

# INVESTIGATION AS LEGITIMISATION: THE DEVELOPMENT, USE AND MISUSE OF INFORMAL COMPLEMENTARITY

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*This article introduces the idea of informal complementarity. Where the principle of complementarity allows the International Criminal Court ('ICC') to assess the admissibility of a particular case, informal complementarity is employed by states. It exists independently (or pre-emptively) of an International Criminal Court investigation. Appeals to informal complementarity speak fluidly of individual criminal proceedings and state-level investigations or inquiries. When a state appeals to informal complementarity, it is not immediately concerned with individual criminal liability or the admissibility of a particular case. Instead, informal complementarity serves to deny the state's non-criminal responsibility. Appeals to informal complementarity constitute an emergent vocabulary. It increasingly features within the lexicon of states that engage in the use of force. It provides a novel means of asserting legitimacy. Within armed conflict, states are supplementing traditional appeals to international law and assertions of legal fidelity with claims of post-hoc legal accountability. Grounded within a study of Israel's engagements with international law during and after the 2008–09 and 2014 Gaza wars, this article demonstrates that the post-war discourse has moved from exclusive assertions of legal compliance to include pronouncements of investigative willingness. Framed around the metaphor of the proleptic show trial, four phases of legal engagement are introduced that collectively constitute both an appeal to informal complementarity and an emergent means of asserting legitimacy.*

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## I INTRODUCTION

On 16 January 2015, Fatou Bensouda, the Prosecutor of the International Criminal Court ('ICC'), began a preliminary examination into the 'situation in Palestine'.<sup>1</sup> This followed years of diplomatic and legal manoeuvring by the Palestinian Authority ('PA'). In the preceding weeks, Palestine had acceded to the *Rome Statute of the International Criminal Court* ('*Rome Statute*')<sup>2</sup> and under art 12(3) of the founding treaty accepted ICC jurisdiction over alleged crimes committed throughout the Palestinian territories since 13 June 2014.<sup>3</sup> Israel had long resisted Palestinian efforts to gain formal international recognition by means other than bilateral peace negotiations and was staunchly opposed to the Court's pending jurisdiction.<sup>4</sup> Predictably, the Israeli response to the Prosecutor's announcement was harsh, constituting a near ontological attack on the Court.<sup>5</sup> Then Foreign Minister Avigdor Lieberman announced plans to lobby Israel's allies to defund the Court and declared that 'Israel will act in the international sphere to bring about the dismantling of this court which represents hypocrisy and gives impetus to terror'.<sup>6</sup>

<sup>1</sup> See Office of the Prosecutor, International Criminal Court, 'The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine' (Press Release, ICC-OTP-20150116-PR1083, 16 January 2015) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>> archived at <<https://perma.cc/7LC5-F9MW>>.

<sup>2</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

<sup>3</sup> Office of the Prosecutor, International Criminal Court, 'The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine', above n 1. See also Mahmoud Abbas, *Declaration Accepting the Jurisdiction of the International Criminal Court* (31 December 2014) <[https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine\\_A\\_12-3.pdf](https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf)> archived at <<https://perma.cc/8U8Q-FA3C>>.

<sup>4</sup> See, eg, Daniel Benoliel and Ronen Perry, 'Israel, Palestine, and the ICC' (2010) 32 *Michigan Journal of International Law* 73, 73–6. See also Mohamed M El Zeidy, 'Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation Under Scrutiny' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 179.

<sup>5</sup> Jodi Rudoren, 'Joining International Criminal Court Wouldn't Guarantee Palestinians a War Crimes Case', *The New York Times* (online), 1 January 2015 <<https://www.nytimes.com/2015/01/02/world/middleeast/court-membership-wouldnt-guarantee-palestinians-a-war-crimes-case.html>>. See also 'Israel Slams International Criminal Court for Letting Palestinians Join: "There is No Palestinian State"', *The National Post* (online), 1 April 2015 <<http://nationalpost.com/news/world/israel-middle-east/israel-slams-international-criminal-court-for-letting-palestinians-join-there-is-not-palestinian-state>>; Khaled Abu Toameh, Tovah Lazaroff and Lahav Harkov, 'Israel Freezes Palestinian Tax Revenues in Response to ICC Membership', *The Jerusalem Post* (online), 3 January 2015 <<http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Israel-freezes-Palestinian-tax-revenues-in-response-to-ICC-membership-386556>> archived at <<https://perma.cc/Z2EF-6P8B>>.

<sup>6</sup> Justin Jalil, 'FM Calls to Dismantle ICC After Launch of "War Crimes" Probe', *The Times of Israel* (online), 16 January 2015 <<https://www.timesofisrael.com/fm-calls-to-dismantle-icc-after-launch-of-war-crimes-probe/>> archived at <<https://perma.cc/W6ZL-M6K5>>.

Within months, however, Israel began to shift its position. Initially, it refused to cooperate with the Court's investigation but later, to the wonderment of many observers, amended its stance. It opened a formal dialogue with ICC officials.<sup>7</sup> In September 2016, Israel acquiesced to the Prosecutor's request to visit the region in coordination with the Court's preliminary inquiry.<sup>8</sup> Israeli officials suddenly appeared to welcome the ICC's pending intervention: 'We have nothing to hide and we would be happy to show the court at The Hague how serious, professional and independent the Israeli legal system is'.<sup>9</sup>

Facing a potential criminal investigation and amidst the fury of condemnation that followed the 2014 Gaza war — Operation Protective Edge — these newfound Israeli assurances allude to both the principle of complementarity and the obligation of states to investigate non-criminal violations of international humanitarian law ('IHL'). These notions are formally and legally distinct. Criminal and civil respectively, each convey an obligation, incentive and prerogative upon the state to address alleged violations of international law that may amount to, *inter alia*, war crimes.<sup>10</sup> Complementarity, as articulated within the *Rome Statute*, structures the relationship between national and international jurisdictions and intends for each system to simultaneously complement the other.<sup>11</sup> It incentivises domestic redress of international crimes by premising international intervention upon the absence of national proceedings.<sup>12</sup>

The obligation to investigate non-criminal violations of IHL compels states to monitor and assess compliance with *their* legal commitments.<sup>13</sup> Each intends to strengthen compliance with international law. Each provides a form of redress should these obligations not be met. In practice, however, states often conflate these principles and reference one, the other, or both to assert the primacy and

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<sup>7</sup> Initially, Israel officials made clear that their dialogue with the Court did not constitute cooperation with the International Criminal Court ('ICC') investigation but this stance would also alter. See generally Barak Ravid, 'Exclusive: Israel Decides to Open Dialogue with ICC over Gaza Preliminary Examination', *Haaretz* (online), 9 July 2015 <<http://www.haaretz.com/israel-news/.premium-1.665172>> archived at <<https://perma.cc/8CNM-PC67>>.

<sup>8</sup> Barak Ravid, 'Netanyahu Weighs International Criminal Court Prosecutors' Request for Israel, West Bank Visit', *Haaretz* (online), 2 September 2016 <<http://www.haaretz.com/israel-news/1.739905>> archived at <<https://perma.cc/MGY9-2RGW>>. See also Barak Ravid, 'ICC Delegation Arrives in Israel for Five-Day "Educational Visit", Won't Conduct Evidence Collection', *Haaretz* (online), 5 October 2016 <<http://www.haaretz.com/israel-news/1.745849>> archived at <<https://perma.cc/EG3R-778D>>.

<sup>9</sup> Ravid, 'Netanyahu Weighs International Criminal Court', above n 8.

<sup>10</sup> Article 5 of the *Rome Statute* explains that only the most serious international crimes that concern the international community as a whole come within the ICC's auspices. The scope of the civil obligation of a state to investigate violations of international humanitarian law is not as clearly defined. See Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 *Harvard National Security Journal* 31, 37–9. See also Françoise J Hampson, 'An Investigation of Alleged Violations of the Law of Armed Conflict' (2016) 46 *Israel Yearbook on Human Rights* 1, 12–16.

<sup>11</sup> See Mohamed M El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff, 2008) 4.

<sup>12</sup> See generally William W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 *Harvard International Law Journal* 53. See also William W Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' (2008) 19 *Criminal Law Forum* 59.

<sup>13</sup> See Hampson, above n 10, 8–9.

appropriateness of employing domestic measures to address incidents that allege individual criminal liability or the violation of the state's non-criminal responsibilities.<sup>14</sup>

Since the PA embarked upon its strategy of 'internationalising' the conflict with Israel — an attempt to shift the conflict from its traditional political paradigm to accentuate the legal questions that accompany the PA's grievances and policies — recourse to the ICC has served as the endgame.<sup>15</sup> Correspondingly, Israel has viewed ICC membership as the most serious and threatening of the various international bodies and treaty regimes in which the Palestinians have pursued membership.<sup>16</sup> As the PA began to formalise their relationships with a host of international bodies and signalled their intention to prosecute the conflict before judicial and quasi-judicial institutions, various commentators wrote about the potential consequences and legal questions resulting from the PA's successive jaunts to The Hague.<sup>17</sup> These queries, however, commonly fixate on formal legal questions. Often, they seek to reach

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<sup>14</sup> Orna Ben-Naftali describes this confluence in relation to the Israeli High Court of Justice's treatment of targeted killing decisions. See Orna Ben-Naftali, 'A Judgment in the Shadow of International Criminal Law' (2007) 5 *Journal of International Criminal Justice* 322, 329. See also Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff, 2008) vol 34, 15; Jennifer Trahan, 'Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression? Considering the Problem of "Overzealous" National Court Prosecutions' (2012) 45 *Cornell International Law Journal* 569, 571. For an account of the well-established position that states are required to investigate alleged violations of international law occurring within their jurisdiction, see Amichai Cohen and Yuval Shany, 'Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts' (2011) 14 *Yearbook of International Humanitarian Law* 37, 41. See also Alon Margalit, 'The Duty to Investigate Civilian Casualties During Armed Conflict and its Implementation in Practice' (2012) 15 *Yearbook of International Humanitarian Law* 155, 160–1; Paul Seils, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes* (International Center for Transitional Justice, 2016) 5–7.

<sup>15</sup> President Mahmoud Abbas announced the Palestinian Authority's intention to 'internationalise' the conflict in a 2011 New York Times op-ed: Mahmoud Abbas, 'The Long Overdue Palestinian State', *The New York Times* (online), 16 May 2011 <<https://www.nytimes.com/2011/05/17/opinion/17abbas.html>>. See also Barak Ravid, 'Israel's Troubles are Just Beginning: Enter the Palestinian "Nuclear Option"', *Haaretz* (online), 1 January 2015 <<http://www.haaretz.com/israel-news/.premium-1.634807>> archived at <<https://perma.cc/UL5P-BA8M>>.

<sup>16</sup> See Orde F Kittrie, *Lawfare: Law as a Weapon of War* (Oxford University Press, 2016) 208.

<sup>17</sup> See, eg, Maryne Rondot, 'The ICC and the Israel–Palestine Conflict: Current Developments, Implications and Future Scenarios' (Report, American Non-Governmental Organizations Coalition for the International Criminal Court, 7 August 2013); Benoliel and Perry, above n 4; El Zeidy, 'Ad Hoc Declarations of Acceptance of Jurisdiction', above n 4; David Luban, 'Palestine and the ICC — Some Legal Questions' on *Just Security* (2 January 2015) <<https://www.justsecurity.org/18817/palestine-icc-legal-questions/>> archived at <<https://perma.cc/Y2QX-H9XK>>; Luis Moreno Ocampo, 'Palestine's Two Cards: A Commitment to Legality and an Invitation to Stop Crimes' on *Just Security* (12 January 2015) <<https://www.justsecurity.org/19046/palestines-cards-commitment-legality-invitation-stop-crimes/>> archived at <<https://perma.cc/3G48-NJUY>>; Alan M Dershowitz, 'Response to My Friend Luis Moreno Ocampo on the International Criminal Court and the Palestinian Situation' on *Just Security* (20 January 2015) <<https://www.justsecurity.org/19248/response-friend-luis-moreno-ocampo-international-criminal-court-palestinian-situation/>>; Bar Levy and Shir Rozenzweig, 'Israel and the International Criminal Court: A Legal Battlefield' (2016) 19(2) *Strategic Assessment* 129; Eugene Kontorovich, 'Israel/Palestine — The ICC's Uncharted Territory' (2013) 11 *Journal of International Criminal Justice* 979.

determinations of legality. They question the appropriate jurisdiction of the Court. And they seek corresponding conclusions regarding the Court's competence, the associated requirements of Palestinian statehood and standing or the formal admissibility of a particular petition.<sup>18</sup>

These debates often allude to (or conflate) the principle of complementarity and the obligation to investigate non-criminal violations of IHL.<sup>19</sup> When Israel reversed its approach to the ICC and spoke of its efforts and capacity to address alleged legal violations, the concurrent discourse assessed the sincerity of these assurances. Israel was accused of 'shielding'.<sup>20</sup> Valentina Azarova, for example, argued that 'Israel, well aware of the complementarity principle, is clearly taking steps to shield itself from ICC investigation'.<sup>21</sup> Azarova cites what she perceives as the tokenistic convictions of Israel Defense Forces ('IDF') soldiers — the Israeli State Comptroller's appeal to international law within an examination of political and military decision-making structures, and the joint reports of the Israeli Ministries of Defense and Foreign Affairs into IDF conduct and the legal questions posed by the 2014 Gaza war — as evidence of the intent to shield.<sup>22</sup>

These initiatives, however, also enable an alternative conclusion. David Luban has explained that

[c]omplementarity would offer Israel a large measure of protection from most war crimes charges. If Israel carries out its own investigations *in good faith*, it would be insulated from most liability — potentially, even if it never indicts anyone.<sup>23</sup>

Luis Moreno Ocampo, the ICC's inaugural Prosecutor, argued that Israel

has the ability to avoid the opening of an ICC investigation. As a court of last resort the ICC can intervene only when there are no genuine national investigations of the crimes under its jurisdiction.<sup>24</sup>

By appealing to the principle of complementarity, Ocampo claimed Israel 'can conduct national investigations of the alleged crimes committed after June 13, 2014 and make the situation inadmissible'.<sup>25</sup>

Divergent interpretations of complementarity's potential application and the sincerity of Israel's domestic accountability measures emerged. One understood complementarity as offering Israel a direct opportunity to avoid ICC scrutiny. It held Israel's practice of self-investigation and willingness to resort to domestic criminal proceedings as satisfying its legal requirements and rendering a

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<sup>18</sup> These debates have taken various approaches but have largely focused on jurisdictional quandaries and associated questions of statehood and eligibility. See Kontorovich, above n 17, 982–3. See also Dershowitz, above n 17. Alternatively, John Quigley has argued in favour of recognised Palestinian statehood for the purposes of satisfying art 12(3) of the *Rome Statute*. See John Quigley, 'The Palestine Declaration to the International Criminal Court: The Statehood Issue' (2009) 35 *Rutgers Law Record* 1, 2, 9.

<sup>19</sup> See Hampson, above n 10, 16.

<sup>20</sup> Valentina Azarova, 'Palestine's Day in Court? The Unexpected Effects of ICC Action' on *Al-Shabaka* (1 April 2015) <<https://al-shabaka.org/briefs/palestines-day-in-court-the-unexpected-effects-of-icc-action/>> archived at <<https://perma.cc/C2EJ-6M5A>>. The notion of shielding is addressed in art 17 of the *Rome Statute* and will be discussed in Part II below.

<sup>21</sup> Azarova, above n 20.

<sup>22</sup> *Ibid.*

<sup>23</sup> Luban, above n 17 (emphasis added).

<sup>24</sup> Moreno Ocampo, above n 17.

<sup>25</sup> *Ibid.*

potential petition to the ICC inadmissible.<sup>26</sup> The other interpreted these same actions as a nefarious strategy designed to insulate the state from the Court's oversight.<sup>27</sup> Should the Palestinian petition to the ICC move beyond the preliminary examination stage, the Prosecutor and Court will have the opportunity to examine the domestic measures undertaken by Israel and determine whether the necessary admissibility requirements have been satisfied.<sup>28</sup> Within this process, the principle of complementarity asks whether domestic proceedings have occurred and, if so determined, may then present contestable legal questions — regarding accusations of shielding and exploring whether Israel's domestic initiatives constitute 'genuine' efforts to investigate or prosecute the alleged international crime(s) — that will likely influence the Court's determination of admissibility.<sup>29</sup>

This article does not, however, attempt to provide answers to these questions. It does not seek to assess whether Israel's efforts following the Gaza wars constituted genuine attempts to investigate and prosecute alleged crimes committed during the conduct of hostilities. Equally, it does not seek to reach a legal determination regarding the admissibility of a Palestinian petition. It assumes an agnostic approach to such formal legal questions.

Instead, this article will observe and explore the significance of *informal* state engagements with the principle of complementarity. It considers how these observed engagements are employed to generate legitimacy and establish an advantageous legal narrative in defence of controversial military actions. Within armed conflicts, states are increasingly supplementing their traditional appeals to international law and assertions of compliance with evidence of investigative willingness. In response to international scrutiny, states are moving from a discourse of legal fidelity to one of post-hoc legal accountability. The traditional refrain of *we respect and adhere to the law* is increasingly coupled with a novel chorus of *we investigate the law*.

Complementarity provides a legal vernacular through which this emerging form of legitimacy may be asserted. This does not suggest that states will feign investigation simply to discharge their legal duty. Frédéric Mégret has questioned the extent to which a state is likely to undertake such explicit forms of shielding. Mégret argues that understandings of shielding, as conveyed within

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<sup>26</sup> See Dershowitz, above n 17.

<sup>27</sup> See B'Tselem — The Israeli Information Center for Human Rights in the Occupied Territories, 'ICC Jurisdiction Cannot Be Denied Based on Israel's Façade of Investigation' (Press Release, 16 July 2015) <[https://www.btselem.org/press\\_releases/20150715\\_israel\\_claims\\_regarding\\_icc\\_authority\\_unfounded](https://www.btselem.org/press_releases/20150715_israel_claims_regarding_icc_authority_unfounded)> archived at <<https://perma.cc/XW7X-37HS>>.

<sup>28</sup> Formally, determinations of admissibility apply to specific cases and not general or preliminary investigations. Often, the Office of the Prosecutor will examine an entire 'situation' before individual cases are identified through the formal accountability processes provided by the *Rome Statute*. See Stigen, above n 14, 91. See also Office of the Prosecutor, International Criminal Court, 'The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine', above n 1.

<sup>29</sup> See *Rome Statute* art 53(1).

art 17 of the *Rome Statute*, often do not fit with reality.<sup>30</sup> If anything, Mégret claims, typical ICC cases

are those in which there will be no investigation whatsoever (regardless of the adequacy of legislation) and where a state evidences no intention of complying with either their *Rome Statute* or general international law obligations to try certain crimes ... In fact, it was always unlikely politically that states would conduct ‘mock’ proceedings for the purposes of holding off ICC jurisdiction. If a state is unwilling, it will generally be unwilling all the way.<sup>31</sup>

Israel does not demonstrate the overt unwillingness that Mégret references. It has long professed at least a rhetorical devotion to the precepts of international law.<sup>32</sup> Much of the literature addressing questions of admissibility, the application of the complementarity principle and potential instances of shielding exhibits a formalist orientation. This is reflective of the approach promoted by the ICC’s jurisprudence and the drafting history of the *Rome Statute*.<sup>33</sup>

While Frédéric Mégret is likely correct — that states will not routinely engage in sham proceedings — this article traces Israel’s employment of informal complementarity when facing alleged violations of international law during or after armed conflicts. These legal appeals occur well before, or in the absence of, formal ICC proceedings. They are not immediately concerned with individual criminal liability or the admissibility of a particular case (which may never occur). Instead, they serve principally, though not wholly, to deny the state’s non-criminal responsibility and substantiate assertions of legitimacy. The state may offer examples of investigations, criminal proceedings and efforts to ensure against impunity. Redress may be provided should an alleged violation be substantiated. These actions are displayed as evidence of legal compliance. They imply legitimacy of process. Collectively, they are required and necessary but may also be duplicitous. Informal appeals to complementarity enable efforts to frame the conflict and present a gainful narrative of legal compliance through fulfilment of the prescribed inspective processes. Within these processes, the state may both interpret international law and adjudge compliance through its advantageously conveyed dictates. Coupled with appeals to the legitimacy of process, this facilitates efforts to exhibit legitimacy of substance.

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<sup>30</sup> Frédéric Mégret, ‘Too Much of a Good Thing? Implementation and the Uses of Complementarity’ in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011) 361, 376.

<sup>31</sup> *Ibid.*

<sup>32</sup> See Israel Ministry of Foreign Affairs, ‘The Operation in Gaza 27 December 2008 – 18 January 2009: Factual and Legal Aspects’ (Report, 29 July 2009) 2 [6], 35 [89] (*‘Operation in Gaza Report’*).

<sup>33</sup> See, eg, William A Schabas, ‘“Complementarity in Practice”: Some Uncomplimentary Thoughts’ (2008) 19 *Criminal Law Forum* 5; William W Burke-White, ‘Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo’ (2005) 18 *Leiden Journal of International Law* 557; Kevin Jon Heller, ‘The Shadow Side of Complementarity: The Effect of Article 17 of the *Rome Statute* on National Due Process’ (2006) 17 *Criminal Law Forum* 255; Federica Gioia, ‘State Sovereignty, Jurisdiction, and “Modern” International Law: The Principle of Complementarity in the International Criminal Court’ (2006) 19 *Leiden Journal of International Law* 1095. For a broad overview of related judicial consideration, see El Zeidy, *The Principle of Complementarity in International Criminal Law*, above n 11, 163–75.

As these observed forms of engagement draw upon the formal language and purpose of complementarity but are likely to occur as a response to broad situations and not the individual cases that are the focus of international criminal law, they are described here as informal legal engagements. Informal complementarity, as it is understood within these pages, occurs independently (or pre-emptively) of an ICC case and beyond the strictures of statutory requirements. Where the *Rome Statute* and international criminal law address the actions of individuals — the unruly soldier, the negligent commander or the unrelenting *génocidaire* — informal complementarity conflates the language of criminal and non-criminal liability under international law. It speaks fluidly of individual criminal proceedings and state-level investigations or inquiries.<sup>34</sup> Despite the orientation of such assertions and the formal distinction between individual liability and state responsibility, collective appeals to informal complementarity provide a vocabulary to diffuse international condemnation of state actions, establish a narrative of legal fidelity, and substantiate the legitimacy of state behaviour and policy within instances of armed conflict.

As a means of achieving particular preordained and didactic purposes, these legal engagements, and the processes through which they are conveyed, may be understood as a form of show trial. This framing is not intended to be unavoidably pejorative. It differs significantly from the famous show trials of the 20<sup>th</sup> century — in Moscow, of Klaus Barbie, Slobodan Milošević, Saddam Hussein and others.<sup>35</sup> Significantly, where general understandings of such trials foretell guilt and conviction, the processes described here ‘show’ compliance and legitimacy. They are not an individual trial in which there is an accused and an accuser. Instead, the state’s efforts to exhibit investigative willingness may be understood as a proleptic show trial. It serves rhetorical purposes in anticipation of legal objections and criticisms so as to answer them pre-emptively. The state places itself on trial, not formally, but through a series of self-investigations and multifaceted legal engagements that are facilitated by, and appeal to, informal complementarity.

To begin to understand the development, use and misuse of informal complementarity, this paper explores recent events in Israel, Palestine and The Hague. These considerations, however, are removed from the formal legal questions posed by the Palestinians’ recent overtures. Instead, this paper wishes to understand how the post-war performance of a proleptic show trial — how appeals to and engagements with informal complementarity — allow Israel to

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<sup>34</sup> Françoise Hampson alludes to this conflation when she notes that the ‘duty to investigate’ is used, confusingly, to describe both monitoring obligations under international humanitarian law (‘IHL’) and criminal investigations. See Hampson, above n 10, 10. In practice, there is of course much necessary overlap. See generally Beatrice I Bonafè, *The Relationship between State and Individual Responsibility for International Crimes* (Martinus Nijhoff, 2009).

<sup>35</sup> See, eg, Max Radin, ‘The Moscow Trials: A Legal View’ (1937) 16(1) *Foreign Affairs* 64; Awol K Allo, ‘The Show in the Show Trial: Contextualising the Politicization of the Courtroom’ (2010) 15 *Barry Law Review* 41, 56; Jeremy Peterson, ‘Unpacking Show Trials: Situating the Trial of Saddam Hussein’ (2007) 48 *Harvard International Law Journal* 257; Gerry Simpson, ‘Politics, Sovereignty, Remembrance’ in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing, 2004) 47; Michael P Scharf, ‘The International Trial of Slobodan Milosevic: Real Injustice or Realpolitik?’ (2002) 8 *ILSA Journal of International & Comparative Law* 289.



move from viewing a Palestinian petition to the ICC as what Avichai Mandelblit, then the Military Advocate General ('MAG'), labelled as an act of war to now welcoming the Court's intervention.<sup>36</sup>

Part II of this article briefly describes the principle of complementarity and the obligation of states to investigate alleged violations of IHL. This is intended to provide context. It distinguishes between the widely understood purpose of complementarity — as applied to determine admissibility under the *Rome Statute* — and the notion of informal complementarity introduced within these pages. Part III situates informal complementarity within the broader discussion of international law's relationship with legitimacy. It acknowledges that when states use force they attempt to exhibit the rightfulness of their actions and recall international law to provide the requisite justification. This Part traces Israel's early appeals to international law. It argues that over a succession of conflicts and ensuing diplomatic contestations of legitimacy, the post-conflict discourse has moved from exclusive assertions of legal compliance. Now it includes pronouncements of investigative willingness. Part IV observes Israel's increasing appeals to informal complementarity following the 2008–09 and 2014 Gaza wars. Framed around the metaphor of a proleptic show trial, this section introduces four broad phases of legal engagement. These are expressive of state recourse to informal complementarity. Part V concludes. It considers the efficacy of appeals to informal complementarity. A tension exists between the desire for states to investigate their conduct upon the use of force and the potential for engagements with complementarity to facilitate something other than what the principle intends.

This may be significant. Appeals to informal complementarity and the preordained and didactic purposes of the proleptic show trial can facilitate state efforts to forestall formalist measures and endeavour to nationalise international scrutiny of state actions during instances of armed conflict or upon the use of force. A significant tension exists between the desire for states to seriously engage with their formal legal commitments, to protect against impunity, and to investigate and redress potential violations of IHL and the capacity of appeals to domestic measures to formalistically assert post-hoc legitimacy. The strategic legal focus exhibited by appeals to the latter, and in neglect of the former, threatens to promote a conception of international humanitarian law that understands breaches as occurrences requiring redress not prevention.

