

# The Panopticon of International Law: B'Tselem's Camera Project and the Enforcement of International Law in a Transnational Society

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## The Panopticon of International Law: B'Tselem's Camera Project and the Enforcement of International Law in a Transnational Society

PINI PAVEL MIRETSKI\* &  
SASCHA-DOMINIK VLADIMIR OLIVER BACHMANN\*\*

This paper analyzes the influence of transnational non-state actors on compliance with international legal rules as part of Michel Foucault's power/knowledge structure. In particular, it examines the effects of the Shooting Back project, organized by the Israeli non-governmental organization B'Tselem, on the level of investigations of alleged violations of the law of occupation. In 2007, B'Tselem supplied Palestinians living in high-conflict areas with video cameras in order to capture, expose, and "seek redress for" human rights violations in the Occupied Territories. According to Jeremy Bentham's principles of panopticism, power should be visible and unverifiable. The implementation of these principles by transnational actors is highlighted by the Shooting Back project in Israel. This project caused soldiers and their commanders to become aware of the possibility that their actions were being observed and documented without the exact location or identity of the observer being known. Shooting Back also demonstrates the potential role of transnational actors in conflict resolution. Such actors can assist in the implementation of Bentham's principles through the geographical spread and use of affordable means of communication.

Cet article analyse l'influence des acteurs transnationaux non *étatiques* sur la conformité aux règles du droit international dans le cadre de la notion de savoir-pouvoir de Michel Foucault. Il examine en particulier l'effet du projet *Shooting Back*, organisé par l'ONG

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israélienne *B'Tselem*, sur le niveau d'investigation des violations présumées de la loi d'occupation. *B'Tselem* a fourni en 2007 aux Palestiniens vivant dans les zones de fort conflit des caméras vidéo afin de leur permettre de filmer et dénoncer les atteintes aux droits de la personne dans les territoires occupés, dans le but d'en « obtenir réparation ». En vertu du principe de panoptisme de Jeremy Bentham, le pouvoir doit être à la fois visible et invérifiable. La mise en œuvre de ce principe par des acteurs transnationaux est illustrée par le projet israélien *Shooting Back*. Ce projet a forcé les soldats israéliens et leurs supérieurs à considérer la possibilité que leurs gestes soient observés et attestés sans qu'ils sachent ni l'identité de l'observateur, ni l'endroit où il se trouve. *Shooting Back* démontre également le rôle potentiel des acteurs transnationaux dans la résolution des conflits. De tels acteurs pourraient appliquer le principe de Bentham sur un vaste territoire en utilisant des moyens de communication abordables.

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Hence the major effect of the Panopticon: to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power.<sup>1</sup>

**CONTEMPORARY GLOBAL TRANSNATIONAL SOCIETY** is composed of a variety of actors. Traditional state actors in the Westphalian sense<sup>2</sup> are no longer the sole actors in international relations: non-state actors, such as non-governmental organizations (NGOs), as well as transnational corporations (TNCs), play an increasingly important role in international relations and politics.<sup>3</sup>

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1. Michel Foucault, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (New York: Pantheon Books 1977) at 201 [Foucault, *Discipline*].
  2. See e.g. Peter Stirk, "The Westphalian Model, Sovereignty and Law in *Fin-de-siècle* German International Theory" (2005) 19:2 Int'l Rel 153 at 168; Yale H Ferguson & Richard W Mansbach, *Remapping Global Politics: History's Revenge and Future Shock* (Cambridge, UK: Cambridge University Press, 2004) at 55-56.
  3. Menno T Kamminga's conception of "non-governmental organizations," which we use here, refers to organizations that have the following five elements: first, NGOs are private structures in the sense that they are not established or dominated by states (which distinguishes them from intergovernmental organizations); second, their goal is not to replace governments by force (as opposed to national liberation movements and armed opposition groups); third, while NGOs can aspire to alter governmental policy, they do not seek to take control over the government themselves (as opposed to political parties and movements); fourth, NGOs are non-self-profitable organizations, even though they can employ fundraising and even marketing (unlike business entities); and finally, even though some NGOs can sometimes employ civil disobedience, they are mostly law abiding (as opposed to criminal groups). See Menno T Kamminga, "The Evolving Status of NGOs under International Law: A threat to the Inter-State System?" in Philip Alston, ed, *Non-State Actors and Human Rights* (New York: Oxford University Press, 2005) 93 at 96.

The terms transnational corporations (TNCs), multinational corporations (MNCs), multinational enterprises (MNEs), global enterprises, and multinationals are used interchangeably in the literature, sometimes with differences between them. As there is no single definition of TNC in the literature, for the purposes of this article, the definition of the *Draft United Nations Code of Conduct on Transnational Corporations* will be used:

[A]n enterprise, whether of public, private or mixed ownership, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them [may be able to] exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others.

This article explores the influence of transnational actors on states' compliance with international legal rules in terms of Michel Foucault's power/knowledge structure<sup>4</sup> via a study of the Shooting Back<sup>5</sup> project initiated by the Israeli NGO B'Tselem (The Israeli Information Center for Human Rights in the Occupied Territories). To that end, this article examines the effect of the Shooting Back project on the level of investigations of alleged violations of the law of occupation in the Occupied Territories (OT). It does not purport

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See Commission on Transnational Corporations, *Report on the Special Session*, UNESCO, 1983, Supp No 7, UN Doc E/1983/17/Rev. 1 at 1. For further discussion of TNCs, see David Weissbrodt & Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (2003) 97:4 AJIL 901 at 907-909; Jonathan I Charney, "Transnational Corporations and Developing Public International Law" (1983) 32:4 Duke LJ 748 at 749, n 3; Fleur Johns, "The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory" (1994) 19:4 Melbourne UL Rev 893 at 893, n 1; Peter T Muchlinski, *Multinational Enterprises and the Law*, 2d ed (New York: Oxford University Press, 2007) at 5-6; Tania Voon, "Multinational Enterprises and State Sovereignty Under International Law" (1999) 21:2 Adel LR 219 at 220.

For discussion of the role played by NGOs, TNCs, and other non-state actors in international relations, see *e.g.* Steven R Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111:3 Yale LJ 443 at 446-48; Voon, *supra* note 3 at 221; James N Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* (Princeton, NJ: Princeton University Press, 1990) at 6; Ferguson & Mansbach, *supra* note 2 at 2; Emeka Duruigbo, "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges" (2008) 6:2 Nw U J Int'l Hum Rts 222 at 224; Johns, *supra* note 3 at 893; Olga Martin-Ortega, "Business and Human Rights in Conflict" (2008) 22:3 Ethics & Int'l Aff 273 at 274 [Olga Martin-Ortega, "Business"]; Pini Pavel Miretski, "The Influence of Non-Governmental Actors on Compliance with International Law – Compliance with United Nations Security Council Decisions on Angola's Conflict Diamonds" in Noëlle Quéniévet & Shilan Shah-Davis, eds, *International Law and Armed Conflict: Challenges in the 21st Century* (The Hague: TMC Asser Press, 2010) 208 at 208-10.

4. See *e.g.* Barbara Townley, "Foucault, Power/Knowledge, and Its Relevance for Human Resource Management" (1993) 18:3 Ac Mgmt Rev 518 at 521-23. For a discussion of Foucault's work in the context of international law, see James F Keeley, "Toward a Foucauldian Analysis of International Regimes" (1990) 44:1 Int'l Org 83 at 84-85.
5. This project has later been renamed the "camera distribution project," and the two names will be used interchangeably throughout this article.

to present the entire complexity of Foucault's work on power/knowledge,<sup>6</sup> but rather to apply his notion of resistance to the increased ability of NGOs in a transnational society to acquire power through the spread of knowledge. The focus of this article is on the mechanisms of power rather than on the definition of power.<sup>7</sup> In an information-driven world, power relations "are multiform and are not found in a dichotomous relationship between the dominator and dominated."<sup>8</sup> Knowledge provided by transnational actors such as NGOs and TNCs to the news media (which influences and, to a large degree, controls the flow of knowledge in transnational society)<sup>9</sup> may influence the manifestation and experience of power, and can even assist in conflict resolution. This fact in turn empowers transnational actors, as they are able to have an impact on the array of available knowledge in the system.<sup>10</sup>

