

Beyond the Habitual: Legal Argument Upon the Use of Force and During the Conduct of
Hostilities

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ABSTRACT

This dissertation moves beyond traditional assessments of legal compliance. It offers a more complete understanding of how international law functions upon the use of force and during the conduct of hostilities. The dissertation consists of four case studies – each presented and published as standalone articles – that provide fuller descriptions of international law’s efficacy within fraught international contexts. By moving beyond the common evaluative standard of compliance, this dissertation presents a pluralistic conception of international law’s function and purpose.

Accordingly, the first case study presents an account of the way that international humanitarian law is used to manage “prolonged occupation.” The second case study shows how the traditional language of legal legitimacy is being supplemented by states that now complement claims of legal compliance with assertions of investigative willingness. The third case study engages with the notion of lawfare and suggests that this term as become a means of limiting access to international justice. The fourth and final case study provides a communicative theory that describes the microprocesses that states employ when they use international law to argue and to advance military and diplomatic objectives.

Collectively, these case studies understand international law as a multifunctional tool. They provide accounts of how international law functions, how it compels, how it facilitates, and how it is altered. Through a series of rhetorical moves the state identifies the forms of international law with which they adhere, it devalues or deflects certain obligations by accentuating others, it establishes and develops conceptions of international law with which it wishes to further, and it presents the resulting engagements as illustrative of a commitment to the international legal process and global order. This dissertation asks not *whether* states comply with international law but *how* they comply.

For Bowser

An ever-present companion

who sat beside me from the first word to the last.

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TABLE OF CONTENTS

ABSTRACT.....	II
DEDICATION.....	III
ACKNOWLEDGEMENTS.....	IV
TABLE OF CONTENTS.....	VI
INDEX OF ACRONYMS.....	VII
BEYOND THE HABITUAL: INTERNATIONAL LEGAL ARGUMENT UPON THE USE OF FORCE AND DURING THE CONDUCT OF HOSTILITIES.....	1
MOVING FROM MANAGEMENT TO TERMINATION: A CASE STUDY OF PROLONGED OCCUPATION	16
INVESTIGATION AS LEGITIMISATION: THE DEVELOPMENT, USE AND MISUSE OF INFORMAL COMPLEMENTARITY.....	81
WHAT DOES LAWFARE MEAN?.....	146
HOW STATES PERSUADE: AN ACCOUNT OF INTERNATIONAL LEGAL ARGUMENT UPON THE USE OF FORCE.....	186
BIBLIOGRAPHY.....	259

INDEX OF ACRONYMS

ACLU – American Civil Liberties Union

ASIL – American Society of International Law

CAT – Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

DRC – Democratic Republic of Congo

ECHR – European Convention in Human Rights

ECtHR – European Court of Human Rights

EU – European Union

FCO – Foreign and Commonwealth Office

FFA – Fact Finding Assessment

GDP – Gross Domestic Product

IAF – Israel Air Force

ICC – International Criminal Court

ICCPR – International Covenant on Civil and Political Rights

ICJ – International Court of Justice

ICL – International Criminal Law

ICRC – International Committee of the Red Cross

ICTY – International Criminal Tribunal for the Former Yugoslavia

IDF – Israel Defence Forces

IHL – International Humanitarian Law

IISS – International Institute for Strategic Studies

ILC – International Law Commission

ILD – International Law Department/Division

ISIL – Islamic State of Iraq and the Levant

ISIS – Islamic State of Iraq and Syria

LOAC – Law of Armed Conflict

MAG – Military Advocate General

MPCID – Military Police Criminal Investigation Division

NACDL – National Association of Criminal Defense Lawyers

NATO – North Atlantic Treaty Organization
NGO – Non-Governmental Organization
NIAC – Non-International Armed Conflict
P5 – Permanent five members of the Security Council
PA – Palestinian Authority
PLO – Palestine Liberation Organization
RtoP – Responsibility to Protect
SD – *Sicherheitsdienst*
SS – *Schutzstaffel*
TRNC – Turkish Republic of Northern Cyprus
UN – United Nations
US – United States
USSR – Union of Soviet Socialist Republics
UK – United Kingdom

**BEYOND THE HABITUAL: INTERNATIONAL LEGAL ARGUMENT UPON THE USE OF
FORCE AND DURING THE CONDUCT OF HOSTILITIES**

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1. Situating the Dissertation through Commonality

The inaugural volume of the *European Journal of International Law* featured an exchange between James Crawford and Francis Boyle. Two leading international lawyers debated the merits of Palestinian statehood.¹ They offered contrasting views in response to the legal questions that followed from the 1988 Algiers Declaration in which the Palestinian Liberation Organization proclaimed an independent state.² Ostensibly, Crawford and Boyle queried the extent to which Palestinian statehood merited legal recognition. The two scholars drew upon legal sources, recalled historical documents and events, cited precedent, and offered doctrinal analysis. These methods of legal inquiry are familiar practices, common tools wielded by international lawyers. Yet the exchange between Crawford and Boyle exposed the exceptional character of the statehood debate's unavoidable context – the Israeli-Palestinian conflict.

Crawford's response to Boyle's endorsement of Palestinian statehood appealed to a larger notion that surpassed the particularities of any identified legal question. This concerned the use and purpose of international law itself. Crawford observed:

It seems to be difficult for most international lawyers to write in an impartial and balanced way about the Palestine issue. Most of the literature, some of it by respected figures, is violently partisan. Still, such a level of partisanship in legal discourse is disturbing...And the obstinate fact remains that the actors, most of the time, continue to use the language of law in making and assessing these claims...That the language of law is used implies that these claims can be assessed, on the basis of values which extend beyond allegiances to a particular, country, block, or religion.³

The exchange continued, returning to legal considerations of statehood, yet the broader questions – regarding the role of law within fraught international contexts – are of enduring significance. Often, when international lawyers confront a legal question or evaluate a contested scenario, they seek to provide an answer. They assess legal compliance.⁴ Has the state acted in a way that constitutes a violation of international law?

