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THE LEGAL BATTLE TO DEFINE THE  
LAW ON TRANSNATIONAL  
ASYMMETRIC WARFARE

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# THE LEGAL BATTLE TO DEFINE THE LAW ON TRANSNATIONAL ASYMMETRIC WARFARE

Eyal Benvenisti

## **Abstract**

This essay describes the emerging legal battleground between states engaged in transnational armed conflict and the role of third parties—courts, international institutions, NGOs, and civil society—in developing and enforcing the law. This legal conflict has led to the formation of two opposing “camps” within the community of legal scholars and practitioners: the “IHL camp” which emphasizes the protection of non-combatants and the obligation to limit harm to combatants, and the “LOAC camp,” that wishes to point out that the Law of Armed Conflict is primarily designed to regulate the relations between fighting armies engaged in mutual destruction. The essay delineates the fundamental cleavage that exists between these two visions and explores its ramifications with respect to questions such as the legality of targeted killing and the scope of judicial review of military discretion.

## THE LEGAL BATTLE TO DEFINE THE LAW ON TRANSNATIONAL ASYMMETRIC WARFARE

EYAL BENVENISTI\*

### INTRODUCTION: TECHNOLOGY AND THE RISE OF PERSISTENT AND PREVALENT ASYMMETRIC WARFARE

Asymmetric warfare is not a new phenomenon. From the dawn of history, adversaries developed capabilities to overwhelm their opponents and conquer them into submission. The technological innovations of the day, from gun powder and the napalm bomb to unmanned fighting systems, were the most noticeable form to gain asymmetric power. But technology also helped the weaker side that resorted to guerilla warfare or terrorism. The spread of innovations like hand-held missiles, undetectable explosives, and increasingly improving communication tools offered loosely-organized insurgents affordable and effective means of confronting mighty opponents. “[T]he democratization or privatization of the means of destruction”<sup>1</sup> provided novel opportunities for non-state actors to challenge not only their own governments but also the strongest of powers.

The contemporary democratic spread of technological innovations ensures the persistence and the prevalence of asymmetric military conflict between regular armies and irregular, sub-state militias. The powerful side is drawn into such conflicts relying on increasingly more sophisticated and accurate, and hence more potent and discerning, weapons that promise a short and decisive submission of a loosely-organized enemy, with reduced self-risk and fewer civilian casualties. The stronger party is determined to end an indefinite state of insecurity caused by a handful of individuals whose access to an increasingly diverse and lethal arsenal of weapons threatens national interests. It is politically difficult for both sides to seek amicable avenues to resolve their conflict: the strong side because it regards the irregulars as extortionists and the weak side because it must cultivate an uncompromising maximalist ideology among its fighters. And

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1. ERIC HOBBSBAWM, *AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914-1991*, 560 (Vintage Books 1994).

as asymmetric battles continue indefinitely, their very persistence is likely to be regarded as a successful strategy from the perspective of weak or relatively weak actors. Hence, such conflicts become prevalent: states in conflict situations whose military capacity is relatively weak tend to adopt the strategies of the non-state militias, by supporting such groups as proxies or by turning their own forces into guerilla or terrorist units. This phenomenon can be observed in the Middle East, with Iraqi forces reverting to guerrilla tactics during the 2003 invasion, and Syria and Iran supporting the Hezbollah in Lebanon.<sup>2</sup> We can therefore anticipate that most future wars will be characterized as asymmetric, involving powerful regular armies and irregular non-state militias.

The rise of transnational asymmetric conflict and the unique challenges it poses led Toni Pfanner to argue that, if “wars between States are on the way out, perhaps the norms of international law that were devised for them are becoming obsolete as well.”<sup>3</sup> This essay is a modest attempt to explore the possible avenues for responding to this challenge. The regulatory potential of the *jus in bello* lay in the types of wars anticipated in Europe during the nineteenth century, and in the common European effort to maintain the prevailing balance of power. These were conventional military conflicts between state armies that operated under similar principles using similar means of warfare. The law consisted of norms to which the parties consented and which reflected their shared concerns—the safeguarding of non-combatants and the elimination of unnecessary suffering of combatants. The law was created by mutual agreement and enforced through the promise and threat of reciprocity. Because the law depended on reciprocity not only for consent but also for enforcement, it applied to aggressors and defenders alike; otherwise, the aggressor would have no incentive to respect the law during fighting.

In fact, the disjunction between *jus ad bellum* and *jus in bello* indicates that the traditional law was carefully designed to align the incentives of the parties to the conflict, making sure they all had strong incentives to obey the law. But the regulation of asymmetric warfare requires a different structure of incentives to have any effect on the parties.<sup>4</sup> In the typical asymmetric war of the past—an internal conflict between a

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2. Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 INT'L REV. RED CROSS 149, 153 (2005); ANTHONY H. CORDESMAN, CTR. FOR STRATEGIC & INT'L STUDIES, *IRAN'S SUPPORT OF THE HEZBOLLAH IN LEBANON* 2 (2006).

3. Pfanner, *supra* note 2, at 158. On the need to take caution in introducing changes into the laws of war to address non-state actors see Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443 (2007).

4. See Marco Sassòli, *The Implementation of International Humanitarian Law: Current and Inherent Challenges*, 10 Y.B. INT'L HUMANITARIAN L. 45, 57-67 (2007).

government and local insurgents—neither side had incentives to comply with but the very minimal restraints. The Additional Protocol II attempted to strengthen the commitments of parties to internal armed conflict in order to resuscitate reciprocity<sup>5</sup> but, as we know, this effort utterly failed as both sides to such conflicts eschewed reciprocity in their fighting. A new paradigm based on an alternative incentive structure of third party enforcement and adjudication was therefore required. The advent of several international and hybrid criminal tribunals set up to address intra-state wars, as well as other regional and international institutions that monitored compliance with human rights law promised to resolve the crisis of reciprocity. These institutions and the law that they created<sup>6</sup> and enforced enjoyed the support of powerful countries that wanted to limit violence and prevent spillover effects from internal warfare affecting neighboring countries. Now governments involved in intra-state armed conflicts had to reckon not only with law enforcement by such third parties, but also with their law-making functions.