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6. This article focuses on the genealogical period of Foucault, and in light of its limited scope, it does not include an analysis of Foucault's work on the subject of governmentality. For an introduction to Foucault's genealogical period and to his work on governmentality, see *e.g.* David Knights, "Writing Organizational Analysis into Foucault" (2002) 9:4 *Org* 575 at 578; Gibson Burrell, "Modernism, Postmodernism and Organizational Analysis: The Contribution of Michel Foucault" in Alan McKinlay & Ken Starkey, eds, *Foucault, Management and Organization Theory: From Panopticon to Technologies of Self* (London, UK: SAGE, 1998) 14; Arnold Davidson, "Ethics as Ascetics: Foucault, the History of Ethics, and Ancient Thought" in Gary Gutting, ed, *The Cambridge Companion to Foucault* (New York: Cambridge University Press, 1994) 115 at 118.
  7. Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, ed by Colin Gordon, translated by Colin Gordon et al (New York: Pantheon Books, 1980) at 51 [Foucault, *Power/knowledge*].
  8. Leonard M Hammer, *A Foucauldian Approach to International Law: Descriptive Thoughts for Normative Issues* (Aldershot, UK: Ashgate, 2007) at 46.
  9. See Piers Robinson, "The CNN Effect: Can the News Media Drive Foreign Policy?" (1999) 25:2 *Rev Int'l Stud* 301 at 301 [Robinson, "The CNN Effect"]; Piers Robinson, *The CNN Effect: The Myth of News, Foreign Policy and Intervention* (London: Routledge, 2002) at 1-2 [Robinson, *The Myth of News*]; Clifford Bob, "Merchants of Morality" (2002) 129:2 *Foreign Pol'y* 36 at 38.
  10. See *e.g.* Tanja A Börzel, Tobias Hofmann & Carina Sprungk, "Why Do States not Obey the Law? Lessons from the European Union" (Paper delivered at the EUSA Conference, Nashville, 27-30 March 2003) [unpublished] at 15-16; Jonas Tallberg, "Paths to Compliance: Enforcement, Management, and the European Union" (2002) 56:3 *Int'l Org* 609; David A Lake & Robert Powell, "International Relations: A Strategic-Choice Approach" in DA Lake & R Powell, eds, *Strategic Choice and International Relations* (Princeton, NJ: Princeton University Press, 1999) 3 at 38. One must note, however, that unlike the Foucauldian approach these theories see knowledge and power as analytically distinct terminuses. The use of conclusions from these approaches to enrich the conclusions of the Foucauldian approach should therefore be done carefully.

Jeremy Bentham stated that the two main principles of power are that it should be visible and unverifiable.<sup>11</sup> However, one may ponder whether these principles can be applied to the concept of power in the international arena. In today's global world, the number of publicly available sources of information and knowledge is constantly increasing due to widely available technological developments in the communications sector.<sup>12</sup> This spread of technology may, however, at times, make it necessary for states to limit public access to information in order to restrict the overall visibility of their own actions.<sup>13</sup> Alternatively, states might opt to pursue their own ways of providing information as part of a counter-information campaign.<sup>14</sup> Still, even where one might expect that a state would have total control over the flow of information, as in the context of combat during armed conflict, a (democratic) state's ability to reduce the visibility and subsequent exposure of its actions, including its military actions, is becoming increasingly constrained in today's globalized and transnational society. The presence of global NGOs such as Human Rights Watch or Amnesty International, even in the most remote parts of the world, combined with the availability of cheap and easily attainable means of communication provided by media and technology TNCs, creates the above-mentioned visibility effect. The increasing spread of technology accessible to the individual end-user, such as cell phones and Internet access, enables individual participants to broadcast their point of view to a wide global audience.

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11. Jeremy Bentham, *Panopticon; or, the Inspection-House*, vol 1 (Dublin: Payne, 1791) at 23-27; Foucault, *Discipline*, *supra* note 1 at 201.
  12. While Bentham's work produced many valuable insights and laid many important foundations for various fields, including international law, this article is limited to Bentham's principles of panopticon which are interpreted mainly in line with Foucault's work.
  13. See *e.g.* Elana J Zeide, "In Bed with the Military: First Amendment Implications of Embedded Journalism" (2005) 80:4 NYUL Rev 1309 at 1310; *Foreign Press Association v GOC Southern Command, Major-general Yoav Galant* (2008), 9910/08 (Israel HC) (in Hebrew); Rory McCarthy, "Foreign journalists demand Gaza access," *The Guardian* (30 December 2008) online: <<http://www.guardian.co.uk/world/2008/dec/30/israel-gaza-journalists/print>>.
  14. See *e.g.* Matthew Kalman & Noah Smith, "Israeli army launches camera combat unit – video," *The Guardian* (23 January 2014) online: <<http://www.theguardian.com/world/video/2014/jan/23/israeli-army-combat-cameras-unit-video>>; The Associated Press, "IDF soldiers may take cameras to war to stave off international criticism," *Haaretz* (11 April 2011) online: <<http://www.haaretz.com/news/diplomacy-defense/idf-soldiers-may-take-cameras-to-war-to-stave-off-international-criticism-1.355390>>.

The second principle of power, un-verifiability, is implemented and demonstrated by B'Tselem's Shooting Back project.<sup>15</sup> In January 2007, B'Tselem provided Palestinians living in high-conflict areas with video cameras in order to capture, expose, and seek redress for human rights violations in the OT. This project, once publicized, increased the awareness of soldiers and, more significantly, their commanders of the possibility of being monitored and filmed without always knowing the exact source of the filming. This awareness increased the self-discipline of soldiers and commanders alike. The videos even assisted the internal disciplinary and judicial mechanisms of the Israeli Defence Forces (IDF) in investigating potential violations when suspicions surfaced.

This article postulates that transnational non-state actors can influence the considerations of state decision-makers in the context of compliance with international law and can potentially play a wider role within the enforcement structure of international law. The latter role of non-state actors may involve monitoring and revealing the identities of violators of said rules by way of naming and shaming. If the basic condition of the international legal system is anarchy, characterized by the absence of a supreme law maker, a top-down hierarchy of laws, or a structured enforcement mechanism,<sup>16</sup> the latter characteristic at least may slowly be changing as the global political arena develops from an international system to a transnational society. The recognition and inclusion of transnational non-state actors in the enforcement of international law may be a building block in remedying the general enforcement deficit of international law.

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15. For positive responses to the Shooting Back project, see Yuval Azoulay, "B'Tselem cameras pay off for victims of settler attacks," *Haaretz* (17 June 2008) online: <<http://www.haaretz.com/hasen/spages/993346.html>>; Interview of Oren Yakobovich by Amy Goodman [nd] in "Shooting Back: The Israeli Human Rights Group B'Tselem Gives Palestinians Video Cameras to Document Life Under Occupation," *Democracy Now!* (26 December 2007) online: <[http://www.democracynow.org/2007/12/26/shooting\\_back\\_the\\_israeli\\_human\\_rights](http://www.democracynow.org/2007/12/26/shooting_back_the_israeli_human_rights)> [Yakobovich interview]. But see Gerald M Steinberg, "Bad Timing: B'Tselem And The Durban Conference," *The Jewish Week* (30 December 2008) online: <<https://faculty.biu.ac.il/~steing/oped%20PDFs/2008/badtiming.pdf>>.
16. The term "anarchy" refers here to a lack of centralized government, and not to a lack of order. The term is characteristically used in international relations scholarship to describe a system with order and rules despite the lack of a supreme sovereign. For an introduction to the concept of anarchy as used in international relations scholarship, see Helen Milner, "The Assumption of Anarchy in International Relations Theory: A Critique" (1991) 17:1 *Rev Int'l Stud* 67 at 69-71; Alexander Wendt, "Anarchy Is what States Make of It: The Social Construction of Power Politics" (1992) 46:2 *Int'l Org* 391 at 391. On enforcement under the conditions of anarchy, see Hans Kelsen, *Principles of International Law* (New York: Rinehart & Company, 1952) at 18-19; Thomas M Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990) at 3-16.



Non-state actors may increase compliance with international legal rules by means of additional compliance incentives such as naming and shaming, surveillance, publicity, and visibility.

This article introduces B'Tselem's camera distribution project within a discussion of the concepts of power, power/knowledge, and panopticism drawn from Foucault's conceptual framework and its implementation in organizational studies. Within this context, this article uses the example of the Israeli Shooting Back project to explore the role of transnational actors in testing and applying the panoptic structure of international.

## I. THE SHOOTING BACK PROJECT

B'Tselem is an Israeli NGO focusing on the collection, analysis, and provision of information about human rights in the OT, in order to educate the (first and foremost, Israeli) public and policy makers. While B'Tselem is primarily an Israeli NGO, it has several characteristics making it, in fact, a transnational organization as well. First, while focusing on the Israeli public and policy makers, B'Tselem is also an actor in the transnational arena, making information available to all those interested. US foreign policy plays a vital role in shaping Israel's policies in the OT, and B'Tselem has an office in Washington, DC.<sup>17</sup> Furthermore, a significant part of its funding comes from Europe and North America.<sup>18</sup>

In January 2007, B'Tselem launched its camera distribution project as a video advocacy project focusing on the OT.<sup>19</sup> It provided video cameras to Palestinians living in high-conflict areas. One of the core strategies of the project was distributing cameras to "passive" civilians rather than known activists, as part of a passive image-making concept.<sup>20</sup> The goal of the project, as stated on the website of the organization, was: "bringing the reality of [Palestinians'] lives under occupation to the attention of the Israeli and international public, exposing and seeking redress for violations of human rights."<sup>21</sup> Three factors caused B'Tselem to initiate the project: frustration about B'Tselem's inability, due to limited resources, to document the violations it was aware of; the desire to enlarge the

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17. B'Tselem USA, online: <<http://www.btselem.org/usa>>.