¹ See, Francis A. Boyle, "The Creation of the State of Palestine" (1990) 1 *Eur. J. Int'l L.* 301. See also, James Crawford, "The Creation of the State of Palestine: Too Much Too Soon?" (1990) 1 *Eur. J. Int'l L.* 307 [Crawford Too Much Too Soon].

² The Palestinian Declaration of Independence, Algiers, 15 November 1988, reprinted in: Yehuda Lukacs, ed, *The Israeli-Palestinian Conflict: A Documentary Record 1967-1990* (Cambridge: Cambridge University Press, 1992) at 411.

³ Crawford Too Much Too Soon, *supra* note 1 at 307.

⁴ For example, Sean D. Murphy, "Assessing the Legality of Invading Iraq" (2003-2004) 92 *Geo. L. J.* 173.

Do the actions or contentions of the state conform with some legal interpretation and can thus be assumed permissible?

Entrenched conflict provides countless scenarios that demand legal scrutiny. War, the use of armed force, and military occupation are governed by specific legal regimes. Regulated through intricate frameworks as defined in the *jus ad bellum* and the *jus in bello* (or the laws governing the use of force and international humanitarian law), states and other international actors are compelled to comply with a series of rules. These rules seek to administer the situations and circumstances that follow the breakdown of law's "normal" function. International lawyers assess the compliance of states with these specialized legal regimes. An inherent assumption runs through this process. As James Crawford suggested above, there is a belief that international law will serve as a neutral arbiter, that it presents particular (desirable) values against which state behaviour may be assessed through an (ideally) apolitical process that produces a determination of right or wrong; of compliance or of violation.

This dissertation moves beyond traditional assessments of legal compliance. It offers a more complete understanding of how international law functions upon the use of force and during the conduct of hostilities. The dissertation consists of four case studies that each provide a fuller description of international law's function within fraught international contexts. By moving beyond traditional assessments of compliance, I present a pluralistic conception of international law's function and purpose. This understands international law as a multifunctional tool. It provides a means to formalize and codify moral norms. It regulates inter-state relations and defines the duties and obligations that structure the state's relationship with the individual. Also, international law provides a discourse through which states, other international actors, and individuals may all argue and assert competing claims. As noted by James Crawford and Martti Koskenniemi, international law presents as a "language of government in certain contexts, as a bundle of techniques, and as a framework within which several...constructivist projects are articulated."⁵

The case studies – presented through the four articles within this dissertation – provide accounts of these techniques and of these articulations. The first, *Moving from Management to Termination*, tells of the reinterpretation of legal provisions for purportedly benevolent reasons but with unintended, and intended, consequences that have resulted in a seemingly permanent *temporary* occupation.⁶ The state, bestowed the status of an occupying power under international law, seeks to employ law to manage its occupation of foreign territory. This has facilitated the state's efforts to distract from or defer questions about the legality and form of its imposed control and policies within the occupied territory. The second case study, titled *Investigation as Legitimization*, identifies an emerging practice in which states employ the language of individual

⁵ James Crawford & Martti Koskenniemi, "Introduction" in James Crawford & Martti Koskenniemi, eds, *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012) at 2.

⁶ See, David Hughes, "Moving from Management to Termination: A Case Study of Prolonged Occupation" (2018) 43(3) *Brook. J. Int. L.* 1.

accountability, under international criminal law, to demonstrate collective legitimacy.⁷ Through the use of “informal complementarity,” the state showcases a willingness to investigate military undertakings to avoid unwanted international scrutiny. In the third case study, *What Does Lawfare Mean?*, actors work to define and privilege international law’s acceptable users.⁸ By imposing normative value on particular uses of law, they discount an array of legal engagements by, primarily, non-state actors. The fourth case study, titled *How States Persuade*, describes the ways, the practices and techniques, in which international law becomes a means to an end.⁹ An understanding of these processes shows how international law remains a contested practice and how state actors engage in rhetorical techniques to further particular accounts of what they contend to be the content of international law.

Collectively, this dissertation and the case studies within suggest that when one looks beyond assessments of compliance, when one moves past anticipated assertions of legitimacy and legal conformity, a process of prioritization and preferencing occurs. Within the described contexts, states engage with certain aspects of international law – through interpretation and argument – to neglect other features of legal dictate. States select and accentuate the international law with which they comply. They endeavour to establish or secure the forms of international law that they desire. And they emphasize the resulting processes in pursuit of identifiable diplomatic and military objectives.¹⁰ The case studies within this dissertation tell these stories and describe these processes. Individually and collectively, they provide a more complete understanding of how international law functions, how it compels, how it facilitates, and how it is altered, within fraught international contexts.

2. Moving Beyond Compliance

The case studies within this dissertation each move beyond assessments of legal compliance. They interrogate how states engage with international law to assert, define, and demonstrate adherence to the requirements of international law and in advancement of particular objectives. International legal theorists have long fixated on compliance. Theories of compliance provide answers to the enduring question of why states, absent an obvious source of coercion, adhere to legal obligations that may not serve their immediate interests. A wealth of literature ponders the cause of seemingly adherent state behaviour. While the resulting accounts differ significantly, they generally ground their inquiries in Louis Henkin’s oft-quoted aphorism, that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”¹¹

⁷ David Hughes, “Investigation as Legitimization: The Development, Use, and Misuse of Informal Complementarity” (2018) 19(1) *Melb. J. Int. L.* 84.

⁸ David Hughes, “What Does Lawfare Mean?” 40 *Ford. Int. L.J.* 1.

