

2014

International Humanitarian Law Transparency

Lesley Wexler

Follow this and additional works at: <https://ir.law.fsu.edu/jtlp>



Part of the Law Commons

Recommended Citation

Wexler, Lesley (2014) "International Humanitarian Law Transparency," *Florida State University Journal of Transnational Law & Policy*. Vol. 23: Iss. 1, Article 4.

Available at: <https://ir.law.fsu.edu/jtlp/vol23/iss1/4>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Journal of Transnational Law & Policy by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

INTERNATIONAL HUMANITARIAN LAW TRANSPARENCY

LESLEY WEXLER*

I.	INTRODUCTION	93
II.	EXISTING MECHANISMS OF IHL TRANSPARENCY.....	96
III.	CASE STUDY: THE KUNDUZ INCIDENT IN GERMANY	100
	A. Background	100
	B. Deploying Existing Transparency Mechanisms	102
	1. Armed Conflict Determinations	104
	2. Civilian Casualties and Proportionality	106
	3. Transparency Ecology	107
IV.	INTERNATIONAL HUMANITARIAN LAW PUBLIC TRANSPARENCY REQUIREMENTS	110
	A. Existence of Armed Conflict or Occupation and Application of IHL.....	110
	B. Civilians and Combatants: Classification & Proportionality	112
	C. Weapons	115
V.	QUESTIONS FOR THE FRONTIER	116

I. INTRODUCTION

This article identifies the demand for public transparency as a new frontier in International Humanitarian Law (IHL). When new conflicts occur, they expose the limitations of the IHL regime and often spur major reform efforts. I suggest that the growing movement for greater public access to information is just as significant as proposals for substantive IHL changes, calls for enhanced accountability, and suggestions for better training. Its advocates contend that information is a necessary precondition to intelligent public debate over IHL reform and assessments of IHL compliance.

Armed conflicts have long required governments to balance secrecy and transparency. To take a few examples, they must decide whether and how to acknowledge the existence of an armed conflict, the applicable legal rules, the evidence of possible violations, and the number of combatant and civilian casualties. But the long war on terror has heightened global civil society's concerns about expansive government secrecy. Demands for enhanced public transparency span the range of IHL activities:

* Professor, University of Illinois College of Law. Thanks to Nathaniel Koppel for excellent research and translation assistance.

the classification of conflicts, the sorting of combatants and civilians, the numbers of civilian casualties, the deployment of unlawful weapons, the conditions of detention, the use of coercive interrogation, its facilitation via extraordinary rendition, and the punishment for unlawful activities.

Assessing the costs and benefits of public transparency is notoriously difficult as the government closely guards much of the information needed to make such a determination. In the context of armed conflicts, states may have a laundry list of justifications not to disclose information to the public: enhancing safety for civilian populations and their own troops, maintaining diplomatic relationships and protecting allies, discouraging strategic behavior by their opponents, and allowing policy and negotiation flexibility. Yet government actors may have less laudatory motives such as: precluding public debate, discouraging accountability,¹ avoiding reform to unlawful practices, and accruing power vis-à-vis members of other government branches.

Of course, numerous justifications for greater public access to information during armed conflicts exist as well. These include bolstering government accountability, shoring up government legitimacy,² building a historical record, reducing uncertainty for families of potential victims, enhancing decision-making,³ and revealing strength or compliant behavior. Again, actors may also have less praise-worthy motives in revealing information such as forwarding a particular policy agenda,⁴ embarrassing other government actors or branches, and undermining political relationships.

While revelations about drone strikes and national surveillance programs have spurred a domestic transparency debate, more attention needs to be paid to the role of international transparency. Many other countries also engage in the war on terror, and several face their own internal armed conflicts. They too must decide how to manage information disclosure in light of their participation in armed conflicts. Moreover, revelations during armed conflicts often implicate multiple countries and, in so doing,

1. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM*, 557 (2004) (arguing that secrecy under the Bush administration was motivated by its desire “to insulate executive action from public scrutiny.”).

2. *Richmond Newspapers v. Virginia, Inc.*, 448 U.S. 555, 572 (1980) (quoting 6 J. WIGMORE, *EVIDENCE* § 1834, 438 (J. Chadbourn rev. 1976)) (noting in the context of the public’s right to attend criminal trials that openness increases “respect for the law” and knowledge of the “methods of government”).

3. Alisdair Roberts, *National Security and Open Government*, 9 *GEO.PUB. POL’Y REV.* 69, 73-75 (2004).

4. Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 *HARV. L. REV.* 906, 910-11 (1990).

can affect cooperation and interoperability. Thus, this article looks abroad to map out various mechanisms for IHL-related transparency and discusses the role of IHL itself in mandating public transparency.

Part I begins by broadly contextualizing some of the most frequently deployed mechanisms of public transparency. First, democratic governments sometimes acknowledge voluntary disclosure of information regarding armed conflicts or authorize the unacknowledged release of information. In addition, unauthorized leakers or other third parties actors may reveal information regarding IHL that the government prefers to keep secret or differs from official government accounts. Domestic law itself may compel public disclosure of some information. While each state has its own variants, this section describes some relevant sources such as open access laws and judicial rulings during litigation. Relatedly, international law may also contain public transparency provisions that remain applicable during armed conflicts. While all of these mechanisms may enhance public access to information, the increasing demands for information outstrip their current application.

Part II uses a 2010 German-ordered air strike in Kunduz, Afghanistan to investigate the role of various transparency mechanisms in the current IHL climate. As this operation ignited a political firestorm in Germany, it provides a nice case study of transparency in action. The strike raised such questions as whether an armed conflict existed, what rules of IHL applied, what the facts on the ground were concerning civilian casualties, and whether government actors had lied or engaged in a cover up. This section concludes by briefly describing the ecosystem in which existing transparency mechanisms dynamically interacted and noting why civil society might find them inadequate.

Part III turns to the substantive content of IHL itself to survey existing and possible future transparency requirements. While legal scholars have exhaustively discussed domestic information forcing statutes, they have written much less about how IHL itself can be used as a tool to compel disclosure.⁵ While such requirements would still require domestic implementation, they affect transparency on a global scale. This section identifies the limited public transparency requirements and notes reform efforts calling for new interpretations or new rules to facilitate public access to information.

5. Cf. Eliav Lieblich, *Show Us the Films: Transparency, National Security and Disclosure of Information Collected by Advanced Weapon Systems under International Law*, 45 ISR. L. REV. 459, 460 (2012).

This paper concludes by noting the contours of this new IHL frontier. What normative priors inform this frontier? What questions demand further research? What sort of reforms need to be assessed? This paper opens this conversation in hopes that as other IHL reforms are proposed and debated, the need for quality IHL information is recognized as an essential part of any of those other frontiers.

II. EXISTING MECHANISMS OF IHL TRANSPARENCY

This section briefly reviews some of the most important mechanisms of government transparency. First, a government may always choose to voluntarily release information about an armed conflict. For instance, a country may announce the existence of an armed conflict and the application of a particular body of law as did Austria-Hungary when it declared war on Serbia in July 1914. Or a head of state may have his officials explain the governing interpretations of IHL like the Obama administration did with a series of speeches articulating its legal positions on the war on terror.⁶ Similarly, a military could choose to release data relating to civilian casualties as the United Kingdom did for recent conflicts in Iraq and Afghanistan.⁷ But as mentioned in the introduction, executives often have strong incentives not to provide and acknowledge information to the public.

In addition to publicly acknowledged disclosures, plants and leaks provide another mechanism of government transparency. With plants, someone in the government authorizes the revelation of information to the media.⁸ Because such information is not publicly linked to a named individual, governments may communicate data and messages without absorbing all of the “diplomatic, legal, or political risks.”⁹ Take, for example, an unnamed French official condemning Georgia’s behavior as “mad”

6. KENNETH ANDERSON & BENJAMIN WITTES, *SPEAKING THE LAW: THE OBAMA ADMINISTRATION ADDRESSES ON NATIONAL SECURITY LAW* (forthcoming 2014).