18. About B'Tselem, online: <[http://www.btselem.org/about\\_btselem](http://www.btselem.org/about_btselem)>.

19. B'Tselem's Camera Project, online: <[http://www.btselem.org/english/Video/CDP\\_Background.asp](http://www.btselem.org/english/Video/CDP_Background.asp)> [B'Tselem Camera Project].

20. Interview of Yoav Gross, coordinator of the B'Tselem video department, by the authors (29 November 2009) [Gross interview].

21. "Ruin and Humiliation – Qalqilya, 2007," online: <<http://www.btselem.org/video/2007/08/ruin-and-humiliation-qalqilya>>.

audience aware of the violations; and the wish to promote law enforcement.<sup>22</sup> As of November 2009, B'Tselem provided more than 150 cameras to individuals and families living in the West Bank and Gaza, focusing, in particular, on the region of Hebron and the South Hills.<sup>23</sup>

The project was managed by B'Tselem's video department. This department was originally established to provide information on the activities of the organization to the public and to advocate for B'Tselem's activities in the news media. Later, and partly due to the success of the Shooting Back project, the video department began focusing more on supplying information which could later be used as evidence in investigations conducted by enforcement authorities and in judicial proceedings.<sup>24</sup> Yoav Gross and Oren Yakobovich of B'Tselem's video department emphasized in interviews that every time B'Tselem submitted a report to the IDF it received a quick response, which was consequently published by B'Tselem, along with the report. Gross also pointed out that both the army and the police encouraged the organization to film the violations witnessed.<sup>25</sup> Gross noted that once the project was well established, military and police intelligence offices often contacted him directly, as soon as there were rumors of an incident in the OT, inquiring whether B'Tselem possessed video documentation of the rumored incident.<sup>26</sup> In June 2009, the Shooting Back project received the British One World Media Award in the field of citizen journalism.<sup>27</sup>

One of the most publicized incidents documented as a result of the project was captured by the first video received by B'Tselem. In this video, sixteen-year-old Rajah Abu Aisha of Hebron recorded a female Jewish neighbour, Yifat Alkobi, coming up to Abu Aisha's front gate, telling his family to close the door and stay inside, and repeatedly calling a member of his family a slut, all with no response from a soldier who was standing nearby.<sup>28</sup> However, probably the most famous incident documented by the project was the case of Ashraf Abu Rahma,

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22. Gross interview, *supra* note 20.

23. Marie Medina, "Shooting Back in Palestine: when cameras become weapons," *Babelmed* (21 November 2008) online: <[http://www.babelmed.net/Countries/Mediterranean/shooting\\_back.php?c=3757&m=9&l=en](http://www.babelmed.net/Countries/Mediterranean/shooting_back.php?c=3757&m=9&l=en)>; Y Azoulay, *supra* note 15; Gross interview, *supra* note 20.

24. Gross interview, *supra* note 20.

25. *Ibid*; Yakobovich interview, *supra* note 15.

26. Gross interview, *supra* note 20.

27. B'Tselem, Press Release, "B'Tselem's video camera distribution project wins British One World Media award" (23 June 2009) online: <[http://www.btselem.org/english/press\\_releases/20090623.asp](http://www.btselem.org/english/press_releases/20090623.asp)>.

28. Y Azoulay, *supra* note 15; Yakobovich interview, *supra* note 15; Gross interview, *supra* note 20.

a Palestinian protesting the separation barrier in Ni'lin.<sup>29</sup> Abu Rahma was arrested during a routine demonstration on 7 July 2008. After being handcuffed, blindfolded, beaten, and left on the ground for two hours, he was led by the arm by Lieutenant Colonel Omri Borberg and ordered to remain standing next to a military jeep. Orna Ben-Naftali and Noam Zamir describe what happened next:

Speaking in Hebrew, the officer asked [a] soldier, "What do you say, shall we take him aside and 'shoot rubber' at him?" The soldier responded, also in Hebrew: "I have no problem shooting at him." The officer then instructed the soldier to load the bullet and the soldier responded that he had already done so. The soldier then aimed his weapon at the protester's legs and fired a rubber-coated steel bullet, a shrapnel of which hit Abu Rahma's left toe.<sup>30</sup>

This incident was filmed by a Palestinian girl, Salaam Amira, from the window of her home.<sup>31</sup> According to Gross, the value of this footage was not immediately comprehended. A copy of the tape was transferred to International Solidarity volunteers, and was later given to Al Jazeera, which dismissed the value of broadcasting it.<sup>32</sup> The footage was published by B'Tselem on 20 July 2008, a day after it received the copy of the video and thoroughly checked its facts and authenticity.<sup>33</sup> Following the video's publication, B'Tselem presented the

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29. Orna Ben-Naftali & Noam Zamir, "Whose 'Conduct Unbecoming?': The Shooting of a Handcuffed, Blindfolded Palestinian Demonstrator" (2009) 7:1 J Int'l Crim Justice 155; Peter Beaumont, "Story behind the shot protester and the teen who caught it on film," *The Guardian* (27 July 2008) online: <<http://www.guardian.co.uk/world/2008/jul/27/israelandthepalestinians.middleeast>> [Beaumont, "Story"]; Peter Beaumont, "Israeli occupation filmed by 100 Palestinian cameras" *The Guardian* (30 July 2008) (video), online: <<http://www.theguardian.com/world/video/2008/jul/30/beaumont.palestine>> [Beaumont, "Israeli"]; *Abu Rahma v Military Advocate General* (2009), HCJ 7195/08 at para 3 (Israel SC) [*Abu Rahma*].
30. *Supra* note 29. For further descriptions of the incident, see *Abu Rahma*, *supra* note 29 at para 3; *Military Advocate General v Lieutenant Colonel Omri Borberg and Sergeant First Class Leonardo Korea* (Verdict) (2010), M/08/5 at 45-46 (Israel SC) (in Hebrew), online: <[http://www.btselem.org/Hebrew/Legal\\_Documents/20100715\\_Nilin\\_verdict\\_heb.pdf](http://www.btselem.org/Hebrew/Legal_Documents/20100715_Nilin_verdict_heb.pdf)> [*Borberg & Korea Verdict*].
31. Ben-Naftali & Zamir, *supra* note 29 at 158. For a different account of the facts in this incident, see Beaumont, "Story," *supra* note 29; Beaumont, "Israeli," *supra* note 29.
32. Gross interview, *supra* note 20.
33. Soon after the video was released, in a demonstration against the separation barrier in Ni'lin, the father of Salaam Amira was arrested and charged with violation of an enclosed military space, participation in a protest, and assault of a soldier. However, the Judea and Samaria Military Court of Appeals released him due to a lack of evidence. See Ben-Naftali & Zamir, *supra* note 29 at 158, n 11; Dan Izenberg, "Military court orders release of Ni'lin video whistleblower's father," *The Jerusalem Post* (19 August 2008) (on file with author). As Waked discusses, the judge suggested the questionability of the charges by asking: "Why was the

information to military police<sup>34</sup> and demanded that an investigation be opened in order to bring the officer and the soldier involved in the incident to justice. Following the investigation, the Military Advocate General (MAG) decided to prosecute both the officer and the soldier for “conduct unbecoming,” a minor offence leaving no criminal record. According to the indictment, the officer intended to threaten the detainee, while the soldier misunderstood his intentions.<sup>35</sup> On 19 August 2008 an urgent appeal of the MAG’s decision was filed with the Israeli High Court of Justice (HCJ), which issued an interim injunction deferring the proceedings. In September, following a hearing of the case, the High Court ordered the MAG to reconsider the indictment and to inform the HCJ of his decision. The High Court also used the occasion to criticize the MAG’s judgment in this case.<sup>36</sup> After the MAG again decided to indict simply for conduct unbecoming,<sup>37</sup> the HCJ issued a judgment on 1 July 2009 in which it overturned the MAG’s decision. (Justice Rubinstein even called it blasphemy.) Furthermore, the HCJ requested that both the soldier and the officer be indicted for more serious offences.<sup>38</sup> The subsequent trial began in September 2009, with Lieutenant Colonel Borberg being charged with conduct unbecoming and making threats, while First Sergeant Korea was charged with both conduct unbecoming and illegal use of firearms.<sup>39</sup> On 15 July 2010 both Lieutenant Colonel Borberg and First Sergeant Korea were found guilty as charged.<sup>40</sup> However, despite the clear denunciations used in the verdict to describe the incident and the defendants’

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father of the girl arrested out of all those protesting at the time?” See Ali Waked, “Military judge: Naalin arrest unfounded,” *Ynet* (17 August 2008) online: <<http://www.ynetnews.com/articles/0,7340,L-3583912,00.html>>. See also Gross interview, *supra* note 20; *Hasin Ali Amira v Military Prosecution* (2008), AM/08/3938 (Military Court of Appeals) (in Hebrew).

