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The Law on Asymmetric Warfare

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Abstract

The traditional law of armed conflict was carefully designed to align the incentives of parties engaged in a symmetric type of warfare. But asymmetric warfare against non-state actors is fundamentally different, and therefore requires a distinct set of substantive norms as well as different modalities of enforcement. The law of asymmetric warfare must eschew the traditional distinction between *jus ad bellum* and *jus in bello*, and instead demand that the powerful actor acknowledge its normative and institutional obligations toward civilians exposed to its military might. The discretion it has under the law, *inter alia*, to prevent excessive harm to civilians and to decide which precautions to take before an attack must be subjected to a reliable system of scrutiny which the essay outlines.

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in Honor of
W. Michael Reisman

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Chapter 46

The Law on Asymmetric Warfare

Eyal Benvenisti*

I. Introduction: The Logic of Asymmetric Warfare

In his writings on the laws of war, Michael Reisman has devoted much attention to the challenges of asymmetric warfare characterized by the demise of the “dynamic of reciprocity and retaliation,”¹ especially when regular armies fight non-state actors that are “neither beneficiaries of nor hostages to the territorial system.”² Indeed, asymmetric warfare shakes the very foundations of the traditional law of war, both *ad bellum* and *in bello*. The weaker parties, certainly the non-state actors, exploit and, hence, challenge two basic assumptions that have grounded *jus in bello* since its inception: that it is possible to compartmentalize the battlefield and isolate with sufficient clarity military from civilian targets and that there are clear objectives to any military campaign, such as gaining control over territory. These two assumptions gave rise to the premise that a military conflict could be compatible with humanitarian ideals, that war would be about inducing concessions from the defeated party by degrading its military capabilities, weakening and disabling its fighters without necessarily killing them.³ Neither of these assumptions typically holds in asymmetric warfare, when regular armies fight irregulars. First, in the asymmetric context there are very few purely military targets. This dramatically limits the ability of a regular army to identify arenas where it can legitimately exercise its power. In fact, as the invasion into Iraq in 2003 demonstrated, a relatively weaker army will try to reduce the availability of such arenas by reverting

* I thank George W. Downs for his very helpful comments on an earlier draft and to Shay Gurion and Guy Keinan for their excellent research assistance.

1 W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82, 86 (2003).

2 *Id.*

3 As the 1868 St. Petersburg Declaration of the International Military Commission 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, reprinted in 1 AM. J. INT'L L. 95 (Supp. 1907).

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to guerrilla tactics.⁴ Moreover, 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. With no tangible military objectives, commanders are often tempted to simply capture or kill as many of their opponents as possible or to intimidate their opponents' non-combatant constituency.

While not a new phenomenon, asymmetric warfare began to proliferate at the end of the Cold War. What Eric Hobsbawm called “the democratization or privatization of the means of destruction”⁵ provided novel opportunities for non-state actors to challenge not only their own governments but also the strongest of powers. Although these opportunities did not produce equality in arms—on the contrary, governments continued to develop more sophisticated and remotely controlled means of their own—the weapons employed by non-state actors pose a real threat to governmental interests and routing irregular combatants entails a prohibitive toll in non-combatants. The availability of low-cost effective weaponry and means of communications has empowered insurgents and at the same time prompted state leaders to resolve conflicts by using overwhelming, and at times excessive, force. The outcome has been carnage and instability.

Finding new modalities to regulate this type of asymmetric warfare became a priority because the traditional ones had ceased to be of effect. Symmetric wars are self-regulated based on the threat of tit-for-tat. But as Reisman has noted,⁶ in asymmetric warfare, the dynamic of reciprocity and retaliation is lacking. The most immediate endeavor was directed at developing new enforcement mechanisms, mainly through international criminal tribunals.⁷ In retrospect, however, we must realize that not only the modalities of enforcement have changed; the law itself has changed. Perhaps due to the resort to third parties as the new enforcers of the law, perhaps due to the different conceptions of what is just in asymmetric warfare, the substance of the law on asymmetric warfare is fundamentally different than the law applicable to the typical duel between regular armies.

This essay asserts that it is time to recognize that asymmetric warfare is a distinct phenomenon that is, and should be, subject to a distinct set of substantive norms and not only to different modalities of enforcement. Conscious of Toni Pfanner's provocative challenge—“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”⁸—this

4 Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 INT'L REV. RED CROSS 149, 153 (2005).

5 ERIC HOBSBAWM, *AGE OF EXTREMES: THE SHORT TWENTIETH CENTURY 1914-1991*, at 560 (1993).

6 See Reisman, *supra* note 1.

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

8 Pfanner, *supra* note 4, 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).

essay argues that it is in fact already possible to discern new norms for asymmetric warfare, both internal and international. It is further suggested that once we grasp that asymmetric warfare is a very different beast, we will be able to explore the potential for improving the protection of non-combatants by treating the law on asymmetric warfare as distinct from the law applied in traditional symmetric conflicts.

Part II below begins by noting the changing norms of war and explaining this evolution as a response to the challenge of asymmetric warfare. Part III then explores potential areas in which the law on asymmetric warfare can and should further depart from traditional symmetric warfare law. Part IV concludes with a call to recognize asymmetric warfare as a distinct type of conflict that should be free of the confines of a law that was designed to address the traditional wars of past. Humanity would be better served were this type of warfare to have its own carefully tailored set of norms.

II. Asymmetric Warfare and the Shift from Rules to Standards

Until not very long ago, the regulation of warfare by international law was conveniently organized through several sets of dichotomies. The right to use force—*jus ad bellum*—was determined by the presence or absence of an actual armed attack, and once under attack, the victim was entitled to pursue its enemy until the latter's submission; military conflict was defined as either international or internal, with the latter entailing only minimal restriction of the sovereign's exercise of power. The regulation of hostilities in international armed conflicts—traditional *jus in bello*—was founded on the dichotomous distinction between combatants (and military targets) and non-combatants (and non-military targets). A sharp distinction was also made between the obligations of parties to the conflict and those of neutral third parties. Occupation was clearly distinct from invasion, with narrowly defined rights and obligations for the invading army for each of the stages of war. Most prominent of all, however, was the sharp distinction between *jus ad bellum* and *jus in bello*: the aggressor, including the aggressive occupant, enjoyed the same privileges during combat as the victim.⁹

With time, many of these dichotomies have evolved into continua shaped by overlapping sets of norms. In the context of *jus ad bellum*, several new exceptions to the prohibition on the use of force have been recognized in response to new types of challenges: forceful means to respond to or stop imminent attacks,¹⁰ protracted

9 For recent support for this dichotomy, see Adam Roberts, *The Equal Application of the Laws of War: A Principle under Pressure*, 90 INT'L REV. RED CROSS 931 (2008); Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 723-34 (2008); and Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47 (2009).

