many civilians were actually harmed by WP. As HRW admits, "The total number of Palestinians killed and injured by white phosphorus is not known and will likely remain so. Hospitals in Gaza were unable to provide statistics on white phosphorus casualties because they lacked the diagnostic tools to determine the cause of burns" (p. 5). Much of the evidence regarding alleged WP injuries comes from doctors who, though they admitted not having any experience identifying WP, reported having seen "strange burns." The Federation of American Scientists' "White Phosphorus Fact Sheet" categorizes the lethality of WP as "low" when used as a smoke obscurant.

WP munitions do seem to have caused fires in a number of cases, including in several high-profile instances involving medical facilities and buildings belonging to international organizations. However, given that thousands of WP smoke shells were fired, each containing 116 felt wedges, it is difficult to claim that the damage caused was clearly excessive to the important advantage gained of protecting troops. There is, therefore, little basis for the claim that Israel's use of WP violated the proportionality principle.

³⁸ The Rome Statute of the International Criminal Court is available at <http://untreaty.un.org/cod/icc/statute/rome.htm>. It should be noted, however, that Israel is not a party to the ICC.

³⁹ Neuman (2004, p. 100) in reference to the AP-I provision, concludes, "Based on the Protocol I text, the negotiation history, military manuals and the ICC Statute, the standard for measuring 'concrete and direct military advantage anticipated' in Protocol I is the advantage anticipated from the military campaign, of which the attack is part, as a whole, and not only from isolated or particular parts of that campaign or operation." See his discussion of the scholarly debate, especially pp. 96-100.

Case 2: Unmanned Aerial Vehicles (UAVs)

A

nother aspect of Israel's actions that received a great deal of NGO and media attention was its use of Unmanned Aerial Vehicles (UAVs). On June 30, 2009, HRW released a report entitled, "Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles."⁴⁰

The opening lines state with absolute certainty that "during the recent fighting ... the IDF killed dozens of Palestinian civilians with one of the most precise weapons in its arsenal: missiles launched from an unmanned combat aerial vehicle (UCAV)."⁴¹ According to HRW, the death of civilians from UAV-launched missiles shows that "Israeli forces either failed to take all feasible precautions to verify that the targets were combatants ... or they failed to distinguish between combatants and civilians" (p. 4). In the words of Marc Garlasco, who co-authored the report (HRW, "Israel: Misuse of Drones Killed Civilians in Gaza," June 2009), "Drone operators can clearly see their targets on the ground and also divert their missiles after launch. ... Given these capabilities, Israel needs to explain why these civilian deaths took place."

AI asks, on the basis of UAVs' alleged optical capabilities, "why so many children and other individuals who were visibly civilians were targeted in the first place and why these missiles were not diverted when it became clear that they were about to strike children and other civilians" (pp. 15-16). It questions (AI, "Faulty Intelligence, Wanton Recklessness, or a Combination of the Two," Feb. 2009) whether it was faulty intelligence or wanton recklessness that led to the alleged civilian casualties from UAV-launched missiles. When discussing Israeli precision strikes more generally, AI concludes that the death and injury of numerous civilians indicates that "such attacks failed to distinguish between civilians and combatants; they were at best reckless, and in some cases the evidence

indicates that soldiers directly targeted unarmed civilians" (p. 11).

HRW and AI's main accusations, then, are that Israel: a) failed to take all feasible steps to verify that the objectives it targeted were military and not civilian; b) failed to distinguish between combatants or militants; and c) deliberately targeted civilians.⁴²

There are numerous aspects to these NGO claims, and many factors must be taken into account in analyzing them. The claims and charges are, of course, interconnected in various ways. However, for the purposes of undertaking an analysis, it will be useful to separate them into two distinct arguments.

Argument 1: Israel failed to take feasible steps to verify the status and nature of intended targets. This line of reasoning progresses as follows:

- 1) In the instances discussed, UAVs were used to launch attacks.
- 2) The targets of these attacks turned out to be civilians.
- 3) Given that UAVs were used, Israel should have found it feasible to verify that its intended targets were civilians and not militants, and refrain from attack.

Therefore Israel must have failed in its LOAC duty to do everything feasible to verify the nature of its targets. Given this failure, its targeting was reckless and unlawful.

The first part of the following analysis will point out the numerous factual and legal difficulties in AI and HRW's claims regarding elements 1 and 3 of this argument. The veracity of the second element will be addressed in the discussion of Argument 2 (see below).

⁴⁰ All references to HRW in Section 5 refer to "Precisely Wrong" unless otherwise specified.

⁴¹ "UCAV" is sometimes used to describe a UAV that has been armed for use in an offensive capacity.

⁴² This last charge is usually phrased as "the evidence indicates," or "may have," rather than leveled outright.

Argument 2: Israel failed to distinguish between objects and persons with military and civilian status, or intentionally targeted the latter. This line of reasoning progresses as follows:

- 1) Those allegedly hurt in the cases cited were civilians.
- 2) There were no military objectives in the area that may have been the intended target.
- 3) The civilians, then, must have been the intended target.
- 4) Israel did or should have known that the targets were civilian.

Therefore Israel must have failed to distinguish between civilians and combatants, or intentionally targeted civilians.

The second part of the analysis will show the problematic nature of elements 1, 2, and 3 of this argument (element 4 is addressed in relation to Argument 1).

Feasible Steps to Verify Nature of Objective

The LOAC requirement to take all feasible steps to verify the status of a target finds expression in Article 57(2)(a)(i) of AP-I, which reads:

- (a) those who plan or decide upon an attack shall:
 - (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them.

57(2)(b) further stipulates: “(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection ...”⁴³

Article 51(2) contains the principle of distinction, determining that “the civilian population as such, as well as individual civilians, shall not be the object of attack.” Attacks that do not distinguish between combatants and civilians, besides violating the duty to verify contained in Article 57(2)(a)(i), are indiscriminate attacks within the meaning of Article 51(4).