34. Gross interview, *supra* note 20.

35. Ben-Naftali & Zamir, *supra* note 29 at 158; *Abu Rahma*, *supra* note 29 at paras 15, 24, 28; *Borberg & Korea Verdict*, *supra* note 30 at 4-5.

36. *Abu Rahma*, *supra* note 29 at paras 2, 34, 53, 65, 71-81; Ben-Naftali & Zamir, *supra* note 29 at 159.

37. *Ibid*; “Judge Advocate General informs the High Court that he will not amend the indictment in the shooting of a bound Palestinian in Ni’lin” B’Tselem (21 November 2009), online: <[http://www.btselem.org/english/firearms/20081104\\_nilin\\_state\\_response.asp](http://www.btselem.org/english/firearms/20081104_nilin_state_response.asp)>.

38. *Abu Rahma*, *supra* note 29 at para 88.

39. IDF Mag Corps, “Opening of the trial of the accused in Ni’lin shooting affair,” (24 September 2009) (in Hebrew); Anshel Pfeffer, “Prosecution: Lt. Colonel Borberg did not give an order to shoot a rubber bullet at a bound demonstrator at Ni’lin,” *Haaretz* (25 September 2009) (in Hebrew), online: <<http://www.haaretz.co.il/hasite/pages/ShArt.jhtml?itemNo=1116799&contrastID=0&subContrastID=9>>.

40. *Borberg & Korea Verdict*, *supra* note 30.

behaviour, as well as the special attention given to the damage the incident caused to Israel's public image, both defendants received moderate sentences.<sup>41</sup>

This case, as well as a number of others, including the case of Yifat Alkobi, emphasize one significant effect of the camera distribution project: visibility that leads subsequently to the exposure of potential offences committed by the military under the veil of state security. The presence of cameras in high-conflict areas presents a new dimension of visibility not known before. Yakobovich, then the director of B'Tselem's video department, focused on power and transparency when he described the Shooting Back project to *Democracy Now's* Amy Goodman:

It's giving power. You know, this word is called 'empowerment.' I don't like this word so much, but I will use it. It's the children and the kids [who] are filming. It's helping to mobilize communities. In Hebron, where the community was destroyed, suddenly they're filming and they have some kind of an interest in seeing the videos, talking about it. And what I hope to achieve, that everything is going to be filmed, at least [that] ... there's going to be a feeling that everything is being filmed, *nothing is being done in the dark*. And this is what B'Tselem was basically established for, to bring light to places that are in the dark so violation will not occur.<sup>42</sup>

## II. POWER, KNOWLEDGE, AND THE STRUCTURE OF A PANOPTICON

In order to understand the role of non-state actors in the power/knowledge structure of international law, it is helpful first to discuss briefly the concept of power and the related power/knowledge structure. Foucault's analysis of power was not intended to define power but only to suggest where we should find it. Therefore, instead of using a single definition of power, we can but elaborate on some of its characteristics.<sup>43</sup> This analysis will be based on Foucault's later, so-called genealogical period.<sup>44</sup> The issues explored by Foucault during this period included

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41. Elior Levy, "Palestinians slam Borberg sentence," *Ynet* (27 January 2011) online: <<http://www.ynetnews.com/articles/0,7340,L-4020125,00.html>>; Ori Lewis, "No Jail for Israel Soldiers who Shot Palestinian," *Reuters* (27 January 2011) online: <<http://www.reuters.com/article/2011/01/27/us-palestinians-israel-sentences-idUSTRE70Q6CT20110127>>; *Military Advocate General v Lieutenant Colonel Omri Borberg and Sergeant First Class Leonardo Korea* (Sentencing) (2011), M/08/5 2011 (COURT) (in Hebrew) [*Borberg & Korea* Sentencing].

42. Yakobovich interview, *supra* note 15 [emphasis added].

43. Thomas E Wartenberg, *Rethinking Power* (Albany, NY: SUNY Press, 1992) at xxi-xxii.

44. Alan McKinlay & Ken Starkey, "Managing Foucault: Foucault, Management and Organization Theory" in McKinlay & Starkey, eds, *supra* note 6, 1 at 1; Knights, *supra* note 6 at 578; Burrell, *supra* note 6 at 17-21.

the relationship between power and knowledge “and the ‘genealogy’ of ‘organizations (as) social machines which produce elaborate discourses of information/knowledge in which human subjects are a necessary part of the material flow on which the discourses are inscribed.”<sup>45</sup>

#### A. THE CONCEPT OF POWER AND POWER/KNOWLEDGE ACCORDING TO FOUCAULT

Power for Foucault is not a unitary concept, but “an infinitely complex network of ‘micro-powers’” and power relations that permeate every aspect of social life.<sup>46</sup> It is not localized in a single place, nor can it be acquired as wealth or a commodity.<sup>47</sup> Power does not have a subject.<sup>48</sup> Its objects are data, information, and the power to evaluate information.<sup>49</sup> Power is not static, rather it and its application are subject to constant change and alteration.<sup>50</sup> As Leonard Hammer writes: “Power is part of an ongoing and ever-changing relationship of resistance to the assertion of power.”<sup>51</sup> It is not vested only in the state, “but rather [it is] an ongoing form of relationship between various social forces and actors that tend to influence and shape state decisions.”<sup>52</sup> Foucault said in one of his lectures: “Power is exercised through networks, and individuals do not simply circulate in those networks; they are in a position to both submit to and exercise this power.”<sup>53</sup>

B’Tselem’s Shooting Back project exemplifies the dynamics of power and resistance through which the use of technology and knowledge can, at times, enable a traditionally “inferior” actor—in this case, an occupied population—to overcome a far superior actor—in this case, an established occupying power.

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45. McKinlay & Starkey, *supra* note 44 at 1, citing Robert Cooper & Gibson Burrell, “Modernism, Postmodernism and Organizational Analysis: An Introduction” (1988) 9:1 *Org Stud* 91 at 105.
46. Alan Sheridan, *Michel Foucault: The Will to Truth* (New York: Tavistock Publications, 1980) at 139, 183. See also Stewart Clegg, “Foucault, Power and Organizations” in McKinlay & Starkey, eds, *supra* note 6, 29 at 31.
47. Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975-76*, translated by David Macey (New York: Picador, 2003) at 29 [Foucault, *Society*]; Sheridan, *supra* note 46 at 184.
48. Wartenberg, *supra* note 43 at xxii.
49. Larry Catá Backer, “Global Panopticism: States, Corporations, and the Governance Effects of Monitoring Regimes” (2008) 15:1 *Ind J Global Legal Stud* 101 at 128.
50. Hammer, *supra* note 8 at 42.
51. *Ibid* at 47.
52. *Ibid* at 44.
53. Foucault, *Society*, *supra* note 47 at 29.

For Foucault, power and knowledge are inseparable:<sup>54</sup> the exercise of power perpetually creates knowledge, and, conversely, knowledge constantly brings about effects of power. Knowledge and power are mixed with one another, and it is not possible for power to be exercised without knowledge, just as it is impossible for knowledge not to give rise to power.<sup>55</sup> Truth and knowledge are in fact “weapons by which a society manages itself.”<sup>56</sup> B’Tselem’s Shooting Back project provides an example of knowledge allowing a civil population to defend itself against the possibility of violations of the law of occupation by the occupying power, as we will argue below in Part II(B), below, in relation to the Abu Rahma case.

Data are inert prior to being used.<sup>57</sup> However, the use of data creates knowledge, which is the exercise of power.<sup>58</sup> As Stuart Hall writes, “Foucault argued that not only is knowledge always a form of power, but power is implicated in the questions of whether and under what circumstances knowledge is to be applied... .”<sup>59</sup> As others exercise power, one’s knowledge changes, which, in turn, influences one’s own use of power.<sup>60</sup> While we acknowledge that the knowledge of human rights violations gained within the scope of B’Tselem’s Shooting Back project will not always lead to actual enforcement action (contrary to the above-mentioned case of Abu Rahma), we contend that it may contribute to the existing general knowledge of such human rights violations, and hence to the exercise of power.