⁹ David Hughes, “How States Persuade” 50 *Geo. J. Int. L.* (forthcoming).

¹⁰ A special thanks to Frédéric Mégret for his helpful articulation of this focus.

¹¹ Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Washington, DC: Council on Foreign Relations, 1979) at 47.

The compliance question carries undeniable importance. As Harold Koh suggests, “if we cannot predict when nation-states will carry out their international legal obligations respecting trade retaliation, environmental protection, human rights, global security, and supranational organizations, how can we count on multilateralism to replace the bipolar politics as the engine of the post-Cold War order?”¹² As the Twentieth Century proliferation of treaty-based international law began to touch nearly all aspects of international society and relations, realist scholars like Kenneth Waltz deemphasized the significance of the emerging legal regimes.¹³

In response to realist dismissals, compliance theories explain international law’s relevancy by providing a more purposeful account of why law compels states to alter or structure their behaviour. The resulting accounts differ. An influential series of theories suggest that state compliance is the result of international law’s normative pull. Accordingly, Thomas Franck contends that compliance is based on the perception by the obliging state that a particular rule or legal provision is in itself fair and legitimate.¹⁴ The “managerial approach,” offered by Abram Chayes and Antonia Handler Chayes, suggests that the propensity of states to fulfill their international commitments stems from the legal principles generated through treaty regimes. For Chayes and Chayes, compliance is grounded in the states desire to ensure efficiency, to promote its interests, and to adhere to international norms.¹⁵ Building on the work of both Franck and Chayes and Chayes, Harold Koh asserts that compliance is best ensured through a transnational legal process that allows for the interpretation and domestic internalization of international norms.¹⁶

Institutionalist scholars seek to explain the influence of international institutions on state behaviour. Steeped in the language of regimes, institutionalist theory views the self-interested state as the principal international actor. Robert Keohane insists that states behave as rational utility-maximizers that view international regimes as devices to facilitate agreements that further the interests of states.¹⁷ Thus, compliance is a means of securing benefit. Also building on the notion of self-interest, Andrew Guzman claims that the question of compliance must be understood as a two-stage game. First, states negotiate over the content of law and the required level of commitment. Second, the state decides whether it will comply with international obligations by assessing the potential of

¹² Harold H. Koh, “Why do Nations Obey International Law?” (1996-1997) 106 *Yale L. Rev.* 2599 at 2600.

¹³ For realists like Waltz, legal compliance and state engagement with international institutions was an unimportant biproduct of powerful state interests. International law was not understood as possessing the ability to alter state behaviour or interest. See, Kenneth N. Waltz, *Theory of International Politics* (New York: McGraw-Hill, 1979). See also, Kenneth N. Waltz, “Structural Realism After the Cold War” (2000) 25 *International Security* 26.

¹⁴ See, Thomas M. Franck, “Legitimacy in the International System” (1988) 82 *Am. J. Int. L.* 705.

¹⁵ See, Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1998).

¹⁶ See, Koh, *supra* note 12.

¹⁷ Robert O. Keohane, “The Demand for International Regimes” (1982) 36 *Int. Org.* 335. See also, Robert O. Keohane, *International Relations and International Law: Two Optics* (1997) 38 *Harv. Int. L. J.* 489.

direct sanctions and the degree of reputational loss that is likely to be incurred should the state dismiss its commitments.¹⁸

Liberal theory emphasizes the role of the individual actor within the international sphere. Where similar approaches, like Koh's transnational legal process, accentuate law's normative pull, liberal theory holds that states are the sum of many parts. These constitutive parts must be considered independently and collectively to "fully understand state action on the world stage."¹⁹ Anne-Marie Slaughter contends that individuals and groups engaging with transnational civil society are essential to the international system. States interact with these actors in a process of representation and regulation. Compliance results from this interactive process when governments exhibit the preferences of these domestic forces.²⁰

International law now exists in what Thomas Franck has termed a "post-ontological phase."²¹ It is intellectually assured, a "mature" and "established" legal system against which international lawyers and scholars can (and have) move beyond iterations of relevancy to embrace a holistic or pluralistic account of international law's function, purpose, and efficacy. The case studies within this dissertation situate within a post-realist environment that emphasizes the role of rhetoric in the conduct of international affairs.²² Each of the case studies tells an independent story with unifying themes about how states engage with international law.

Compliance remains a desirable normative pursuit. However, situating international legal inquiries around a binary understanding of *compliance-violation* unnecessarily limits conceptions of international law. It constricts understandings of the means by which, and the purposes for which, states employ international law in pursuit of foreign policy objectives.²³ A complete understanding of international law's relevancy and effectiveness must do more than attribute significance to the fact that states pay rhetorical homage to legal dictate as they articulate and justify their policies.

War, conflict, and the consequences of a state's decision to use force are often portrayed through countless instances of legal violations. This is understandable. War is devastating. International law provides a vocabulary to condemn the mounting death tolls and wanton destruction. Also, however, international law provides a means to justify the use of force. David Kennedy has termed this "legally conditioning the battlefield."²⁴

¹⁸ See, Andrew T. Guzman, "A Compliance-Based Theory of International Law" (2002) 90 Calif. L. Rev. 1826.

¹⁹ See, Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?" (2002) 111 Yale L. J. 1935 at 1952.

²⁰ See, Anne-Marie Slaughter, "International Law in a World of Liberal States" (1995) 6 Eur. J. Int'l. L. 508.

²¹ Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1998) at 6.

²² See generally, Francis A. Beer & Robert Hariman, eds, *Post-Realism: The Rhetorical Turn in International Relations* (East Lansing, MI: Michigan State University Press, 1996).

²³ See generally, Lisa Martin, "Against Compliance" in Jeffrey L. Dunoff & Mark A. Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013) at 591.