HRW and AI’s first argument is problematic on two levels. First, contrary to their claims, the organizations have little proof that UAV-launched missiles were actually used in any of the attacks they describe. This problem is significant, as the NGOs frequently point to the drones’ alleged technical capabilities as proof that Israel should have been able to determine that its intended targets were civilian rather than military. Second, their presentation and interpretation of the feasibility standard regarding the duty to verify a target’s status fails to consider relevant factors and does not accurately reflect the meaning of the term under CIL.

Israel has been at the forefront of UAV development and its military, like many others, employs UAVs extensively for ISTAR (intelligence, surveillance, target acquisition, and reconnaissance) missions (Flight International, 1997). While there have been reports that Israel used armed UAVs in an offensive capacity in the 2006 Lebanon War and in targeted killings of Palestinian militants, it has refused

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to confirm or deny this use. Currently, only the US and the UK are positively known to field UAVs with missile-launching capacities, which they are reported to have used in Afghanistan, Pakistan, Iraq, and Yemen (Somerville, 2002; Partlow, 2010).

One reason for the NGO and media focus on Israel’s use of UAVs was AI’s claim that Israeli UAV engines had originated in the UK. However, another significant reason derives from the need to show a *mens rea* when attempting to establish claims of severe LOAC targeting violations (Review Committee, 2000, para. 28). UAVs have advanced sensors as well as the ability to hover over battlefields for an extended period of time. This, combined with the public’s “unduly high expectations of the accuracy of smart weapons” (Rogers, 2000), serves as a basis for the NGO claim that the IDF must or should have known the consequences of its strikes.

⁴³ The clause continues, “... or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

HRW's "Precisely Wrong" report goes to great lengths in each of the incidents it documents to show that the armament apparently used in the strike was the Spike missile, produced by Rafael Advanced Defense Systems Ltd. It takes this as an indication that the strike was launched from a UAV. The report asserts, "In Gaza, Israel used both the Hermes and Heron drones armed with a Spike" (p. 12). Its source for this assertion is an "e-mail from Norwegian Broadcasting Corporation quoting a Jane's Defence Weekly staffer" (p. 12, n. 14).

In fact, there is no proof that Israel has ever used the Spike missile in an aerial capacity. The HRW report describes numerous metal cubes that were allegedly found in the vicinity of the area where the missile hit, and then claims that these must have been from the Spike. While AI does not go into detail as to the evidence supporting its claims that particular strikes were launched from UAVs, its assertions also seem to be largely based on the presence of "the tiny cube-shaped metal shrapnel from the missiles usually fired by drones" (p. 19).⁴⁴

The NGO reports appear to be describing the use of an anti-personnel warhead with a fragmentation sleeve (Defense Update, "Hellfire II"; HRW, p. 13). Such a warhead can be used with various types of missiles capable of being launched from numerous platforms. The presence of its remnants provides no indication as to what type of missile was used or from where it was launched.

In fact, although AI and HRW both claim to have visited numerous sites bearing the impact of drone-launched missiles, the military experts at the two organizations provide opposing views as to the missiles' telltale signs (besides the metal cubes). HRW (p. 12) explains, "In addition, blast and fragmentation patterns at strikes investigated by Human Rights Watch strongly indicate the use of the Spike: typically a *shallow crater*" (emphasis added). AI (p. 109) reports the opposite – "the signature of these new missiles, in addition to the deadly tiny metal cubes, is a *small and deep hole* in the ground" (emphasis added).

Even if it is correct that the missiles used were of the Spike variety, and even if it is true that the Hermes and/or Heron drones employed by the IDF were armed with the Spike,⁴⁵ this in no way proves or even indicates that the missiles in any of the attacks were launched from UAVs. As Rafael's brochure for the Spike missiles explains, the Spike "was designed to be mounted on combat vehicles, helicopters, and naval vessels" (Rafael, "SPIKE Family"). Israel used all of these platforms extensively in the Gaza fighting.

The HRW report attempts to address this problematic aspect of its claim by seeking to eliminate the possibility that the missiles were fired from helicopters. It explains, "The missile pieces [found onsite] were inconsistent with either the anti-tank versions of the Hellfire or TOW missiles ... fired from Apache and Cobra helicopters" (p. 12). The impression given is that the types of helicopters fielded by Israel do not use the kind of armament allegedly found at the site. However, an online military journal reports that "a Spike-ER launcher ... can be fitted to a variety of helicopters, including AH-64 Apache (which can carry 16 missiles), AH-1S Cobra ..." (army-technology.com, "Spike Missile Systems, Israel"). Moreover, Rafael's website includes a photo of a Cobra helicopter firing a Spike missile.⁴⁶

The other piece of evidence HRW offers for its unqualified assertion that the attacks were carried out by UAVs is that "victims and witnesses also spoke of hearing the distinctive buzz of the overhead drone – what Palestinians call a *zannana* – prior to the attack" (p. 6). In one alleged instance of a UAV strike, AI documents that residents claim to have seen a drone fire a missile at children. This raises a dual question: 1) Is it likely that a person on the ground would have heard or seen the drone, if it was being used to launch a strike?; and 2) Is it more likely that what they saw or heard was something other than the drone that supposedly fired the missile?

With regard to the first question, Colonel Richard Kemp, former Commander of British Forces in Afghanistan, "questioned whether such distinctions [between the noise

⁴⁴ AI does not, however, identify the shrapnel as having come specifically from the Spike missile.

⁴⁵ Of the two articles quoted by HRW to support this unqualified assertion, one does not mention Spike missiles at all and the other states, "The missiles carried are possibly Rafael Spikes, although this has not been independently confirmed." (See HRW, p. 12, n. 13 and la Franchi, 2006.)