## II THE PRINCIPLE OF COMPLEMENTARITY AND THE OBLIGATION TO INVESTIGATE VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

States often conflate the principle of complementarity with the obligation to investigate violations of IHL.<sup>37</sup> This blurs the formal distinction between

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<sup>36</sup> See Colum Lynch, 'Should Israel Fear ICC War Crimes Prosecutions if Palestine Becomes a State?', *Foreign Policy* (online), 12 September 2011 <<http://foreignpolicy.com/2011/09/12/should-israel-fear-icc-war-crimes-prosecutions-if-palestine-becomes-a-state/>> archived at <<https://perma.cc/U85T-U6LB>>. See also Kittrie, above n 16, 208.

individual responsibility under international criminal law ('ICL') and the non-criminal, civil liability of states for violations of IHL.<sup>38</sup> Despite the formalism of this distinction, these separate means of legal accountability often merge in practice and objective. This is observed in the political speech of states. Increasingly, they apply the language of self-investigation, appeal to the pre-eminence of local measures or promote their capacity to conduct independent and impartial domestic proceedings. The state purports that these efforts protect against ICC scrutiny *and/or* international censure. Merger, however, is also present when either criminal or non-criminal accountability mechanisms are applied in good faith. Much practical overlap exists between these respective legal measures and obligations.<sup>39</sup>

This confluence is exhibited through the political rationale presented by an Israeli official who asserted that,

against the background of both the events of Operation Protective Edge and in the wake of the 2009 United Nations *Goldstone Report* concerning Operation Cast Lead in Gaza [the 2008–09 Gaza war], that a thorough internal investigation will reduce international pressure *and* thwart legal measures against IDF officers abroad.<sup>40</sup>

This appeals to both criminal and non-criminal measures. It offers a means of satisfying an amalgamated notion of international justice. While the convergence of these notions is common — in rhetoric and in practice — it is necessary to understand the formal purpose of both complementarity and the obligation to investigate non-criminal violations of IHL before considering the informal legal engagements identified throughout.

### A *The Principle of Complementarity*

The principle of complementarity serves important and necessary purposes. It works to promote compliance. It encourages the domestication of international law and assuages the sovereignty-based concerns of member states. It ensures an

<sup>37</sup> See Turkel Commission, 'The Public Commission to Examine the Maritime Incident of 31 May 2010 — Second Report: Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law' (Report, February 2013) 85–7 [33] ('*Second Turkel Commission Report*').

<sup>38</sup> The Nuremberg Trials viewed individual prosecutions as an essential means of international legal enforcement. See Judicial Decisions, 'International Military Tribunal (Nuremberg): Judgment and Sentences' (1947) 41 *American Journal of International Law* 172. See also Cohen and Shany, above n 14, 44. See Dianne Orentlicher, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity — Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN ESCOR, 61<sup>st</sup> sess, Agenda Item 17, UN Doc E/CN.4/2005/102/Add.1 (8 February 2005).

<sup>39</sup> See André Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 *International and Comparative Law Quarterly* 615, 615. See generally Bonafè, above n 34; Thomas Franck, 'Individual Criminal Liability and Collective Civil Responsibility: Do They Reinforce or Contradict One Another?' (2007) 6 *Washington University Global Studies Law Review* 567; Willian A Schabas, 'State Policy as an Element of International Crimes' (2008) 98 *Journal of Criminal Law & Criminology* 953.

<sup>40</sup> Amos Harel, 'Preempting The Hague: How the IDF Seeks to Avoid International Legal Action', *Haaretz* (online), 3 January 2015 <<http://www.haaretz.com/israel-news/1.635021>> archived at <<https://perma.cc/3PDH-P2FZ>> (emphasis added).

efficient and co-dependent relationship between national and international jurisdictions.<sup>41</sup> Collectively, it facilitates the primary objective of the ICC. In so doing, it pursues the promise of universal justice by encouraging states to employ domestic measures to prevent impunity for the most serious international crimes.<sup>42</sup>

Complementarity builds upon a succession of developments that occurred throughout the 20<sup>th</sup> century.<sup>43</sup> Most commonly, though, while various notions of complementarity have long existed, it is prominently associated with the ICC and the Court's jurisdictional governance.<sup>44</sup> Though the *Rome Statute* does not explicitly reference complementarity, the principle is articulated throughout art 17.<sup>45</sup> To establish admissibility and balance the co-dependent relationship between national legal systems and the ICC, the article provides a two-step test. First, art 17 determines whether a case has been investigated or prosecuted. If it has not, then the case will be admissible. Second, if a case has been prosecuted at the national level, the ICC may assess the proceedings and assert jurisdiction only if the state is deemed to have been unwilling or unable to *genuinely* conduct proceedings.<sup>46</sup>

<sup>41</sup> Tatiana E Sainati, 'Divided We Fall: How the International Criminal Court Can Promote Compliance with International Law by Working with Regional Courts' (2016) 49 *Vanderbilt Journal of Transnational Law* 191, 200.

<sup>42</sup> Then United Nations Secretary-General Kofi Annan explained the purpose of the ICC as providing 'the promise of universal justice': United Nations Office of Legal Affairs, *Overview: Rome Statute of the International Criminal Court (1998–99)* <<http://legal.un.org/icc/general/overview.htm>> archived at <<https://perma.cc/95XA-FELM>>, quoting United Nations, 'International Criminal Court Promises Universal Justice, Secretary-General Tells International Bar Association' (Press Release, SG/SM/6257, 12 June 1997). See also David Wippman, 'The International Criminal Court' in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) 151, 176; Jeffrey L Dunoff and Joel P Trachtman, 'The Law and Economics of Humanitarian Violations' (2004) 36 *Studies in Transnational Legal Policy* 211, 229–30.

<sup>43</sup> El Zeidy presents four major models of complementarity that have developed throughout the twentieth century. See El Zeidy, *The Principle of Complementarity in International Criminal Law*, above n 11, 6–8.

<sup>44</sup> Mohamed M El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 *Michigan Journal of International Law* 869, 870.

<sup>45</sup> The closest direct reference is found in art 1 of the *Rome Statute*. This holds that:

An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be *complementary* to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

*Rome Statute* art 1 (emphasis added). For a general account of the drafting history of art 17, see John T Holmes, 'The Principle of Complementarity' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute — Issues, Negotiations, Results* (Kluwer Law International, 1999) 41.

<sup>46</sup> *Rome Statute* art 17 holds, inter alia, that:

- (1) ... the Court shall determine that a case is inadmissible where:
  - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
  - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

The *Rome Statute* balances the sovereign concerns of member states with the need to ensure an efficient relationship between the ICC and national jurisdictions. Article 17's inclusion of the unwilling and unable exceptions, however, acknowledged that this procedural requirement — as conveyed by the test's first step — may become susceptible to abuse or manipulation.<sup>47</sup> The 'unwilling' and 'unable' exceptions provide safeguards against such abuse. 'Unable' refers to the criterion of inability. It objectively evaluates a state's capacity to undertake a genuine investigation.<sup>48</sup> This assesses conditions or factors that may bar a state from conducting the necessary proceedings within circumstances where it would otherwise be inclined to meet the requisite standard.<sup>49</sup> Primarily, the 'unable' requirement addresses instances in which a state cannot pursue *genuine* prosecution due to such factors as civil disorder, war, natural disaster or the collapse of a national judicial system.<sup>50</sup>

The criterion of 'unwillingness' is of more immediate relevance.<sup>51</sup> In relation to the focus of this paper, and as Azarova asked following the Palestinians' initiation of proceedings at The Hague, '[t]he question is not whether Israel is "able" to conduct any investigations, but whether it is "willing" to do so'.<sup>52</sup>

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- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
  - (d) The case is not of sufficient gravity to justify further action by the Court.

See also El Zeidy, *The Principle of Complementarity in International Criminal Law*, above n 11, 161; El Zeidy, 'A New Machinery to Implement International Criminal Law', above n 44, 898. See also Darryl Robinson, 'The Mysterious Mysteriousness of Complementarity' (2010) 21 *Criminal Law Forum* 67, 90.

<sup>47</sup> See *Rome Statute* art 17(1)(a). The inclusion of the unwilling or unable standard recognises that although states have the first responsibility and right to prosecute international crimes and that the ICC may only exercise jurisdiction where national legal systems fail to act, exceptions allow the Court to assert jurisdiction when the state 'purport[s] to act but in reality [is] unwilling or unable to genuinely carry out proceedings'. See Office of the Prosecutor, International Criminal Court, 'The Principle of Complementarity in Practice' (Informal Expert Paper, 2003) 3 ('*Complementarity in Practice*'). See also Cohen and Shany, above n 14, 57; Margalit, above n 14, 157–8.

<sup>48</sup> El Zeidy, *The Principle of Complementarity in International Criminal Law*, above n 11, 222. See Margalit, above n 14, 157.

<sup>49</sup> The determination of inability is discussed broadly in *Rome Statute* art 17(3). This holds that:

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

<sup>50</sup> See El Zeidy, *The Principle of Complementarity in International Criminal Law*, above n 11, 222. Further, the ICC held that Libya was unable to conduct an adequate investigation and prosecution of Saif Al-Islam Gaddafi. See Carla Ferstman et al, 'The International Criminal Court and Libya: Complementarity in Conflict' (Meeting Summary, Chatham House, 22 September 2014) 3 <[https://www.chathamhouse.org/sites/files/chathamhouse/field/field\\_document/20140922Libya.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20140922Libya.pdf)> archived at <<https://perma.cc/BT4U-V4KY>>. See also *Prosecutor v Gaddafi (Decision on the Admissibility of the Case)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11-344-Red, 31 May 2013).

<sup>51</sup> Valentina Azarov and Sharon Weill, 'Israel's Unwillingness? The Follow-Up Investigations to the UN Gaza Conflict Report and International Criminal Justice' (2012) 12 *International Criminal Law Review* 905, 910.

<sup>52</sup> Azarova, above n 20.

Ostensibly, this may be answered in the affirmative. Since the commencement of Operation Cast Lead in 2008, Israel has conducted numerous investigations and formed several commissions to evaluate, post-hoc, its conduct and compliance with international law.<sup>53</sup> Yet, Israel's investigative initiatives remain susceptible to the various interpretations that accompanied the Office of the Prosecutor's announcement of a preliminary examination. The ICC has made clear, however, that the simple occurrence of an investigation does not reactively render a case inadmissible.<sup>54</sup> The *Rome Statute* provides further specification. Article 17(2) explains that the Court's Prosecutor may invoke jurisdiction, despite the occurrence of national proceedings, on the basis of the accused state's unwillingness if: the purported national proceeding was made for the purpose of shielding the accused from criminal responsibility; there has been an unjustified delay deemed 'inconsistent with an intent to bring the person concerned to justice'; or if the domestic measures were or are not being conducted independently or impartially.<sup>55</sup>

Mohammed El Zeidy notes that the unwillingness requirement in art 17 is a 'test of the good faith of national authorities'.<sup>56</sup> The article's second paragraph provides preconditions to assure the test's effectiveness.<sup>57</sup> Shielding, conveyed in sub-para (a) and as alluded to by Azarova, is of greatest relevance to the divergent assessments of Israel's post-war accountability measures and investigative efforts. El Zeidy explains that circumstances constituting shielding vary greatly. He cites examples of explicit bad faith, the formal adoption of amnesty laws or (despite Mégret's dismissal)<sup>58</sup> the orchestration of sham proceedings.<sup>59</sup> Still, it is difficult to qualify the totality of circumstances that may

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<sup>53</sup> For example, the Turkel Commission examined both the naval incident and Israel's existing mechanisms for investigating alleged violations of international law during armed conflicts. See Turkel Commission, 'The Public Commission to Examine the Maritime Incident of 31 May 2010 — Part One' (Report, 23 January 2011) ('*First Turkel Report*'). See also *Second Turkel Commission Report*, above n 37. Further, a government commissioned report on the legal status of settlement construction considered both the domestic and international legal status of West Bank settlements. See Levy Commission, 'The Levy Commission Report on the Legal Status of Building in Judea and Samaria' (Report, 21 June 2012) <<http://israelipalestinian.procon.org/sourcefiles/The-Levy-Commission-Report-on-the-Legal-Status-of-Building-in-Judea-and-Samaria.pdf>> archived at <<https://perma.cc/9SLF-WWY5>>. Section C of the 2010 Israeli report into the factual and legal aspects of the 2008–09 Gaza war and chapter seven of the Israeli report published in 2015 following Operation Protective Edge provide detailed accounts of Israel's investigative procedures following alleged violations of IHL and the status of undertaken investigations for alleged incidents having occurred during the respective conflicts. See *Operation in Gaza Report*, above n 32, 76–151 [209]–[430]; Israel Ministry of Foreign Affairs, 'The 2014 Gaza Conflict: Factual and Legal Aspects' (Report, State of Israel, 14 June 2015) 218–41 [409]– [457] ('*2014 Gaza Conflict Report*').

<sup>54</sup> See *Prosecutor v Lubanga (Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04–01/06–2–tEN, 10 February 2006). For discussion of the *Lubanga* decision and a detailed account of the drafting history and development of the unable and unwilling criteria, see El Zeidy, *The Principle of Complementarity in International Criminal Law*, above n 11, 161–70.

<sup>55</sup> *Rome Statute* arts 17(2)(a)–(c).

<sup>56</sup> El Zeidy, *The Principle of Complementarity in International Criminal Law*, above n 11, 168.

<sup>57</sup> *Ibid.*

<sup>58</sup> Mégret, above n 30, 376.

<sup>59</sup> El Zeidy, *The Principle of Complementarity in International Criminal Law*, above n 11, at 175.

constitute shielding.<sup>60</sup> These varied understandings support competing assessments of Israel's domestic accountability measures. They also raise questions about the necessary means of legal compliance and the potential for manipulation. This has caused Kevin Jon Heller to ask 'what kinds of national investigative steps are required to establish that a state is indeed genuinely investigating the suspect targeted by the ICC'?'<sup>61</sup>

The inclusion of complementarity and the art 17 criteria pacified traditional proponents of state sovereignty. This drew upon the foundational contention that a state possesses the right 'to exercise its jurisdiction over crimes committed in its territory'.<sup>62</sup> Historically, states were exceedingly reluctant to dilute sovereign rights and resisted initiatives to delegate their bestowed prerogatives beyond local structures.<sup>63</sup> Efforts, initiated during the inter-war years and under the auspices of the League of Nations, to establish a permanent international criminal court were required to negotiate with a devout Westphalian state system.<sup>64</sup> When such negotiations became formalised in the lead up to the creation of the ICC, the principle of complementarity, as articulated through art 17 of the *Rome Statute*, was the resulting compromise.<sup>65</sup> El Zeidy explains:

In order to create an international criminal court to punish grave crimes of an international character, this historical obstacle had to be overcome. The compromise reached is the principle of complementarity. This principle requires the existence of both national and international criminal justice functioning in a subsidiary manner for the repression of crimes of international law. When the former fails to do so, the latter intervenes and ensures that perpetrators do not go unpunished.<sup>66</sup>

The principle of complementarity also serves a pragmatic function. The ICC has limited resources and cannot possibly provide redress for the totality of

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<sup>60</sup> See *ibid.*

<sup>61</sup> See Kevin Jon Heller, 'Radical Complementarity' (2016) 14 *Journal of International Criminal Justice* 637, 640 (emphasis in original). See also *Prosecutor v Muthaura (Judgement on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011)* (International Criminal Court, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) [40]–[43].

<sup>62</sup> See El Zeidy, 'A New Machinery to Implement International Criminal Law', above n 44, 870. The territoriality principle is a general principle of public international law and holds that a state has the right to prosecute criminal offences that occur within its borders. See *SS Lotus (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10. See also Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 2<sup>nd</sup> ed, 2003) 301.

<sup>63</sup> See Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law* 2, 11–12. See also Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Transnational Publishers, 2002) 8, 25.

<sup>64</sup> Cassese, above n 63; Sadat, above n 63. See also Nidal Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (Ashgate, 2011) 3, 5.

<sup>65</sup> Member states to the ICC have reached opposing interpretations of whether the *Rome Statute* obliges or reaffirms the entitlement of states to invoke jurisdiction following the suspected commission of international crimes. See Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press, 2008) 235–7. See also *Rome Statute* Preamble, para 6.

<sup>66</sup> El Zeidy, 'A New Machinery to Implement International Criminal Law', above n 44, 870.

international crimes that may come within its mandate.<sup>67</sup> Complementarity recognises that in many instances domestic legal systems are best suited to ensure appropriate remedies.<sup>68</sup> In practice, the Court would rather defer to a functional domestic system to provide protection and ensure against impunity.<sup>69</sup> This is consistent with complementarity's primary efforts to encourage states to investigate alleged violations domestically, to ensure that states possess the necessary legal mechanisms to pursue such prosecutions and to address impunity at the national level.<sup>70</sup>

When states, subject to international scrutiny, point towards the various domestic measures that they purport satisfy accountability requirements (and thus preclude admissibility under art 17), they often identify both individual and general investigative procedures. Mireille Delmas-Marty describes the necessity of a formalist distinction between criminal and non-criminal accountability:

An important point to be verified in appreciating a state's willingness to investigate is not only the opening of an investigation into a general situation, but whether or not the investigation is in fact directed toward the persons truly responsible.<sup>71</sup>

While this formal distinction is widely acknowledged, there are practical reasons why evaluations of domestic proceedings may wish, at least initially, to avoid too rigid a distinction.<sup>72</sup> Nevertheless, when states claim legitimacy by employing the language of complementarity, when they reference national-level inquiries into the legality of a general situation, they often conflate the principle of complementarity with the obligation of states to investigate non-criminal violations of IHL.

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<sup>67</sup> See Office of the Prosecutor, International Criminal Court, 'Paper on Some Policy Issues before the Office of the Prosecutor' (Policy Paper, September 2003) 3 <[https://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25--60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](https://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25--60AA962ED8B6/143594/030905_Policy_Paper.pdf)> archived at <<https://perma.cc/VP5E-G52K>>. See also Olympia Bekou, 'Building National Capacity for the ICC: Prospects and Challenges' in Triestino Mariniello (ed), *The International Criminal Court in Search of its Purpose and Identity* (Routledge, 2015) 133, 138–9.

<sup>68</sup> Sainati, above n 41, 204–5.

<sup>69</sup> *Complementarity in Practice*, above n 47, 3.

<sup>70</sup> William Burke-White has termed this approach 'proactive complementarity': Burke-White, 'Proactive Complementarity', above n 12, 54. Moreno Ocampo noted in 2004 that the Office of the Prosecutor would apply a positive approach to complementarity and that 'rather than competing with national systems for jurisdiction, we will encourage national proceedings wherever possible'. See Luis Moreno Ocampo, 'Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps' (Speech delivered at The Hague, 12 February 2004) <[https://www.icc-cpi.int/NR/rdonlyres/0F999F00-A609-4516-A91A-80467BC432D3/143670/LOM\\_20040212\\_En.pdf](https://www.icc-cpi.int/NR/rdonlyres/0F999F00-A609-4516-A91A-80467BC432D3/143670/LOM_20040212_En.pdf)> archived at <<https://perma.cc/7U6L-STZG>>.

<sup>71</sup> See Mireille Delmas-Marty, 'Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC' (2006) 4 *Journal of International Criminal Justice* 2, 5.

<sup>72</sup> See El Zeidy, *The Principle of Complementarity in International Criminal Law*, above n 11, 166–7. See also *Second Turkel Commission Report*, above n 37, 147 [109].

B *The Obligation to Investigate Non-Criminal Violations of International Humanitarian Law*

International criminal law is premised on the belief that ‘only by punishing individuals who commit such crimes can the provisions of international law be enforced’.<sup>73</sup> IHL provides states with the obligation to investigate non-criminal violations. Prominently, violations of IHL involve individual conduct.<sup>74</sup> The *Geneva Conventions*, however, address both individual criminal liability and the civil responsibility of states for the commission of international crimes and wrongful acts.<sup>75</sup> Marco Sassòli notes that this recalls IHL’s origins of governing relations between belligerent states: ‘violations are attributed to States and measures to stop, repress and redress them must therefore be directed against the State responsible for the violations’.<sup>76</sup>

The relationship between state and individual responsibility was succinctly distinguished by the International Law Commission (‘ILC’). During the arduous codification process of its *Draft Articles on State Responsibility*, the ILC declared:

the criminal responsibility of individuals does not eliminate the international responsibility of States for the consequences of acts committed by persons acting as organs or agents of the State. But such responsibility is of a different nature and falls within the traditional concept of State responsibility. The criminal responsibility of the State cannot be governed by the same régime as the criminal responsibility of individuals ...<sup>77</sup>

This dual focus is reflective of international practice. Countless historical examples demonstrate that, most often, international crimes and individual violations of IHL feature substantial state involvement.<sup>78</sup>

It is widely understood that states hold a legal duty to investigate their conduct for non-criminal or civil breaches of IHL. Positivist readings of IHL do not, however, provide substantive guidance regarding the content or cause of the

<sup>73</sup> Judicial Decisions, above n 38, 221. As part of the fulfillment of these obligations, a state may be required to conduct a criminal investigation. Although this may contribute to the conflation of the two legal frameworks (criminal and civil), they remain both formally and substantively separate. See Hampson, above n 10, 4–5.

<sup>74</sup> See Marco Sassòli, ‘State Responsibility for Violations of International Humanitarian Law’ (2002) 84 *International Review of the Red Cross* 401, 401–2.

<sup>75</sup> Ibid. Reference to state obligation is found in art 51 of the first *Geneva Convention* and is repeated in arts 52, 131 and 158 of the second, third and fourth *Geneva Conventions* respectively. See *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 51 (‘*Geneva Convention I*’); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) art 52 (‘*Geneva Convention II*’); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 131 (‘*Geneva Convention III*’); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 148 (‘*Geneva Convention IV*’).

<sup>76</sup> Sassòli, above n 74, 402.

<sup>77</sup> ‘Report of the International Law Commission to the General Assembly on the Work of its Thirty-Sixth Session’ [1984] II(2) *Yearbook of the International Law Commission* 11. See also Bonafè, above n 34, 33.

<sup>78</sup> Bonafè, above n 34, 71.



required investigations.<sup>79</sup> Instead, the substance and source of the obligation to investigate is derived from international human rights law.<sup>80</sup> In *Velásquez Rodríguez v Honduras*, the Inter-American Court of Human Rights interpreted the requirement that states ‘ensure’ the rights within the *American Convention on Human Rights*<sup>81</sup> as presenting an affirmative duty to ‘prevent, investigate and punish any violation of the rights recognized by the Convention’.<sup>82</sup> Several international human rights treaties, including the *International Covenant on Civil and Political Rights* (‘ICCPR’)<sup>83</sup> and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (‘CAT’),<sup>84</sup> contain language obliging states to undertake investigations of alleged legal violations.<sup>85</sup> In its art 2 jurisprudence, the European Court of Human Rights has held that the right to life imposes positive obligations. These include a duty to investigate deaths that may have occurred in breach of the *European Convention of Human Rights*.<sup>86</sup> Further, in *Resolution 60/147* the General Assembly affirmed the

<sup>79</sup> See Jean-Marie Henckaerts and Louise Doswald-Beck, ‘Customary International Humanitarian Law: Rules’ (Cambridge University Press, 2005) vol 1, 530–3. Article 4(1) of the *Articles on the Responsibility of States for Internationally Wrongful Acts* holds that:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

*Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56<sup>th</sup> sess, 85<sup>th</sup> plen mtg, Agenda Item 162, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex (‘*Responsibility of States for Internationally Wrongful Acts*’) art 4(1). See also Hampson, above n 10, 12. See generally Sassòli, above n 74.

<sup>80</sup> See generally Naomi Roht-Arriaza, ‘State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law’ (1990) 78 *California Law Review* 451. See also Michael Scharf, ‘The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes’ (1996) 59 *Law and Contemporary Problems* 41.

<sup>81</sup> *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

<sup>82</sup> See *Velásquez-Rodríguez v Honduras (Judgement)* (1988) Inter-Am Court HR (ser C) No 4, [166] (emphasis added). See also Roht-Arriaza, above n 80, 469–74.

<sup>83</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).

<sup>84</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (‘CAT’).

<sup>85</sup> See Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation on States Parties to the Covenant*, 80<sup>th</sup> sess, 2187<sup>th</sup> mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [8]. See also CAT art 12. For an overview of these developments, see Marzuki Darusman, Steven R Ratner and Yasmin Sooka, ‘Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka’ (Report, United Nations Secretary-General, 31 March 2011) 73–5 [262]–[269] (‘*Panel of Experts on Accountability Report*’).

<sup>86</sup> The Court held that:

a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art 2), read in conjunction with the State’s general duty under Article 1 (art 2+1) of the *Convention* to ‘secure to everyone within their jurisdiction the rights and freedoms defined in [the] *Convention*’, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.

requirement that states investigate cases of gross violations of human rights and humanitarian law.<sup>87</sup> Both the International Committee of the Red Cross and the United Nations Secretary-General's Expert Panel on Accountability in Sri Lanka have found that the obligation to investigate serious violations of human rights and IHL 'are now buttressed by a generation of state practice' and form part of customary international law.<sup>88</sup>

Françoise Hampson explains that a state's obligation to investigate and monitor civil or non-criminal violations of IHL is influenced by the requirements that states 'respect' and 'ensure respect' for the *Geneva Conventions*.<sup>89</sup> This supposes a state obligation to both prevent violations and to act should a violation occur.<sup>90</sup> While the regulation of grave breaches instils individual criminal responsibility,<sup>91</sup> each of the *Conventions* have common language requiring that a 'High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present *Convention* other than the grave breaches'.<sup>92</sup> The requirement to suppress transcends war crimes and the liability of individuals. As Hampson notes:

In order to suppress something, States need to know whether it is occurring. This would appear to require some form of monitoring. If, as a result of monitoring, a State determines that a violation of the *Conventions* is occurring, it is required to suppress it. This may be by means of criminal proceedings but, unlike the case with 'grave breaches', it does not have to be by such means. The only obligation is to put an end to the behaviour in question.<sup>93</sup>

To ensure respect, under Common Article 1, and to satisfy treaty provisions requiring the 'prevention', 'suppression' and 'repression' of violations, states are

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*McCann and Others v The United Kingdom* [1995] 21 Eur Court HR 1, 41 [161], citing *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). See generally Alastair Mowbray, 'Duties of Investigation under the *European Convention on Human Rights*' (2002) 51 *International and Comparative Law Quarterly* 437.

