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Pini Pavel Miretski

Sascha-Dominik Oliver Vladimir Bachmann

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This paper analyzes the influence of transnational non-state actors on compliance with international legal rules, as part of Foucault's power/knowledge structure. Particularly it examines the effect of the "Shooting Back" project, by the Israeli NGO B'Tselem, on the level of investigations of alleged violations of the law of occupation. According to Bentham's principles of Panoptism, power should be visible and unverifiable. The implementation of these principles by transnational actors is highlighted by the "Shooting Back" project in Israel. In 2007 the NGO 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. This project caused soldiers and their commanders to become aware of the possibility that they and their actions are being observed and documented, without knowing the exact source of the observer. It also demonstrates the potential role of transnational actors in conflict resolution, who through their geographical spread and the use of affordable means of communication can assist in the implementation of Bentham's principles.

Keywords:

Foucault, B'Tselem, Transnational Law, International Humanitarian Law (IHL), Compliance, Enforcement, Conflict Theory, Conflict and Society

Author(s):

Pini Pavel Miretski
Hebrew University of Jerusalem
E: pini.miretski@gmail.com

Sascha-Dominik Vladimir Oliver Bachmann
Bournemouth University
E: sbachmann@bournemouth.ac.uk

**THE PANOPTICON OF INTERNATIONAL LAW: B'TSELEM'S CAMERA
PROJECT AND THE ENFORCEMENT OF INTERNATIONAL LAW IN A
TRANSNATIONAL SOCIETY**

Pini Pavel Miretski and Sascha-Dominik Vladimir Oliver Bachmann

ABSTRACT

This paper analyzes the influence of transnational non state actors on compliance with international legal rules, as part of Foucault's power/knowledge structure. Particularly it examines the effect of the "Shooting Back" project, by the Israeli NGO B'Tselem, on the level of investigations of alleged violations of the law of occupation. According to Bentham's principles of Panoptism, power should be visible and unverifiable. The implementation of these principles by transnational actors is highlighted by the "Shooting Back" project in Israel. In 2007 the NGO 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. This project caused soldiers and their commanders to become aware of the possibility that they and their actions are being observed and documented, without knowing the exact source of the observer. It also demonstrates the potential role of transnational actors in conflict resolution, who through their geographical spread and the use of affordable means of communication can assist in the implementation of Bentham's principles.

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I. INTRODUCTION

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.¹

The current global transnational society is composed of a variety of actors. Traditional state actors in a Westphalian sense,² are no longer the sole actors in international relations (the global arena): non-state actors, such as non-governmental organizations (NGOs)³, as well as transnational corporations (TNCs)⁴, play an increasingly

¹ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (New York: Pantheon Books, 1977) at 201.

² D Stirk, “The Westphalian Model, Sovereignty and Law in Fin-de-siècle German International Theory” (2005) 19:2 *International Relations* 153 at 168; Y H Ferguson & R W Mansbach, *Remapping Global Politics: History’s revenge and future shock* (Cambridge: Cambridge University Press, 2004) at 55–56.

³ The term ‘Non-governmental organizations’ as will be used here refers to organizations which 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 Organisations); 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). 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..

⁴ The terms transnational corporations, 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 in the literature, for the purposes of this paper, the definition of the UN Draft 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.

David Weissbrodt & Maria Kruger, “Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights” (2003) 97:4 *American Journal of International Law* 901 at 907–909; Jonathan I Charney, “Transnational Corporations and Developing Public International Law” (1983) *Duke Law Journal* 748 at 749; Fleur E Johns, “The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory” (1994) 19 *Melbourne University Law Review* 893 at 893; Peter T Muchlinski, *Multinational Enterprises and the Law*, Second Edition ed (New York: Oxford University Press, 2007) at 5–6; Tania Voon, “Multinational Enterprises and State Sovereignty under International Law” (1999) 21 *The Adelaide Law Review* 219 at 220.

important role in international relations and politics.⁵ International law continues to set the standard of behaviour and rationalization for the legality of state actions.

This article explores the influence of transnational actors on compliance with international legal rules, as part of Foucault's power/knowledge⁶ structure. In particular the article examines the effect of the 'Shooting Back'⁷ project, initiated by the Israeli NGO 'B'Tselem the Israeli Center for Human Rights' (hereinafter B'Tselem), on the level of investigations of alleged violations of the law of occupation in the 'Occupied Territories' (hereinafter OT). This article does not purport to present the entire complexity of Foucault's work on power/knowledge,⁸ but rather to apply and transfer the inherent notion of resistance therein onto the increased ability of NGOs in a transnational society to acquire power through the spread of knowledge. The focus of this article will be on the mechanisms of power rather than on the definition of power.⁹ The relations of power, as developed in an information-driven world, are multiform and are not found in a dichotomous relationship between

⁵ Steven R Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111:3 Yale Law Journal 443 at 446-448; Voon, *supra* note 4 at 221; James N Rosenau, *Turbulence in World Politics: A theory of Change and Continuity* (Princeton: 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 Nw U J Int'l Hum Rts 222 at 224; Johns, *supra* note 4 at 893; Olga Martin-Ortega, "Business and Human Rights in Conflict" (2008) 22:3 Ethics & International Affairs 273 at 274; Pini Pavel Miretski, "The Influence of Non-Governmental Actors on Compliance with International Law - Compliance with UNSC 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: T.M.C. Asser Instituut, 2010) 208 at 208-210.

⁶ James F Keeley, "Toward a Foucauldian Analysis of International Regimes" (1990) 44:1 International Organization 83 at 84-85; Barbara Townley, "Foucault, Power/Knowledge, and Its Relevance for Human Resource Management" (1993) 18:3 The Academy of Management Review 518 at 521-523.

⁷ This project has later been renamed as the 'camera distribution project', and the two terms will be used interchangeably in this paper.

⁸ This article focuses on the genealogical period of Foucault, and in light of its limited scope does not include the analysis of Foucault's work on the subject of governmentality. David Knights, "Writing Organizational Analysis into Foucault" (2002) 9:4 Organization 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: SAGE, 2000) 14; Arnold I Davidson, "Ethics as ascetics: Foucault, the history of ethics, and ancient thought" in Gary Gutting, ed, *The Cambridge Companion to Foucault* (Cambridge: Cambridge University Press, 1994) 115 at 118.