⁴⁶ Available at <http://www.rafael.co.il/marketing/area.aspx?FolderID=332>.

of a UAV and other battlefield noises] could be made, not least as the Spike's range is 8 km (5 miles) – enough to put helicopters or naval boats out of earshot" (Quoted in Williams, 2009). He explained that "in a battlefield, in an urban environment, with all the other noises, it's certainly more than likely you would not hear something five miles away." A similar point could be made as to the ability to visually pinpoint a missile launch possibly occurring miles away.

As to the question of whether it is more likely that the witnesses had seen or heard something other than the drone allegedly used in the attack, it is well-known that the IDF makes extensive use of unarmed drones for ISTAR missions. Therefore, even if Palestinian witnesses had heard or seen drones in the vicinity, this would not positively indicate that they had been used in the strike.

HRW uses an e-mail from Norway quoting an anonymous staffer, fragments of a missile from an unidentified platform, and highly questionable witness testimony to establish the factual basis for its accusations. AI, while offering even less support for its assertions, likewise claims that shrapnel found at the sites indicates the use of a drone-launched missile, without offering any basis for this claim. Repeatedly, HRW and AI assert that a strike should not have been carried out based on the alleged technical capabilities of drones, while offering little credible evidence that drones were actually used. In the words of Robert Henson, editor of *Jane's Air-Launched Weapons*, commenting on the "Precisely Wrong" report, "Human Rights Watch makes a lot of claims and assumptions about weapons and drones, all of which is still fairly speculative, because we have so little evidence" (Ibid.).

Beyond the particular platform from which a strike was launched, numerous factors must be considered in evaluating whether a commander, in deciding to launch that strike, took adequate steps to determine that it was lawful. These factors, which are reflective of the nature of modern combat, are recognized by LOAC but ignored or misrepresented in the NGO reports. AI and HRW's reports tend to be replete instead with irrelevant technical information and emotional details, which do not impact on the lawfulness of Israeli actions.

The duty to verify whether a potential target is a legitimate military objective is qualified by the feasibility standard. A commander must "do everything feasible to verify that the objectives to be attacked" are not civilian (AP-I, Article 57(2)(a)(i)). As was shown in the above section on WP, a commander is entitled to take both military

HRW uses an e-mail from Norway quoting an anonymous staffer, fragments of a missile from an unidentified platform, and highly questionable witness testimony to establish the factual basis for its accusations.

and humanitarian factors into account when deciding what is feasible, and to give due consideration to force protection.

The degree to which it is feasible for a commander to determine the civilian or military status of a potential target is greatly influenced both by the means available to her and the nature of the fighting in which she is engaged. Even the most advanced weapons are rarely as accurate or "clean" as many would like to believe. Holland (2004, p. 48) notes the prevalence of "often-unrealistic public expectations when it comes to the accuracy of Precision Guided Munitions (PGM)." These expectations apply to other types of technologically-sophisticated weapons as well. He continues, "The public expects not only smart weapons but infallible weapons" (Ibid). The truth is that aerial targeting, even with advanced modern capabilities, is still far from infallible. As Hays Parks (1983) explains, in discussing aerial bombardment, "despite the development of sophisticated computer systems, many variables influence the accuracy equation" (cited in Fenwick, 1997, p. 547).

AI and HRW, like others without significant combat experience, present an unrealistic picture of the factual and legal variables involved in targeting decisions. They imagine a UAV operator who can languish over a potential target, carefully studying every detail of the area and consulting with various authorities until calmly making the decision to open fire.⁴⁷ As shown above, they have little evidence that UAVs were actually used in the instances they describe. Yet even assuming that UAVs were used, the

⁴⁷ HRW claims that "because of the slow speed of the drones and their long flight times ... they can loiter over the battlefield for hours at a time with no danger to the pilot or operator" and that therefore "military lawyers may be consulted to help determine whether targets are legitimate" (p. 4).

NGOs provide little support for their repeated contentions that this would have allowed for fine distinctions such as whether a quickly moving person was a teenager or adult.⁴⁸ HRW's report describes in detail how UAVs carry "an array of sensors, often combining radars, electro-optical cameras, infrared cameras, and lasers" (p. 11). Yet, as *The British Army Field Manual* (vol. 1, part 10, 2009) acknowledges, when enemy combatants blend in with the civilian population, it is "extremely difficult" to target them with distinction (sec. 12-16). The manual goes on to note, "That difficulty is multiplied for Air assets: Range makes visual identification difficult, *even with modern sensors*"⁴⁹ (emphasis added). This is true whether the platform is an F-16, UAV, or Apache helicopter, all of which are equipped with cameras and advanced sensors.

More significantly, however, even if their descriptions of the inherent technical capabilities of UAVs are correct, AI and HRW ignore central factors that characterize many targeting decisions. The length of time during which a UAV can stay in the air, or even its optical capabilities under optimal conditions, have little to do with the length of time a commander may have to make a critical decision. As the lesson script of the US Army International Intelligence Officer Advanced Course (n.d.) explains, "All battlefields require commanders to make and execute decisions faster than the enemy" (2.f). The modern battlefield is "placing even more emphasis on quick decision-making, particularly those decisions related to targeting" (Holland, 2004, p. 37). This is true regardless of the technical means available.

The NGOs fail to take into account the distinction between "planned" and "immediate" targets, and between those that are merely "unplanned" and those that are "unanticipated" (see Schmitt, 2005). If UAV operators

or airborne targeters surveying an area suddenly notice a suspicious figure approaching a rocket-launching site, their responsibility to both friendly forces and the overall mission requires a quick decision. They may not be able to wait to see whether the suspicious figure intends to fire or dismantle the rocket, without putting the lives of civilians or their own forces at risk.

