Insufficient Knowledge in Kunduz: The Precautionary Principle and International Humanitarian Law

Emma J Marchant[*]

Abstract

The targeting protocols applied by forces during armed conflict are some of the most secretive documents held by any military. However, their role in applying principles of International Humanitarian Law (IHL) mean that they are key to understanding their development. This piece is primarily concerned with practical and operational application of the precautionary principle under IHL; how much knowledge is sufficient to carry out an attack lawfully during modern armed conflict. In order to establish if a standard has developed with the increase in Intelligence, Surveillance and Reconnaissance (ISR) technology, this piece uses the framework of an investigation into an incident in Kunduz, Afghanistan in 2009. I explore the difficulties of obtaining information post-incident, the differential standards expected by NATO and the Bundesgerichtshof (German Federal Court of Justice), and the manner in which these can be evaluated through the principles of proportionality, distinction and precautions in attack. The piece looks at the interrelated issues raised by the Rules of Engagement (ROE) and Tactical Directives, as well as the problems surrounding the clarity of intelligence available. I argue that this case is demonstrative of the failings inherent in the application and practical use of the precautionary principle outlined by IHL. The lack of transparency afforded in, and after, incidents of this nature prevents objective analysis and so the development of IHL can be obfuscated. I conclude that the lack of information following incidents of this kind confuses any intelligence standard that exists under IHL.

Introduction

The 2009 Fuel Tankers case provides an illustrative example of how a multi-national force operates during conflict. The implications of this one targeting decision have been far-reaching, to the extent that conflicting opinions appear to have arisen out of the official reports made. Despite the numerous legal and political questions raised by this particular incident, this piece will focus primarily on the standard of intelligence required by IHL. This case study has been chosen as a framework for the analysis as it highlights potential failings in the application and practical use of the precautionary principle outlined by IHL. I demonstrate that this incident exposes the wider issue with target identification and verification in complex battlespaces such as Afghanistan. Furthermore, I contend that the lack of transparency afforded in, and after, incidents of this nature can limit external analysis which, in turn, can restrict the development of customary IHL. Meanwhile states continue to create and maintain ROE that can obfuscate the issue further.

[*] Post Doctoral Researcher, University of Birmingham. E-mail: e.j.marchant@bham.ac.uk

The law of targeting is being increasingly scrutinised to understand the implications of new technology and new warfare situations. The Fuel Tankers case relies primarily on the principles of distinction and precaution and so can be analysed to provide an indication of the current accepted state practice. This particular incident is chosen due to the depth of information available which is not often the case, including the substantial legal analysis undertaken by von Heinegg and Peter.[1] Furthermore, the German media gained access to some of the classified documents which indicate that NATO were dissatisfied with the intelligence information relied upon by the commanders. This presents a useful indicator for the development of any intelligence standard under IHL. This piece intends to evaluate the precautionary principle, and the depth and scope of knowledge required prior to and during attack for it to be lawfully conducted.

The piece is structured such that it initially provides an introduction to the key legal principles relevant to targeting in IHL, before discussing the problem of analysing highly classified military incidents. The next section outlines the detail of the incident in Kunduz and highlights the investigations that were conducted post-attack. The final third of the article provides a legal analyses of the incident to establish whether Klein had taken all feasible precautions in his attack, and if it is possible to determine a normative legal development.

Legal Principles

At its heart IHL is concerned with establishing a balance between military necessity and humanity. The concept of 'limited warfare' is understood to require "every belligerent to strike a balance between the conflicting concerns of humanity and military necessity."[2] Thus, the principles of IHL affirm and define the limitations of military operations.The prohibition on targeting the civilian population is "well-established in customary International law and is based on the principles of distinction, precaution and protection…"[3] For targeting the primary body of law is found within Additional Protocol I (API)[4] and in the *corpus* of customary law maintained by the International Committee of the Red Cross (ICRC).[5] As such, the three pillars of IHL, namely: distinction,[6] proportionality[7] and precautions,[8] establish the lawful limits on military operations.

The principle of distinction is a fundamental norm of IHL and forms Rule 1 of the ICRC study on customary IHL. Dinstein states that dinstinction "constitutes the underpinning of

[1] von Heinegg Wolff and Dreist Peter, 'The 2009 Kunduz Air Attack: The Decision of the Federal Prosecutor-General on the Dismissal of Criminal Proceedings against Members of the German Armed Forces' (2010) 53 German YB Int'l Law 833

[2] Stefan Oeter, 'Methods and Means of Combat' in Dieter Fleck (ed.) *The Handbook of International Humanitarian Law* (3rd edn. OUP 2013) 122

[3] ICTY, *Prosecutor v Milošević (D)* (12 December 2007) IT-98-29/1-T, Trial Judgement, 941

[4] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 [API]

[5] 'IHL Database: Customary IHL' *ICRC* https://ihl-databases.icrc.org/customary-ihl/eng/docs/home accessed 25 November 2019

[6] API Art. 48

[7] API Art. 51(5)(b)

[8] API Art. 57

international humanitarian law (IHL) in the sense that, if you were to remove it, the entire legal edifice might collapse."[9] It is reflected in API Art. 48 and affirmed as custom by the International Court of Justice in its Advisory Opinion of 1996 on *The Legality of the Threat or Use of Nuclear Weapons,*[10] in which it stated that this was one of the "cardinal principles contained in the texts constituting the fabric of humanitarian law" and one of the "intransgressible principles of international customary law."[11] Thus, in order to undertake a lawful attack commanders must distinguish between civilians and military objects at all times.

The principle of proportionality is designed to balance the competing demands of military necessity and humanity. As Doswald-Beck states: "The principle of proportionality in attack (that the foreseeable harm caused to non-combatants be outweighed by the benefit expected to be achieved by the military action itself) is an excellent example of compromise between military and humanitarian needs…"[12] IHL recognises the inherent risks that warfare presents to the civilian population and property, but does not prohibit their incidental loss. It is currently delineated by API Art. 51(5) that prohibits "an attack which may be expected to cause incidental loss of civilian life… which would be excessive in relation to the concrete and direct military advantage…" Thus, the standard that is established is one of excessive loss in relation to the military advantage.

To be able to achieve distinction between military and civilian objects and to ensure that any incidental loss is not excessive in relation to the direct and concrete military advantage, commanders require a certain level of situational awareness. In IHL this is the precautionary principle as defined at API Art. 57. The requirement to verify a target is stated as customary rule 16 by the ICRC and found at API Art. 57(2)(i) as: "Those who plan or decide upon an attack shall… do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects…" This reflects the requirement to provide adequate distinction. Proportionality is covered by the following section of Art. 57, which states that those planning or conducting an attack should "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life…"[13]

Everything feasible is understood to mean that which is reasonable or practically possible.[14] Thus, the standard is considered to be that "which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations."[15] This interpretation is an operational standard[16] but it is the view asserted

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[9] Yoram Dinstein, 'Direct Participation in Hostilities' (2013) 18 Tilburg Law Review 3, 5
[10] *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons* (International Court of Justice) 1996
[11] ibid 78-79
[12] Louise Doswald-Beck, 'Implementation of International Humanitarian Law in Future Wars' (1999) 52:1 Naval War College Review 24, 28
[13] API Art. 57(2)(ii)
[14] The Steering Committee for Human Rights (CDDH), *Report to Committee III on the Work of the Working Group submitted by the Rapporteur* (Official Records, Vol. XV, CDDH/III/264/Rev.1, 13 March 1975) 353, also see state practice at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule15_sectionc accessed 10 January 2019
[15] Adam Roberts and Richard Guelff, *Documents on the Laws of War* (3rd edn. OUP 2000) 510
[16] In accordance with the Vienna Convention on the Law of Treaties (23 May 1969, entered into force 27 January 1980) Art. 21

by numerous states[17] and the ICRC has recognised this as being customary.[18] The ICRC Commentary on the precautionary standard comments that the interpretation must "be a matter of common sense and good faith. The person launching an offensive must take the necessary identification measures in good time in order to spare the population as far as possible."[19]

Interestingly for this incident, the German military manual at the time[20] was unclear as to the level of information that should be available requiring a standard of "maximum precautions to protect the civilian population,"[21] thus seeming to require a higher standard than IHL. However, later in the same document in reference to protecting civilians it requires "all feasible precautions."[22] In terms of verification it states more simply: "Before engaging an objective, every responsible military leader shall verify the military nature of the objective to be attacked."[23] The understanding of the German military of the obligations created by IHL is significant for this case. It is my contention that the analysis conducted by the Bundesgerichtshof in the review of this case is notably awry in the temporal scope of the obligations to maintain their intelligence and situational awareness throughout the attack.[24]

Nevertheless, the specific quality and quantity of information or intelligence required for commanders to make the decision to launch an attack is far from clear. The legal rules turn predominantly on the 'feasible precautions' as stated; however, any developments in this standard will be developed by military operations and state practice. In order to be able to establish if there is a difference in the *lex lata* and *lex feranda,* investigation of these types of incidents is important.