10 See W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279 (1985).

and low-level attacks by non-state actors,¹¹ or humanitarian tragedies,¹² and even, at times, to prevent the development of WMD.¹³ The response of the victim of an act of aggression has come to be regarded, at least by some, as subject to the requirement of proportionality of that response throughout the conflict.¹⁴ The distinction between international and internal armed conflicts has been significantly muted by the recognition of the relevancy of both humanitarian and human rights obligations in both types of conflicts. Guerrilla tactics that exploited the law's distinctions between combatants and non-combatants and between military and non-military targets made it necessary to transform these distinctions into elaborate continua. The obligation to ensure compliance with the laws of war has been recognized as applicable *erga omnes* and therefore obliges neutral states to be vigilant and even take action when they are violated. In the context of the law of occupation, it has been generally accepted that while the occupant has relatively broad discretion regarding the amendment of domestic legislation, it is still required to abide by human rights norms.

There are several explanations for this move from rules to standards. One explanation focuses on the institutional perspective, namely, the shift of the decision-making power from the executive branches to the courts. As Amichai Cohen has noted, whereas in the past, international lawmaking was the province of executives and generals, who preferred bright line rules and were able to fashion them *ex ante*, in recent years, the task of adapting the laws of war to contemporary needs has been delegated to courts, which prefer vague standards that broaden their discretion and allow them to pass judgment *ex post*.¹⁵ Another explanation is of a political and cultural nature, highlighting the "transformation of the Hague/Geneva rule system into a modern vocabulary of political legitimacy."¹⁶ Indeed, the breakdown of the dynamic of reciprocity and retaliation has emerged as an invitation to not only courts but also

11 See W. Michael Reisman, *No Man's Land: International Legal Regulation of Coercive Responses to Protracted and Low Level Conflict*, 11 HOUS. J. INT'L L. 317 (1989).

12 See W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 75 (1996); W. Michael Reisman, *Hollow Victory: Humanitarian Intervention and Protection of Minorities*, 91 AM. SOC'Y INT'L L. PROC. 431 (1997); W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3 (2000).

13 See W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3 (1999); W. Michael Reisman, *Self-Defense in an Age of Terrorism*, 97 AM. SOC'Y INT'L L. PROC. 141 (2003); W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525 (2006).

14 Although the *jus ad bellum* assessment does depend on *jus in bello* considerations, a response to aggression that excessively harms non-combatants would be regarded in itself in violation of *jus ad bellum*. See Andreas Zimmermann, *The Second Lebanon War: Jus ad Bellum, Jus in Bello and the Issue of Proportionality*, 11 MAX PLANCK Y.B. U.N. L. 99, 124 (2007).

15 Amichai Cohen, *Rules and Standards in the Application of International Humanitarian Law*, 41 ISRAEL L. REV. 41 (2008).

16 DAVID KENNEDY, *OF WAR AND LAW* 84 (2006).

to other third parties, including diverse commissions of inquiry, to take part in the process of monitoring the fighting and criticize—using the rhetoric of law—what they deem as excess.

But the turn to standards became necessary not only because of increased reliance on third parties as monitors. In asymmetric warfare, bright line rules have lost much of their utility. Rules had offered regular armies engaged in symmetric conflicts means to ensure reciprocal compliance with the law. The prohibition on, for example, “[t]he attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended”¹⁷ or on making “improper use of ... the military insignia and uniform of the enemy”¹⁸ enabled the adversaries to communicate and monitor one another’s extent of compliance with the law and to avoid misunderstandings that could escalate into an endless cycle of reprisals. Even when standards were used to enhance protection of non-combatants, they were set sufficiently high to discern violations. Accordingly, the standard for illegal collateral harm to non-combatants was set at the “excessive” rather than “disproportionate” level.¹⁹ Although bright-line rules or relatively narrow standards entailed, as they must, under-inclusive protection for non-combatants in certain contexts (for example, civilians in defended buildings), they did represent the optimal framework in the circumstances. The advent of asymmetric warfare, where the logic of dyadic reciprocity is absent and asymmetry incentivizes both sides to circumvent the clear norms, has rendered narrow tests of this type ineffective for protecting non-combatants.

Why have the governments and army generals yielded to third parties the power to redefine the law and determine its proper application? Did they simply succumb to the growing apprehensions of a better-informed and relatively safe civil society? My answer would be that with the rise of asymmetric warfare in the post-Cold War era, the delegation of authority to courts was not only a response to the sense of urgency expressed by civil society, but also served the interests of the governments of the more powerful states. These governments were concerned with the destabilizing effects of internal asymmetric warfare, which tends to burden neighboring and other countries with massive inflows of refugees or create areas of lawlessness that provide safe-havens for terrorists. These powerful governments were primarily preoccupied with internal conflicts in the developing world and in neighboring countries where the democratization of the means of destruction produced inter-ethnic conflicts that had been suppressed during the Cold War era. The tragedy in Yugoslavia was not only a humanitarian crisis but also a burden on neighboring countries that were swarmed by refugees.

The criminalization and judicialization of *jus in bello* obligations in the post-Cold War era was thus mainly a reflection of the growing concern over internal armed

17 Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, art. 25, 36 Stat. 2277 [hereinafter Hague Regulations].

18 *Id.* art. 23(f).