⁹ Michel Foucault, *Power/knowledge: Selected interviews and other writings 1972-77* by Michel Foucault, translated by Colin Gordon et al (New York: Pantheon Books, 1980) at 51.

the dominator and dominated.¹⁰ Therefore knowledge provided by third parties, including transnational actors such as non-governmental organizations (NGOs) and transnational corporations (TNCs) in the field of the media, which influence and to a large degree control the flow of knowledge in a transnational society,¹¹ may influence the manifestation and experience of power and can even assist in conflict resolution. This, in turn, empowers transnational actors, as they are able to impact on the array of available knowledge in the system.¹²

Bentham stated that the two main principles of power are that it should be visible and unverifiable.¹³ However, one may ponder whether these principles can be applied to the concept of power in the international arena? In today's global world, there is a constant increase in availability of sources of information and knowledge due to widely available technological developments in the communications sector. This wide spread of technology, however, at times may make it necessary for states to limit access to such 'public' information in order to restrict the overall visibility of their own actions.¹⁴ Alternatively, states might opt to provide own ways of providing

¹⁰ Leonard M Hammer, *A Foucauldian Approach to International Law: Descriptive Thoughts for Normative Issues* (Aldershot: Ashgate, 2007) at 46.

¹¹ Piers Robinson, "The CNN Effect: Can the News Media Drive Foreign Policy?" (1999) 25:02 *Review of International Studies* 301 at 301; Piers Robinson, *The CNN effect: the myth of news, foreign policy and intervention* (London: Routledge, 2002) at 1–2; Clifford Bob, "Merchants of Morality" (2002):129 *Foreign Policy* 36 at 38.

¹² Tanja A Börzel, T Hoffman & C Sprungk, *Why Do States not Obey the Law? Lessons from the European Union* (Nashville, 2003) at 15–16; Jonas Tallberg, "Paths to Compliance: Enforcement, Management, and the European Union" (2002) 56:3 *International Organization* 609 at 611; D A Lake & R Powell, "International Relations: A Strategic-Choice Approach" in D A Lake & R Powell, eds, *Strategic Choice and International Relations* (Princeton: Princeton University Press, 1999) 3 at 38–39. 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.

¹³ Jeremy Bentham, *Panopticon, or, The inspection-house* (Dublin: Payne, 1791) at 23–27; Foucault, *supra* note 1 at 201.

¹⁴ 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. E J Ziede, "In Bed with the Military: First Amendment Implications of Embedded Journalism" (2005) 80 *New York University Law Review* 1309 at 1310; *Foreign Press Association v. GOC Southern Command, major-general Yoav Galant*, 2008 9910/08 (available on http://www.adh-geneva.ch/RULAC/pdf_state/Bagatz-foreign-press-1-.pdf); Rory

information as part of a counter information campaign.¹⁵ Still, even in a reality where one might expect that a state would have total control over the flow of information, like in the context of combat during armed conflict, a (democratic) state's options of actually reducing visibility, and subsequent exposure of its military actions are becoming increasingly constrained in today's globalized and transnational society. The actual 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, create the abovementioned visibility effect. The increasing spread of technology accessible to the individual end-user, such as cell phones and internet access enable individual participants to broadcast their point of view to a wide global audience.

The second principle of power, 'un-verifiability' is implemented and demonstrated by the 'Shooting Back' project of the Israeli human rights NGO B'Tselem.¹⁶ 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 publicised, increased the awareness of soldiers and mainly their commanders to the possibility of being monitored and

McCarthy, "Foreign journalists demand Gaza access", *Guardian.co.uk* (30 December 2008), online: <<http://www.guardian.co.uk/world/2008/dec/30/israel-gaza-journalists/print>>.

¹⁵ 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.com* (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>>.

¹⁶ 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>>; Amy Goodman, "Shooting Back: The Israeli Human Rights Group B'Tselem Gives Palestinians Video Cameras to Document Life Under Occupation.", (26 December 2007), online: *Democracy Now! The War and Peace Report* <http://www.democracynow.org/2007/12/26/shooting_back_the_israeli_human_rights>. But see Gerald M Steinberg, "Bad Timing: B'tselem And The Durban Conference", *The Jewish Week* (30 December 2008), online: <http://www.thejewishweek.com/viewArticle/c55_a14420/Editorial__Opinion/Opinion.html#>.

filmed, without always knowing the exact source of the filming. This awareness increased self-discipline of soldiers and commanders alike. The filming materials even assisted the internal disciplinary and judicial mechanisms of the 'Israeli Defence Forces' (hereinafter IDF) in investigating potential violations when suspicions surfaced.

This article postulates the notion that transnational non-state actors can influence the considerations of decision makers of state actors 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, which stipulates the absence of a supreme law maker, a top-down set of laws and a structured enforcement mechanism,¹⁷ at least the latter may slowly be changing as the global political arena is developing 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 another building block in remedying the general enforcement deficit of international law. 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 the reader to B'Tselem's camera distribution project within a discussion of the concepts of power, power/knowledge and panoptism,

¹⁷The 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. Generally on anarchy as used in IR scholarship see Helen Milner, "The Assumption of Anarchy in International Relations Theory: A Critique" (1991) 17:1 *Review of International Studies* 67 at 69–71; Alex Wendt, "Anarchy is What States make of It: The Social Construction of Power Politics" (1992) 46:2 *IO* 391. On enforcement under the conditions of anarchy see Hans Kelsen, *Principles of International Law* (New York: Rinehart & Company Inc., 1952) at 18–19; Thomas M Franck, *The Power of legitimacy among nations* (Oxford: Oxford University Press, 1990) at 1–16.

according to Foucault's conceptual framework and its implementation in organizational studies. Within this context, the paper explores the role of transnational actors in testing and applying the panoptic structure of international law by using the Israeli 'Shooting Back' project as an example.

II. '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 (first and foremost the Israeli) public and policy makers. While B'Tselem is primarily an Israeli NGO, it has several characteristics making it, in fact, a transnational organisation 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. Hence, and since US foreign policy plays a vital role in shaping Israel's policies in the Occupied Territories, B'Tselem has an office in Washington, DC.¹⁸ Furthermore, a significant part of the funding of the organisation comes from European governments and foundations from Europe and North America.¹⁹

In January 2007 B'Tselem launched its camera distribution project. This project was defined by them as a video advocacy project focusing on the OT.²⁰ The organization 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 the passive image making concept.²¹ The goal of the project, as published on the website of the organization, was: 'bringing the reality of their [Palestinians] lives under occupation to the attention of the Israeli and

¹⁸ "B'Tselem USA", online: <<http://www.btselem.org/usa>>.

¹⁹ "About B'Tselem", online: <http://www.btselem.org/about_btselem>.