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54. This is mainly true in regard to his later works, while in the early ones, one can find a different interpretation. See Townley, *supra* note 4 at 521.

55. Foucault, *Power/knowledge*, *supra* note 7 at 51-52; Eric Paras, *Foucault 2.0: Beyond Power and Knowledge* (New York: Other Press, 2006) at 113; Sheridan, *supra* note 46 at 138-40; Townley, *supra* note 4 at 521. See also Sheridan, *supra* note 46 at 131. Sheridan quotes Foucault as stating,

No body of knowledge can be formed without a system of communications, records, accumulation and displacement, which is in itself a form of power and which is linked, in its existence and functioning, to the other forms of power. Conversely, no power can be exercised without the extraction, appropriation, distribution or retention of knowledge. On this level, there is not knowledge on the one side and society on the other, or science and the state, but only the fundamental forms of knowledge/power ... .

56. McKinlay & Starkey, *supra* note 44 at 1.

57. Backer, *supra* note 49 at 126.

58. Sheridan, *supra* note 46 at 220.

59. “The Work of Representation” in Stuart Hall, ed, *Representation: Cultural Representations and Signifying Practices* (London, UK: Sage, Open University, 1997) 13 at 48.

60. Hammer, *supra* note 8 at 46.

## B. PANOPTICISM

The ensemble of mechanisms brought into play in different clusters of power is perhaps best seen in the panopticon.<sup>61</sup> The principle of the panopticon is:

A perimeter building in the form of a ring. At the centre of this [structure], a tower, pierced by large windows opening on to the inner face of the ring. The outer building is divided into cells each of which traverses the whole thickness of the building. These cells have two windows, one opening on to the inside, facing the windows of the central tower, the other, outer one allowing daylight to pass through the whole cell. All that is then needed is to put an overseer in the tower and place in each of the cells a lunatic, a patient, a convict, a worker or a schoolboy. The back lighting enables one to pick out from the central tower the little captive silhouettes in the ring of the cells. In short, the principle of the dungeon is reversed; daylight and the overseer's gazer capture the inmate more effectively than darkness, which afforded after all a sort of protection.<sup>62</sup>

Bentham's concept of panopticism is arguably the "Columbus's egg in the order of politics," as Bentham himself defined it.<sup>63</sup> Panopticism is "a technological invention in the order of power, comparable with the steam engine in the order of production...,"<sup>64</sup> as it automates and dis-individualizes power.<sup>65</sup> Power in the panopticon does not depend solely on an individual person, but rather is "a certain concerted distribution of bodies, surfaces, lights, [and] gazes ... [which] produce the relations in which individuals are caught up."<sup>66</sup> The panopticon is a machine that produces the homogenous effects of power—both the "inspector" and the inmates in the "cells" are constantly watched. Bentham emphasized the importance of seeing without being seen for the inspectors and the overall safeguard of equal treatment of the inmates as a consequence of this visibility.<sup>67</sup>

Bentham wrote about four somewhat different types of panopticons.<sup>68</sup> However, in this article, we will focus only on the first version of the "prison-panopticon"

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61. Foucault, *Power/knowledge*, *supra* note 7 at 71. For a discussion of the panopticon, see generally Bentham, *supra* note 11.

62. Foucault, *Power/knowledge*, *supra* note 7 at 147. See also Bentham, *supra* note 11 at 5-12.

63. Foucault, *Power/knowledge*, *supra* note 7 at 146. See also Bentham, *supra* note 11 at 139.

64. Foucault, *Power/knowledge*, *supra* note 7 at 71.

65. Foucault, *Discipline*, *supra* note 1 at 202.

66. *Ibid*; Clegg, *supra* note 46 at 35.

67. Bentham, *supra* note 11 at 23, 29-30.

68. Anne Brunon-Ernst, "Deconstructing Panopticism into the Plural Panopticons" in Anne Brunon-Ernst, ed., *Beyond Foucault: New Perspectives on Bentham's Panopticon* (Farnham, UK: Ashgate, 2012) 17 at 21-24.



and Foucault's interpretation thereof through the concept of panopticism.<sup>69</sup> In *Discipline and Punish*, Foucault wrote that the panopticon was "a machine for dissociating the see/being seen dyad: in the peripheral ring, one is totally seen, without ever seeing; in the central tower, one sees everything without ever being seen."<sup>70</sup> However, in later interviews he stressed that the overseer also cannot escape from the structure of the panopticon.<sup>71</sup> As Foucault himself said: "In the Panopticon each person, depending on his place, is watched by all or certain of the others."<sup>72</sup> This power to watch is not identified as resting with an individual who possesses or exercises such power by right of birth; rather, this power has become a machine that no one owns.<sup>73</sup>

Bentham's idea of the panopticon was originally constructed to create an instrument of discipline enabling the ruler to perfect his control over the dominated. Foucault's perception of this machine in the context of power/knowledge and his emphasis on the mutual visibility of both the "guard" and the "inmates" emphasized the fact that the control was exercised from within the social body and not from "the monarch" above. In Foucault's later writings, he shifted his emphasis to stressing that "where there is power, there is resistance."<sup>74</sup> No single individual is in total control in the panopticon as even the "inmates" have a role in the control over the "guard."<sup>75</sup> The power of the "inmates" arises from the knowledge they possess as a result of the visibility of the "guard." It is this awareness of his visibility that limits the total control of the "guard" and hence subverts and limits his own power. This is not to contend that the power of the "inmates" is equal or even comparable to that of the "guard," but rather to point out that they possess certain, though limited, power as a result of the structure of the panopticon.

The power of an occupied population against the occupying power functions in much the same way: video cameras and surveillance equipment enable the

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69. See Leroy's analysis on the relevance of Foucault's interpretation to other versions of panopticism. Marie-Laure Leroy, "Transparency and Politics: The Reversed Panopticon as a Response to Abuse of Power" in Anne Brunon-Ernst, ed, *Beyond Foucault: New Perspectives on Bentham's Panopticon* (Farnham, UK: Ashgate, 2012) 143. But see criticism of Foucault's approach and its effect on Bentham's legacy in Anne Brunon-Ernst, "Introduction" in *ibid*, 1 at 2-3.

70. Foucault, *Discipline*, *supra* note 1 at 201-02.

71. Foucault, *Power/knowledge*, *supra* note 7 at 156.

72. *Ibid* at 158.

73. *Ibid* at 156.

74. Keith Douglas Smith, *Liberalism, Surveillances and Resistance: Indigenous Communities in Western Canada, 1877-1927* (Edmonton, Alta: Athabasca University Press, 2009) at 6.

75. *Ibid* at 5-6.

occupied population to create spreadable knowledge of violations, the potential negative effect of which limits the total control of the occupying power. In order to provide credibility to the potential threat of the knowledge of the “inmates” within the panopticon structure, there is still a need for a responsible external power (similar to the Israeli legal system’s eventual indictment of the defendants in the Abu Rahma case); but in a world where “panoptic” structures are everywhere, the very potential of visibility often suffices.

The major effect of the panopticon is

to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power. . . . In view of this, Bentham laid down the principle that power should be visible and unverifiable. Visible: the inmate will constantly have before his eyes the tall outline of the central tower from which he is spied upon. Unverifiable: the inmate must never know whether he is being looked at at any one moment, but he must be sure that he may always be so.<sup>76</sup>

The invention of the panopticon had the peculiarity of being utilized first of all on a local level, in schools, barracks, and hospitals. However, for Bentham, panopticism was a set of principles applicable to all forms of social governance.<sup>77</sup> As Foucault wrote: “This was where the experiment of integral surveillance was carried out.”<sup>78</sup> Surveillance in its modern form represents yet another step in the perfection of social panopticism. The creation of systems of social order that are self-regulating and internalized by those regulated represents a further shifting of coercive power from the hierarchical and external (the state, the police, and the institution) to the social and internal (the individual and the private members of society).<sup>79</sup> The effect of the panopticon over time is that the threat of constant observation leads to internalization and reduces the need for formal discipline so that, finally, “discipline, regulation and surveillance are taken for granted.”<sup>80</sup>

This process of internalization leads us to claim that the “guards” mere awareness of the potential for exposure and the “inmates” knowledge of any transgressions increase the power of the “inmates.” Therefore, the mere awareness of the possibility of being videotaped by B’Tselem’s cameras spurs soldiers and their commanders to self-regulate and discipline themselves in order to prevent

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76. Foucault, *Discipline*, *supra* note 1 at 201. See also Clegg, *supra* note 46 at 35; Derrick Jensen & George Duffin, *Welcome to the Machine: Science, Surveillance, and the Culture of Control* (White River Junction, VT: Chelsea Green Publishing, 2004) at 10.