²⁴ David Kennedy, *Of War and Law* (Princeton, NJ: Princeton University Press, 2006) at 8.

Through a discursive process, the humanitarian vocabulary of international law is mobilized by militaries as a strategic asset. Such an understanding of international legal engagement is frequently evidenced in accompaniment of the decision to use force and during the conduct of hostilities. Kennedy explains 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.”²⁵

Claims of legitimacy almost always accompany military action. The norm prohibiting the use of force – as articulated within Article 2(4) of the UN Charter – is so entrenched that states must justify their conduct through an established international legal vocabulary. As Dino Kritsiotis explains, 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.”²⁶ This dissertation embraces the view that international law provides an argumentative platform. The case studies, however, attempt to go further than similar conceptions of law’s role within the international sphere. They do not suggest that the described legal interactions evidence a discursive process in which two sides debate the correct answer, the true meaning, or the proper interpretation of a legal prescription. Each of the case studies evidences how states engage in a process through which the state prioritizes the legal obligations that it wishes to comply with, deemphasizes those that it wishes to disregard, and endeavours to accentuate a particular vision of law, often through informal means, that allows the state to function within the international sphere. The following case studies, written as independent articles, each describe variants of this argumentative process.

3. Introducing the Case Studies

This dissertation consists of four case studies. Each case study is presented as a standalone piece. They offer independent contentions and self-contained descriptions regarding the employment of legal argument by those states that take the decision to use force and partake in the conduct of hostilities. Yet, as described throughout, several strands run through and conjoin the case studies that constitute this dissertation. Collectively, they tell of the value in moving beyond strict considerations of legal conformity and of understanding state engagement with international law, upon the use of force, as a process of prioritization in which the *jus ad bellum* and the *jus in bello* are each divided, emphasized and deemphasized, in a continual process that seeks to influence, adapt, and apply the law in pursuit of military and diplomatic objectives. Each case study, their independent features and their common traits, will now be described.

3.1. Moving from Management to Termination

²⁵ *Ibid*, at 41.

²⁶ Dino Kritsiotis, “When States Use Armed Force” in Christian Reus-Smit, ed, *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) 45 at 47.

The first article, titled *Moving from Management to Termination* describes and assesses the application of the law of occupation in a prolonged scenario that is unanticipated by the applicable legal framework.²⁷ In 2017, the Israeli occupation of the Palestinian territories reached a half-century in duration. The occasion reignited a conversation amongst legal scholars. A flurry of new publications questioned the efficacy of occupation law. They asked whether it had become an anachronism. Across Israel and the Palestinian territories, those that directly invoke the law of occupation sought a more effective means of adapting the law to meet the exigencies created by fifty years of imposed control. The accompanying debates recalled questions concerning the legal treatment of prolonged occupation.

Built around a detailed case study of Israel's occupation of the West Bank, I argue that as commonly interpreted, international law does not regulate – but instead – facilitates prolonged occupation. Referencing various historical moments, I describe when and how international law has been employed to entrench an occupying power's control. These legal engagements are justified as responses to the particular challenges produced by prolonged occupation. Such uses of international law, the article argues, are based on a common interpretative approach. This understands occupation as a fact or non-normative phenomenon. As a result, international law is unable to alter occupation. Instead, it may only manage it. The state emphasizes certain aspects of the occupation framework to facilitate its control of, and to embed its presence within, the occupied territory. It neglects those features of the framework that question, or disallow, the form of control that the state now imposes.

Identifying the motive of management as a causal factor, I argue that common responses to prolonged occupation – by occupying powers, other states, and international organizations – may be necessary but when taken within the occupation framework's traditional, non-normative confines they risk perpetuating occupation. They entrench a legal framework that is understood to neglect duration and curtail the inherent requirement of temporality. This interpretation of the occupation framework becomes susceptible to manipulation. In response, the article proposes a novel interpretative approach. This shifts the focus of the occupation framework. It emphasizes a conception of occupation as temporary and facilitates efforts to end occupation. By recognizing that prolonged occupation constitutes an altered form of control, and grounding responses to this means of control in established legal principles, this amended normative approach identifies a legal basis under which an occupying power will be required to enable the termination of prolonged occupation. This reasserts the law of occupation's relevancy and efficacy. It better aligns the purpose and functions of occupation law with diplomatic objectives and international norms. And it shifts the discourse that accompanies prolonged occupation from management to termination.

²⁷ Hughes, *Moving from Management to Termination*, *supra* note 6.

3.2. Investigation as Legitimization

The second article is methodologically similar. It describes how a state employs the language of international criminal law to confer the legitimacy of its actions upon the use of force. Titled, *Investigation as Legitimation*, this article introduces the idea of informal complementarity.²⁸ The Rome Statute employs complementarity to determine whether the International Criminal Court (ICC) has jurisdiction to prosecute international crimes. Informal complementarity, as it is coined within this article, is employed by states. It occurs independently (or pre-emptively) of an ICC 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 own (non-criminal) responsibility. The state may offer examples of investigations, criminal proceedings, and efforts to ensure against impunity. These actions are displayed as evidence of legal compliance. Collectively, they are required and necessary but may also be duplicitous.

Despite the formal distinction between individual criminal liability and state responsibility, appeals to informal complementarity constitute an emergent vocabulary. It increasingly features within the lexicon of states that engage in the use of force. This article identifies appeals to informal complementarity as an alternative or supplementary means of asserting legitimacy. Traditionally, when states employ force, they couple the initiation of hostilities with legal justifications that are designed to demonstrate the legitimacy of the state's actions. Within armed conflict, states are supplementing traditional appeals to international law and assertions of legal fidelity with claims of *post hoc* legal accountability. The traditional refrain of 'we respect and adhere to the law' is increasingly coupled with the novel chorus of 'we investigate the law'.