19 On the difference between the two standards, see Georg Nolte, Thin or Thick? The Principle of Proportionality and International Humanitarian Law (Jan. 3, 2009) (unpublished manuscript, on file with author).

conflicts and their internal as well as external consequences. To restrain domestic actors, neighboring states and powerful governments had to set up tribunals and authorize them to both reshape the law and apply it. The reliance on tribunals resolved two problems. First, the tribunals made new law to regulate internal warfare, thereby overcoming the problem that emerged during the negotiations on the Additional Protocols, when many developing world governments were reluctant to voluntarily commit to new constraints in this area. Second, judicialization proved to be the most effective means of enforcing compliance in internal armed conflicts. In fact, the creation of new rules to regulate internal conflicts was accomplished quite effectively during an astonishingly short amount of time.²⁰ This process was led by the ICTY judiciary, as “the key transitional stage [which, inter alia] changed the definition of armed conflict in a way that lowered the threshold for applying laws that govern international conflicts and ... enhanced the regime governing civil wars.”²¹ The lacunae in the traditional law applicable to internal armed conflict were quickly filled by drawing from the law applicable to international armed conflicts and, no less importantly, by recognizing the parallel applicability of human rights law.²² Moreover, by the mid-1990s, human rights bodies (such as the European Court of Human Rights²³ and the Inter-American Court on Human Rights²⁴) had become prominent actors taking part in the elaboration and application of the new law. In a relatively short period of time, then, the law on internal warfare has become even more protective of individuals than the law on international warfare. This would come as no surprise to students of Michael Reisman, who has noted the authorship of state elites in the process of international lawmaking in general and in the area of the laws of war in particular.²⁵

20 Theodor Meron, Editorial Comment, *War Crimes Law Comes of Age*, 92 AM. J. INT’L L. 462 (1998); see also Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) (separate opinion of Judge Abi-Saab). According to Judge Abi-Saab, the tribunals have been afforded “a unique opportunity to assume the responsibility for the further rationalisation of these categories at some distance from the historical and psychological conditions from which they emerged and from the perspective of the evolving international legal order.”

21 Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 41 (2006).

22 Given the concept of the laws of war as *lex specialis* (as envisioned by the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8)), the less elaborate are the laws of war the more there is room for the provisions of human rights law.

23 *Isayeva v. Russia*, App. No. 57950/00, 41 Eur. H.R. Rep. 791 (2005).

24 *Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L./V/II.98, doc. 6 rev. (1998); *Coard v. United States*, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L./V/II.106, doc. 6 rev. (1999); Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), Inter-Am. C.H.R., 41 I.L.M. 532 (Mar. 12, 2002).

25 W. Michael Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 VA. J. INT’L L. 1, 2 (1973) (“The traditional corpus of international law comprised express and

But what about the regulation of asymmetric *transnational* armed conflicts, conducted by one foreign government in another's territory against non-state actors? What was registered in this sphere is the opposite effort: powerful governments have sought to relieve themselves of even the most basic constraints of the laws of war embodied in Common Article 3 of the Geneva Convention. "The war on terror" was regarded by its authors as a unique type of war, one that allowed them to use force in any part of the world, but without any legal constraints, because the enemy consisted of "international outlaws" or "unlawful combatants."²⁶ Human rights law was not applicable to areas not subject to those states' jurisdiction, and UN-mandated operations were in any event deemed to be insulated from the human rights constraints applicable to some of the participating states because the UN was not bound by the relevant treaty obligations. Thus, at the same time that asymmetric *internal* conflicts have come to be densely regulated and sustained by relatively effective means of enforcement, asymmetric *transnational* armed conflicts suffered from under-regulation. The juxtaposition of the two sets of conflicts and the laws that govern them reveals significant gaps in the protection of non-combatants in *transnational* armed conflicts.

The gaps in civilian protection are sustained by the two remaining dichotomies in the law on international armed conflict that inform also the law on transnational armed conflict: the distinction between *jus ad bellum* and *jus in bello* and the separation of the law on the conduct of hostilities from the law on occupation. These two distinctions succeed in insulating regular armies engaged in *transnational* conflicts from the norms otherwise applicable international or internal conflicts, and expose civilians to insufficiently regulated risks. Fortunately, the deficiencies in non-combatant protection have already attracted attention and, for reasons explained below, are more likely to be addressed sooner rather than later, at which point, the move to standards will be completed.

III. Bridging the Gaps in Civilian Protection in the Law on Asymmetric Transnational Armed Conflicts

The focus of this inquiry is asymmetric transnational armed conflicts. Such conflicts are characterized by regular armies fighting in foreign lands against non-state actors or state actors that employ the modus operandi of non-state actors, which includes combatants resorting—directly or indirectly—to guerilla tactics and terrorism. In contrast to asymmetric internal conflicts, in asymmetric transnational conflicts, the powerful foreign army can rely on two legal doctrines to avoid or limit its responsibility toward non-combatants. The aim of this Part is to show the untenability of such gaps in responsibility and point out possible ways to fill them.

tacit communications between the effective elites of territorial communities about the practices which ought to be reciprocated among themselves.”)

²⁶ See George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 (2002).

A. Jus Ad Bellum Considerations Informing the Analysis of "Proportional" Warfare

In a system in which warfare is monitored and regulated by the judiciary, the dichotomous distinction between *jus ad bellum* and *jus in bello* has outlived much of its usefulness for those concerned with the protection of non-combatants.²⁷ While the dichotomy continues to make sense in symmetric international conflicts constrained by reciprocity, in asymmetric transnational conflicts, its consequences are counter-productive for non-combatants, and unnecessarily permissive for the powerful state army. In fact, as I will argue below, the detachment of *jus ad bellum* from *jus in bello* considerations shields a crucial element in the proportionality analysis from review, because the assessment of whether the damage to non-combatants was excessive or not does not query whether the fighting was at all necessary. This Part questions the logic of the dichotomy by observing, explaining, and justifying the growing weight of *ad bellum* considerations in assessing compliance with *in bello* obligations in the context of asymmetric transnational warfare against non-state actors.

Jus in bello proportionality analysis can take into account not only the *jus ad bellum* question of who is to blame for the *commencement* of hostilities. It can similarly factor in the decision of the parties to the conflict to pursue unrelated goals during battle or prolong the military confrontation instead of negotiating its end. Whereas under traditional *jus in bello*, each party is entitled to pursue its adversary until the latter's total defeat, it is increasingly becoming relevant—at least in political discourse—to inquire into the extent to which the continuation of the fighting is in fact necessary.²⁸ Was it legitimate for the coalition forces during the 1991 campaign to rout the Iraqi army, conquer Iraq, and replace the regime after the repulsion of its forces from Kuwait? Was it legitimate to pursue the Hamas leadership in Gaza in 2008 after it had signaled its willingness to negotiate ceasefire with Israel? Under this analysis, the party who had either no legitimate reason to resort to force or no good reason to pursue it further would be more limited in justifying its exercise of military measures. A major change would ensue were these propositions to become part of

27 On the challenges of asymmetric warfare to the traditional *jus in bello*, see the excellent analysis in Robin Geiß, *Asymmetric Conflict Structures*, 88 INT'L REV. RED CROSS 757 (2006).