77. Bentham, *supra* note 11 at 2-3; McKinlay & Starkey, *supra* note 44 at 3.

78. Foucault, *Power/knowledge*, *supra* note 7 at 71.

79. Backer, *supra* note 49 at 112; Smith, *supra* note 74 at 5.

80. McKinlay & Starkey, *supra* note 44 at 2, citing Shoshana Zuboff, *In the Age of the Smart Machine: The Future of Work and Power* (New York: Basic Books, 1988) at 319.

the creation (and mainly publication) of new negative images similar to the ones that formed the basis of the Abu Rahma incident. The added credibility of the project, due to the actual indictments of the filmed soldiers, increases the probability of potential penalties and further discipline and, in turn, reinforces the internalization of the very ideas of discipline by the individuals.

In organizational studies, these effects of the panopticon are connected with the principle of “continuous observation made possible by technical arrangements,” where the system essentially makes the individual “want” what the system needs to perform well.<sup>81</sup> As Stewart Clegg notes, since Max Weber, “obedience” has been central to the analysis of the production of power in organizations.<sup>82</sup> The lessons of the panopticon are also learned and implemented when constructing and managing organizations and factories.<sup>83</sup> B’Tselem’s Shooting Back project tries to utilize these effects in order to minimize the occurrence of Israeli violations of international humanitarian law (IHL) in the OT by revealing them to the Israeli and international public.<sup>84</sup>

### III. THE ROLE OF TRANSNATIONAL ACTORS AS PART OF AN ENFORCEMENT STRUCTURE

According to Foucault, Joseph Michel Antoine Servan wrote:

When you have thus formed the chain of ideas in the heads of your citizens, you will then be able to pride yourselves on guiding them and being their masters. A stupid despot may constrain his slaves with iron chains; but a true politician binds them even more strongly by the chains of their own ideas; it is at the stable point of reason that he secures the end of the chain; this link is at all the stronger in that we do not know of what it is made and we believe it to be our own work; despair and time eat away the bonds of iron and steel, but they are powerless against the habitual union of ideas, they can only tighten it still more; and on the soft fibres of the brain is founded the unshakable base of the soundest of Empires.<sup>85</sup>

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81. McKinlay & Starkey, *supra* note 44 at 3, citing Zuboff, *supra* note 80 at 322.

82. Clegg, *supra* note 46 at 38.

83. Alan McKinlay & Phil Taylor, “Through the Looking Glass: Foucault and the Politics of Production” in McKinlay & Starkey, eds, *supra* note 6, 173 at 177. See generally Alan McKinlay & Ken Starkey, eds, *supra* note 6.

84. B’Tselem Camera Project, *supra* note 19.

85. Foucault, *Discipline*, *supra* note 1 at 103, citing Joseph Michel Antoine Servan, *Le soldat citoyen, ou vues patriotiques sur la maniere la plus avantageuse de pourvoir a la defense du royaume* (Neufchâtel, France: Dans le pays de la liberté, 1780); Joseph Michel Antoine Servan, *Discours sur l’administration de la justice criminelle*, (Yverdon, France: Fortunato Bartolomeo De Felice, 1767).

In order to assess whether transnational actors such as B'Tselem can play an active role in enforcing compliance with international law, we have to revisit the tenets of power and its enforcement. Thomas M. Franck defined legitimacy as “a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”<sup>86</sup> Legitimacy is a component of power, since it enables one to achieve its goals by means other than coercion alone. It is a significant cost-effective measure as it “has the power to pull toward compliance those who cannot be compelled.”<sup>87</sup>

Foucault said that power cannot be held for long by purely repressive measures. Perhaps one of the mechanisms to overcome this repression is legitimacy. Legitimacy lies at the basis of the pull towards compliance: “it is the legitimacy of the rules which conduces to their being respected.”<sup>88</sup> One should, however, be careful not to mistake legitimacy for a neutral concept. The question of what is legitimate is resolved by power struggles.<sup>89</sup> Legitimacy may derive from ideology or from local socioeconomic or political interests that bring a certain conception of morals and ethics to a given society.<sup>90</sup>

The presence of media giants and NGOs limits the freedom of states to use military means as they may see fit. The quest for legitimacy, which can be fulfilled by complying with international law,<sup>91</sup> affects the assertion of power by the state. Power is the response to the assertion of power by others.<sup>92</sup> Therefore, by revealing new issues and hence changing available knowledge, transnational actors restrain and reconstruct the power of states.

Ronnie D. Lipschutz argues that NGOs redefine the borders between public and private spheres.<sup>93</sup> In many campaigns organized by NGOs, issues

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86. *Supra* note 16 at 24.

87. *Ibid.*

88. *Ibid.* at 38.

89. On the concepts of “legitimate power” and “illegitimate power” in organizational theories, see Clegg, *supra* note 46 at 38.

90. Pitman B Potter, “Legal Reform in China: Institutions, Culture, and Selective Adaptation” (2004) 29:2 L & Soc Inquiry 465 at 479; Pitman B Potter, “Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices” (2003) 2:1 Wash U Global Stud L Rev 119 at 121.

91. Kenneth W Abbott & Duncan Snidal, “Hard and Soft Law in International Governance” (2000) 54:3 Int'l Org 421 at 428.

92. Hammer, *supra* note 8 at 47.

93. “Power, Politics and Global Civil Society” (2005) 33:3 Millennium: J Int'l Stud 747 at 759-60.

that were once considered private are becoming part of public debate, and matters that were previously regarded as objects for public influence are urged to be left in the private sphere. B'Tselem's camera distribution project presents a case where publicized knowledge of a situation empowers the weak, in this case, the occupied civil population.<sup>94</sup> This knowledge is power, as it empowers the civilians and restrains the power of the occupying state. The state, and particularly its armed forces, has to reconsider its actions, as violations of the law of occupation are no longer regarded as the state's private domain, outside the remit of domestic and international scrutiny. With the infrastructure present in the contemporary global world and due to the "CNN effect,"<sup>95</sup> separate incidents in small peripheral villages may well become headline news all over the world and influence state behaviour.

According to Larry Catá Backer, compliance depends on both observation and the knowledge of being observed. Law can thus be understood as a framework for surveillance, understanding surveillance as information gathering, assessment, and even judgment in the eyes of the beholder. Surveillance can thus be understood as "a new form of lawmaking through which the old boundaries between public and private, national and transnational, are made irrelevant."<sup>96</sup> It represents a shifting of coercive power from the external and hierarchically superior (the state, the police, and the institution) to the internal (the individual and the private).<sup>97</sup> Surveillance has accordingly morphed from an element of

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94. The rationale that was behind the current formulation of the laws of occupation was that the occupied civil population is the weakest object, and is therefore in need of institutional protection. See especially the rules of the *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Can TS 1965/20, UKTS 039/1958 (entered into force 21 October 1950) [*Geneva Convention*]. See also the *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*, 18 October 1907, Can TS 1942/6, UKTS 009/1910 (entered into force 26 January 1909) [*Hague Convention*].

95. The "CNN effect" refers to the idea that real-time communication technology could provoke major responses from domestic audiences and political elites to global events. It is commonly connected with armed Western interventions in humanitarian cases. See *e.g.* Robinson, "The CNN Effect," *supra* note 9 at 301; Robinson, *The Myth of News*, *supra* note 9 at 1-2; Eytan Gilboa, "The CNN Effect: The Search for a Communication Theory of International Relations" (2005) 22:1 Pol Comm 27 at 28 [Gilboa, "The CNN Effect"]; Eytan Gilboa, "Global Television News and Foreign Policy: Debating the CNN Effect" (2005) 6:3 Int'l Stud Persp 325 at 326 [Gilboa, "Global Television"]. But see Peter Viggo Jakobsen, "Focus on the CNN Effect Misses the Point: The Real Media Impact on Conflict Management is Invisible And Indirect" (2000) 37:2 J Peace Research 131 at 131-32; Bob, *supra* note 9 at 36.

96. Backer, *supra* note 49 at 105.

97. *Ibid* at 112.

governance “to the basis of governance itself.”<sup>98</sup> As Backer concludes, “in its modern form, surveillance represents another step in the perfection of social panopticism.”<sup>99</sup>

B’Tselem’s Shooting Back project is just such a step in the perfection of social panopticism. Bentham’s two principles of power—visibility and un-verifiability—are manifested in the project. Once the existence of the project had been published, soldiers serving in the OT must have become aware of the possibility that their actions would be visible. These actions are now visible not only to the local population that has no significant power against the army, or solely to journalists whose access to high-conflict areas may be restricted, but also to the Israeli and international public, as well as to the enforcement bodies not present at the scene. Illegal and criminal acts, or acts that can be portrayed as legitimate when edited to reflect a desired narrative, can now be video-documented by the local population present at the scene.<sup>100</sup> Particularly in a state of belligerent occupation, where an army has to handle complex situations in highly populated areas, the visibility effect is intensified.