Scarcity of Information

One of the main issues with undertaking legal analysis of this, and other military instances of mistaken targeting, is a paucity of accurate information. Large swathes of evidence and reports remain classified and are therefore inaccessible for legal analysis of the facts. This case is no different, excepting that the political furore in Germany has led to a number of documents being leaked or released, presenting an opportunity to delve more deeply into

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[17] See the practice of Algeria, Australia, Austria, Belgium, Canada, Ecuador, Egypt, Germany, Ireland, Italy, Netherlands, New Zealand, Spain, UK and the USA, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule15 accessed 10 November 2019

[18] Customary International Humanitarian Law, *Rule 15 – Principle of Precautions in Attack* (ICRC) available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule15 last accessed 21 August 2019

[19] Yves Sandos et al. (eds.) *Commentary on the Additional Protocols to the Geneva Conventions* (ICRC 1987) 2198

[20] This document was updated in May 2013

[21] Humanitarian Law in Armed Conflicts – Manual, The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, ss. 447 (English version of ZDv 15/2, Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch)

[22] Ibid ss. 510

[23] Ibid ss. 457

[24] See, Der Generalbundesanwalt beim Bundesgerichtshof, *Ermittlungsverfahren gegen Oberst Klein und Hauptfelwebel W. wegen des Verdachts einer Strafbarkeit nach dem VStGB und anderer Delikte,* (Karlsruhe, 16 April 2010) 47-50

the issues. However, as Heintschel von Heinegg remarks; "Still, in view of the ill-founded allegations of war crimes and the needs of the German armed forces in Afghanistan for legal clarity and legal security, a more timely publication would have been most helpful."[25] Indeed, in this case there were a number of investigations conducted including those led by ISAF, NATO, the ICRC, German Parliament, German Military Police and Amnesty International. It should be noted that despite, or perhaps as a result of, the variety of investigative commissions and the court cases in Germany, the details surrounding the circumstances of the attack remain contested.[26] Nonetheless, it is possible to view the leaked footage of the incident taken by one of the US jets preceding and during the attack. This footage, as reported by the Washington Post, shows "only a handful of people running away after the explosion."[27] The factual details of the air attack, as publicly available, can be brought together from a range of both official and journalistic sources.

It should be noted that the primary problem with conducting legal analysis from journalistic sources is one of bias. There is an overwhelming predilection for discussion of the casualty numbers and the German papers particularly were concerned with the political impact.[28] Furthermore, maybe the most valuable information, that of the NATO report, can only be viewed in snippets from Der Spiegel who obtained a leaked copy.[29] It is clear then that without access to the full report the legal analysis can rely only on the quotes made by the papers, which could have been taken out of context. Full investigatory reports can run to many thousands of pages, with substantially reduced and redacted versions routinely published, most notably by the US Military. An example of this is the report of the US into the MSF hospital incident of 3 October 2015. The original classified version is reputed to have over 3,000 pages of documentary evidence[30] whilst the unclassified public version comprises just 126 pages.[31] This release of reports in an unclassified form is welcome and the US are by far the leaders in this field.[32] Although these are substantially redacted, they allow a far greater detail for analysis against the provisions of IHL and have more reliability than documents that have been leaked.[33] Irrespective then of whether Der Spiegel had

[25] von Heinegg Wolff and Dreist Peter (n 1) 866

[26] Elisabeth V Henn, 'The Development of German Jurisprudence on Individual Compensation for Victims of Armed Conflicts: The Kunduz Case' (2014) 12 Journal of International Criminal Justice 615, 616

[27] Chandrasekaran Rajiv, 'NATO Orders Probe of Afghan Airstrike Alleged to Have Killed Many Civilians' *Washington Post Foreign Service* (4 September 2009) http://www.washingtonpost.com/wp-dyn/content/article/2009/09/04/AR2009090400543.html accessed 13 November 2017

[28] John Goetz, Konstantin von Hammerstein and Holder Stark, 'Kunduz Affair puts German Defense Minister Under Pressure' (19 January 2010) *Spiegel Online* http://www.spiegel.de/international/germany/nato-s-secret-findings-kunduz-affair-report-puts-german-defense-minister-under-pressure-a-672468.html accessed 7 March 2018

[29] Ibid

[30] Reuters, 'Report: Combination of errors led to US bombing of MSF hospital in Afghanistan' (24 November 2015) *Newsweek* https://www.newsweek.com/report-combination-errors-led-us-bombing-msf-hospital-afghanistan-398120 accessed 7 January 2019

[31] Press Release, 'April 29: CENTCOM releases investigation into airstrike on Doctors Without Borders trauma center' (29 April 2016) *US Central Command* http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/904574/april-29-centcom-releases-investigation-into-airstrike-on-doctors-without-borde/ accessed 7 January 2019

[32] Government organisations provide FOIA (Freedom of Information Act) reading rooms allowing access to a myriad of sources that have been redacted and released to the general public. The UK in contrast has a far more restricted view on what can be released to the National Archives

[33] There is no easy way of establishing the reliability of a document published, for example, by WikiLeaks

access to the full classified version or a reduced summary, a few sentences gleaned from the conclusion[34] has the significant potential to be de-contextualised, as much by omission as by intent.

Nonetheless, it is possible to establish the basic facts of the case through these and the German Court ruling which was, in part, made public. As this ruling has yet to be translated into English, scholarly articles analysing the case remain a key source of information. Although the dominance of English as the lingua franca within international law has the potential to undermine the concept of universality,[35] IHL is applicable to all states[36] with variation occurring in the interpretation and application of these rules.[37]

Given all of these considerations it could be viewed as unwise to take the view that IHL is universal in application, however it should be recalled that IHL is designed to be symmetrical and applied equally by states.[38] Nonetheless, it is shown that there are variations in understanding, with information for analysis not only scarce, but also limited by language, classification, and by and from states. Furthermore, information is also potentially biased by the reporting of newspapers. None of this is unusual but it shouldn't mean that investigations are avoided, merely qualified by these factors. In order to attempt to establish any developments in applied standards to meet the 'feasible precautions' requirements, and thus establish what intelligence standard is required, it is vital to conduct this form of analysis, despite the difficulties presented.

Kunduz 2009: The Fuel Tankers Case

During the evening of 3 September 2009, the German Military Intelligence Officer on duty at Kunduz, Afghanistan, was contacted by Afghan security forces on the ground to inform him that two NATO fuel tankers had been hijacked in the Alibad region by insurgent forces. The intelligence unit contacted the regional commander and aerial reconnaissance was requested from NATO headquarters in Kabul to locate the missing trucks. An American B1-B long range bomber was in the vicinity and was tasked with searching for the trucks. They were located around an hour later by the bomber, and this was confirmed shortly afterwards by an intelligence source on the ground.[39] The reconnaissance bomber and the ground informant both confirmed that there were no civilians in the area.

[34] Goetz, von Hammerstein and Stark (n 29)

[35] Anthea Roberts, *Is International Law International?* (OUP 2017)

[36] The most notable exceptions being the signatories to API, as well as weapons treaties, including the Convention on Cluster Munitions 2008 and the Convention on the Prohibition of the Use, Stockpiling and Transfer of Anti-Personnel Mines and on their Destruction 1997. The US is not a party to any of these whereas NATO allies, France, Germany and the UK are parties to all of them.