But these developments were confined to intra-state asymmetric conflicts in places like the former Yugoslavia, Rwanda, and Chechnya. Concurrently with the successful efforts to impose restraints on intra-state asymmetric warfare, we have been witnessing efforts by the same powerful countries that pressed for *intra*-state conflict regulation to *deregulate inter*-state asymmetric warfare, or what may be called “transnational” warfare; namely, armed conflicts between state military forces and foreign non-state actors that take place *beyond* state borders. The formal legal explanations for deregulating such conflicts suggested that such transnational conflicts were not *internal* armed conflicts, because they took place *across* international borders, but at the same time they were also not *international* armed conflicts because they did not involve two or more *nations* fighting each other. Such conflicts were therefore conducted in a legal void, and hence were subject to only the very basic constraints of Article 3 common to all four Geneva conventions of 1949.<sup>7</sup> Beyond this technical argument,

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5. Article 1(1) of Additional Protocol II stipulates that it would apply in internal armed conflict provided, *inter alia* that the non-state actors “exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of victims of Non-International Armed Conflicts (Protocol II) art. 1(1), June 8, 1977, 1125 U.N.T.S. 609, 611.

6. On the law-making function of such tribunals see Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 41 (2006).

7. *See* Military and Paramilitary Activities (Nicar. v U.S.), 1986 I.C.J. 14, 114 (June 27) (holding that Common Article 3 is “a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts”); *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 562 (2006)



there is also a substantive one: because regular armies fight against irregulars who not only disregard the law but also abuse its protections, the regular armies should not be expected to comply with the law unilaterally.

These arguments that seek to deny the applicability of legal restraints to transnational conflicts are challenged by an alternative vision, one that bears in mind the goal of protecting non-combatants: regular armies that enjoy significantly more resources and military might than their irregular enemy must take *additional* precautions and assume *more* limitations on their exercise of power than required in conventional warfare, simply because of the asymmetric power relations. As discussed below, this alternative vision already finds support in judgments of national and international courts, and is reflected in the positions of the ICRC and other non-state actors.

This essay seeks to explore this tension between the two conflicting visions on the regulation of transnational armed conflict. Part I outlines the normative and institutional challenges for the legal regulation of transnational armed conflict. Part II describes the emerging legal battleground between states engaged in transnational armed conflict and third parties—courts, international institutions, NGOs, and civil society—in developing and enforcing the law and highlights some of the issues that are at stake.

## I. CHALLENGES FOR THE REGULATION OF TRANSNATIONAL ARMED CONFLICT

The regulation of transnational armed conflict poses both normative and institutional challenges. The normative challenges stem from the fact that the traditional *jus in bello* is not sensitive to the power relations between adversaries in asymmetric conflicts and creates perverse incentives for parties. The first normative challenge is posed by the assumption of equality of arms, an unrealistic assumption in most transnational armed conflicts. The laws of war inherently favor the stronger army which is capable of striking the military assets of its weaker adversary, while the adversary is unable to reciprocate in kind. The weaker party is expected to play by the rules that predetermine its defeat. The burden of obeying the law rests on the shoulders of the weaker side, who is likely to find such law morally questionable and certainly not worthy of compliance, all the more so if—as is often the case—the powerful side happens to be (or is regarded by the weak opponent as) the aggressor.

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(“Common Article 3 . . . affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory [state] who are involved in a conflict ‘in the territory of’ a signatory.”).



The assumption of the equality in arms is maintained despite the fact that the traditional *jus in bello*, based on state consent, grants state actors the power to reject changes in the law that might limit their capabilities. This is most acutely demonstrated in the regulation of new weaponry. Usually it is the stronger, technologically advantaged regular army that develops and enjoys the advantage of using new weapons. That party will most likely refuse to outlaw new weaponry it holds exclusively. What Julius Stone observed in 1955 is still true today:

States only come to a common view on regulating or prohibiting new weapons . . . when no one of them can rely on obtaining or maintaining the lead in their use. Broadly, therefore, the rules that grow up are rules touching the old and more marginal weapons, not weapons which by their novelty and efficiency are more likely to be decisive.<sup>8</sup>

The weaker party that effectively has no voice in the regulation of new weaponry and has no access to such weapons sees the law as the dictate of the strong, designed to ensure its domination.

But the stronger side also has concerns with the traditional norms. Its non-state adversary fights from within urban centers or otherwise abuses the protection that the law grants to civilians. The traditional law on warfare was based on two key premises: that it was possible to isolate military and civilian targets with sufficient clarity and that there was a tangible military objective to be attained from the battle, such as hitting army bases or gaining control over territory. Compliance with the law was compatible with the interest of armies that sought to focus on military objectives and offer immunity to uninvolved civilians and enemy combatants who laid down their arms.<sup>9</sup> These premises gave rise to the expectation that military conflicts could be compatible with humanitarian ideals—that war would involve inducing concessions from the defeated party by degrading its military capabilities and weakening and disabling its fighters without necessarily killing them.<sup>10</sup> These premises do not apply where regular armies fight irregulars. First, in the asymmetric context there are very few purely military targets. This dramatically limits the ability of a

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8. JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 551 (Rinehart & Co. 1954).

9. Sassòli, *supra* note 4, at 58-59 (stating that IHL “make[s] victory easier, because it ensures that [the combatants] concentrate on what is decisive, the military potential of the enemy”).

10. As the 1868 St. Petersburg Declaration asserted, “The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy . . . for this purpose it is sufficient to disable the greatest possible number of men.” Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29-Dec.11, 1868, 18 Martens Nouveau Recueil (ser. 1) 474, available at <http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument>. [hereinafter St. Petersburg Declaration].



regular army to identify arenas where it can legitimately project its power. Second, it has become increasingly unclear what can be considered a military gain, especially since control over enemy resources and territory often proves to be a liability rather than an asset.

The final challenge to the regulation of transnational conflicts is institutional. In addition to disagreements over the substantive norms, parties to asymmetric warfare cannot rely on reciprocity, the longstanding institution for enforcing compliance with the law. Rather, in asymmetric situations both parties have strong incentives to violate the law. The weaker party may resort to perfidy or target non-combatants as perhaps the only way to harm its opponent. At the same time, the stronger party is not worried about retaliation. The temptation to strike hard and fast, to respond disproportionately and to end the conflict swiftly is high, and feelings of frustration and anger are prevalent when the weaker party perseveres. The democratic pressure to avoid casualties at all costs also plays out, tempting the army to impose the collateral damages of combat on the opponent even at the price of exposing the other side's civilians to more risk.

