

TRANSPARENCY AND DRONE OPERATIONS

EXPLORING TRANSPARENCY REQUIREMENTS IN INTERNATIONAL
HUMANITARIAN LAW

SUBMITTED TO: Prof. Marco Sassoli

SUBMITTED BY: Vaishali Sharma

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I. INTRODUCTION

Transparency is a notion which, irrespective of our intuitive understanding of it,¹ is complicated to define. This is mostly owing to the fact that it has developed differently in different contexts, and consequently means many different things. There is no ‘one size fits all’ definition of Transparency. Oxford dictionary defines ‘transparency’ as the ‘condition of being transparent.’² ‘Transparent’ is defined as (i) (Of a material or article) allowing light to pass through so that objects behind can be distinctly seen; (ii) Easy to perceive or detect; (iii) Having thoughts or feelings that are easily perceived; (iv) open; and (iv) (Of an organization or its activities) open to public scrutiny³. Generally speaking, Transparency is used as a notion to talk about openness, allowing clear view of actions and thoughts, and facilitating public scrutiny. The specific scope of Transparency and consequences flowing from it will depend on the context in which it is used.

In International Law the trend towards Transparency is considered relatively new. Traditionally, International Law has been associated with international diplomacy involving secret deals and negotiations, not amenable to being subject to Transparency requirements. However, it is observed that this culture of secrecy has given way to calls for Transparency because of persistent concerns raised by the international community.⁴ This change is attributed to the paradigm shift from ‘private’ to ‘public’ character of International Law.⁵ Once again, in this context, Transparency is not a singular notion, and is generally associated with knowledge, legitimacy, and accountability, participatory democracy and good

¹ Andrea Bianchi, ‘On Power and Illusion: The Concept of Transparency in International Law’ in Andrea Bianchi and Anne Peters (eds.), *Transparency in International Law* (CUP 2013) 9.

² Oxford Dictionaries, ‘Transparency’ <<http://www.oxforddictionaries.com/definition/english/transparency>> accessed 17 August 2015.

³ Oxford Dictionaries, ‘Transparent’ <<http://www.oxforddictionaries.com/definition/english/transparent>> accessed 17 August 2015.

⁴ Bianchi (n 1) 3.

⁵ Anne Peters, ‘Towards Transparency as a Global Norm’ in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 536. According to Bianchi ‘transparency is associated with a public law paradigm that is transposed onto the international legal system to provide good governance and enhance its overall legitimacy and effectiveness’ (Bianchi (n 1) 5).

governance.⁶ One could say that Transparency exists in a supporting role, ‘facilitating many ends and being part of a greater whole.’⁷

In order to do justice to the broad notion of Transparency, this paper does not seek to define it. Transparency, throughout the paper, will be seen as an umbrella term which encapsulates within it notions of access to information, accountability, investigation, remedy, oversight and monitoring, etc. The relation between Transparency and these notions is envisaged as symbiotic, i.e. mutually beneficial. These notions promote Transparency and Transparency in turn facilitates the effective implementation of these notions. Thus, Transparency is both an end and a means.

Transparency does not enjoy enough support and definitional clarity to be characterised as a ‘general principle of international law’ under Article 38(1)(c) of Statute of the International Court of Justice (ICJ).⁸ Similarly, it is not yet considered Customary International Law under Article 38(1)(b) of the ICJ Statute.⁹ Despite its lack of status amongst the traditional sources of International Law, it is suggested that Transparency exists as an autonomous concept. It is claimed that it has translated into a ‘principle’ in the sense of a ‘normative prescription of a general character’.¹⁰ It is believed that such principles contribute significantly to the international legal processes. They are credited with shaping the content, interpretation and enforcement of international legal rules in conformity with contemporary ethos.¹¹

This paper conforms to the above view and discusses Transparency in similar light - as a legally relevant principle which reflects social realities. The focus throughout is on exploring Transparency in International Humanitarian Law (IHL) and I look at other sub-regimes of International Law to analyse and compare the Transparency requirements in IHL. I start with explaining the link between Transparency and Drone operations and why the latter is chosen the subject of this study. The next section discusses Transparency as it exists and applies in the International Human Rights (IHRL) framework. This section discusses duty to

⁶ Bianchi (n 1); Aarti Gupta and Michael Mason, ‘A Transparency Turn in Global Environmental Governance’ in Aarti Gupta and Michael Mason (eds), *Transparency in Global Environmental Governance: Critical Perspectives* (MIT 2014) 3.

⁷ Bianchi (n 1) 5.

⁸ Bianchi (n 1) 5.

⁹ Bianchi (n 1) 5.

¹⁰ Bianchi (n 1) 6.

¹¹ Bianchi quotes works of Rober Ago, Antonio Cassese and Vaughan Lowe in support of this point (Bianchi (n 1) 7).

investigate, right to effective remedy, right to truth and right to information as the legal basis for Transparency in IHL. The penultimate section explores Transparency requirements in IHL through duty to investigate, Article 1 common to the Geneva Conventions (Common Article 1) and further discusses right to effective remedy, right to truth and certain policy arguments in favour of Transparency. The final section concludes that IHL has a positive legal basis for Transparency and that Transparency calls made so far with respect to Drone operations are legally justified.

II. RELEVANCE OF TRANSPARENCY IN DRONE OPERATIONS

On 12 December 2013 a happy wedding celebration in Yemen was turned into a funeral with US Drones attacking the wedding convoy. It led to death of a dozen men, wounding fifteen others.¹² Initially Yemen authorities stated that only ‘terrorists’ had died but later this was replaced with an apology.¹³ However, anonymous US officials asserted that two internal investigations were conducted regarding the attack which concluded that only members of Al Qaida were killed.¹⁴ The report of these investigations was not published.¹⁵ Moreover, things were made worse with the CIA analysts assessing that some of the victims might have been civilians.¹⁶ Even after the lapse of a year after the attack, the US has not publicly acknowledged the attack and the fact that unarmed civilians died as a result.¹⁷

This is just one poignant example, amongst a staggering number of such covert Drone strikes, which illustrates the Transparency deficit in these operations.¹⁸ In fact, lack of Transparency is identified as a prominent issue plaguing Drone operations and this is highlighted by the calls for Transparency voiced by almost all stakeholders in International Law.¹⁹ Transparency

¹² Letta Taylor, ‘A Wedding that became a Funeral: US Drone Attack on Marriage Procession in Yemen’ (*Human Rights Watch*, 19 February 2014) <<https://www.hrw.org/report/2014/02/19/wedding-became-funeral/us-drone-attack-marriage-procession-yemen>> accessed 17 August 2015.

¹³ Chris Woods, *Sudden Death: America’s Secret Drone Wars* (Hurst & Co. 2015) 192.

¹⁴ *ibid* 192.

¹⁵ *ibid* 193.

¹⁶ Woods (n 13) 193; see also Lucy Draper, ‘The Wedding That Became a Funeral: U.S. Still Silent One Year on From Deadly Yemen Drone Strike’ (*Newsweek*, 12 December 2014) <<http://europe.newsweek.com/wedding-became-funeral-us-still-silent-one-year-deadly-yemen-drone-strike-291403>> accessed 17 August 2015.

¹⁷ Draper (n 16).

¹⁸ See generally Woods (n 13); Letta Taylor, ‘Between a Drone and Al-Qaeda: The Civilian Cost of US Targeted Killings in Yemen’ (*Human Rights Watch*, 2013) <http://www.hrw.org/sites/default/files/reports/yemen1013_ForUpload.pdf> accessed 17 August 2015.