[37] A good example being the US and war-sustaining objectives, see Stephen W. Preston, *Department of Defense Law of War Manual* (United States Office of General Counsel Department of Defense 2015) 5.7.6.2; Also, William Boothby, *The Law of Targeting* (OUP 2012) 106; Marten Zwanenberg, 'International Humanitarian Law Interoperability in Multinational Operations' (2013) 95 IRRC 681, 692-3

[38] Mark McMahon, 'Laws of War' in Samantha Besson, and John Tasioulas, (eds.) *The Philosophy of International Law* (OUP 2010)

[39] Michael J Williams, *The good war : NATO and the liberal conscience in Afghanistan* (Palgrave Macmillan 2011) viii

In order to further the operation, the German military command needed to maintain air support and this they requested. At the time they were advised that air support "would only be possible in a situation of 'troops in contact'."[40] According to the European Centre for Constitutional and Human Rights (ECCHR) the NATO ROE at this time required close air support only in cases where the German troops are endangered.[41] As it was, Klein determined that, given the proximity of the Taliban fighters and two trucks to the base, they posed an 'imminent threat'.[42] The two ISAF F15 jets arrived at the scene and, using infrared cameras, filmed the activity below. The decision was made to use two 500 pound bombs and target only the sandbank, "in order to definitively exclude the possibility of collateral damage in the neighbouring villages."[43] There appears to have been some discussion between the USAF crew and the German troops concerning the quantity of bombs as well as the requirement to carry out a low fly past.[44] Ultimately, Klein ordered the bombs be dropped some seven hours after the tankers were located on the sandbank.[45]

Knowledge at the time

The exact level of intelligence available to Klein at the time of the incident remains classified and therefore it is only possible to surmise from the information that is available.[46] Although it is possible to ascertain a broad overview of the targeting doctrine that is used by military forces,[47] this merely shows a process that is followed. It is designed to work in conjunction with ROE, Commanders' Operational Plans (OPLAN), specific legal guidance, Tactical Directives and a myriad of other documentation and procedures at the operational level. All of these documents that form the basis of targeting protocols are routinely classified at very high levels and so it is virtually impossible to ascertain exactly what information or obligations Klein was working with at the time of this incident.

However, from the sources that are publicly available, it is apparent that Klein had access to three different sources of intelligence upon which he based his decision: the first ISAF B1-B bomber, the latter two ISAF F-15E fighters and the human source. Initially, he had intelligence obtained from the B-1B bomber which had located the tankers. This aerial footage was such that the aircraft could: "positively identify that many of the individuals were carrying small arms and rocket-propelled grenades."[48] They were also able to identify two trucks and two smaller vehicles on the sandbank. The number of individuals on the

[40] von Heinegg Wolff and Drest (n 1) 838
[41] European Center for Constitutional and Human Rights, *German Air Strike near Kunduz – A Year After* (Berlin, 30 August 2010) 3 http://www.adh-geneve.ch/RULAC/news/ECCHR-Kunduz-A-Year-After.pdf accessed 5 March 2018
[42] von Heinegg Wolff and Drest (n 1) 838
[43] Holder Stark, 'German Colonel Wanted to Destroy Insurgents' (29 December 2009) *Speigel Online* http://www.spiegel.de/international/germany/kunduz-bombing-affair-german-colonel-wanted-to-destroy-insurgents-a-669444.html accessed 11 January 2018
[44] Carla Bleiker, 'Questions remain as Kunduz trial continues' *(*31 October 2013) *DW* https://www.dw.com/en/questions-remain-as-kunduz-trial-continues/a-17196492 accessed 7 March 2018
[45] For full details see, Der Generalbundesanwalt beim Bundesgerichtshof, s. B IV.
[46] Primarily from media sources
[47] Michael Schmitt, Jeffrey Biller et al, 'Joint and Combined Targeting: Structure and Process' in Jens David Ohlin, Larry May and Claire Finkelstein eds., *Weighing Lives in War* (OUP 2017) 298
[48] von Heinegg Wolff and Drest (n 1) 837

sandbank at this time was reported by those in the Tactical Operational Centre to be around 70.[49] After around 30 minutes, the B1-B aircraft had to leave the area due to a shortage of fuel.

Around 20 minutes after the bomber departed, two ISAF F-15E fighters flown by the USAF reported to the German Joint Tactical Air Controller (JTAC) to co-ordinate targeting and weaponeering. These aircraft were able to provide infrared images of the scene on the sandbank, footage of which was made available to the German court.[50] This grainy footage shows the tankers on the sandbank as well as a number of people. It is not possible to determine whether or not the individuals are holding weapons from this source.[51]

The final intelligence source that Klein relied on was an individual on the ground who was reportedly able to see the sandbank. This informant was reportedly contacted by Klein seven times during the night[52] to confirm that there were no civilians present on the sandbank. On each occasion, Klein was informed that the people were insurgents and there were no civilians present. The informant did not speak English and so the intelligence came through an interpreter.[53]

Based on these three sources of intelligence, Klein commanded the deployment of two 500-pound GBU-38 bombs[54] thus destroying the tankers and anyone in the immediate vicinity of the sandbank. So, given the number of civilian casualties caused by the bombing, the question is whether Klein, or any others, acted unlawfully. In other words, had Klein successfully applied and adhered to an intelligence standard as prescribed by IHL.

The Official Reports

The German position was made clear at the Bundesgerichtshof, where the Federal Prosecutor General concluded that Klein did not breach any rules of IHL applicable and so he could not be held liable for the casualties.[55] On the other hand, it is disclosed that the NATO report, written following their investigation and remaining classified, highlights that Klein had been dependent on one human source which was "inadequate to evaluate the various conditions and factors in such a difficult and complex target area."[56] This statement was made with consideration of the aerial imagery that was made available to Klein at the time of the incident. To further complicate the issue, the ECCHR states that the NATO report

[49] Ibid

[50] It was also leaked to the newspaper BILD https://www.youtube.com/watch?v=NyArX92T9as accessed 8 January 2017

[51] It should be noted that footage of this type can be deliberately degraded before release

[52] Carla Bleiker, 'Appeal by Kunduz airstrike victims' families fails' *(*30 April 2015) *DW* https://www.dw.com/en/appeal-by-kunduz-airstrike-victims-families-fails/a-18420262 accessed 5 May 2018

[53] Although, note that English would not be Klein's native language either

[54] It should be noted that this type of bomb is guided with Global Positioning System technology, see Rajiv Chandrasekaran, 'NATO Orders Probe of Afghan Airstrike Alleged to Have Killed Many Civilians' (5 September 2009) *Washington Post Online* http://www.washingtonpost.com/wp-dyn/content/article/2009/09/04/AR2009090400543.html??noredirect=on accessed 8 May 2018

[55] The Prosecutor v. Colonel Georg Klein [2013] http://www.internationalcrimesdatabase.org/Case/1035/Klein/ accessed 5 July 2018

[56] Goetz, von Hammerstein and Stark (n 29)

"found a number of violations of the NATO ROE."[57] They continued to say that the ICRC had conducted their own investigation into breaches of IHL and "came to the conclusion that the attack had been unlawful."[58] None of these reports is publically available; however, these statements raise concerns about the differing view of the level of information that is required prior to, and during, the conduct of an attack.

The arguments may well turn on different aspects of the rules to be applied during armed conflict, including IHL, ROE and Tactical Directives. Their legal status is significantly different; accordingly a different intelligence standard may be applied by each. The value of this is two-fold; firstly, increasing restrictions or permissions, of whatever form, within state practice could be indicative of a developing norm and thus custom. Secondly, given states have differing treaty obligations, and differ on cultural and policy approaches to the law, the adoption of similar 'rules' could indicate *opinio juris* in specific areas.[59] It is important to note, however, that the soft law provisions of ROE and Tactical Directives are not intended to create law, merely to be operational tools to comply with the overall mission parameters.[60]

Nevertheless, to attempt to establish if there is a standard of intelligence that has developed in modern conflict, the provisions guiding forces, and the interpretation of the law are key. However, it is apparent that there remains a lack of transparency in the reports leading to disparity in the decisions. How then can it be said that there is a clear intelligence standard? Furthermore, the question should be asked as to whether any others involved in the attack would be responsible under law.[61] To be able to analyse this further we need to establish what law is applicable and consequently what standard of intelligence Klein was required to have.