28 Note that some commentators believe that the *jus ad bellum* assessment is applicable throughout the military conflict. See, e.g., JUDITH GAIL GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 162 (2004); Christopher Greenwood, *The Relationship Between Jus ad Bellum and Jus in Bello*, 9 REV. INT'L STUD. 221 (1983); Christopher Greenwood, *Jus ad Bellum and Jus in Bello in the Nuclear Weapons Advisory Opinion*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 247, 260-65 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999). Yet others maintain that the *ad bellum* proportionality requirement becomes irrelevant once war is raging. See, e.g., YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 237-42 (4th ed. 2005). But even Greenwood maintains that the *ad bellum* and the *in bello* norms that apply simultaneously are "complementary and coexistent in their application," rather than inter-linked. Greenwood, *supra*, at 265.

the law: the traditional *in bello* proportionality analysis never required the attacker to explain the necessity of attaining the military objective *by military means*; it was a given that military action was a legitimate method to attain the military objective sought by the army; the proportionality assessment was focused on the means, not the ends.²⁹

It is no small thing to advocate bridging the gap between the two areas of the law. There are compelling moral and pragmatic reasons to maintain the “total separation”³⁰ between *jus ad bellum* and *jus in bello*. But these reasons lose force in the context of asymmetric warfare. The need to look beyond strict *jus in bello* law was not lost on different observers and actors, who conflated these distinct fields by injecting *jus ad bellum* considerations into their assessment of the legality of certain uses of force. Indeed, even adherents of maintaining the *ad bellum* and *in bello* separation concede that in public opinion “[f]or better or worse, conflicts continue to be viewed in terms of ‘good’ and ‘evil.’ ... [T]he reality is that such differences, real or perceived, matter.”³¹ Judith Gardam was the first to observe that during the Gulf War of 1991 both the coalition forces and the international community took into consideration the illegality of the Iraqi invasion of Kuwait when assessing the proportionality of the measures taken by the coalition forces. According to Gardam, “In the assessment of proportionality, civilians, and to a lesser extent combatants, of the aggressor state were accorded less weight in the balancing process than combatants of the ‘just side.’”³² Robert Sloane takes a similar approach with regard to the bombing of Serbia and Kosovo in 1999 and the 2006 Lebanon War.³³ Likewise, in the reactions of key observers to the Israeli attack in the Gaza Strip during December 2008-January 2009, a linkage can be discerned between *ad bellum* and *in bello* considerations. When asked whether the United States viewed Israel’s attacks as disproportionate, the U.S. Ambassador to the United Nations linked the two issues:

29 In her dissenting opinion in the *Legality of the Threat or Use of Nuclear Weapons*, Judge Higgins refers to the test of excessive collateral civilian casualties in relation to the military advantage when the military advantage is “related to the very survival of a State or the avoidance of infliction (whether by nuclear or other weapons of mass destruction) of vast and severe suffering on its own population” and adds the test of necessity, namely that “no other method of eliminating this military target be available.” *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 21 (July 8) (dissenting opinion of Judge Higgins). It seems clear that by “no other method” Judge Higgins refers to no other *military* method, rather than no other *peaceful* method.

30 Yoram Dinstein, *The Rule of Law in Conflict and Post-Conflict Situation: Comments on War*, 27 HARV. J. L. & PUB. POL’Y 877, 881-82 (2004).

31 Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F.L. REV. 1, 41 (2008).

32 Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391, 412 (1993).

33 Sloane, *supra* note 9, at 93-103; Enzo Cannizzaro, *Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War*, 88 INT’L REV. RED CROSS 779 (2006).

[W]e believe that Israel has the right to defend itself against [the Hamas] rocket attacks and we understand also that Israel needs to do all that it can to make sure that the impact of its exercise of right of self defense against rockets is as minimal and no affect on the civilian population.³⁴

A responsible legal adviser, noticing this trend, must conclude that the justness of one's cause, as it is perceived by others, influences the assessment of others as to the proportionality of one's military actions. Such an observation is bound to shape the evolution of international practice and, hence, also the law. This is the insight that feeds Michael Reisman's theory of the incident as a decisional unit in international law,³⁵ which gives great weight to the task of observing the responses to the incident. By observing reactions to incidents where various actors assert rights and obligations under international law, it is possible, according to Reisman, to "mak[e] inferences about the normative expectations of those who are politically effective in the world community."³⁶ This may be an exercise in politics rather than black-letter law, but "[i]t is no disservice to law to acknowledge that prescriptions about what one *ought* to do are, alas, only one factor in deciding what one *will* do. Naturally, the weight accorded prescriptive norms will vary with the factual context, the identity of the actors, and the effectiveness of the legal system enforcing the norms."³⁷

Accordingly, a responsible legal adviser must conclude from the reactions to the 1991 Gulf War, Kosovo in 1999, and the warfare in Lebanon and Gaza that the more "just" you are (or continue to be) regarded in *jus ad bellum* terms, the broader your discretion in determining the proportionality of your military actions. Such an observation is bound to shape the evolution of international law. It is my claim, however, that these reactions also reflect sound policy considerations.

Most contemporary scholars balk at such a suggestion.³⁸ There are two main strands to their firm opposition to linking the two bodies of law. First is the argument from dyadic reciprocity: to ensure compliance with *jus in bello*, both sides must enjoy its equal protection. The aggressor will have no incentive to comply with the law if the defender is released from the law's constraints. And because each side tends to view itself as just, unless *jus in bello* is insulated from *ad bellum* considerations, the two

34 Press Release, U.S. Mission to the United Nations in New York, Statement by Ambassador Zalmay Khalilzad, U.S. Permanent Representative, on the situation in Gaza, at the Security Council Stakeout (Dec. 31, 2008), *available at* http://www.usun-ny.us/press_releases/20081231_381.html. Admittedly, most other statements, including those issued by U.S. officials, noted both that Israel acted in self-defense and that it was obliged to avoid disproportionate harm to civilians and created no linkage between the two issues.