¹⁹ Philip Alston in his report to the United Nations Human Rights Council (UNHRC) dedicated a section to transparency and accountability requirements in which he criticised the non disclosure by States of crucial information regarding the legal basis of targeted killings, the legal safeguards available, the consequences of

concerns relate to the legal basis for the strikes, the identity of the targets, and disclosing information about civilian casualties and investigations.

Thus, Transparency concerns associated with Drone operations are a real and contemporary challenge. Considering that Transparency is not an obvious obligation under IHL, this challenge also extends to identifying and defining Transparency requirements under IHL. Hence, this paper seeks to explore the legal basis for Transparency requirements under IHL. It is clarified that the use of Drones is not subject to any special regime under IHL. However, Drones is chosen as the focus of this study because of the contemporary debate on Transparency which surrounds their use by States. Furthermore, Transparency requirements discussed in this paper are of a general application in nature and can be extended to any other weapon or means of warfare.

III. TRANSPARENCY IN HUMAN RIGHTS

Before we look at Transparency in IHL, it is useful to analyse the place of Transparency in IHRL. The reasons for this are (i) Transparency is a more developed notion in IHRL; (ii) IHL and IHRL are very close—both protect similar interests;²⁰ and (iii) IHL and IHRL apply in parallel in armed conflicts and thus harmonisation of the norms of conduct in the two is desirable²¹.

these attacks in terms of harm to civilians etc. (UNHRC ‘Study on Targeted Killings, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions’(28 May 2010) UN Doc A/HRC/14/24/Add.6 <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>> paras 87-92). In 2014, Human Rights Council (HRC) passed a resolution calling upon states to ensure transparency in their records on the use of armed drones and to conduct prompt, independent and impartial investigations whenever there are indications of a violation to international law caused by their use (UNHRC ‘Ensuring Use of Remotely Piloted Aircraft or Armed Drones in Counter-Terrorism and Military Operations in Accordance with International Law, Including International Human Rights and Humanitarian law’ (24 March 2014) UN Doc A/HRC/25/L.32, 2. See also Alice Ross, ‘UN Report Identifies 30 Drone Strikes that Require “Public Explanation”’ (*The Bureau of Investigative Journalism*, 1 March 2014) <<https://www.thebureauinvestigates.com/2014/03/01/un-report-identifies-30-drone-strikes-that-require-public-explanation/>> accessed 18 August 2015; Columbia Law School, ‘Civil Society Joint Letter to Obama Administration to Publicly Acknowledge and Investigate Drone Strikes and Targeted Killings’ (13 May 2015) <https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/civil_society_joint_letter_to_obama_on_drone_strikes_-_may_13_2015.pdf> accessed 18 August 2015.

²⁰ ‘Though differently formulated, it cannot be denied that the essence of some of the rules is similar if not identical’ (ICRC, ‘International Humanitarian Law and International Human Rights Law : Similarities and Differences: Factsheet’ <<https://www.icrc.org/en/document/international-humanitarian-law-and-international-human-rights-law-similarities-and>> accessed 19 August 2015).

²¹ See generally Rule of Law in Armed Conflicts Project, ‘Interaction Between Humanitarian Law and Human Rights in Armed Conflicts’ (Geneva Academy of International Humanitarian Law and Human Rights) <<http://www.geneva->

Under IHRL, Transparency is supported by the duty to investigate violations and to provide effective remedy to victims. Additionally, ‘right to information’ is being identified as part of freedom of expression, which supports Transparency ends. Further, there is an emerging ‘right to truth,’ whose justifications are intrinsically linked with Transparency. This section discusses each of these rights to demonstrate how they are instrumental in promoting Transparency.

3.1 DUTY TO INVESTIGATE

There is a positive relation between investigation and Transparency. Investigation ensures accountability for violations. It entails the disclosure and appraisal of information related to alleged violations. Furthermore, it facilitates public scrutiny. Thus, it serves the cause of Transparency.

Duty to investigate in IHRL finds its basis in the interpretation of the general obligation to ‘respect and ensure’ human rights²² and fulfilment of the right to ‘effective remedy’^{23, 24}. The Human Rights Committee has interpreted Article 2(1) of International Covenant on Civil and Political Rights (ICCPR) as entailing both positive and negative obligations. Positive obligations require the State Party to protect individuals against violation of convention rights by State agents and private actors.²⁵ Thus, failure to investigate the harm could lead to a violation by the State Party. As for effective remedy given in Article 2(3) of ICCPR, the Human Rights Committee has held that ‘administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies’.²⁶ Additionally, it emphasized that ‘a failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is

[academy.ch/RULAC/interaction_between_humanitarian_law_and_human_rights_in_armed_conflicts.php](http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf)> accessed 22 August 2015.

²² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 1.

²³ ICCPR art 2(3) and ECHR art 13.

²⁴ The Public Commission to Examine the Maritime Incident of 31 May 2010, ‘Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law’ (February 2013) (Turkel Report) para 29 <<http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf>> accessed 18 August 2015.

²⁵ UN Human Rights Committee (CCPR) ‘General Comment 31’ (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 (GC 31) para 8.

²⁶ *ibid* para 15.

an essential element of the right to an effective remedy.²⁷ Human Rights Committee has reiterated this stand in many individual communications.²⁸

The rich jurisprudence of the European Court of Human Rights (ECtHR) has substantially identified the obligation to investigate and its elements. In the seminal case of *McCann*, it was held that an obligation to investigate in case of violation of right to life arose from reading Article 2 together with the general obligation to ‘secure rights’ given in Article 1 of the European Convention of Human Rights (ECHR).²⁹ This was later developed and re-enforced in other cases.³⁰ The duty to investigate has also been upheld by Inter-American Court of Human Rights in a number of cases.³¹

Furthermore, the obligation to investigate and ensure accountability can be found in many soft law instruments such as, United Nations Basic Principles on Use of Force and Firearms by Law Enforcement Officials³², Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law³³, and UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions³⁴.

3.1.1 Elements

The Goldstone Commission Report articulated four elements which comprise the ‘universal principles’ of investigation, i.e. (i) independence; (ii) effectiveness; (iii) promptness; and (iv)

²⁷ *ibid* para 15.

²⁸ *Bautista de Arellana v Colombia* CCPR Communication no 563/1993 (27 October 1995), para 8.6; See also, *José Vicente and ors v Colombia* CCPR Communication no 612/1995 (14 June 1994) para 8.8; *Rajapakse v Sri Lanka* CCPR Communication no 1250/2004 (14 July 2006) para 9.3.

²⁹ *McCann and ors v UK* App no 18984/91 (ECtHR, 27 September 1995) para 161.

³⁰ *Ergi v Turkey* App no 23818/94 (ECtHR, 28 July 1998); *Kaya v Turkey* App no 22729/93 (ECtHR, 19 February 1998); *Isayeva, Yusupova and Bazayeva v Russia*, Apps nos 57947/00, 57948/00, 57949/00 (ECtHR, 24 February 2005); *Hugh Jordan v UK* App no 24746/94 (ECtHR, 4 May 2001); *Kelly and Others v UK* App No 30055/96 (ECtHR, 4 May 2001); *McKerr v UK* App no 28883/95 (ECtHR, 4 May 2001); *Powell v UK* App no 45305/99 (ECtHR, 4 May 2000); *Shanaghan v UK* App no 37715/97 (ECtHR, 4 May 2001); *Ulku Ekinci v Turkey* App no 27602/95 (ECtHR, 16 July 2002).