Intelligence Standard? The Law

Any intelligence standard would need to be devolved from the law concerning methods and means of attack, primarily the precautions in attack. These can be said to derive from the fundamental principles of proportionality and distinction.[62] Both Germany and Afghanistan are parties to API; however the United States have not ratified it. Furthermore, API is concerned with international armed conflicts (IAC)[63] with Additional Protocol II (APII)[64] being relevant to non-international armed conflict (NIAC). As the ICRC explains: "It was necessary

[57] ECCHR (n 44) 3
[58] Ibid
[59] As Bothe comments: "It appears that in the field of IHL, cases where states adopt a certain stance as a matter of policy only, without considering themselves bound to behace in that way, are relatively rare." Michael Bothe, 'Customary International Humanitarian Law: Some Reflections on the ICRC Study' (2005) 8 Yearbook of IHL 143, 161
[60] Peter Rowe, 'The ROE in Occupied Territory: Should they be published?' (2007) 8 Melbourne Journal of International Law
[61] For example the F-15E pilots
[62] API Art. 57
[63] API Art. 1
[64] to the Geneva Conventions of 1949, 1977

to differentiate between the two situations, as States were not prepared to grant the same degree of legal protection in both cases."[65]

At the time of the attack in question, the conflict in Afghanistan was non-international in nature and so API cannot be applied directly. Therefore, in order to establish what law is applicable it needs to be determined what aspects of the law are considered customary. Furthermore, even if these aspects of law are deemed customary, it does not mean that they can be directly transplanted into a non-international conflict. As declared in *Tadić* concerning the development of customary law from treaties, "…this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts."[66]

The ICRC considers that the rules for precautions in attack are customary. They state that "constant care must be taken to spare the civilian population" and develop this by aligning custom with the standard in API. Rule 16 of the ICRC's customary law study[67] thus states: "each party to the conflict must do everything feasible to verify that targets are military objectives." This is based on what is considered state practice and confirmed by the new San Remo Manual relating to NIAC which states that: "All feasible precautions must be taken by all parties to minimise both injuries to civilians and damage to civilian objects."[68] It should be recalled that the San Remo manual is not a legally binding IHL instrument, however these types of documents can form the basis of custom.[69] In this case I would argue that this is declaratory of state practice and the customary standard that is already accepted.

However, US concerns over the development of customary rules should be noted when considering the application of API in a NIAC. In response to the ICRC study, the US responded with a lengthy statement questioning the rigours of the methodology and the development of *opinio juris*.[70] That aside, the US recognises that all but one of their NATO partners have ratified API[71] and so detailed work has been undertaken to ensure the success of coalition operations. To achieve this, the US applies many of the provisions of API as a matter of policy[72] and states the military need for "common rules to govern allied operations and a… need for common principles to demonstrate our mutual commitment to

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[65] 'Protocols I and II additional to the Geneva Conventions' (01 January 2009) *ICRC* https://www.icrc.org/eng/resources/documents/misc/additional-protocols-1977.htm accessed 10 January 2018

[66] *Prosecutor v Dudko Tadić* [1999] ICTY IT-94-1-A, 126 http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf accessed 10 January 2018

[67] 'Practice Relating to Rule 16. Target Verification' *(ICRC)* https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter5_rule16 accessed 10 January 2018

[68] Michael Schmitt, Charles Garraway and Yoram Dinstein, *San Remo Manual to Non-International Armed Conflicts* (International Institute of Humanitarian Law, San Remo, 2006) 2.1.2 (a) http://stage.iihl.org/wp-content/uploads/2015/12/Manual-on-the-Law-of-NIAC.pdf accessed 15 May 2018

[69] Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law* (8th edn. Routledge 2019) 34

[70] William Bellinger & John Haynes, 'A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*' (2007) 89 IRRC 443

[71] The exception being Turkey

[72] Tracey Begley, 'Is it Time to Ratify Additional Protocol I?' (6 July 2015) *Intercross US* http://intercrossblog.icrc.org/blog/d9r104eqyjzqgma49vlapmk6a9l67i accessed 7 January 2019

humanitarian values."[73] In 1987 the US stated they would not be a party to API but recognised that "certain provisions of Protocol I reflect customary international law or are positive new developments, which should in time become part of the law."[74] By the Iraq war of 2003, it is arguable that the precautions in attack standard applied by all states complied with API.[75] Furthermore, the application of API standards in targeting was consistent for all states involved in the coalition in Afghanistan as a matter of practice.[76] This would therefore lend credence to the assertion that the precautionary principle, requiring all feasible precautions to be taken in conducting an attack, is now considered normative in nature.

Therefore, Klein was required to do 'everything feasible' to ensure that he was targeting a military objective and minimising injuries to civilians. As Oeter states: "The command authorities responsible for planning and deciding upon an attack must employ all means of reconnaissance and intelligence available to them unless and until there is sufficient certainty of the military nature of the objective of an attack."[77] Consequently, Klein must be established as the commander responsible for 'planning and deciding' upon the attack. In this scenario, it is apparent that Klein, as the commanding officer of Task Force 47 present at PRT Kunduz, was the commander responsible. The Court also considered the role of the JTAC, a sergeant who was responsible for providing the information the Colonel required to make his decisions. In the situation of 3 September 2009, Klein was viewed by the Bundesgerichtshof to be the 'command authority' and so meeting the legal standard for precautions was his responsibility.

The next criteria that needs to be met is whether or not the tankers themselves constituted a military objective targetable under IHL. The current law definition of this is established at API Art. 52(2) which creates a criteria that is two-fold and cumulative. It states that military objectives should be objects "which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[78] Therefore, Klein had to ensure that his targets provided an 'effective contribution' to the adversary's military action and the targeting of such would offer a 'definite' military advantage 'in the circumstances ruling at the time'.

Klein judged that the tankers stranded on the sandbank were those that had been hijacked earlier that day which by their purpose contributed to the military action.[79] It is reported that he believed the fuel from those tankers would be used to fuel the insurgents'

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[73] Martin P Dupuis, John Q Heywood & Michéle YF Sarko, 'The Sixth Annual American Red Cross Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions' (1987) 2 American University International Law Review 415, 421

[74] Ibid 422

[75] Neil Brown, 'Issues Arising from Coalition Operations: An Operational Lawyer's Perspective' (2008) 84 International Law Studies 225, 227

[76] Alan Cole, 'Legal Issues in Forming the Coalition' (2009) 85 International Law Studies 141, 147

[77] Stefan Oeter, 'Methods and Means of Combat' in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (3rd edn OUP 2013) 200

[78] API Art. 52(2)

[79] Der Generalbundesanwalt beim Bundesgerichtshof, 49

campaign, and he feared that attacks would be brought against the base near Kunduz.[80] These understandings led to the conclusion that the destruction, capture or neutralisation of the tankers would offer a 'definite' military advantage.

Moreover, to better understand the 'circumstances ruling at the time', this particular incident should not be taken in isolation. Since April 2009, the Kunduz camp had faced daily attacks and in July 2009 they had been warned of a complex attack against them. This intelligence indicated that two vehicles would be used, one as a bomb, in combination with suicide bombers infiltrating the camp.[81] Thus, Klein was convinced that the tanker trucks would soon be used in an attack against the camp and he was "determined to neutralize"[82] them. Therefore, he was sufficiently certain that they were a military object targetable under IHL. This also highlights the significance of reliable intelligence to develop greater strategic situational awareness to operate in concert with more time-sensitive targeting data.