It is important to remember the legal context of Israel’s occupation of the “occupied” territories of the West Bank: there is little doubt that Israel has been occupying these territories since the war of 1967. The International Court of Justice confirmed Israel’s position as the occupying power in its 2004 (non-binding) advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*.<sup>101</sup> This legal view is not shared by the Israeli government, which uses instead of “occupied territories” the

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98. *Ibid* at 145.

99. *Ibid* at 112.

100. In *Borberg & Korea* Sentencing, this fact was discussed, particularly taking into account the hostile mindset against the IDF of the Palestinians filming the incident, but these issues were considered irrelevant, as the prosecution claimed that

even if it was filmed by elements hostile to the State of Israel and the IDF warriors, out of a desire to harm the image of the state, in the case discussed, these elements documented the actions of the defendants, in a way which coincides with the determination of the facts in the judgment, a determination which was not based on viewing the film.

*Supra* note 41 at 13 [translated by authors].

101. [2004] ICJ Rep 136. This view was, unsurprisingly, affirmed in a United Nations General Assembly resolution of the same year. See *Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem*, GA Res ES-10/15UNGAOR, 10th Sess, UN Doc A/5 (2004).

term “disputed territories,”<sup>102</sup> while—significantly—applying military law to the civilian “Palestinian inhabitants,” which reinforces the “occupation” view. Consequently, the Israeli Supreme Court sitting as the High Court of Justice seems to follow international legal opinion that Israel has held “the West Bank in belligerent occupation since 1967.”<sup>103</sup> The Court has also made it clear that the rules of *IHL (the Law of Armed Conflict)* are to apply.<sup>104</sup>

Our discussion of enforcement and visibility has to be seen against the backdrop of the legal and political debate revolving around the nature of Israel’s occupation of land outside the Green Line.<sup>105</sup> Since a significant part of the enforcement of the public order by the occupying power occurs in or around villages and towns, illegal actions occurring in this context can now be made visible more easily. The fact that cameras are given to a relatively large number of families in each area intensifies the effect of visibility. The mere presence of cameras and the filming of incidents cannot be outlawed, as is perhaps desired by the army. Therefore, even if the army is aware of the source of the filming, it does not usually have the operational capability or legal authority to limit the movement of the filming individual or family. Unlike pure eyewitness testimonies, which can be easily discredited and are difficult to communicate to the global public, video footage is easily transferable and leaves a distinct, though subjective, account of a given incident, thus emphasizing the saying that “a picture is worth a thousand words.”<sup>106</sup>

The second principle of power, un-verifiability, is also significantly present in this example. The filming of an incident is not done from an identifiable position, as in cases where journalists are allowed to accompany ground forces

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102. “Disputed Territories: Forgotten Facts About the West Bank and Gaza Strip” *Israel Ministry of Foreign Affairs* (1 February 2003), online: <[http://mfa.gov.il/MFA/MFA-Archive/2003Pages/DISPUTED\\_TERRITORIES-Forgotten\\_Facts\\_About\\_the\\_We.aspx](http://mfa.gov.il/MFA/MFA-Archive/2003Pages/DISPUTED_TERRITORIES-Forgotten_Facts_About_the_We.aspx)>.

103. *Beit Sourik Village Council v Israel* (2004), HCJ 2056/04, 129 ILR 189.

104. For some of these rules, see *e.g. Hague Convention, supra* note 94; *Geneva Convention, supra* note 94.

105. The “Green Line” is the armistice line that was put in place in 1949 after the fighting between Israel and Jordan as part of Israel’s War of Independence. Though this armistice line was clearly defined as not representing a final boundary, since its definition this line has become the unofficial border and the basis for negotiations between Israel and the Palestinian Authority. See Ruth Wedgewood, “The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense” (2005) 99:1 AJIL 52 at 55-56.

106. Significant literature has been written on the influence of photography (including selective photography) on human rights and international law. See *e.g.* Sharon Sliwinski, *Human Rights In Camera* (Chicago: University of Chicago Press, 2011); Ariella Azoulay, *The Civil Contract of Photography* (Brooklyn, NY: Zone Books, 2008); Daniel Joyce, “Photography and the Image-Making of International Justice” (2010) 4:2 L & Human 229.

as “embedded journalists” or to document from a specific observation point. Moreover, the army does not know which families or individuals have cameras and which do not. The emphasis on “passive image-making”<sup>107</sup> intensifies the vagueness of the source of surveillance. Even if a soldier knows who owns a camera, he or she does not know if at any particular moment that individual is operating the camera, if the camera has been passed on to somebody else, or if the camera is functional at all.

Foucault encouraged others to adapt his work to fit their interests as he himself had done with the works of Friedrich Nietzsche and others.<sup>108</sup> B’Tselem’s camera distribution project exemplifies the potential panopticon structure in the law of occupation. The traditional conception of the law of occupation is that the occupying state is responsible for maintaining public order, and it is up to that state, or others in some cases, to prosecute soldiers who commit crimes and other violations of the laws of war.<sup>109</sup> Power is therefore experienced in a traditional way that enshrines the public-private divide and makes the state more powerful by accentuating its status as supreme over all private actors. This conception of power requires constant surveillance of the civil population by the army.

The Shooting Back project advances a different kind of surveillance, that of the army by the civil population, facilitated by the availability of NGO resources and media technology. The situation therefore exhibits what Foucault referred to as a “diabolical aspect” of panopticism: the panopticon is “a machine in which everyone is caught, those who exercise power, just as much as those over whom it is exercised.”<sup>110</sup> Power is no longer identified with a single individual (or authority); everyone plays the role of an overseer in the machine.<sup>111</sup> The army’s duty in the territories is to maintain public order, and for that reason it is the overseer of the civil population. Members of the civil population are, perhaps for the first time, able to complete the structure of the panopticon, as they have also become actors who oversee the actions of the army and its compliance with the rules of IHL.

This developing panoptic structure, which has the potential to influence the balance of power between the strong and the weak, constitutes a significant evolution for the enforcement of international law in general and IHL in particular.

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107. Gross interview, *supra* note 20.

108. Knights, *supra* note 6 at 576.

109. *Geneva Convention*, *supra* note 94 at paras 146-49.

110. Foucault, *Power/knowledge*, *supra* note 7 at 156.

111. *Ibid* at 152, 154-56.



In line with the scholarship on compliance,<sup>112</sup> visibility in the panopticon, inherent to its structure, restricts not only the freedom of the “inmates” in the cells as the weak, but also the freedom of the “guard” as the strong. By increasing visibility in the structure of the panopticon, the guard’s violations of law become visible as well. The structure of the panopticon encourages the “guard” to step away from misconduct, as it would be visible to all. Similarly, in the case of the Shooting Back project, the presence of cameras provides enforcement agencies and the judiciary with evidence required for conducting effective investigations and bringing successful disciplinary and criminal charges against transgressors. This positive assessment of the project seems to correspond with the responses B’Tselem has received from the army and the police, who utilize the information provided by B’Tselem as evidence in their investigations into acts of misconduct and criminal behaviour.<sup>113</sup>

The effect of visibility is not limited to the particular violator and his actions. The greater level of transparency brought by the video coverage increases the overall cost of non-compliance for the state. The spread of cameras in a globally oriented society aids in the monitoring of potential violations and facilitates the wider distribution of such knowledge. Therefore, the state has to improve its procedures and safeguard their enforcement in order to reduce transgressions by individual violators. The state as a whole may become immediately subject to global scrutiny due to the transgressions of an individual soldier. Hence, the cost of non-compliance is escalated due to the larger risk of documented non-compliance, potential civil damage claims, and litigation, as well as the potential damage to the occupying power’s overall legitimacy and public image.

As outlined above, legitimacy plays an important role in the exercise of power. Illegitimate and purely repressive uses of power lead people to oppose it. Occupation itself is mostly considered “a factual, rather than a normative

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112. See *e.g.* Börzel, Hofmann & Sprungk, *supra* note 10 at 15-16; Tallberg, *supra* note 10 at 611-12; George W Downs, David M Rocke & Peter N Barsoom, “Is the Good News about Compliance Good News about Cooperation?” (1996) 50:3 *Int’l Org* 379 at 379; James D Fearon, “Bargaining, Enforcement, and International Cooperation” (1998) 52:2 *Int’l Org* 269 at 269; Alan E Boyle, “Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions” (1991) 3:2 *J Envtl L* 229 at 229; S Tarrow, “Transnational Politics: Contention and Institutions in International Political” (2001) 4:1 *Ann Rev Pol Sci* 1.