³¹ *Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Cost) IACtHR Series C No 124 (15 June 2005) para 146; *Velásquez-Rodríguez v Honduras* (Merits) IACtHR Series C No 4 (29 July 1988) paras 161–172; *La Cantuta et al v Peru* (Merits, Reparations and Costs) IACtHR Series C No 162 (29 November 2006) para 226; *Ituango Massacres v Columbia* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 148 (1 July 2006).

³² Eighth United National Congress on the Prevention of Crime and the Treatment of Offenders (27 August to 7 September 1990) (UN Basic Principles on Use of Firearms) principles 22, 23.

³³ UN General Assembly (16 December 2005) UN Doc A/Res 60/147 (UN Basic Principles on Right to Remedy) principles 3(b), 4, 24.

³⁴ The Economic and Social Council Res 1989/65 (24 May 1989) principles 9-17.

impartiality.³⁵ Thus, adherence to these four principles makes an investigation ‘effective’.³⁶ In addition, the requirement of transparency³⁷ is seen as a fifth element of the duty of investigation. Transparency as used here has two components, i.e. transparency in the manner of conducting the investigation, and transparency in ensuring that the results are open to public scrutiny³⁸. Similar standards of investigation are also found in soft law.³⁹

However, without discussing the four elements of investigation mentioned above, it will suffice for our purposes to note that there exists a strong obligation to investigate and its elements are well defined and developed under IHRL.⁴⁰

3.2 RIGHT TO EFFECTIVE REMEDY

Right to effective remedy is one of the sources of duty to investigate. However, this right has more to contribute to the Transparency discussion as will be detailed in this section.

The right to effective remedy is encapsulated in almost all human rights treaties⁴¹ and soft law instruments⁴². It is seen as one of the most fundamental and essential rights for the

³⁵ UN Human Rights Council ‘Report of the United Nations Fact Finding Mission on the Gaza Conflict’ (25 September 2009) UN Doc A/HRC/12/48 (Goldstone Report) para 1814.

³⁶ Amichai Cohen and Yuval Shany, ‘Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts’ in Michael Schmitt and Louise Arimatsu (eds), *Yearbook of International Humanitarian Law: 2011*, vol 14(TMC Asser Press 2012) 61.

³⁷ The term ‘transparency’ here is used in a narrow meaning of an element of investigation and is distinguished from the term ‘Transparency’ used elsewhere in the paper referring to the broader notion.

³⁸ UN Human Rights Council ‘Report of the Committee of Independent Experts in International Humanitarian and Human Rights Laws to Monitor and Assess Any Domestic, Legal or Other Proceedings Undertaken by both the Government of Israel and the Palestinian Side, in the Light of General Assembly Resolution 64/254, Including the Independence, Effectiveness, Genuineness of These Investigations and Their Conformity with International Standards’ (23 September 2010) UN Doc A/HRC/15/50 (Tomuschat Report) para 21; Turkel Report (n 24) 114.

³⁹ Tomuschat Report (n 38) para 21.

⁴⁰ Tomuschat Report (n 38); Turkel Report (n 24); Cohen and Shany (n 36).

⁴¹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 8. ICCPR art 2(3); United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT) art 14; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD) art 6; Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 2; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC) art 39; ECHR art 13; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 25; African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (African Charter) art 7.

⁴²UNGA ‘UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’(29 November 1985) UN Doc A/RES/40/34, principle 19; UN Basic Principles on the Right to Remedy (n 33) principles 1(c), 11; UN Basic Principles on Use of Firearms (n 32) principle 23.

effective protection of all other human rights.⁴³ This is affirmed by the Human Rights Committee, which held that the right to effective remedy is a treaty obligation inherent in the ICCPR Convention as a whole and hence must be complied with even during a state of emergency.⁴⁴

The need for Transparency can be identified in the various obligations that the right to effective remedy imposes. For instance, States have an obligation to remove all barriers that impede access to justice,⁴⁵ to take appropriate legislative and administrative measures,⁴⁶ provide relevant information concerning violations and reparations, and provide reasons for victimisation,⁴⁷ etc. ‘Satisfaction’ include taking measures aimed at cessation of continuing violations, verification of the facts, full and public disclosure of the truth (subject to reasonable restrictions), public apology, including acknowledgement of the facts and acceptance of responsibility, etc.⁴⁸ Thus, it is evident that access to information is essential in giving full effect to this right.

3.3 RIGHT TO TRUTH

Right to truth exists as a part of right to effective remedy and is instrumental in promoting Transparency. The right to truth is the right of the family members, close relatives, and society to know the truth about serious human rights violations.⁴⁹ This right is traced to the right of families to know the fate of their relatives and the obligation upon parties to search for missing persons in IHL.⁵⁰ It was given a broader interpretation in the context of enforced disappearances by several human rights bodies such as the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (IACtHR), the UN Working

⁴³Cordula Droegge, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioner’s Guide*, series no 2 (International Commission of Jurists 2006) 44.

⁴⁴ UN CCPR ‘General Comment 29’ (31 August 2001) UN Doc CCPR/C/21/ Rev.1/Add.11, para 14.

⁴⁵ International Commission of Jurists, ‘Declaration on Access to Justice and Right to a Remedy in International Human Rights Systems’ (12 December 2012) <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/02/Congress-Declaration-adoptedFINAL.pdf>> accessed 18 August 2015. See also UN Basic Principles on the Right to Remedy (n 33) principles 2, 11.

⁴⁶ GC 31 (n 25) paras 7, 15.

⁴⁷ UN Basic Principles on the Right to Remedy (n 33) principles 11(c), 24.

⁴⁸ UN Basic Principles on the Right to Remedy (n 33) principles 22(a), 22(b), 22(e).

⁴⁹ Droegge (n 43) 81; Valeska David, ‘The Expanding Right to an Effective Remedy: Common Developments at the Human Rights Committee and the Inter-American Court’ (2014) 3 Brit J Am Legal Stud 259, 277 <http://heinonline.org/HOL/Page?handle=hein.journals/bjamles3&div=11&collection=journals&set_as_cursor=0&men_tab=srchresults> accessed 18 August 2015.

⁵⁰ Yasmin Naqvi, ‘The Right to the Truth in International Law: Fact or Fiction?’ (2006) 88 (862) IRRC 245, 248 <https://www.icrc.org/eng/assets/files/other/irrc_862_naqvi.pdf> accessed 18 august 2015).

Group on Enforced or Involuntary Disappearances, and the Human Rights Committee.⁵¹ However, today this right not limited to only enforced disappearances. Human Rights Committee has upheld the right of the victims and families to know the truth about human rights violations.⁵² The IACtHR also offers a rich jurisprudence on the right to truth, its content and scope.⁵³

More generally, the ECtHR has acknowledged the right to truth as being a part of the right to be free of torture or ill-treatment, and the right to effective remedy and investigation⁵⁴. Furthermore, many resolutions by the General Assembly and Human Rights Council have repeatedly highlighted this right and called upon States to take steps to ensure its observance.⁵⁵

The scope of the right to truth includes the obligation to make public the facts and circumstances surrounding human rights violations, the reasons for such violations, and its perpetrators.⁵⁶ This indicates that the right to truth can be instrumental in demanding Transparency in Drone operations when they lead or are believed to lead to human rights violations. In a way, right to truth goes farther than investigations in ensuring Transparency because it demands revelation of facts that might be investigated but not made public. Moreover, it empowers the whole society to demand Transparency and not just the victim.⁵⁷

Furthermore, owing to the expansive recognition of this right in International law, it is claimed by some that the right to truth also exists as an autonomous right.⁵⁸ However the

⁵¹ *Sarma v Sri Lanka* CCPR Communication no 950/2000 (31 July 2003) para 9.5. See also Droege (n 43) 84; Naqvi (n 50) 249.