Proportionality

A further issue at point is whether Klein was required to observe the law of proportionality if it is established that he did not believe there were any civilians present.[83] It is here that I contend that the Bundesgerichtshof was notably awry in their analysis of the law. They determined that: "there was no duty for the commander of the PRT to take all feasible precautions in the choice of means and methods to spare civilians as far as possible..."[84]

The Bundesgerichtshof judged that Klein had carried out 'everything feasible' to verify that the people present on the sandbank were not civilians; thus he had exhausted his requirements under law. However, a number of criticisms can be raised against this argument. In his commentary to the additional protocols, Bothe states: "The obligation to do everything feasible to verify that the target of attack are military objectives, as prescribed in subpara. 2(a)(i), involves a *continuing* obligation to assign a high priority to the collection, collation, evaluation and dissemination of timely target intelligence."[85] (emphasis added) The duty to cancel or suspend an attack is held to be customary, and is clearly stated in the San Remo manual such that: "An attack must be cancelled or suspended if it becomes apparent that the target is not a fighter or military objective…"[86]

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[80] Paulina Starski, 'The Kunduz Affair and the German State Liability Regime – The Federal Court of Justice's Turn to Anachronism' (5 December 2016) *Blog of the European Journal of International Law* https://www.ejiltalk.org/the-kunduz-affair-and-the-german-state-liability-regime-the-federal-court-of-justices-turn-to-anachronism/ accessed 22 March 2018

[81] von Heinegg Wolff and Drest (n 1) 839

[82] Ibid

[83] It is reported that he was aware that at least one of the tanker drivers was still alive and so this would indicate that not all of the individuals present were insurgents, see Charles Hawley, 'Germany Confronts the Meaning of War' (4 February 2010) *Spiegel Online* http://www.spiegel.de/international/germany/letter-from-berlin-germany-confronts-the-meaning-of-war-a-675890.html accessed 28 March 2018

[84] Henn (n 27) 629

[85] Bothe et al, *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Convention of 1949* (Martinus Nijhoff 2013) 363

[86] Schmitt, Garraway and Dinstein (n 68) 2.1.2(c)

The obligation to cancel or suspend an attack can lie with any personnel who have the ability to do so.[87] The evidence of the continuing temporal scope of the precautionary principle was demonstrated during the 1999 NATO air campaign over Kosovo. The International Criminal Tribunal for the former Yugoslavia (ICTY) approach is exemplified by the attack on a convoy at Djakovica on 14 April 1999. The parallels that can be drawn between the details of this attack some ten years earlier and the Kunduz incident are quite striking. In 1999, pilots carrying out the attack on the convoy became concerned that the situation did not conform to previously encountered convoys. As such, a slower A-10 aircraft was dispatched to gather more intelligence and further attacks were suspended. Following the reports that the convoy contained both military and civilian vehicles all attacks were cancelled.[88] Thus, both incidents concern air to ground targeting and confused intelligence potentially leading to an impression of military objectives rather than civilians.

It is important to note that the Final Report to the Prosecutor concludes that it was their opinion that, whilst the pilots may have benefited from more information, "neither the aircrew nor their commanders displayed the degree of recklessness in failing to take precautionary measures which would sustain criminal charges. The Committee also noted that the attack was suspended as soon as the presence of civilians in the convoy was suspected."[89] A point to note here was that during the Djakovica air strike it was not the commanders but the aircrew who initially questioned the status of the convoy and ceased strikes until further information was available. This is significant in that it could, potentially, suggest that the USAF F15 fighter pilots over Kunduz should have further questioned their attack. It is noted that they were concerned about the target and the pilots repeatedly requested permission to carry out a 'show of force';[90] this was declined and they were told to "hide."[91] The redacted cockpit transcript clearly demonstrates the concerns of the two pilots. It details the second pilot talking to the first, saying, "… something doesn't feel right but I can't put my thumb on it…"[92] The pilots having had their requests for a show of force declined accepted that: "…the JTAC said imminent threat from what you told me. I would dig a little more but basically he might have some more information…"[93] Thus, accepting the command they carried out the strikes.

It is accepted practice that a JTAC has the best level of intelligence available, there is an assumption that the information held by them will be the most reliable given their proximity to the ground based activity.[94] Therefore, it follows that the pilots would believe that the JTAC had information unavailable to them. Furthermore, it is established that the imagery

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[87] Nils Melzer, *Targeted Killing in International Law* (OUP 2008) 364

[88] APV Rogers, 'Zero Casualty Warfare' (2000) 82 IRRC 837

[89] 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia' (13 June 2000) 70 http://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal accessed 25 June 2018

[90] A tactic used throughout Afghanistan to scatter the people surrounding targets

[91] Peter Wall, 'Kunduz and 'seeing like a military'' (2 January 2014*) Geographical Imaginations* https://geographicalimaginations.com/2014/01/02/kunduz-and-seeing-like-a-military/ accessed 8 July 2018

[92] Cockpit transcript of Kunduz incident, obtained via Peter Wall. 3 September 2009, all times listed in Zulu (routinely used in aviation and military fields for clarity, it equates to UTC +0 or Greenwich Mean Time) http://dip21.bundestag.de/dip21/btactical directives/17/CD07400/Dokumente/Dokument%20060.pdf accessed 9 July 2018

[93] Ibid 20:51:26

[94] Discussions by the writer with operational staff under Chatham House Rules

available to them within their cockpits was of an insufficient quality to ascertain whether the individuals were combatants or civilians.[95] Given that observations of proportionality are aligned to the overall military advantage,[96] the pilots would not have been in a position to make a decision of this nature. Although they also held the duty to take all 'feasible precautions' it is my contention that they acted upon their doubts and raised them to the JTAC and as such, having had them alleviated, continued with the attack.

That the Final Report to the Prosecutor following the Djakovica incident did not press for criminal investigations is perhaps not surprising. It should be noted though that the Final Report has been criticised precisely due to the conflation of state liability and individual criminal responsibility.[97] Benvenuti reflects that the Report "… does not explain the reason why, in addition to state responsibility … a parallel criminal responsibility does not arise for the individual persons acting wrongfully."[98] However, the standard frequently referred to is not that of simple mistake, but the act must have been "committed with intent and knowledge."[99] The International Criminal Court has furthered this and requires knowledge such that a "… person *means* to cause that consequence or *is aware* that it will occur in the ordinary course of events."[100]

As the responsible commander, Klein was required to ensure that 'everything feasible' had been done to verify that the objective was a military one;[101] he had to take 'constant care' to protect civilians;[102] and he was required to 'cancel or suspend' the attack if civilian casualties were likely to be 'excessive' relative to the 'concrete and direct' military advantage anticipated.[103] This tri-fold of obligations relates directly to the intelligence that he could obtain, and the intelligence that those involved in the attack had; the intelligence standard. As such, it is concluded that Klein's obligations under IHL did not end at the point he determined there were no civilians on the sandbank. He was required to continue to carry out these 'feasible precautions' throughout the attack. Thus, the reasoning of the German court can be called into question with their dismissal of the later obligations.

Nevertheless, the situation as presented does not indicate that Klein was aware of civilians at any point. Moreover, there is no indication from the footage of the F-15 fighters, nor from the human source, that intelligence became available during the attack that there were civilians in the vicinity of the sandbank. Therefore, although the duty to 'cancel or suspend' the attack remained, it is likely that it had no real consequences in this case. The main concern with the German court developing this line of argument is for continuing demonstration of state practice. This case is already cited by the ICRC; demonstrating

[95] Bleiker (n 44)
[96] Emanuela-Chiara Gillard, *Proportionality in the Conduct of Hostilities: The incidental harm side of the assessment* (Chatham House, December 2018) 26 https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incidental-harm-gillard-final.pdf accessed 10 January 2019
[97] Paolo Benvenuti, 'The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia' (2001) 12:3 EJIL 503
[98] Ibid 14
[99] Rome Statute of the International Criminal Court [2002] Article 30(1)
[100] Ibid Art 30(2)(b)
[101] API Art. 57(2)(a)i
[102] API Art. 57(1)
[103] API Art. 57(2)(b)

Germany's understanding of 'feasible precautions'.[104] This in turn could lead to a differential in the development of custom in NIAC. It is my contention that this understanding would not be deemed to be in accordance with the fundamental principles of proportionality and distinction, and thus would constitute an invalid argument. However, this type of misinterpretation can easily lead to confusion within operational situations and thus alter the *law de facto*.