113. Gross interview, *supra* note 20.

phenomenon.”<sup>114</sup> It is considered to be only temporary in nature, a limited period of time when IHL has to be observed, and at the end of which the territory and its resources should be returned to the original sovereign. Positive public opinion, both domestic and international, is one of the main sources of legitimacy for an occupying power today. The appearance of video footage that questions the level of compliance with IHL in the occupied territory may actually delegitimize the occupation both internationally and domestically, a development that in turn may decrease the power of the occupying state.<sup>115</sup>

It seems that in the case of B’Tselem’s camera distribution project, the NGO, using technology provided by media corporations, empowered the local population by providing it with the means to become an overseer of the level of compliance with IHL rules by the army and border police. Transnational actors in this case may have altered the balance of power by spreading knowledge and therefore creating the conditions for a panopticon structure.

International law in general could be changing through the introduction of panoptic structures in a global, transnational, and technologically oriented society. Bentham said that the structure of the panopticon would be applicable to “all establishments whatsoever, in which within a space not too large to be covered or commanded by buildings, a number of persons are meant to be kept under inspection.”<sup>116</sup> The spread of easily accessible information facilitated by the presence of available technology like the cameras provided by B’Tselem or Twitter updates from the streets of Cairo during the so-called Arab Spring of 2011 serves as the “buildings” in the structure of the panopticon while at the same time possessing the capability to bring knowledge to every corner of the world. The question of whether rules of international law are adhered to is not monitored from a single location. Instead, each camera becomes a monitoring instrument and platform that provides knowledge and limits the ability of the transgressor to violate rules without being exposed.

The case of the Shooting Back project presents one example of how transnational private actors are increasingly involved in achieving overall compliance with international law. It is perhaps the most crystallized version of the indirect role and impact of transnational actors on such compliance. In this case, B’Tselem did

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114. Orna Ben-Naftali, Aeyal M Gross & Keren Michaeli, “Illegal Occupation: Framing the Occupied Palestinian Territory” (2005) 23:3 *Berkeley J Int’l L* 551 at 552. See also Eyal Benvenisti, *The International Law of Occupation* (Princeton, NJ: Princeton University Press, 1993).

115. James Fallows, “Who Shot Mohammed Al-Dura?” *The Atlantic* (June 2003), online: <<https://www.theatlantic.com/past/docs/issues/2003/06/fallows.htm>>.

116. Bentham, *supra* note 11 at 2.

not choose simply to pressure the Israeli government to investigate the alleged violations reported by the local population. Rather, it chose to provide the state with knowledge that affected its use of power, while at the same time empowering the local population. B'Tselem provided the state with knowledge that it could not have received in other ways. Although states are responsible for the implementation and enforcement of the law of occupation, they are at times unable to monitor effectively certain areas and are thus dependent on assistance from other actors. In our global age, this monitoring role can be best fulfilled by NGOs and the media. Perhaps monitoring by NGOs and the media could also be a fruitful approach to compliance with international law in areas of limited statehood.<sup>117</sup>

#### IV. CONCLUSION

Non-state transnational actors are not the ultimate solution to the problem of ensuring compliance in international law. Perhaps they are not even a good solution—they may have a democratic deficit, be dependent on external funding, have their own partisan interests, be highly politicized, or be designed to maximize their own profits.<sup>118</sup> However, they are already influencing compliance, and their role should be properly analyzed and understood before being dismissed.

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117. Thomas Risse & Ursula Lehmkuhl, "Governance in Areas of Limited Statehood – New Modes of Governance?" (SFB 700 Governance Working Paper No 1, December 2006).

118. See *e.g.* Bob, *supra* note 9; Steve Charnovitz, "Nongovernmental Organizations and International Law" (2006) 100:2 AJIL 348; Gilboa, "Global Television," *supra* note 95; Alan Hudson, "NGOs' Transnational Advocacy Networks: From 'Legitimacy' to 'Political Responsibility?'" (2001) 1:4 Global Networks 331; Jakobsen, *supra* note 95; Timothy W Luke & Gearóid Ó Tuathail, "On videocameralistics: the geopolitics of failed states, the CNN International and (UN)governmentality" (1997) 4:4 Rev Int'l Pol Eco 709; Robinson, "The CNN Effect", *supra* note 9; Gerald M Steinberg, "Manipulating the marketplace of ideas," *Haaretz* (27 November 2009), online: <<http://www.haaretz.com/hasen/pages/1131105.html>>.

The recognition that NGOs and the media have significant powers and affect international policy is not new.<sup>119</sup> However, the mechanisms by which they employ their power are underexplored. B'Tselem's camera distribution project presents an interesting example of the way that NGOs can empower the weaker side by providing them with an opportunity to publicize knowledge. B'Tselem's project eventually promoted a situation where, in Hebron today, people prefer to walk with cameras as they feel more protected.<sup>120</sup> This empowerment also affords great powers to the NGO itself. As Gross described, he is now often approached by top-level military and police officers seeking information and knowledge from his organization whenever an incident occurs.<sup>121</sup> The IDF is committed to universal moral values, and the value and dignity of human rights are central to its legitimacy. In this light, the knowledge provided by organizations like B'Tselem enables the IDF to function better and its well-developed internal investigation mechanisms to work more efficiently.<sup>122</sup> Furthermore, the IDF itself is training combat soldiers to carry cameras in order to present its side of the story.<sup>123</sup>

The case of B'Tselem's camera distribution project was not selected for being a typical NGO enforcement advocacy project, but rather for its uniqueness and innovation. The concept of this project erodes yet another aspect of sovereignty: traditional formal sovereignty rested on principles of sovereign equality and non-interference in the domestic affairs of another state, according to which each state decided how to deal with enemy populations and with its own troops who defied the laws of war. With time, these concepts were narrowed down by clarification and eventually the codification of the universal laws of war,

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119. Philip Alston, ed, *Non-State Actors and Human Rights* (New York: Oxford University Press, 2005); Backer, *supra* note 49; Niklas Egels-Zandén & Peter Hyllman, "Exploring the Effects of Union – NGO Relationships on Corporate Responsibility: The Case of the Swedish Clean Clothes Campaign" (2006) 64:3 J Bus Ethics 303; Gilboa, "The CNN Effect," *supra* note 95; Gilboa, "Global Television," *supra* note 95; Volker Heins, *Nongovernmental organizations in international society* (Palgrave Macmillan: New York, 2008); Jakobsen, *supra* note 95; Luke & Tuathail, *supra* note 118; Martin-Ortega, "Business," *supra* note 3; Olga Martin-Ortega, "Deadly Ventures? Multinational Corporations and Paramilitaries in Colombia" (2008) 16 *Revista Electronica De Estudios Internacionales* 1; Jason McNichol, "Transnational NGO Certification Programs as New Regulatory Forms: Lessons from the Forestry Sector" in Marie-Laure Djelic & Kerstin Sahlin-Andersson, eds, *Transnational Governance: Institutional Dynamics of Regulation* (Cambridge, UK: Cambridge University Press, 2006) 349; Kathrin Zippel, "Transnational Advocacy Networks and Policy Cycles in the European Union: The Case of Sexual Harassment" (2004) 11:1 *Soc Pol* 57.

120. Gross interview, *supra* note 20; Y Azoulay, *supra* note 15; Kalman & Smith, *supra* note 14.

121. Gross interview, *supra* note 20.

122. Israel Defense Forces, "Doctrine," online: <<http://www.idf.il/1497-en/Dover.aspx>>.

123. Kalman & Smith, *supra* note 14; The Associated Press, *supra* note 14.

the establishment of greater enforcement mechanisms by international bodies (human rights courts, human rights committees, and international criminal tribunals), and the acquiescence (even though restrictive) to extend universal criminal jurisdiction of states over the crimes of individual perpetrators from other states (which incorporates the idea that one state can have a moral virtue over another). B'Tselem's project opens another perspective on the change that is taking place in the structure of power/knowledge in our globalized and transnational society. Private transnational actors supply information and knowledge to all those actively seeking it. The state is no longer the sole source and master of knowledge as it feels increasingly unable to filter and control the information it wishes to publicize. The relevant power structures, as well as our understanding of them, should be adapted to better reflect this transition. Is this transition a further erosion of the formal concepts of sovereignty or merely a technological change that will eventually cause states to restrict the flow of information through legal and technical counter-measures? The flow of information and knowledge opens the door for new forms and mechanisms of enforcement that may eventually increase enforcement of and compliance with international law.

Enforcement is impossible without knowledge. Even if there is a will for compliance, the practical inability to gather knowledge about violations occasionally prevents potential compliance. Gathering and transmitting knowledge, as in the Shooting Back project, can be a role for transnational actors in this structure of compliance with international law. The wide dissemination of cameras in high-conflict areas, conjointly with the strategy of passive image-making, allow the widest array of coverage of the situation, unachievable by traditional means. Shooting Back simply provides knowledge and this is perhaps its greatest achievement to date.