The normative concerns of both sides suggest that there is little room for agreement on mutually accepted norms. Both sides seek to dilute, in opposite ways, their obligations in this new type of war. The institutional challenges indicate that parties to transnational conflict cannot rely on reciprocity to ensure compliance with the law. The conclusion is that the regulation of transnational conflicts cannot rely on the traditional norms and institutions of the *jus in bello* that are designed to address conventional armed conflicts. Transnational warfare is a very different beast and should be regulated by different norms and institutions. But what are these new norms? Which institutions will recognize and implement them?

## II. THE POTENTIAL RISE OF NEW LAW AND NEW INSTITUTIONS FOR REGULATING TRANSNATIONAL CONFLICT

Fortunately, technological innovations provide not only new weaponry but also novel possibilities for monitoring the battlefield. Monitoring is no longer confined to the parties to the conflict. Information technology adds a crucial dimension to traditional warfare: it brings the details of far away conflicts into the homes of people around the world. The same technology helps convey to governments public opinion demanding responses to what the public sees as excesses. We thus see a new logic of enforcement emerging: broader pluralistic dynamics instead of

the reciprocal relations between the immediate parties to the conflict.<sup>11</sup> These dynamics involve various actors including domestic courts, foreign governments and courts, international organizations and international tribunals, humanitarian NGOs, and domestic and global civil society. Can such third parties' indirect monitoring, lawmaking, and enforcement functions effectively respond to the challenges of regulating transnational warfare?

#### A. Institutional Aspects

New institutions have myriad opportunities to create and enforce the law. These include formal and informal actors: domestic courts, foreign national courts, international courts and organizations, foreign governments, and private firms. NGOs mobilize public opinion to put pressure on their governments to agree on new constraints in war; third party governments and even private institutions impose political and economic pressure on the strong party to a transnational conflict; and foreign and international courts impose legal sanctions in extreme situations. These actors participate in the development of new norms and new types of third-party retaliatory mechanisms ranging from divestment to criminal prosecutions of those who they find to have violated the law. The publicly available information about the behavior of the parties to the transnational conflict raises public attention and enables third party monitoring. With access to diverse and reliable sources of information, third parties can monitor, assess, and question the lawfulness of actions taken by the parties to the conflict. Just as the Battle of Solferino in 1859 inspired Henry Dunant to set up the ICRC, coalitions of NGOs have since the end of the Cold War managed to set the agenda of legal reform in the context of the laws of war,<sup>12</sup> influencing the adoption of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997),<sup>13</sup> the setting up of the International Criminal Court ("ICC") (1998),<sup>14</sup> and the drafting of the

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11. Dan Belz, *Is International Humanitarian Law Lapsing into Irrelevance in the War on International Terror?*, 7 THEORETICAL INQUIRIES L. 97 (2006) (explaining the development of third party review mechanisms by the erosion of bilateral reciprocity).

12. For the contributions of NGOs to the development of international law see generally Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348 (2006); JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 611 (Oxford University Press 2005).

13. *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, Sept. 18, 1997, 2056 U.N.T.S. 211.

14. On NGO involvement and achievements see Zoe Pearson, *Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL INT'L L.J. 243, 254 (2006); Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*,

Cluster Munitions Convention (2008).<sup>15</sup> As René Provost notes, such intervention breaks the cartel of government-made law and gives voice to all stakeholders.<sup>16</sup>

The very involvement of such third parties in bilateral conflicts is self-enhancing, incrementally strengthening their own legal authority to intervene in such conflicts rather than remain neutral and aloof. The International Court of Justice (“ICJ”) was particularly innovative in this context by developing the idea of *erga omnes* obligations of parties to armed conflict that create standing to all other states to demand compliance, and by recognizing the obligation of all state parties to the Geneva Conventions to ensure that parties to armed conflict comply with their treaty obligations.<sup>17</sup> NGOs, private legal experts, and other non-state actors have noted the willingness of tribunals to move the law beyond formal state consent and have embarked on several efforts to generate new law by adopting soft law “guiding principles” and other such informal norms that ostensibly interpret the law. These norms practically move the law beyond state consent and below the radar screens of governments in the hope that domestic and international courts will resort to them as reflecting evolving law.<sup>18</sup> One such example is the development of the Guiding Principles on Internal Displacement of 1998, a soft-law instrument whose main protagonists openly admit was designed “to progressively develop certain general principles of human rights law where the existing

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93 AM. J. INT’L L. 22, 23 (1999); see generally MARLIES GLASIUS, *THE INTERNATIONAL CRIMINAL COURT: A GLOBAL CIVIL SOCIETY ACHIEVEMENT* (Routledge 2006); MICHAEL J. STRUETT, *THE POLITICS OF CONSTRUCTING THE INTERNATIONAL CRIMINAL COURT: NGOS, DISCOURSE, AND AGENCY* (Macmillan 2008).

15. On NGO involvement see Bonnie Docherty, *Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law*, 31 HUM. RTS. Q. 934, 941 (2009); John Borrie, *The ‘Long Year’: Emerging International Efforts to Address the Humanitarian Impacts of Cluster Munitions, 2006-2007*, 10 Y.B. INT’L HUMANITARIAN. L. 251, 259 (2007).

16. René Provost, *Asymmetrical Reciprocity and Compliance with the Laws of War* 13 (Jan. 14, 2010) (unpublished manuscript, available at [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID1540233\\_code372725.pdf?abstractid=1427437&mirid=3](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1540233_code372725.pdf?abstractid=1427437&mirid=3)).

17. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 200 (July 9) (“[A]ll the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.”)

18. See also Kenneth W. Abbott, *Commentary: Privately Generated Soft Law in International Governance*, in *INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: BRIDGING THEORY AND PRACTICE* 166 (Thomas J. Biersteker et al eds., 2007). Abbott notes that “NGOs and other advocates often expect privately generated soft law . . . to develop greater normative authority than sovereignty-conscious states and other objectors anticipate, in part by mobilizing and empowering affected groups.” *Id.* at 168-69.

treaties and conventions may contain some gaps.”<sup>19</sup> Another such effort is the reinterpretation of the *jus in bellum* as obligating offending states to pay reparations directly to affected individuals rather than to their states.<sup>20</sup> In the latter case, some national courts have responded positively and recognized such a right,<sup>21</sup> and the ICJ has issued an enigmatic statement<sup>22</sup> that is sufficient to blow new wind in the sails of soft law entrepreneurs.