7. COUNTING CIVILIAN CASUALTIES 39 (Taylor B. Seybolt et al. eds., 2013).

8. David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 11, 37 (forthcoming 2013).

9. *Id.* at 38-40 (elucidating reasons for plants: They allow executives to “circumvent or cajole the career bureaucracy, to communicate more efficiently with foreign governments, to send signals and warnings to adversaries without formally engaging them, to float trial balloons, to respond rapidly to breaking developments, to preserve plausible deniability if an initiative is poorly received or an assertion turns out to be false and generally to impart information about executive branch policies without officially acknowledging those policies and thereby inviting unwanted forms of accountability or constraint.”).

and a bad gamble during the recent conflict over South Ossetia.¹⁰ The comments convey a message without the full costs of an official statement. In contrast, with leaks, someone in the government discloses confidential information to the media without the authority to do so.¹¹ Both Daniel Ellsberg's public dissemination of the Pentagon papers detailing the Department of Defense's assessment of the U.S. role in Vietnam¹² and Bradley Manning's provision of confidential war logs and embassy cables to WikiLeaks are leaks directly related to activity governed by IHL. With the increasing digitization of information, such IHL-related leaks are likely to continue.¹³

Independent actors may also provide information about government activity. For instance, witnesses may observe and disclose government activity. When Israel denied using white phosphorus in Lebanon, civilian reports suggested differently.¹⁴ Sometimes, parties make contemporaneous revelations as when local occupants and news agents captured incendiary bombs on school playgrounds in Syria,¹⁵ while others take place years or even decades later as with Iris Cheng's painstaking interviews of Chinese survivors of the Rape of Nanking.¹⁶ Yet non-government actors may often be unaware of much of the detail surrounding IHL-related activity, or the government may act to bar the dissemination of such information. Take, for example, the limited media access to Guantanamo or China's new secret detention law¹⁷ or the absolute secrecy of suspected CIA black sites in Thailand, Romania, Poland, and Lithuania.

10. Doug Bandow, *United in Powerlessness*, THE NAT'L INTEREST (Aug. 18, 2008), <http://nationalinterest.org/article/united-in-powerlessness-2824>.

11. Pozen, *supra* note 8, at 17. Individuals may possess a variety of reasons to leak: to satisfy their "sense of self-importance, to curry favor with a reporter," to help make policy, to settle a grudge, "to test the response of key constituencies" and to reveal a perceived abuse, "to neutralize prior disclosures" or by accident. *Id.* at 15 discussing STEPHEN HESS, *THE GOVERNMENT/PRESS CONNECTION: PRESS OFFICERS AND THEIR OFFICES* 77-78 (1984).

12. *United States-Vietnam Relations, 1945-1967: A Study Prepared by the Department of Defense*.

13. Alisdair Roberts, *Open Secrets and Dirty Hands*, in *LAW & SECRETS* 25 (Austin Sarat et al. eds., 2012).

14. Jeremy R. Hammond, *Israel's Illegal Use of White Phosphorus During 'Operation Cast Lead' And How the U.S. Media Tries to Cover Up Israeli War Crimes*, FOREIGN POLICY JOURNAL (May 2, 2013), <http://www.foreignpolicyjournal.com/2013/05/03/israels-illegal-use-of-white-phosphorus-during-operation-cast-lead/>.

15. *BBC News World, Syria Crisis: Incendiary Victims Like the Walking Dead* (Aug. 23, 2013), <http://www.bbc.co.uk/news/world-23892594>.

16. *See generally* IRIS CHENG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* (1997).

17. Sui-Lee Wee, *China Holds Man in Secret under New Law Despite Reform Talk*, REUTERS (Jan. 8, 2013), <http://www.reuters.com/article/2013/01/08/us-china-dissident-idUSBRE90707U20130108>.

While the International Committee of the Red Cross (ICRC) is the independent actor with the greatest access to on the ground IHL-related information, it is institutionally committed not to enhance transparency about government activity during armed conflicts.¹⁸ As the custodian of the Geneva Conventions, the ICRC is tasked with the humanitarian mission of protecting victims of armed conflict. In so doing, it maintains a code of confidentiality¹⁹—typically not disclosing communications with states or other armed actors.²⁰ When the ICRC makes field visits, it does not publicly reveal IHL violations or violators in order to maintain its neutrality and continued access.²¹ Similarly, it generally does not disseminate its opinion about whether particular factual situations violate IHL.²² That said, the ICRC does occasionally leak information to other organizations. For instance, while it has only provided Guantanamo detainee reports to the United States,²³ the ICRC did make public its legal analysis of the appropriate legal rules for detainee treatment.²⁴ In addition it may provide information to other governments or organizations to influence state behavior.²⁵ Yet only in rare instances will the ICRC publicly condemn specific IHL violations.²⁶

Sometimes a government discloses information because its own law requires it do so. Such domestic mechanisms include open access laws and judicial litigation. The United States' Freedom of Information Act is an important model as over seventy countries have adopted similar open access laws with various success

18. Steven R. Ratner, *Beyond the Flag of Dunant: Secrecy and the Compliance Mission of the International Committee of the Red Cross*, in *TRANSPARENCY IN INTERNATIONAL LAW*, at 2, 16, 23 (A. Bianchi & A. Peters eds., forthcoming 2013) available at <http://ssrn.com/abstract=2047788> (noting “secrecy is part of the personality and the identity of the ICRC.”).

19. *Id.* at 23.

20. *Id.* at 65.

21. Kenneth Anderson, *First in the Field: The Unique Mission and Legitimacy of the Red Cross in a Culture of Legality*, *TIMES LITERARY SUPPLEMENT BOOK REV.*, at 4 (July 31, 1998). Such a stance has proven controversial, as when it was later learned that the ICRC chose not to speak out in 1942 of what it knew of the Holocaust. *Id.* at 5.

22. CAROLINE MOOREHEAD, *DUNANT'S DREAM: WAR, SWITZERLAND AND THE HISTORY OF THE RED CROSS*, at xxx (1998) (noting the ICRC refused to take a stand despite their knowledge of Germany's mass murders of various groups civilians during World War II).

23. Yves Daccord, *ICRC Communication: Generating Support*, 87 *INT'L REV. RED CROSS* 694, 696 (2005).

24. *Id.* at 697.

25. Ratner, *supra* note 18, at 5; Leah M. Nicholls, Note, *The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and Its 161 Rules of Customary International Humanitarian Law*, 17 *DUKE J. COMP. & INT'L L.* 223, 227, 230-31 (2006) (discussing possible ICRC leakage of US detention conditions).

26. Ratner, *supra* note 18, at 5.

including China, India, and New Zealand.²⁷ Yet such acts still allow governments to keep classified documents private and contain other exclusions which often limit their application during armed conflicts.²⁸ In addition, courts can act both as a generator and disseminator of IHL information. For instance, in order to resolve legal questions, the judicial branch may declare its interpretation of IHL or its applicability to a particular factual situation. For example, when ascertaining the legality of targeted killings, the Israeli high court declared the existence of an international armed conflict and explained its legal reasoning.²⁹

International law may also create state obligations for public disclosure. The push for greater IHL transparency requirements might be seen as part and parcel of the civil society movement for international law transparency generally. The new United Nations International Convention for the Protection of All Persons from Enforced Disappearance is a particularly salient example as it is clearly applicable even during times of armed conflict. The treaty requires states to acknowledge all persons they hold in custody and to acknowledge custodial deaths to their family members.³⁰ While the viewing of official registers of those detained is limited,³¹ article eighteen provides some information about detainees to “any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel.”³² Other human rights treaties also contain provisions requiring varying forms of public transparency for government actions, but their applicability during armed conflicts is often limited.

Despite the existence of these mechanisms and others, many in civil society lament the lack of quality government information regarding IHL and believe that governments are still far too opaque.³³ They may distrust their governments³⁴ or simply feel

27. Alasdair Roberts, *A Great and Revolutionary Law? The First Four Years of India's Right to Information Act*, 70 PUB ADMIN. REV. no. 6 925, 926-27 (2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1527858.

28. Mark Fenster, *The Implausibility of Secrecy*, 11 (forthcoming 2013) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220376.

29. HCJ 769/02 *The Public Committee Against Torture in Israel v. Government of Israel* n. 60-61 [2006] (Isr.).

30. International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, art. 10, 24, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/177 (Feb. 6, 2007) available at <http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>.

31. *Id.* at art. 17 (mandating “up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose”).