⁵² *Hugo Rodríguez v Uruguay* CCPR Communication no 322/1988 (19 July 1994) paras 12 (3), 14; UN CCPR, ‘Observations and Recommendations to the State of Guatemala’ UN Doc CCPR/C/79/Add.63, para 25; *Maria del Carmen Almeida de Quinteros v Uruguay* CCPR Communication no 107/1981 (21 July 1983) para 14.

⁵³ *Blake v Guatemala* (Merits) IACtHR Series C No 36 (24 January 1998) paras 114-16; *Villagran-Morales et al v Guatemala* (Merits) IACtHR Series C No 63 (19 November 1999) paras 177, 253.4; *Bimaca-Veldsquez v Guatemala* (Merits) IACtHR Series C No 70 (25 November 2000) para 197.

⁵⁴ *Tas v Turkey* App no 24396/94 (ECtHr, 14 November 2000); *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001).

⁵⁵ UNGA ‘Right to the Truth’ (21 January 2014) UN Doc A/RES/68/165; UNHRC ‘Right to the Truth’ (12 October 2009) UN Doc A/HRC/RES/12/12; UNHRC ‘Right to the Truth’ (10 October 2012) UN Doc A/HRC/RES/21/7; UNCHR ‘Right to the Truth’ (20 April 2005) UN Doc E/CN.4/RES/2005/66.

⁵⁶ Droege (n 43) 92.

⁵⁷ Droege (n 43) 92.

⁵⁸ See UNCHR ‘Report of the Office of the UN High Commissioner for Human Rights on the Right to the Truth’ (8 February 2006) UN Doc E/CN.4/2006/91 (Report on Right to the Truth); Dermot Groome, ‘The Right to Truth in the Fight against Impunity’ (2011) 29 *Berkeley J Int'l Law* 175 <<http://scholarship.law.berkeley.edu/bjil/vol29/iss1/5>> accessed 18 August 2015; Thomas Antkowiak, ‘Truth as

autonomous status of this right is still emerging and not established.⁵⁹ Still, its importance lies in its close links to principles of transparency, accountability and rule of law⁶⁰.

3.4 RIGHT TO INFORMATION

Right to information is a primary tool to ensure Transparency. It forms the legal foundation for furthering the ends of Transparency⁶¹. It is in this context that this emerging right is discussed in this section.

The right to information is increasingly recognised as a part of right to freedom of expression. There is also an argument for recognising it as an autonomous right.⁶² The significance of this right can be traced to the first session of the General Assembly which adopted a resolution including that ‘freedom of information is a fundamental right and is the touchstone of all the freedoms to which the United Nations is consecrated’.⁶³ Later, this right was incorporated in the Universal Declaration of Human Rights (UDHR)⁶⁴ and Article 19 of the ICCPR. The wordings of these provisions do not do justice to the expanding ambit and positivist force of this right. It has mostly developed through interpretation by international tribunals and expert bodies.⁶⁵

Special Rapporteurs on Freedom of Opinion and Expression have repeatedly emphasized in their reports that the right to access to information, especially information held by public bodies, is deduced from the right to seek and receive information as found in the UDHR and ICCPR.⁶⁶ In 2011, the Human Rights Committee held that Article 19(2) embraces a right to

Right and Remedy in International Human Rights Experience’ (2002) 23 MICH J INT’L L 977 <<http://digitalcommons.law.seattleu.edu/faculty/421>> accessed 18 August 2015.

⁵⁹ ‘The right to the truth stands somewhere on the threshold of a legal norm and a narrative device’ (Naqvi (n 50) 273).

⁶⁰ Report on Right to the Truth (n 58) paras 56, 46.

⁶¹ Jonathan Klaaren, ‘The Human Right to Information’ in Andrea Bianchi and Anne Peters (eds), *Transparency In International Law* (CUP 2013) 225.

⁶² *ibid* 229.

⁶³ UNGA ‘Calling of an International Conference on Freedom of Information’ (14 December 1946) UN Doc A/RES/59(I).

⁶⁴ UDHR art 19.

⁶⁵ Roy Peled and Yoram Rabin, ‘The Constitutional Right to Information’ (2011) 42 Columbia Human Rights Law Review 357, 382 <http://www3.law.columbia.edu/hrlr/hrlr_journal/42.2/Peled_Rabin.pdf> accessed 18 August 2015.

⁶⁶ UNCHR ‘Report of Special Rapporteur Submitted pursuant to Commission on Human Rights resolution 1997/26’ (28 January 1998) UN Doc E/CN.4/1998/40; UNCHR ‘Report on Civil and Political Rights Including the Question of Freedom of Expression’ (17 December 2004) UN Doc E/CN.4/2005/64.

access to information held by public bodies.⁶⁷ Quite significantly, the Committee held that read with Article 25, the right to access information includes the right of media to access information on public affairs and the right of the general public to receive media output.⁶⁸ It further highlighted the duty of state parties to proactively put information of public interest in the public domain and ensure easy, prompt, effective and practical access to such information.⁶⁹

*Claude Reyes and ors v Chile*⁷⁰ and the *Társaság a Szabadságjogoket v Hungary*⁷¹ are landmark cases in the progressive development of this right. In *Claude* case, The IACtHR held that the right to freedom of thought and expression includes the protection of the right to access to State-held information, which also includes the individual and social dimensions.⁷² In *Tarsasag* case, the ECtHR moved away from its restrictive jurisprudence on Article 10 and recognised the right of access to information as part of freedom to receive information.⁷³ The Court linked the hindrance to flow of information with the ability of civil society to play watch dog and pursue debates on matters of public importance.⁷⁴ These two decisions demonstrate the development of this right in the context of notions of good governance and accountability.

Additionally, the African Commission and Commission's Special Rapporteur on Freedom of Expression and Access to Information in Africa have interpreted Article 9 of the African Charter as recognising a free standing right of access to information separately from the right of freedom of expression.⁷⁵

There is also a movement in scholarship to recognise right to information as an independent right required under International law and not just sourced under the ICCPR. This argument

⁶⁷ UN CCPR 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34, para 18.

⁶⁸ *ibid.*

⁶⁹ *ibid* para 19.

⁷⁰ IACtHR Series C No 151(19 September 2006).

⁷¹ App no 37374/05 (ECtHR, 14 April 2009).

⁷² *Claude* (n 70) para 77.

⁷³ *Tarsasag* (n 71) para 36.

⁷⁴ Marcos Orellana, 'The Right of Access to Information and Investment Arbitration' (2011) 26 (2) ICSID Review 59, 71 <<http://icsidreview.oxfordjournals.org/content/26/2/59.full.pdf>> accessed 18 August 2015.