35 W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT'L L. 1 (1984); INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS (W. Michael Reisman & Andrew R. Willards eds., 1988).

36 Reisman, *supra* note 35, at 2.

37 *Id.* at 3.

38 See sources cited *supra* note 9.

camps will immediately sink to ruthless brutality.³⁹ This argument is convincing, even morally compelling,⁴⁰ when conditions for reciprocity obtain. But the dyadic reciprocity rationale does not hold in asymmetric warfare. The asymmetric relations in fact incentivize *both* sides to abandon reciprocal considerations: the non-state actor resorts to terrorism, whereas the stronger regular army is tempted to inflict excessive harm upon non-combatants, to conflate military objectives with killing combatants, and to treat captured combatants as outlaws.

Fortunately, instead of through dyadic reciprocity, compliance with the law in asymmetric warfare can be sustained through the growing involvement of third parties in such conflicts with their novel review mechanisms. Their involvement shifts the incentive structure from the traditional dyadic dynamic of reciprocity to a much broader dynamic. The parties to the combat must take the reactions of those third parties into account as the fighting is played out not only bilaterally but also concurrently in the global arena. Toleration or condemnation from key international actors—including public and private actors and observers and foreign and international courts and commissions of inquiry—often proves to be an effective incentive for at least the state party in the conflict and possibly also the irregular forces. The state party will not resort to barbaric tactics regardless what the enemy does if it has incentive to maintain its good reputation and legitimacy globally or to avoid personal criminal sanctions against its officials. Even if during the conflict it is deemed the aggressor, the powerful state party can be expected to seek to preserve or gain a reputation for compliance with the laws of warfare. As George Downs and Michael Jones have pointed out, states have multiple reputations and may use high reputation in one area to compensate for their low reputation in another area.⁴¹ Reputation is also a matter of degree, not a binary quality. Since third-party observers often address both *ad bellum* and *in bello* considerations, the permeation of *ad bellum* considerations into the *jus in bello* proportionality analysis could create a rather sophisticated and effective constraint on the stronger regular army. What the traditional law takes for granted—that *in bello*, all military goals are equally and always legitimate—can now be questioned by the new emerging assessors and indirect enforcers of the law.

The second argument rejecting the proposed linking of *in* and *ad bellum* takes a moral standpoint. The standard argument sets out from the assumption that the detachment of *jus in bello* from *ad bellum* considerations is moral because of the equal protection *jus in bello* accords to combatants and non-combatants regardless of their affiliation. Michael Walzer calls it “the moral equality of soldiers” who have “an equal right to kill.”⁴² Unequal application of the law is problematic because it strips combat-

39 See Dinstein, *supra* note 30, at 891.

40 See Yitzhak Benbaji, *The War Convention and the Moral Division of Labour*, 59 PHIL. Q. 593 (2009).

41 See George W. Downs & Michael A. Jones, *Reputation, Compliance and Development, in THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION* 117 (Eyal Benvenisti & Moshe Hirsch eds., 2004).

42 MICHAEL WALZER, *JUST AND UNJUST WARS* 34, 41 (3d ed. 2000).

ants and non-combatants belonging to the aggressive side of protection, despite their lack of responsibility for their leaders' aggression.⁴³

There are two moral objections to this argument for *jus in bello* equality, which also support the injection of *ad bellum* considerations into *in bello* analysis. The first objection simply refuses to accord equal moral weight to the pursuit of unjust aggression.⁴⁴ The second moral objection challenges the depiction of *jus in bello* as evenly balanced. The focus on the law's impartiality between the different combatants is misleading when one takes into account the disparity in arms between the strong and the weak adversaries. In asymmetric warfare, the two adversaries are actually treated differently by the law's apparent impartiality. The laws of war are inherently biased in favor of the stronger armies that can translate their relative economic power into military gain. The weaker party that fights for a just cause must play by the rules that make its defeat inevitable. The burden of obeying the law—and even the very burden of insulating *jus in bello* from *ad bellum* considerations—rests, therefore, on the shoulders of the weaker side. It is small wonder that the constituency of the weak finds the insulated *jus in bello* morally corrupt. Indeed, weaker communities might be more inclined to subscribe to a law that takes into account also the justness of the cause.

Even those philosophers who objected to moral soundness of the distinction between *in bello* and *ad bellum* accepted that the laws of war must maintain the distinction on pragmatic grounds.⁴⁵ However, as argued above, this moral concession to practical constraints is not imperative in conditions of asymmetric warfare, where dyadic reciprocity disappears and alternative mechanisms for assessing justness of cause exist. The availability of third-party institutions to enforce compliance with the law and identify on which side justice lies releases the moral assessment from the shackles of pragmatic reasoning.

It is crucial to note that the injection of *ad bellum* considerations into the analysis of *jus in bello*'s vaguer concepts increases rather than diminishes limitations on the use of force by the parties. The comprehensive balancing of competing considerations say, for example, in determining excessive harm to civilians or targeting of individuals "for such time as they take a direct part in hostilities"⁴⁶ would not provide either side with greater freedom of action or impose greater risks on non-combatants. Quite the contrary: a party would have to convince third parties that its military operations were aimed at legitimate causes in order to justify the military goals it pursued.⁴⁷

43 But see Benbaji's criticism and alternative explanation, *supra* note 40.

44 See Jeff McMahan, *The Ethics of Killing in War*, 34 *PHILOSOPHIA* 23, 27-28 (2006); see also Thomas Hurka, *Proportionality in the Morality of War*, 33 *PHIL. & PUB. AFF.* 34, 44 (2005).

45 Hurka, *supra* note 44, at 45; McMahan, *supra* note 44, at 729-30.

46 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(3), June 8, 1977, 1125 U.N.T.S. 3.

47 Compare with the Rome Statute's definition, which proscribes "clearly excessive [damage to civilians] in relation to the concrete and direct overall military advantage anticipated."