32. *Id.*

33. Roberts, *supra* note 13, at 4.

34. *Id.*

ill-informed. While many have written about the push for greater access to information by reforming various domestic laws, this paper suggests reformers may also wish to look directly at IHL itself. While many have documented the shortcomings of U.S. domestic transparency schemes, this next section looks at the limitations in another setting.

III. CASE STUDY: THE KUNDUZ INCIDENT IN GERMANY

The Kunduz incident in Germany provides an interesting case study in IHL public transparency. In 2009, the German-ordered bombing of two fuel tankers sparked a national debate over the lawfulness of targeted killings and the government's public transparency in making such assessments. This section opens with a factual background regarding Germany's role in Afghanistan and the 2009 bombing. It then investigates the mechanisms fostering greater public IHL transparency including voluntary government disclosures, forced government disclosures through litigation, and involuntary government disclosures via leaks. It concludes with some observations about the dynamic system in which actors revealed information about the Kunduz affair and the notable absence of claims about IHL transparency requirements.

A. Background

In the aftermath of World War II, Germany has been reluctant to engage in military activities. Although Germany participated in multilateral missions in Kosovo and Somalia,³⁵ it chose the safest aspects of those actions and consequently, German troops engaged in very little combat during those operations.³⁶ Similarly, although Germany contributed a significant number of troops to NATO's International Security Assistance Force in Afghanistan,³⁷ it chose to direct actions in a relatively quiet area to avoid combat activities.³⁸ In addition, Germany publicly construed its

35. *The End of Innocence in Afghanistan: The German Air Strike Has Changed Everything*, SPIEGEL ONLINE INT'L (Sept. 14, 2009), <http://www.spiegel.de/international/world/the-end-of-innocence-in-afghanistan-the-german-air-strike-has-changed-everything-a-648925.html>.

36. *Id.*

37. Siobhan Dowling, *Letter from Berlin: Rising Star Guttenberg Embraces Difficult Defense Job*, SPIEGEL ONLINE INT'L (Nov. 13, 2009), <http://www.spiegel.de/international/germany/letter-from-berlin-rising-star-guttenberg-embraces-difficult-defense-job-a-661124.html> (sending over 4,300 troops)

38. Dirk Kurbjuweit, *Afghanistan and the West: The Difficult Relationship between Democracy and War*, SPIEGEL ONLINE INT'L (July 7, 2010), <http://www.spiegel.de/international/world/afghanistan-and-the-west-the-difficult-relationship-between-democracy>

Afghanistan mission to domestic audiences as a reconstruction effort.³⁹

For several years, the government avoided directly answering the question of whether Germany was engaged in an armed conflict in Afghanistan or elsewhere. Many of Germany's practices suggested it was not engaged in an armed conflict vis-à-vis the Taliban or terrorists more generally.⁴⁰ Both the public and many members of the government were unsure of the limits of Germany's role. For instance, after several years in Afghanistan, a high-ranking German Defense Ministry lawyer lamented the absence of "a clear directive on whether and to what extent Germany can take part in the targeting process."⁴¹

A high profile incident on September 4, 2009 created the conditions for a national conversation over the legality of targeted killings and other subsidiary IHL questions. It began when Taliban fighters in Afghanistan hijacked two fuel tankers. Once U.S. reconnaissance missions located the tankers,⁴² German Army Colonel Georg Klein directed U.S. fighter jets to strike. After denying repeated requests from U.S. pilots to engage in a fly-by to disperse persons located near the tankers⁴³ and suggestions to consult with ISAF headquarters prior to the use of force,⁴⁴ Klein

-and-war-a-704884.html (noting that after a brief time in Kabul, the Germans moved to the stable Northern part of the country).

39. Charles Hawley, *Letter from Berlin: Germany Confronts the Meaning of War*, SPIEGEL ONLINE INT'L (Feb. 4, 2010), <http://www.spiegel.de/international/germany/letter-from-berlin-germany-confronts-the-meaning-of-war-a-675890.html>.

40. For instance, early German military directives restricted German use of force to self-defense. Ulrike Demmer et al., *'Capture or Kill': Germany Gave Names to Secret Taliban Hit List*, SPIEGEL ONLINE INT'L (Aug. 2, 2010), <http://www.spiegel.de/international/germany/capture-or-kill-germany-gave-names-to-secret-taliban-hit-list-a-709625.html>. Evidence shows that German troops received little training in NATO procedures, perhaps because they did not anticipate the frequent need to engage in the use of force. Matthias Gebauer, *Aftermath of a Deadly Airstrike: Misguided Esprit de Corps Lets Officer Off the Hook*, SPIEGEL ONLINE INT'L (Aug. 20, 2010), <http://www.spiegel.de/international/germany/aftermath-of-a-deadly-airstrike-misguided-esprit-de-corps-lets-officer-off-the-hook-a-712843.html>.

41. Demmer, *supra* note 40; Matthias Gebauer & Shoib Najafizada, *Another Hit Against the Taliban: Pakistan Arrests Germany's Enemy Number One*, SPIEGEL ONLINE INT'L (Feb. 18, 2010), <http://www.spiegel.de/international/world/another-hit-against-the-taliban-pakistan-arrests-germany-s-enemy-number-one-a-678723.html> (noting that as late as 2010, German newspapers were reporting that German troops refused to take part in such missions in Afghanistan).

42. The tankers were stuck for several hours on a sandbank in the Kunduz River. Matthias Gebauer, *Inquiry into Kunduz Bombing: German Defense Minister Blasted for 'Slanderous' Statements*, SPIEGEL ONLINE INT'L (Mar. 19, 2010), <http://www.spiegel.de/international/germany/inquiry-into-kunduz-bombing-german-defense-minister-blasted-for-slanderous-statements-a-684541.html>.

43. Matthias Gebauer & John Goetz, *Testimony to Parliamentary Inquiry: German Officer Defends Controversial Afghanistan Air Strike*, SPIEGEL ONLINE INT'L (Feb. 10, 2010), <http://www.spiegel.de/international/germany/a-677109.html>.

44. He also acted without advice from his legal advisor or supervisors. *The End of Innocence in Afghanistan: The German Air Strike Has Changed Everything*, *supra* note 35.

falsely reported enemy contact and again ordered a strike.⁴⁵ American pilots then dropped two bombs killing a significant number of people.⁴⁶

The ordering of this air strike proved politically controversial in Germany.⁴⁷ Several politicians decried the strike as illegitimate,⁴⁸ and the public, already reluctant to send troops, used this opportunity to question the lawfulness of their involvement in Afghanistan.⁴⁹ In order to assess the legitimacy of the strike, the Germans needed to know what body of law to apply. Did IHL rules apply to a targeted killing or did the rules of self-defense govern?⁵⁰ As a next set of questions, the Germans would need to know how did the government distinguish civilian deaths from combatant deaths? How many of the deaths were civilians? Given those answers, should the strike be viewed as disproportionate and thus unlawful under IHL?

B. Deploying Existing Transparency Mechanisms

Thus, the Kunduz strike raised legal questions regarding the applicability of IHL⁵¹ and the application of the proportionality

45. Hawley, *supra* note 39.

46. Matthias Gebauer & John Goetz, *Kunduz Bombing in Afghanistan: German Defense Ministry Sought to Obscure the Truth*, SPIEGEL ONLINE INT'L (Mar. 18, 2010), <http://www.spiegel.de/international/germany/kunduz-bombing-in-afghanistan-german-defense-ministry-sought-to-obscure-the-truth-a-684411.html>.

47. The lower house in parliament characterized the strike as "one of the most serious incidents involving the German military since the Second World War." *German Court Hears Suit by Afghan Raid Victims*, AGENCE FRANCE PRESSE (Mar. 20, 2013), <http://www.globalpost.com/dispatch/news/afp/130318/court-hear-suit-against-germany-afghan-raid-victims>.

48. *Debate on Germany's status in Afghanistan Heats Up*, DEUTSCHE WELLE (Nov. 7, 2009), <http://www.dw.de/debate-on-germanys-status-in-afghanistan-opens-up/a-4868657-1>.

49. The lower house in parliament characterized the strike as "one of the most serious incidents involving the German military since the Second World War." *German Court Hears Suit by Afghan Raid Victims*, *supra* note 47.