<sup>87</sup> See *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN GAOR, 60<sup>th</sup> sess, Agenda Item 71(a), UN Doc A/RES/60/147 (21 March 2006).

<sup>88</sup> *Panel of Experts on Accountability Report*, above n 85, 75 [269]. See Henckaerts and Doswald-Beck, above n 79, 607.

<sup>89</sup> Common Article 1 holds that: 'The High Contracting Parties undertake to respect and to ensure respect for the present *Convention* in all circumstances'. See *Geneva Convention I* art 1. See Hampson, above n 10, 12.

<sup>90</sup> Hampson notes that this view is affirmed by the obligation to disseminate the treaty provisions of the *Geneva Conventions* as conveyed by arts 47, 48, 127 and 144 of the four *Conventions* respectively: Hampson, above n 10, 12. See *Geneva Convention I* art 47; *Geneva Convention II* art 48. The wording of the obligation is extended by both the third and fourth *Conventions*. See *Geneva Convention III* art 127; *Geneva Convention IV* art 144. See also Advisory Service on International Humanitarian Law, 'The Obligation to Disseminate International Humanitarian Law' (Fact Sheet, International Committee of the Red Cross, 28 February 2003) <<https://www.icrc.org/en/document/obligation-disseminate-international-humanitarian-law-factsheet>> archived at <<https://perma.cc/9G4S-P2W8>>.

<sup>91</sup> Hampson, above n 10, 13.

<sup>92</sup> *Geneva Convention I* art 49; *Geneva Convention II* art 50; *Geneva Convention III* art 129; *Geneva Convention IV* art 146. See also Hampson, above n 10, 13.

<sup>93</sup> Hampson, above n 10, 14.

required to monitor the function of their military systems and investigate alleged violations that may occur within an armed conflict.<sup>94</sup>

As with the principle of complementarity, the obligation to investigate non-criminal violations serve important and necessary purposes. These should be encouraged and enabled. Both individuals and states, however, may be reluctant to assume such responsibility. Frequently, when facing accusations of serious legal violations, states reactively deny such accusations.<sup>95</sup> They argue and interpret the relevant provisions of international law and present corroborating facts to support their claim and assert legitimacy.<sup>96</sup> These traditionally structured forms of legal argumentation remain ever-present features of armed conflicts. They manifest throughout the discourse that follows the use of force. States, however, are increasingly supplementing their international legal engagements with pre-emptive and informal appeals to the principle of complementarity and the obligation to investigate non-criminal violations of IHL. Investigations are conducted for various reasons and often in good faith.<sup>97</sup> However, the informal appeals to complementarity identified here are intended, principally, to generate legitimacy upon the use of force and through the legal discourse that follows the cessation of hostilities.

### III INTERNATIONAL LAW, LEGITIMACY AND THE USE OF FORCE

‘You cannot win a war today without simultaneously keeping legitimacy inside the country and around the world’, declared Mandelblit following the Second Lebanon War in 2006.<sup>98</sup> States have long acknowledged an interconnectedness between legitimacy and the use of force.<sup>99</sup> M Cherif Bassiouni dates this relationship to antiquity.<sup>100</sup> From this time, states have coupled initiations of force with appeals to the legitimacy of their actions.<sup>101</sup> International relations scholars ponder the source, purpose and effects of these

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<sup>94</sup> Ibid 15. See also *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) arts 57, 87, 91 (*‘Additional Protocol I’*); Ian Park, ‘Joint Series on International Law and Armed Conflict: The Obligation to Investigate Violations of IHL’ on *EJIL Talk!* (30 September 2016) <<http://www.ejiltalk.org/joint-series-on-international-law-and-armed-conflict-the-obligation-to-investigate-violations-of-ihl/>>.

<sup>95</sup> Cohen and Shany explain that states are reluctant to prosecute persons who acted in their name or pursuant to direct orders. See Cohen and Shany, above n 14, 77–8.

<sup>96</sup> See David Kennedy, *Of War and Law* (Princeton University Press, 2006) 7–8.

<sup>97</sup> Ibid 34.

<sup>98</sup> See Alan Craig, *International Legitimacy and the Politics of Security: The Strategic Deployment of Lawyers in the Israeli Military* (Lexington Books, 2013) 7, quoting Military Advocate General (‘MAG’) Avichai Mandelblit’s testimony before the Winograd Commission.

<sup>99</sup> See David Armstrong and Theo Farrell, ‘Force and Legitimacy in World Politics: Introduction’ (2005) 31 *Review of International Studies* 3, 3. See generally Jeremy Black, ‘War and International Relations: A Military-Historical Perspective on Force and Legitimacy’ (2005) 31 *Review of International Studies* 127, 127.

<sup>100</sup> M Cherif Bassiouni, ‘Terrorism: The Persistent Dilemma of Legitimacy’ (2004) 36 *Case Western Reserve Journal of International Law* 299, 299.

<sup>101</sup> See *ibid.* See also Armstrong and Farrell, above n 99, 8–9; Dino Kritsiotis, ‘The Power of International Law as Language’ (1998) 34 *California Western Law Review* 397, 402; Richard Falk, ‘Legality and Legitimacy: The Quest for Principled Flexibility and Restraint’ (2005) 31 *Review of International Studies* 33, 36–44.

assertions.<sup>102</sup> Though these considerations are beyond the present scope, a broad recognition has emerged, that from at least the latter half of the 20<sup>th</sup> century, international law influences appeals to legitimacy. It now provides states a vocabulary to justify (or contest) the use of force.<sup>103</sup>

It is, of course, possible to distinguish between legitimacy and legality.<sup>104</sup> However, since the post-World War II shift towards international institutions, the *Charter of the United Nations* ('*UN Charter*') prohibition of the use of force<sup>105</sup> and the dissemination of IHL, the embrace of legal argument has become 'one of the staple features of state practice on the use of force, so that when states use force against other states, they also *use* international law to define and defend, argue and counter-argue, explain and rationalise their actions'.<sup>106</sup> This goes beyond positivist appeals to the specific provisions that express the limited grounds upon which states may resort to force and which govern, often in great detail, the means by which such force may be applied.<sup>107</sup> Christian Reus-Smit notes that when states began codifying the principles that govern the conduct of hostilities, they were not only enshrining rules. They also established a framework of what constituted rightful state actions within the international sphere.<sup>108</sup> Accordingly,

[i]nternational law has become a site for the social construction of models of legitimate agency and action, and the models it enshrines have become key justificatory touchstones in the constitutive political struggles of global society.<sup>109</sup>

Law is also framed as an excuse. Critical legal scholars have traced the evolution of law's humanising endeavours.<sup>110</sup> Premised on the assumption that legal war is a more humane exercise than illegal war, legalised contestations have long provided states a means of explaining the need for war and excusing

<sup>102</sup> See generally Ian Clark, *Legitimacy in International Society* (Oxford University Press, 2005). See also Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press, 1999); David Beetham, *The Legitimation of Power* (Palgrave Macmillan, 2<sup>nd</sup> ed, 2013); Allen Buchanan, *Human Rights, Legitimacy, and the Use of Force* (Oxford University Press, 2010); Andrew Hurrell, *Legitimacy and the Use of Force: Can the Circle Be Squared?* (2005) 31 *Review of International Studies* 15.

<sup>103</sup> See Michael Byers, *War Law: Understanding International Law and Armed Conflict* (Grove Press, 2005) 3, 43.

<sup>104</sup> See generally Nicholas Rengger, 'The Judgment of War: On the Idea of Legitimate Force in World Politics' (2005) *Review of International Studies* 143. See also Martti Koskenniemi, 'Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons' (1997) 10 *Leiden Journal of International Law* 137.

<sup>105</sup> *Charter of the United Nations* art 2(4) ('*UN Charter*').

<sup>106</sup> Dino Kritsiotis, 'When States Use Armed Force' in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) 45, 47 (emphasis in original). See also Jennifer Welsh, *The Return of History: Conflict, Migration, and Geopolitics in the Twenty-First Century* (Anansi Press, 2016) 64.

<sup>107</sup> David Kennedy, for example, explains that for the past century law and international law have been in revolt against formalism. Law and legal argument, Kennedy claims, have successfully become a 'practical vocabulary for politics'. See Kennedy, above n 96, 45.

<sup>108</sup> Christian Reus-Smit, 'The Politics of International Law' in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) 14, 20.

<sup>109</sup> *Ibid.*

<sup>110</sup> See generally Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 *Harvard International Law Journal* 49.

particular actions taken during combat.<sup>111</sup> Inside the domestic polity and throughout the international sphere, the legal regulation of war provides states with, as David Kennedy identified, a means of privileging the use of force.<sup>112</sup>

Adherents to various strands of international relations question the association between international law and politics. Realist, rationalist and constructivist approaches offer differing accounts of international law both generally and in times of armed conflict.<sup>113</sup> Though a diversity of motivational perspectives exist, understandings of international law and the use of force mostly accept that states *do* appeal to the former upon engagement of the latter.<sup>114</sup> Despite international law's acknowledged weaknesses — its deficient enforcement mechanisms and the absence of formal requirements compelling legal justifications — states willingly invoke law.<sup>115</sup> Numerous observed instances of state recourse to legal argument substantiate the self-reliant nature of international law's relationship with the politics and legitimacy of armed conflict. This does not endorse the validity of, or suggest parity between, particular legal claims. Such appeals to international law are commonly contested, may be offered in bad faith or strain plausible interpretations beyond reasonable recognition.<sup>116</sup>

Notwithstanding tenuous appeals and alongside particular rules, customs and treaty provisions, international law provides 'a framework and vocabulary for states to imagine, negotiate and realise social relations'.<sup>117</sup> Yet war's inevitable tragedy induces heightened controversy. Cicero declared *inter arma enim silent leges* (in war law is silent) but Grotius contended that war is 'so horrible, that nothing but the highest necessity or the deepest charity can make it be right'.<sup>118</sup> Silence has long given way to contestations of legitimacy. Claims that war or the use of force are 'right' now assume a familiar argumentative structure. Andrew Hurrell notes that the state's reliance on law is not a result of the law's (perceived) capacity to unambiguously determine the legality of a military action.<sup>119</sup> Instead, reliance reflects law's internal structure, which contains

well-established patterns of argumentation about the use of force, about the rules that have governed and might govern the use of force, about the ways political interests can be expressed in a common language of claim and counter-claim.<sup>120</sup>

Similarly, Kennedy has described war as both a fact and an argument.<sup>121</sup> Within the argument that accompanies the use of force, international law has

<sup>111</sup> Ibid 50. See also David Kennedy, 'Lawfare and Warfare' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 158.

<sup>112</sup> Kennedy, 'Lawfare and Warfare', above n 111, 160.

<sup>113</sup> For an overview of these perspectives, see Christian Reus-Smit, above n 108, 15–24.

<sup>114</sup> Kritsiotis, 'When States Use Armed Force', above n 106, 46.

<sup>115</sup> Kritsiotis, 'The Power of International Law as Language', above n 101, 402.

<sup>116</sup> See *One Humanity: Shared Responsibility — Report of the Secretary-General for the World Humanitarian Summit*, UN GAOR, 70<sup>th</sup> sess, Agenda Item 73(a), UN Doc A/70/709 (2 February 2016) 13 [48]. See also Kritsiotis, 'The Power of International Law as Language', above n 101, 402; Welsh, above n 106, 89–90; Byers, *War Law*, above n 103, 3.

<sup>117</sup> Armstrong and Farrell, above n 99, 10.

<sup>118</sup> M Tulli Ciceronis, 'Pro T Annio Milone: Oratio ad Iudices' in F H Colson (ed), *Cicero pro Milone* (MacMillan, 1893) 1, 5; Hugonis Grotii, *De Jure Belli et Pacis* (Cambridge University Press, 1853) vol 2, 442.

<sup>119</sup> Hurrell, above n 102, 24.

<sup>120</sup> Ibid 24–5.

become ‘the rhetoric through which we debate and assert the boundaries of warfare’.<sup>122</sup> These appeals to international law, however, serve divergent purposes. Kennedy contends that if law can

increase friction by persuading relevant audiences of a campaign’s illegitimacy, it can also grease the wheels of combat. Law is a strategic partner for military commanders when it increases the perception of outsiders that what the military is doing is legitimate. And of course, it is a strategic partner for the war’s opponents when it increases the perception that what the military is doing is not legitimate.<sup>123</sup>

Proponents and opponents of war *may* possess symmetrical access to the legal vernacular that structures contestations of legitimacy. However, as Max Weber famously opined, only states successfully claim a monopoly on the legitimate use of force.<sup>124</sup> Corresponding attempts to demonstrate the legitimacy of the use of force by state actors traditionally appeal, often separately, to both *jus ad bellum* and *jus in bello*. Israel has promoted the formality of this distinction.<sup>125</sup> In accordance, Israel claims that evaluations of military conduct must observe this division to ensure that an alleged violation does not unduly influence overall assessments of a military operation’s legitimacy.<sup>126</sup>

Collectively, states appeal to both the cause of war and the means through which it is conducted. This intends to demonstrate the legitimacy of their actions and the consistency of their methods with the requirements of international law. The common refrain of *we obey the law* underscores specific arguments. The public and diplomatic discourses accompanying the use of force emphasise the *general* legitimacy (or legality) of the overall operation. In accordance with the prohibition on the use of force, states have traditionally appealed, under *jus ad bellum*, to the self-defence exception contained within the *UN Charter*. On countless occasions, from the *Caroline* incident to the US-led wars in Iraq and Afghanistan, states have followed a familiar argumentative structure. This recalls international law and self-defence, it demonstrates legal compliance and asserts legitimacy.<sup>127</sup> This traditional structure of legal argument, in justification of the use of force, remains a prominent feature of contemporary conflicts. States, however, are increasingly coupling accounts of legal adherence, to *jus ad bellum*, with appeals to the legitimacy of their actions, through *jus in bello*.

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<sup>121</sup> Kennedy, above n 96, 5.

<sup>122</sup> David Kennedy, ‘Modern War and Modern Law’ (2007) 16 *Minnesota Journal of International Law* 471, 473.

<sup>123</sup> Kennedy, above n 96, 41.

<sup>124</sup> Tony Waters and Dagmar Waters, *Weber’s Rationalism and Modern Society: New Translations on Politics, Bureaucracy, and Social Stratification* (Palgrave Macmillan, 2015) 136.

<sup>125</sup> See generally Robert D Sloane, ‘The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War’ (2009) 34 *Yale Journal of International Law* 47, 48–9.

<sup>126</sup> See *Operation in Gaza Report*, above n 32, 12–13 [35].

<sup>127</sup> See, eg, Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010) 289–99. See also Michael Byers, ‘Not Yet Havoc: Geopolitical Change and the International Rules on Military Force’ (2005) 31 *Review of International Studies* 51, 51–63.

### A *Israel's Early Appeals to International Law and Legitimacy*

Israel has long viewed the relationship between diplomacy — including its legal aspects — and security policy as a strategic calculation. David Ben-Gurion described this relationship. He explained that ‘[t]he Minister of Defense is authorized to make defense policy; the role of the Foreign Minister is to explain that policy’.<sup>128</sup> Israel’s earliest appeals to the legitimacy of its military actions primarily invoked self-defence. Upon the use of force, Israel employed the language of art 51 of the *UN Charter* to purport legal compliance.<sup>129</sup> As many states claim, the use of force was presented as a final resort, a demand of necessity. Although war has been a palpable feature of the Israeli–Arab conflict since the Mandate era and despite cyclical episodes of violence, Israeli and Palestinian actors remained cognisant of the evolving legal framework that rapidly formalised in the latter half of the 20<sup>th</sup> century.<sup>130</sup>

In 1948 Israel achieved statehood and a war began.<sup>131</sup> In response to the Security Council, Israeli officials sought to illustrate the conformity of their actions with the *UN Charter*.<sup>132</sup> Asked whether its military forces were operating beyond its borders, the Provisional Government of Israel replied that

[n]o area outside of Palestine is under Jewish occupation but sallies beyond the frontiers of the State of Israel have occasionally been carried out by Jewish forces for imperative military reasons, and as part of an essentially defensive plan.<sup>133</sup>

Undertaken military actions were presented in accordance with international law. They appealed to the self-defence exception contained in art 51 of the *UN Charter* and purported to respect the prohibition on the use of force within art 2(4).<sup>134</sup> Collectively, Israel claimed that its military actions were taken ‘in order to repel aggression, as part of our essentially defensive plan, to prevent these areas being used as bases for attacks against the State of Israel’.<sup>135</sup> They were intended to

protect Jewish population, traffic and economic life, including the protection of those Jewish settlements outside the area of the State where, owing to the absence

<sup>128</sup> Dan Horowitz, ‘The Israeli Concept of National Security’ in Avner Yaniv (ed), *National Security and Democracy in Israel* (Lynne Rienner, 1993) 11, 12. See generally Avi Shlaim, *The Iron Wall: Israel and the Arab World* (W W Norton, 2000).

<sup>129</sup> Article 51 of the *UN Charter* states, inter alia, that ‘[n]othing in the present *Charter* shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security’. See *UN Charter* art 51.

<sup>130</sup> See John Strawson, *Partitioning Palestine: Legal Fundamentalism in the Palestinian–Israeli Conflict* (Pluto Press, 2010) 104, 126.

<sup>131</sup> See generally Benny Morris, *1948: A History of the First Arab–Israeli War* (Yale University Press, 2008).

<sup>132</sup> See *Questions Addressed to the Governments of Egypt, Saudi Arabia, Transjordan, Iraq, Yemen, Syria and Lebanon, to the Arab Higher Committee and to the Jewish Authorities in Palestine Pursuant to the Decision of the Security Council Taken at the 295<sup>th</sup> Meeting Held on 18 May 1948*, UN SCOR, 295<sup>th</sup> sess, UN Doc S/753 (18 May 1948).

<sup>133</sup> *Letter Dated 18 May 1948 from the Assistant Secretary-General for Security Council Affairs Addressed to the Jewish Agency for Palestine, and Reply Dated 22 May 1948 Addressed to the Secretary-General Concerning the Questions Submitted by the Security Council*, UN SCOR, UN Doc S/766 (22 May 1948) 4.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

of any duly constituted authority and the failure to implement the guarantees and safeguards provided for under the General Assembly Plan, life and property are in imminent danger.<sup>136</sup>

Israel's justifications directly appealed to international law and asserted compliance with its newly codified dictates. Significant segments of the international community were generally (though not completely) supportive of Israel's defensive claims and the Security Council neither formally endorsed nor directly rebuked them.<sup>137</sup>

Nearly two decades later, in reaction to the events of June 1967, Israel displayed a similar reliance upon the language of self-defence and international law. Many in Israel believed that the nation verged on the brink of annihilation prior to its swift victory in the 1967 war.<sup>138</sup> Despite Israel's newfound control of the West Bank (including East Jerusalem), the Gaza Strip, the Sinai Peninsula and the Golan Heights, the Security Council moderated its initial engagements with the political and legal questions that accompanied the regional transformation.<sup>139</sup> Throughout the international community, however, Israel faced growing condemnation. This too harnessed an international legal vocabulary. It appealed to the *UN Charter*, claiming that Israeli actions violated the *UN Charter's* prohibition on the aggressive use of force.<sup>140</sup> The Israeli response was immediate and decisive. Abba Eban, addressing the Security Council, purported that Israel's actions were consistent with international law. They were presented as legitimate and as a necessary response to an overwhelming threat:

as time went on, there was no doubt that our margin of general security was becoming smaller and smaller. Thus, on the morning of 5 June, when Egyptian forces engaged us by air and land, bombarding the villages of Kissufim, Nahal-Oz and Ein Hasheloshah we knew that our limit of safety had been reached, and perhaps passed. In accordance with its inherent right of self-defence as formulated in Article 51 of the United Nations *Charter*, Israel responded defensively in full strength. Never in the history of nations has armed force been used in a more righteous or compelling cause.<sup>141</sup>

Israel's response was multifaceted. However, to the extent that it employed international law to demonstrate legitimacy, it purported compliance with the immanency and necessity requirements of self-defence.<sup>142</sup>

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<sup>136</sup> Ibid.

<sup>137</sup> Victor Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891–1949* (Pluto Press, 2009) 180–2. See also D W Bowett, *Self-Defence in International Law* (Manchester University Press, 1958) 100; Murray Colin Alder, *The Inherent Right to Self-Defence in International Law* (Springer, 2013) vol 19, 127.

<sup>138</sup> Ami Gluska, *The Israeli Military and the Origins of the 1967 War: Government, Armed Forces and Defence Policy 1963–1967* (Routledge, 2007) 6.

<sup>139</sup> See, eg, *Resolution 233*, UN SCOR, 1348<sup>th</sup> mtg, UN Doc S/Res/233 (6 June 1967).

<sup>140</sup> The strongest of such came from the Arab and Soviet delegations. See *Letter Dated 13 June 1967 from the Minister for Foreign Affairs of the Union of Soviet Socialist Republics*, UN GAOR, 5<sup>th</sup> sess, 1526<sup>th</sup> plen mtg, Agenda Item 5, UN Doc A/PV.1526 (19 June 1967) 6 [82]. See also UN SCOR, 1348<sup>th</sup> mtg, UN Doc S/PV.1348 (6 June 1967) [49], [74], [113], [114].

<sup>141</sup> UN SCOR, 1348<sup>th</sup> mtg, UN Doc S/PV.1348 (6 June 1967) 15 [155].

<sup>142</sup> See generally John Quigley, *The Six-Day War and Israeli Self-Defense: Questioning the Legal Basis for Preventive War* (Cambridge University Press, 2013) 75, 120.



The legal questions, diplomatic exchanges and contestations of legitimacy that followed the 1967 war were principally fixated on the *jus ad bellum* before shifting towards the protracted conflict accompanying Israel's subsequent occupation of the Palestinian territories. Though such considerations were rarely absent over the tumultuous decades that followed, during the escalating conflict with the Palestinians, and within the increasingly entrenched occupation of the West Bank and Gaza Strip, the Second Lebanon War featured expansive appeals to international law. These increasingly emphasised the legitimacy of state actions under *jus in bello*. Now, assertions of legal compliance, based on appeals to defensive necessity, were expanded. Commonly, the state would profess that its specific military actions — its selection of targets, choice of weaponry or calculation of proportionality — adhered to the requirements of international law.

### B *Lebanon and an Increased Reliance on International Law*

On 12 July 2006, Hezbollah operatives crossed into Israel. They sought to ambush and abduct an IDF patrol unit. The operation had been planned for months. It served Hezbollah Secretary-General Hassan Nasrallah's strategy of antagonising Israel, of bolstering his domestic standing and of gaining leverage to free Palestinian and Lebanese prisoners held within Israel.<sup>143</sup> Early that morning, two IDF military vehicles were fired upon with heavy weaponry. The unit was separated. Three soldiers were killed while others hid nearby. Udi Goldwasser and Eldad Regev were captured by militants, transferred to jeeps and driven north into Lebanon.<sup>144</sup> Although the abductions of Goldwasser and Regev triggered the Second Lebanon War, tensions had been mounting between Israel and Hezbollah in the years that followed Israel's withdrawal from southern Lebanon in 2000.<sup>145</sup> Israel framed the abductions, not as a terrorist or militant action undertaken by Hezbollah, but instead as a state act that required and warranted a decisive military response. Israeli Prime Minister Ehud Olmert announced: 'The events of this morning cannot be considered a terrorist strike; they are the acts of a sovereign state that has attacked Israel without cause'.<sup>146</sup>

Almost immediately, the IDF launched attacks against Hezbollah targets in southern Lebanon. In response, communities in Israel's north — in and near Nahariya and Safed — came under rocket attack. Over the next month Israeli forces bombed targets within Lebanon. Hezbollah militants launched rockets into Israel.<sup>147</sup> International efforts to produce a ceasefire were initially blocked by the

<sup>143</sup> See Amos Harel and Avi Issacharoff, *34 Days: Israel, Hezbollah, and the War in Lebanon* (Palgrave Macmillan, 2008) 58–9, 83.

<sup>144</sup> *Ibid* 3–4.

<sup>145</sup> Israel's Ministry of Foreign Affairs noted that '[a]ny analysis of the recent conflict in Lebanon must take into consideration broader events in that country over the preceding years'. See Israel Ministry of Foreign Affairs, 'Preserving Humanitarian Principles While Combating Terrorism: Israel's Struggle with Hezbollah in the Lebanon War' (Diplomatic Notes No 1, 1 April 2007) <<http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/hizbullah/pages/preserving%20humanitarian%20principles%20while%20combating%20terrorism%20-%20april%202007.aspx>> ('*Preserving Humanitarian Principles*').

<sup>146</sup> Harel and Issacharoff, above n 143, 76.

<sup>147</sup> Anthony H Cordesman, George Sullivan and William D Sullivan, *Lessons of the 2006 Israeli-Hezbollah War* (CSIS Press, 2007) 4–5.

Americans and British, who viewed the Israeli offensive as a necessary facet of the broader struggle against regional terrorist organisations.<sup>148</sup> When the UN-brokered ceasefire came into effect on 13 August, approximately 1200 Lebanese and over 40 Israeli civilians had been killed.<sup>149</sup>

Israel's Ministry of Foreign Affairs framed the continuous rocket attacks by Hezbollah as violations of the principle of distinction and thus IHL. It claimed Hezbollah employed human shields, also in violation of IHL, and intentionally targeted Israeli civilians through their choice of weaponry and means of combat.<sup>150</sup> Again, Israel presented its response as a legitimate and necessary appeal to self-defence. Israel claimed that diplomatic means were exhausted, its actions necessary, and the use of force proportionate.<sup>151</sup>

Initially, Israel's decision to launch a military operation received qualified international support.<sup>152</sup> This, however, would falter. As the campaign continued, civilian casualties rose. Shiite villages and neighbourhoods in Beirut were bombarded and the IDF began targeting Lebanese infrastructure.<sup>153</sup> In response, Israel faced mounting condemnation.<sup>154</sup> On 30 July, the Israeli Air Force ('IAF') attacked the village of Qana. The strike killed an estimated 28 civilians and evoked a strong international reaction.<sup>155</sup> Kofi Annan condemned the attack.<sup>156</sup> The Security Council expressed 'shock and distress'.<sup>157</sup> Following the conflict, the *UN Soares Report* held:

<sup>148</sup> Mark Oliver, 'Diplomats Fail to Urge Immediate Ceasefire', *The Guardian* (online), 26 July 2006 <<https://www.theguardian.com/world/2006/jul/26/syria.italy>> archived at <<https://perma.cc/54P5-ZMLB>>. See also Foreign Affairs Committee, *Global Security: The Middle East*, House of Commons Report No 8, Session 2006–07 (2007) 45–6; Harel and Issacharoff, above n 143, 105; 'Bush: Hezbollah Suffered a Defeat', *CNN* (online), 15 August 2006 <<http://www.cnn.com/2006/POLITICS/08/14/bush/index.html>> archived at <<https://perma.cc/ZJY6-3XBU>>.