⁷⁵ Klaaren (n 61) 232; Orellana (n 74) 74-75.

is based on the recent trend in adoption of right to information laws by a large number of countries.⁷⁶

IV. TRANSPARENCY IN IHL

IHL poses a number of challenges to building a strong case for Transparency requirements. To begin with, it does not incorporate a positive right to know or access information. This has been seen to reflect the presumption in favour of State's right to secrecy.⁷⁷ Additionally, IHL suffers from an enforcement deficit⁷⁸ and hence leaves many crucial decisions solely within the purview of state's sovereign powers. Furthermore, 'military necessity' is usually used to tip the balance in favour of secrecy than disclosure.⁷⁹ Despite these challenges, it is proposed that IHL embodies a positive obligation on the states to disclose information and make their actions more Transparent. This obligation flows from the duty to investigate in IHL and from the obligation to 'respect and ensure respect' mandated in Common Article 1. Furthermore, right to effective remedy and right to truth, in conjunction with other influencing factors indicate that IHL should lean in favour of Transparency.

4.1 DUTY TO INVESTIGATE

Investigation here is referred to in a broad sense and includes criminal, disciplinary, civil measures and/or fact-finding inquiry. The obligation to investigate is evident from many provisions of IHL. The more obvious and explicit ones are the 'grave breaches' provisions.⁸⁰ These provisions oblige states to search for, and either prosecute or extradite any individual who is alleged to have committed grave breaches, irrespective of the nationality of the

⁷⁶ Orellana (n 74) 72; Klaaren (n 61) 231.

⁷⁷ Orna Ben-Naftali, 'How Much Secrecy Does Warfare Need?' in Andrea Bianchi and Anne Peters (eds), *Transparency In International Law* (CUP 2013) 321.

⁷⁸ ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts (2007) 89 (867) IRRC 719, 721 <<https://www.icrc.org/eng/assets/files/other/irrc-867-ihl-challenges.pdf>> accessed 18 August 2015.

⁷⁹ Ben-Naftali (n 77) 345.

⁸⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GC I) art 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (GC II) art 50; Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III) art 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV) art 146; API art 85.

individual.⁸¹ The duty to investigate and take appropriate measures is not limited to grave breaches. In fact, it is well established that there is a duty to examine and address all violations of IHL.⁸² This broad duty to investigate is supported by the following arguments.

Firstly, the text of the grave breaches makes clear that the Contracting States are required to take measures to suppress all acts in violation of the Convention, in addition to the grave breaches.⁸³ This interpretation also finds support in the Drafters' intention not to have grave breaches limit the general duty to investigate and prosecute.⁸⁴ In order to give effect to these obligations, investigation of the suspected violation is a pre-requisite.

Secondly, there is a duty to prosecute war crimes which is an established obligation under Customary IHL.⁸⁵ Since war crimes are not limited to grave breaches alone and include serious violations of IHL,⁸⁶ it can be concluded that the duty to investigate is not limited to grave breaches alone.

Thirdly, a broad duty to investigate is sourced from Command Responsibility under IHL.⁸⁷ Command Responsibility is found in Articles 86 and 87 of the Additional Protocol I to the Geneva Conventions (AP I) and is further identified as Customary IHL. According to this doctrine, the commander of an armed force is under an obligation to take measures to prevent or repress breaches.⁸⁸ This duty to prevent or repress is seen as incorporating the duty to punish and consequently, to investigate.⁸⁹ Additionally, commanders are also required to report the violations to a competent authority and/or initiate penal and disciplinary measures.⁹⁰

⁸¹ Cohen and Shany (n 36) 41.

⁸² Turkel Report (n 24) 73; Cohen and Shany (n 36) 37.

⁸³ GC I art 49; GC II art 50; GC III art 129; GC IV art 146. Similar language is also found in the first protocol (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 12 December 1977, entered into force 7 December 1979) 1125 UNTS 3 (AP I) arts 85)

⁸⁴ Cohen and Shany (n 36) 42.

⁸⁵ ICRC, 'Customary IHL: Rule 158' < https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule158 > accessed 18 August 2015.

⁸⁶ ICRC, 'Customary IHL: Rule 156' < https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule156 > accessed 18 August 2015.

⁸⁷ Cohen and Shany (n 36) 46; Alon Margalit, 'The Duty to Investigate Civilian Casualties During Armed Conflict and Its Implementation in Practice' in Terry Gill et al (eds), *Yearbook of International Humanitarian Law: 2012*, vol 15(TMC Asser Press 2014) 162.

⁸⁸ AP I art 86(2).

⁸⁹ *Prosecutor v Boškoski and Tarčulovski* (Judgment) ICTY-04-82 (10 July 2008) para 418.

⁹⁰ AP I arts 87(1), 87(3).

Lastly, duty to investigate is deduced from a couple of other provisions. First is Common Article 1 obliging States to ‘respect and ensure respect’ of IHL.⁹¹ Second is the obligation on the States to take feasible precautions during the conduct of hostilities.⁹² Third is provisions related to compensation for violations⁹³ and fourth is Article 132 of the Convention relative to the Treatment of Prisoners of War (GC III) which provides that investigation shall be initiated at the request of the party to the conflict.⁹⁴

4.1.1 Elements

There is no IHL treaty directly addressing the duty to investigate and that makes it difficult to lay down the contents of this duty. However, elements of the duty can be culled out from the decisions of International Criminal Tribunals on Command Responsibility, the duty’s internal logic and the lastly principles of effective investigation existing in IHRL.

The duty to repress violations of IHL is interpreted by International Criminal Tribunals to include the duty to punish.⁹⁵ Duty to punish is further analysed as requiring an effective investigation.⁹⁶ What constitutes an ‘effective’ investigation is not very clear from the case law but certain indicators frequently used include, for instance, taking ‘necessary and reasonable’ steps,⁹⁷ investigating ‘with a view to establishing the facts’,⁹⁸ ‘taking active steps to bring the perpetrators to justice’,⁹⁹ and ‘calling for report and thoroughness of the investigation’¹⁰⁰. Thus, it can be said that an effective investigation must be able to

⁹¹ ‘Investigation of serious violations of IHL can be viewed as an indispensable means by which to effectively carry out the duty to ensure respect for IHL’ (Cohen and Shany (n 36) 44, 45).

⁹² It has been argued that investigation of past incidents in which harm has occurred is arguably part of the ‘‘constant care’’ which parties are expected to demonstrate in order to assess on an ongoing basis the proportionate nature of the methods and means of warfare they employ. In other words, monitoring the effects of military actions through investigation of possible violations arguably constitutes a ‘‘feasible precaution’’ against excessive harm’ (Cohen and Shany (n 36) 47).

⁹³ AP I art 91; Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227 (HC) art 3.

⁹⁴ However, it is admitted that it makes for a weak argument because of lack of state practice (Cohen and Shany (n 36) 47). See also Margalit (n 87) 162.

⁹⁵ *Prosecutor v Jean-Pierre Bemba Gombo* (Decision on Confirmation of Charges) ICC-01/05-01/08 (15 June 2009) para 440; *Boškoski* case (n 89).

⁹⁶ Turkel Report (n 24) 114.

⁹⁷ *Bemba* case (n 95).

⁹⁸ It was not clarified what are these reasonable and necessary steps and held that it will depend on a case by case analyses (*Boškoski* case (n 89)).

⁹⁹ *Prosecutor v Sefer Halilovic* (Judgment) ICTY-01-48 (16 November 2005) paras 97-98; *Boškoski* case (n 89).