50. Relatedly, even if the strike satisfied the formal rules of IHL, did it violate U.S. General McChrystal's recent 2009 Rules of Engagement, limiting airpower to avoid risks to civilian lives? *The End of Innocence in Afghanistan: The German Air Strike Has Changed Everything*, *supra* note 35 (dictating that "if there is a risk of civilian casualties, ISAF commanders should call off air support at the last minute and allow the enemy to escape."); see also *Investigation in Afghanistan: New Allegations against German Officer who Ordered Kunduz Air Strike*, SPIEGEL ONLINE INT'L (Sept. 21, 2009), <http://www.spiegel.de/international/world/investigation-in-afghanistan-new-allegations-against-german-officer-who-ordered-kunduz-air-strike-a-650200.html> (discussing ISAF regulations requiring consultation with ISAF headquarters in the absence of an imminent threat or the necessary authorization of NATO's joint force command if civilians are at risk).

51. The press viewed this incident as raising the question "Are or should Germans be permitted to conduct targeted killings in Afghanistan?" Holger Stark, *Kunduz Bombing Affair: German Colonel Wanted to 'Destroy' Insurgents*, SPIEGEL INT'L ONLINE (Dec. 29, 2009), <http://www.spiegel.de/international/germany/kunduz-bombing-affair-german-colonel-wanted-to-destroy-insurgents-a-669444.html>.

principle under IHL.⁵² Numerous bodies addressed the application of IHL to the specific facts on the ground. For instance, NATO investigators⁵³ went to the Kunduz base, questioned personnel, reviewed radio communications,⁵⁴ and interviewed the American pilots.⁵⁵ The German Defense Ministry also conducted its own investigation,⁵⁶ concluding that although the attack was “militarily inappropriate,”⁵⁷ neither Klein nor others committed a breach of discipline warranting further action. Yet these actors conducted these investigations privately and as an official matter, intended to keep their reports and legal analysis largely confidential.⁵⁸

The government’s opacity as to its basic legal positions regarding rules governing Afghanistan and the factual details regarding the specific Kunduz bombing raised fundamental questions about whether Parliament and the public possessed sufficient information to assess the executive branch’s positions. After inconsistent answers and unsatisfying accounts, the Parliament eventually conducted an inquiry into the government’s behavior regarding the Kunduz affair. In turn, that inquiry led to a parliamentary debate over the nature of the actions.⁵⁹ But even

52. German political officials viewed it as forcing them to address “whether the fundamental principal of proportionality when applying military force, and thereby the conditional national ban on targeted killing, still holds true.” Spencer Kimball, *German Opposition Condemns Kunduz Airstrike as Mistake*, DEUTSCHE WELLE (Aug. 11, 2011), <http://www.dw.de/german-opposition-condemns-kunduz-airstrike-as-mistake/a-15311961>.

53. *Dozens Dead in Afghanistan: UN Calls for Investigation into Air Strikes*, SPIEGEL ONLINE INT’L (Sept. 4, 2009), <http://www.spiegel.de/international/world/dozens-dead-in-afghanistan-un-calls-for-investigation-into-air-strikes-a-647084.html>.

54. *Investigation in Afghanistan: New Allegations against German Officer who Ordered Kunduz Air Strike*, SPIEGEL ONLINE INT’L (Sept. 21, 2009), <http://www.spiegel.de/international/world/investigation-in-afghanistan-new-allegations-against-german-officer-who-ordered-kunduz-air-strike-a-650200.html>.

55. Matthias Gebauer & John Goetz, *Deadly Bombing in Kunduz: German Army Withheld Information from US Pilots*, SPIEGEL ONLINE INT’L (Feb. 1, 2010), <http://www.spiegel.de/international/germany/deadly-bombing-in-kunduz-german-army-withheld-information-from-us-pilots-a-675229.html>.

56. *Germany Drops Probe into Afghan Air Raid*, UNITED PRESS INT’L (Aug. 20, 2010), http://www.upi.com/Top_News/Special/2010/08/20/Germany-drops-probe-into-Afghan-air-raid/UPI-94981282322935/.

57. John Goetz, *NATO’s Secret Findings: Kunduz Affair Report Puts German Defense Minister Under Pressure*, SPIEGEL ONLINE INT’L (Jan. 19, 2010), <http://www.spiegel.de/international/germany/nato-s-secret-findings-kunduz-affair-report-puts-german-defense-minister-under-pressure-a-672468.html>. By December 2009, Guttenberg claimed “[a]lthough Colonel Klein undoubtedly acted to the best of his knowledge and belief as well as to protect his soldiers, it was, from today’s objective viewpoint, and in light of all of the documents that were withheld from me at the time, militarily inappropriate.” *Id.*

58. See, e.g., Volker Wieker, *Declassification of Kunduz Report*, Headquarters ISAF (Nov. 4, 2009), <http://dipbt.bundestag.de/dip21/btd/17/CD07400/Dokumente/Dokument%20073.pdf>.

59. Chuck Penfold, *German Opposition Slams Berlin’s Stance on Kunduz Inquiry*, DEUTSCHE WELLE (Jul. 3, 2011), <http://www.dw.de/german-opposition-slams-berlins-stance-on-kunduz-inquiry/a-15207372>.

so, the German public has been left with many unknowns and the suggestion that no reform to German practices have occurred.⁶⁰

I use the Kunduz affair as a case study to highlight the workings of the transparency ecosystem in the IHL context. Kunduz provides an opportunity to explore both the potential and the limitations of some existing mechanisms in encouraging public transparency. I look at highly charged IHL questions such as whether Germany was participating in an armed conflict, how it assessed civilian casualties, and whether Germany engaged in targeted killings. The following subsections illustrate the role of voluntary disclosures, leaks, and litigation in revealing and generating information for public consumption on these IHL questions.

1. Armed Conflict Determinations

As mentioned above, the threshold question of whether a state is engaged in an armed conflict must be answered to determine the applicability of IHL. For many years, the German government dodged this question. Though it originally classified the deployment of German troops as a “stabilization mission,”⁶¹ this does not directly address the question of IHL application. Immediately after the Kunduz attack, a defense ministry spokesperson voluntarily acknowledged that stabilization could include fighting but remained coy about the legal classification of troop activity.⁶²

Nor did Klein prove to be a reliable source of information as to the nature of his activities. Klein failed to contemporaneously declare the applicable rules of engagement for the strike.⁶³ During an early investigation, Klein initially defended the strike as immediately necessary to protect soldiers at a nearby base from a Taliban suicide attack suggesting the application of self-defense rules.⁶⁴ Subsequent investigations made public however, suggested

60. Joerg Brunsmann, *Kunduz Bombing Taught Germany Nothing*, *War Crime Expert Says*, DEUTSCHE WELLE (Aug. 4, 2010), <http://www.dw.de/kunduz-bombing-taught-germany-nothing-war-crimes-expert-says/a-5970832>.

61. Siobhan Dowling, *The World from Berlin: New Evaluation on Afghanistan Long Overdue*, SPIEGEL ONLINE INT'L (Feb. 11, 2010), <http://www.spiegel.de/international/germany/the-world-from-berlin-new-evaluation-on-afghanistan-long-overdue-a-677289.html>.

62. *Dozens Dead in Afghanistan: UN Calls for Investigation into Air Strikes*, *supra* note 53 (“In reply to a question put to him during the press conference, as to whether the Bundeswehr would continue to maintain that there was no war in Afghanistan, the spokesperson said ‘this is about a stabilization effort. It is a robust stabilization effort, and as such, necessarily involves some fighting.’”).

63. Gebauer & Goetz, *supra* note 55.

64. *Top Prosecutor to Investigate Controversial Airstrike*, DEUTSCHE WELLE (Nov. 6, 2009), <http://www.dw.de/top-prosecutor-to-investigate-controversial-airstrike/a-4866396>.