<sup>149</sup> Although estimates vary, the UN reported that 1191 Lebanese civilians were killed and 4409 were injured. Additionally, 900 000 fled from their homes. The same UN report indicates that 43 Israeli civilians were killed and an additional 997 were injured. 300 000 persons were displaced by Hezbollah's rocket attacks on towns in Israeli's north. See Commission of Inquiry on Lebanon, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council': Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1, 3<sup>rd</sup> sess, Agenda Item 2, UN Doc A/HRC/3/2 (23 November 2006) [77]–[78] ('UN Soares Report'). Israel lost approximately 120 soldiers and between 250–800 Hezbollah militants were killed. See Cordesman, Sullivan and Sullivan, above n 147, 5.*

<sup>150</sup> See *Preserving Humanitarian Principles*, above n 145.

<sup>151</sup> *Ibid.* See also Craig, *International Legitimacy and the Politics of Security*, above n 98, 171.

<sup>152</sup> Craig, *International Legitimacy and the Politics of Security*, above n 98, 176. See also Harel and Issacharoff, above n 143, 106.

<sup>153</sup> Harel and Issacharoff, above n 143, 78–82.

<sup>154</sup> UN Secretary-General Kofi Annan condemned both the Hezbollah abduction, calling for the release of the Israel Defense Forces ('IDF') soldiers, and Israel's use of force in southern Lebanon. See 'Annan Condemns Israel Attack in Lebanon', *Ynet News* (online), 12 July 2006 <<https://www.ynetnews.com/articles/0,7340,L-3274607,00.html>> archived at <<https://perma.cc/2K6D-VXRX>>. See also Craig, *International Legitimacy and the Politics of Security*, above n 98, 169.

<sup>155</sup> Craig, *International Legitimacy and the Politics of Security*, above n 98, 154.

<sup>156</sup> United Nations, 'Security Council Must Condemn Israeli Attack, Demand Cessation of Hostilities, Annan Says' (Press Release, 30 July 2006) <<https://news.un.org/en/story/2006/07/187252-security-council-must-condemn-israeli-attack-demand-cessation-hostilities-annan>> archived at <<https://perma.cc/5G2S-88XP>>.

while Hezbollah's illegal action under international law of 12 July 2006 provoked an immediate violent reaction by Israel, it is clear that, albeit the legal justification for the use of armed force (self-defence), Israel's military actions very quickly escalated from a riposte to a border incident into a general attack against the entire Lebanese territory.<sup>158</sup>

The report continued to note that Israel, *jus in bello*, exhibited a 'lack of respect for the cardinal principles regulating the conduct of armed conflict, most notably distinction, proportionality and precaution.'<sup>159</sup> It held that '[t]he particularly tragic impact on civilians and civilian property is certainly due to this deficit.'<sup>160</sup> In reply to mounting accusations of legal disregard, Israel professed fidelity to international law:

In responding to the threat posed by Hezbollah's terrorist attacks, and notwithstanding the fact that Hezbollah made no effort to comply with the principles of humanitarian law, the IDF regarded itself as bound to comply with the established principles of the law of armed conflict.<sup>161</sup>

Israel claimed that it carefully determined what constituted a legitimate military target, adhered to the principle of proportionality when assessing targets, and emphasised the distinction between military objectives and civilian objects.<sup>162</sup>

Strikes against Lebanese infrastructure — including the Beirut airport and the Al-Manar television station — that had provoked significant condemnation were presented as being in accordance with international law.<sup>163</sup> Israel claimed these facilities served dual-use purposes.<sup>164</sup> The airport was said to constitute a legitimate military target as it was likely to be used to supply weaponry and military materials to Hezbollah and transport the abducted Israelis from Lebanon.<sup>165</sup> Al-Manar purportedly relayed messages to terrorists and incited acts of violence.<sup>166</sup> Israel claimed that pursuant to the Committee established to

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<sup>157</sup> United Nations Security Council, 'Security Council Expresses Shock and Distress at Israeli Shelling in Qana; Strongly Deplores Loss of Innocent Lives in Present Conflict' (Press Release, SC/8791, 30 July 2006) <<https://www.un.org/press/en/2006/sc8791.doc.htm>> archived at <<https://perma.cc/W4NZ-TAV7>>; UN SCOR, 5499<sup>th</sup> mtg, UN Doc S/PV.5499 (30 July 2006).

<sup>158</sup> *UN Soares Report*, UN Doc A/HRC/3/2, 23 [61].

<sup>159</sup> *Ibid* 27 [80].

<sup>160</sup> *Ibid*.

<sup>161</sup> *Preserving Humanitarian Principles*, above n 145. The Ministry of Foreign Affairs cited the Chief of Staff's Order No 33.0133, which obliged every IDF soldier to conduct him or herself in accordance with the *Geneva Conventions*.

<sup>162</sup> *Ibid*.

<sup>163</sup> See, eg, *UN Soares Report*, UN Doc A/HRC/3/2, [146]–[148].

<sup>164</sup> *Ibid*; *Preserving Humanitarian Principles*, above n 145.

<sup>165</sup> Israel noted that, under international law, airports are widely recognised as legitimate military targets and cited the Canadian Law of Armed Conflict Manual and the International Commission of the Red Cross's inclusion of airfields as constituting a generally recognised military objective. See *Preserving Humanitarian Principles*, above n 145, citing Canada Office of the Judge Advocate General, *Law of Armed Conflict at the Operational and Tactical Level* (National Defence, 1999); International Committee of the Red Cross, *Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff, 1987).

<sup>166</sup> See *Preserving Humanitarian Principles*, above n 145.

review NATO bombings in Yugoslavia, such actions rendered the station a legitimate military target.<sup>167</sup>

The Israeli assault on Qana was immediately described as a war crime.<sup>168</sup> The *UN Soares Report* would later hold that it found no evidence suggesting the buildings Israel had attacked were used by Hezbollah to launch rockets. Accordingly, they did not constitute military targets.<sup>169</sup> The IDF were adjudged to have used disproportionate force. They were censured for the deaths of civilians.<sup>170</sup> Again, in response, Israel claimed that its actions did not constitute a violation of international law.<sup>171</sup> Qana was presented as a hub of terrorist activity. Israel claimed that the IAF targeted launching sites, undertook precautions to minimise civilian casualties and only took action against terrorist infrastructure. Israel steadfastly rejected that it purposefully targeted civilians.<sup>172</sup>

In Jerusalem and at The Kirya in Tel Aviv, politicians and military officials discussed the likely international reactions to Israel's proposed response.<sup>173</sup> Assessments of legitimacy and perception weighed heavily throughout deliberations. Attorney-General Menachem Mazuz was asked to adjudge the legality of strikes against homes that intelligence indicated were used to store rockets but would also result in civilian casualties.<sup>174</sup> Military lawyers were deployed in theatre to evaluate proposed targets. They received broad discretion to veto targets that contravened IHL.<sup>175</sup> The IDF's International Law Department ('ILD') contributed to the formation of general military policy and, despite institutional resistance to the newfound prominence accorded to international law, military lawyers substantively contributed to operational decisions.<sup>176</sup>

Following the war, as Israel faced persistent condemnation 'legal discourse became central to Israel's defence of its campaign and the lawyers now played

<sup>167</sup> The Committee held that '[i]f the media is used to incite crimes, as in Rwanda, then it is a legitimate target. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target'. See International Criminal Tribunal for the Former Yugoslavia, 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia' (2000) 39 ILM 1257, 1270 [47]. See also *Preserving Humanitarian Principles*, above n 145.

<sup>168</sup> Human Rights Watch, 'Israel/Lebanon: Israel Responsible for Qana Attack — Indiscriminate Bombing in Lebanon a War Crime' (Press Release, 29 July 2006) <<https://www.hrw.org/news/2006/07/29/israel/lebanon-israel-responsible-qana-attack>> archived at <<https://perma.cc/PQT3-AMNQ>>.

<sup>169</sup> *UN Soares Report*, UN Doc A/HRC/3/2, 30–1 [102].

<sup>170</sup> Ibid [13], [112], [137], [317]–[322]. See also Human Rights Council, *The Grave Situation of Human Rights in Lebanon Caused by Israeli Military Operations*, 2<sup>nd</sup> sess, UN Doc A/HRC/S-2/L.1 (9 August 2006).

<sup>171</sup> Kofi A Annan, *Letter Dated 7 August 2006 from the Secretary-General Addressed to the President of the Security Council*, UN SCOR, UN Doc S/2006/626 (7 August 2006) 5.

<sup>172</sup> *Letter Dated 7 August 2006 from the Secretary-General Addressed to the President of the Security Council*, UN Doc S/2006/626, annex III ('*Note Verbale Dated 3 August 2006 from the Permanent Mission of Israel to the United Nations Addressed to the Secretariat*'). See also Israel Ministry of Foreign Affairs, 'Israel Defense Forces Press Conference Following the Kafr Qana Incident' (Press Conference Transcript, 30 July 2006) <<http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/hizbullah/pages/idf%20press%20conference%20following%20the%20kafr%20qana%20incident%2030-jul-2006.aspx>> archived at <<https://perma.cc/F83A-5FHM>>.

<sup>173</sup> Harel and Issacharoff, above n 143, 79–80.

<sup>174</sup> Ibid 86.

<sup>175</sup> Craig, *International Legitimacy and the Politics of Security*, above n 98, 150–2.

<sup>176</sup> Ibid.

an unprecedented international role in defending the legality of the war and mitigating legitimacy costs to the state.<sup>177</sup> Advocacy professed compliance. Daniel Reisner, the former head of the ILD, provided the Israeli Government's response to a Human Rights Watch report.<sup>178</sup> The report claimed the high numbers of civilian casualties resulted from Israel's failure to distinguish between military objectives and civilian objects.<sup>179</sup> Reisner argued that military targets were vetted by lawyers, resulting civilian damage was proportionate and that Israel's actions were consistent with the requirements of *jus in bello*.<sup>180</sup>

The Second Lebanon War featured increased reliance upon international law. The legal engagements that accompanied the use of force shifted from exclusive assertions of defensive legitimacy to broader exhibitions of legal compliance. As with the major conflicts that preceded it, Israel justified its decision to use force in a legal vernacular that appealed to self-defence and the *UN Charter*. When Israel faced international condemnation that challenged the legitimacy of its actions, Israel increased its reliance upon the legitimising potential of law. It expressed adherence to relevant legal norms, professed total compliance and exhibited its efforts to ensure that specific targets were vetted to determine the legality of military actions. These engagements recall Kennedy's description of law's strategic potential.<sup>181</sup> They are expressive of the common state refrain of *we obey the law* and serve to illustrate the military campaign's legitimacy.

Domestically, however, the Second Lebanon War was perceived as a failure.<sup>182</sup> Israel did not significantly weaken Hezbollah or exhibit a strong deterrent capability. It suffered reputational damage within the international community and faced questions about the IDF's capacity and readiness.<sup>183</sup> The Winograd Commission was formed to evaluate political and military decision-making within the much-maligned campaign.<sup>184</sup> Testimonies from Attorney-General Mazuz and Mandelblit described the function of IDF lawyers and their

<sup>177</sup> Ibid 150. See generally Amichai Cohen, 'Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law' (2011) 26 *Connecticut Journal of International Law* 367.

<sup>178</sup> Craig, *International Legitimacy and the Politics of Security*, above n 98, 7.

<sup>179</sup> Human Rights Watch, 'Why They Died: Civilian Casualties in Lebanon During the 2006 War' (Report vol 19, No 5(E), September 2007) 5 <<https://www.hrw.org/reports/2007/lebanon0907/lebanon0907web.pdf>> archived at <<https://perma.cc/5VZQ-2NSD>>.

<sup>180</sup> Craig, *International Legitimacy and the Politics of Security*, above n 98, 171.

<sup>181</sup> Kennedy, above n 96, 41.

<sup>182</sup> Amos Harel, 'Israel's Second Lebanon War Remains a Resounding Failure', *Haaretz* (online), 12 July 2016 <<http://www.haaretz.com/israel-news/.premium-1.729734>> archived at <<https://perma.cc/5QUT-DD74>>. See also Amir Rapaport, 'The IDF and the Lessons of the Second Lebanon War' (2010) 85 *Mideast Security and Policy Studies* 1.

<sup>183</sup> Rapaport, above n 182, 1. See also Efrain Inbar, 'How Israel Bungled the Second Lebanon War' (2007) 14(2) *Middle East Quarterly* 57.

<sup>184</sup> See Israel Ministry of Foreign Affairs, 'Winograd Commission Submits Interim Report' (Report, 30 April 2007) <<http://www.mfa.gov.il/mfa/pressroom/2007/pages/winograd%20inquiry%20commission%20submits%20interim%20report%2030-apr-2007.aspx>> archived at <<https://perma.cc/LM6Z-X3CJ>>.

reliance upon international law during the conduct of hostilities.<sup>185</sup> The Commission criticised what it perceived as an unnecessary deference to international law. It accused Mazuz of ‘taking international law too seriously’.<sup>186</sup> In response, the Attorney-General directly referenced complementarity and argued that the role of international law within armed conflict had increased. Such legal engagements, claimed Mazuz, would provide opportunity to ensure that Israel’s military conduct was not adjudicated in international forums.<sup>187</sup> In order to both avoid criticism and to ensure against individual responsibility, the Attorney-General stressed international law’s strategic importance and legitimising potential.<sup>188</sup>

Although Israel would later employ the Attorney-General’s advice, its direct response to the criticism it faced during and upon conclusion of the Second Lebanon War followed a familiar pattern. Israel countered claims of legal violations with assertions of legal fidelity. It sought to demonstrate that its military actions, *jus ad bellum* and *jus in bello*, complied with international law. Israel appealed to legal reasoning and offered broad interpretations of international law that facilitated its claims of legality, and thus legitimacy. These arguments were relatively silent on questions of process. Following the assault on Qana, Israel had argued that its targets constituted military objectives, presented evidence of rocket sites and accused the Lebanese militants of using human shields. However, when the Association for Civil Rights in Israel called for a state inquiry into the incident, neither the Government nor military were willing to comply.<sup>189</sup> Although little direct attention was paid to the legitimising potential of formal investigations, this soon would change as Israel’s security and

<sup>185</sup> Mazuz’s testimony noted that the Lebanon campaign featured the greatest involvement of lawyers, who provided concrete assessments of proportionality in relation to designated targets, and that military lawyers played an unprecedented role at both strategic and operational levels. See Alan Ian Henry Craig, *The Struggle for Legitimacy: A Study of Military Lawyers in Israel* (PhD Thesis, University of Leeds, 2011) 33–7 <<http://etheses.whiterose.ac.uk/2702/>> archived at <<https://perma.cc/UUM9-VBJJ>>.

<sup>186</sup> *Ibid* 34. These criticisms were led by Commission Member Professor Ruth Gavison. Summarising Gavison’s position, Craig explains that her concerns were twofold:

firstly, that lawyers would inhibit the soldier on the ground and prevent efficient response to changing circumstances, and secondly, that unnecessary legal restrictions would be imposed through the application of perceived legal restraints where, in her view, few in fact exist.

At 2. Despite Gavison’s position, the final Commission report did not find evidence that IDF lawyers or appeals to international law adversely influenced the operation. It did, however, strongly recommend curbing the increasing role and influence of military lawyers and international law within situations of armed conflict. Craig, *International Legitimacy and the Politics of Security*, above n 98, 34.

<sup>187</sup> Craig, *The Struggle for Legitimacy*, above n 185, 34–5.

<sup>188</sup> Mazuz told the Commission that ‘international law has a growing importance in relation to both state, “in order for the State of Israel not to be exposed to international criticism”, and individual responsibility — “a personal and important price tag”’. Craig conveys Mazuz’s argument in relation to individual liability in which Mazuz, ‘alluded to the principle of complementarity, whereby the International Criminal Court (ICC) and foreign domestic courts, exercising a universal jurisdiction to try war crimes, give preference to recognised criminal procedures of the courts of the defendant’s home country’. For Mazuz this was a ‘good reason for Israeli law to take international law seriously and avoid facing allegations of war crimes “in a forum outside of the State of Israel”’. See Craig, *The Struggle for Legitimacy*, above n 185, 34–5.

<sup>189</sup> Craig, *International Legitimacy and the Politics of Security*, above n 98, 165.

legal apparatuses shifted their attention from Hezbollah and the northern border to Hamas and the Gaza Strip.

#### IV INVESTIGATION AS LEGITIMISATION: INFORMAL COMPLEMENTARITY AND GAZA

The Winograd Commission's efforts to constrain the IDF's recourse to international law were unsuccessful. Israel furthered its appeals to legal argument and justification. Over subsequent military campaigns, Israel became progressively cognisant of the strategic benefit conveyed by complementarity. Pnina Sharvit Baruch, the former head of the IDF's International Law Division, noted that

[t]he main way to confront the anticipated allegations in the international arena, and especially in potential criminal proceedings, is to carry out independent investigations that are thorough, effective, fast, and transparent, and are conducted in such a way that the investigative mechanism will also receive international legitimacy. In specific cases — if for example, it becomes clear that IDF forces acted contrary to military orders and the laws of warfare — a hard line should be taken against those responsible, including prosecution in suitable cases. This is necessary in order to preserve and protect the rule of law and the values of the IDF. But in addition, this will enable reliance on the principle of complementarity, whereby international proceedings and foreign judicial intervention are not appropriate when the state concerned carries out a genuine and effective investigation on its own.<sup>190</sup>

Israel appealed to the principle of complementarity after a Spanish court claimed universal jurisdiction to hear a case regarding the targeted killing of Salah Shehadeh.<sup>191</sup> In 2002, an Israeli operation to kill Shehadeh, then the military commander of Hamas' Izz ad-Din al Qassam Brigade, resulted in the deaths of 14 civilians.<sup>192</sup> The operation was condemned throughout the international community but Israel initially refused to conduct criminal

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<sup>190</sup> Pnina Sharvit Baruch, 'Operation Protective Edge: The Legal Angle' in Anat Kurz and Shlomo Brom (eds), *The Lessons of Operation Protective Edge* (Institute for National Security Studies, 2014) 65, 70.

<sup>191</sup> See generally Sharon Weill, 'The Targeted Killing of Salah Shehadeh' (2009) 7 *Journal of International Criminal Justice* 617, 618, 624.

<sup>192</sup> See Suzanne Goldenberg, '12 Dead in Attack on Hamas', *The Guardian* (online), 23 July 2002 <<https://www.theguardian.com/world/2002/jul/23/israel1>> archived at <<https://perma.cc/X9LU-CJ7J>>. See also Weill, above n 191, 617–19.

proceedings.<sup>193</sup> Israel exhibited a common posture — dismissive of the threat of international prosecution and supportive of both the individual actions taken during the operation and the general policy that propagated the controversial event.<sup>194</sup> After a non-governmental organisation advocated for criminal proceedings against the involved members of the IDF, General Dan Halutz, the Commander of the IAF, reassured the pilots that conducted the operation:

You aren't the ones who choose the targets, and you were not the ones who chose the target in this particular case [the Shehadeh assassination]. You are not responsible for the contents of the target. Your execution was perfect. Superb ... You did exactly what you were instructed to do. You did not deviate from that by as much as a millimeter to the right or to the left.<sup>195</sup>

Following the Second Lebanon War, however, Israel had become increasingly mindful of international law's strategic potential.<sup>196</sup> In 2008, upon the initiative of Chief Justice Aharon Barak, Israel established a commission of inquiry to assess the Shehadeh operation. This would 'examine the circumstances surrounding the harm inflicted on uninvolved civilians'.<sup>197</sup> When a Spanish court began proceedings against a number of high-level Israeli officials a year later,

<sup>193</sup> A petition was filed to the Israeli High Court of Justice that sought an order requiring the MAG and the Attorney-General to begin a criminal investigation into the actions of the Air Force Commander, the Chief of General Staff, the Minister of Defense and the Prime Minister. This was denied by the Court. See *Hass v Judge Advocate General*, Supreme Court of Israel, 8794/03, 23 December 2008. Israel faced both domestic and international condemnation. See Amnesty International UK, 'Israel/OT: Killing Palestinian Civilians Will Not Bring Security or Peace' (Press Release, 23 July 2002) <<https://www.amnesty.org.uk/press-releases/israelot-killing-palestinian-civilians-will-not-bring-security-or-peace>> archived at <<https://perma.cc/65HB-4H9D>>. See also David Stout, 'White House Rebukes Israel for Attack, Calls it "Heavy-Handed"', *The New York Times* (online), 23 July 2002 <<https://www.nytimes.com/2002/07/23/international/white-house-rebukes-israel-for-attack-calls-it-heavyhanded.html>>; Mark Oliver, 'Bush Joins in Condemnation of Israeli Attack', *The Guardian* (online), 24 July 2002 <<https://www.theguardian.com/world/2002/jul/23/israel2>> archived at <<https://perma.cc/KT2F-9VKN>>; Margalit, above n 14, 158–9; Weill, above n 191, 618.

<sup>194</sup> For example, Israeli Prime Minister Ariel Sharon declared the mission to be one of Israel's greatest successes but did note, in response to the collateral damage and international fallout following the targeted killing, that had he known the outcome, the assassination would have been postponed. See June Thomas, 'Israel Hits and Misses', *Slate* (online), 26 July 2002 <[http://www.slate.com/articles/news\\_and\\_politics/international\\_papers/2002/07/israel\\_hits\\_and\\_misses.html](http://www.slate.com/articles/news_and_politics/international_papers/2002/07/israel_hits_and_misses.html)> archived at <<https://perma.cc/7R98-DNCC>>.

<sup>195</sup> Uri Ben-Eliezer, *Old Conflict, New War: Israel's Politics Toward the Palestinians* (Palgrave MacMillan, 2012) 137. See Moshe Reinfeld, 'Gush Shalom: Investigate IAF Chief Over Shehadeh Bombing', *Haaretz* (online), 21 August 2002 <<http://www.haaretz.com/news/gush-shalom-investigate-iaf-chief-over-shehadeh-bombing-1.36337>> archived at <<https://perma.cc/X74S-H3NR>>. See also 'The High and the Mighty Cont.', *Haaretz* (online), 21 August 2002 <<http://www.haaretz.com/the-high-and-the-mighty-cont-1.36292>>.

<sup>196</sup> Eyal Weizman, *The Least of All Possible Evils: Humanitarian Violence from Arendt to Gaza* (Verso, 2011) 90.

<sup>197</sup> See also Israel Ministry of Foreign Affairs, 'Salah Shehadeh — Special Investigatory Commission' (Report, 27 February 2011) <[http://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/Salah\\_Shehadeh-Special\\_Investigatory\\_Commission\\_27-Feb-2011.aspx](http://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/Salah_Shehadeh-Special_Investigatory_Commission_27-Feb-2011.aspx)> archived at <<https://perma.cc/KQZ5-25ZF>>. See generally Craig, *International Legitimacy and the Politics of Security*, above n 98, 139–54.



Israel referenced complementarity.<sup>198</sup> Israel replied to the Spanish authorities that the Shehadeh incident was subject to a domestic inquiry. This would establish whether criminal proceedings were necessary.<sup>199</sup> The Israeli communication claimed that Spanish jurisdiction would infringe upon Israeli sovereignty, violate the principle of subsidiarity and contradict the principle of complementarity.<sup>200</sup> Meanwhile, it continued to detail the various methods of domestic review available for suspected legal violations by Israeli personnel and the efforts taken under these procedures following the Shehadeh incident.<sup>201</sup>

Israel's various accountability measures addressed (and dismissed) issues of state responsibility and not individual criminal liability. Regardless, upon review, the National Court of Spain declined to pursue prosecution on the basis of Israel's demonstrated domestic initiatives.<sup>202</sup> Despite Israel's initial reluctance to employ criminal proceedings or display investigative aptitude, the post-Lebanon embrace of legal recourse signalled a shift in tactic. When international attention refocused on the Israeli-Palestinian conflict following the 2008–09 and 2014 Gaza wars, Israel coupled traditional assertions of legal compliance with appeals to informal complementarity. These novel efforts to generate legitimacy following the use of force — by appealing to the state's willingness to investigate alleged violations of international law — were presented as evidence of legal compliance and through what may be conceptualised as a proleptic show trial.

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<sup>198</sup> The Spanish Court asserted universal jurisdiction following complaints by six Palestinians who alleged that the use of a one tonne bomb in a densely populated residential neighbourhood constituted an indiscriminate attack and thus an alleged war crime. See Weill, above n 191, 617, 618, 624.

<sup>199</sup> This was part of a dual — legal and diplomatic — strategy. See Craig, *International Legitimacy and the Politics of Security*, above n 98, 154.

<sup>200</sup> The communication explained complementarity to mean that 'another State may only consider the exercise of jurisdiction when the territorial state is unable or unwilling to investigate the matter in good faith'. See Letter from Israel to the Spanish Court, 29 January 2009, cited in Weill, above n 191, 624 n 25.

<sup>201</sup> The Israeli communication to the Spanish Court explained that: 'legal enforcement over conduct of IDF personnel is carried out by the IDF Military Prosecution which reviews all incidents where it is suspected, claimed or believed that a violation of these rules and standards may have been committed by Israeli personnel'. It continues to detail how such inquiries are subject to further review by the Attorney-General and the Israeli Supreme Court. Further, the Israeli letter described the various reviews and inquiries, including at the Supreme Court, into the Shehadeh incident and a general defence of the legality of its targeted killing policy. In relation to Shehadeh this included a review by the MAG and the Attorney-General which held criminal investigation was not merited as the attack was against a lawful military target; the Supreme Court decision which rejected a petition by an NGO seeking to nullify the administrative decisions of the MAG and the Attorney-General; and the results of a subsequent public inquiry into the matter. See Letter from Israel to the Spanish Court, 29 January 2009.