Law-of-war manuals, drafted by those with extensive military experience, incorporate these factors in setting standards for lawful conduct. The Canadian Judge Advocate General's LOAC manual (2001) explains that an evaluation of a commander's judgment must take "fully into account the urgent and difficult circumstances

The Canadian Judge Advocate General's LOAC manual (2001) explains that an evaluation of a commander's judgment must take "fully into account the urgent and difficult circumstances under which such judgments are usually made" (para. 418.2).

under which such judgments are usually made" (para. 418.2). *The British Army Field Manual*, as mentioned above, acknowledges that "when the adversary takes every effort to blend in with and operate from within the civilian population it is extremely difficult for the soldier on the ground to target him with distinction" (12-16). LOAC recognizes that in the case of "emerging targets," there may not be time to undertake complex verification procedures. Rather, predetermined criteria will have to be used in order to quickly evaluate the status of an objective (Queguiner, 2006).⁵⁰ Such a process will obviously not be foolproof, even when carried out in good faith and with due caution. While AI (p. 17) contends that if conditions are not optimal, such as poor visibility, a commander

⁴⁸ Both HRW and AI cite an Internet post by someone claiming to have been a UAV operator during Cast Lead, describing his involvement in a single instance where he was able to identify a slowly moving target. HRW also cites an article from the US Border Protection Border Patrol.

⁴⁹ It further explains that the difficulties inherent in these actions "may generate a public perception of indiscriminate and disproportionate use of force."

⁵⁰ Queguiner continues, "The fact remains, however, that these expeditious procedures must leave room for practical precautionary measures" (p. 799).

should choose not to carry out a strike, this does not seem to be customary law.⁵¹

The recognition that combat decisions must often be taken quickly and under conditions of great uncertainty has led treaty framers and states to emphasize that those decisions must not be evaluated based on hindsight. Rather, the evaluation must be carried out from the point of view of the information reasonably available to the commander at the time of his decision. AP-I (Article 51(5) (b)) speaks of the degree to which an attack is expected to cause collateral damage, and the military advantage anticipated, as the standards for weighing the lawfulness of combat decisions. The UK, upon ratifying AP-I, insisted that “military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.” Canada added, “Such decisions cannot be judged on the basis of information which has subsequently come to light.” Eleven other countries (Belgium, Germany, Australia, Ireland, Italy, the Netherlands, New Zealand, Egypt, Switzerland, Spain, and Austria) made similar declarations.

Given AI and HRW’s problematic factual assertions regarding UAVs, and their failure to realistically consider key targeting factors, it would appear that they do not sufficiently support their claim that Israel failed to take feasible steps to verify the nature of targets. The inability to support this claim in turn weakens their second charge, that Israel failed to distinguish between combatants and civilians. As the NGOs cannot prove directly that IDF commanders were uninterested in distinguishing between legitimate and non-legitimate objectives (the *mens rea*), they must rely on indications derived from the resulting actions. Thus they attempt to show that it was feasible for

IDF commanders to verify to a higher degree the status of potential targets. If it was theoretically feasible to determine that a potential target was civilian, and yet that civilian target was nevertheless hit, the NGOs can argue that the IDF did not distinguish between civilians and combatants. However, as the preceding analysis has shown, the NGOs are unable to establish their claims regarding a failure to take feasible steps in target verification, disqualifying the premise of their argument regarding the failure to distinguish.

The following section will examine several other aspects of claims made by AI and HRW in their attempt to support the assertion that Israel failed to distinguish between military and civilian objects, or intentionally targeted the latter.

Legitimate Military Objectives and Collateral Damage

In contending that the IDF intentionally or recklessly targeted civilians, the NGOs often base their argument on two misleading premises. First, they 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. In some cases, AI even goes so far as to present definitions for “military objective” that seem to have little grounding in LOAC. Then, once presuming the absence of legitimate military objectives, they take as given 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.⁵²

As an example, the HRW report on the strike that hit the Masharawi family home in Gaza City records, “According

⁵¹ The decision by NATO to conduct its bombing campaign against Yugoslavia from a height of 15,000 feet would seem to indicate that AI’s contention is contrary to state practice. In one instance, NATO’s decision to conduct air strikes from that height led to civilian tractors being mistakenly identified as military vehicles and bombed. In another instance, a NATO plane launched a second strike on a bridge despite knowing that a civilian train was on it, and despite the bridge being obscured by smoke as a result of the first strike. In neither case did the Review Committee find sufficient grounds to prosecute for war crimes. (See Review Committee, 2000.)

⁵² This is assuming that the casualties were actually civilians. It appears that in numerous instances, Hamas militants blended in with the civilian population, while in others they were presented as civilians on casualty lists. For example, the Palestinian Center for Human Rights presents senior Hamas military commander Nizar Rayan as a “civilian” and “university professor” in its casualty statistics. See NGO Monitor, “NGOs Claimed Nizar Rayan was a Civilian,” Jan. 2010; Intelligence and Terrorism Information Center, “Hamas and the Terrorist Threat from the Gaza Strip,” March 2010.

to residents, the site was at least five kilometers from any fighting at the time between the IDF and Palestinian armed groups. IDF statements and media reports also report no fighting in that area at that time” (p. 21). Similarly, the AI account of a strike which hit the home of the Mousa family in Gaza City prominently features a witness who states that at the time of the strike, “the area was quiet” (p. 17). Concurrently, AI and HRW ask the misleading question as to why the injured or killed non-combatants were “targeted.” This question makes the implicit assumption that those hurt were the target of the attack.

The LOAC definition of a legitimate military objective has little to do with proximity to the battlefield or even the presence of active fighters. Article 52(2) of AP-I states, “In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” This encompasses numerous potential targets which would most likely be

Distance from the battlefield is not indicative of whether a person is taking a “direct part in hostilities” under international law.

both hidden and located at a distance from the fighting.