This article begins by distinguishing the conventional conception of complementarity from its informal usage. It provides a detailed case study of Israel's wars in Gaza to trace the development and use of informal complementarity. Through an analysis of Israel's employment of international law (pre-and post Gaza operations), this article demonstrates that, following a succession of wars, the post-conflict discourse has moved from assertions of legal compliance exclusively to include pronouncements of investigative willingness. Framed around the metaphor of the proleptic show trial, the article introduces four broad phases of legal engagement that collectively constitute both an appeal to informal complementarity and an emergent means of asserting legitimacy.

3.3. What Does Lawfare Mean?

The forms of legal engagements described in these first two case studies may come under the ill-defined rubric of "lawfare." The third article departs from the substantive and case-driven approach assumed in *Moving from Management to Termination* and *Investigation as Legitimization* and considers the broader framing of these forms of

²⁸ David Hughes, *Investigation as Legitimization*, *supra* note 7.

strategic legal usage. It engages, critically, with the notion of lawfare by suggesting that its common application strays from its initial descriptive purpose. It serves as a means to preference who may employ international law.

Titled, *What Does Lawfare Mean?* this article differentiates various usages of this increasingly common nomenclature.²⁹ Since its introduction into public, political, and legal discourses, the term lawfare has captured the attention of both scholars and practitioners of international law. Initially, the term was used to describe the novel ways by which international law was being applied to achieve traditional military objectives. It has since transformed into a blanket term of competing meanings. Lawfare has been understood as the imposition or manipulation of international legal standards in order to confine military operations. Employing the precepts of international law to shame powerful countries has been described as lawfare. The use of human shields by non-state actors engaged in asymmetrical warfare has been held to constitute an act of lawfare. Lawfare has been used to label and decry the efforts of lawyers and organizations representing foreign nationals at the Guantánamo Bay detainment camp in Cuba. And the term lawfare has described the strategic use of international law by states for the purpose of achieving a particular, often military, objective.

Despite the term's ubiquity there is no consensus as to lawfare's definition. Although lawfare has received wide treatment within academic literature, the majority of these discussions attempt to provide such a definition or evaluate the term's normative underpinnings. This article recognizes that such a consensus definition will remain elusive and that this singular focus largely fails to explore the implications of lawfare's most common uses. This article reframes the debate surrounding lawfare by moving beyond the definitional question and asking instead what the implications of lawfare's usages for both the understanding and practice of international law are? Such consideration has been almost wholly absent from the legal literature. Built around seven prominent quotations that claim to either define lawfare or describe what the speaker deems an act of lawfare, this article argues that when one observes contemporary applications of the term lawfare and the associating debates about the legitimate function of international law, it becomes evident that most often applications of lawfare serve to decry a *particular* use of international law by a *particular* actor. Here, lawfare becomes a means of prioritizing certain forms of international legal engagements while deemphasizing others. When framing the lawfare debate or articulating a response to accusations of lawfare that are intended to delegitimize such specific uses of international law, this paper argues that it is prudent to understand the application of the lawfare label not as a general means of attacking or dismantling legal norms (as many critics do) but as a particular strategy intended to limit the emerging notion of access to international justice.

²⁹ David Hughes, *Lawfare*, *supra* note 8.

3.4. How States Persuade

The final paper addresses the microprocesses of legal argument and considers how states employ persuasion to prioritize those features of international law that they desire and to disregard those facets that they deem disruptive. It follows a similar descriptive, case-study driven approach as with the first two articles. And it is greatly informed by these first two studies. It is intended as the culmination of this work and of my consideration of how international law is employed by states in conflict situations. As with the previous case studies, this article wishes to further identify and understand law's function. It offers a framework to conceptualize the nature of particular forms of legal argument. Titled, *How States Persuade*, this article acknowledges that states are increasingly responding to the perception of new threats and the altering nature of warfare by coupling military action with sophisticated legal appeals.³⁰ This has shifted the discourse accompanying war beyond assertions of legal conformity. Commonly, the use of force is paired with appeals that attempt to persuade that inventive legal arguments constitute acceptable interpretations or applications of international law.

Law is portrayed as a medium for debate. Within this debate, persuasion becomes a means to encourage legal fidelity. Persuasion is inexorably linked with questions of compliance. Yet this is only one side of the practice. Persuasion is a two-faceted discourse. It is both a means to ensure compliance and a method to define how international law should be understood. Efforts to alter the behaviour of a "non-compliant" state through cogent communication are often met with or pre-empted by legal argument put forth as ripostes by the state.

Built around a series of case studies in which states offer legal arguments in support of actions that, *prima facie*, extend beyond the limits of legal permissibility, persuasion is understood differently than it is commonly represented. The state becomes not only the "engine and the target" of compliance but a participant actively engaged in defining compliance's meaning. The article begins by asking: why do states persuade? It suggests that the non-compliant state may employ persuasive legal argument to supplement a lie (e.g. we did not do what you claim that we did). The state may appeal to persuasion in support of a particular legal interpretation (e.g. what you say happened but it is not illegal or the law is unclear). Or the state may invoke persuasive argument to generate legitimacy (e.g. military action is a necessary response to an emerging threat). The resulting arguments are directed toward either broad audiences (e.g. the international community; domestic constituencies) or narrow audiences (e.g. specific interpretative or epistemic communities).