Klein, in consultation with Germany's Special Forces Unit,⁶⁵ ordered the strike to "liquidate" Taliban fighters, which could fall under IHL rules.⁶⁶

Once local prosecutors opened a criminal investigation to consider the legality of Klein's actions,⁶⁷ the government found it difficult to maintain its opaque stance on such a key question.⁶⁸ Jurisdictional considerations for the pursuit of criminal charges forced the question of IHL's application. Local prosecutors had to decide whether to move the prosecution to a federal office for consideration of international law issues.⁶⁹ When prosecutors decided that they would in fact have to look into international law,⁷⁰ the government chose to clarify its position. For instance, in November 2009, Defense Minister Guttenberg referred to the war-like conditions in Afghanistan⁷¹ and soon thereafter, labeled the situation in Afghanistan theater as a non-international armed conflict.⁷² Similarly, German Foreign Minister Guido Westerwelle classified the military deployment in Afghanistan as an "armed conflict within the parameters of international law" and explained the classification as important to allow German soldiers to act without fear of prosecution.⁷³ Westerwelle also said, "[w]e have to know that rebel fighters in a non-international armed conflict covered by the framework of humanitarian international law can and must be deliberately fought."⁷⁴

65. Johannes Stern, *German Foreign Minister Defends Targeted Killings in Afghanistan*, WORLD SOCIALIST WEB SITE (Aug. 7, 2010), www.wsws.org/en/articles/2010/08/targa07.html (noting that Klein "had consulted with the German KSK elite unit that had been tracking the movements of Taliban leaders.").

66. Kimball, *supra* note 52.

67. The criminal case began as a local prosecution but was moved to "Germany's highest prosecution office to ascertain if the incident is covered by international law." *Top Prosecutor to Investigate Controversial Airstrike*, DEUTSCHE WELLE (Nov. 6, 2009), <http://www.dw.de/top-prosecutor-to-investigate-controversial-airstrike/a-4866396-1>.

68. *Id.*

69. *Legal Issues Snarl German Inquiry into Airstrike Colonel*, DEUTSCHE PRESSE-AGENTUR (Nov. 6, 2009), <http://www.lakelandlegal.com/content/headline/embed/headline/2009/11/06/legal-issues-snarl-german-inquiry-into-airstrike-colonel>.

70. *Germany Drops Probe into Afghan Air Raid*, *supra* note 56. In Germany, civilian courts adjudicate actions concerning the military as Germany abolished courts martials after World War II. Edward F. Sherman, *Military Justice without Military Control*, 82 YALE L. J. 1398, 1398 (1973).

71. Siobhan Dowling, *Letter from Berlin: Rising Star Guttenberg Embraces Difficult Defense Job*, SPIEGEL ONLINE INT'L (Nov. 13, 2009), <http://www.spiegel.de/international/germany/letter-from-berlin-rising-star-guttenberg-embraces-difficult-defense-job-a-661124.html>.

72. Ulrike Demmer, *The Afghan War Logs: Germany Gave Taliban Names to Secret U.S. 'Capture or Kill' Unit*, SAN FRANCISCO SENTINEL (Aug. 2, 2010), <http://www.sanfranciscosentinel.com/?p=83030>.

73. Siobhan Dowling, *The World from Berlin: 'New Evaluation on Afghanistan Long Overdue'*, SPIEGEL ONLINE INT'L (Feb. 11, 2010), <http://www.spiegel.de/international/germany/the-world-from-berlin-new-evaluation-on-afghanistan-long-overdue-a-677289.html>.

74. Stern, *supra* note 65.

This clarification guided both this prosecution and created the information necessary to assess other actions going forward. For instance, the prosecutors decided to apply IHL to assess the lawfulness of Klein's actions.⁷⁵ The classification may also prove relevant to an ongoing civil suit seeking compensation for the incident.⁷⁶ And the official indication allows the public to debate whether it wishes to be involved in such a conflict and whether IHL rules are being properly applied and interpreted. It no longer has to focus on the question of whether it is engaged in an armed conflict at all.

2. Civilian Casualties and Proportionality

One related set of IHL questions raised by the Kunduz strike relates to civilian casualties. In order for the public to assess the lawfulness of the specific incident and the quality of government accountability measures in this instance, it needs a sense of the number of civilian casualties.⁷⁷ In debating the lawfulness of the strike, governments and non-governmental organizations have hotly contested the number of civilian casualties. German Defense Minister Franz Jung initially maintained the strike only killed Taliban fighters.⁷⁸ Similarly, Afghan Governor Omar's interview with German journalists suggested there were few or no civilian casualties.⁷⁹ The WikiLeaks embassy cables similarly suggested that the Afghanistan government either believed, or wanted the U.S. and Germany to believe, few if any civilians were involved.⁸⁰

Yet the availability of other information gatherers challenged the government's original casualty assessments. An early report to Afghan President Hamid Karzai and leaked to the public noted 30 civilian deaths and 69 Taliban deaths.⁸¹ Others determined the

75. Matthias Gebauer, *Aftermath of a Deadly Airstrike: Misguided Esprit de Corps Lets Officer Off the Hook*, SPIEGEL ONLINE INT'L (Aug. 20, 2010), <http://www.spiegel.de/international/germany/aftermath-of-a-deadly-airstrike-misguided-esprit-de-corps-lets-officer-off-the-hook-a-712843.html>.

76. Carla Bleiker, *German Court to Rule on Kunduz Air Strike*, DEUTSCHE WELLE (Mar. 20, 2013), <http://www.dw.de/german-court-to-rule-on-kunduz-airstrike/a-16680014>.

77. Of course, the number of civilian deaths is only part of the proportionality analysis, but without it, the conversation cannot progress.

78. *Germany Drops Probe into Afghan Air Raid*, *supra* note 56.

79. According to Kunduz ANP Chief Gen. Abdul Rizzaq, those killed in the airstrike came from fourteen villages, some from outside the province, which he said suggested strongly they were anti-government elements rather than innocent victims. *Id.* In addition, the Governor suggested that as no one had come forward to demand compensation, unlike in previous incidents where innocent civilians were killed or injured, one should infer no civilians were involved. *Id.*

80. Embassy Kabul, *Response to Coalition Strike in Kunduz: We Need More of This*, WikiLeaks Embassy Cable Ref id 224402, 09KABUL2760 (Sep. 9, 2009) available at <http://wikileaks.org/cable/2009/09/09KABUL2760.html>.

81. *Legal Issues Snarl German Inquiry into Airstrike*, *supra* note 69.

civilian counts to be much higher with the International Red Cross at 74, Amnesty International at 83, and the International Organization for Migration at 95.⁸² WikiLeaks also provided full access to the classified NATO report and the Military Police “for service only” report that suggested there should have been a strong expectation of civilians killed.⁸³

The availability of other sources of information caused the German government to revise its estimates. For instance, German Defense Minister Franz Jung subsequently walked back his earlier comment that there were no civilian casualties.⁸⁴ By December 2009, Defense Minister Guttenberg called the attack “military disproportionate” to the German parliament.⁸⁵ A later German report indicated that the “airstrike killed 91 people, at least 83 of whom were civilians, including 22 children.”⁸⁶ Yet in revising its estimates and changing its assessment of the attack, the government did not disclose its legal analysis distinguishing combatants from civilians or who counts as civilians directly participating in hostilities.

3. Transparency Ecology

The Kunduz incident reveals a government refusing to take a stance on the nature of operations and the application of the laws of war. When faced with a use of force resulting in a large number of deaths, the government initially maintained limited or no civilian casualties. Yet the combination of small data leakage to traditional news outlets as well as full text, full database leakage via WikiLeaks⁸⁷ provided information that was incorporated into the public debate over Germany’s IHL application and compliance.⁸⁸

82. Jochen-Martin Gutsch, *Compensation for Bombing Victims: The Price of an Afghan Life*, SPIEGEL ONLINE INT’L (Aug. 10, 2010), <http://www.spiegel.de/international/world/compensation-for-bombing-victims-the-price-of-an-afghan-life-a-710963.html>.

83. Lieutenant Colonel Brenner, *Untersuchungsbericht zum ‘Close Air Support KUNDUZ’ vom 04.09.2009* (Sept. 9, 2009) available at <http://wlstorage.net/file/de-isaf-cas-kunduz-sep09.pdf>.

84. *Aftermath of Afghan Air Strike: Germany Pledges Full Probe as Pressure Mounts on Defense Minister*, SPIEGEL INT’L ONLINE (Sept. 7, 2009), <http://www.spiegel.de/international/world/aftermath-of-afghan-air-strike-germany-pledges-full-probe-as-pressure-mounts-on-defense-minister-a-647398.html>.