Therefore, it is significant to understand if the criticisms of the civilian casualty numbers are justified and if there a breach of IHL, potentially constituting a war crime.[105] Significantly, was there a sufficiency of intelligence for Klein to base his decision upon to launch the attack in the first instance. In order to understand these queries, it is crucial to establish how much intelligence, or information, is required and therein lies the heart of the issue.

Precautionary Principle

In order to fulfil the requirements of the precautionary principle, it is important to understand the limits and boundaries of this standard. The standard is viewed as a subjective one "in the sense that in judging the commander's actions one must look at the situation as he saw it and in the light of the information that was available to him."[106] A recent US Commander's Handbook affirms their understanding stating: "[i]n planning and conducting attacks, combatants must take feasible precautions to reduce the risk of incidental harm. What precautions are feasible depends greatly on the context, including operational considerations."[107] These statements thus confirm the requirement for assessments to be made based on the information that was available at the time, rather than based on hindsight. The Danish Military Manual follows the same approach and affirms, "[i]n the assessment of what can be considered to be reasonable in such a situation, factors such as time, intelligence resources, and protection of one's own troops are included."[108] Therefore, the amount of information that is required is based upon what is practically possible for a commander to obtain at the time, with Schmitt explaining that: "Decisional factors might include such matters as the time necessary to gather and process the additional information, the extent to which it would clarify any uncertainty, competing demands on the ISR [intelligence, surveillance, reconnaissance] system in question, and risk to it and its operators."[109] Quéguiner concurs, furthering that there is no obligation of result, only that the commander must, in cases of doubt, seek further information.[110] This understanding is particularly significant for the development of an intelligence requirement under IHL, as it provides the caveat that any analysis should consider the information *available at the time* to the *reasonable* commander.

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[104] ICRC, 'Practice relating to Rule 15 - the Principle of Precautions in Attack' *(ICRC)* Section D https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule15 accessed 9 February 2018
[105] Rome Statute, Article 8
[106] APV Rogers, *Law on the Battlefield* (3rd edn. Manchester University Press 2012) 150
[107] US Department of the Army, *The Commander's Handbook on the Law of Land Warfare, FM 6-27, MCTP 11-10C* (August 2019) 2.82
[108] Defence Command Denmark, *Military Manual on international law relevant to Danish armed forces in international operations,* (Danish Ministry of Defence, September 2016) 5.2, 72
[109] Michael Schmitt, 'Precision attack and international humanitarian law' (2005) 85:889 IRRC 445, 461
[110] Quéguiner (n 123) 798

However, whilst the precautionary principle is not absolute, it is held that: “A military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential targets. The commander must also direct his forces to use available technical means to properly identify targets during operations.”[111] If a commander is unable to access sufficient information to provide for subjective certainty and doubt remains then, to remain lawful, he must refrain from attack.[112] I would argue that the standard of intelligence required remains contextual, and so any doubt should also be framed in this manner.

In Kunduz Klein was required to do ‘everything feasible’ to establish whether there were civilians present.[113] As stated, Klein had three different sources of information, albeit the images from the F-15E fighters could be said to provide little value in establishing whether the people were civilians or insurgents. The initial source, the B1-B bomber, indicated that the individuals were carrying weapons, and the human source said that the individuals ‘were all involved’. It is not clear if there were other sources of information available to Klein, but certainly these were the only sources that were indicated in the journalistic articles, and referenced by the Bundesgerichtshof. Therefore, initial investigation should focus on these areas before further reaching into the realms of what could also have been available to him.

The human source appears to be the most contested; on quality, reliability and sufficiency. The German reports, state that Klein “made the order at least seven times that the human source should be contacted in order to verify whether the situation remain unchanged.”[114] The frequency of this was highlighted within the case to question Klein’s belief that there were no civilians present; however it was argued he was simply trying to gain all the information available. In contrast to this, Grigo claims that the human intelligence “should have made him think twice: according to McChrystal’s report, the man called every 15 to 20 minutes, hinting at the Taliban stealing gasoline.”[115] There is no indication that the informant at any point told Klein that any civilians were involved. Nonetheless, reports indicate that the informant did not speak English and so the direct contact was with an interpreter. The reliability of the information received from this source has been criticised based on the terms used to discuss the individuals on the sandbank. It is claimed that the use of the word ‘insurgent’ could be misleading and that, in fact, the translator merely stated that the individuals were ‘all involved’.[116]

It should be noted that English would not be Klein’s native tongue and as such the nuances of language could be significantly lost in these communications. Nonetheless, the use of

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[111] Final Report to the Prosecutor, 29
[112] Oeter (n 2) 201
[113] API Art. 57
[114] von Heinegg Wolff and Drest (n 1) 838
[115] Andreas Grigo, ‘The accidental victims’ (20 March 2013) *DW* http://www.dw.com/en/the-accidental-victims/a-16681586 accessed on 10 November 2017
[116] Thom Ruttig, ‘The incident at Coordinate 42S VF 8934 5219: German court rejects claim from Kunduz air strike victims’ (15 December 2013) *Afghanistan Analysts Network* https://www.afghanistan-analysts.org/the-incident-at-coordinate-42s-vf-8934-5219-german-court-rejects-claim-from-kunduz-air-strike-victims/ accessed 22 August 2019

local sources is common in Afghanistan[117] and consequently the simple dismissal of this intelligence purely on this basis is somewhat disingenuous. It seems clear that the phrase 'all involved' could easily be interpreted to mean that the people were all involved in taking the fuel, rather than anything more sinister.

Finally, and most significantly, the reliance on the human source was criticised by the NATO report for being a sole source of intelligence.[118] However, there is no requirement under law that states the quantity or quality of intelligence that has to be obtained prior to launching an attack. As Dinstein states: "Palpably, no absolute certainty can be guaranteed in the process of ascertaining the military character of an objective selected for attack, but there is an obligation of due diligence and acting in good faith."[119] Quéguiner concurs, agreeing that there is no obligation of result, only that the commander must, in cases of doubt, seek further information.[120] Therefore, based on the information available, Klein had established through two sources that there were no civilians indicated on the sandbank. It can be argued that he had, at this point, met the intelligence standard as required under IHL.

Other Intelligence Sources

Upon this straightforward application of IHL, Klein could be said to have fulfilled the requirements of the precautionary principle, and so, in concurrence with the Bundesgerichtshof, there was no breach of IHL for individual criminal liability. However, a more nuanced approach could imply that Klein was required to gain more information than the single human source he used. As Boothby asserts: "All of the circumstances pertaining at the time must be considered in order to determine what precautions are feasible. The important point is that the taking of verification precautions should be considered, and a positive decision should be made as to their feasibility…"[121] Therefore, it could be questioned what further information may have been available to Klein in the circumstances at the time and whether he had made a 'positive decision' to exclude further investigation. Given the broad range of intelligence assets at the disposal of the US-led coalition it would be reasonable to hope that more than one human source and the poor footage of F15 fighters could be deployed.

In work focusing on Network Enabled Operations Topolski argues that Klein operated in a binary manner, "visible from his [Klein's] choices to limit intelligence to his J3 [informant]; not to request further validation from other partners in the network-enabled operation; to consider the Americans at the command centre as unsupportive; and choosing to falsify information rather than be open and allow for deliberation."[122] Given the timescales in which Klein was operating, it would be difficult to argue that these tankers posed an

[117] Robert Winnett, 'Wikileaks Afghanistan: Taliban hunting down informants' (30 July 2010) *The Telegraph* http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/7917955/Wikileaks-Afghanistan-Taliban-hunting-down-informants.html?ref=patrick.net accessed 29 January 2018
[118] Goetz, von Hammerstein and Stark (n 29)
[119] Yoram Dinstein, *The conduct of hostilities under the law of international armed conflict* (CUP 2016) 126
[120] Quéguiner (n 123)
[121] Boothby (n 39) 173
[122] Anya Topolski, 'Relationality: An Ethical Response to the Tensions of Network-Enabled Operations in the Kunduz Air Strikes' (2014) 13:2 Journal of Military Ethics 158, 167

‘imminent threat’, particularly as he had them under surveillance and could react should they move from the sandbank. It is established that there were seven hours in which Klein could have sought further information from either NGOs or troops on the ground. Further, it is reported that Klein was in command of a task force consisting of members of the *Kommando Spezialkräfte* (German Special Forces).[123] What role these Special Forces played in the attack remains classified but it could indicate that Klein had more resources available than the one human source may indicate.