Finally, the article asks: how do states persuade? I present a communicative framework. First, the state constructs a Habermasian-like "common lifeworld." Second, the state establishes itself as a general norm-acceptor. Third, the state demonstrates its authority to interpret the law. Fourth, it establishes a standard of compliance based on the "acceptable legal argument." And fifth, the state draws upon precedent and

³⁰ David Hughes, *How States Persuade*, supra note 9.

commonalities to apply law to fact. Nowhere is this argumentative structure more apparent than in relation to the use of force. Grounded in a series of case studies, the paper concludes by tracing the argumentative offerings posited by Russia following the annexation of Crimea; by the United States and the United Kingdom as they developed the “unwilling or unable” standard as applied in justification of the use of force against a non-state armed group; and by Israel following the 2014 Gaza war. By acknowledging this underexplored role of persuasion – as employed by states to lie, to interpret, or to legitimize – the article provides a communicative framework and a platform to better understand how international law becomes a means of both facilitating and restraining the use of force by states.

4. Defending the Choices within the Dissertation

The case studies within this dissertation explore how particular states engage with particular bodies of international law. The first two case studies – *Moving from Management to Termination* and *Investigation as Legitimization* – emphasize Israeli engagements with both the *jus ad bellum* and the *jus in bello*. This limited focus was deliberate. The Israeli-Palestinian conflict contains countless instances in which international law and international legal argument are afforded primacy. From widely endorsed UN resolutions to the activist’s placard, international law has long served as a significant feature of both the conflict between the Israelis and the Palestinians as well as the international community’s response to it. Former UN Secretary General Kofi Annan remarked: “there is no conflict in the world today whose solution is so clear, so widely agreed upon, and so necessary to world peace as the Israeli-Palestinian conflict.”³¹

Annan’s address to the Arab League referenced a litany of UN resolutions that provide the legal basis for the commonly endorsed two-state solution. The late Secretary General, as with so many others, believed that progress vested, in some part, in that vast body of law that has incrementally developed throughout the second-half of the Twentieth Century.³² By moving beyond commonplace assessments of compliance to explore the multifunctional uses of international law that Israel has employed throughout its conflict with the Palestinians, observers are well-placed to see that what the Secretary General described as the promise of international law is but one aspect of its function.

The Israeli-Palestinian conflict has long-provided the backdrop to many inventive legal contentions. The conflict has served as a testing place for uncertain legal assertions. Accordingly, the engaged actors – both Israeli and Palestinian – have implemented numerous policies and undertaken various actions that are correctly identified as legal violations. Yet, the conflict has produced an environment in which legal argument is common place and taken seriously. It provides a fertile space for the study of international law’s function, development, uses, and misuses.

³¹ UNSG, Press Release, *Leading their People back from the Brink is Duty of Israeli, Palestinian Leaders*, UN Doc. SG/SM/8177 (27 March 2002).

³² See, Susan M. Akram, et.al., “Introduction” in Susan M. Akram, et. al., eds, *International Law and the Israeli-Palestinian Conflict: A rights-based approach to Middle East Peace* (New York: Routledge Press, 2011) at 2.

I began considering these broader forms of legal engagement while working in the East Jerusalem neighbourhood of Sheikh Jarrah. Here, I met the Al Kurd family shortly after they had been evicted from their home. Umm Kamal, the family matriarch, moved to Sheikh Jarrah with her husband as refugees in 1956. His family came from Jaffa, the biblical port city famously associated with tales of Solomon and Jonah. Her family were from Talbeyieh, a sloping, leafy neighbourhood in Jerusalem's western sector. To the Al Kurds, like a great number of Israelis and Palestinians involuntarily embroiled within the contemporary conflict over this ancient city, Jerusalem is simply home. Yet, on 8 November 2008, following a protracted legal battle, their family became the first to be evicted from their property in the contested East Jerusalem neighbourhood.

Umm Kamal's grandson, Mohammad Al Kurd, was fourteen when he told me that he wanted to become a human rights lawyer so that he could use the law to return his family to their home. Their story attracted international attention. World leaders – former President Jimmy Carter, Catherine Ashton, then the EU's High Representative for Foreign Affairs, political and parliamentary delegations – visited the protest tent that was established on the street near their home. A social movement emerged. Palestinians, Israelis, and international activists attended weekly protests. NGOs and international organizations penned legal briefs and reports, distributed press releases, and filed complaints with UN bodies. I wrote many of these. All appealed to international law for a solution. But international law also facilitated the Al Kurds' dispossession.

The focus on international law's employment within the Israeli-Palestinian conflict tells of the particular means that a state may employ to prioritize certain forms of international law and to neglect alternative legal dictates. The focus on Israeli legal engagements – most prominently within the first two case studies – is guided by the rich examples that this conflict has produced about how international law can facilitate; how it can legitimize; how it can preference; and how it can persuade. Accordingly, much (though by no means all) of what follows, the case studies and the fact patterns, is informed by the Israeli-Palestinian conflict. This, however, is not a dissertation about Israel and Palestine. It is about international humanitarian law, the use of force, international criminal law, the ways that legal engagements are framed, and the means by which actors employ law to argue and to advance agendas. It is about some of the lesser acknowledged ways that international law can affect and can evolve within conflict situations. It is, at the most basic level, a study about how international law works.

There is a temptation when one writes about international humanitarian law or the use of force to fixate on either Israel or the United States. Many of the reasons for this are clear. Both Israel and the United States employ the use of force more frequently than most states. Throughout their histories Israel and the United States have been involved in various conflicts that attracted immense legal, media, and scholarly attention. Often, within these conflicts, their actions and legal justifications are highly controversial and result in polarizing debates. The controversial nature of these actions encourage inventive (and at times dubious) legal arguments. To the credit of both states, they often (though not always) provide detailed legal articulations in justification of their actions. This

provides a bounty of primary materials that may be interrogated and subjected to scholarly pursuits. The focus of the initial case studies is influenced by these realities.