The list of military objectives prepared in 1956 by the International Committee of the Red Cross (ICRC) includes “installations ... and other organs for the direction and administration of military operations,” “industries for the manufacture of supplies and material of a military character,” and “storage and transport installations” meant to serve the war industries. The ICRC at the time doubtless pictured war ministries and factories. However, as AI notes, “The [Palestinian armed] groups openly acknowledge that their fighters and military facilities are present in towns

and villages in Gaza” (p. 76). Their command, control, communication, manufacturing, and storage sites are deeply embedded within the civilian infrastructure of the Gaza Strip, including within mosques, schools, hospitals, public buildings, and private homes.⁵³

In terms of the scope of persons who may be attacked, this in part depends on the heavily debated question as to whether members of terrorist organizations should be considered combatants, civilians taking part in hostilities, or some other category. It also depends in part on the equally debated question as to whether CIL recognizes the principle contained in AP-I (Article 51(3)) that civilians taking part in hostilities regain their immunity once they halt their participation.⁵⁴ Even assuming that members of terrorist groups are civilians rather than combatants, and that the AP-I principle reflects customary law, Article 52(3) provides that civilians lose their immunity “for such time as they take a direct part in hostilities.”

Distance from the battlefield is not indicative of whether a person is taking a “direct part in hostilities” under international law. Hostile acts are defined by the ICRC commentary to AP-I as “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.” While there is no agreed-upon definition of “direct part” in LOAC, Schmitt (2004) correctly points out that “in modern combat ... activities far from the ‘battlefield’ may be as important, perhaps more so, than actually ‘pulling the trigger’” (p. 529). In the words of Barak (2005), legitimate targets may include persons planning or directing an attack, or servicing weapons, “be the distance from the battlefield as it may” (para. 35). Engaging in exchanges of fire does not determine participation. Rather, as Barak notes, “function determines the directness of the part taken in the hostilities” (Ibid.).

The preceding discussion was based on AI and HRW’s contentions that there was no active fighting in a given

⁵³ For detailed documentation of this practice, see Intelligence and Terrorism Information Center, “ Hamas and the Terrorist Threat from the Gaza Strip,” pp. 110-115.

⁵⁴ Aharon Barak (2005), writing for the Israeli Supreme Court in the *Targeted Killing* judgment (“The Public Committee Against Torture in Israel v. The Government of Israel”), considers the provision contained in AP-I 51(3) as part of customary law. Turner and Norton (2001), on the other hand, conclude: “Customary international law does not recognize the ability of an unlawful combatant to regain the protections of his civilian status. However, a controversial provision of Additional Protocol I allows the civilian to regain his protection from attack when he ceases direct participation in hostilities” (cited in N. Neuman, 2004, p. 102).

area. Had there been, there would be even less grounds for asserting that the IDF intentionally targeted civilians. However, it should be noted that HRW and AI assertions regarding the (non)presence of fighting or militants are themselves problematic. They rely to a high degree on witness testimony that is in almost all cases unverifiable and in some cases quite dubious. Hamas' control of the environment may have influenced witness testimony, whether or not Hamas militiamen were present in the room when it was given.

Questions about the reliability of this witness testimony are amplified by the fact that outside sources and even the NGO reports themselves often contain information that raises serious doubts about its credibility. For example, an HRW report ("Rain of Fire") describes an incident that occurred in the village of Siyafa, which according to the same report is about 500 meters from the village of Atatra. The report states that "residents of Siyafa told HRW ... that they neither saw nor heard any Palestinian fighters in the area" (p. 49). A footnote to this statement, however, records that "a media investigation into Atatra south of Siyafa revealed that Hamas fighters did engage the IDF there." The footnote is a bit of an understatement, as fighting in Atatra was particularly intense (Bronner and Tavernise, 2009). Therefore, it seems somewhat likely that neighboring residents would have seen retreating fighters, or at least heard gunshots being fired 500 meters away.⁵⁵

In other cases, it is outside sources that raise serious questions about the statements given to the NGOs, including by seemingly reliable witnesses. In describing an incident in which WP hit a hospital in Tel al-Hawa on January 15, 2010, AI records "the previous night there had been fighting between Israeli forces and Palestinian gunmen in the outskirts of Tel al-Hawa, some distance from the hospital. The director and staff of the hospital told AI that there were no gunmen in or outside the hospital (p. 34). This is contradicted by an Agence France-Presse (Jan. 15, 2010) story from the same day headlined "Patients flee as flames engulf Gaza hospital." The article documents:

During the day a deafening cacophony of tank shells, missiles, artillery, helicopter gunships and automatic rifles filled the air as battles unfolded less than 300 metres from the hospital beneath a thick haze of smoke Armed Hamas fighters dressed in blue and black uniforms, one of them carrying the green flag of his Islamist movement, ran down a street 100 metres from the hospital, firing Kalashnikov rifles.

It is therefore far from certain that there was no militant activity in the area at the time of the instances described in the NGO reports. However, even assuming that there was no active combat, given LOAC definitions of legitimate military objectives and Hamas' entrenchment within the civilian population, it is quite logical that there would have been legitimate targets located far from the scene of fighting. Presumably, Hamas and other armed groups do not post public notices as to the location of their strategic sites or command headquarters. The NGOs seem to discount the possibility that the armed groups, in making use of a civilian structure so that it became a valid military objective, acted discretely, such that some of the neighbors, including those who later gave testimony to the NGOs, were unaware.

The injured non-combatants may well have been the anticipated, but not excessive, unfortunate incidental damage in strikes on critical military objectives. LOAC recognizes that in attacking legitimate military targets, there may be incidental civilian losses, and only requires that these not be "excessive in relation to the direct and concrete military advantage anticipated from the attack." The NGOs' conclusions, expressed with near certainty, that Israel intentionally or recklessly targeted civilians, would seem to be unwarranted.