<sup>202</sup> *Operation in Gaza Report*, above n 32, 114 [306]; 'Spain Court Drops Gaza Probe into Israeli Air Raid', *Ynet News* (online), 30 June 2009 <<http://www.ynetnews.com/articles/0,7340,L-3739264,00.html>> archived at <<https://perma.cc/KYS5-EH5X>>. The 2009 Israeli report into Operation Cast Lead cited the Spanish Court decision as: 'Unofficial Translation of Decision no 1/2009, 17 July 2009 (plenary), of the National Criminal Court of Appeals (Sala de lo Penal de la Audiencia Nacional), at 24, Regarding Preliminary Criminal Proceedings No 154/2008 of the Central Investigation Court No 4'. See *Operation in Gaza Report*, above n 32, 114 [306].

## A The 2008–09 and 2014 Gaza Wars

It was not happenstance that upon acceding to the *Rome Statute*, the Palestinians chose the date of 13 June 2014 to accept the Court's jurisdiction.<sup>203</sup> A day earlier, on 12 June, Marwan Qawasmeh and Amar Abu Aysha stole a car near Hebron. The two were members of Hamas but believed to be acting on their own initiative.<sup>204</sup> They drove towards Gush Etzion, a bloc of Israeli settlements in the Judean Mountains south of Jerusalem. Here they came upon three students from a nearby yeshiva. Eyal Yifrach, Gilad Shaar and Naftali Fraenkel were hitchhiking home. They were forced into the car. Upon being taken, Gilad Shaar attempted to contact the police on his phone and report the abduction. Kawasmeh and Abu-Isa, discovering this attempt, shot and killed the three young students.<sup>205</sup>

Weeks later, when the bodies were found, Israeli Prime Minister Benjamin Netanyahu directly implicated Hamas: 'Hamas is responsible, and Hamas will pay ... [the students] were kidnapped and murdered in cold blood by wild beasts'.<sup>206</sup> Israeli society galvanised around the abduction and killing of the three students.<sup>207</sup> Tensions throughout Israel and the Palestinian territories continued to rise. A day after the burials of Yifrach, Shaar and Fraenkel, Mohammad Abu-Khdeir, a 16-year old Palestinian from East Jerusalem, was forced into a car by a group of Israelis believed to be members of an extremist cell. Abu-Khdeir was driven from near his home in Shua'fat to the Jerusalem Forest, beaten, doused in gasoline and ignited in an act of vengeance that would claim his life.<sup>208</sup>

The escalating events interrupted a fragile ceasefire between Israel and Gazan militants that preceded the murders in the West Bank and Jerusalem. Protests spread across the region. Militant groups in Gaza, believed to be unaffiliated

<sup>203</sup> See Kittrie, above n 16, 218. See also Amira Hass, 'Abbas Asks ICC to Probe "Israeli War Crimes" Since June '14, Palestinian Source Says', *Haaretz* (online), 1 January 2015 <<https://www.haaretz.com/.premium-palestinians-ask-icc-to-probe-war-crimes-1.5355370>> archived at <<https://perma.cc/X9VE-FTPJ>>.

<sup>204</sup> Max Blumenthal, *The 51 Day War: Ruin and Resistance in Gaza* (Nation Books, 2015) 8.

<sup>205</sup> Amos Harel and Chaim Levinson, 'One Year After West Bank Murder-Kidnapping: What Israel's Security Forces Got Wrong', *Haaretz* (online), 12 June 2015 <<http://www.haaretz.com/israel-news/.premium-1.660854>> archived at <<https://perma.cc/WV9M-522A>>.

<sup>206</sup> See Peter Beaumont and Orlando Crowcroft, 'Bodies of Three Missing Israeli Teenagers Found in West Bank', *The Guardian* (online), 1 July 2014 <<http://www.theguardian.com/world/2014/jun/30/bodies-missing-israeli-teenagers-found-west-bank>>. A Hamas official would later indicate involvement in the orchestration of the kidnap plot, though these claims were strongly doubted by many observers and dismissed as untrue by alternative sources within Hamas. See Orlando Crowcroft, 'Hamas Official: We were Behind the Kidnapping of Three Israeli Teenagers', *The Guardian* (online), 21 August 2014 <<http://www.theguardian.com/world/2014/aug/21/hamas-kidnapping-three-israeli-teenagers-saleh-al-arouri-qassam-brigades>> archived at <<https://perma.cc/42VQ-XLS3>>.

<sup>207</sup> See, eg, Sarah Gruen, 'Bring Back our Boys Campaign Inspires Hope', *Jerusalem Post* (online), 14 June 2014 <<http://www.jpost.com/National-News/Israelis-launch-social-media-campaign-to-help-find-missing-boys-with-BringBackOurBoys-359326>> archived at <<https://perma.cc/F9GN-39BE>>.

<sup>208</sup> Adiv Sterman, 'Six Jewish Extremists Arrested in Killing of Jerusalem Teen', *The Times of Israel* (online), 6 July 2014 <[http://www.timesofisrael.com/suspects-arrested-in-killing-of-east-jerusalem-teen/?fb\\_comment\\_id=674432782648910\\_675281995897322#f18a8e8139248c](http://www.timesofisrael.com/suspects-arrested-in-killing-of-east-jerusalem-teen/?fb_comment_id=674432782648910_675281995897322#f18a8e8139248c)> archived at <<https://perma.cc/8MEJ-B2KL>>; See Nathan Thrall, 'Hamas's Chances' 36(16) *London Review of Books* 10.

with Hamas, began launching rockets towards Israel in declared acts of defiance and solidarity. When the attacks increased, Israel ordered an airstrike that killed seven Hamas militants in Khan Yunis. In response, Hamas assumed responsibility for the rocket attacks and increasingly began to target sites in southern Israel. The following day, on 8 July 2014, Israel announced the commencement of Operation Protective Edge.<sup>209</sup>

The resulting conflict, as with the international community's response, followed a similar pattern to the 2008–09 Israeli offensive against Hamas in Gaza — Operation Cast Lead. In both instances, the international community appealed for restraint before condemning the military actions taken by Israel and Hamas.<sup>210</sup> As formal hostilities ceased, the parties presented competing legal narratives. Each vied for legitimacy.<sup>211</sup> Sharvit Baruch, who served as the head of the ILD between 2003–09, acknowledges that Israel was fully aware that its military campaigns are likely to receive condemnation.<sup>212</sup> In reply, and consistent with previous practice, Israel appealed to self-defence and the legality of its actions under *jus ad bellum* and *jus in bello*. It sought to demonstrate the legitimacy of its military operations and the necessity of its decision to use force. Sharvit Baruch notes that while considerations of legitimacy are only a factor of operational decision-making, appeals to legitimacy serve important post-conflict purposes:

it is important on a diplomatic level — to be able to give good answers to allies like the United States and the United Kingdom. Now it is also important, with the potential of [international] criminal investigations, to demonstrate the legitimacy of actions and also be able to give good answers. Beyond criminal proceedings, however, it is necessary to respond to international organizations, NGOs and others who are critical of the military action.<sup>213</sup>

These post-hoc engagements may be placed within a process of normative judgment. As described by Alan Craig, standards are set and states engage in the strategic promotion of their policies. Craig notes that '[i]n the area of security policy, states can be expected to deploy their lawyers at home and abroad to influence understandings of international legitimacy that best fit the execution of

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<sup>209</sup> See generally Thrall, above n 208, 11.

<sup>210</sup> See United Nations General Assembly, 'General Assembly Demands Full Respect for Security Council *Resolution 1860* Calling for Immediate Gaza Ceasefire, as Emergency Session Concludes' (Press Release, GA/10809/Rev.1, 16 January 2009) <<https://www.un.org/press/en/2009/ga10809.doc.htm>> archived at <<https://perma.cc/F7S3-3PPT>>. See also SC Res 1860, UN SCOR 1860, 6063<sup>rd</sup> mtg, UN Doc S/RES/1860 (8 January 2009). The response to the 2014 war followed a similar pattern. See United Nations Security Council, 'Security Council Weighs Effectiveness during "Eventful and at Times Tragic Month"' (Press Release, SC/11502, 30 July 2014) <<https://www.un.org/press/en/2014/sc11502.doc.htm>> archived at <<https://perma.cc/PV9W-8E4Y>>. For an account of the international community's shift from acceptance of Israeli claims regarding *jus ad bellum* to condemnation pursuant to *jus in bello*, see Joel Peters, 'Gaza' in Joel Peters and David Newman (eds), *The Routledge Handbook on the Israeli-Palestinian Conflict* (Routledge, 2013) 196, 203. See also Colin Shindler, *A History of Modern Israel* (Cambridge University Press, 2<sup>nd</sup> ed, 2013) 379–80.

<sup>211</sup> Barak Ravid, 'Delegitimization of Israel Must Be Delegitimized', *Haaretz* (online), 16 October 2009 <<https://www.haaretz.com/1.5250761>> archived at <<https://perma.cc/F74C-QH9L>>.

<sup>212</sup> Interview with Colonel (Retired) Adv Pnina Sharvit Baruch, (Tel Aviv, 20 March 2017).

<sup>213</sup> *Ibid.*

their policies'.<sup>214</sup> In accordance with traditional appeals to international law, where compliance is asserted through a legal vernacular, Israeli officials drew upon supportive segments of the international community to articulate self-defence-based justifications for the use of force and profess legal fidelity upon its application.<sup>215</sup>

Such legal appeals were not exclusive to Israel. The PA claimed that Israel, as an occupying power, had abdicated its responsibilities towards the Palestinian population. It called upon the international community to ensure Israeli compliance with its associated obligations.<sup>216</sup> Hamas, who do not hold a formal voice within the international community and do not often engage a legal vernacular when addressing grievances with Israel, also made allusions to international law. These held Hamas to be acting in self-defence, as possessing a right to resist foreign domination, and claimed that their armed groups undertook necessary efforts to avoid targeting civilians.<sup>217</sup>

Israel's initial efforts to employ a legal vernacular and articulate a narrative of compliance did not, however, halt the inevitable chorus of condemnation. Following the 2008–09 and 2014 wars, the resulting legal discourse developed

<sup>214</sup> Craig, *International Legitimacy and the Politics of Security*, above n 98, 1. See generally Emanuel Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations* (Routledge, 2005) 184.

<sup>215</sup> In response to the mounting condemnation that followed the 2008–09 war, Israel's appeals to self-defence drew upon the principles of imminence and proportionality. See Israel Ministry of Foreign Affairs, *Operation Cast Lead — Israel Defends Its Citizens* (Press Release, 2013) <<http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/GazaFacts/Pages/Operation-Cast-Lead-Israel-Defends-its-Citizens.aspx>>. See also *Operation in Gaza Report*, above n 32, 5 [16], 14–15 [38], 19–21 [52]–[54]; *The Situation in the Middle East, Including the Palestine Question*, UN SCOR, 6060<sup>th</sup> mtg, UN Doc S/PV.6060 (31 December 2008) 5–6. At the commencement of the 2014 war, the Israeli Ministry of Foreign Affairs continued to draw upon self-defence while citing assurance received by Israel from United States President Barack Obama, British Prime Minister David Cameron and UN Secretary-General Ban Ki-moon. See Israel Ministry of Foreign Affairs, *Operation Protective Edge — Q&A* (Press Release, 14 August 2014) <<http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Operation-Protective-Edge-QA.aspx>> archived at <<https://perma.cc/TQP3-32C9>>. See also *2014 Gaza Conflict Report*, above n 53.

<sup>216</sup> See Riyadh Mansour, *Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory: Identical Letters Dated 29 December 2008 from the Permanent Observer of Palestine to the United Nations Addressed to the Secretary-General and President of the Security Council*, UN GAOR, 10<sup>th</sup> sess, Agenda Item 5, UN Doc A/ES-10/429–S/2008/828 (29 December 2008). See also Negotiations Affairs Department, Palestinian Liberation Organization, 'Dr Erekat Condemns "the Savage Israeli Assault on the Gaza Strip"' (Press Release, 27 December 2008) <https://www.nad.ps/en/media-room/press-releases/dr-erekat-condemns-savage-israeli-assault-gaza-strip%E2%80%99%E2%80%99>; Negotiations Affairs Department, Palestine Liberation Organization, 'Gaza: Occupation by Siege' (Factsheet, 28 February 2011) <https://www.nad.ps/en/publication-resources/factsheets/gaza-occupation-siege>.

<sup>217</sup> See C Jacob, 'Hamas Responds to *Goldstone Report* — On PA's Behalf; Issues Apology for Harming Israeli Civilians, then Denies and Renounces Doing So', *Memri* (online), 23 February 2010 <<https://www.memri.org/reports/hamas-responds-goldstone-report-%E2%80%93-pas-behalf-issues-apology-harming-israeli-civilians-then>> archived at <<https://perma.cc/6RC4-E4WQ>>.

around a series of UN fact-finding reports.<sup>218</sup> These presented detailed accusation of legal violations by Israeli and Palestinian actors.<sup>219</sup> The most serious accusations were contained within the 2009 *Goldstone Report* and would become the source of considerable controversy.<sup>220</sup> The report held that Israel had deliberately targeted Gaza's civilian population as part of its military operation.<sup>221</sup> Both the *Goldstone Report* and the 2014 Independent Commission Report would also accuse the PA and Hamas of various legal violations that ranged in severity.<sup>222</sup> Hamas was held to have, inter alia, engaged in indiscriminate attacks against a civilian population, actions which could amount to war crimes.<sup>223</sup>

The UN-mandated reports became the fulcrum for much of the post-conflict legal discourse. Israeli officials interpreted this process as an effort to delegitimise their military operation.<sup>224</sup> Prime Minister Netanyahu announced

<sup>218</sup> See, eg, Richard Goldstone et al, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN GAOR, 12<sup>th</sup> sess, Agenda Item 7, UN Doc A/HRC/12/48 (25 September 2009) ('*Goldstone Report*'); William Schabas, Mary McGowan Davis and Doudou Diène, *Human Rights Situation in Palestine and Other Occupied Arab Territories: Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1*, 29<sup>th</sup> sess, Agenda Item 7, UN Doc A/HRC/29/CRP.4 (24 June 2015) ('*Report of the Detailed Findings of the Independent Commission*').

<sup>219</sup> See *Goldstone Report*, UN Doc A/HRC/12/48, [151]. For background on the mission's evolving mandate, see *The Grave Violations of Human Rights in the Occupied Palestinian Territories, Particularly Due to the Recent Israeli Military Attacks against the Occupied Gaza Strip*, HRC Res S-9/1, UN GAOR, 9<sup>th</sup> sess, 3<sup>rd</sup> mtg, UN Doc A/HRC/Res/S-9/1 (12 January 2009). See also Raimond Gaita, 'Introductory Essay' in Raimond Gaita (ed), *Gaza: Morality, Law & Politics* (University of Western Australia Publishing, 2010) 1, 9. The commission formed after the 2014 war and its subsequent report contained a similar focus. See *Ensuring Respect for International Law in the Occupied Palestinian Territory, Including East Jerusalem*, HRC Res S-21/1, 21<sup>st</sup> sess, UN Doc A/HRC/Res/S-21/1 (24 July 2014) para 13. See also *Report of the Detailed Findings of the Independent Commission*, UN Doc A/HRC/29/CRP.4.

<sup>220</sup> See generally Michael P Scharf and Leila Nadya Sadat, 'Understanding the *Goldstone Report*: Controversy and Ramifications' (2009) 18 *International Law Students Association Quarterly* 14.

<sup>221</sup> *Goldstone Report*, UN Doc A/HRC/12/48, [809], [810], [815], [1884]. Specifically, the report detailed a series of incidents in which Israeli attacks led to civilian deaths with what the report alleged to be a total absence of a justifiable military objective: at [704]–[885].

<sup>222</sup> The fact-finding mission received reports of alleged violations by the Palestinian Authority including the unlawful arrest and detention of suspected Hamas affiliates and practices by the PA security services that were alleged to amount to torture and cruel, inhuman, or degrading treatment. These included the deaths of individuals in detention that may have resulted from torture. Complaints concerning such practices were not, however, subject to full investigation by the fact-finding mission. The report continued to accuse the PA of committing acts of international violence including torture, of having targeted Hamas supporters and of imposing limitations on the freedoms of assembly, expression and the press. See *ibid* [97], [1550]–[1575], [1584].

<sup>223</sup> *Ibid* [108]. The *Goldstone Report* concluded that 'the Gaza authorities have an obligation to respect and enforce the protection of the human rights of the people of Gaza, inasmuch as they exercise effective control over the territory, including law enforcement and the administration of justice': at [1369]. The report's contention was partly based on statements by the Hamas leadership that, upon assumption of control of Gaza in 2007, they would respect international human rights standards and that 'the Government is in permanent contact with the Red Cross and human rights organizations, and listens to their observations and takes into account their recommendations as far as it can, and those institutions can testify on that': at [1370].

<sup>224</sup> Craig, *International Legitimacy and the Politics of Security*, above n 98, 200.

that such efforts must, in turn, be delegitimised.<sup>225</sup> The Israeli response exhibited many features commonly employed by states that faced allegations of legal violations. Declarations of compliance and interpretations of legal provisions were presented. Now, however, Israel also supplemented its claims of legal compliance and legitimacy with informal appeals to complementarity and expressions of investigative willingness.

Israel's collective response was robust. Initially, following the 2008–09 war, Israel refuted the perceived efforts of the UN's *Goldstone Report* to delegitimise the undertaken military operation. Israel mounted its own claims to legitimacy. Initially, these followed a familiar pattern. Protestations were forged in legal vernacular and designed to establish the legitimacy of Israeli conduct under *jus ad bellum*.<sup>226</sup> While elements of Israel's immediate reaction to the *Goldstone Report* devolved into ad hominem attacks, Israel attempted to pivot the post-war debate towards reiterations of the self-defence-based justifications that had gained notable traction with significant elements of the international community in the war's earliest days and which Israel accused the UN report of failing to sufficiently acknowledge.<sup>227</sup>

Israel's retorts moved from broad pronouncements to specific analysis. This recognised that despite the appeal of self-defence-focused arguments, much of the ensuing criticism addressed Israeli actions pursuant to *jus in bello*. Sharvit Baruch noted that 'the more significant claims concern the manner in which the IDF used force in the operation and the application of the laws of warfare (that is, the area of *jus in bello*)'.<sup>228</sup> Israel addressed these accusations through a series of reports following both the 2008–09 and 2014 Gaza wars.<sup>229</sup> The reports,

<sup>225</sup> Ravid, 'Delegitimization of Israel', above n 211.

<sup>226</sup> The status and visibility of the *Goldstone Report*, and the subsequent attention it would receive both within formal international institutions and throughout civil society surpassed comparable criticism of past Israeli military actions and likely represented the first instance in which a UN commissioned report had directly accused Israel of having committed war crimes. See Jennifer Barnette, 'Initial Reactions to the *Goldstone Report* and Reflections on Israeli Accountability', in Chantal Meloni and Gianni Tognoni (eds), *Is There a Court for Gaza? A Test Bench for International Justice* (TMC Asser Press, 2012) 123, 125. In its most public manifestations, Israel sought to discredit the *Report* as an exercise in political bias. See Roni Sofer, 'Netanyahu: *Goldstone Report* "A Prize for Terror"', *Ynet News* (online), 16 September 2009 <<http://www.ynetnews.com/articles/0,7340,L-3778079,00.html>> archived at <<https://perma.cc/2SJ4-5FN8>>. For a detailed account of the public Israeli response to the publication of the *Goldstone Report*, see Barnette, 'Initial Reactions to the *Goldstone Report* and Reflections on Israeli Accountability', above n 226, 127–38.

<sup>227</sup> See Israel Ministry of Foreign Affairs, 'Initial Response to Report of the Fact Finding Mission on Gaza Established pursuant to *Resolution S-9/1* of the Human Rights Council' (Press Release, 24 September 2009) <<http://mfa.gov.il/mfa/foreignpolicy/terrorism/pages/initial-response-goldstone-report-24-sep-2009.aspx>> archived at <<https://perma.cc/F88P-LM9E>>. Israeli Prime Minister Benjamin Netanyahu would later note that legal efforts to deny Israel the right to self-defence constituted one of the most significant threats facing the state. See Israel Ministry of Foreign Affairs, 'PM Netanyahu Addresses the Saban Forum' (Press Release, 15 November 2009) <[http://mfa.gov.il/MFA/PressRoom/2009/Pages/PM\\_Netanyahu\\_addresses\\_Saban\\_Forum\\_15-Nov-2009.aspx](http://mfa.gov.il/MFA/PressRoom/2009/Pages/PM_Netanyahu_addresses_Saban_Forum_15-Nov-2009.aspx)>. See also Robbie Sabel, 'Manipulating International Law as Part of Anti-Israel "Lawfare"' in Alan Baker (ed), *Palestinian Manipulation of the International Community* (Jerusalem Center of Public Affairs, 2014) 13, 19; Weizman, above n 196, 102.

<sup>228</sup> Sharvit Baruch, above n 190, 66.

<sup>229</sup> See *Operation in Gaza Report*, above n 32; *2014 Gaza Conflict Report*, above n 53.

prepared jointly by the Ministries of Defense and Foreign Affairs, provide examples of (and themselves constituted) informal appeals to complementarity.

It is, of course, unsurprising that Israel responded to the accusations it faced and contested international attempts to adjudicate the conflict. Equally, it is predictable that these responses served to deny accusations, to posit advantageous interpretations of international law and to frame the ensuing debate within supportable narratives that drew upon legitimising legal frameworks and the repetitious call of *we obey the law*.<sup>230</sup> While these responses contained a range of legal justifications that commonly feature when a state asserts that its military actions are legitimate, they would move beyond the expected legal and factual claims that the state conformed to the requirements of international law. Through the employment of various accountability measures and the initiation of formal investigative processes, Israel appealed to informal complementarity and the obligation to investigate.

The series of Israeli reports, disseminated following the Gaza wars, chronicle what is characterised here as a proleptic show trial. Informal appeals to complementarity were woven throughout Israel's various diplomatic interactions, domestic investigations and commissions, and documented within the series of reports that followed the succession of wars in Gaza. Commonly, the proleptic show trial features four phases of engagement that purport legal compliance, advocate for broad and permissive interpretations of various provisions of IHL, and document investigative initiatives. Within the first stage of the proleptic show trial, the state establishes its legal capacity and esteem. Next, it asserts standing. Thirdly, the state conducts and conveys general investigations into the legality of *its* conduct. And, finally, it performs and then disseminates the results of individual criminal proceedings. These described forms of legal engagement overlap. They are not linear and often conflate the formal distinction between individual criminal responsibility and the non-criminal liability of states for violations of IHL. Collectively, though, these diverse, multifaceted and informal forms of engagement seek to achieve didactic purposes, establish a narrative of legal compliance and substantiate associated claims of legitimacy.

### B *Establishing Legal Capability and Esteem*

The proleptic show trial begins abstractly. During the first phase of engagement, the state demonstrates the capacity, independence and esteem of its domestic legal system. These efforts recall the Israeli official who, following the

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<sup>230</sup> For Israel, these efforts were initially premised around the notion of self-defence and framed in accordance with international efforts to combat terrorism. See Israel Ministry of Foreign Affairs, 'Responding to Hamas Attacks from Gaza — Issues of Proportionality' (Background Paper, 29 December 2008) <<http://www.mfa.gov.il/mfa/aboutisrael/state/law/pages/responding%20to%20hamas%20attacks%20from%20gaza%20-%20issues%20of%20proportionality%20-%20march%202008.aspx>>; *Operation in Gaza Report*, above n 32, 14 [38], 26–7 [69]–[70]. In contrast, the PA's position was framed around the notion of belligerent occupation and sought to accentuate the obligations and requisite legal framework placed upon Israel, the occupying power, under *The Hague Regulations* and *Geneva Convention IV*. See Negotiations Affairs Department, Palestine Liberation Organization, 'Gaza: Occupation by Siege', above n 216; Negotiations Affairs Department, Palestinian Liberation Organization, 'Dr Erekat Condemns "the Savage Israeli Assault on the Gaza Strip"', above n 216. See also *Geneva Convention IV* arts 47–78.

Palestinian petition to the ICC, did not refer to a specific investigation or prosecution but instead expressed a willingness to ‘show the court at the Hague how serious, professional and independent the Israeli legal system is’.<sup>231</sup> This does not allude to complementarity’s formal focus. It does not claim that the state has initiated criminal proceedings against an individual accused of violating ICL. Instead, it provides a declaration of capacity. This initial phase of engagement is broad. It speaks generally, to the international community, of the state’s willingness to ensure accountability. Additionally, it attempts to influence the ICC’s preliminary investigation. This *may* consider general questions of domestic judicial competence.<sup>232</sup> When the Prosecutor initiates proceedings, she will often begin by examining an ‘entire situation’ before identifying specific cases for direct scrutiny and potential prosecution.<sup>233</sup>

In addition to the admissibility requirements contained within art 17 of the *Rome Statute*, the *ICC Rules of Procedure and Evidence* encourage states to demonstrate that their national courts meet internationally recognised standards for independence and impartiality.<sup>234</sup> Commenting on the strength of Israel’s legal system, Alan Baker, a former Israeli diplomat, veteran negotiator and member of Israel’s delegation to the Rome Conference, asserts:

this is a fact. If a delegation or the Prosecutor of the ICC comes to Israel to talk and to present the ICC, then clearly it is in Israel’s interest to impress upon the delegation the fact that Israel has a very advanced legal system ... Israel has an interest in telling the world — whether it is the ICC, or the UN, or Goldstone — that Israel has an advanced legal system in its army and therefore investigates anytime there is a need to investigate.<sup>235</sup>

<sup>231</sup> Ravid, ‘Netanyahu Weighs International Criminal Court’, above n 8.

<sup>232</sup> Asked whether investigations conducted within the Israeli army itself will be considered as fulfilling the complimentary requirement, Fatou Bensouda replied:

During the course of this preliminary examination, any information given by the Israel and Palestinian governments related to complementarity efforts will be evaluated in order to determine whether national investigations and prosecutions are genuine, and bearing in mind the Office’s policy of focusing investigative efforts on those most responsible for the most serious crimes. The Office will also consider information gathered from other reliable sources, as well as open sources, in assessing complementarity.