The final study, however, attempts to move beyond the predictable subjects that recur within these legal fields. *How States Persuade* introduces numerous examples of how various nations – Russia, the United Kingdom, India, Germany, Australia, and others – have engaged with international law in an effort to posit more generalizable claims.

While I do not present this dissertation as a series of case studies about Israel, the United States, or any particular nation, it is very much a project about how *states* engage with international law. Historically, states have been deemed the primary subject and sole actor within the international sphere. This is, of course, no longer so. The state-centric approach presented within this dissertation and through these case studies does not endorse a limited, or realist, view of international standing. Non-state actors assume significant roles within the international sphere. The statist approach forwarded within these case studies does not discount the significance of these groups, individuals, and organizations. They are highly active within conflicts – as belligerents, mediators, monitors, and as assessors. Non-state actors contribute to the formulation of international law as well as to important efforts to ensure its implementation.³³ Yet it remains states that retain the capacity to employ the most serious and sustained forms of force. They are the most likely to provide intricate legal rationales in accompaniment of such uses of force. These realities inform the scope and focus of the following articles.

Collectively, the dissertation presents claims about how law functions within fraught international scenarios. This focus necessarily limits the forms of international law that are considered. Thus, this becomes a dissertation about specific bodies of international law. The case studies within focus primarily on the law governing the use of force and on international humanitarian law. They touch more briefly on international criminal law and allude to international human rights law. Other dissertations and further research may be undertaken about how different fields of international law function within diverse scenarios. Some findings will likely be comparable. Some claims will be generalizable. Others will diverge.

The bodies of law and the contexts within which they are applied reflect the overarching commitment to theoretical pluralism that runs through the case studies. The choices and focuses presented throughout this dissertation result from my belief that international legal engagements are variable. The reasons why and how a state may engage with international law will likely alter between state and by body of law. The reasons for which a state may adhere to a bilateral trade agreement, a human rights commitment, of whether it may support a formalist or an expansionist reading of the self-defence

³³ See generally, Raffaele Marchetti & Nathalie Tocci, “Conflict society: understanding the role of civil society in conflict” (2009) 21 *Glob. Change, Peace & Sec.* 201. See also, Shany Payes, *Palestinian NGOs in Israel: The Politics of Civil Society* (London: I.B. Tauris Publishers, 2005); Richard Rogers & Anat Ben-David, “The Palestinian-Israeli Peace Process and transnational issue networks: the complicated place of the Israeli NGO” (2008) 10 *New Media & Soc.* 497.

exception in the UN Charter, when or whether it may join an international regime like the International Criminal Court will diverge. Accordingly, understandings of international law are more effectively advanced when they move beyond efforts to provide unified theories. The temptation to provide such an account is clear and while I do embrace the foundational contention that almost all nations observe almost all principles of international law, it is those exceptions where compliance appears elusive that motivate these case studies and that benefit from exclusive focus.

5. Conclusion

It is commonly assumed that the dictates of international law are abandoned upon the commencement of hostilities. Cicero declared *inter arma enim silent leges* (in war law is silent).³⁴ Since the mid-Nineteenth Century, intricate legal frameworks have developed that regulate both the grounds upon which force is permissible and the means by which it may be employed. But where war's inevitabilities are tallied and articulated as legal violations, there remains an accompanying sense that instances of international law's disregard evidence its irrelevance. Andrew Guzman, for example, notes that compliance mostly occurs, "in situations with many repeated interactions, each with relatively small stakes...the topics that have traditionally held center stage in international law – the laws of war, neutrality, arms control, and so on – are precisely those in which international law is least likely to be relevant."³⁵

Observations of legal abandonment brought Hersch Lauterpacht to famously pronounce that "if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law."³⁶ This dissertation resists dismissals of international law's relevancy. Each of the case studies are situated within armed conflicts, they address instances where states couple the use of force with intricate legal arguments. They each advance a multivariant vision of international law. While a compelling story can be told about the ways that international law functions as a constraint and provides protection during armed conflict, these case studies describe other features of international legal engagement. They disassociate assessments of compliance from the notion of relevancy.

Recalling David Kennedy's contention that international law can increase perceptions of legitimacy each case study explores the ways that states move beyond habitual assertions of compliance and claims of legitimacy to prioritize particular legal engagements. The resulting international legal discourses – as evidenced throughout the following articles – are not contests that seek to establish whether an action or policy conforms with international law. They are, instead, a series of rhetorical moves that allow the state to identify the forms of international law with which they adhere, to devalue or deflect certain obligations by accentuating others, to establish and develop the conceptions of

³⁴ M Tulli Ciceronis, "Pro T Annio Milone: Oratio ad Iudices" in F.H. Colson, ed, *Cicero pro Milone* (New York: MacMillan Press, 1893) 1 at 5.

³⁵ See, Guzman, *supra* note 18 at 1828.

³⁶ Hersch Lauterpacht, "The Problem of the Review of the Law of War" (1952) 29 Brit. Y.B. Int'l L 360 at 382.

international law that they wish to further, and to present the resulting engagements as illustrative of a commitment to the international legal process and global order. The question that each of the following case studies asks is not *whether* states comply with international law but *how* they comply.

MOVING FROM MANAGEMENT TO TERMINATION: A CASE STUDY OF PROLONGED OCCUPATION

DAVID HUGHES*

In 2017, the Israeli occupation of the Palestinian territories reached a half-century in duration. This reignited a conversation amongst legal scholars. In articles and books, lawyers questioned the efficacy of occupation law. They asked whether it had become an anachronism. Across Israel and the Palestinian territories, those that directly invoke the law of occupation sought a more effective means of adapting the law to meet the exigencies of a fifty-year-old occupation. The accompanying debates recalled questions concerning the legal treatment of prolonged occupation. This article seeks to fundamentally alter the recurring discourse.