This fuller account of *jus in bello* proportionality analysis⁴⁸ focuses not only on the necessity of the collateral harm to non-combatants but also on the legitimacy of the pursuit of the military goals. This is not to suggest that whatever an aggressor does would be tainted as a *jus in bello* violation and that its population would become fair game for the enemy. Once thrown into combat, combatants belonging to the aggressor would still be entitled to protect themselves and their population from attacks and their defensive military goals would still be regarded as legitimate. Moreover, the party that initially defended itself against aggression might subsequently overreact or reject opportunities to settle the conflict, at which point, its margin of discretion will become more limited. Obviously, the basic rules of *jus in bello* need not change: the prohibitions on intentionally killing non-combatants, on denying quarter, and so on must remain insulated from *ad bellum* considerations.

Several objections to this development of *jus in bello* can be expected. For example, the reliance on third parties for impartiality and skillfulness in assessing the combatants' actions raises concern, as do the complexity of the combined *ad bellum/in bello* assessment and the practical challenge of addressing the military demand for "a single, widely respected grab-bag of rules that are inherent in the idea of military professionalism."⁴⁹ But these are not insurmountable hurdles. Third parties are simply the best available means for monitoring compliance with the law in asymmetric transnational armed conflicts, and new modalities, like the increasing use of commissions of inquiry, could improve these means. Regular armies can at least partially internalize the risks of misjudgment (their own or the third parties') by relying on professional legal advice before, during, and after conflicts to compensate for the unavailability of clear rules.⁵⁰ Armies also engage some of those external monitors—

Rome Statute of the International Criminal Court art. 8(2)(b)(iv), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90. According to footnote 36 of the International Criminal Court's Elements of Crimes, ICC-ASP/1/3 (part II-B) (Sept. 9, 2002), this provision "does not address justifications for war or other rules related to *jus ad bellum*." See KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 163 (2003).

48 On the difference between "thin" and "thick" meanings of *jus in bello* proportionality, see Nolte, *supra* note 19.

49 Roberts, *supra* note 9, at 962.

50 On the importance of military manuals and their incorporation in domestic law in asymmetric warfare, see W. Michael Reisman & William K. Leitzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict*, in 64 UNITED STATES NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, THE LAW OF NAVAL OPERATIONS 1, 5-6 (Horace B. Robertson, Jr. ed., 1991); Major Jeffrey F. Addicott & Major William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 162-65 (1993); and G.I.A.D. Draper, *Comments on Military Manuals*, in NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 202 (Michael Bothe, Peter Macalister-Smith & Thomas Kurzidem eds., 1990), *reprinted in* REFLECTIONS ON LAW AND ARMED CONFLICTS 115, 117-18 (Michael A Meyer & Hilaire McCoubrey eds., 1998). On operational legal advice and post-hostilities inquiries, see FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT:

governments and civil society—in real time through various channels, ranging from news briefings to video clips on YouTube to fill in information gaps that they view as detrimental. In this context, the weaker party often has access to the global media.

Ultimately, the introduction of *ad bellum* considerations into the *jus in bello* analysis would impose constraints on the stronger army in asymmetric transnational armed conflicts that are similar to those borne by governments fighting internal conflicts: the restrictions deriving from a comprehensive proportionality analysis of collateral civilian harm would include not only the general analysis of “excessive harm” but also the obligation of the regular army to expose its combatants to some risks to reduce the risks of civilians in the area of operations, or the screening of detainees to identify the combatants among them, and the standard of treatment of those detainees identified as combatants.

B. Beyond Effective Control: A More Flexible Test for Responsibility to the Well-Being of Foreign Nationals

Once the invading army has succeeded in occupying foreign territory, it becomes responsible for the welfare of the occupied population. The setting of a clear rule that spells out the circumstances in which occupation starts and the occupant’s ensuing obligations arise was triggered by the traditional perception of symmetric warfare between two regular armies. Each side was assumed to be capable of providing for the needs of the population in the territory under its control. Only when the one side had been driven out and the enemy had taken effective control of the territory would the latter be required to take charge and become responsible for the population in the territory. The underlying presupposition was that the invading army would seek to establish effective control over the enemy territory and would be able to overcome local resistance with mere police force. Under this premise, the local population would remain protected: either by its own government or by the occupant.⁵¹

This presupposition has no force in asymmetric transnational conflicts, in which the foreign invader, fearing resistance by irregulars, has no taste for establishing control with “boots on the ground,” while the weak, war-torn indigenous governments are often unable to provide for their citizens even in areas under their nominal control. The democratization of the means of destruction renders foreign presence “with boots on the ground” in foreign territory more a liability than an asset for the invader. The additional legal obligations imposed by the law on occupation only constitute further reason to avoid taking “effective control” over foreign territory. Thus, modern armies have instead developed remotely controlled equipment to obviate the need for establishing direct presence in foreign territory. As a consequence, the neat legal

ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001); Charles J. Dunlap, Jr., *The Revolution in Military Legal Affairs: Air Force Legal Professionals in 21st Century Conflicts*, 51 A.F. L. REV. 293 (2001); and Stephen A. Myrow, *Waging War on the Advice of Counsel: The Role of Operational Law in the Gulf War*, 7 U.S. A.F. ACAD. J. LEGAL STUD. 131 (1996-1997).

51 See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 4-5 (1993).

distinction between the stages of hostilities and occupation, as well as “effective control” as the key requirement for enhanced obligations of occupants to kick in, leave the indigenous non-combatant population, already exploited by irregular warfare tactics without a designated protector.

That international tribunals help to maintain the disjunction between the conduct of hostilities and the stage when the invading army has established effective control over the occupied area can provide ammunition to critics of these courts who view them as upholding the interests of the more powerful states. The International Court of Justice, in its 2005 judgment in *Case Concerning Armed Activities on the Territory of the Congo*,⁵² raised the bar even higher, going beyond the traditional test of the Hague law in insisting that occupation requires not only the ability to exercise control but also the *actual* (rather than *potential*) substitution of the foreign army’s authority in place of the ousted government.⁵³ A similar reluctance was apparent when the European Court of Human Rights interpreted the European Convention on Human Rights as applicable primarily within the state party territory, due to “the ordinary and essentially territorial notion of jurisdiction”;⁵⁴ and the Court therefore stipulated that “only in exceptional cases ... acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of ... the Convention.”⁵⁵ In the context of an armed conflict, such exceptional cases will include situations “when the respondent State, [directly or via proxies,]⁵⁶ through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.”⁵⁷ Such interpretations relieves strong powers fighting non-state actors in transnational armed conflicts but without exercising “public powers normally to be exercised” by governments, of their obligations as occupants under the law of occupation and of human rights obligations toward the occupied population.⁵⁸

52 *Armed Activities of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 1, ¶¶ 173, 177 (Dec. 19).