¹⁰⁰ *Halilovic* case (n 99) and *Boškoski* case (n 89).

successfully identify those responsible and commit them to justice.¹⁰¹ Investigation is mostly criminal in nature but can also include other forms.¹⁰²

Additionally, Article 17 of the Rome Statute of the International Criminal Court is interpreted as indicating certain investigation standards.¹⁰³ Article 17(1) embodies the principle of complementarity and states that the Prosecutor cannot initiate a case if ‘the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution’. From Article 17(2) it can be deduced that an investigation that meets the standards of Article 17(1) is bona fide in nature, prompt, independent and impartial.¹⁰⁴ These standards can also be extended to an ‘effective’ investigation in IHL.¹⁰⁵

Elements of investigation discussed above i.e. good faith, promptness, independence and impartiality, are also corroborated by the duty’s ‘internal logic.’¹⁰⁶ The logic behind the duty to investigate is to establish responsibility and ensure justice. This can only be achieved by incorporating the above mentioned elements.

To develop the elements of investigation further, it is necessary to look at the more developed and established principles of IHRL. Principles of investigation under IHRL are seen as ‘universal principles’¹⁰⁷ and it is well established that these principles are used to determine whether an investigation under IHL is credible and genuine.¹⁰⁸ However, any importation of principles by analogy cannot be an exercise of blindly copying of the norms, but ought to be carried out cautiously and after taking into account the specificities of IHL.¹⁰⁹ Following briefly discusses the ways in which IHRL norms on investigation are adapted to IHL.

(i) Independence and Impartiality

¹⁰¹ Turkel Report (n 24) 112.

¹⁰² Turkel Report (n 24) 114.

¹⁰³ Turkel Report (n 24) 85; Shany and Cohen (n 36) 57.

¹⁰⁴ Shany and Cohen (n 36) 58.

¹⁰⁵ Shany and Cohen (n 36) 57.

¹⁰⁶ Shany and Cohen (n 36) 58.

¹⁰⁷ Goldstone Report (n 35).

¹⁰⁸ Turkel Report (n 24) 114; Tomuschat Report (n 38) para 30, *Al Skeini and ors v UK* App no 55721/07 (ECtHR, 7 July 2011) para 164.

¹⁰⁹ Turkel Report (n 24) 114. See also Cohen and Shany (n 36) 59-60.

Military investigation or having military personnel on the panel of judges raises a presumption against independence and impartiality under IHRL. However, this presumption does not find support under IHL. Under IHL, military justice system is justified as long as the investigation is not subject to the same chain of command as the person(s) implicated.¹¹⁰ One challenge posed to this requirement is the need for the investigator to possess operational and technical expertise in order to understand the operations and conduct an effective investigation. However, this requirement is not inconsistent with the requirement that investigation should remain separate from the chain of command.¹¹¹

(ii) Effectiveness and Thoroughness

Conducting an effective and thorough investigation during armed conflict faces practical challenges in terms of control over site of incident, limited resources, restriction on ability to interview witnesses, etc.¹¹² However, while the investigation might suffer in its evidentiary standards, it must reach conclusive and reliable findings. For instance, in the *Al Skeini* case, it was held that investigation is an obligation of means and not of results.¹¹³ The authorities are obliged to take reasonable steps available and secure the evidence concerning the incident.¹¹⁴ Hence, despite certain constraints resulting from the situation of armed conflict, parties remain under an obligation to take all reasonable steps to conduct a thorough and effective investigation as far as possible and in a professional manner.

(iii) Promptness

The reality of armed conflicts and complexity of the situation can cause delays in investigation. ECtHR has looked at principle of promptness in context of armed conflict and held that even though armed conflict might impede an investigation, the authorities are still under an obligation to respond actively and with reasonable expedition to an incident.¹¹⁵ The reasonableness of delay has to be evaluated based on the situation and the intensity of the

¹¹⁰ Turkel Report (n 24) 140.

¹¹¹ Turkel Report (n 24) 141.

¹¹² UNHRC 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (8 March 2006) UN Doc E/CN.4/2006/53, para 36.

¹¹³ *Al Skeini* case (n 108) para 166.

¹¹⁴ *Al Skeini* case (n 108) para 166.

¹¹⁵ *Ergi* case (n 30) para 85; *Kaya* case (n 30) para 107; *Yasa v Turkey* App no 22495/93 (ECtHR, 2 September 1998) para 104.

violence. Additionally, delay in investigation is likely to affect the availability of evidence and hence, negatively impact the requirement of effectiveness and thoroughness.¹¹⁶

(iv) Transparency

Transparency is recognised as a key requirement under IHRL, both in the manner in which the inquiry is conducted and to ensure public scrutiny.¹¹⁷ However, under IHL it raises certain concerns owing to questions of national security.¹¹⁸ The Tomuschat Report held that ‘while involving victims in investigations is desirable, it is not a requirement under IHL’.¹¹⁹

The Turkel Report, while referring to the view of the Tomuschat Report, pointed out that it is desirable to comply with the requirement of transparency because it leads to greater accountability via public scrutiny.¹²⁰ This public scrutiny aspect of transparency was also seen central to achieving the purpose of the duty to investigate in IHL, i.e. to increase compliance and suppress and prevent future violations. The report later elaborated that this might be practically done by publishing guidelines, establishing reporting mechanisms, and making publicly available relevant information such as statistics.¹²¹

Thus, in conclusion, transparency is a crucial requirement and obligation under IHRL but there are impediments to its application under IHL.¹²² However, it is important to remember that military necessity is not a blanket rule which can be used to deny access to all information. IHL seeks to balance military necessity against humanitarian considerations. Additionally, transparency is instrumental in giving effect to other obligations under IHL like investigation.¹²³ In this regard Orna Ben has clarified that there is not always a conflict between Transparency and secrecy required by war. Additionally in case of conflict, secrecy cannot automatically and always claim priority. Lastly, prioritising secrecy does not rule out rule out partial or delayed disclosure to resort to intermediate mechanisms for oversight and

¹¹⁶ Turkel Report (n 24) 144.

¹¹⁷ Turkel Report (n 24) 135-136.

¹¹⁸ Tomuschat Report (n 38) para 32.

¹¹⁹ Tomuschat Report (n 38) para 33.

¹²⁰ Turkel Report (n 24) 145.

¹²¹ Turkel Report (n 24) 145.

¹²² Cohen and Shany (n 36) 64.

¹²³ ‘Public scrutiny helps to ensure the genuineness and effectiveness of the investigation and to ascertain that the investigative acts taken are necessary and reasonable’ (in Cohen and Shany (n 36) 64).

accountability.¹²⁴ Commission of Inquiry on the Gaza conflict also rejected the Israeli argument that Law of Armed Conflict does not oblige publications of sensitive information, and decided in favour of accountability.¹²⁵

Thus, though it might not be mandated directly by any provision of IHL, transparency does find support in other obligations and objectives of IHL. Hence, transparency requirement should be given effect,¹²⁶ keeping in mind the specific issues and concerns of IHL.

4.2 COMMON ARTICLE 1

I argue that the requirement for Transparency flows from the obligation of States to respect and ensure respect of IHL, as provided in Common Article 1 and reflecting Customary IHL.¹²⁷ Common Article 1 reads:

‘The High Contracting Parties undertake to **respect and to ensure respect** for the present Convention **in all circumstances**’ (emphasis added)

This phrasing is re-iterated in Article 1(1) of AP I. This obligation also extends to non international armed conflicts by virtue of Article 3 common to the Geneva Conventions.¹²⁸ Furthermore, Common Article 1 obliges States to take measures during peacetime like dissemination of the law, incorporation of it in the domestic law, etc.¹²⁹

Common Article 1 incorporates two separate obligations. The obligation ‘to respect’ entails an obligation on the subjects of IHL to take ‘all measures to required by the law, and to behave in all circumstances in accordance with the rules and principles of this law’.¹³⁰ It is an autonomous provision and the measures to be taken are not limited to the measures given in

¹²⁴ Ben-Naftali (n 77) 323.