It is also possible that more assistance could have come from the air. The cockpit transcript of the F15 fighters indicates that during this short period they also encountered an A-10 shortly before they arrived at the target area. This was the same kind of aircraft used to evaluate targets in the Djakovica convoy incident in 1999 and so one wonders if this could have been employed. In addition to this, not long after the F15 fighters released the bombs, they were in communication with an ISR platform. They provided information to this platform that responded with: “… we’re not here in support of a [Troops in Contact] (TIC), we’re just looking to deconflict airspace with you… if you do need us for some help we’ll see if we can get retasked to you.”[124] These platforms have far more sophisticated equipment for surveillance and reconnaissance and would have been able to provide greater intelligence detail prior to a strike. That Klein never requested such is concerning. Based on the premise that Klein is obliged to undertake all practicable steps to verify the nature of the objects that are to be targeted, it would follow that he should have used all of the information sources available to him. It is perfectly reasonable to expect that these resources may not have been available to him; however, I would contend he was under a duty to, at least, request such assistance. In consideration of the time scales and intensity of the battlespace it would seem that, in the circumstances facing Klein on 3 September 2009, he had sufficient time and space to make the request and await a response.

It could be argued that Klein was never under the impression that there would be zero civilian casualties from the strike as he was aware that one of the original drivers of the tankers was still with them. IHL is established to balance in favour of the civilian in cases of doubt and should then be considered as civilian.[125] Therefore, if Klein, or any other individual, was in any doubt at all about the status of the people on the sandbank then he should presume they were civilians until such point as he could be reasonably certain that they were targetable. In this case the pilots asked the same question and the response from the base was: “… if the driver’s still alive down there he’s willing to sacrifice that.”[126] It is likely, that given the overall military advantage offered by the destruction of the tankers, the collateral damage of one individual would be considered proportionate.

Rules other than law

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[123] ‘KSK unterstützte Oberst Klein in der Bombennacht’ (10 December 2009) *Spiegel Online* http://www.spiegel.de/politik/ausland/eliteeinheit-in-kunduz-ksk-unterstuetzte-oberst-klein-in-der-bombennacht-a-666249.html accessed 10 April 2018

[124] Cockpit transcript (n 95) 21:38:05

[125] API Art. 50(1)

[126] Cockpit transcript (n 95) 21:01:30

The NATO report, albeit classified, is critical of Klein's actions in this incident and this perhaps gives us the greatest clue that something is amiss within the understanding and application of the precautionary principle. That IHL does not require absolute certainty is well-established, therefore it is important to establish the basis on which NATO reached their conclusion. Without access to the document one can only use the information that has been leaked, and in this we find an indication of the expectations of NATO. It is stated that: "it was not clear what ROE was applied during the airstrike"[127] and a lack of understanding led to "actions and decisions inconsistent with ISAF procedures and directives."[128] Therefore, it appears that NATO are basing their criticism on other sources of instruction rather than the pure basis of IHL.

The ROE and Directives referred to here are the methods by which IHL is transcribed and operated upon by military personnel; they are not a direct translation of that law. The UK Army Field Manual defines them as: "commanders' directives - in other words policy and guidance - sitting within the legal framework rather than law themselves."[129] Therefore, it would be incorrect to assume that any breach of ROE and/or Tactical Directives would automatically lead to activity that is considered unlawful. ROE are developed from IHL but are also derived from national policy and operational requirements.[130] Furthermore, in the Kunduz case, von Heinegg states: "ROE are especially restrictive insofar as they do not allow armed forces to make use of the entire spectrum of measures that are lawful under IHL."[131] The restriction placed on forces by ROE has, however, at times been overinflated by the popular media[132] and it is interesting to note that Sandvik blames the introduction of too permissive ROE for the failings at Kunduz.[133]

Sandvik's criticism of the new ROE of July 2009 as being too permissive is in direct conflict with the other sources listed here. In fact, it is widely asserted that the ROE (and the accompanying Tactical Directives) established in early July 2009 were actually more restrictive than previously used. Muhammedally reports that: "... some subordinate-level US commanders were critical of the 2009 directive, interpreting it as more restrictive than was required."[134] Furthermore, he continues that some of the troops and commanders were

[127] Goetz, von Hammerstein and Stark (n 29)
[128] Ibid
[129] Land Warfare Development Centre, *UK Army, Land Operations, Army Doctrine Publication AC71940* (March 2017) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/605298/Army_Field_Manual__AFM__A5_Master_ADP_Interactive_Gov_Web.pdf accessed 21 March 2018
[130] Richard J. Grunawalt, 'The JCS Standing ROE: A Judge Advocate's Primer' 44 A.F.L. REV 245, 246-7 (1997). *See also* International Institute of Humanitarian Law, ROE Handbook 1, 6 (2009) [hereinafter San Remo ROE Handbook] ("In addition to *self-defence*, ROE will therefore generally reflect multiple components, including political guidance from higher authorities, the tactical considerations of the specific mission, and LOAC. Succinct and unambiguous rules are essential.")
[131] von Heinegg Wolff and Drest (n 1) 850
[132] Laurie Blank, 'ROE: Law Strategy and Leadership' (2012) Emory Public Law Research Paper 11-168
[133] Kristin Bergtora Sandvik, 'Regulating War in the Shadow of Law: Toward a Re-Articulation of ROE' (2014) 13:2 Journal of Military Ethics 118
[134] Sahr Muhammedally, 'Minimizing civilian harm in populated areas: Lessons from examining ISAF and MISOM policies' (2016) 98:1 IRRC 225, 235

concerned that it was compromising their right to self-defence.[135] Without access to the ROE it is not possible to accurately determine the facts but this problem is one that Sandvik is likely to have also faced. Irrespective then of whether or not personal perceptions have played a part, it is the case that ROE can never be less restrictive than the law on which they're based.[136]

Perhaps though the relationship between ROE and IHL is more intricate than initially observed. Rowe maintains that: "As a form of military order, which the soldier is required to obey, their legal status cannot be independent of, or supplant, national or international law binding in or on the state concerned."[137] The legal status of ROE is clearly not intended to bind the state, as is demonstrated by *R v Clegg*: "…it is not suggested that the yellow card[138] has any legal force."[139] The position in Canada and Australia is similar but it should be noted that in 1996 it was accepted that ROE could form a basis of military duty and as such could lead to a breach of that duty.[140] Thus, ROE are not intended to form binding law and nor are they *intended* to demonstrate state practice for the purposes of developing customary law.

Despite the reluctance of states to recognise any legal obligations created as a result of ROE, the role they play should not be underestimated. It is the method by which conflict is conducted and as such will continue to play a role in how IHL is interpreted. An example of this is shown by Bothe who discusses the detail that ROE should develop for IHL. In commentary on the adoption of API Art 50, discussing the loss of the phrase: "immediate vicinity of military objectives" from the draft provisions, Bothe reflects that: "This action indicates a recognition that it is not possible to regulate all of the infinite variables which may affect military operations… These matters should be regulated in detail by the ROE and technical instructions issued by the Parties."[141] Thus, if ROE are expected to provide the depth and detail to the provisions established by IHL it indicates that this relationship is more symbiotic than perhaps is initially expected. However, this relationship remains driven by the dictates of IHL which must always guide ROE.