²⁰ B'Tselem, "B'Tselem Video - Camera distribution project", (21 November 2009), online: <http://www.btselem.org/english/Video/CDP_Background.asp>.

²¹ Yoav Gross, *Personal interview with B'Tselem's Video Coordinator* (2009).

international public, exposing and seeking redress for violations of human rights.’²²

Three factors caused B’Tselem to initiate the project – frustration from the inability to document the violations they were aware of, due to limited resources; the desire to enlarge the audience aware of the violations; and the will to promote law enforcement.²³ B’Tselem, as of November 2009, provided over 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.²⁴

The project was managed by the video department of the organization. This department was originally established for providing information on the activities of the organization to the public and advocating B’Tselem’s activities in the media. Later, and partly due to the success of the ‘Shooting Back’ project, the video department began focusing more on supplying information which can later be used as evidence in investigations conducted by enforcement authorities and in judiciary proceedings.²⁵ Both, Yoav Gross the video coordinator of B’Tselem and Oren Yakobovich, the director of the department at B’Tselem, emphasized in interviews that every time his organization submitted a report to the IDF they 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 were encouraging the organization to film the violations witnessed.²⁶ Gross also pointed out that once the project was well established, intelligence bodies of the army and the police often contact him directly, as soon as there are rumours of an incident in the OT, inquiring

²² B’Tselem, *supra* note 20.

²³ Gross, *supra* note 21.

²⁴ Babelmed, “Shooting Back in Palestine: when cameras become weapons | Mediterranean | Culture et politique en Méditerranée: information et identité Méditerranéennes avec Babelmed”, (14 November 2009), http://www.babelmed.net/Countries/Mediterranean/shooting_back.php?c=3757&m=9&l=en; online:

Azoulay, *supra* note 16; Gross, *supra* note 21.

²⁵ Gross, *supra* note 21.

²⁶ Goodman, *supra* note 16; Gross, *supra* note 21.

whether B'Tselem possesses video documentation.²⁷ In June 2009, the 'Shooting Back' project received the British One World Media Award in the field of citizen journalism.²⁸

Among the most publicized incidents, documented as a result of the project was the first video received, when Rajah Abu Aisha of Hebron videotaped his Jewish neighbour, Yifat Alkobi, verbally assaulting his wife, including calling her a slut, without any response from a soldier that was standing nearby.²⁹ However, what is probably the most famous incident documented in the scope of the project was the case of Ashraf Abu Rahma, a Palestinian protester against the separation barrier in Ni'ilin.³⁰ Abu Rahma was arrested during a routine demonstration on 7 July 2008. After being handcuffed and blindfolded, he was led by the arm by Lt. Colonel Omri Borberg and ordered to remain standing next to a military jeep. Afterwards, an exchange between the officer and a soldier, of something similar to the following took place. The officer asked the soldier in Hebrew: "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

²⁷ Gross, *supra* note 21.

²⁸ B'Tselem, "B'Tselem - Press Releases - 23 June '09: B'Tselem's video camera distribution project wins British One World Media award", (21 November 2009), online: <http://www.btselem.org/english/press_releases/20090623.asp>.

²⁹ Azoulay, *supra* note 16; Goodman, *supra* note 16; Gross, *supra* note 21; Babelmed, *supra* note 24.

³⁰ Orna Ben-Naftali & Noam Zamir, "Whose 'Conduct Unbecoming'?: The Shooting of a Handcuffed, Blindfolded Palestinian Demonstrator" (2009) J Int Criminal Justice, online: <<http://jicj.oxfordjournals.org/cgi/content/abstract/mqp012v1>>; Peter Beaumont, "Story behind the shot protester and the teen who caught it on film | World news | The Observer", *Guardian.co.uk* (26 July 2008), online: <<http://www.guardian.co.uk/world/2008/jul/27/israelandthepalestinians.middleeast>>; Azoulay, *supra* note 16; Peter Beaumont, *Video: Israeli occupation filmed by 100 Palestinian cameras | World news | guardian.co.uk* (Guardian, 2008); *Ashraf Abu Rahma vs. The Judge Advocate General*, 2009 HCJ7195/08.

at the protester's legs and fired a rubber-coated steel bullet, a shrapnel of which hit Abu Rahma's left toe.³¹

This incident was filmed by a Palestinian girl Salaam Amira from Ni'ilin from the window of her home.³² According to Gross, B'Tselem's video coordinator, 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, who dismissed the value of broadcasting this video.³³ The footage was published by B'Tselem on 20 July, a day after they received the copy of the video and thoroughly checked the facts and the authenticity of the video.³⁴ Following the publication, B'Tselem presented the information to military police,³⁵ and demanded opening an investigation, and bringing 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 offense that holds no criminal record. According to the indictment, the officer intended to

³¹ Ben-Naftali & Zamir, *supra* note 30; Ashraf Abu Rahma vs. The Judge Advocate General, *supra* note 30; 5/08/מ' 2010 קוראה לאונרדו, "ר עומרי בורברג וסמ"ר קוראה לאונרדו" (available on http://www.btselem.org/Hebrew/Legal_Documents/20100715_Nilin_verdict_heb.pdf) at 45–46.

³² Ben-Naftali & Zamir, *supra* note 30 at 4. But see Beaumont, *supra* note 30; Beaumont, *supra* note 30.

³³ Gross, *supra* note 21.

³⁴ Soon after the video was released, in a demonstration against the separation barrier in Ni'ilin, the father of Salaam Amira was arrested and charged with violation of an enclosed military space, participation in a protest, and assaulting a soldier. However, the Judea and Samaria Military Court of Appeals released him due to lack in evidence, and criticized the obvious connection to the filming, when asked 'Why was the father of the girl arrested out of all those protesting at the time?' Ben-Naftali & Zamir, *supra* note 30 at 4; Dan Izenberg, "Military court orders father of Ni'lin video whistleblower released. Jamal Amira accused of hitting soldier. Son says he was arrested because of film showing IDF shooting", *The Jerusalem Post* (19 August 2008), online: <<http://pqasb.pqarchiver.com/jpost/access/1535916671.html?dids=1535916671:1535916671&FMT=ABS&FMTS=ABS:FT&date=Aug+19%2C+2008&author=DAN+IZENBERG&pub=Jerusalem+Post&edition=&startpage=5&desc=Military+court+orders+father+of+Ni%27lin+video+whistleblower+released.+Jamal+Amira+accused+of+hitting+soldier.+Son+says+he+was+arrested+because+of+film+showing+IDF+shooting>>; Ali Waked, "Military judge: Naalin arrest unfounded - Israel News, Ynetnews", *Ynet* (17 August 2008), online: <<http://www.ynetnews.com/articles/0,7340,L-3583912,00.html>>; Gross, *supra* note 21; 3938/08 עמ' 2008, התביעה העבאית, ג' מאל חסין עלי עמירה נ' התביעה העבאית.