Unchained from the shackles of reciprocity, not only have the modalities of enforcement changed, but the law itself can change and already has in some contexts. No longer bound by parties’ consent, third parties, acting separately or collectively, can overcome power disparities between the parties to the conflict and the contingencies of this new type of asymmetric combat. The rise of international criminal law cannot be explained otherwise. Moreover, its applicability to internal armed conflicts must be attributed to the jurisprudence of the International Criminal Tribunal of the former Yugoslavia (“ICTY”), which has in only a few years of adjudicating war crimes in the former Yugoslavia virtually rewritten the law on internal armed conflicts. By formally asserting the laws customary status, the ICTY overcame years of governmental resistance to regulating methods for fighting insurgents.<sup>23</sup>

Strong parties that fight against non-state actors now have new incentives that are not based on bilateral reciprocity to comply with the law; for example, to eliminate excessive harm to non-combatants. In fact, parties to contemporary conflicts engage this new “front” of public relations and law—what some governments scornfully call “lawfare”—by developing their own means of “lawfare.” They do so by employing various information technologies ranging from news briefings to video clips on YouTube to fill information gaps that they view as detrimental and control what the world will see.<sup>24</sup>

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19. Walter Kälin, *The Guiding Principles on Internal Displacement – Introduction*, 10 INT’L J. OF REFUGEE L. 557, 561 (1998). See also Francis M. Deng, *The Guiding Principles on Internal Displacement and the Development of International Norms*, in INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: BRIDGING THEORY AND PRACTICE 141 (Thomas J. Biersteker et al. eds., 2007); Roberta Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, 10 GLOBAL GOVERNANCE 459 (2004).

20. See Draft Declaration of International Law Principles on Compensation for Victims of War, art. 6 (Int’l Law Ass’n 2008). As noted in the Report presented at the ILA Rio de Janeiro Conference of 2008, Article 6 proposed that “[v]ictims of armed conflict have a right to full and prompt reparation.”

21. See Maria Gavouneli & Ilias Bantekas, *Prefecture of Voiotia v. Federal Republic of Germany Case No. 11/2000*, 95 AM. J. INT’L L. 198 (2001).

22. 2004 I.C.J. at 138 (noting the obligation to pay compensation without explicitly mentioning who is directly entitled to compensation).

23. See Danner, *supra* note 6, at 41.

24. See Jack M. Beard, *Law and War in the Virtual Era*, 103 AM. J. INT’L L. 409, 424 (2009) (“Virtual military technologies have been instrumental in making international law relevant to armed

Thus, the intensified involvement of third parties creates a new conflict between the conventional armies that fight insurgents or terrorists and seek more discretion and fewer constraints and the third parties who insist on maintaining and even increasing constraints in warfare. We might call it a conflict between the “IHL camp,” that emphasizes the humanitarian aim of the *jus in bello*, which they refer to as International Humanitarian Law, and the “LOAC camp,” that wishes to point out that the Law of Armed Conflict is primarily designed to regulate the relations between fighting armies and therefore must take military concerns seriously into account. The LOAC camp insists that this “lawfare” is not only hypocritical but also perilous: that the IHL camp is being manipulated by the terrorists, who endanger the population on whose behalf they ostensibly fight by their abuse of civilian immunities. In a sense, and certainly unwillingly, the IHL camp becomes a strategic ally of the terrorists because the terrorists benefit indirectly from whatever constraints the IHL camp would impose.

Despite these objections, it is not likely that governments can avoid accountability for their conduct of hostilities to formal or informal IHL actors. In an age informed by liberal principles that reject collective punishment and guilt by association, protecting non-combatants remains a common concern. Even the domestic courts of those governments that engage in such conflicts resist the demand to yield authority to the executive.<sup>25</sup> At this stage it is possible to assume that the recourse to third parties will only intensify and expand. But questions remain as to how this law would and should look. Among the remaining questions are the extent to which third parties should second-guess military decisions and how far they would (and should) develop the law without government consent. The following sections outline the fundamental dispute as to which direction developing the law on transnational conflicts should take.

#### B. Normative Aspects

What would (and what should) be the contours of the new law created by third parties? Why should it constrain the non-consenting state that engages in transnational warfare? It is beyond the scope of this essay to delve into these profound questions. Instead, I will outline the two opposing approaches that can already be observed. The position of the LOAC side is that transnational armed conflicts are not, and should not, be

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conflicts, in part by bringing new levels of transparency to questions about the legitimacy of military operations and related notions of what constitutes victory in war.”)

25. Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM J. INT’L L. 241, 255 (2008).

regulated by conventional norms; instead, the law should grant parties *more* discretion than is afforded in conventional warfare. Conventional armies engaged in transnational armed conflicts dispute the applicability of the *jus in bello* to particular conflicts they engage in, arguing that they do not rise above the threshold requirements for an “armed conflict” subject to that law. Technological innovations allow powerful states to resort to effective acts of war like the targeting of individuals or other types of low intensity warfare without committing to invasions with ground troops or heavy bombardments. Conventional armies argue that such acts do not amount to “protracted armed fighting between organized armed groups,” which is the threshold for applicability of the law.<sup>26</sup> Moreover, the identity of the irregular enemy, not a party to the relevant treaties or a subject of international law, has been invoked as another explanation for why such conflict is not subject to the law.<sup>27</sup> According to this view, states can resort to military means because they are acting in self-defense and are not constrained by *jus in bello* as long as they do not reach the level of intensity of an armed conflict.<sup>28</sup>

Even when the LOAC camp agrees to abide by the constraints of *jus in bello* in transnational armed conflicts, some governments put forward arguments that call for an expansive definition of military targets<sup>29</sup> and military goals.<sup>30</sup> This reasoning taxes the civilian population for the fact that the irregular force does not distinguish between the military and

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26. See, e.g., Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, 1 (Notre Dame Law School Legal Studies Research Paper No. 09-43), available at <http://ssrn.com/abstract=1501144> (“By October of 2009, the CIA had launched around 80 drone attacks. These attacks cannot be justified under international law for a number of reasons. First drones launch missiles or drop bombs, the kind of weapons that may only be used lawfully in an armed conflict. Until the spring of 2009, there was no armed conflict on the territory of Pakistan because there was no intense armed fighting between organized armed groups. International law does not recognize the right to kill without warning outside an actual armed conflict.”); see also Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y (forthcoming 2010).