85. Gutsch, *supra* note 82.

86. Kimball, *supra* note 52.

87. *Legal Issues Snarl German Inquiry into Airstrike*, *supra* note 69.

88. The leaks to traditional media outlets tended to be more filtered in the information provided to the public. For instance, the newspaper Der Spiegel received access to a secret NATO report, but did not publish it in its entirety. The newspaper did reveal several of NATO’s factual determinations such as: Klein’s reliance on a single intelligence source, Klein’s failure to identify the applicable Rules of Engagement, the American pilots’ repeated efforts to delay or avoid the strike, and Klein’s statement to the pilots that the people on the

In turn, the inconsistencies between the government accounts and the other sources of information along with a failed early promise from Prime Minister Merkel for a full investigation and questions about potential governmental irregularities,⁸⁹ led the Bundestag to create a parliamentary inquiry.⁹⁰ This inquiry was to both look at the events precipitating the attack⁹¹ and to “review[] the German government’s response to events in Kunduz and whether politicians sought to cover up possible mistakes made by German officers.”⁹² This inquiry called high level officials to account for Germany’s earliest official position maintaining both the lawfulness of Klein’s decision to strike and the absence of civilian deaths.⁹³ The inquiry reviewed multiple reports submitted by various parties containing conflicting facts and assessments of Klein’s actions.⁹⁴ This inquiry revealed the government’s efforts to mislead the public on the Kunduz affair. For instance, the inquiry uncovered a Defense Ministry working group formed to influence NATO investigators to draft a favorable report of Klein’s actions.⁹⁵ It lasted 14 months and included over 40 witnesses including Prime Minister Merkel and Defense Minister Guttenberg.⁹⁶

ground were an imminent threat and that enemy contact had been made. Goetz, *supra* note 57.

89. Matthias Gebauer & Holger Stark, *One Year After the Kunduz Air Strike: No Sign of a Full Investigation*, SPIEGEL ONLINE INT’L (Aug. 30, 2010), <http://www.spiegel.de/international/world/one-year-after-the-kunduz-air-strike-no-sign-of-a-full-investigation-a-714532.html>.

90. Many governments possess the legislative capacity to publicly investigate the deceptive behavior of political actors. Germany’s capacity is embodied in the parliamentary inquiry. Under Article 44 of the Basic Law, the Bundestag can establish a committee of inquiry to investigate “possible misgovernment, maladministration and possible misconduct on the part of politicians.” *Committees of inquiry established in accordance with Article 44 of the Basic Law*, DEUTSCHER BUNDESTAG, available at http://www.bundestag.de/htdocs_e/bundestag/committees/bodies/inquiry/index.html. The committee functions as a quasi-judicial body with the authority to “question witnesses and experts and request that further investigations be carried out by courts and administrative authorities.” *Id.*

91. Charles Hawley, *Letter from Berlin: Germany Confronts the Meaning of War*, SPIEGEL ONLINE INT’L (Feb. 4, 2010), <http://www.spiegel.de/international/germany/letter-from-berlin-germany-confronts-the-meaning-of-war-a-675890.html>.

92. Cathrin Schaer, *The World from Berlin: Truth is Often the First Casualty of War*, SPIEGEL ONLINE INT’L (Apr. 21, 2010), <http://www.spiegel.de/international/germany/letter-from-berlin-germany-confronts-the-meaning-of-war-a-675890.html>.

93. A week into office, German Defense Minister Guttenberg briefed parliamentary groups about the NATO report and concluded to the press that “the military strikes and the airstrikes given the overall threat environment, must be viewed as militarily appropriate.” Goetz, *supra* note 57.

94. Kimball, *supra* note 52.

95. Gebauer & Goetz, *supra* note 46. Some evidence suggests they had a “spy” in the NATO team working on the report, and he was instructed to get the report “to say that Klein did not go beyond his ‘discretionary authority’ in his decision to order the bombings.” The group also undercut a German military police report critical of Klein. See Gebauer, *supra* note 42.

96. Judy Dempsey, *Merkel Gives Testimony on 2009 Airstrike in Afghanistan*, NYTIMES (Feb. 10, 2011), http://www.nytimes.com/2011/02/11/world/europe/11iht-germany11.html?_r=0; Siobhan Dowling, *The World from Berlin: German Soldiers Don’t*

The Kunduz incident provides a nice example of how the demands for transparency can be self-reinforcing. As sources revealed more information via one mechanism, it often triggered another process and more information revelations. Litigation and legal inquiries served an information-forcing role by creating conditions under which government actors felt the need to formally endorse a legal position. Even for those classified legal proceedings and quasi-judicial inquiries, journalists and leakers may sometimes have opportunities for information dissemination.

Yet these mechanisms may be unsatisfying. Looking at Kunduz, even with a scandal of this magnitude, the public's frustration continues with its lack of access to information.⁹⁷ Many key documents remain classified.⁹⁸ Despite promises of transparency, the parliament conducted a closed-door session with Colonel Klein.⁹⁹ The inquiry's report was viewed as inconclusive and did not answer many of the questions the public had.¹⁰⁰ Moreover, some legal experts contend that no reform to German military practices has occurred.¹⁰¹

To speak more broadly, the frequency and coverage of leaks is uncertain. Litigation and public inquiries are slow and not always public. Many publics, including the German, do not view open access laws as an important avenue for information.¹⁰² One might leave this incident with the hypothesis that if civil society wants better access to information for public debate or greater accountability on IHL issues, one might look to the substance of IHL itself. Thus, this next session maps out existing requirements and efforts to generate more access.

Believe in a Happy Outcome, SPIEGEL ONLINE INT'L (Apr. 23, 2010, 2:57 PM), <http://www.spiegel.de/international/germany/the-world-from-berlin-german-soldiers-don-t-believe-in-a-happy-outcome-a-690826.html>.

97. Gebauer & Goetz, *supra* note 43.

98. Gebauer & Stark, *supra* note 89.

99. Gebauer & Goetz, *supra* note 97.

100. Nicole Goebel, *Report on Deadly German Ordered Air Raid in Kunduz is Inconclusive*, DEUTSCHE WELLE (Oct. 28, 2011), <http://www.dw.de/report-on-deadly-german-ordered-air-raid-in-kunduz-is-inconclusive/a-15493225>.

101. Joerg Brunsmann, *Kunduz Bombing Taught Germany Nothing, War Crime Expert Says*, DEUTSCHE WELLE (Sept. 4, 2009), <http://www.dw.de/kunduz-bombing-taught-germany-nothing-war-crimes-expert-says/a-5970832>.

102. Tom Hannan, *FOI Requests: Do You Know About Your Right to Know?*, GLOBAL INTEGRITY, (Oct. 17, 2012, 3:35 PM), <http://www.globalintegrity.org/node/1121> (explaining that German freedom of information laws did not appear to play a significant role in this context and German adoption of such a laws is relatively recent and their invocation infrequent).

IV. INTERNATIONAL HUMANITARIAN LAW PUBLIC TRANSPARENCY REQUIREMENTS

Given the groundswell of support for greater public access to information regarding armed conflicts, the IHL governing such conflicts is one natural place to turn. This final section surveys some of the most relevant substantive areas to get a sense of existing public transparency requirements. As such mandates are limited, this section also provides a flavor of the movement for reinterpreting or amending IHL to require greater government openness.

A. Existence of Armed Conflict or Occupation and Application of IHL

Some states understood early IHL to require a public declaration of war in order to trigger its application. For instance, the Hague Convention of 1899 is applicable only “in case of war.”¹⁰³ Some read this requirement to mean a “declared” war was necessary to trigger their IHL obligations.¹⁰⁴ Thus Japan steadfastly maintained that IHL did not apply to its activities in China during World War II because no formal declaration had been made.¹⁰⁵ While international courts rejected this argument,¹⁰⁶ it led the drafters of the Geneva Conventions to make clear public declarations were not necessary for IHL application.

In fact, the Geneva Conventions carry no requirement that either the triggering event or the state’s decision to apply IHL be made public. IHL’s transparency requirements are narrow and generally do not provide for public access to information. While the Geneva Conventions set up the standards for determining whether an armed conflict exists and what rules of IHL apply, the Conventions do not require a formal declaration by a state for their application nor must states publicly identify which rules they choose to apply. Common Article 2, which governs international armed conflicts states.