Quoted in Aeyal Gross, ‘ICC Prosecutor: Low-Ranking Israeli Soldiers, as well as Palestinians, Could Be Prosecuted for War Crimes’, *Haaretz* (online), 1 May 2015 <<https://www.haaretz.com/.premium-icc-prosecutor-low-ranking-idf-soldiers-palestinians-could-be-prosecuted-1.5357334>> archived at <<https://perma.cc/NN6Q-GJBR>>. See also Office of the Prosecutor, International Criminal Court, ‘Policy Paper on Preliminary Examinations’ (Policy Paper, November 2013) 12 <[https://www.icc-cpi.int/iccdocs/otp/otp-policy\\_paper\\_preliminary\\_examinations\\_2013-eng.pdf](https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf)> archived at <<https://perma.cc/LGW4-7TA5>>; Stigen, above n 14, 88.

<sup>233</sup> See Office of the Prosecutor, International Criminal Court, ‘The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine’, above n 1. The distinction between situations and cases is intended to provide the Court with independence so as it can identify cases that merit prosecution following the referral of a general situation by the Security Council. See Stigen, above n 14, 91–2.

<sup>234</sup> See International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) r 51 (‘*ICC Rules of Procedure and Evidence*’). Jo Stigen notes that ‘[t]he question as to which weight should be placed upon such general information remains, however, highly discretionary’. See Stigen, above n 14, 131.

<sup>235</sup> Interview with Ambassador Alan Baker (Jerusalem and Toronto, 19 March 2017).



Israel began responding to claims that it had violated international law during the Gaza wars by describing its national legal capacity and the esteem of its domestic legal system. The series of reports disseminated following the 2008–09 war exhibited this first phase of engagement with informal complementarity. Between the conclusion of Operation Cast Lead and the publication of Israel’s principal report into the ‘factual and legal aspects’ of the war, the National Court of Spain had declined to prosecute the Israeli officials accused of war crimes during the targeted killing of Salah Shehadeh.<sup>236</sup> Israel referenced the Court’s decision to substantiate the claim that it is capable and ‘committed to fully investigating alleged violations of Israel’s legal obligations’.<sup>237</sup> The report accentuated that the Criminal Chamber of the (Spanish) National Court had

emphasised Israel’s ability to fully and fairly investigate the charges itself. It held that Israeli procedures and decisions with regard to the legality of preventive strikes under international law, and the military, civilian and judicial review in Israel of the Shehadeh incident, comport with the principle of complementarity, as the State of Israel is a democratic country where the rule of law applies.<sup>238</sup>

The series of reports disseminated following the Gaza wars further exhibit this first phase of engagement. Each report dedicates substantial space to detail the function of Israel’s various accountability measures — both military and civilian — and favourably compares these procedures with those of other states.<sup>239</sup> Israel acknowledged that ‘all allegations regarding violations of international law in Gaza by any party, for which there is reliable information, must be thoroughly investigated, and where appropriate, prosecuted’.<sup>240</sup> The reports provide accounts of the investigative processes. These include IDF field investigations, review by the MAG and the Attorney-General and appeal to the Supreme Court. Independence is accentuated.<sup>241</sup> These claims intend to demonstrate legitimacy of process. They claim that domestic legal and investigatory systems are capable of providing redress and preventing impunity, that they meet or exceed international standards and that ‘Israel does not shy away from investigating its operations, or from filing criminal complaints where they are warranted’.<sup>242</sup>

Legitimacy is derived from the assertion that the state is both able and willing to investigate allegations of international legal violations. It trades upon the democratic credentials of the state, its commitment to the rule of law and the professional esteem of its judiciary. Though investigative willingness is initially presented abstractly, it facilitates pre-emptive appeals to the principle of complementarity. Following Operation Protective Edge in 2014, Israel’s references to domestic capacity drew upon the Second Turkel Commission

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<sup>236</sup> See Weill, above n 191, 631.

<sup>237</sup> *Operation in Gaza Report*, above n 32, 107 [283].

<sup>238</sup> *Ibid* [306].

<sup>239</sup> For example, Israel’s primary report following the 2008–09 war provided a detailed comparison between the Israeli system and its US and British counterparts. See *ibid* [307]–[311].

<sup>240</sup> *Ibid* [312].

<sup>241</sup> *Ibid* [312]–[445]. See *Follow-Up to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict — Report of the Secretary-General*, UN GAOR, 64<sup>th</sup> sess, Agenda Item 64, UN Doc A/64/651 (4 February 2010) annex I (‘*Gaza Operation Investigations: An Update*’) 7, 10, 31–7.

<sup>242</sup> *Operation in Gaza Report*, above n 32, 107 [283], 157 [451].

Report.<sup>243</sup> The Commission was formed following the 2010 naval raid of the Mavi Marmara which, alongside five other ships, attempted to breach Israel's blockade of Gaza.<sup>244</sup> Mandated to investigate the legality of the flotilla raid and the maritime blockade, the Commission was further tasked with assessing Israel's mechanisms for evaluating complaints and alleged violations of IHL.<sup>245</sup>

When Israel sought to reaffirm its investigative capacity, it offered the endorsement of the Turkel Commission. This was presented as evidence of the comprehensiveness of Israel's domestic investigative and accountability mechanisms and the favourable standing of these procedures in comparison to several western, democratic nations.<sup>246</sup> This further facilitated efforts to establish the legitimacy of process. Mandelblit, the MAG, described the report's strategic importance as a means of substantiating Israel's assertions of operational legitimacy and as providing evidence of and support to claims that under the complementarity regime Israel is capable of satisfying its legal obligations:

The report thus has tremendous significance for strengthening Israel's image around the world. It has an important role to play in Israel's battle for legitimacy, which has been unjustly impugned over the past decade. It is also a significant step in eliminating the international community's doubts about the credibility of the Israeli judicial system and its ability to investigate complaints and allegations of violations of the laws of war.<sup>247</sup>

Israel asserted that it possesses a respected and internationally endorsed legal system that exhibits the requisite values of 'independence, impartiality,

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<sup>243</sup> See, eg, *2014 Gaza Conflict Report*, above n 53, 218–19 [410]–[411]. See also *Second Turkel Commission Report*, above n 37.

<sup>244</sup> See generally Robert Booth, 'Israeli Attack on Gaza Flotilla Sparks International Outrage', *The Guardian* (online), 1 June 2010 <<https://www.theguardian.com/world/2010/may/31/israeli-attacks-gaza-flotilla-activists>> archived at <<https://perma.cc/9GFJ-3AC6>>. See also Human Rights Council, *Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian Law and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance*, 15<sup>th</sup> sess, Agenda Item 1, UN Doc A/HRC/15/21 (27 September 2010).

<sup>245</sup> See *First Turkel Report*, above n 53, 17 [4]. Alongside its initial mandate, the Commission was also asked to examine

the question whether the examination and investigation process for complaints and allegations raised with regard to violations of the law of combat, as generally practiced in Israel and as implemented with regard to the incident under consideration, is consistent with the obligations of the State of Israel pursuant to the rules of international law.

At 17 [4], quoting *Resolution 1796 of the 32<sup>nd</sup> Government: 'Appointment of an Independent Public Commission, Chaired by the Supreme Court Judge (ret), Jacob Turkel, to Examine the Maritime Incident of May 31, 2010'* (Israel) 14 June 2010, art 5. See also *Second Turkel Commission Report*, above n 37, [1]–[2].

<sup>246</sup> Israel's primary report following the 2014 Gaza war made explicit reference to the findings of the Turkel Commission. See *2014 Gaza Conflict Report*, above n 53, 218 [410].

<sup>247</sup> Avihai Mandelblit and Keren Aviram, 'The Second Turkel Commission Report' (Insight Report No 403, Institute for National Security Studies, 13 February 2013) 3 <<http://www.inss.org.il/index.aspx?id=4538&articleid=2608>> archived at <<https://perma.cc/J72N-7MD7>>.

effectiveness, thoroughness, and promptness'.<sup>248</sup> It claimed it is *capable* of fulfilling the requirements of the state's investigatory obligations.<sup>249</sup> This encouraged Prime Minister Netanyahu to respond to the ICC preliminary inquiry by appealing to complementarity and citing Israel's investigative capacity and the esteem of its legal system. The Prime Minister stated:

It's absurd for the ICC to go after Israel, which upholds the highest standards of international law ... Our actions are subject to the constant and careful review of Israel's world-renowned and utterly independent legal system.<sup>250</sup>

The Prime Minister's remarks capture both the traditional state approach of asserting legal fidelity and novel appeals to the legitimising potential of investigation.

### C *Asserting Appropriateness and Standing*

Upon establishing an abstract capacity to ensure legal accountability, the second phase of the proleptic show trial makes a specific claim of appropriateness and standing. Various legal and diplomatic engagements frame complementarity and the obligation to investigate non-criminal violations of IHL as a state right or prerogative. These efforts are, of course, consistent with traditional understandings of international law, sovereignty and the drafting history of the *Rome Statute*. Equally, these do not deny that complementarity or investigative requirements are understood as obligations. Instead, they serve to accentuate the appropriateness and primacy of the state's jurisdiction.<sup>251</sup> Following Operations Cast Lead and Protective Edge, Israel expressed willingness to investigate incidents in which the IDF were accused of violating international law.<sup>252</sup> The series of Israeli reports, however, premised this willingness on the proposition that '[u]nder international law, the responsibility to investigate and prosecute alleged violations of the Law of Armed Conflict by a state's military forces falls first and foremost to that state'.<sup>253</sup>

Israeli appeals to the appropriateness of domestic jurisdiction allude to the principle of complementarity. The first Israeli update report — which provides accounts of individual investigations and criminal proceedings conducted

<sup>248</sup> Independence, impartiality, thoroughness, promptness and effectiveness are 'universal principles': Human Rights Council, *Report of the Committee of Independent Experts in International Humanitarian and Human Rights Laws to Monitor and Assess Any Domestic, Legal or Other Proceedings Undertaken by Both the Government of Israel and the Palestinian Side, in the Light of General Assembly Resolution 64/254, Including the Independence, Effectiveness, Genuineness of These Investigations and Their Conformity with International Standards*, UN GAOR, 15<sup>th</sup> sess, Agenda Item 7, UN Doc A/HRC/15/50 (23 September 2010) [21] ('*Report of the Committee of Independent Experts on IHL and HRL*').

<sup>249</sup> See Mandelblit and Aviram, above n 247.

<sup>250</sup> Isabel Kershner, 'Israeli Government Watchdog Investigates Military's Conduct in Gaza War', *The New York Times* (online), 20 January 2015 <[https://www.nytimes.com/2015/01/21/world/middleeast/israel-hamas-gaza-strip-war-investigation.html?\\_r=0](https://www.nytimes.com/2015/01/21/world/middleeast/israel-hamas-gaza-strip-war-investigation.html?_r=0)>.

<sup>251</sup> Alongside appeals to the principle of territoriality, this recalls Israel's reference to the principle of subsidiarity in its communication to the Spanish Court's pending prosecution following the Shehadeh case. See Letter from Israel to the Spanish Court, 29 January 2009.

<sup>252</sup> See *Operation in Gaza Report*, above n 32, 117 [312]. See also *2014 Gaza Conflict Report*, above n 53, 218 [409].

<sup>253</sup> See *Gaza Operation Investigations: An Update*, UN Doc A/64/651, annex I paras 71–2.

following Operation Cast Lead — cites an ICC expert paper. This defines and explains complementarity as establishing that '[s]tates have the first responsibility and right to prosecute international crimes'.<sup>254</sup> These appeals to informal complementarity are again presented in the abstract. They serve to assert the legitimacy of domestic jurisdiction, presented as capable within the first phase of engagement, and now offered as the appropriate means of assessment. This subtly shifts complementarity's emphasis from structuring a co-dependent relationship between the ICC and national courts to confirming the primacy of domestic jurisdiction.

Appeals to informal complementarity attempt to establish the legitimacy of state actions. Pleas to the appropriateness of domestic jurisdiction ensure that legitimising assessments of state behaviour occur at the (preferential) national level. Following Operation Cast Lead, the rhetoric that accompanied Israel's investigative efforts equated complementarity with the prominence of national proceedings:

The international community and national fora must respect and support national investigations currently in progress in Israel. To the extent that external organisations have gathered information related to the Gaza Operation, in the interest of justice, they should provide the information and any evidence on which it is based to Israel to facilitate those investigations. This is the essence of the principle of complementarity.<sup>255</sup>

The Second Turkel Commission Report accentuates the appropriateness of domestic jurisdiction.<sup>256</sup> The view that complementarity elevates the standing of domestic legal systems draws upon the principle's association with sovereignty. The ICC was established amidst the widespread reluctance of states to relinquish their prerogative over criminal jurisdiction.<sup>257</sup> Complementarity, in part, appeased state concerns. It was presented to ensure that states would retain 'investigative and prosecutorial priority'.<sup>258</sup> Thus, when a state pre-emptively appeals to complementarity and frames complementarity as conveying an investigative prerogative, it draws upon this formative conception. Made within the proleptic show trial, however, recourse to informal complementarity claims standing and facilitates subsequent efforts to establish the legitimacy of process and of substance.

Assertions of complementarity — which prioritise domestic jurisdiction — often blur measures intended to address individual criminal liability with those that pursue collective state responsibility. By framing complementarity and investigative obligations as a prerogative, the state may broaden complementarity's formal focus on domestic criminal proceedings to include general national investigations, commissions of inquiry or fact-finding missions. These serve, principally, to assess the overall legality of the military action or

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<sup>254</sup> Ibid [71], quoting *Complementarity in Practice*, above n 47, 3.

<sup>255</sup> *Operation in Gaza Report*, above n 32, 117 n 256.

<sup>256</sup> See *Second Turkel Commission Report*, above n 37, 85 [32].

<sup>257</sup> Cassese, above n 63, 11. See also Dominic McGoldrick, 'Political and Legal Responses to the ICC' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing, 2004) 389, 441; Holmes, above n 45, 43.

<sup>258</sup> Stigen, above n 14, 35.

use of force. The facilitating language of complementarity is employed to establish a forum in which broadly conceived investigations may be conducted, where legality is assessed and through which legitimacy may be purported.

D *Development of a Legal Narrative through General Investigations of State Conduct*

Establishment of the state's capacity and prerogative to investigate facilitates the third phase of the proleptic show trial. In this phase, the state addresses the merits of its military operation. In anticipation of condemnation, it assesses the legality of its actions and policies. It conducts and publicises the results of general investigations or commissions of inquiry. These are offered in satisfaction of the complementarity principle. This, purportedly, renders international scrutiny unnecessary. Appeals to informal complementarity recognise that, most often, states face broad accusations of legal violations. Within the public sphere, these accusations rarely differentiate between individual and state responsibilities. In response, the state builds upon the esteem of its domestic legal system to address accusations that *its* actions or policies are themselves illegal or illegitimate.

The investigative process exhibits characteristics of a show trial.<sup>259</sup> General investigations enable efforts to frame the conflict. They attempt to achieve pre-ordained and didactic purposes by showing a greater 'truth' and developing a legal narrative that purports investigative willingness, compliance and legitimacy. Following the Gaza wars, Israel's response to the mounting accusations of legal wrongdoing built upon the experiences of Lebanon. Israeli officials recognised that by conducting investigations they may appeal to complementarity and substantiate claims of legal compliance. Motivated by international law's perceived prominence and its ability to convey legitimacy, unprecedented resources ensured a thorough level of legal engagement both during and after Operation Cast Lead.<sup>260</sup> Six years later, following the ICC Prosecutor's commencement of a preliminary examination, Israel's State Comptroller, Joseph Haim Shapira, announced a broad inquiry into Israel's conduct during the 2014 war. He coupled this announcement with the claim that:

According to principles of international law when a State exercises its authority to objectively investigate accusations regarding violations of the laws of armed conflict, this will preclude examination of said accusations by external international tribunals (such as the International Criminal Court in The Hague).<sup>261</sup>

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<sup>259</sup> Jeremy Peterson argues that a show trial is defined by the presence of two related elements. First, there is an increased probability that the defendant will be convicted due to the planning and control of the trial. Second, the trial focuses, principally, on an 'audience outside of the courtroom rather than on the accused'. See Jeremy Peterson, 'Unpacking Show Trials: Situating the Trial of Saddam Hussein' (2007) 48 *Harvard International Law Journal* 257, 260.

<sup>260</sup> Weizman, above n 196, 90. See generally Amichai Cohen, above n 177, 367.

<sup>261</sup> State Comptroller and Ombudsman of Israel, 'The State Comptroller Investigation of Operation Tzuk Eitan — Protective' (Press Release, 20 January 2015) <[http://www.mevaker.gov.il/\(X\(1\)S\(loetsz0npwuzelkraw3ut1ok\)\)/he/publication/Articles/Pages/2015.1.20-Tzuk-Eitan.aspx?AspxAutoDetectCookieSupport=1](http://www.mevaker.gov.il/(X(1)S(loetsz0npwuzelkraw3ut1ok))/he/publication/Articles/Pages/2015.1.20-Tzuk-Eitan.aspx?AspxAutoDetectCookieSupport=1)> archived at <<https://perma.cc/4DKD-DZMK>>. See also Kershner, above n 250.

The State Comptroller responded directly to the ICC announcement. The proposed investigation sought to insulate the State from formal international scrutiny. Israel, however, had begun investigating its conduct and establishing a narrative of legal compliance and legitimacy while still in theatre. Writing after Operation Protective Edge, Sharvit Baruch discussed the difficulty of substantiating claims that a particular use of force was in fact legal. To address this challenge, Sharvit Baruch described the importance of expeditious investigation — of documenting events, attaining relevant testimonies and compiling photographic evidence that illustrates adherence to requisite legal principles.<sup>262</sup> Through the series of reports disseminated following the Gaza wars, Israel presented its investigative initiatives as inferring legitimacy of process. Many of the investigations detailed within these reports prioritise assessments of state responsibility above questions of individual criminal liability. While this stage of engagement demonstrates investigative willingness, these investigations primarily evaluate state conduct. They provide a platform to advocate in favour of permissive interpretations of foundational legal principles. They detail Israel's investigative efforts and processes. And, collectively, they present a narrative, crafted in an international legal vernacular, of the state's military operation that substantiates claims to legitimacy of substance.

Israel's investigative willingness — as well as its assessments of the cause and conduct of each war — was framed within a compelling defensive context. As with the *jus ad bellum*-based arguments that accompanied Israel's decisions to use force in 1948 and 1967, each report is framed around the threat posed by the rocket and mortar attacks emanating from Gaza. Following Operation Cast Lead, Israel asserted:

For eight years, Hamas, a terrorist organisation avowedly dedicated to the destruction of Israel, has launched deliberate attacks on Israeli civilians, from suicide bombings to incessant mortar and rocket attacks. Since October 2000, Hamas and other terrorist organisations unleashed more than 12,000 rockets and mortar rounds from the Gaza Strip at towns in Southern Israel. Even though Israel withdrew from the Gaza Strip in August 2005, the attacks continued. Even though Israel made repeated diplomatic efforts, including appeals to the UN Security Council, to end the violence, the attacks continued. The death, injuries and — as Hamas intended — terror among the civilian population, including children, were intolerable, particularly as Hamas increased the range and destructiveness of its attacks.<sup>263</sup>

In response to constant peril, Israel justified its decision to use force through the language of the *UN Charter*. Post-conflict legal engagements were premised on the position that military action was necessary, that it constituted self-defence.<sup>264</sup> Investigations of military actions remained mindful of this context. They were evaluated alongside a narrative of defence against a persistent,

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<sup>262</sup> Sharvit Baruch, above n 190, 66.

<sup>263</sup> *Operation in Gaza Report*, above n 32, 5 [15]. The primary Israeli report following Operation Protective Edge contained detailed accounts and documentations of Hamas' operations, chronicling the impact of rocket attacks in southern Israel. See *2014 Gaza Conflict Report*, above n 53, 58–136 [107]–[230].

<sup>264</sup> See, eg, *Operation in Gaza Report*, above n 32, 1 [3], 5 [16], 26 [68].

asymmetrical, campaign of terror.<sup>265</sup> Legal evaluations were to acknowledge, as Israel claimed, that

Hamas' cynical choice of tactics — including the unlawful strategy of deliberately shielding their operatives and munitions in civilian buildings and protected sites — made difficult, complex and hazardous battlefield decisions by IDF even *more* difficult, *more* complex, and *more* hazardous.<sup>266</sup>

Despite the appeal of defensive necessity, Israel recognised that the implications of these decisions evoked international condemnation and presented challenges to the legitimacy of its military operations.<sup>267</sup> In acknowledgment, Israel's investigative efforts moved beyond well-received articulations of self-defence. They assessed the state's conduct upon the use of force.<sup>268</sup>

The Israeli reports, and the results of the various investigations, were in part a response to the demands of the international community.<sup>269</sup> Following both the 2008–09 and 2014 Gaza wars, Israel expressed willingness to investigate any credible allegation of legal wrongdoing.<sup>270</sup> When Operation Cast Lead concluded, the IDF initiated field investigations into allegations that it had violated IHL. The MAG and the Attorney-General were tasked with evaluating the findings of these inquiries.<sup>271</sup> After its initial response, the IDF conducted an overarching examination of its conduct during Operation Cast Lead. This was

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<sup>265</sup> Ibid 118 [315].

<sup>266</sup> Ibid 8–9 [26] (emphasis in original).

<sup>267</sup> Sharvit Baruch, above n 190, 66.

<sup>268</sup> Amongst heightened sensitivities regarding the threat and challenges posed by terrorism, Israel's appeals resonated with influential members of the international community. See General Assembly, 'General Assembly Demands Full Respect for Security Council Resolution 1860 Calling for Immediate Gaza Ceasefire, as Emergency Session Concludes' (Press Release, GA/10809/Rev.1, 16 January 2009) <<https://www.un.org/press/en/2009/ga10809.doc.htm>> archived at <<https://perma.cc/8JLY-MAEB>>. See also SC Res 1860, UN SCOR, 6063<sup>rd</sup> mtg, UN Doc S/RES/1860 (8 January 2009). These assurances were not, however, held throughout the international community. See, eg, Khalid Shawabkah, *Identical Letters Dated 27 December 2008 from the Chargé d'Affaires AI of the Permanent Mission of Jordan to the United Nations Addressed to the Secretary-General and to the President of the Security Council*, UN SCOR, UN Doc S/2008/818 (27 December 2008). See also Victor Kattan, 'Operation Cast Lead: Use of Force Discourse and Jus ad Bellum Controversies', (2009) 15 *Palestine Yearbook of International Law* 95, 96–100. A sizable and influential group of international law scholars published an open letter within which they asserted Israeli actions in Gaza did not constitute self-defence but instead represented an act of aggression amounting to a war crime'. See Ian Brownlie et al, 'Israel's Bombardment of Gaza is Not Self-defence — It's a War Crime', *The Sunday Times* (London), 11 January 2009.

<sup>269</sup> 'Israel Defends Actions in 2009 Gaza Conflict', *CNN* (online), 30 January 2010 <<http://www.cnn.com/2010/WORLD/meast/01/29/israel.gaza.report/>> archived at <<https://perma.cc/GRL3-6L6B>>. This followed from the *Goldstone Report's* recommendation that under art 40 of the *UN Charter*, the Security Council should require Israel to conduct investigations. See *Goldstone Report*, UN Doc A/HRC/12/48, [1969]. This was affirmed by the General Assembly. See *Follow-Up to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict — Report of the Secretary-General*, UN Doc A/64/651, 2 [2]–[3].

<sup>270</sup> See, eg, *Operation in Gaza Report*, above n 32, 117 [312]. See also *2014 Gaza Conflict Report*, above n 53, 217 [408].

<sup>271</sup> *Operation in Gaza Report*, above n 32, 117 [312]–[313].

said to emanate from, and satisfy, the IDF's 'professional, moral and legal' obligations to thoroughly investigate its conduct during the 2008–09 war.<sup>272</sup>

In accompaniment of Operation Protective Edge, Israel launched three inquiries to investigate the campaign's conformity with international law. The first began during the conflict. Upon the initiative of the IDF Chief of General Staff, a fact-finding assessment mechanism was established to investigate 'Exceptional Incidents'.<sup>273</sup> This prompt expression of investigative willingness was promoted as evidence of the IDF's commitment to the rule of law and to the requirements of international law.<sup>274</sup> In the months following the cessation of hostilities, along with the State Comptroller investigation, the Knesset's Foreign Affairs and Defense Committee launched an inquiry into Protective Edge.<sup>275</sup>

By conducting and publicising investigations, the state gains an opportunity to advocate for (and apply) broad and permissive interpretations of IHL. During this phase of engagement, as the state moves from abstract pronouncements to specific analysis, it attempts to influence evaluative legal standards. This recalls Joseph Nye's description of soft power. Within, states attempt to shape international rules in accordance with their own interests, so that their actions appear more legitimate to external observers.<sup>276</sup> Incident-specific investigations appealing to the principle of complementarity, employ permissively interpreted standards of legal compliance to reach an advantageous determination and exhibit legitimacy of both process and substance.

Addressing the source of much of the condemnation it faced following Operation Cast Lead, Israel referenced the International Criminal Tribunal for the Former Yugoslavia ('ICTY') and argued, '[t]he fact of civilian casualties in an armed conflict, even in significant numbers, does not in and of itself establish any violation of international law'.<sup>277</sup> Constitutive principles like distinction and proportionality were understood within Israel's diplomatic communications as broad and permissive. They were interpreted to provide the state significant

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<sup>272</sup> Israel Ministry of Foreign Affairs, 'IDF: Conclusion of Investigations into Claims in Operation Cast Lead — Part 1' (Press Release, 22 April 2009) <[http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Pages/IDF\\_Conclusion\\_of\\_investigations\\_Operation\\_Cast\\_Lead\\_Part1\\_22-Apr-2009.htm.aspx](http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Pages/IDF_Conclusion_of_investigations_Operation_Cast_Lead_Part1_22-Apr-2009.htm.aspx)>.

<sup>273</sup> See *Report of the Detailed Findings of the Independent Commission*, UN Doc A/HRC/29/CRP.4, 164 [611].

<sup>274</sup> *Ibid.*

<sup>275</sup> *Ibid* [617].

<sup>276</sup> Joseph S Nye Jr, *Soft Power: The Means to Success in World Politics* (Public Affairs, 2004) 10–11. See also Craig, *International Legitimacy and the Politics of Security*, above n 98, 17, 233.

<sup>277</sup> *Operation in Gaza Report*, above n 32, 35 [90]. Israel further noted that civilian casualties could occur for a variety of justifiable reasons including that

[civilians] may be harmed due to their proximity to a military target, or by operational mistakes. At times civilians may suffer harm because they are conscripted by the adversary to serve as 'human shields' against an attack upon a military target.