27. See George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 891, 893 (2002).

28. For this position see Paust, *supra* note 26, at 22 (“Article 51 self-defense actions provide a paradigm that is potentially different than either a mere law enforcement or war paradigm, and it is understood that military force can be used in self-defense when measures are reasonably necessary and proportionate.”).

29. As Israeli Defence Forces spokesman Captain Benjamin Rutland is reported to have told the BBC: “Our definition is that anyone who is involved with terrorism within Hamas is a valid target. This ranges from the strictly military institutions and includes the political institutions that provide the logistical funding and human resources for the terrorist arm.” Heather Sharp, *Gaza Conflict: Who is a Civilian?*, BBC News, Jan. 5, 2009, available at [http://news.bbc.co.uk/2/hi/middle\\_east/7811386.stm](http://news.bbc.co.uk/2/hi/middle_east/7811386.stm).

30. Gabriel Siboni, Inst. for Nat’l Security Stud., *Disproportionate Force: Israel’s Concept of Response in Light of the Second Lebanon War*, INSIGHT 74 (2008), available at <http://www.inss.org.il/publications.php?cat=21&incat=&read=2222>.

civilian functions of its apparatus. Hence, civilian targets become military ones<sup>31</sup> and captured civilians may be kept in detention indefinitely as suspected combatants.

International Humanitarian Law, which is endorsed by foreign actors and by several national courts, takes the opposite approach and rejects the concept that armed conflict can take place in a legal void and insists on the applicability of at least the minimal requirements of the *jus in bello*.<sup>32</sup> The Israeli Supreme Court in its judgment regarding targeted killings went even further by stipulating that an *international* armed conflict exists when a state conducts armed activities outside its national boundaries.<sup>33</sup> While these views may go beyond the text, and in the latter case beyond conventional wisdom, they maintain the logic of ensuring the protection of the foreign civilian population. Ultimately, it is this population which immediately suffers from any lowering of the standards expected of combatants.

In general, third party actors, and certainly third party norm entrepreneurs, suggest that the legal restraints on transnational conflict must treat the stronger party as responsible for positively protecting the population in the theater of operation from harm because the stronger party often exclusively, has effective—even if only virtual—control over the population.<sup>34</sup> In fact, with recourse to new types of weaponry and reconnaissance tools, with 24/7 presence of unmanned aerial vehicles (“UAV”) over foreign territory, contemporary armies often have the capacity to control some of the activities of the population on the ground effectively as an occupying power. Such control can perhaps be regarded as

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31. STATE OF ISRAEL, THE OPERATION IN GAZA 27 DEC. 2008-18 JAN. 2009: FACTUAL AND LEGAL ASPECTS ¶ 235, available at [http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/Operation\\_in\\_Gaza-Factual\\_and\\_Legal\\_Aspects.htm](http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/Operation_in_Gaza-Factual_and_Legal_Aspects.htm) (“While Hamas operates ministries and is in charge of a variety of administrative and traditionally governmental functions in the Gaza Strip, it still remains a terrorist organisation. Many of the ostensibly civilian elements of its regime are in reality active components of its terrorist and military efforts. Indeed, Hamas does not separate its civilian and military activities in the manner in which a legitimate government might. Instead, Hamas uses apparatuses under its control, including quasi-governmental institutions, to promote its terrorist activity.”).

32. See *Military and Paramilitary Activities (Nicar. V. U.S.)*, 1986 I.C.J. 14 (June 27); *Hamdan v. Rumsfeld* 548 U.S. 557, 562 (2006).

33. HCJ 769/02 *The Public Committee against Torture in Israel v. The Government of Israel* [2005], available at [elyon1.court.gov.il/files\\_eng/02/690/007/A34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf) (stating that the law on international armed conflicts “applies in any case of an armed conflict of international character – in other words, one that crosses the borders of the state – whether or not the place in which the armed conflict occurs is subject to belligerent occupation.”).

34. For more detailed discussion, and endorsement, of this view see Eyal Benvenisti, *The Law on Asymmetric Warfare*, in *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN* (Mahnoush H. Arsanjani et al. eds., forthcoming 2010).



virtual occupation. As the law stands, during conventional international armed conflict, obligations to occupied populations are more demanding than those toward foreign civilians in the combat zone.<sup>35</sup>

This last point requires explanation: in symmetric warfare, the attacker's power does not amount to an ability to fully control the lives of the enemy's population. The defending government is still in control and in fact forcefully resists the attacker's effort to gain exclusivity. Lacking such exclusive control, there is no basis to impose an obligation on the attacking army to *ensure* enemy civilians' lives (protecting them, for example, from internal ethnic conflicts). Their army, which is still in control, has the duty to ensure their rights. Instead, before and during the attack, the attacking army owes a duty to *respect* enemy civilians' lives, consisting of the duty to avoid unnecessary harm. In contrast, the same army will assume the duty to *ensure* the rights of enemy civilians when they become subject to its effective control as prisoners of war or "protected persons" in occupied territories.<sup>36</sup> An obligation to ensure the civilians' rights is fundamentally different from an obligation to respect them, applicable to parties to symmetric conflicts. The vertical power relations that exist in transnational asymmetric conflicts, particularly against non-state actors, seem to call for recognizing positive duties towards those civilians, like in an occupation. Such a duty will reflect the nature and scope of the power that the "attacking" army (during an on-going, indefinite "attack") has over the attacked population.

The obligation to protect in transnational asymmetric armed conflict, if recognized, would be quite demanding. It would call for three specific obligations. First, it would require the consideration of alternatives to military action and the determination of whether the decision to use force against legitimate military targets rather than exploring non-forcible, or less-forcible alternatives, was justified under the circumstances. In fact it would imply injecting *jus ad bellum* considerations, or human rights law, into *jus in bello* analysis. Secondly, if there were no available alternatives, a second requirement would demand that the army invest significant resources to minimize harm to civilians. Finally, the army would be

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35. The obligation to "ensure" public order and civil life in occupied territory is recognized by the Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex, Oct. 18, 1907 art. 43. The positive duties on the occupant are even more pronounced under the IV Geneva Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949. On these obligations see EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 104-06 (Princeton Univ. Press 1993).