The primary issue with ROE as a basis for state practice is the fact that the majority of them are secret, for operational reasons. The UK policy on this is quite clear: "we do not comment on the detail of ROE and it would not be appropriate to comment on the national caveats that may have been imposed by other nations."[142] Again the Commonwealth states of the UK, Canada and Australia have very similar approaches to the publication of ROE. On the other hand, the United States do occasionally publish ROE whilst retaining classified details

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[135] David Zucchino, 'As US Deaths in Afghanistan Rise, Military Families Grow Critical' (2 September 2010) *Los Angeles Times* http://articles.latimes.com/2010/sep/02/nation/la-na-casualties-20100902 accessed 8 July 2018

[136] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict'* (CUP 2010) 30

[137] Peter Rowe, 'The ROE in Occupied Territory: Should they be published?' (2007) 8 Melbourne Journal of International Law

[138] ROE are frequently given to soldiers on cards, referred to as yellow cards in Northern Ireland and generally now as 'card alpha', see UK, *Parliamentary Debates*, House of Lords, 31 October 2006, vol 686, 211

[139] [1995] 1 AC 482, 491

[140] See *R v Brocklebank* (1996) 134 DLR (4th) 377, 397-8

[141] Bothe (n 88) 364

[142] Defence Committee, 'The UK Deployment to Afghanistan: Government Response to the Committee's Fifth Report of Session 2005-06' https://publications.parliament.uk/pa/cm200506/cmselect/cmdfence/1211/1211.pdf accessed 6th July 2018

of operational planning but this is frequently only following the conclusion of the operation to which the ROE relate.

Rowe argues that ROE should be more widely published. Whilst conceding that there are operational details that should remain classified for mission security and success, he states that the publication of ROE "would tell an enemy nothing about the legal obligations … although he may be pleasantly surprised to note that the US also accepts at least one rule of customary international law in these ROE."[143] This increased transparency would also aid legal evaluation of intended state practice and provide more detail for cases such as the Kunduz incident of 2009. Any development of customary law derives from state practice and, much like the US adoption of API principles, can be seen in its infancy through military operations.

The Classified NATO Report

Therefore, returning to the NATO report, it could provide the final piece of the puzzle to the events of 3 September 2009 but, as previously stated, this report remains classified. In order to establish whether the precautionary standard has developed and expectations are now exceeding that which were previously established, it would be valuable to understand this report. The report levels criticism about a failure to clearly follow ROE and the Tactical Directives in place, and further concludes that the "intelligence summaries and specific intelligence provided by HUMINT (human intelligence) did not identify a specific threat to the camp in Kunduz that night."[144]

The nature of a specific threat was significant for NATO as it could indicate that the attack was not carried out in accordance with the Tactical Directives put in place by General McChrystal in July 2009. It applied to both ISAF and USFOR-A (United States Forces – Afghanistan), altering their approach to targeting by giving a primary focus on reducing civilian casualties and avoiding alienation of the local population. In part the Tactical Directives remained classified for operational security reasons but the de-classified version demonstrates the approach to close air support that is significant for the incident under discussion. It states that commanders should limit the use of approaches such as close air support and they "must weigh the gain of using CAS (close air support) against the cost of civilian casualties…"[145] Further, it states that: "The use of air-to-ground munitions and indirect fires against residential compounds is only authorized under very limited and prescribed conditions."[146] The relevant conditions though are not included in the declassified version of the Tactical Directives. Therefore, the unclassified provisions made by the Tactical Directives do not appear to place any heavier a burden on the forces operating in Afghanistan than IHL had already placed on them at this point. The significant aspect of it appears to be a restatement of the importance of maintaining a 'hearts and minds' approach to battling the insurgency in Afghanistan at the time. The requirement to weigh

[143] Rowe (n 140) IV
[144] Ibid
[145] NATO/ISAF UNCLASS, 'Tactical Directive 6 July 2009' https://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf accessed 12 December 2017
[146] Ibid

civilian casualties is already provided for in the principle of proportionality and the statement that residential compounds not be targeted would follow the principle of distinction. As such, it is hard to argue that Klein had breached these rules, at least at the unclassified level.

However, given the specifics of the Tactical Directives are not detailed, and a reading of this only outlines well established principles of IHL, it is once again only possible to infer from commentary their significance. In this case, the impression would be that there was a requirement to have troops in contact, endangered or facing imminent threat, prior to close air support being approved. Reuters reported that: "Under orders he [General McChrystal] issued in July, aircraft are not supposed to fire unless they are sure there is *no chance* civilians can be hurt or are responding to an immediate threat."[147] (emphasis added) This standard is beyond that required by IHL and more akin to an international human rights approach to use of force. This prioritises life and requires that: "Persons posing a threat must be captured rather than killed, unless it is necessary to protect persons against the imminent threat of death or serious injury…"[148] Thus, Klein's actions in launching the attack could be questioned on the basis that he had not established beyond doubt that there was *no chance* that civilians could be hurt. That is a higher standard than IHL requires, but for NATO their concern is likely broader than purely legal liability. Nevertheless, without access to the report it becomes difficult to clarify the real issues found by NATO and appreciate their rationale. Therefore, fully understanding the precautionary principle as NATO presumes it to be, and how it is approached by states involved in modern warfare, is mired in secrecy.

Conclusion

That a significant number of civilians were injured or lost their lives as a direct result of Colonel Klein's decision on that day in September 2009 is without doubt. I have argued that in the seven-hour window available to Klein he could have done more to clarify the status of the individuals on the sandbank. Although a single source of HUMINT is not in obvious contradiction to IHL, given the increasing availability of technology and resources in modern warfare, as well as the timeframe in which this happened, it seems reasonable to expect an 'everything feasible' standard would have demanded more. That the transcripts indicated other more sophisticated platforms were in the vicinity and potentially able to assist is critical evidence. It is arguable that the restrictive ROE present at the time presented Klein with a dilemma as to gaining further information and the F15 fighters that were despatched to him provided no advantage in terms of intelligence. Further, the constantly shifting dimensions of ROE and limited provision for intelligence standards had further complicated

[147] Fraidoun Elham, 'NATO strikes fuel tankers in Afghanistan' *(*4 September 2009) *Reuters* https://www.reuters.com/article/oukwd-uk-afghanistan-idAFISL45305720090904 accessed 1 December 2017

[148] ICRC, 'International humanitarian law and the challenges of contemporary armed conflicts' (2015) Report of the 32nd International Conference of the Red Cross and Red Crescent 32IC/15/11, 34; Further see, *The Public Committee against Torture in Israel and others v. The Government of Israel and others ("The Targeted Killings Case")* [2005] HCJ 769/02, 40; HRC, *Camargo and Suarez de Guerrero v Colombia* (1982) UN Doc. CCPR/C/15/D/45/1979 Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (CUP 2006); Françoise Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' (2008) 90 IRRC 549

his decision-making process, causing distrust and a lack of openness cross-allies. This was evident from the concerns shown by the two pilots and the critique levelled by NATO.

It is my contention that Klein failed to carry out ‘everything feasible’ to assess the situation and as such acted unlawfully. The apparent disregard for the opinions of the pilots and lack of further requests for support from headquarters indicates that, irrespective of the result, he did not carry out what would be expected from a ‘reasonable war-fighter’. The great tragedy of this, aside from the civilian casualties, is that the Bundesgerichsthof, when presented with an opportunity to clarify the law, have avoided this in favour of viewing the standards individually, thereby creating further confusion. I believe that they overlooked some crucial aspects of this incident in their judgment: most notably the legal requirement to maintain constant awareness of proportionality and the obligation to cancel or suspend attacks where necessary. There is also a failure to address what role the individuals were playing on the sandbank and whether Klein had made a ‘positive decision’ to exclude any further investigations. Moreover, they have not clearly assessed what actions Klein could have taken to gain better intelligence given the timeframe he had available.

Aside from the issues this has presented for the specific case the implications are far broader. The development of the precautionary principle under modern warfare is likely to be conducted through incremental change. The lack of transparency restricts external analysis potentially creating divergence and further undermining clarity that would aid in legal development. The symbiotic relationship of ROE and other policy directives with the development of custom needs further investigation, specifically in the area of precautions that have been significantly altered by technological innovation.