At 35 [91]. In support, Israel cited the position taken by the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia, which 'rejected any suggestion, in its evaluation of the NATO bombing campaign in Yugoslavia, that the mere fact of civilian harm was indicative of wrongdoing': at 35 [91]. See International Criminal Tribunal for the Former Yugoslavia, above n 167, 1271 [51].



operational latitude.<sup>278</sup> These readings of international law became the evaluative standards that Israel applied to assess its actions in theatre.

Didactic and procedural investigative objectives merged within the conveyed assessments of IDF conduct. During the third phase of engagement, the state investigates the factual and legal aspects of controversial incidents. The resulting assessments, however, focus on the legality of state policy. Accordingly, in the maiden hours of Operation Cast Lead, Israel launched several strikes against police facilities throughout Gaza.<sup>279</sup> These resulted in numerous casualties, a torrent of international condemnation and competing discourses regarding the legitimacy of the IDF's targeting determinations.<sup>280</sup> Following the strikes, an IDF spokesperson noted that targeting decisions are made on the presumption that anyone involved with terrorism and in Hamas constitutes a valid target.<sup>281</sup> In reply, Human Rights Watch asserted that, in accordance with IHL, police and police infrastructure are presumptively civilian. They maintain this status throughout hostilities unless members of the police forces become direct

<sup>278</sup> The 2009 report, following Operation Cast Lead, addressed both the principles of distinction and proportionality. In relation to distinction, the report recognised the definition provided within *Additional Protocol I*. See *Operation in Gaza Report*, above n 32, 36–42 [94]–[115], citing *Additional Protocol I* art 48. The report continues to explain that distinction, in accordance with widespread state practice, addresses ‘only deliberate targeting of civilians, not incidental harm to civilians in the course of striking at legitimate military objectives’: *Operation in Gaza Report*, above n 32, 37 [97]. Having provided and supported broad understandings of the terms ‘military advantage’ and ‘indiscriminate attack’, Israel concluded its assessment of the principle of distinction by noting that ‘military operations that cause *unintended* and unwanted damage to civilians do not constitute violations of the Law of Armed Conflict, much less a war crime’: at 36–42 [94]–[115] (emphasis in original). The Israeli report continues to acknowledge that proportionality, as recognised in *Additional Protocol I*, prohibits attacks or military actions ‘which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’: at 44 [120], citing *Additional Protocol I* art 51(5)(b). In recognising the difficulty of balancing military and civilian objectives, Israel advocates for an evaluative standard that assesses proportionality from the perspective of the ‘reasonable military commander’. See *Operation in Gaza Report*, above n 32, 45 [123], 46 [125], 46 [127]; *2014 Gaza Conflict Report*, above n 53, 126 [332].

<sup>279</sup> The highest profile incident involved the targeting of a police ceremony that killed between 15 and 100 individuals (the precise nature of the event is disputed). See Taghreed El-Khodary and Ethan Bronner, ‘Israelis Say Strikes Against Hamas Will Continue’, *The New York Times* (online), 27 December 2008 <<https://www.nytimes.com/2008/12/28/world/middleeast/28mideast.html>>; Tim Butcher, ‘Israel Attack on Gaza: Fragile Peace Shattered Again’, *The Telegraph* (online), 27 December 2008 <<https://www.telegraph.co.uk/news/worldnews/middleeast/palestinianauthority/3981502/Israel-attack-on-Gaza-Fragile-peace-shattered-again.html>>.

<sup>280</sup> Human Rights Watch was critical of the targeting decision and noted that it may be unlawful. See Human Rights Watch, ‘Israel/Gaza: Civilians Must Not Be Targets’ (Press Release, 30 December 2008) <<https://www.hrw.org/news/2008/12/30/israel/gaza-civilians-must-not-be-targets>> archived at <<https://perma.cc/TQS7-FCTA>>. See also Shay Fogelman, ‘Shock and Awe’, *Haaretz* (online), 31 December 2010 <<http://www.haaretz.com/israel-news/shock-and-awe-1.334520>> archived at <<https://perma.cc/GN44-FXRY>>.

<sup>281</sup> Captain Benjamin Rutland, the IDF spokesperson, communicated that ‘[o]ur 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* (online), 5 January 2009 <<http://news.bbc.co.uk/2/hi/7811386.stm>> archived at <<https://perma.cc/WW2V-TAWG>>.

participants in the armed conflict.<sup>282</sup> The *Goldstone Report* determined that the Gazan police maintained their status as a civilian law enforcement agency. It found that many of those killed in the Israeli attacks were not participating in hostilities and thus did not forfeit their civilian status.<sup>283</sup> Israel's actions, at the commencement of Cast Lead, were labelled a violation of IHL.

The legitimacy and legality of Israel's operation had been challenged. In response, Israel conveyed the results of its investigation into these (and other) incidents. The ensuing discourse attempted to influence the factual and the legal. Despite the potential for individual criminal liability, these investigations assessed Israel's targeting determination policy. First, Israel framed its military action within the established narrative of avowedly defensive objectives. The operation was presented as a necessary means of reducing Hamas' terrorist capability.<sup>284</sup> Numerous factual assertions were offered in substantiation of Israel's claim that the Gazan police forces served a military function.<sup>285</sup> Next, Israel communicated the process of its investigative efforts. The requisite — albeit broadly interpreted — legal framework was applied to adjudge legality and assess legitimacy. Legal norms like distinction and proportionality, interpreted abstractly, now provided evaluative standards of self-assessment. The investigation found that while members of a solely civilian police force are immune from attack, this principle does not apply where the police are part of an armed party.<sup>286</sup> Within these circumstances, police forces constitute a legitimate military target.<sup>287</sup>

Israel further evaluated its targeting decisions in accordance with the principle of distinction. Israel had called for a permissive reading of distinction. This held the foundational humanitarian principle to address only the deliberate targeting of civilians and not incidental harm incurred in the course of striking a legitimate military target.<sup>288</sup> This reading provided Israel with an advantageously interpreted legal framework, under which incident-specific evaluations were

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<sup>282</sup> See Human Rights Watch, 'Israel/Gaza: Civilians Must Not Be Targets', above n 280. See also B'Tselem — The Israeli Information Center for Human Rights in the Occupied Territories, *Explanation of Statistics on Fatalities* (2018) <[https://www.btselem.org/statistics/casualties\\_clarifications](https://www.btselem.org/statistics/casualties_clarifications)> archived at <<https://perma.cc/43NR-EG8D>>.

<sup>283</sup> See *Goldstone Report*, UN Doc A/HRC/12/48, 17 [33]–[34].

<sup>284</sup> The airstrikes against police stations in al-Sajaiyeh and Deir al-Balah were placed within the context of Israel's overarching military objective of reducing Hamas' terrorist capabilities. See *Second Follow-Up to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict — Report of the Secretary-General*, UN GAOR, 64<sup>th</sup> sess, Agenda Item 64, UN Doc A/64/890 (11 August 2010) annex I ('*Gaza Operation Investigations: Second Update*') 64 [82].

<sup>285</sup> Israel contended that Hamas' military capabilities included both its armed forces (the Izz al-Din al-Qassam Brigades) and its internal security forces: *Operation in Gaza Report*, above n 32, 29–30 [77]–[79], 89–92 [237]–[244].

<sup>286</sup> *Ibid* 89 [238].

<sup>287</sup> *Ibid*. Israel cited *The Handbook of Humanitarian Law in Armed Conflict*. This states, inter alia, that, '[a]long with the combatant status attained through the incorporation into the armed forces, these (police) forces also become a military target (as defined by Art 52, para 2 API) and are therefore subject to armed attacks by the opposing party to the conflict just like any other unit in the armed forces': at 89 n 210, citing Knut Ipsen, 'Combatants and Non-Combatants' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, 1995) 65, 75.

<sup>288</sup> See *Operation in Gaza Report*, above n 32, 36–42 [94]–[115].

rendered. These substantiated traditional claims of legal fidelity. However, they also allowed Israel to demonstrate that it investigated allegations of legal violations, that it adhered to the required processes that the international community demanded. Investigative willingness entered the well-established patterns of argumentation that have long accompanied the use of force. Demonstration of such willingness allowed the state to claim compliance, to further its legal argument and ultimately to assert legitimacy.

Israel disseminated the results of its investigations. Amalgamated factual and legal arguments purportedly conveyed legitimacy of process and substance. Upon review, the MAG found that the strike against police stations in al-Sajaiyeh and Deir al-Balah adhered to the principle of distinction.<sup>289</sup> The stations constituted legitimate military targets. The policy that identified these targets was deemed consistent with international law. The station in Deir al-Balah was designated as part of Hamas' 'internal security' apparatus and said to be occupied by armed operatives. The attack was found to have served a legitimate objective by 'substantially weakening the military force available to Hamas'.<sup>290</sup> Despite the professed legality of the attack, a number of civilians had been killed while shopping at a nearby market.<sup>291</sup> The MAG investigation concluded, however, that the IAF was not aware of the market's existence. It could not have planned the attack to avoid the resulting casualties. Therefore, it did not violate the principle of distinction by intentionally targeting those civilians in the vicinity of the attack.<sup>292</sup>

The investigation demonstrated the purported legitimacy of Israel's targeting policy. It contributed to a general narrative of legal conformity and engagement. Israel was credited for having employed measures to minimise collateral damage.<sup>293</sup> It had performed investigations into the incident and found that the IDF's actions were in conformity with the requirements of IHL. The perceived benefit of these general, state-centric, investigative initiatives is multifaceted. They provide a platform upon which the state may present, uninterrupted, its narrative or theory of the case. The state gains an opportunity to advocate for, and then apply, permissive interpretations of legal provisions like distinction or proportionality. By engaging in this process, appealing to these investigative requirements, the state may illustrate legal compliance of both process and substance. Although these legal engagements did not fully moderate the condemnation Israel faced following both Gaza wars, they facilitated efforts to generate legitimacy.

Following the investigations into the incidents in al-Sajaiyeh and Deir al-Balah, the MAG declined to recommend assessment for individual criminal liability. During Operation Protective Edge and under the direction of Major General Danny Efroni, who served as MAG from 2011–15, Israel employed near-immediate investigations following contentious incidents. These, claimed

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<sup>289</sup> *Gaza Operation Investigations: Second Update*, UN Doc A/64/890, annex I 23–4 [79]–[82].

<sup>290</sup> *Ibid* 24 [83].

<sup>291</sup> This was directly addressed in the *Goldstone Report: Goldstone Report*, UN Doc A/HRC/12/48, 102 [406].

<sup>292</sup> *Gaza Operation Investigations: Second Update*, UN Doc A/64/890, annex I 24 [84].

<sup>293</sup> These included the use of a warhead of reduced size and strength and equipped with a delay fuse. The IAF were said to be unable to provide advanced warning because the attack 'required the element of surprise': *ibid* 24 [85].

Efroni, would ensure the rule of law while also reducing international pressure *and* thwarting legal measures against the IDF abroad.<sup>294</sup> The third phase of legal engagement is primarily focused on state behaviour and assesses military decisions and policies central to the controversy that accompanies the use of force. Often, these find that a particular incident, in which these policies are exercised, does not require further criminal assessment.<sup>295</sup> Efroni's statement, however, is illustrative of a dual focus. Despite recognising complementarity's potential to legitimise Israel's conduct during the Gaza wars, appeals to this principle are not completely separate from complementarity's formal purpose. When criminal proceedings are deemed necessary, the final phase of the proleptic show trial exhibits the state's willingness to employ these proceedings in direct appeal to the principle of complementarity.

### E *The Employment of Individual Criminal Proceedings*

The incident-specific assessments featured within the third phase of the proleptic show trial serve a subsidiary purpose. Despite pleas to complementarity's implied ability to legitimise general state conduct, appeals to this principle are not made in isolation of its formal purpose. As illustrated by the al-Sajaiyeh and Deir al-Balah cases, these investigations prioritise assessments of state policy. Upon completion, however, general investigations will also assess whether additional criminal proceedings are necessary. Often, the incident-specific investigations displayed during the third phase substantiate claims that individual criminal proceedings are unwarranted. The fourth and final phase of the proleptic show trial, nevertheless, exhibits the state's willingness to investigate individual criminal liability, and when deemed appropriate, prosecute individuals accused of violating international law.

The state (or military) may pursue these investigations in good-faith and for various reasons.<sup>296</sup> Within the proleptic show trial, however, these investigations are presented collectively. They illustrate the willingness of the state to investigate allegations of individual misconduct. These efforts are presented in satisfaction of complementarity. Incident-specific investigations and, if necessary, criminal proceedings convey a willingness to consider whether an individual violation occurred. They purport evidence of accountability. And they claim to display adherence to the purposes of the complementarity regime. These investigations differentiate illegitimate individual actions from state policy and from the — professedly legitimate — domestic framework that governs the conduct of hostilities. They are likely to occur well before the formal attention of the ICC. Offered collectively, within the proleptic show trial, these appeals to

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<sup>294</sup> Harel, 'Preempting The Hague', above n 40. See also Gili Cohen, 'Israeli Reservists Demand End to Army's Criminal Probe of Gaza War', *Haaretz* (online), 5 January 2015 <<http://www.haaretz.com/israel-news/1.635439>> archived at <<https://perma.cc/PVN9-G852>>. See also 'Ramat Gan — Israeli Military Lawyer Says ICC Probe Not a Concern', *Vos Iz Neias?* (online), 19 February 2015 <[http://www.vosizneias.com/195316/2015/02/19/ramat-gan-israeli-military-lawyer-says-icc-probe-not-a-concern/?comments\\_sort=asc](http://www.vosizneias.com/195316/2015/02/19/ramat-gan-israeli-military-lawyer-says-icc-probe-not-a-concern/?comments_sort=asc)> archived at <<https://perma.cc/4PLM-JQRH>>.

<sup>295</sup> Nye Jr, above n 276, 10.

<sup>296</sup> Hampson, above n 10, 3.

and examples of the state's willingness to investigate and prosecute cases again present as legitimacy of process and of substance.

Israel, as with many states, has rejected abstract calls for members of its military to be prosecuted before international tribunals. Prime Minister Netanyahu, following the PA's accession to the *Rome Statute*, vowed to his Cabinet that '[w]e will not allow Israeli soldiers and officers to be dragged to [the International Criminal Court in] The Hague'.<sup>297</sup> Ehud Olmert, who served as Prime Minister during Operation Cast Lead, stated that

[t]he soldiers and commanders who were sent on missions in Gaza must know that they are safe from various tribunals and that the State of Israel will assist them on this issue and defend them just as they [boldly] defended us during Operation Cast Lead.<sup>298</sup>

Israeli officials have of course, recognised the importance of individual prosecutions as a means of ensuring domestic accountability, discipline and structure within the IDF.<sup>299</sup> Additionally, however, officials acknowledge that such prosecutions generate legitimacy and enable appeals to the principle of complementarity. This recalls Sharvit Baruch's claim that to rely upon complementarity and confront both allegations in the international arena and potential criminal proceedings, Israel should employ independent investigations that will receive international legitimacy.<sup>300</sup> The Turkel Commission sought to facilitate these efforts.<sup>301</sup> It recognised the importance of legislative readiness in ensuring that a state possesses the required legal framework to 'investigate and prosecute individuals for the offenses set out in the *Rome Statute*'.<sup>302</sup>

Israel presented its post-conflict investigative efforts as in accordance with international obligations.<sup>303</sup> Following Operation Cast Lead, Israel asserted that its 'legal and judicial apparatus is fully equipped and motivated to address alleged violations of national or international law by its commanders and soldiers.'<sup>304</sup> Investigations were conducted by the Military Police Criminal

<sup>297</sup> Daniella Peled, 'How Israel Stands to Lose at the ICC, without a Single Trial Taking Place', *Haaretz* (online), 6 January 2015 <<http://www.haaretz.com/opinion/.premium-1.635650>> archived at <<https://perma.cc/JLY3-M7NA>>.

<sup>298</sup> Israel Ministry of Foreign Affairs, 'Cabinet Communique' (Communiqué, 25 January 2009) <[http://www.mfa.gov.il/mfa/pressroom/2009/pages/Cabinet\\_communique\\_25-jan-2009.aspx](http://www.mfa.gov.il/mfa/pressroom/2009/pages/Cabinet_communique_25-jan-2009.aspx)>. See also Human Rights Watch, *Turning a Blind Eye: Impunity for Laws-of-War Violations during the Gaza War* (Report, April 2010) 22 ('*Turning a Blind Eye*').

<sup>299</sup> Harel, 'Preempting The Hague', above n 40. Decisions to investigate and efforts to prosecute have, however, caused considerable controversy within the IDF, especially in relation to the events related to conduct of Operation Protective Edge. See, eg, Yonah Jeremy Bob, 'IDF War Crimes Probes Threaten to Tear Military Apart from Within', *The Jerusalem Post* (online), 1 January 2015 <<http://www.jpost.com/Israel-News/Analysis-IDF-probes-into-Gaza-war-conduct-threatens-to-tear-military-apart-from-within-386327>> archived at <<https://perma.cc/X6VA-ZUVG>>.

<sup>300</sup> Sharvit Baruch, above n 190, 70.

<sup>301</sup> Harel, 'Preempting The Hague', above n 40.

<sup>302</sup> *Second Turkel Commission Report*, above n 37, 162 [8]. The Turkel Commission noted that in many countries, 'ratification and the desire to ensure that the country is in a position to try its own nationals, should that be necessary, served as a catalyst for amendment and development of legislation setting out offenses of war crimes and other violations of the law of armed conflict'.

<sup>303</sup> See, eg, *Gaza Operation Investigations: An Update*, UN Doc A/64/651, annex I 38 [91].

<sup>304</sup> *Operation in Gaza Report*, above n 32, 107 [284].

Investigation Division ('MPCID'), the MAG and the Military Courts.<sup>305</sup> The scope of these investigations was considerable. They included legal assessments of numerous incidents that had evoked concern amongst international observers.<sup>306</sup> Israel's post-conflict accountability efforts supplemented the incident-specific investigations of state policy with assessments of individual criminal liability. When the war concluded and attention shifted to the diplomatic sphere, Israel conveyed the results of these inquiries. Many of the incident specific investigations, featured during the third phase of engagement, did not find a reasonable suspicion of criminal wrongdoing. These cases were closed.<sup>307</sup> A number of investigations into high-profile incidents that occurred during Operation Cast Lead were dismissed as intelligence failures that did not entail individual (or state) responsibility.<sup>308</sup>

The permissive interpretations of legal standards like proportionality and distinction — for which Israel had advocated — were initially applied to assess state conduct. Now they would determine individual criminal liability.<sup>309</sup> A series of 90 command-level investigations evaluated incidents that resulted in civilian injuries, fatalities and the destruction of property. These investigations were premised on the view that 'injuries to civilians and damage to civilian property during hostilities do not, in themselves, provide grounds for opening a criminal investigation into potential violations of the Law of Armed Conflict'.<sup>310</sup> In cases where investigations found that international law had been breached, such breaches also constituted violations of the IDF's rules of engagement.<sup>311</sup> In one incident 'a Brigadier General and a Colonel had authorized the firing of

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<sup>305</sup> Ibid 108 [286].

<sup>306</sup> Following Operation Cast Lead, five broad categories of alleged violations, encompassing thirty individual incidents, were initially investigated under the direction of Lieutenant General Gabi Ashkenazi, the IDF's Chief of General Staff. These addressed:

Claims regarding incidents where UN and international facilities were fired upon and damaged during the Gaza Operation; Incidents involving shooting at medical facilities, buildings, vehicles and crews; Claims regarding incidents in which civilians not directly participating in the hostilities were harmed; The use of weaponry containing phosphorous; and Destruction of private property and infrastructure by ground forces.

Ibid 119 [318].

<sup>307</sup> See, eg, *2014 Gaza Conflict Report*, above n 53, 236 [455].

<sup>308</sup> For example, an investigation into an operation targeting a weapons storage facility that resulted in civilian deaths found that the IDF had mistakenly targeted the home of the Al-Daya family rather than the neighbouring building. In another incident under consideration, the update report described an incident where the lead car of a UNRWA convoy was fired upon. The report noted, however, that the investigation revealed that this was due to a communications error and found no legal responsibility under IHL/ICL. *Gaza Operation Investigations: An Update*, UN Doc A/64/651, annex I 42 [99].

<sup>309</sup> See *Operation in Gaza Report*, above n 32, 35–42 [90]–[91], 36–42 [94]–[115]; *2014 Gaza Conflict Report*, above n 53, 186 [332].

<sup>310</sup> *Gaza Operation Investigations: An Update*, UN Doc A/64/651, annex I 48 [129]. See also *Operation in Gaza Report*, above n 32, 118 [315].

<sup>311</sup> See, eg, *Gaza Operation Investigations: An Update*, UN Doc A/64/651, annex I 42 [100]. See also Cohen and Shany, above n 14, 55.

explosive shells which landed in a populated area'.<sup>312</sup> This was held to be a violation of IDF orders limiting the use of artillery fire in such areas.<sup>313</sup>

Similar patterns emerged following Operation Protective Edge. Upon the recommendation of the Turkel Commission, the fact-finding assessment mechanism provided the MAG with information that would be used to determine whether reasonable grounds existed to begin a criminal investigation.<sup>314</sup> The principal Israeli report noted the significant number of complaints that Israel had received and was reviewing following the war.<sup>315</sup> 126 incidents were under consideration by March 2015.<sup>316</sup> General investigations of state conduct gave way to specific investigations that would determine whether a particular incident entailed criminal liability. Assessments were rendered as to whether accused individuals adhered to a standard of reasonableness. The Israeli position held that:

Rooted in the idea of the 'reasonable commander', the legal analysis is focused on circumstances at the time of the incident, in light of information that was known to the commander (or should have been known). Thus, for example, targeting decisions that result in civilian casualties do not, *ipso facto*, indicate a [criminal] violation of the Law of Armed Conflict, whereas the deliberate targeting of civilians would indicate such a violation.<sup>317</sup>

Often, such investigations into high-profile events — those that elicited significant international controversy — served to demonstrate legal compliance, defuse state responsibility and generate legitimacy through their individual focus. In one incident, a MAG investigation into an IDF strike that killed two caregivers at a centre for people with mental and physical disabilities in Beit Lahiya found that the intelligence assessment did not produce evidence of a care centre.<sup>318</sup> Under the auspices of an investigative mechanism that was intended to assess criminal liability, the Israeli investigation served a dual purpose. Conveyed and disseminated through a post-conflict report, Israel could

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<sup>312</sup> *Gaza Operation Investigations: An Update*, UN Doc A/64/651, annex I 42 [100].

<sup>313</sup> The report explains that in this case '[t]he Commander of the Southern Command disciplined the two officers for exceeding their authority in a manner that jeopardized the lives of others': *ibid*.

<sup>314</sup> *Report of the Detailed Findings of the Independent Commission*, UN Doc A/HRC/29/CRP.4, 164 [612]. See also *Second Turkel Commission Report*, above n 37, 425–6 [8]–[9].

<sup>315</sup> *2014 Gaza Conflict Report*, above n 53, 233 [448]. As noted in all Israeli reports, investigations could (and commonly were) initiated followed any credible complaint from a wide variety of sources that include Palestinian civilians, local or international non-governmental organisations, UN bodies or agencies, in response to media reports, or on the IDF's own initiative. See, eg, *Operation in Gaza Report*, above n 32, 108 [288]; *Gaza Operation Investigations: An Update*, UN Doc A/64/651, annex I 38–9 [91].

<sup>316</sup> *2014 Gaza Conflict Report*, above n 53, 233 [449].

<sup>317</sup> *Ibid* 234 [452].

<sup>318</sup> *Ibid* 236 [456]. The strike was intended to target a weapons depot located inside the home of a senior Hamas commander. The report explained:

According to the factual findings and material collected by the FFA Mechanism [Fact Finding Assessment] and presented to the MAG, the strike was directed at a weapons depot located inside the residential home of a senior Hamas commander, in a building comprising four apartments. While the operating forces were aware of the existence of a kindergarten in the same building, close to the weapons depot, there was no information indicating the existence of a care centre.

demonstrate that the incident had been investigated and that there was no evidence of individual criminal liability. Israel could avail of an additional platform to reiterate that *its* conduct and policy accorded with relevant legal requirements:

the MAG found that the targeting process followed in this case accorded with Israeli domestic law and international law requirements. The attack was directed against a military objective, while adhering to the requirements of the principle of proportionality, and the decision to attack was made by the authorities authorised to do so. Further, the MAG found that the attack was carried out after a number of precautions were undertaken intended to minimise the potential for civilian harm, and that the professional assessment at the time of the attack — that civilians would not be harmed as a result of the attack — was not unreasonable under the circumstances. Although seemingly civilians were harmed as a result of the attack — indeed a regrettable result — it does not affect its legality post facto.<sup>319</sup>

When investigators found that international law had been breached, that an individual criminal offense had occurred, they did not question state policy or action. Such cases were well-removed from the responsibilities of the state. They were also few in number. After Operation Cast Lead, of the 36 criminal investigations referenced in the first Israeli update report, only one led to indictment, seven were dismissed due to a lack of evidence or inability to obtain testimony and the remainder were in progress.<sup>320</sup> In totality, following the 2008–09 Gaza war, Israel initiated approximately 400 investigations. From these, the MAG commenced 52 criminal investigations. Two produced convictions — in the first a soldier was sentenced to seven and a half months' imprisonment for the theft of a credit card, while in the other two soldiers were convicted of using a child as a human shield and each received suspended sentences of three months.<sup>321</sup>

The post-conflict response to Operation Protective Edge drew upon a fact-finding assessment mechanism. Resulting investigations into 'exceptional incidents' allowed Israel to demonstrate adherence to a process that had been endorsed by the Turkel Commission. Under the mechanism, Israel would first investigate and document a particular event. This allowed for an assessment of state conduct. On the basis of this investigation, however, Israel determined

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<sup>319</sup> Ibid.

<sup>320</sup> See *Gaza Operation Investigations: An Update*, UN Doc A/64/651, annex I 43–6 [104]–[120], [130], [131], [134], [137]. Following Operation Protective Edge, of the 126 incidents examined by the MAG (as of March 2015), 65 had been completed. From these 6 were referred for criminal investigation, 17 were closed after the MAG found that 'IDF's actions did not raise reasonable grounds for suspicion of criminal behaviour' and in the remainder of cases the MAG had requested further information. A further 19 criminal investigations were opened by the MAG. *2014 Gaza Conflict Report*, above n 53, 233 [448]. The focus of these investigations ranged from incidents of looting and obstruction of military investigations to cases in which civilians had been killed: at 235–42 [453]–[457].