³⁵ Gross, *supra* note 21.

threaten the detainee, while the soldier misunderstood his intentions.³⁶ On 19 August 2008 an urgent appeal on the MAG's decision was filed with the Israeli High Court of Justice (hereinafter HCJ). In light of the appeal, the HCJ issued an interim injunction deferring the proceedings. In September, following a hearing on the case, the Court ordered the MAG to reconsider his indictment and to inform the Court of his decision, using the occasion to criticise the judgement of the MAG in this case.³⁷ The subsequent decision of the MAG to indict simply for 'conduct unbecoming'³⁸ caused the HCJ to issue a judgment on 1 July 2009, in which the MAG's decision was openly criticized (Justice Rubinstein even called the MAG's decision blasphemy) and dismissed. Furthermore, the HCJ requested that both the soldier and the officer were to be indicted for more serious offenses.³⁹ In September 2009 the trial of the two began, with Lt. Colonel Borberg being charged with 'threats' in addition to 'conduct unbecoming' and First Sergeant Korea, being charged with both 'conduct unbecoming' and 'illegal use of firearms'.⁴⁰ On 15 July 2010, both Lt. Colonel Borberg and First Sergeant Korea were found guilty as charged.⁴¹ However, despite the clear denunciations used in the verdict to describe the incident and the behaviour of the defendants, as well as the special attention given to the damage the incident

³⁶ Ben-Naftali & Zamir, *supra* note 30 at 4; Ashraf Abu Rahma vs. The Judge Advocate General, *supra* note 30; קוראה לאונרדו וסמ"ר בורברג וסמ"ר קוראה לאונרדו, *supra* note 31 at 4–5.

³⁷ Ashraf Abu Rahma vs. The Judge Advocate General, *supra* note 30; Ben-Naftali & Zamir, *supra* note 30 at 5.

³⁸ Ben-Naftali & Zamir, *supra* note 30 at 5; B'Tselem, "B'Tselem - Use of Firearms - 4 Nov.'08: Judge Advocate General informs the High Court that he will not amend the indictment in the shooting of a bound Palestinian in Ni'lin", (21 November 2009), online: <http://www.btselem.org/english/firearms/20081104_nilin_state_response.asp>.

³⁹ Ashraf Abu Rahma vs. The Judge Advocate General, *supra* note 30.

⁴⁰ IDF Mag Corps, "IDF Mag Corps", (24 September 2009), online: *IDF Mag Corps - News* <<http://www.law.idf.il/164-3439-he/Patzar.aspx?SearchText=%D7%91%D7%95%D7%A8%D7%91%D7%A8%D7%92>>; Anshil Peper, "התביעה: סא"ל בורברג לא הורה לירות כדור גומי במפגין כפות בנעלין", *Haaretz.com* (25 September 2009), online: <<http://www.haaretz.co.il/hasite/pages/ShArt.jhtml?itemNo=1116799&contrassID=0&subContrassID=9>>.

⁴¹ קוראה לאונרדו וסמ"ר בורברג וסמ"ר קוראה לאונרדו, *supra* note 31.

caused to the public image of Israel, moderate sentences were issued with regard to both of them.⁴²

This case, as well as a number of similar others, including the case of Yifat Alkobi, emphasise one significant effect of the camera distribution project: visibility which subsequently brings the exposure of potential offenses 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, the director of the video department at B'Tselem, focused on power and transparency when he described the 'Shooting Back' project:

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 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*. [Emphasis added].⁴³

III. 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 initially to discuss briefly the concepts of power, and

⁴² 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>>; 2011, *קוראה לאונרדו*, *התובע הצבאי נגד סא"ל עומרי בורברג וסמ"ר קוראה לאונרדו*, 5/08/ג.

⁴³ Goodman, *supra* note 16.

the related power/knowledge structure. Since Foucault's analysis of power was not intended to define power, but only to suggest where we should find it, instead of using a single definition of power, we can but elaborate on some of its characteristics.⁴⁴ This analysis will be based on the later, so called genealogical period of Foucault.⁴⁵ The issues explored by Foucault during this period, included the relationship between power and knowledge and the 'genealogy' of "organizations [as] social machines which produce elaborate discourses of information/knowledge in which human subject are a necessary part of the material flow on which the discourses are inscribed".⁴⁶

A. The concept of Power and Power/Knowledge according to Foucault

Power for Foucault was not a unitary concept, but an infinitely complex network of 'micro-powers' and power relations that permeate every aspect of social life.⁴⁷ It is not localized in a single place, nor can it be acquired as wealth or a commodity.⁴⁸ Power does not have a subject.⁴⁹ Its objects are data, information and the power to evaluate information.⁵⁰ Power is not static, rather it and its application are subject to constant change and alteration.⁵¹ Power is part of an on-going and ever-changing relationship of resistance and the assertion of power.⁵² It is not vested only in the state,

⁴⁴ Thomas E Wartenberg, *Rethinking power* (SUNY Press, 1992) at 51.

⁴⁵ Alan McKinlay & Ken Starkey, "Managing Foucault: Foucault, Management and Organization Theory" in Alan Mckinlay & Ken Starkey, eds, *Foucault, Management and Organization Theory: From Panopticon to Technologies of Self* (London: SAGE, 2000) 1 at 1; Knights, *supra* note 8 at 578; Burrell, *supra* note 8 at 14–21.

⁴⁶ McKinlay & Starkey, *supra* note 45 at 1.

⁴⁷ Alan Sheridan, *Michel Foucault: The Will to Truth* (New-York: Tavistock Publications, 1984) at 139,183. See also Stewart Clegg, "Foucault, Power and Organizations" in Alan Mckinlay & Ken Starkey, eds, *Foucault, Management and Organization Theory: From Panopticon to Technologies of Self* (London: SAGE, 2000) 29 at 31.

⁴⁸ Michel Foucault, "*Society must be defended*": lectures at the Collège de France, 1975-76, translated by David Macey (London: Penguin Books, 2003) at 29; Sheridan, *supra* note 47 at 184.

⁴⁹ Wartenberg, *supra* note 44 at 51.