103. Convention with Respect to the Laws and Customs of War on Land, art. 2, Jul. 29, 1899, 32 Stat. 1803. T.S. 403.

104. LAURIE BLANK & GREGORY NOONE, INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CHALLENGES IN THE LAW OF WAR 83 (2013).

105. Judgment of Nov. 4, 1948, 1948 Military Tribunal for the Far East, at 490-91 (discussing Japan’s arguments that hostilities in China were only an incident and thus, “the military authorities persistently asserted that the rules of war did not apply in the conduct of the hostilities.”).

106. *Id.*

[T]he present Convention shall apply to all cases of declared war *or other* armed conflict which may arise between two or more High Contracting Parties *even if the state of war is not recognized by one of them*. The convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if said occupation meets with no armed resistance.¹⁰⁷

The commentary to this goes on to make clear that “[t]here is no need for a formal declaration of war, or for the recognition of the existence of a state of war, as preliminaries to the application of the Convention.”¹⁰⁸

Nor does Common Article 3, which governs non-international armed conflicts, demand public transparency as to the existence or nature of the conflict. It is triggered simply by the existence of an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”¹⁰⁹ The drafters intentionally chose not to define “armed conflict not of an international character” in the text in order to facilitate a wide application of the protections.¹¹⁰ Rather the Commentary simply provides a list of relevant, but non-obligatory conditions, upon which one may determine such a conflict exists. While recognizing insurgents as belligerents or the agreement of the insurgent civil authority to be bound by the Geneva Conventions are relevant,¹¹¹ they are not mandatory and neither side must formally acknowledge the existence of an armed conflict.

While abolishing formal declarations allows for greater application of Geneva Convention protections, this often leaves civil society in the dark as to the nature of government activities. One particularly visible and controversial example of such uncertainty regards the use of drone strikes outside of Afghanistan. The United States deployed drones, often administered by CIA, to strike suspected terrorists in Yemen and Pakistan. Other

107. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

108. INT'L COMM. RED CROSS, COMMENTARY ON THE GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 22-23 (Oscar M. Uhler & Henri Coursier eds., 1958).

109. *Id.* at 35-36.

110. *Id.*

111. *Id.*

countries such as Germany,¹¹² Australia,¹¹³ Britain,¹¹⁴ Pakistan,¹¹⁵ and Yemen¹¹⁶ aided these missions. Yet many of these states remained coy about their participation and whether their role constituted participation in an armed conflict. As I have written in more detail previously, this lack of clarity generated much domestic pressure for governmental disclosure about participation in and classification of the nature of the potential armed conflict.¹¹⁷

B. Civilians and Combatants: Classification & Proportionality

The acknowledgement of armed conflict and the application of a particular set of IHL rules help states determine who they may target with force and when the unintended deaths from such force are lawful. In other words, IHL authorizes a state engaged in an armed conflict to kill combatants and civilians directly participating in conflicts.¹¹⁸ Relatedly, under IHL, states are not liable for the unintended deaths of civilians if such deaths are proportionate to a military objective.¹¹⁹ Yet even if states disclose the existence of an armed conflict and the applicability of a certain

112. Nathalie Van Raemdonck, *Vested Interest or Moral Indecisiveness? Explaining the EU's Silence on the US Targeted Killing Policy in Pakistan*, 1205 ISTITUTO AFFARI INTERNAZIONALI WORKING PAPERS 15 (2005) (noting that Germany only took a public position opposing the use of German intelligence for US drone strikes after a German citizen was killed in such a strike).

113. Philip Doring, *Pine Gap Drives US Kills*, THE AGE (July 21, 2013), <http://www.smh.com.au/national/pine-gap-drives-us-drone-kills-20130720-2qbsa.html> (report describing use of Australian Spy base to locate terrorist suspects and provide intelligence to Americans for drone strikes).

114. Steve Swann, *CIA Drone Strikes. Is the UK Involved?* BBC NEWS UK (Dec. 12, 2012, 5:37PM), <http://www.bbc.co.uk/news/uk-20804072> (reporting on dismissing lawsuit attempted to find out nature of UK involvement in drone strikes). Notably, Germans had provided information on the head of the Taliban group that abducted the tanks described below to place him on Joint Prioritized Effects List. This list is also known as a "capture or kill list" *Capture or Kill: Germany Gave Names to Secret Taliban Hit List*, SPIEGEL ONLINE INT'L (Aug. 2, 2010), <http://www.spiegel.de/international/germany/capture-or-kill-germany-gave-names-to-secret-taliban-hit-list-a-709625.html>.

115. John Hudson, *WikiLeaks Cache Reveals Pakistan's Role in Drone Strikes*, THE ATLANTIC WIRE (May 20, 2011), <http://www.theatlanticwire.com/global/2011/05/wikileaks-cache-reveal-pakistans-role-drone-strikes/37966/>.

116. Cheryl Sullivan, *Why Yemen Claims Role in US Drone Strike on Cleric Anwar al-Awlaki*, CHRISTIAN SCIENCE MONITOR (May 7, 2011), <http://www.csmonitor.com/USA/2011/0507/Why-Yemen-claims-role-in-US-drone-strike-on-cleric-Anwar-al-Awlaki>.

117. Lesley Wexler, *The Role of the U.S. Judicial Branch during the Long War: Drone Courts, Damage Suits and Freedom of Information Act (FOIA) Requests*, in *Applying Int'l Humanitarian Law in Judicial and Quasi Judicial Bodies: International and Domestic Aspects* (Derek Jinks, Jackson Nyamuya Maogoto & Solon Solomon eds., forthcoming 2014).

118. For such time as they participate. Whereas if the state is not engaged in armed conflict, it must use other rules to decide when and against whom force is appropriate.

119. See Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 17512, Art. 51(5); BLANK & NOONE, *supra* note 104.

set of rules, IHL contains no clear textual mandate demanding disclosure of either states' classification standards for differentiating between combatants and civilians or their civilian casualty counts. Nor does the text of any IHL treaty demand that states must reveal their analytic tools or factual predicates for measuring proportionality. One might plausibly argue that such transparency is a necessary precondition for ensuring respect for the convention, but as a matter of *lex lata*, states have not understood IHL this way. States do not commonly report civilian casualties in either international or internal armed conflicts.

Yet an emerging civil society movement is calling for the recording, dissemination, and compensation of civilian deaths during armed conflicts. For instance, the civil society coalition comprising the Every Coalition Counts campaign contends IHL already legally requires data collection and transparency for every casualty of armed conflict. The coalition draws on a broad interpretation of the Geneva Conventions, supplemented by expansive application of human rights protections.¹²⁰ Acknowledging that this approach may not be common practice,¹²¹ they have also suggested a treaty consolidating or creating these protections and making clearer the obligations may be in order.¹²² To facilitate this process, they have drafted a charter calling for states to ensure that every direct "casualty of armed violence" is "promptly recorded[,] correctly identified[,] and] publicly acknowledged."¹²³ In the absence of full government agreement

120. For example, despite the absence of a clear textual hook, the Oxford Research Groups' Recording of Armed Conflict Programme has argued that "a move towards establishing a systematic mechanism of casualty recording in all theatres of armed conflict is necessary and required by law." Susan Breau & Rachel Joyce, *The Legal Obligation to Record Civilian Casualties of Armed Conflict* (June 2011), <http://www.oxfordresearchgroup.org.uk/sites/default/files/1st%20legal%20report%20formatted%20FINAL.pdf>. They urge a broad and comprehensive reading of the Geneva Conventions and human rights laws to demonstrate this requirement. *Id.*

Others, such as the UN Special Rapporteurs on Extrajudicial Killings, have forwarded similar textual arguments on behalf of transparency requirements for casualty statistics. For instance, Christof Heyns, cited numerous Geneva Convention articles, but none references such a duty. Rapporteur on Extrajudicial, Summary or Arbitrary Executions *Addendum 3*. U.N. Doc. A/HRC/20/22/Add.3 13n 68 available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-22-Add3_en.pdf (citing the Geneva Conventions I-IV 1, 50, 51, 130, 147, API I 11.85, 87 (3) and the Economic and Social Council Resolution 1989/65, annex, para. 17.).