<sup>321</sup> The results of these investigations were detailed in a report of the UN Committee of Independent Experts that was formed to monitor Israeli and Palestinian efforts to implement the recommendation of the *Goldstone Report*. See Mary McGowan Davis and Lennart Aspegren, *Report of the Committee of Independent Experts in International Humanitarian and Human Rights Law Established Pursuant to Council Resolution 13/9*, 16<sup>th</sup> sess, Agenda Item 7, UN Doc A/HRC/16/24 (18 March 2011) [24], [30], [32] ('*McGowan Davis Report*'). See also *Gaza Operation Investigations: An Update*, UN Doc A/64/651, annex I 49–50 [137].



whether additional criminal investigation was necessary.<sup>322</sup> Regardless of the assessment, this facilitated the claim that alleged breaches of international law were investigated for criminal liability. The final MAG update report explained that 190 incidents had been referred for investigation.<sup>323</sup> Some remained pending and many had been closed.<sup>324</sup> In one incident, the MAG opened a criminal investigation when two soldiers were accused of stealing NIS2420 from a home in the Shuja'iyya neighbourhood of Gaza City. Three soldiers were indicted.<sup>325</sup>

On 16 July 2014, four children were killed when playing on a beach near the Gaza port. Ahed, Ismail, Mohamad and Zakaria Bakr were cousins. Two shells from a naval vessel exploded as they ran along the shore of the Mediterranean.<sup>326</sup> The Israeli strike became one of the most controversial events of the war. The UN Commission of Inquiry found 'strong indications that the IDF failed in its obligations to take all feasible measures to avoid or at least minimize incidental harm to civilians'.<sup>327</sup> The Israeli response coupled the traditional refrain of *we obey the law* with the novel claim of *we will investigate*. Only hours after the incident, an IDF spokesperson claimed the attack was against a 'legitimate' military target.<sup>328</sup> Soon after, however, the IDF announced that it was investigating the events.<sup>329</sup>

The incident was referred to the fact-finding assessment mechanism ('FFA') for evaluation. The mechanism found reasonable grounds for suggesting that the attack 'was not carried out in accordance with the rules and procedures applicable to IDF forces'.<sup>330</sup> In accordance, the MAG began a formal investigation.<sup>331</sup> When the investigation was complete, the MAG found that there was insufficient evidence that a criminal offence had occurred. The case was closed. The MAG held that the IDF targeted an area known to be used by

<sup>322</sup> *Report of the Detailed Findings of the Independent Commission*, UN Doc A/HRC/29/CRP.4, 165 [615].

<sup>323</sup> Israel Ministry of Foreign Affairs, 'Operation Protective Edge: Investigation of Exceptional Incidents — Update 4: Decisions of the IDF Military Advocate General' (Press Release, 11 June 2015) <<http://mfa.gov.il/MFA/ForeignPolicy/IsraelGaza2014/Pages/Operation-Protective-Edge-Investigation-of-exceptional-incidents-Update-4.aspx>>.

<sup>324</sup> Cases were closed for a variety of reasons. These included incidents where it was determined that there were no reasonable grounds for suspicion of criminal behaviour. In other cases, the MAG found that the alleged incident was in conformity with international law and thus there was no need to assess individual liability. See *ibid*.

<sup>325</sup> *Ibid*.

<sup>326</sup> Jethro Mullen and Ben Wedeman, "'They went to the Beach to Play': Deaths of 4 Children Add to Growing Toll in Gaza Conflict', *CNN* (online), 17 July 2014 <<http://www.cnn.com/2014/07/17/world/meast/mideast-conflict-children/>> archived at <<https://perma.cc/ER6H-HRZ7>>; Anshel Pfeffer, 'An Eyewitness Account of the Attack that Killed Four Children on Gaza Beach', *Haaretz* (online), 16 July 2014 <<https://www.haaretz.com/an-eyewitness-account-of-the-attack-that-killed-four-children-on-gaza-beach-1.5255759>> archived at <<https://perma.cc/S2GP-C2FR>>.

<sup>327</sup> *Report of the Detailed Findings of the Independent Commission*, UN Doc A/HRC/29/CRP.4, 170 [631].

<sup>328</sup> Pfeffer, above n 326.

<sup>329</sup> *Ibid*. See also Ben Wedeman, Michael Pearson and Ali Younes, 'Israel, Hamas OK Temporary Cease-Fire: Five Hours on Thursday', *CNN World* (online), 16 July 2014 <<https://edition.cnn.com/2014/07/16/world/meast/mideast-crisis/index.html>> archived at <<https://perma.cc/C2M6-DQTH>>.

<sup>330</sup> Israel Ministry of Foreign Affairs, 'Operation Protective Edge: Investigation of Exceptional Incidents — Update 4: Decisions of the IDF Military Advocate General', above n 323.

<sup>331</sup> *Ibid*.

Hamas naval forces and that was exclusively utilised by militants. A day earlier the IDF had targeted a nearby site used to store military supplies. Intelligence reports were said to show that Hamas planned to use this area to launch an attack against Israel. Aerial surveillance identified four individuals running through the site. It was unclear that they were children.<sup>332</sup> The MAG found that the attack was in accordance with Israel's legal obligations. The decision to attack 'was aimed at figures who were understood to be militants from Hamas' Naval Forces, who had gathered in order to prepare to carry out military activities against the IDF'.<sup>333</sup> The attack was not 'expected to result in any collateral damage to civilians or to civilian property' and several precautionary measures were taken.<sup>334</sup>

When Israel communicated the results of its investigation, it emphasised the process used to reach its legal determination:

The investigation that was conducted was thorough and extensive. During the investigation process testimony was collected from a large number of IDF soldiers and officers who were involved in the planning and execution of the attack. Additionally, an extensive number of documents relating to the attack were reviewed, along with video footage documenting the attack in real time, as well as media images and video footage which documented parts of the incident. Moreover, MPCID investigators made efforts to collect the testimonies of Gaza Strip residents who were, allegedly, witnesses to the incident. In this context, the collection of testimony from three witnesses was coordinated. Regretfully, despite the prior coordination, the witnesses eventually declined to meet with the MPCID investigators, and instead provided affidavits in regard to the incident.<sup>335</sup>

The Israeli response attempted to illustrate the legitimacy of its military action and investigative processes. Each was intended to demonstrate the State's compliance with international law.<sup>336</sup> Following the 2008–09 and 2014 Gaza wars, Israel partook in an international dialogue regarding the conflict and in assessment of the use of force.<sup>337</sup> It is of course not unusual that Israel defended its military action, that it professed compliance with international law. Such declarations of legal fidelity commonly accompany the use of force. They form part of the conversation that follows conflict and attempts to justify state violence. Now, however, the state is incentivised to cite complementarity. The traditional post-conflict discourse increasingly includes assertions of legitimacy that draws upon the state's willingness to investigate.

## V CONCLUSION: THE UNCERTAIN EFFICACY AND INHERENT TENSION OF INFORMAL COMPLEMENTARITY

The proleptic show trial is a metaphor. The phases of legal engagement described throughout Part IV are not fixed. In practice, they do not follow a linear progression and they continue to emerge and evolve. Certain features of the proleptic show trial are formal. This includes professional investigations.

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<sup>332</sup> Ibid.

<sup>333</sup> Ibid.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid.

<sup>336</sup> Ibid.

<sup>337</sup> See, eg, *ibid.*

Undertaken by the state, these may adhere to international standards and are employed for various purposes. One such purpose, however, is to generate legitimacy. This is the principal objective of the proleptic show trial, which displays adherence to a process and contributes towards a narrative that traditionally draws upon the justificatory tone of international law.<sup>338</sup> While the outcome of a particular investigation may not be predetermined, it is weighted in favour of the state. Investigations commonly substantiate claims of legal adherence or distinguish between an overt violation and the state policy governing the use of force. Within the proleptic show trial the state may determine the appropriate standards of legal compliance and evaluate incidents for conformity with these standards. The prosecutor becomes both the legislator and the judge.

As such, many ardent critics remain unmoved by Israeli engagements with international law. They receive accompanying appeals to complementarity with scepticism.<sup>339</sup> Israel's displays of investigative willingness — to the extent that Israel sought to achieve didactic objectives and generate legitimacy — did, however, experience qualified success. Israel received diminishing scrutiny within limited but noteworthy circumstances. Significantly, Richard Goldstone — the former South African judge and primary author of the report often placed at the centre of the legal discourse and who arguably became the most high-profile critic of Israeli actions following the 2008–09 Gaza war<sup>340</sup> — recanted his most damaging accusation. Writing in *The Washington Post*, Goldstone claimed: 'If I had known what I know now, the *Goldstone Report* would have been a different document'.<sup>341</sup> He continued that at the time of writing, Israel had conducted 400 investigations of operational misconduct while Hamas had conducted none. Goldstone cited with approval comments from a UN expert panel formed to oversee the implementation of his report. This, in part, commended the Israeli investigations.<sup>342</sup>

Ultimately, Richard Goldstone reconsidered and disavowed his report's primary accusation, that Israel had intentionally targeted civilians. The former judge noted the influence of the numerous investigations undertaken by Israel:

The allegations of intentionality by Israel were based on the deaths of and injuries to civilians in situations where our fact-finding mission had no evidence on which to draw any other reasonable conclusion. While the investigations published by the Israeli military and recognized in the UN committee's report have established

<sup>338</sup> See, eg, Byers, *War Law*, above n 103, 3.

<sup>339</sup> See *Report of the Detailed Findings of the Independent Commission*, UN Doc A/HRC/29/CRP.4, 159–69 [618]–[629]. See also *Report of the Committee of Independent Experts on IHL and HRL*, UN Doc A/HRC/15/50, 22–3 [90]–[95]; B'Tselem — The Israeli Information Center for Human Rights in the Occupied Territories, 'ICC Jurisdiction Cannot Be Denied Based on Israel's Façade of Investigation', above n 27; *Turning a Blind Eye*, above n 298, 1; Schmitt, above n 10, 31–4.

<sup>340</sup> See *Goldstone Report*, UN Doc A/HRC/12/48; Richard Goldstone, 'Reconsidering the Goldstone Report on Israel and War Crimes', *The Washington Post* (online), 1 April 2011 <[https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC\\_story.html](https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html)> archived at <<https://perma.cc/CG45-TTMD>>.

<sup>341</sup> Goldstone, above n 340.

<sup>342</sup> *Ibid.* See also *McGowan Davis Report*, UN Doc A/HRC/16/24. For an account of the various readings of Goldstone's decision to renounce aspects of his report, see Craig, *International Legitimacy and the Politics of Security*, above n 98, 201–3.

the validity of some incidents that we investigated in cases involving individual soldiers, they also indicate that civilians were not intentionally targeted as a matter of policy.<sup>343</sup>

The Israeli experience, following the succession of wars in Gaza, supports Mégret's contention that states are unlikely to conduct 'mock' proceedings to avoid ICC scrutiny.<sup>344</sup> The conclusion, however, that '[i]f a state is unwilling, it will generally be unwilling all the way'<sup>345</sup> is contestable. When Luban, Azarova and others considered the role that complementarity may play should the ICC Prosecutor move beyond a preliminary examination and bring a case before the Court, their opposing assessments queried the genuineness of Israel's investigative and accountability initiatives.<sup>346</sup> These inquiries employ the language of art 17 of the *Rome Statute*. They attempt to assess whether a (hypothetical) case is admissible due to the unwilling exception or if Israel's domestic efforts ensure that cases are 'investigated and prosecuted by a State which has jurisdiction over it'.<sup>347</sup>

The purpose of this paper is not to relitigate the Israel-Palestinian conflict or the Gaza wars. Instead, this paper suggests — through its description of informal complementarity — that a broader, more encompassing understanding and purpose of this principle exists. This goes beyond the formal usage conveyed through art 17 of the *Rome Statute*. It exceeds complementarity's formalistic assessment of a particular case's admissibility. Informal complementarity, as understood throughout, facilitates an emerging means of generating legitimacy following the use of force. It has entered the post-conflict discourse and diplomatic debates. The state now couples its traditional assertions of legal compliance with evidence of both its capacity and willingness to investigate.

These legal engagements with informal complementarity occur pre-emptively, in advance of ICC involvement — which may never transpire. They conflate the formal distinction between individual criminal liability and the non-criminal obligation of states under IHL. States often appeal to informal complementarity with multiple motives. Primarily, they rely upon the language of complementarity to convey legitimacy of process and of substance. The requisite investigations provide a platform from which the state may build a narrative of legal compliance. They may demonstrate the legality of state policy, in both *jus ad bellum* and *jus in bello*, and defend particular decisions within specific operations. Overt violations of international law can be acknowledged and identified as exceptional. Informal complementarity allows proactive differentiation between an individual violation and the state's policy or the military's rules of engagement. Finally, appeals to informal complementarity

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<sup>343</sup> Goldstone, above n 340. While Richard Goldstone retracted part of the report's conclusion, his co-authors affirmed the original accusations. See Hina Jilani, Christine Chinkin and Desmond Travers, 'Goldstone Report: Statement Issued by Members of UN Mission on Gaza War', *The Guardian* (online), 14 April 2011 <<https://www.theguardian.com/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza>> archived at <<https://perma.cc/RXP8-LP45>>.

<sup>344</sup> Mégret, above n 30, 376.

<sup>345</sup> *Ibid.*

<sup>346</sup> See, eg, Luban, above n 17; Moreno Ocampo, above n 17; Dershowitz, above n 17; Azarova, above n 20.

<sup>347</sup> *Rome Statute* art 17(1)(a).

provide a means of insulating both the state and its officials from international scrutiny.

These forms of legal engagement do not suggest that the domestic investigations, fact-finding missions, commissions of inquiry and criminal proceedings that substantiate appeals to informal complementarity are not genuine. States are expected to investigate and encouraged to ensure domestic accountability so as to avoid international scrutiny. This is a central purpose of the complementarity regime. Certain domestic initiatives — that profess to satisfy investigative requirements and preclude ICC admissibility — may, of course, be in bad faith. Others may exhibit mixed motives. As Abram Chayes so ably demonstrated, it is difficult, often impossible, to know the extent to which international legal considerations influence domestic political decisions.<sup>348</sup>

Within the increasingly fraught and polarised context of Israeli-Palestinian relations, appeals to complementarity may be processed as manipulations of international law. Equally, they may present as evidence of compliance to a proscribed process. They can, and have, been observed in condemnation and in vindication. The primary purpose of this paper, however, has not been to assess Israel's investigative mechanisms. It has been to observe this larger use of complementarity and identify a shift toward investigative legitimacy.

The political and legal debates that accompany the Israeli-Palestinian context, however, illustrate an inherent tension that rests at the core of informal complementarity. This exists between the desire to encourage investigation by states and the unavoidable implication that appeals to informal complementarity are somehow disingenuous efforts to manufacture legitimacy. Despite the sceptical tone often evoked by appeals to informal complementarity, it is vital that states are encouraged to investigate and redress alleged violations of international law. Such encouragement is central to the formal complementarity regime. This promotes the internalisation of international law and compels states to ensure against impunity. It is what Moreno Ocampo meant when he declared that, 'as a consequence of complementarity ... the absence of trials before this Court ... would be a major success'.<sup>349</sup>

Yet, it is necessary to understand the implications of informal complementarity and ask whether this principle has become or facilitates something other than what it initially intended. Asking such questions, however, risks producing what Darryl Robinson termed 'inescapable dyads'.<sup>350</sup> A state is faulted for either failing to engage *or* engaging with its investigative obligations. A state official or military leader may interpret these forms of criticism as products of a winless situation, the positioning of moral judgement above legal standard.

This is understandable. But as David Kennedy and others have explained, professed legitimacy risks enabling conflict and emboldening states to use force.<sup>351</sup> The extent to which investigation as legitimisation facilitates the use of

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<sup>348</sup> Abram Chayes, *The Cuban Missile Crisis* (Oxford University Press, 1974) 4. See also Kritsiotis, 'The Power of International Law as Language', above n 101, 401–2.

<sup>349</sup> See *Complementarity in Practice*, above n 47, 2.

<sup>350</sup> See Darryl Robinson, 'Inescapable Dyads: Why the International Criminal Court Cannot Win' (2015) 28 *Leiden Journal of International Law* 323, 323–4

<sup>351</sup> Kennedy, above n 96, 41.

force and excuses state violence requires further consideration. Do informal appeals to complementarity help break, or facilitate, the cycle of violence that continues to plague Palestine, Israel and beyond? Whether these informal legal engagements can facilitate state efforts to forestall formalist measures and endeavour to nationalise international scrutiny of state behaviour compels additional thought. The inherent tension that exists between the desire for states to investigate potential violations of IHL and the capacity of appeals to domestic measures to formalistically assert post-hoc legitimacy must be contemplated. And the implications of strategic legal engagements in appeal to the latter, and in neglect of the former, must also be recognised to ensure that states do not understand breaches of international law as something that requires redress not prevention. A violation must not become an occurrence that is to be explained but not avoided.

## VI ADDENDUM

On 14 March 2018, Israel's State Comptroller issued its long-awaited report evaluating the 2014 Gaza War.<sup>352</sup> Adopting an international legal framework, the report assessed political and military decision-making during Operation Protective Edge. The State Comptroller — tasked with providing independent governmental oversight — had announced this investigative initiative mere days after the ICC Prosecutor launched the preliminary examination into the 'situation in Palestine'.<sup>353</sup> The report's title — *IDF Activity from the Perspective of International Law, Particularly with Regard to Mechanisms of Examination and Oversight of Civilian and Military Echelons* — signalled its purpose and emphasis. The Comptroller would audit how the 'political echelon carried out its responsibilities from the perspective of international law in the context of the Cabinet's deliberations during Operation "Protective Edge"'.<sup>354</sup> It would evaluate the 'implementation and the recommendations of the Turkel II Report' as it pertained to the methods of investigating alleged violations of international law.<sup>355</sup> It would consider the effectiveness of the fact-finding assessment mechanism that had been deployed during the war and in its aftermath. And it would review various IDF policies that were implemented throughout the conflict.<sup>356</sup>

The State Comptroller cited the strategic benefits of the proposed investigation when announcing its audit of the Gaza war.<sup>357</sup> The 2018 report reiterated these motivating factors. On the first page the Comptroller assures that international criminal law provides that 'the domestic judicial system has

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<sup>352</sup> State Comptroller of Israel, 'Operation "Protective Edge": IDF Activity from the Perspective of International Law, Particularly with Regard to Mechanisms of Examination and Oversight of Civilian and Military Echelons' (Report, 14 March 2018) ('*State Comptroller Report 2018*').

<sup>353</sup> Kershner, above n 250.

<sup>354</sup> *State Comptroller Report 2018*, above n 352, 6.

<sup>355</sup> *Ibid.*

<sup>356</sup> *Ibid.* 6–7.

<sup>357</sup> The Comptroller remarked that 'when a state exercises its authority to objectively investigate accusations regarding violations of the laws of armed conflict, this will preclude examination of said accusations by external international tribunals': Kershner, above n 250, quoting State Comptroller and Ombudsman of Israel, above n 261.

precedence over an extraterritorial judicial system in adjudicating international law violations'.<sup>358</sup> Referencing the principles of complementarity and subsidiarity, the Comptroller noted that 'investigative and judicial systems in the State of Israel which function properly will help prevent the intervention of external courts and tribunals in the sovereign affairs of the State of Israel'.<sup>359</sup> This is framed around contestations of legitimacy.<sup>360</sup>

The State Comptroller report considers the extent to which international law informed high-level decision-making. It evaluated whether IDF command received adequate legal training, how legal considerations influenced operational initiatives and whether necessary measures were taken to reduce harm to uninvolved civilians and to protect against humanitarian crisis.<sup>361</sup> Previous post-war assessment reports — those published jointly by the Ministries of Foreign Affairs and Defense — addressed policy provisions in relation to specific accusations of legal violation.<sup>362</sup> The Comptroller report, however, focuses abstractly on broader policy.<sup>363</sup> It attempts to determine whether an overarching commitment to the requirement of international law informed Israel's conduct during the 2014 war. The Comptroller reviewed the minutes of Cabinet meetings and interviewed numerous high-level political and military officials.<sup>364</sup> The report concludes that

it is evident that both the political echelon and the senior military echelon explicitly considered the limitations and rules set forth in international law regarding the conduct of the fighting in Gaza, and even the Prime Minister instructed against harming uninvolved civilians.<sup>365</sup>

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<sup>358</sup> *State Comptroller Report 2018*, above n 352, 3. The report notes that

[t]his is based on two principles: the 'principle of complementarity', according to which the authority of an international jurisdiction will be exercised as a last resort when states are unwilling or unable to exercise their duty to investigate and prosecute; and the 'principle of subsidiarity', according to which a jurisdiction with territorial or national affiliation has precedence over an international jurisdiction, which has subsidiary responsibility.

<sup>359</sup> *Ibid.*

<sup>360</sup> *Ibid* 19.

<sup>361</sup> Under the rubric of 'Conduct of the Political Echelon during Operation "Protective Edge" from the Perspective of International Law', the report evaluated the extent to which international legal considerations influenced efforts to reduce harm to uninvolved civilians: *ibid* 66–77.

<sup>362</sup> See generally *Operation in Gaza Report*, above n 32. See also *2014 Gaza Conflict Report*, above n 53.

<sup>363</sup> For example, the evaluation of targeting decisions conveyed, following interviews with senior officials, that general measures were taken to ensure that civilians were protected. A senior legal official noted that '[t]he army is working together with the International Law Department at the MAG Corps with respect to the "incrimination" of targets': *State Comptroller Report 2018*, above n 352, 70. During a Cabinet meeting, the Chief of General Staff noted: 'I am very proud that, wherever possible, attacks where we believed uninvolved civilians might be harmed were stopped'. The Attorney-General was cited as noting during a Cabinet meeting that 'we saw with our own eyes the caution taken by the Air Force when bombing. We saw how much effort was invested in respect of each and every house, how many phone calls were made to the house. We, at least, were very impressed'.

<sup>364</sup> The audit was conducted within, inter alia, the Prime Minister's Office, the Ministry of Justice, the IDF, the Operations Directorate, the MAG Corps and the Military Police Investigations Department. See *ibid* 27, 73.

<sup>365</sup> *Ibid* 73.

The Comptroller found that, ‘in providing their instructions at the cabinet meetings, the political echelon and the military echelon were careful to take steps to prevent potential violations of the provisions of international law’.<sup>366</sup>

The Comptroller report cites Moshe Ya’alon. The former Minister of Defense told the audit that ‘[a] military action should be planned both in terms of ethics and in terms of legal defense’.<sup>367</sup> Constituting a significant portion of the report, consideration of the State’s capacity to investigate is presented by the Comptroller as part of that legal defence. The Comptroller recalls that following Operation Cast Lead and the formation of the Turkel Commission, the United Nations cited Israel’s investigative initiatives with approval. It noted ‘that Israel had dedicated significant resources to investigate allegations of operational misconducts in the course of [Operation Cast Lead], and has made progress in investigating the concrete cases mentioned in the *Goldstone Report*’.<sup>368</sup>

The Comptroller describes Israel’s reliance upon various investigative mechanisms in response to ‘exceptional incidents’ during the 2014 Gaza War.<sup>369</sup> Again, assessed abstractly, these efforts were described as in accordance with the State’s international legal obligations.<sup>370</sup>

The Comptroller references the now 464 investigations that were launched since the conclusion of Operation Protective Edge. The responsibilities of the MAG and the fact-finding assessment mechanism are described.<sup>371</sup> Where past reports detailed the investigative processes and conveyed their findings, much of the Comptroller report evaluates whether the State sufficiently internalised the recommendations of the Turkel Commission.<sup>372</sup> Effectively, the Comptroller report recognises the legitimising potential of investigative procedures. It accentuates the importance and influence of the Turkel Commission’s work. Its recommendations are said to convey the ‘principles guiding the state and the military’ in their investigative duties.<sup>373</sup> Stressing the strategic importance of these duties, the report provides recommendations intended to strengthen the ability of officials to actualise the legitimising potential of investigations.<sup>374</sup>

Ultimately, the Comptroller report endorses and exhibits informal complementarity. It provides further checks to ensure that the recommendations of the Second Turkel Commission Report are fully implemented. This purports

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<sup>366</sup> Ibid 167.

<sup>367</sup> Ibid 72.

<sup>368</sup> Ibid 78–9. Citing the United Nation’s Davis Commission, the Comptroller continued that the Commission had noted positively the work of Turkel and concluded that ‘a public commission of inquiry like the Turkel Commission is an example of a mechanism that Israel can use’: at 79, citing *McGowan Davis Report*, UN Doc A/HRC/16/24, 19 [80].

<sup>369</sup> *State Comptroller Report 2018*, above n 352, 79–80.

<sup>370</sup> Ibid 78.

<sup>371</sup> See, eg, *ibid* 79, 144–65.

<sup>372</sup> The report found that the fact-finding mechanism and the State’s investigative capacity exhibited flaws regarding their efficiency and expediency. Overall, however, the report determined that these investigative initiatives were conducted ‘in good faith and out of a sincere desire to conduct a thorough and complete fact-finding assessment and to arrive at the truth’: *ibid* 163.

<sup>373</sup> Ibid 89.

<sup>374</sup> For example, recommendations to amend reporting and documentation procedures are explained as, *inter alia*, having ‘great significance with regard to the legitimacy of IDF’s operations and its ability to manage the legal and media campaigns that accompany its military operations’: *ibid* 94.



to be additional evidence of Israel's investigative willingness. Characteristic of informal complementarity, this accentuates the potential of general investigations — often focused on policies and state actions and irrespective of individual criminal liability — to discharge legal requirements and discount international scrutiny. The Comptroller, in accordance with the Turkel Commission, notes that

in order to ensure that the fact-finding assessment fulfills its purpose and to justify, in the eyes of international bodies, the MAG's decision not to open a criminal investigation, it is appropriate to apply to the [fact-finding assessment mechanism] the general principles set forth in international law as material requirements for the existence of an investigation that will be considered effective.<sup>375</sup>

Proposals to reform the investigative processes and improve the various mechanisms are, again, presented as responses to the legal campaigns and accusations of violations that are assumed inevitable following war or upon the use of force.<sup>376</sup> They become another means through which the state may contest and assert both the legitimacy of substance and the legitimacy of process.

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<sup>375</sup> Ibid 144.

<sup>376</sup> Ibid 164–8.