⁵⁰ Larry Catá Backer, "Global Panopticism: States, Corporations and the Governance Effects of Monitoring Regimes" (2008) 15:1 Indiana Journal of Global Legal Studies 101 at 128.

⁵¹ Hammer, *supra* note 10 at 42.

⁵² *Ibid* at 47.

but rather it is an ongoing form of relationship between various social forces and actors that tend to influence and shape state decisions.⁵³ 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."⁵⁴ B'Tselem's 'Shooting Back' project exemplifies that through the usage of technology and knowledge, as the traditionally 'inferior' actor - an occupied population, can, at times, overcome the far more superior actor - an established occupying power.

For Foucault, power and knowledge were inseparable.⁵⁵ For him, 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.⁵⁶ Truth and knowledge are in fact weapons by which a society manages itself.⁵⁷ As will be presented below in the analysis of the abovementioned case of Ashraf Abu Rahma, 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.

⁵³ *Ibid* at 44.

⁵⁴ Foucault, *supra* note 48 at 29.

⁵⁵ This is mainly true in regard to his later works, while in the early ones, one can find different interpretation. Townley, *supra* note 6 at 521.

⁵⁶ Foucault, *supra* note 9 at 51–52; Eric Paras, *Foucault 2.0: Beyond Power and Knowledge* (New York: Other Press, 2006) at 113; Sheridan, *supra* note 47 at 138–140; Townley, *supra* note 6 at 521. In Foucault's words: "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." Sheridan, *supra* note 47 at 131.

⁵⁷ McKinlay & Starkey, *supra* note 45 at 1.

Data itself is inert prior to being used. However the use of that data creates knowledge and that is the exercise of power.⁵⁸ 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.⁵⁹ As others exercise power, one's knowledge changes, which, in turn, will influence the individual's own use of power.⁶⁰ While we acknowledge that the knowledge of human rights violations committed in the OT, gained within the scope of B'Tselem's 'Shooting Back' project, will not always lead to actual enforcement action (contrary to the abovementioned case of Abu Rahma) we contend that it may contribute to the existing general knowledge of the situation, and hence on the exercise of power.

B. Panoptism

The ensemble of various mechanisms brought into play in all different clusters of power, is perhaps best seen in the 'Panopticon'⁶¹The principle of the Panopticon was:

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.⁶²

⁵⁸ Backer, *supra* note 50 at 126; Sheridan, *supra* note 47 at 220.

⁵⁹ Stuart Hall & Open University, *Representation: Cultural Representations and Signifying Practices* (SAGE, 1997) at 48.

⁶⁰ Hammer, *supra* note 10 at 46.

⁶¹ Bentham, *supra* note 13; Foucault, *supra* note 9 at 71.

⁶² Foucault, *supra* note 9 at 147; Bentham, *supra* note 13 at 5–12.

Jeremy Bentham's concept of Panoptism was arguably, as Bentham himself defined it, the 'Columbus's egg in the order of politics'.⁶³ Panoptism was a technological invention in the order of power, comparable with the steam engine in the order of production, as it automates and dis-individualizes power.⁶⁴ Power in the Panopticon does not depend solely on an individual person, but rather it is a certain concerted distribution of bodies, surfaces, lights, and gazes, which produce the relations in which individuals are caught by. The Panopticon is a machine which produces homogenous effects of power – both the 'inspector' and the inmates in the 'cells' are constantly watched.⁶⁵ Bentham emphasised 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.⁶⁶

Bentham wrote about four, somewhat different types of Panopticons.⁶⁷ However, in this article, we will focus only on the first version of the 'prison-panopticon' and Foucault's interpretation thereof through the concept of panopticism.⁶⁸ 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.⁶⁹ However, in later interviews he stressed that the overseer also cannot escape

⁶³ Bentham, *supra* note 13 at 139; Foucault, *supra* note 9 at 146–148.

⁶⁴ Foucault, *supra* note 9 at 71.

⁶⁵ Foucault, *supra* note 1 at 202; Clegg, *supra* note 47 at 35.

⁶⁶ Bentham, *supra* note 13 at 23, 29–30.

⁶⁷ Anne Brunon-Ernst, "Deconstructing Panopticism into the Plural Panopticons" in Anne Brunon-Ernst, ed, *Beyond Foucault: New Perspectives on Bentham's Panopticon* (Farnham: Ashgate Publishing, Ltd., 2012) 17 at 21–22.

⁶⁸ See Leroy's analysis on the relevance of Foucault's interpretation to other versions 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: Ashgate Publishing, Ltd., 2012) 143; but see criticism on Foucault's approach in Anne Brunon-Ernst, ed, *Beyond Foucault: New Perspectives on Bentham's Panopticon* (Farnham: Ashgate Publishing, Ltd., 2012) at 2.

⁶⁹ Foucault, *supra* note 1 at 201–202.

from the structure of the Panopticon.⁷⁰ In the Panopticon each person, depending on his place, is watched by all or some others.⁷¹ This power is not identified as resting with an individual who possesses or exercises such power by right of birth; rather power has become a machine that no one owns.⁷²

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 within the context of power/knowledge and the emphasis on the mutual visibility of both the 'guard' and the 'inmates' emphasised 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'. No single individual is in total control in the Panopticon as even the 'inmates' have a role in the control over the 'guard'.⁷³ 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 the 'guard', but rather point out that they possess certain, though limited, power as a result of the structure of the Panopticon. Same is the power of the occupied population against the occupying power – video cameras and surveillance enables them 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 (similarly to the eventual indictment in the Abu Rahma

⁷⁰ Foucault, *supra* note 9 at 156.

⁷¹ *Ibid* at 158.

⁷² *Ibid* at 156.

⁷³ Keith Douglas Smith, *Liberalism, Surveillance, and Resistance: Indigenous Communities in Western Canada, 1877-1927* (Edmonton: Athabasca University Press, 2009) at 5–6.

case), but in the reality of a world where the ‘panoptic’ structures are everywhere, the very potential of visibility often suffices.

The major effect of the Panopticon was to induce in the inmate/ mad man/ soldier/ schoolboy/ worker 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 observed at any single moment; but he must be sure that he may always be so.⁷⁴

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, Panoptism was a set of principles applicable to all forms of social governance.⁷⁵ This was where the experiment of integral surveillance was carried out.⁷⁶ Surveillance in its modern form represents yet another step in the perfection of the social Panoptism. The creation of systems of social order that are self-regulating and internalized among those regulated, represent 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.⁷⁷ 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”.⁷⁸ It is these processes of internalization which bring us to claim that the mere awareness of potential of exposure, increase the power of the ‘inmates’

⁷⁴ Foucault, *supra* note 1 at 201; Clegg, *supra* note 47 at 35; Derrick Jensen & George Draffan, *Welcome to the Machine: Science, Surveillance, and the Culture of Control* (White River Junction: Chelsea Green Publishing, 2004) at 10.