In addition to an unrealistic portrayal of the conditions under which targeting decisions are made, the NGOs at times invent their own criteria and standards. Malcom Smart, AI's Middle East and North Africa Programme Director, claimed (AI, "Gaza Civilians Endangered," Jan. 2009), AI's, "Fighters on both sides must not carry out

⁵⁵ While it may be admirable that HRW chose to note that in this case its witnesses appeared to be lying, in other cases it fails to do so.

attacks from civilian areas but when they do take cover behind a civilian house or building to fire, it does not make that building and its civilian inhabitants a legitimate military target. Any such attacks are unlawful.” Smart’s

AI admits, “Palestinian militants then used some of the empty properties” for military purposes but contends that this “would not have been possible if the Israeli forces had not forced the inhabitants to leave” (Ibid.). It is not clear

“However, when the allure of precision creates exaggerated expectations of its possibilities such that those beyond the battlefield impose unreasonable demands on the military or postulate norms that go beyond treaty or custom, international humanitarian law is weakened.”

statement is directly contradicted by the language of AP-I and the vast majority of legal scholars. A house being used as a firing position would certainly qualify as an object whose “purpose or use,” in the language of AP-I, was making an effective contribution to military action and whose destruction would offer a definite military advantage. As Dinstein (2004) explains, “If a steeple of a church or a minaret of a mosque is used as a snipers nest ... the enemy is entitled to treat it as a military objective” (p. 91). Certainly the civilians themselves would not be legitimate targets and the attack would have to pass the proportionality test, but Smart’s statement that “any such attacks are unlawful” is wholly unfounded.

In another such instance, when criticizing Israel’s definition of a legitimate target, AI explains, “The Israeli army considers as a military target ... any house or property which is used in any way by Palestinian armed groups – even when this was only possible because Israeli soldiers forced the inhabitants to leave” (p. 64). For example, AI explains, when Israeli forces entered Gaza on January 3, they took positions in and around Palestinian residences, forcing many of the inhabitants to evacuate.

why AI finds the fact that residents left the area after the Israeli army entered relevant to the status of a house used for military purposes as a military objective. No LOAC principle provides that a military objective ceases to be, or cannot become, a legitimate target based on the manner in which it became a military objective.⁵⁶

It may be enlightening to conclude this section with the words of one of the foremost experts on “both the legal and practical aspects of this area of law,”⁵⁷ Michael Schmitt, who explains:

Further, as weaponry becomes more precise, interpretation of international humanitarian law is becoming increasingly demanding for an attacker. So long as such interpretations do not depart from the law or ignore the realities of military necessity, this too is to be welcomed. However, when the allure of precision creates exaggerated expectations of its possibilities such that those beyond the battlefield impose unreasonable demands on the military or postulate norms that go beyond treaty or custom, international humanitarian law is weakened. (2005, p. 466)

⁵⁶ It also raises the question as to whether AI believes that it would have been better had Israel not removed civilians from the sites of urban street battles.

⁵⁷ Garraway, n.d., p. 2.

Conclusion

The growth in size and influence of international human rights NGOs has elevated issues relating to LOAC to a central place within the international system. As NGOs play an increasingly important role in shaping the policies of states and international bodies, the need to ensure the accuracy and objectivity of the information they produce has become all the more critical. It appears that at least in their reporting on the Israeli-Palestinian conflict, NGO reports contain numerous 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, evaluate carefully their areas of competency and ensure that factual assertions are made with the proper degree of expertise. In some of the instances considered in this report, information indicating the inaccuracy of the NGOs' assertions is readily available on the Internet. This suggests that the NGOs must be careful to maintain standards of objectivity and ensure that ideological biases do not create a tendency to confirm predetermined hypotheses.⁵⁸

AI and HRW clearly intend for their reports to play a central role in the movement to monitor and enforce compliance with LOAC. While at times they present their reports as simply establishing *prima facie* justifications

to their calls for independent investigations, in many instances they make conclusive assertions of war crimes and other illegal behavior. If the NGOs' reports are to make a positive contribution to the enforcement of LOAC, the organizations must be careful to base their analyses on accurate presentations of international law, reflecting generally accepted standards and definitions. Those repeating NGO arguments, such as journalists and diplomats, should pay greater attention to attempts at "standard setting" within NGO reports.⁵⁹ NGOs do and should play a significant role in the development of international law, including in the evolution of its standards. Yet when undertaking an evaluation of whether a country has complied with the requirements of international law, it is crucial to judge based on the current state of the law, and not on what the particular NGO might prefer it to be.

Policy-makers should subject the information they receive from NGOs to more critical scrutiny before allowing it to influence their decisions. NGOs such as HRW and AI certainly have an important role to play in informing government officials, diplomats, and the public, particularly regarding areas to which others have less access. Subjecting NGO reports and statements to careful analysis will help ensure that these are produced at the highest standards, without being influenced by ideological predispositions or selection biases. In this way, NGOs such as AI and HRW will be able to most effectively carry out their mission of promoting and protecting human rights.

⁵⁸ See G. M. Steinberg, "Soft Powers Play Hardball: NGOs Wage War Against Israel," for a critical analysis of the role of ideological biases in NGO reporting, particularly with reference to the Arab-Israeli arena ("Israel Affairs," vol. 12, No. 4, Oct. 2006), pp. 748-768.

⁵⁹ 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.

References

Agence France-Presse. (2009, January 15). Patients flee as flames engulf Gaza hospital: Medics. *AFP*. Available at <http://www.google.com/hostednews/afp/article/ALeqM5iFtVdO5p6benIXGgQQCrBIWoeRKQ>

(Note: all URLs in References were last accessed May 11, 2010.)