121. They have drafted a publication specifically criticizing the U.S. drone practices for failing to make publicly available its data on civilian casualties. Susan Breau et al., *Drone Attacks, International Law and the Recording of Civilian Casualties of Armed Conflict* (June 2011), <http://www.oxfordresearchgroup.org.uk/sites/default/files/ORG%20Drone%20Attacks%20and%20International%20Law%20Report.pdf>.

122. *Id.* See also EVERY CASUALTY, <http://www.everycasualty.org/> (last visited Apr. 18, 2014).

123. Charter for the recognition of every casualty of armed violence, EVERY CASUALTY, *supra* note 122.

to these goals, the group is also creating a broad coalition of an international practitioner network to facilitate the recording and dissemination of casualty data.¹²⁴

Similarly, the Center for Civilians in Conflict (also known as CIVIC) campaign argues that states must acknowledge civilian casualties as part of their international responsibilities and provide compensation or other amends for victims of armed conflicts.¹²⁵ For about a decade, the campaign has offered ethical, strategic, and legal reasons why militaries must track civilian harms.¹²⁶ While CIVIC allows that IHL currently contains no explicit tracking requirement, it suggests that proportionality analysis necessitates a full understanding of “what civilian harm has occurred as a result of a particular operation. This requires matching post-operation data with estimations of probable civilian harm assessed pre-operation.”¹²⁷ Relatedly, the group is also working on increasing international willingness to make amends to civilian victims of armed conflict. Such amends may include public recognition of the losses.¹²⁸

While transparency regarding civilian deaths is one part of the puzzle, many are also calling for greater public availability of the government’s proportionality analysis.¹²⁹ In order to assess the lawfulness of an attack resulting in civilian casualties, one needs some sense of how the government valued both the anticipated military objective and the anticipated civilian losses. Yet most governments do not disclose either their standards or the specific facts as regards proportionality analysis. As a result of FOIA litigation, the U.S. government has made a significant portion of its analytical reasoning related to proportionality available.¹³⁰ Yet discrete calculations and valuations are still unavailable and few other states provide nearly as much information.

124. International Practitioner Network, OXFORD RESEARCH GROUP, http://www.oxfordresearchgroup.org.uk/rcac/international_practitioner_network (last visited Apr. 18, 2014).

125. CENTER FOR CIVILIANS IN CONFLICT, <http://www.civiliansinconflict.org/who-we-are> (last visited Apr. 18, 2014); Taylor Seybolt, *Significant Numbers: Civilian Casualties and Strategic Peacebuilding*, in COUNTING CIVILIAN CASUALTIES 15, 19 (eds. Taylor B. Seybolt et al. 2013).

126. *Tracking Civilian Harm*, CENTER FOR CIVILIAN CONFLICT, <http://civiliansinconflict.org/our-work/research-documentation/tracking/> (last visited Apr. 18, 2014).

127. *Id.*

128. *Amends & Post Harm Assistance*, CENTER FOR CIVILIANS IN CONFLICT, <http://civiliansinconflict.org/our-work/amends/> (last visited Apr. 18, 2014).

129. Wexler, *supra* note 117.

130. Gregory McNeal, *Guest Post*, LAWFARE BLOG (Nov. 29, 2011, 9:16 PM), <http://www.lawfareblog.com/2011/11/guest-post-gregory-mcneal>; see also *Joint Targeting Cycle and Collateral Damage Estimation Methodology* (Nov. 10, 2009) available at http://www.aclu.org/files/dronefoia/dod/drone_dod_ACLU_DRONES_JOINT_STAFF_SLIDE_S_1-47.pdf.

C. Weapons

IHL also contains few public transparency requirements regarding weapons and other means and methods of warfare. States publicly commit to the prohibition on certain weapons or certain uses of weapons by ratifying treaties, but treaty-mandated compliance information is usually only shared among states. Notably, however, the trend may be pushing in the direction of greater openness. While the vast majority of weapon bans contain no public transparency compliance requirements, both the recent landmine and cluster bomb bans dictate that state parties make their annual compliance reports publicly available.

Similarly, while article 36 of the Additional Protocol I to the Geneva Conventions dictates states must conduct a legal review of new weapons and means and methods of warfare, it contains no public transparency requirement.¹³¹ In other words, when states determine whether new weapons are capable of complying with principles of distinction and discrimination, no requirement for public input or oversight exists. Other state parties may ask about internal procedures for the review,¹³² but no such provision is made for civil society. That said, many states' domestic open access laws govern these weapons reviews.¹³³ For instance, most U.S. weapon reviews are unclassified and thus available to the public.¹³⁴

In the last 15 years, various groups have called for significantly enhanced transparency regarding weapons and other means and methods of warfare. The International Conference of the Red Cross has encouraged enhanced article 36 transparency "wherever possible."¹³⁵ A UK NGO, aptly named Article 36, also urges greater transparency on information about weapons. It "operates from

131. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 17512, art. 36. Many consider this requirement to be customary international law and thus apply to even non-ratifying states. ICRC, *A guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977*, 88 INT'L REV. RED CROSS 931, 933 (Dec. 2006).

132. Commentary of the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, paras. 1470, 1482 (Y. Sandoz et al, eds. 1987). Six states, including the United States, are known to have made the instruments setting up national review mechanisms available to the ICRC. ICRC, *supra* note 131, at n.8.

133. ICRC, *supra* note 131, at 955.

134. W. Hays Parks, Office of the Judge Advocate General of the Army, *Weapons Review Programme of the United States*, presented at the Expert Meeting on Legal Reviews of Weapons and the SIRUS Project, Jongny sur Vevey, Switzerland, 29-31 Jan. 2001 (on file with ICRC).

135. Section 21, Final Goal 1.5 of the Plan of Action for the years 2000-2003 adopted by the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October to 6 November 1999; ICRC, *supra* note 131, at n.8.

a principle that practical, policy and legal controls over weapons should be founded on publicly transparent and evidence-based analysis.¹³⁶ Many have called for greater transparency for reviews of particularly feared weapons such as depleted uranium,¹³⁷ and killer robots.¹³⁸ Others call for casualty statistics to be disaggregated by weapon.¹³⁹

V. QUESTIONS FOR THE FRONTIER

This paper maps out the basic landscape as civil society pushes for greater transparency on IHL-related issues and looks to IHL itself as a source for those obligations. As a next step, scholars need to address the normative and pragmatic questions raised by this frontier.

One set of questions involves the appropriate role of civil society in IHL. Should it play a participatory role in forcing state and individual accountability? Should it help determine the range of acceptable weapons and means and methods? Is civil society well-suited or well-positioned to affect such debates? Is IHL an area where deference to experts of government decision-makers is particularly warranted or particularly worrisome? Can civil society adequately appreciate the security concerns embedded in current decisions to remain flexible and disclose only limited information?

For those that think civil society ought to play a role here, another set of questions arises regarding the best way to disseminate information to civil society. How good are plants, leaks, and other disclosures at painting an accurate picture of the existing state of affairs? Will technology enhance the quality and quantity of such information? Is more transparency-forcing law needed? If so, what should that law mandate? Should legal reasoning and conclusions be treated differently than on-the-ground facts? Should investigations and other judicial and quasi-judicial proceedings be more open?

Relatedly, to the extent that more law is needed, is international law an optimal or even suitable hook to facilitate transparency? Should such efforts precede or follow domestic efforts? Would international law requirements effectively trickle down into domestic law and shift transparency norms? A

136. *About*, ARTICLE 36, www.article36.org/about (last visited Apr. 18, 2014).

137. Doug Weir, *Open Letter to Nick Harvey MP Minister of State for the Armed Forces*, UK URANIUM WEAPONS NETWORK, (Feb. 27, 2012), uwnetwork.wordpress.com/letter-to-nick-harvey-mp/.

138. The Solution, CAMPAIGN TO STOP KILLER ROBOTS, <http://www.stopkillerrobots.org/the-solution/>.

139. See generally COUNTING CIVILIAN CASUALTIES, *supra* note 7.

subsidiary set of questions is whether IHL itself is the right hook for transparency requirements or whether they should be embedded into human rights laws more generally or into freestanding law? As countries continue to be embroiled in internal, international, and transnational armed conflicts, academia and policy makers need to start viewing these questions as an important part of the IHL landscape.