36. On this distinction between the types of obligations, see Eyal Benvenisti *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 *ISR. L. REV.* 81 (2006).

required to conduct a transparent and accountable investigation after the use of force.

A case in point concerns the dispute about targeted killing. This policy treats individuals as military targets per se, given the paucity of conventional non-human military targets of an irregular fighting force. The LOAC camp argues that armies that target individual combatants regard them as legitimate targets in war, as there is no distinction between human and non-human military targets. But the alternative view is sensitive to the fact that the laws regarded the killing of combatants as a legitimate *means* to achieve military goals, rather than a goal in and of itself. As the 1868 St. Petersburg Declaration envisioned, war was not about killing combatants; wars were understood to be fought to achieve non-human military goals and fighting was to be conducted against an abstract, collective enemy.<sup>37</sup> Therefore, it was possible to stipulate that “the only legitimate object which States should endeavour to accomplish during war is to *weaken* the military forces of the enemy; That for this purpose it is sufficient to *disable* the greatest possible number of men.”<sup>38</sup> Although war always involved the killing of combatants, killing the adversary was never the goal. Applying this logic to the effort to preempt individuals from engaging in an attack would require a consideration of whether it is possible to *disable* rather than kill them. This explains why the IHL camp insists on pausing to consider alternatives to targeted killing;<sup>39</sup> something that is viewed by the LOAC camp as injecting irrelevant requirements of human rights law into *jus in bello* analysis.

The tension between governments engaged in transnational warfare and third parties can therefore not be starker: whereas governments seek to deny or dilute the applicability of conventional warfare obligations to transnational asymmetric conflicts, third parties insist on their applicability and lean toward imposing even more stringent constraints, which governments regard as impermissibly endangering their troops and irresponsibly immunizing non-state fighters. Only time can tell if and how this tension can be resolved.

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37. St. Petersburg Declaration, *supra* note 10.

38. *Id.* (emphasis added).

39. See Israeli Targeted Killing judgment, *Public Committee against Torture*, *supra* note 33, para. 40; ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 90 INT'L REV. RED CROSS 991, 1043-44 (2008) [hereinafter *ICRC guidelines*].



### C. Implementation: Reviewing Military Discretion

The growing involvement of third parties in the monitoring and assessment of military decisions raises a third challenge to the legal regulation of warfare: how to regulate the exercise of discretion by the military commander. Because many of the obligations in warfare are based on standards that call for balancing conflicting interests, regulating the commander's exercise of discretion raises two questions: what weight the commander is expected to assign to the conflicting interests and what should be the standard of review of her decisions. Answering these questions was not a stark challenge in conventional, symmetric warfare because the parties to such conflict were presumed to promote their self-interests and were not expected to positively protect (to ensure) enemy civilians. The question was also moot in many asymmetric conflicts due to the lack of information which precluded third parties from effectively assessing many such decisions. But with the growing assertiveness of third parties and increasing availability of ample and precise information, the time to answer these questions has finally arrived.

Take, for example, military decisions made by the commanding officer of an UAV unit whose drones hover above Gaza, Yemen, Afghanistan, or Pakistan looking for irregular combatants, their human prey. The unit identifies a person who it regards as a particularly dangerous combatant. This person is resting at his home, together with his family members who are known to be non-combatants. Recently developed computer programs<sup>40</sup> can help the UAV operators to accurately foresee how many of the family members would be killed together with the person that they wish to kill. Using these programs the operators select a method of attack which due to its specific direction and the weapon to be used would minimize but not eliminate the collateral harm. The commander can now reliably project how many family members will also be killed in the attack. Jack Beard points out that in such situations "civilian deaths . . . may be incidental but no longer . . . accidental."<sup>41</sup> Unfortunately for the individual operators, the same information technology that improves their effectiveness by clarifying the factual situation on the ground also increases their personal responsibility and brings them dangerously close to a criminal mens rea: with the fog of the battle removed, they might not be

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40. Computer software can give an exact estimation of the collateral damage induced by an attack. An algorithm, used specifically with Predator drones, assigns different weights to each of the potential victims and to the collateral damage. See Jane Mayer, *The Predator War*, THE NEW YORKER, Oct. 26, 2009, at 36; David Anthony Denny, U.S. Air Force Uses New Tools to Minimize Civilian Casualties, <http://www.america.gov/st/washfile-english/2003/March/20030318185619ynnedd0.3604242.html> (last visited Apr. 19, 2010).

41. Jack M. Beard, *Law and War in the Virtual Era*, 103 AM. J. INT'L. L. 409, 438-39 (2009).



able to defend themselves by arguing that they did not know what would be the result of the strike.<sup>42</sup>

But will such an attack be considered “clearly excessive” (for criminal liability purposes) or simply “excessive” (for incurring state responsibility)? In most cases, no law could give a strict a priori “yes” or “no” answer to this question without considering the specific circumstances and no judge, or even military advisor, could reasonably condone any course of action in advance.<sup>43</sup> Instead the law relies on standards like “proportionality” or the “reasonable military commander,” and waits for ex-post review of the decisions made.<sup>44</sup> The law can structure the decision-making process by stipulating procedural steps that could eliminate miscalculations or expose the recklessness of the operator,<sup>45</sup> but it does not necessarily make the decision any easier. The requirement to weigh

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42. According to the Elements of Crime under the ICC Statute, for criminal responsibility one has to prove that “the perpetrator knew that the attack would cause incidental death or injury to civilians . . . and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.” International Criminal Court Act 2001 (Elements of Crimes) Regulations 2004, art. 8(2)(b)(iv), available at <http://www.statutelaw.gov.uk> (type “International Criminal Court” into “Title” field, and “2004” into year field; then select link that appears with full title of statute).

43. In its judgment concerning the legality of targeted killings, the Israeli Supreme Court insisted that “[h]ere is . . . no escaping examination of each and every case.” HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel [2005], available at [elyon1.court.gov.il/files\\_eng/02/690/007/A34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf). The responsibility is the military commander’s, and the court cannot decide for the commander in advance but only in retrospect. “Having determined in this judgment the provisions of customary international law on the issue before us, we naturally cannot examine its realization in advance. Judicial review on this issue will, by nature, be retrospective.” *Id.* ¶ 59. This point is also captured by the German Constitutional Court in its 2006 judgment concerning the Aviation Security Act. While annulling legislation that authorized the downing of hijacked planes in 9/11 scenarios, it opined that in an ex post review, in criminal trial, of a person’s private initiative to shoot the hijacked, the decision might be assessed as justified or excused (para. 128 ccc: “It need not be decided here how a shooting down that is performed all the same, and an order relating to it, would have to be assessed under criminal law [...]”). [First Senate] Feb. 15, 2006 (F.R.G.), available at [http://www.bundesverfassungsgericht.net/entscheidungen/rs20060215\\_1bvr035705en.html](http://www.bundesverfassungsgericht.net/entscheidungen/rs20060215_1bvr035705en.html).