¹²⁵ UNHRC ‘Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1’ (24 June 2015) UN Doc A/HRC/29/CRP.4 (Gaza Report) para 215.

¹²⁶ The obligation to make investigations public and offer public explanations was emphasized in the Human Rights Panel on Armed Drones (UNHRC ‘Panel on Remotely Piloted Aircraft or Armed Drones in Counterterrorism and Military Operations’ <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15080>> (OHCHR, 22 September 2014) accessed 21 August 2015.

¹²⁷ Laurence Boisson de Chazournes and Luigi Condorelli, ‘Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests’ <<https://www.icrc.org/eng/resources/documents/misc/57jqcp.htm>> accessed 18 August 2015.

¹²⁸ *ibid.*

¹²⁹ *ibid.* See also Carlo Focarelli, ‘Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?’ (2010) 21 (1) EJIL 125, 158.

¹³⁰ Boisson de Chazournes and Condorelli (n 127).

the Conventions. Additionally, use of the phrase ‘undertake to respect’ implies a positive duty on the State and is not a mere recommendation of general nature. I argue that adopting measures to enhance Transparency is part of this obligation to respect IHL by the States. This finds support in the interpretation of Common Article 1 which imposes a general duty to investigate IHL violations.¹³¹ Thus, this reasoning can also be extended to Transparency measures because they are instrumental in ensuring respect of IHL and hence mandated by the rationale of the provision. I am aware that this provision has not yet been conclusively interpreted in this manner but discuss it to point out the potential it holds in support of Transparency.

The second obligation, i.e. ‘ensure respect’, is the more controversial aspect of Common Article 1. Broadly, two opposing interpretations of this text are argued. The first is a restrictive interpretation, also called ‘individual compliance’ and requires measures to be adopted by States to ensure respect of IHL obligations only within its jurisdiction and by its organs and private individuals.¹³² The second is the extensive interpretation, also called ‘state compliance’ which implies that States have a duty to take measures against other States which fail to respect IHL.¹³³ The latter is the more accepted view today.¹³⁴ There is debate in legal scholarship over the kind of measures that are authorised or obligated under the duty to ensure respect. Discussions focus on whether this duty can be extended to intervention and countermeasures by States against the defaulting State.¹³⁵ However, for the purpose of this paper it is submitted that measures flowing from the duty to ensure respect include a much wider range of possibilities such as diplomatic pressure, measures in cooperation with international organisations, etc.¹³⁶ Thus, obligation to ensure respect of IHL allows third States to take certain lawful measures against other states. Hence, this can serve as a legal

¹³¹ Turkel Commission Second Report (n 25).

¹³² Focarelli (n 129) 127.

¹³³ Focarelli (n 129) 127.

¹³⁴ Focarelli (n 129) 127.

¹³⁵ Marco Sassoli, ‘State Responsibility for Violations of International Humanitarian Law’ (2002) 84 (846) IRRC 401 <https://www.icrc.org/eng/assets/files/other/401_434_sassoli.pdf> accessed 18 August 2015. See also Focarelli (n 129); Boisson de Chazournes and Condorelli (n 127).

¹³⁶ Umesh Palwankar, ‘Measures Available to States for Fulfilling Their Obligation to Ensure Respect for International Humanitarian Law’ <<https://www.icrc.org/eng/resources/documents/misc/57jmaw.htm>> accessed 18 August 2015. See also ICRC, ‘Customary IHL: Rule 144’ <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule144> accessed 18 August 2015.

basis for all States to call for more information regarding alleged violations of IHL by any other State.¹³⁷

The significance of the duty contained in Common Article 1 is further bolstered by its Customary International Law status.¹³⁸ ICJ held in the *Nicaragua* case that US had an obligation ‘to respect’ and ‘to ensure respect’ of the Geneva Conventions and that this obligation flows from general principles of humanitarian law.¹³⁹ ICJ further asserted in the *Nuclear Weapons* case that many rules of IHL constitute ‘intransgressible’ principles of international customary law, thus confirming that all States have a duty to respect these principles, irrespective of all circumstances.¹⁴⁰ The ICJ re-iterated this stand in its *Wall* case where it held that these intransgressible principles give rise to *erga omnes* obligations.¹⁴¹ The Court further emphasized that according to Common Article 1, every State is under an obligation to comply with the requirements of the Geneva Conventions, even if they are not party to the conflict.¹⁴² Thus, reasoning of the ICJ demonstrates that Common Article 1 is not an inconsequential provision in the Geneva Conventions and forms a strong legal basis for ensuring compliance with IHL.¹⁴³ Furthermore, Common Article 1 is also seen as belonging to a set of norms and principles crucial for the promotion of ‘elementary considerations of humanity’.¹⁴⁴

Furthermore, Transparency is identified as the biggest obstacle in ascertaining whether States are taking all possible measures to comply with the fundamental principles of IHL i.e. distinction, proportionality and taking precautionary measures.¹⁴⁵ I argue that lack of

¹³⁷In support of this interpretation, one can cite the EU Parliament’s resolution calling upon states ‘to promote greater transparency and accountability on the part of third countries in the use of armed drones’. It focussed on legal basis for their use, operational transparency and judicial review of drone strikes, and access to effective remedies (EU Parliament ‘Resolution on the Use of Armed Drones’ (25 February 2014) Doc 2014/2567(RSP)).

¹³⁸Focarelli (n 129) 127.

¹³⁹Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v US*) (Merits) [1986] ICJ Rep 14, para 220.

¹⁴⁰*Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 79.

¹⁴¹*Legal Consequences of the Construction of a Wall* (Advisory Opinion) [2004] ICJ Rep 136, para 157.

¹⁴²*ibid*, para 158.

¹⁴³Sassoli has also remarked that common article 1 is ‘the one –if not the most important–mechanism for ensuring compliance with IHL during armed conflicts’ (Marco Sassoli, ‘IHL Mechanisms in Armed Conflict: Where is the Problem?’ in Michel Veuthey (ed), *Respecting International Humanitarian Law: Challenges and Responses* (International Institute of Humanitarian Law 2014) 111.

¹⁴⁴‘Such norms play what may be termed a “constitutional role” in a system of collective security where humanitarian values have become a reason for the adoption of a large number of measures’ (Boisson de Chazournes and Condorelli (n 127).

¹⁴⁵UNGA ‘Report of the Special Rapporteur on the Promotion and Protection of Rights and Fundamental Freedoms While

Transparency is hence undermining respect for IHL. This in turn, further highlights the need to incorporate Transparency measures in order to respect and ensure respect of IHL as mandated by Common Article 1.

4.3 OTHER INFLUENCING CONSIDERATIONS

4.3.1 Right to Effective Remedy

Article 3 of the Hague Conventions, 1907 and Article 91 of AP I provide that the responsible State must provide compensation for IHL violations. This obligation is also recognised as customary IHL.¹⁴⁶ Initially seen as available only to States, the right to claim remedy is interpreted to extend to individuals too.¹⁴⁷ I argue that there exists a substantive right to remedy in IHL which can serve the purpose of Transparency. This is not the strongest argument because of the lack of State practice and clarity in the enforcement of the right to remedy.¹⁴⁸ However, I propose that this certainly adds weight in favour of Transparency requirements under IHL.