Amnesty International. (December 1, 2001). *Universal Jurisdiction: Questions and answers concerning universal jurisdiction*. Available at <http://www.amnesty.org/en/library/info/IO53/020/2001>

Amnesty International. (January 8, 2009). *Gaza civilians endangered by the military tactics of both sides*. Available at <http://www.amnesty.org/en/news-and-updates/news/gaza-civilians-endangered-military-tactics-both-sides-20090108>

Amnesty International. (January 19, 2009). *Israel used white phosphorus in Gaza civilian areas*. Available at <http://www.amnesty.org/en/news-and-updates/news/israeli-armys-use-white-phosphorus-gaza-clear-undeniable-20090119>

Amnesty International. (January 19, 2009). *The conflict in Gaza: A briefing on applicable law, investigations and accountability*. Available at <http://www.amnesty.org/en/library/info/MDE15/007/2009/en>

Amnesty International. (February 2, 2009). *Faulty intelligence, wanton recklessness, or a combination of the two*. Available at <http://livewire.amnesty.org/2009/02/02/faulty-intelligence-wanton-recklessness-or-a-combination-of-the-two/>

Amnesty International. (February 23, 2009). *Fueling conflict: Foreign arms supplies to Israel/Gaza*. Available at <http://www.amnesty.org/en/library/asset/MDE15/012/2009/en/5be86fc2-994e-4eeb-a6e8-3ddf68c28b31/mde150122009en.html>

Amnesty International. (July 2, 2009). *Operation "Cast Lead": 22 days of death and destruction*. Available at <http://www.amnesty.org/en/library/info/MDE15/015/2009/en>

Army-technology.com. (n.d.). Spike anti-armour missile systems, Israel. Available at <http://www.army-technology.com/projects/gill/>

Barak, A. (2005). *The Public Committee Against Torture in Israel v. The Government of Israel*, (HCJ 769/02, 12/11/05). ("Targeted Killing" judgment). Available at http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf

Barry, D. (1997, June 11). Dull, Dirty and Dangerous. *Flight International*. Available at <http://www.flightglobal.com/articles/1997/06/11/3753/dull-dirty-and-dangerous.html>

Bernstein, R. (2009, October 19). Rights watchdog, lost in the Mideast. *The New York Times*. Available at <http://www.nytimes.com/2009/10/20/opinion/20bernstein.html>

Bother, M., Partsch, K. J. & Solf, W. A. (1982). *New rules for victims of armed conflicts*. The Hague: Martinus Nijhoff Publishers.

British Army Field Manual, Vol. 1, Part 10. (2009). Countering insurgency. Available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_11_09_army_manual.pdf

British Foreign and Commonwealth Office. (February 10, 2009). *The use of white phosphorus in international law* (Note to Foreign Affairs Committee). Available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmfa/261/261we02.htm>

Bronner and Tavernise. (2009, February 3). In shattered Gaza town, roots of seething split. *The New York Times*. Available at <http://www.nytimes.com/2009/02/04/world/middleeast/04gaza.html>

Defense Update. (n.d.). Hellfire II Missile System. Available at <http://defense-update.com/products/h/hellfire.htm>

Dinstein, Y. (2004). *The conduct of hostilities under the law of international armed conflict*. Cambridge: Cambridge University Press.

Eshel, D. (2007, April 29). Military confrontation with Hamas in Gaza unavoidable. *Defense Update*. Available at http://defense-update.com/analysis/analysis_290407_gaza.htm

Federation of American Scientists. (n.d.). *White Phosphorus Fact Sheet*. Available at <http://fas.org/programs/bio/factsheets/whitephosphorus.html>

Fenrick, W. J. (1997). Attacking the Enemy Civilian as a punishable offense. *Duke Journal of Comparative & International Law*, 7, 539-569.

Garraway, C. (n.d.). *The conduct of hostilities: Definition of military objectives*. (Remarks at seminar examining the ICRC's *Study into Customary International Humanitarian Law*.) Available at <http://pforum.isn.ethz.ch/docs/C1190039-65B0-58E9-281B8E65DE51DA06.pdf>

Gaudreau, J. (2003). The reservations to the Protocols additional to the Geneva Conventions for the protection of war victims. *International Review of the Red Cross*, 849, pp. 143-184.

Globalsecurity.org. (n.d.). Smoke projectiles. Available at <http://www.globalsecurity.org/military/systems/munitions/smoke.htm>

Harel, A. (2007, Feb. 2). Israel worried Hamas may have advanced anti-tank missiles. *Haaretz*. Available at <http://www.haaretz.com/news/idf-worried-hamas-may-have-advanced-anti-tank-missiles-1.213563>

Herzberg, A. (2008). NGO "Lawfare": Exploitation of courts in the Arab-Israeli conflict. *NGO Monitor Monograph Series* (G. M. Steinberg, Ed.). Available at <http://www.ngo-monitor.org/data/images/File/lawfare-monograph.pdf>

Holland, J. (2004). Military objective and collateral damage: Their relationship and dynamics. *Yearbook of International Humanitarian Law*, 7, 35-78.

Human Rights Watch. (January 10, 2009). *Q&A on Israel's Use of White Phosphorus in Gaza*. Available at <http://www.hrw.org/en/news/2009/01/10/q-israel-s-use-white-phosphorus-gaza>

Human Rights Watch. (March 25, 2009). *Rain of fire: Israel's unlawful use of white phosphorus in Gaza*. Available at <http://www.hrw.org/en/reports/2009/03/25/rain-fire>

Human Rights Watch. (April 20, 2009). *Under cover of war: Hamas political violence in Gaza*. Available at <http://www.hrw.org/node/82366>

Human Rights Watch. (June 30, 2009). *Israel: Misuse of drones killed civilians in Gaza*. Available at <http://www.hrw.org/en/news/2009/06/30/israel-misuse-drones-killed-civilians-gaza>

Human Rights Watch. (June 30, 2009). *Precisely wrong: Gaza civilians killed by Israeli drone launched missiles*. Available at <http://www.hrw.org/en/reports/2009/06/30/precisely-wrong-0>

Human Rights Watch. (August 6, 2009). *Rockets from Gaza: harm to civilians from Palestinian armed groups' rocket attacks*. Available at <http://www.hrw.org/en/reports/2009/08/06/rockets-gaza-0>