⁷⁵ Bentham, *supra* note 13 at 2–3; McKinlay & Starkey, *supra* note 45 at 3.

⁷⁶ Foucault, *supra* note 9 at 71.

⁷⁷ Backer, *supra* note 50 at 112; Smith, *supra* note 73 at 5–6.

⁷⁸ McKinlay & Starkey, *supra* note 45 at 2.

resulting from knowledge of any transgressions by the ‘guards’. 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 the creation (and mainly publication) of new negative images similar to the ones which lied in the basis of the Abu Rahma incident. The added credibility, due to the actual indictments of the filmed soldiers, increases the probability of potential penalties, further disciplines and, in turn, reinforces the internalization of the very ideas of discipline by the individuals.

In organizational studies, these effects of the Panopticon were 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.⁷⁹ As Clegg noted, since the Weberian research, ‘obedience’ was central to the analysis of the production of power in organizations.⁸⁰ The lessons of the Panopticon were also learned and implemented when constructing and managing organizations and factories.⁸¹ B’Tselem ‘Shooting Back’ project tried to utilise these effects in order to minimize the occurrence of instances of Israeli violations of international humanitarian law in the OT by revealing them to the Israeli and international public.⁸²

IV. THE ROLE OF TRANSNATIONAL ACTORS AS PART OF AN ENFORCEMENT STRUCTURE

Servan said that

⁷⁹ *Ibid* at 3.

⁸⁰ Clegg, *supra* note 47 at 38.

⁸¹ Alan McKinlay & Phil Taylor, “Through the Looking Glass: Foucault and the Politics of Production” in Alan Mckinlay & Ken Starkey, eds, *Foucault, Management and Organization Theory: From Panopticon to Technologies of Self* (London: SAGE, 2000) 173 at 177. See also Alan McKinlay & Ken Starkey, eds, *Foucault, management and organization theory: from panopticon to technologies of self* (London: SAGE, 2000).

⁸² B’Tselem, *supra* note 20.

[w]hen 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.⁸³

In order to assess whether transnational actors such as the NGO B'Tselem can play an active role in enforcing compliance with international law, we have to revisit the tenets of power and its enforcement. 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."⁸⁴ 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".⁸⁵

Foucault said that power cannot be held for long by purely repressive measures. Perhaps, one of the mechanisms to overcome this is legitimacy. Legitimacy lies in the basis of the pull towards compliance, "it is the legitimacy of the rules which conduces to their being respected".⁸⁶ One should, however, be careful not to relate to legitimacy as a neutral concept. The question of what is legitimate is the result of

⁸³ Foucault, *supra* note 1 at 103.

⁸⁴ Franck, *supra* note 17 at 24.

⁸⁵ *Ibid.*

⁸⁶ *Ibid* at 38.

power struggles⁸⁷. It may derive from ideology or local socioeconomic or political interests which brought a certain conception of morals and ethics in a given society.⁸⁸

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 gained by complying with international law,⁸⁹ is affecting the assertion of power by the state. Power is the response to the assertion of power by others.⁹⁰ Therefore, by revealing new issues and hence changing available knowledge transnational actors restrain and reconstruct the power of states.

Lipschutz believed that NGOs redefine the borders between public and private spheres.⁹¹ In many campaigns organized by NGOs, issues that once were considered private, are now becoming a part of the public debate, and matters that were in the past an object for public influence are now being advocated to be left in the private sphere. B'Tselem's camera distribution project presents a case where publicised knowledge of a situation empowers the weak, in this case, the occupied civil population.⁹² This knowledge is power, as it empowers the civilians and restrains the power of the occupying state. The state and particularly its armed forces, have to reconsider their 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

⁸⁷ On the concepts of 'legitimate power' and 'illegitimate power' in organizational theories see Clegg, *supra* note 47 at 38.

⁸⁸ Pitman B Potter, "Legal Reform in China: Institutions, Culture, and Selective Adaptation" (2004) 29 *Law & Soc Inquiry* 465 at 479; Pitman B Potter, "Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices" (2003) 2 *Wash U Global Stud L Rev* 119 at 121.

⁸⁹ Kenneth W Abbott & Duncan Snidal, "Hard and Soft Law in International Governance" (2000) 54:03 *International Organization* 421 at 428.

⁹⁰ Hammer, *supra* note 10 at 47.

⁹¹ Ronnie D Lipschutz, "Power, politics and global civil society" (2005) 33:3 *Millenium: Journal of International Studies* 747 at 759–760.

⁹² 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 for an institutional protection, like the 1907 Hague Regulations, and even more so the rules of the 1949 Fourth Geneva Convention.

effect”,⁹³ separate incidents in small peripheral villages, may well become headline news all over the world and influence state behaviour.

According to Backer, compliance depends on both observation and the knowledge of being observed. Law in this sense can 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.⁹⁴ It represents a shifting of coercive power from the external and the hierarchically higher - the state, the police, and the institution to the internal - the individual and the private. Surveillance has accordingly morphed from being an element of governance to becoming the basis of governance itself.⁹⁵ In its modern form, surveillance represents yet another step in the perfection of social Panoptism.⁹⁶

B’Tselem’s ‘Shooting Back’ project is just that. Bentham’s two principles of power, visibility and unverifiability, are well exercised in the project. Once the fact of the existence of the project has been published, soldiers serving in the OT must now be aware of the possibility of their actions being visible. These actions can now be visible not only by the eyes of the local population that has no significant power against the army, or solely by journalists whose access to high-conflict areas may be restricted, but by the Israeli and international public, as well as by the enforcement

⁹³ 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. Robinson, *supra* note 11 at 301; Robinson, *supra* note 11 at 1–2; 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 *Journal of Peace Research* 131 at 131–132; Eytan Gilboa, “The CNN Effect: The Search for a Communication Theory of International Relations” (2005) 22 *Political Communication* 27 at 28; Eytan Gilboa, “Global Television News and Foreign Policy: Debating the CNN Effect” (2005) 6:3 *International Studies Perspectives* 325 at 326; Bob, *supra* note 11 at 38.