44. Referring to the principle of proportionality in warfare, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia “suggested that the determination of relative values must be that of the ‘reasonable military commander.’” FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA, ¶ 50 (2003) [hereinafter *Final Report*].

45. The Israeli targeted killing judgment outlines the procedure for making decisions, namely the need to obtain the “most thoroughly verified” information regarding the identity and activity of the civilian, including “careful verification” in case of doubt; then assessing whether less harmful means can be employed against the person, like arrest and trial. The attack should be followed by “a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack” by “an objective committee,” and compensation should be paid in cases of mistaken identity. HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel [2005], available at [elyon1.court.gov.il/files\\_eng/02/690/007/A34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf).



alternatives to a military strike<sup>46</sup> adds more complexity to this issue because it requires the commander (and third parties) to consider circumstances that cannot be predicted: should the commander wait until the enemy combatant has left the busy street, but then what if he manages to disappear?

The recourse to standards like proportionality or reasonableness is common in law. It makes ample sense to do so when the balancer can be expected to act impartially. Societies have developed tools to make tragic choices based on assumptions regarding the impartiality and skillfulness of the decision-maker to whom society assigns such judgments.<sup>47</sup> For example, we acknowledge that people are more likely to die from accidents if a governmental agency would decide to allocate more resources to building ports than to improving the roads. What makes the assignment of such judgment calls legitimate is the fact that the deaths are statistical deaths; this ensures that decision-makers internalize the risks because they may be the ones killed on the road. But this is not the case during combat, when, for example, the operators of UAVs are called upon to weigh their own national interests versus those of remotely situated foreigners. In such a scenario, the assumption of impartiality is not very realistic. This situation raises two questions: first, do these operators indeed have to give equal weight to other-regarding considerations? Second, if the answer is affirmative, how could the law make them do so?

Let us begin with the first, normative, question, which goes to the heart of the balancing act that national decision-makers must perform. Do we expect a military commander to assign similar values to its national interest and to the interests of foreign civilians in the theater of operation? For national governments, the task of internalizing fully other nations' and foreign nationals' rights and interests, possibly without the promise of reciprocity, is in tension with their political and social accountability.<sup>48</sup> At the same time, and for this very reason, other stakeholders would tend to view such balancing acts as inherently partial and unreliable. Does, and should, international law nevertheless impose such an obligation on the

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46. *See id.* *See also ICRC guidelines, supra* note 39.

47. On the identifications of impartiality and skillfulness as conditions for assigning decision-makers with the task of balancing among rights and interests see Eyal Benvenisti & Ariel Porat, *Implementing the Law by Impartial Agents: An Exercise in Tort Law and International Law*, 6 THEORETICAL INQUIRIES IN L. 1 (2005) (Isr.).

48. For a recent negative answer see the decision of the German federal prosecution not to indict a German officer for ordering an airborne attack on Taliban targets that entailed many civilian casualties: a ground attack would have risked the German troops and international law did not require the commander to assume such a risk. *See* announcement of April 19, 2010 on proceedings concerning an aerial attack on September 4, 2009 (In German) available at <http://www.generalbundesanwalt.de/de/showpress.php?newsid=360>.

national decision-makers, namely to internalize foreign interests fully, as if they were domestic interests, or as if the decision-maker was an agent of humanity, expecting to protect everybody regardless of their national affiliation without any preference given to domestic interests?

I suggest that the answer to any question of this kind must be informed primarily by the expectations of the relevant body of norms that governs the situation. The law of occupation, for example, expects the occupant to act like a trustee of the population subject to its control; it may consider the military interests of occupation forces but not those of the state to which the occupation forces belong.<sup>49</sup> International human rights law compels the state authority not to discriminate on the basis of nationality; “nationality-blindness” should inform the balancing act. In contrast, it is not entirely clear whether the law governing conventional international armed conflict expects the “reasonable military commander” to be “nationality-blind” in order to avoid criminal or state responsibility.<sup>50</sup> If we accept that attacking armies in transnational asymmetric conflicts have a “duty to ensure” the lives of civilians in the area they attack then perhaps they are expected to treat all civilians with similar respect (obviously, such blindness would relate only to the human rights of the relevant civilians and not to the national interests of the foreign state). It can be expected, however, that the LOAC camp will resist such a conclusion, stating that there is no moral or legal basis for the obligation to consider other-regarding considerations in the absence of reciprocity and mutuality of obligations, when there is no assurance that others are equally committed to act selflessly.<sup>51</sup> There is no doubt, therefore, that this suggested conclusion will be another point of contention in the ensuing legal battle between regular armies engaged in transnational armed conflicts and third parties on the future of the law.

The response to the normative question also informs the response to the institutional question concerning the proper standard of review of

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49. For criticism of the seeming impartiality of the occupant’s exercise of discretion and on the appearance of normalcy that such an obligation bestows on what must be regarded as an exceptional regime see Martti Koskenniemi, *Occupied Zone: A Zone of Reasonableness?*, 41 ISRAEL L. REV. 13 (2008); Aeyal Gross, *Human Proportions: Are Human Rights the Emperor’s New Clothes of the International Law of Occupation?*, 18 EUR. J. INT’L L. 9 (2007).

50. The Committee Established to Review the NATO Bombing Campaign regarded such questions as unresolved: “a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants and or the damage to civilian objects? . . . d) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?” *Final Report, supra* note 44, ¶ 49.