53 But see Judge Kooijmans’s criticism in his separate opinion. *Id.* See also my criticism in Eyal Benvenisti, *Occupation, Belligerent*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2009).

54 *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 335, ¶ 61.

55 *Id.* ¶ 67.

56 See *Loizidou v. Turkey* (preliminary objections), 310 Eur. Ct. H.R. (ser. A) (1995); *Loizidou v. Turkey* (merits), 1996-VI Eur. Ct. H.R. 2216 (finding Turkey in control of northern Cyprus); *Ilaşcu v. Moldova*, 2004-VII Eur. Ct. H.R. 179 (2004) (finding Russia in “overall control” over the self-proclaimed “Moldavian Republic of Transdnistria” that had effective control over a part of Moldova).

57 *Banković*, 2001-XII Eur. Ct. H.R. at ¶ 71.

58 They are still responsible for individuals who are under their direct power (like detainees). See *Armed Activities*, 2005 I.C.J. at ¶ 180 (indicating that the foreign army, even if it is not formally an occupant, could still be responsible for specific violations by its troops);

A better reading of the law would not only keep the threshold of occupation low, but also, and even more importantly, recognize obligations to protect non-combatants (and not only to prevent harm to them) also before establishing effective control with boots.

In this context too there are noticeable signs of changing expectations. The Israeli disengagement from Gaza in 2005 was predicated on the requirement of “effective control” as the basis for occupation. Once Israeli forces were no longer present in Gaza, it would cease to be regarded as occupied, the argument went. But this assertion was contradicted by reactions that continued to regard Israel as responsible for the well-being of Gazans. Again, if we take the reactions to the disengagement from Gaza to be an “incident,” we could come to the conclusion that the effective control test may not be conclusive, and Israel, the foreign army, could be regarded as responsible toward the Gazans, the foreign individuals, even though a political boundary separates them.

This proposition would entail that for example when an army takes precautions before launching attack, it must also contemplate the consequences of the attack in terms of the civilian population in the area that will be affected and make plans in advance for emergency assistance, burial of the dead, and provision of food and shelter. Instead of a test of effective control of the landmass, gauged by a sufficient presence of on-the-ground troops and their ability to establish effective administration, the test for enhanced obligations toward the affected population could be based on dominance in the combat zone.

The Israeli High Court judgment could be viewed as a forerunner of this very principle. The Court was reviewing the legality of certain aspects of an on-going intense military operation in Gaza about a year before the disengagement. It described the fighting at that time as follows: “[T]he combat activities are on a large scale. They are intended to damage the terror infrastructure in that area ... The activity taking place there includes battles with armed opponents. Many explosive charges have been directed against the IDF forces, and various weapons are being fired at them.”⁵⁹ And yet despite the fact that this could hardly be described as a situation in which the Israeli army was in “effective control” of the area, the Court held:

It is the duty of the military commander to ensure the supply of water in the area subject to military activities. This duty is not merely the (negative) duty to prevent damage to water sources and to prevent a disruption of the water supply. The duty is also the (positive) duty to supply water if there is a shortage. ... The army must do everything possible, subject to

Issa v. Turkey, 41 Eur. H.R. Rep. 567, ¶¶ 68-71 (2004) (“a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State’s authority and control”). But such specific responsibilities do not amount to responsibilities to provide and protect the indigenous population at large.

59 H CJ 4764/04 Physicians for Human Rights v. Commander of the IDF Forces in the Gaza Strip [2004] IsrSC 58(5) 385, ¶ 1, available at http://elyon1.court.gov.il/Files_ENG/04/640/047/A03/04047640.a03.htm.

the state of the fighting, to allow the evacuation of local inhabitants that [sic] were wounded in the fighting.⁶⁰

Justice Beinisch made no distinction between invasion and occupation:

[A]ny military operation requires advance preparation in order to deal with the basic requirements of the inhabitants who are in the line of fire during the fighting, or who are likely to be hurt by its consequences and ramifications. This advance preparation should take into account the humanitarian obligations to the civilian population, the possibility of harm to it, and the serious consequences that should be prevented or at least minimized. Even if it is not possible to foresee every development that may take place during military operations, there is no doubt that the basic needs of the civilian population which at a time of war are in real danger of damage to life, property and basic subsistence, are known and foreseeable. Therefore, within the framework of the operative planning of a military operation, the army must also take into account that part that guarantees the fulfillment of the humanitarian obligations to the civilian population, which is caught between the cynical exploitation of terrorists without any inhibitions, and exposure to the activity of a military force operating against the terror infrastructure.⁶¹

A more flexible test of applicability of enhanced obligations toward the non-combatant population can be derived not only from *jus in bello* but also from the *jus post bellum* itself. Certainly, the text of the 1907 Hague Regulations endorses the territorial test. The Hague test requires that a territory be “actually placed under the authority of the hostile army [and that the occupation] extends only to the territory where such authority has been established and can be exercised.”⁶² But the text of the Fourth Geneva Convention of 1949 is more amenable to a flexible reading because although it enumerates obligations toward enemy civilians who find themselves “in the hands” of a foreign army,⁶³ it obviously cannot be referring only to actual physical contact. At the very least, an expanded interpretation of being “in the hands” of a foreign army is possible. An army can, for example, expel people from their homes not only by actually placing them on trucks and driving them away but also by instructing them from afar to leave their homes; it would be ridiculous to suggest that Article 49 of that Convention that proscribes deportations of enemy civilians would be inapplicable in such a case.⁶⁴ Similarly senseless would be the interpretation that only armies

60 *Id.* ¶¶ 15, 23

61 *Id.* (Beinisch, J., concurring).