⁹⁴ Backer, *supra* note 50 at 105.

⁹⁵ *Ibid* at 118–145.

⁹⁶ *Ibid* at 112.

bodies not present at the scene. Illegal and criminal acts, or acts that can be portrayed as legitimate when edited to reflect the desired narrative, can now be video-documented by the local population present at the scene.⁹⁷ 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 is occupying these territories since the war of 1967. The ICJ confirmed Israel's position as 'occupying' power in its 2004 (non-binding) advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*.⁹⁸ This legal view is not shared by the Israeli government, which uses the term 'disputed territories' instead⁹⁹ while –significantly- applying military law to the civilian 'Palestinian inhabitants', which reinforces the "occupation" view. Consequently, the Israeli Supreme Court seems to follow international legal opinion, whereas Israel holds "the West Bank in belligerent occupation since 1967".¹⁰⁰ The court also made it clear that the rules of IHL (LOAC) were to apply.¹⁰¹

⁹⁷ In the case of *MAG v Borberg and Korea* 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" [my translation]. קוראה לאונרדו. "ל עומרי בורברג וסמ"ר קוראה לאונרדו. *supra* note 42 at 13.

⁹⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (2004), 2004 2004 ICJ Reports 136 (available on <http://www.icj-cij.org/docket/?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4>). This view was, unsurprisingly, affirmed in UN GA resolution of the same year; *Resolution ES-10/15*, UN General Assembly, 2 August 2004, A/Res/ [Resolution ES-10/15] at 15.

⁹⁹ "Disputed Territories- Forgotten Facts About the West Bank and Gaza Strip", online: *Israel Ministry of Foreign Affairs* <http://mfa.gov.il/MFA/MFA-Archive/2003Pages/DISPUTED_TERRITORIES-Forgotten_Facts_About_the_We.aspx>.

¹⁰⁰ *Beit Sourik Village Council v. Government of Israel* (2004), 43 2004 ILM H CJ 2056/04 1099.

¹⁰¹ Such as 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 [*Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex*]. ("the Hague

Our discussion of enforcement and visibility has to be seen in the context of this backdrop of the legal and political debate revolving around the nature of Israel's occupation of land outside the Green line. Since a significant part of the enforcement of the public order by the occupying power occurs in or around civil villages and towns, the illegitimate 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 even the filming of incidents cannot be outlawed as 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 capabilities and legal authority to limit the movement of that individual or family. Unlike pure eyewitness testimonies that can be easily discredited and are more difficult to be communicated to the global public opinion, video footage is easily transferable, and leaves a distinct, while subjective, account of such an incident. Thus emphasising the saying – 'a picture is worth a thousand words'.¹⁰²

The second principle of un-verifiability is also significantly present in this example. The filming of an incident is not done from an identifiable position, as in cases when journalists are allowed to accompany the ground forces as 'embedded journalists' or to document from a specific observation point. Moreover, the army doesn't know which families or individuals have cameras and which do not. The emphasis on 'passive image making' intensifies the vagueness of the source of surveillance. Even if a soldier knows who owns a camera, he/she doesn't know if at

Regulations") and the *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949 [*1949 Geneva Fourth Convention*]. ("Geneva Convention IV").

¹⁰² There has been significant literature on the influence of photography (including selective) on human rights and international law. See eg Sharon Sliwinski, *Human Rights In Camera* (Chicago: University of Chicago Press, 2011); Ariella Azoulay, *The Civil Contract of Photography* (Brooklyn: Zone Books, 2012); Daniel Joyce, "Photography and the image-making of international justice" (2010) 4:2 Law and Humanities 229.

any particular moment that individual is operating the camera, if the camera has not been passed on to somebody else, or whether the camera is at all functional.

Foucault encouraged others to adapt his work to fit their interest as he himself had done with Nietzsche and others.¹⁰³ 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 state is responsible for maintaining public order, and it is up for the state itself, or to other states in some cases, to prosecute soldiers who commit crimes and other violations of the Laws of War.¹⁰⁴ Therefore power is experienced in a traditional way, which enshrines the public-private divide, and therefore makes the state more powerful by alleviating its status as supreme to all other private actors. This conception requires constant surveillance of the civil population by the army. The 'Shooting Back' project advances a second set of surveillance – that of the army by the civil population, facilitated by the availability of resources of NGOs and technologies of the media. The situation therefore becomes what Foucault referred to as a 'diabolic aspect' of panoptism – panopticon 'is a machine in which everyone is caught, those who exercise power, just as much as those over whom it is exercised'.¹⁰⁵ Power is no longer identified with a single individual (or authority), everyone has a role of an overseer in the machine.¹⁰⁶ The army's duty in the territories is to maintain public order and for that they are the overseers over the civil population. The civil population is, perhaps for the first time, able to truly complete the structure of the Panopticon: as now they have also become actors who oversee the actions of the army, and its compliance with the rules of international humanitarian law (IHL).

¹⁰³ Knights, *supra* note 8 at 178.

¹⁰⁴ 1949 Geneva Fourth Convention, *supra* note 99, paragraph 146–149.

¹⁰⁵ Foucault, *supra* note 9 at 156.

¹⁰⁶ *Ibid* at 152–156.

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. In line with scholarship on compliance,¹⁰⁷ the visibility in the panopticon, inherent to its structure, restricts not only the freedom of the ‘inmates’ in the cells as the weak, but of the ‘guard’ as the strong.¹⁰⁸ . By increasing visibility in the structure of the Panopticon, the existence of violations becomes 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 the enforcement agencies and the judiciary with evidence required for conducting effective investigations and bringing successfully disciplinary and criminal charges against transgressors. This positive assessment seems to correspond with the responses B’Tselem received from the army and the police, which utilise the information provided by B’Tselem as evidence in their investigations into acts of misconduct and criminal acts.¹⁰⁹

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 as a whole. 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 any possible transgressions by

¹⁰⁷ Börzel, Hoffman & Sprungk, *supra* note 12 at 15–16; Tallberg, *supra* note 12 at 611–612; G W Downs, DM Roche & P N Barsoom, “Is the Good News about Compliance Good News about Cooperation?” (1996) 50:3 *International Organization* 379 at 379; J D Fearon, “Bargaining, Enforcement, and International Cooperation” (2003) 52:02 *International Organization* 269 at 269; A E Boyle, “Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions” (1991) 3:2 *Journal of Environmental Law* 229 at 229; S Tarrow, “Beyond globalization: why creating transnational social movements is so hard and when is it most likely to happen” (2001) 5 *Annual Review of Political Science*.