51. Such an argument can be supported by the rejection of cosmopolitan justice arguments. See, e.g., Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. PUB. AFFAIRS 113 (2005) (insisting that the existence of global political institutions that can assure that others are equally committed, there can be no basis to require individual actors and states to act selflessly).



military decision-making. What deference should the reviewing institution give to the “reasonable military commander”? In tort law, where this standard of review is prevalent, we are usually satisfied with assigning the domestic court, which we regard as sufficiently skillful and impartial, the task of properly balancing conflicting interests. It is the court which will determine whether, say, the surgeon operated reasonably or not, without any deference to the surgeon.<sup>52</sup> The answer is different in matters involving the exercise of public power because many democracies believe that it is the administrative agency, not the court, which has been assigned the authority to exercise discretion by the legislator. Therefore, different legal systems adopt (real or rhetorical) deferential doctrines, such as the American *Chevron* doctrine,<sup>53</sup> according to which the reviewing court must defer to the public authority’s judgment call. What is the answer in international law? Again I would suggest that the answer will depend on the norms of the particular body of international law. It is possible to hold that in the context of trade law every sovereign enjoys discretion in forming national policies and hence external review will have to recognize national margins of appreciation,<sup>54</sup> whereas in other contexts—for example *jus ad bellum*, or the law of occupation—no such deference is called for.<sup>55</sup>

What then should be the standard of review, under *jus in bello*, of a military commander’s decision? Should the law regard the commander as a private actor entitled to little deference, like the surgeon in domestic tort law, or like a public authority to which deference is mandatory? So far this question has not received systematic attention.<sup>56</sup> The Israeli Supreme Court, for example, wavers between two opposite positions: in several cases it asserted its own (rather than the military commander’s) “expertise”

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52. See Benvenisti & Porat, *supra* note 47.

53. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

54. Steven Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT’L L. 193, 194 (1996).

55. See *Oil Platforms (Islamic Republic of Iran v. United States)* 2003 ICJ 90, para. 73 (“the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any ‘measure of discretion.’”); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 200 (July 9) (holding that no deference should be granted to Israeli occupation authorities). For a different view see Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT’L L. 907 (2005) (Isr.) (calling for a general doctrine allowing margin of appreciation to states, and criticizing the above-mentioned ICJ decisions).

56. In a dissenting opinion in the *Legality of Nuclear Weapons* Advisory Opinion, Judge Shahabuddeen suggested that the “balance . . . between the degree of suffering inflicted and the military advantage in view . . . of course . . . has to be struck by States. The Court cannot usurp their judgment.” 1996 I.C.J. 226, 402 (dissenting opinion of Judge Shahabuddeen); see also Shany, *supra* note 55, at 934-35.



in determining the proper balance between rights versus security interests,<sup>57</sup> but in other cases it recognized a margin of appreciation that the commander enjoys.<sup>58</sup> Moreover, the availability of several potential reviewers (the commander's national court, a foreign national court, an international tribunal, an ad-hoc commission of inquiry) adds another complexity: should they adopt different standards of review of the military commander's decision?

As already mentioned, I suggest that the answer to this question should be informed by the normative expectations of the national decision-maker, who in this context is the military commander. To the extent that the normative expectation is that the commander is "nationality-blind" and thereby assigns similar values to national and foreign interests, there should be little support for a judicial policy of deference. Two considerations would back this conclusion. First, the national decision-maker can be analogized to an agent of humanity which is expected to serve cosmopolitan values rather than pursuing its own. Second, because its impartiality is inherently suspect when it acts as a judge in its own cause, no deference to the national decision-maker is appropriate.<sup>59</sup> If, however, international law regards national agents as sovereign powers entitled to form national policies that promote them, then national agents would be entitled to deference, perhaps even to a *Chevron*-type of deference. Therefore, the debate between the IHL and the LOAC camps on the nature of obligations of parties engaged in transnational armed conflict shapes also the attitude toward the "reasonable military commander" and the proper standard of review of her decisions.

## CONCLUSION

The persistence and prevalence of asymmetric transnational armed conflicts have given rise to two rival claims. Governments involved in such conflicts emphasize their added risks in fighting irregular combatants who abuse legal protections. These governments seek to interpret the law in

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57. H.C. 2056/04 Beit Sourik Vill. v. Gov't of Israel [2004], available at [elyon1.court.gov.il/files\\_eng/04/560/020/a28/04020560.a28.pdf](http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf) ("The question is whether, by legal standards, the route of the separation fence passes the tests of proportionality. This is a legal question, the expertise for which is held by the Court.").

58. H.C. 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel [2005], available at [elyon1.court.gov.il/files\\_eng/02/690/007/A34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf) ("Proportionality is not a standard of precision. At times there are a number of ways to fulfill its conditions. A zone of proportionality is created. It is the borders of that zone that the Court guards. The decision within the borders is the executive branch's decision. That is its margin of appreciation.").

59. See generally Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Values*, 31 N.Y.U. J. INT'L L. & POL. 843 (1999) (arguing that no deference is due to national decision-makers when the domestic democratic process is likely to disregard minority interests).



ways that dilute their responsibilities. At the same time, however, various third parties, including national and international courts, commissions of inquiry, and global civil society, converge in an entirely different approach. Informed by the expectation that with more power comes more responsibility, these third parties expect the more powerful side to gradually ensure enemy civilians' lives (not only to respect their lives). This expectation leads to demands for modification of the traditional law in the context of transnational asymmetric warfare in at least three areas: first, the recognition of an obligation to consider alternatives to military action (asking not only whether targets were legitimate military targets, but also whether the decision to use force against them rather than explore the non-forcible, or less-forcible alternatives, was justified under the circumstances); second, if there were no available alternatives, the army would be expected to invest significant resources to minimize harm to civilians; and finally, following an attack, the army would be obliged to conduct a transparent and accountable investigation to reexamine its own actions. Third parties may also insist on limiting the discretion of the "reasonable military commander."

This essay sought to understand and delineate the fundamental cleavage between the two visions. The aim was not to develop a detailed argument in favor of one or another position, although outlines of such arguments were offered. It is beyond the scope of this essay to assess if and how such a cleavage between two visions of the law can be bridged and how the law would look in the future. Much depends on the continued ability of courts, both domestic and international, to assert positions independent of governments and the continued commitment of global civil society to constrain conventional armies. At present it does not seem likely that governments will be able to avoid accountability for their conduct of hostilities to formal or informal third parties. In an age informed by the liberal principle that rejects collective punishment and guilt by association, protecting non-combatants remains a common concern. Even the domestic courts of those governments that engage in such conflicts resist the demand to yield authority to the executive. If these attitudes persist, it can be expected that the recourse to third parties as partners in the regulation of transnational armed conflicts will expand.