62 Hague Regulations, *supra* note 17, art. 42.

63 Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

64 See the determination of the ICTY Trial Chamber in *Prosecutor v. Naletilić & Martinović*, Case No. IT-98-34-T, Judgment, ¶ 221 (Mar. 31, 2003) (reasoning that “Otherwise civilians would be left, during an intermediate period, with less protection than that attached to them once occupation is established”).

that actually substituted the ousted government in a foreign territory are required to provide food and shelter to persons protected by the Fourth Geneva Convention.⁶⁵

But even a broader re-reading of the old Hague law on occupation could support a broader interpretation of occupation. At the heart of the traditional law of occupation was not only concern for individuals, but also—perhaps primarily—considerations related to maintaining the bases of power of the respective sovereigns. Radical modification of the status quo in the occupied territory could severely undermine the ability of the ousted government to reclaim its authority, as well as undermine stability in neighboring countries. The law of occupation was to a great extent a mutual commitment of sovereigns to maintain the status quo. It was the wartime gap-filler for a system that allocated both authority and responsibility among sovereigns, an idea articulated by Max Huber, who was the sole arbitrator in the famous Las Palmas arbitration of 1928. Sovereignty, according to Huber, is not only a right: “This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory.”⁶⁶ As Reisman has elaborated, the sovereign “has important obligations to other states which are the very basis of its claim to territorial sovereignty.”⁶⁷ The identification of the occupant was, therefore, also key to identifying the actor responsible for acts and omissions emanating from the occupied territory. At the time, effective control was a necessary element for recognizing such responsibility for such responsibility to arise.

Given contemporary technology and weaponry, on the one hand, and the proliferation of weak or failing regimes, on the other, this neat allocation of responsibility based on physical control of territory does not serve global interests, because the author of potential instability (or stability) does not necessarily have actual presence in the territory. There is thus a need to redefine the rules of allocating responsibilities. The most sensible one would seem to be a rule that interprets authority as “power” (rather than “control” or “jurisdiction”), to be determined based on the consequences of the actual exercise of power in a given territory. A state that exercises its power in

65 This point is exemplified by a judgment handed down by the Israeli Supreme Court that ruled that while Israel no longer has effective control over Gaza, it is nevertheless required to ensure the welfare of the inhabitants of Gaza, based on obligations derived from the state of warfare that currently ensues between Israel and the Hamas organization which controls the Gaza Strip; these obligations also stem from the degree of control that the State of Israel has at the border crossings between it and the Gaza Strip; and also from the situation that was created between the State of Israel and the territory of the Gaza Strip after years of Israeli military control in the area, following which the Gaza Strip is now almost totally dependent on Israel for its supply of electricity. See HCJ 9132/07 Ahmed v. Prime Minister, ¶ 12 (Jan. 30, 2008), available at http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.pdf.

66 Island of Palmas Case (U.S. v. Neth.), 2 R. Int'l Arb. Awards 829, 839 (1928).

67 Reisman, *supra* note 13, at 51.

a foreign ungoverned or partly governed land will be regarded as bearing at least the basic obligations borne by an occupant.

It is possible to envision a parallel extension in the law on human rights. The allocation of responsibilities based on effective control has also been founded on physical control either directly or by proxy. But this interpretation, too, derived from a binary conception of the possible bearers of responsibility: either the sovereign or the foreign actor that effectively controls the territory. Such a neat allocation is useful for identifying the responsible actor among several, but it makes limited sense when it leaves none responsible.

Acceptance of more relaxed conditions for the applicability of humanitarian and human rights obligations could be understood from the recent authorization given by the United Nations to states acting against pirates based in Somalia. Security Council Resolution 1851⁶⁸ authorized land-based operations while “*decid[ing]* that ... States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia ... may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea ... ”⁶⁹ The Resolution further added that “any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law.”⁷⁰ No doubt, even if actions against pirates were to take place on Somali territory, it is highly unlikely that foreign states would thereby establish effective control in the traditional sense. Nevertheless, despite the absence of such control, the Security Council has recognized the potential applicability of both humanitarian *and* human rights obligations to operations with respect to pirates or Somali citizens.

IV. Conclusion: The Law on Asymmetric Transnational Armed Conflict as Requiring Distinctive Treatment

The writings of Michael Reisman offer many new ways to reread the laws on war. With the emergence of significant challenges to the regulation of military measures against non-state actors, he has noted, it was only a matter of time until claims to reassess the law would garner attention and even prominence. As Reisman suggests, when discussing the *jus ad bello* aspect of the conflict with non-state actors,

A critical factor in the acceptance and incorporation of a new claim into the corpus of international law is whether it serves the common interests of the aggregate of actors. Thus, the responsibility of the international lawyer here is to assess innovative claims carefully for their contribution, in present and projected contexts, to the essential goals of law.⁷¹

68 S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

69 *Id.* ¶ 6.

70 *Id.*

71 Reisman, *supra* note 1, at 89.

When armed conflicts were the business of professional armies detached from population centers and governed by reciprocity, dichotomies made eminent sense. They enabled enemies to communicate their mutual expectations. Binary messages—“yes” or “no” to the disproportionate killing of non-combatants—were feasible and effective. But most contemporary conflicts are different. The asymmetric conditions require a different type of regulation, one that is closer to the law enforcement model than to the laws of war, because the regulated activity involves non-state parties that challenge the stronger regular army.

The powerful actor in asymmetric warfare must acknowledge its institutional obligations toward the civilians vulnerable to its military might. The discretion it has under the law to prevent “excessive harm” to civilians and to decide which precautions to take before an attack, as well as the discretion it holds with respect to the additional requirements suggested in this essay, require a reliable system of scrutiny that could lower the risk of a *détournement de pouvoir*. Three types of norms exist to restrict this discretion and ensure accountability: remedial norms addressing the consequences of breaching the standards; institutional norms that offer procedural guarantees designed to develop the invading army’s capacity to implement the general norm; and a sub-set of absolute rules prohibiting specific measures, such as using humans as shield or carrying out reprisals against civilians.⁷²

The persistence of binary barriers between the different sets of norms served the interests of the stronger powers to blur their responsibilities beyond their national boundaries. It enabled them to develop the law on internal armed conflict while maintaining their privileged position unfettered by human rights obligations and other responsibilities toward foreign citizens. But the further development of the law does not lie exclusively in their hands, and it is not beyond hope that third parties such as international and national courts will shape the law to adapt it to the unique challenges of asymmetric transnational armed conflicts.

72 Reisman has argued that states should compensate non-combatants victims or their survivors, even if the actions of the damage-feasor did not violate the laws of war. See W. Michael Reisman, *The Lessons of Qana*, 22 YALE J. INT’L L. 381, 397 (1997). For a survey of the different types of norms see Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 97-108 (2006).