¹⁰⁸ Bentham, *supra* note 13 at 5.

¹⁰⁹ Gross, *supra* note 21.

individual violators. The state as a whole may become immediately subject to global scrutiny due to the transgressions of one individual soldier. Hence, the cost of non-compliance is escalated due to a 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 use of power leads people to oppose it. Occupation itself is mostly considered a factual, rather than a normative phenomenon.¹¹⁰ 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 which in turn decreases the power of the occupying state.¹¹¹

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 means to become an overseer of the level of compliance of the army and border police with IHL rules. Transnational actors in this case may have altered the balance of power, by spreading knowledge and therefore creating the conditions for a Panopticon structure.

¹¹⁰ Eyal Benvenisti, *The International Law of Occupation* (Princeton: Princeton University Press, 2004); Orna Ben-Naftali, Aeyal M Gross & Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory" (2005) 23 *Berkeley J Int'l L* 551 at 552.

¹¹¹ James Fallows, "Who Shot Mohammed Al-Dura?" (2003) 291:5 *Atlantic Monthly* (10727825) 49.

International law in general, could be changing through the introduction of panoptic structures in a global, transnational, technology 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".¹¹² 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, serve as both the 'buildings' of inspection 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 whether rules of international law are adhered to is not monitored solely from a single location alone but rather each camera becomes a monitoring instrument and platform providing knowledge and limiting the ability of the transgressor to violate the rules without being exposed.

The case of the 'Shooting Back' project presents one of the examples where transnational private actors are increasingly involved in achieving overall compliance with international law. The case we studied is perhaps the most crystallised version of the indirect role and impact of transnational actors on such compliance. In this case B'Tselem did 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, at the same time empowering the local population. B'Tselem provided the state with knowledge that it couldn't 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

¹¹² Bentham, *supra* note 13 at 2.

certain areas and are thus depending on assistance from other actors. In our global age, such a role and function can be best fulfilled by NGOs and the media. Perhaps this could also be the new focus of the question of compliance with international law in areas of limited statehood.¹¹³

V. 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, they are dependent on external funding, they have their own partisan interests, they are highly politicized, or designed to maximize their profit.¹¹⁴ However, they are already influencing compliance, and their role should be properly analysed and understood before being dismissed.

The recognition that NGOs and the media have significant powers and do affect international policy is not new.¹¹⁵ However, the mechanisms in which they employ their power have been underexplored. B'Tselem's camera distribution project presents an interesting example of the way that NGOs can empower the weaker side

¹¹³ Thomas Risse & Ursula Lehmkuhl, *Governance in Areas of Limited Statehood – New Modes of Governance?* (Berlin: DFG Research Center (SFB) 700 Freie Universität Berlin, 2006).

¹¹⁴ Bob, *supra* note 11; Steve Charnovitz, "Nongovernmental Organizations and International Law" (2006) 100 *American Journal of International Law* 348; Gilboa, *supra* note 93; A Hudson, "NGOs' Transnational Advocacy Networks: From 'Legitimacy' to 'Political Responsibility'?" (2001) 1:4 *Global Networks* 331; Jakobsen, *supra* note 93; Timothy W Luke & Gearóid Ó Tuathail, "On videocameralistics: the geopolitics of failed states, the CNN - International and (UN) governmentality" (1997) 4:4 *Review of International Political Economy* 709; Robinson, *supra* note 11; Gerald M Steinberg, "Manipulating the marketplace of ideas", *Haaretz.com* (27 November 2009), online: <<http://www.haaretz.com/hasen/spages/1131105.html>>.

¹¹⁵ Philip Alston, ed, *Non-State Actors and Human Rights* (New York: Oxford University Press, 2005); Backer, *supra* note 50; N Egels-Zandén & P Hyllman, "Exploring the Effects of Union-NGO Relationships on Corporate Responsibility: The Case of the Swedish Clean Clothes Campaign" (2006) 64:3 *Journal of Business Ethics* 303; Gilboa, *supra* note 93; Gilboa, *supra* note 93; Volker Heins, *Nongovernmental organizations in international society* (Palgrave Macmillan, 2008); Jakobsen, *supra* note 93; Luke & Tuathail, *supra* note 114; Martin-Ortega, *supra* note 5; 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: Cambridge University Press, 2006) 349; K Zippel, "Transnational Advocacy Networks and Policy Cycles in the European Union: The case of Sexual Harassment" (2004) 11:1 *Social Politics* 57.

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.¹¹⁶ This empowerment also affords great powers to the NGO itself. As Gross described, he is now often being approached by top level military and police officers who are seeking information and knowledge from his organization whenever an incident occurs.¹¹⁷ Being committed to universal moral values and in light of the centrality of the value and dignity of human rights to the IDF,¹¹⁸ the knowledge provided by organisations like B'Tselem enables it to function better and also its well-developed internal investigation mechanisms to work more efficiently. Furthermore, the IDF itself is training combat soldiers to carry cameras in order to present its side of the story.¹¹⁹

The case of B'Tselem's camera distribution project was not selected for being the 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 non-interference in the domestic affairs of another state and of sovereign equality, where it is eventually each state that decided how to deal with the population of the enemy, and with its own troops that defied the laws of war. These concepts were narrowed down with time by clarification and eventually the codification of the universal laws of war, 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

¹¹⁶ Gross, *supra* note 21; Azoulay, *supra* note 16; Kalman & Smith, *supra* note 15.

¹¹⁷ Gross, *supra* note 21.

¹¹⁸ IDF, "IDF - Israel Defense Forces - Doctrine", online: *Israel Defense Forces* <<http://www.idf.il/1497-en/Dover.aspx>>.

¹¹⁹ Kalman & Smith, *supra* note 15; The Associated Press, *supra* note 15.

the idea that one state can have a moral virtue over another). B'Tselem's project enables us to have another look at the change that is taking place in the structure of power/knowledge in our globalised 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 publicise. The relevant structures, as well as our understanding of them should be adapted to better reflect this process of transition. Is this a further erosion of the formal concepts of sovereignty, or is this merely a technological change that will eventually cause the 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 which may eventually increase the chance of enforcing international law and the compliance with its rules.

Enforcement is impossible without knowledge. Even if there is a will for compliance, the practical inability to gather knowledge about violations, at times prevents potential compliance. Gathering and transmitting knowledge, as presented by the 'Shooting Back' project, can be a role for transnational actors in this structure. The wide dissemination of cameras in high conflict areas, conjointly with the strategy to use 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.