4.3.2 Right to Truth

As discussed in section 3.3, the right to truth originated in IHL in the context of the duty to provide information about missing persons to their families and is recognised as Customary IHL.¹⁴⁹ Informing families about the fate of the missing people was one of the central concerns in the development of IHL.¹⁵⁰ Geneva Conventions contain many provisions which

Countering Terrorism' (18 September 2013) UN Doc A/68/389 para 41. Also see Gaza Report (n 125) paras 215, 221.

¹⁴⁶ ICRC, 'Customary IHL: Rule 150' < https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter42_rule150 > accessed 22 August 2015.

¹⁴⁷ Liesbeth Zegveld 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85 (851) IRRC 497, 506. See also ICRC (n 146).

¹⁴⁸ Vito Todeschini, 'Emerging Voices: The Right to a Remedy in Armed Conflict—International Humanitarian Law, Human Rights Law and the Principle of Systemic Integration' (*Opinio Juris*, 5 August 2015) < <http://opiniojuris.org/2015/08/05/emerging-voices-the-right-to-a-remedy-in-armed-conflict-international-humanitarian-law-human-rights-law-and-the-principle-of-systemic-integration/> > accessed 22 August 2015.

¹⁴⁹ ICRC, 'Customary IHL: Rule 117' < https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule117 > accessed 19 August 2015.

¹⁵⁰ International Commission of Jurists, 'Amicus Curie Brief Before the Inter-American Court of Human Rights in the Case of Efraim Bamaca Velasquez v Guatemala' (June 27, 2000) (ICJ Amicus Curie Brief) para 8 < https://www.google.ch/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCEQFjAAa_hUKewi5sPXt17THAhVDPBoKHc_IBFw&url=http%3A%2F%2Fwww.icaed.org%2Ffileadmin%2Fuser_uplo_ad%2FBamacaAmicusENG.doc&ei=qziUVfmuOMP4aM_Lk-AF&usq=AFQjCNEMNW6osd_F8xbmYfh7Km2gKSfHaQ&bvm=bv.99804247.d.bGg > accessed 19 August 2015.

relate to the need to disclose information about combatants and missing persons to the families and States.¹⁵¹ AP1 provides ‘the right of families to know the fate of their relatives’¹⁵² which is recognised as a ‘general principle of international humanitarian law’ with regard to disappeared persons.¹⁵³ Thus, the right to truth is compatible with the principles of IHL, which acknowledges and emphasizes the right of the family to know the truth.

Right to truth also has close connections with the right to effective remedy and duty to investigate.¹⁵⁴ Its scope of application includes all violations of IHL, and is not limited to information about missing persons. Thus, right to truth is seen as the harbinger of right to information under IHL¹⁵⁵ and this is a useful tool to push for Transparency requirements under IHL.

Right to effective remedy and right to truth do not enjoy enough attention in IHL owing to the fact that they aren’t very developed and are difficult to enforce. However, it is submitted that akin to the duty to investigate under IHL which is strengthened by referencing IHRL jurisprudence on the matter, it would be logical to look at IHRL in order to give shape to these rights in IHL. Interpreting these rights in the light of IHRL will lend them more credibility and consequently establish them as legal basis to demand Transparency in IHL.

4.3.3 Policy Arguments

There is a trend towards Transparency at domestic and international level. Though traditionally not given enough attention in IHL, it is being advocated for in recent scholarship.¹⁵⁶ Interestingly, Harold Koh has suggested that it is imperative for the Obama administration to tackle the controversies around drone operations by being more transparent

¹⁵¹ GC I arts 16, 17; GC III art 122; GC IV art 136.

¹⁵² AP I art 32.

¹⁵³ ICJ Amicus Curie Brief (n 150) para 10.

¹⁵⁴ ICJ Amicus Curie Brief (n 150) para 58.

¹⁵⁵ It was concluded that peace requires justice and justice starts with establishing the truth (Commission of Experts ‘Final Report of the Commission of Experts Established Pursuant to Resolution 780 of the Security Council’ (27 May 1994) UN Doc S/1994/674 (Annex) para 320.

¹⁵⁶ Ben-Naftali (n 77) 360. Schabas in the context of Bin Laden operations said that ‘US is only body in possession of the facts. It has a duty to make things clear... in any court of law he or she who invokes self defence as a justification for killing another human being has a burden of proof to demonstrate that the action was proportional...but who knows, so show us the tapes and we can all decide’ (William Schabas, ‘Murder in Pakistan’ (*PhD Studies in Human Rights*, 5 May 2011) <<http://humanrightsdoctorate.blogspot.ch/2011/05/murder-in-pakistan.html>> accessed 19 August 2015).

and consultative.¹⁵⁷ He further elaborated steps to be taken in this regard. These include disclosing the legal standards and institutional processes for targeting, clarifying the method of counting civilian casualties - explaining the inconsistencies with IHL standards in this regard, and disclosing factual records about past strikes in case of factual dispute, etc.¹⁵⁸ In his view, lack of Transparency is the major cause for uproar against US's Drone operations and ensuring it would bring more legitimacy to the US Drone policy.

Thus, Transparency is demanded not only on the basis that it forms a positive obligation under IHL, but there is an international consensus on its importance and desirability in light of its intrinsic connection to larger goals of maintaining international legal order and rule of law.¹⁵⁹

Without going into a detailed philosophical discussion into the rule of law and concept of justice, I submit that there are larger policy considerations for IHL to lean in favour of Transparency. Additionally, Transparency is also crucial for promoting the humanitarian objectives of IHL and making up for its enforcement deficit.¹⁶⁰

V. CONCLUSION

It is true that IHL lacks a specific treaty provision or rule of customary law that directly provides for Transparency. However, Transparency as emphasized in this paper exists through extensive correlations. Hence, this particular fact does not conclusively deny the existence of Transparency requirements under IHL.

I have demonstrated that IHL is not at odds with the notion of Transparency. Duty to investigate is a concrete obligation under IHL and the elements of this duty are clearly identified. It serves as the first and strongest legal basis for Transparency requirements in

¹⁵⁷ Harold Koh, 'How to End the Forever War?' (Speech at the Oxford University, 7 May 2013) 13-15 <<http://opiniojuris.org/wp-content/uploads/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf>> accessed 19 August 2015.

¹⁵⁸ *ibid* 15.

¹⁵⁹ Scrutinising State's compliance is 'paramount to the legitimacy of any legal regime, and is a crucial factor for compliance in the decentralised international system, in which enforcement mechanisms are notably weak' (Eliav Lieblich, 'Show Us the Films: Transparency, National Security and Disclosure of Information Collected by Advanced Weapon Systems under International Law' 45 (3) *IsrLR* 459, 463 <<http://portal.idc.ac.il/FacultyPublication.Publication?PublicationID=2726&FacultyUserName=ZWxpZWJsaWN>> accessed 19 August 2015.

¹⁶⁰ 'Free access to and flow of information regarding the conduct of hostilities are likely to encourage precaution on the part of political and military leadership, bring violations to an end quicker than would have been feasible otherwise and generate a heightened awareness of accountability' (Ben-Naftali (n 77) 343).

IHL. Furthermore, I have argued that Common Article 1 which is closely related to investigation and accountability is also a useful tool to ensure that States undertake more Transparency measures. Additionally, IHL supports the right to effective remedy and right to truth, both of which are intrinsically related to Transparency. Lastly, I have argued that in addition to obligations inherent in IHL, there are policy considerations which favour IHL serving as a basis for ensuring and promoting Transparency.

Thus, I conclude that Transparency requirements under IHL are practical and enforceable, and can be successfully applied to Drone operations.

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