Human Rights Watch. (August 13, 2009). *White flag deaths: Killing of Palestinian civilians during operation "Cast Lead"*. Available at <http://www.hrw.org/node/85014>

Intelligence and Terrorism Information Center. (2010). *Hamas and the terrorist threat from the Gaza Strip*. Available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/g_report_e1.pdf

International Criminal Tribunal for the former Yugoslavia. (2000). *Final report to the Prosecutor by the committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia*. Available at http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf

Judge Advocate General- Canada. (2001). *Law of armed conflict: On the operational and tactical levels* (B-GJ-005-104/FP-021). Available at [http://www.cfd-cdf.forces.gc.ca/websites/Resources/dgfd/Pubs/CF%20Joint%20Doctrine%20Publications/CF%20Joint%20Doctrine%20-%20B-GJ-005-104%20FP-021%20-%20LOAC%20-%20EN%20\(13%20Aug%2001\).pdf](http://www.cfd-cdf.forces.gc.ca/websites/Resources/dgfd/Pubs/CF%20Joint%20Doctrine%20Publications/CF%20Joint%20Doctrine%20-%20B-GJ-005-104%20FP-021%20-%20LOAC%20-%20EN%20(13%20Aug%2001).pdf)

Keck, M. E., & Sikkink, K. (1998). *Activists beyond borders: Advocacy networks in international politics*. Ithaca, NY: Cornell University Press.

la Franchi, P. (2006, August 8). Israel fields armed UAVs in Lebanon. *Flight International*. Available at <http://www.flightglobal.com/articles/2006/08/08/208315/israel-fields-armed-uavs-in-lebanon.html>

Lamb, C. (2006, July 2). Have you ever used a pistol. *The Sunday Times-World*. Available at <https://www.timesonline.co.uk/article/0,,2089-2252723,00.html>

Mandel, S. (2009). Experts or ideologues: A systematic analysis of Human Rights Watch's focus on Israel. *NGO Monitor Monograph Series* (G.M. Steinberg, Ed.). Available at <http://www.ngo-monitor.org/hrw.pdf>

Mathews, J. (1997). Power shift. *Foreign Affairs*, 76(1), 50-66.

- Mutua, M. (2001). Human rights international NGOs: A critical evaluation. In C.E. Welch Jr. (Ed.), *NGOs and Human Rights: Promise and Performance* (pp. 151-156). Philadelphia, PA: University of Pennsylvania Press.
- Neuman, N. (2004). Applying the rule of proportionality: Force protection and cumulative assessment in international law and morality. *Yearbook of International Humanitarian Law*, 7, 79-112.
- NGO Monitor. (2010, January 1). *NGOs claimed Nizar Rayan was a civilian*. Available at http://www.ngo-monitor.org/article/ngos_claimed_nizar_rayan_was_a_civilian
- Nunnenkamp, P. (2008). Aid effectiveness: The myth of NGO superiority. *D+C Development and Cooperation*, 49(5). Available at <http://www.inwent.org/ez/articles/068647/index.en.shtml>
- Partlow, J. (2010, January 13). U.S. uses Predator drone to hit suspected insurgents in Afghanistan. *The Washington Post*. Available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/13/AR2010011300703.html>
- Queguiner, J. (2006). Precautions under the law governing the conduct of hostilities. *International Review of the Red Cross*, 864, 793-821.
- Rafael. (n.d.). *SPIKE family: Multi-Purpose Precision Weapon Systems*. Available at http://www.rafael.co.il/marketing/SIP_STORAGE/FILES/3/923.pdf
- Rogers, A. P. V. (2000). Zero-casualty warfare. *International Review of the Red Cross*, 837, 165-181.
- Roth, K. (2001). The case for universal jurisdiction. *Foreign Affairs*, Sept./Oct. 2001.
- Schmitt, M. N. (2004). Direct participation in hostilities and 21st century armed conflict. In H. Fischer (Ed.), *Crisis Management and Humanitarian Protection: Festschrift Fur Deter Fleck* (pp. 505-529). Berlin: BWV.
- Schmitt, M. N. (2005). Precision attack and international humanitarian law. *International Review of the Red Cross*, 859, 445-466.
- Shivji, I. G. (2007). *Silences in NGO discourse: The role and future of NGOs in Africa*. Oxford: Fahamu.
- Somerville, K. (2002, November 5). US drones take combat role. *BBC News Online*. Available at <http://news.bbc.co.uk/2/hi/2404425.stm>
- UN Fact Finding Mission on the Gaza Conflict. (2009, July 7). *Public Hearings-Geneva, Afternoon Session of July 7, 2009* [unofficial transcript]. Available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/2009.07.07PM_Session.doc
- Upadhyay, A. (2003, June 11). NGOs: Do the watchdogs need watching? *Inter Press Service*.
- US Army Field Manual 3-6*. (1986). Field behavior of NBC agents (including smoke and incendiaries). Available at <http://www.globalsecurity.org/wmd/library/policy/army/fm/3-6/index.html>
- US Army International Intelligence Officer Advanced Course. (n.d.). Offensive operations and intelligence: Tactical decision making process. Available at <http://ftp.fas.org/irp/doddir/army/mioac/tmplp.htm>
- US Navy, Office of the Chief of Naval Operations. (2007). *The commander's handbook on the law of naval operations* (NWP 1-14M). Available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP))
- 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.
- Williams, D. (2009, June 30). Human Rights Watch accuses Israel over Gaza drones. *Reuters*. Available at <http://www.reuters.com/article/idUSTRE55T37A20090630>
- Yates, D. (2009, January 24). A British soldier's view of Operation Cast Lead. *Coffee House: The Spectator Blog*. Available at <http://www.spectator.co.uk/coffeehouse/3286561/a-british-soldiers-view-of-operation-cast-lead.thtml>

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