Built around a detailed case study of Israel's occupation of the West Bank, this article argues that as commonly interpreted, international law does not regulate – but instead – facilitates prolonged occupation. Referencing various historical moments, the article describes when and how international law has been employed to entrench an occupying power's control. These legal engagements are justified as responses to the exigencies of prolonged occupation. Such uses of international law, the article argues, are based on a common interpretative approach. This approach understands occupation as a fact or non-normative phenomenon. As a result, international law is unable to alter occupation. Instead, it may only manage it.

Identifying the motive of management as a causal factor, this article argues that common responses to prolonged occupation may be necessary, but when taken within the occupation framework's traditional, non-normative confines, they risk perpetuating occupation. They entrench a legal framework that is understood to neglect duration and curtail the inherent requirement of temporality. This interpretation of the occupation framework becomes susceptible to manipulation. In response, the article proposes a novel interpretative approach. This shifts the focus of the occupation framework. It emphasizes a conception of occupation as temporary and facilitates efforts to end the occupation. By recognizing that prolonged occupation constitutes an altered form of control, and grounding responses to this means of control in established legal principles, this amended normative approach identifies a legal basis under which an occupying power will be required to enable the conclusion of prolonged occupation. This reasserts the law of occupation's relevancy and efficacy. It better aligns the purpose and function of occupation law with diplomatic objectives and international norms. And it shifts the discourse that accompanies prolonged occupation from management to termination.

“There are currently about 2.75 million Palestinians living under military occupation in the West Bank, most of them in Areas A and B – 40 percent of the West Bank – where they have limited autonomy. They are restricted in their daily movements by a web of checkpoints and unable to travel into or out of the West Bank without a permit from the Israelis. So if there is only one state, you would have millions of Palestinians permanently living in segregated enclaves in the middle of the West Bank, with no real political rights, separate legal, education and transportation systems, vast income disparities, under a permanent military occupation that deprives them of the most basic freedoms. Separate and unequal is what you would have. And nobody can explain how that works. Would an Israeli accept living that way? Would an American accept living that way? Will the world accept it?”

-- John Kerry, 28 December 2016¹

INTRODUCTION

Route 5 begins at the Mediterranean coast, north of Tel Aviv, and journeys east through the Sharon Plain and toward the Jordan Valley. The scenery rapidly transforms from the affluent villas and dense apartment blocks of Ramat HaSharon and Petah Tikva to the arid, rolling hills that mark entry into the West Bank. The road is well-traveled by many who live in the growing communities outside of Israel’s commercial and economic core and who use the highway for direct access into and from the city.

Continue east, twelve miles past the Green Line, and one arrives in Ariel. This large Israeli settlement is located in the heart of the West Bank. To many, the appeal of Ariel echoes that of the North American suburb. Its residents typically prioritize space and affordability above increasingly expensive urban lifestyles. The ostensible normality of daily life in Ariel is convoluted. Despite its proximity to Tel Aviv, Ariel was developed on occupied territory. It has since grown into one of the largest Israeli settlements in the West Bank.² Most often, its residents do not evoke the image of the nationalist settler, whose ideological commitment to a Greater Israel is unwavering. Yet, its presence, beyond the Green Line, places Ariel near the geographic and symbolic center of the land Palestinians claim for a future state, which some Israeli leaders

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¹ Speech by John Kerry, U.S. Sec’y of State, Remarks on Middle East Peace (Dec. 28, 2016), *available at* <https://www.state.gov/secretary/remarks/2016/12/266119.htm>.

² GERSHON SHAFIR, A HALF CENTURY OF OCCUPATION: ISRAEL, PALESTINE, AND THE WORLD’S MOST INTRACTABLE CONFLICT 1, 188–90 (2017).

view as integral to their own, and which the international community recognizes as under belligerent occupation.³

Accordingly, in Ariel and throughout Israel's many West Bank settlements, the mundanities of daily life and local affairs can arouse global interest and ignite regional tension. Yet, Ariel remains a city, otherwise conventional. An Israeli can work, buy a home, attend university, and enjoy the comforts of a suburban life. While its legal status as a settlement, in violation of international law, has negligible influence on the daily routines of its residents, it is a primary facet of the Israeli-Palestinian conflict. It is a space that embodies a prolonged occupation, where legal narratives unfold and bear witness to competing uses of international law.

Settlements like Ariel present a paradox. Their existence, and the normality of daily life within, repudiates the very legal framework that is intended to govern the conflict and enable its resolution. The Israeli occupation of the West Bank has now surpassed its fiftieth year.⁴ As the conflict's landscape becomes increasingly legalized, agreement as to how international law may effectively govern prolonged occupation eludes consensus. Traditionally, occupation is understood as a neutral phenomenon. Military control of foreign territory operationalizes the occupation framework—that is, the various legal instruments that regulate occupation.⁵ The framework's application is commonly understood as a counteraction to the factual recognition of foreign control.⁶ As prominently interpreted, international law's relationship with occupation is devoid of normative content.⁷

Eyal Benvenisti explains that the drafters of the legal framework regulating occupation “took pains to emphasize that the regime of occupation is a *de facto* regime that conveys to the occupant only circumscribed rights and obligations for the limited duration of the occupation.”⁸ The resulting legal treatment is premised upon the assumption that foreign control is temporary.⁹ Although occupation was envisioned in brief intervals and regulated accordingly, the legal

³ See, e.g., S.C. Res. 446, ¶ 3 (Mar. 22, 1979). See also G.A. Res. 32/20, ¶ 1 (Nov. 25 1977) (affirming that Israel's presence within the West Bank constitutes a belligerent occupation). See also Grant T. Harris, *Human Rights, Israel, and the Political Realities of Occupation*, 41 *ISR. L. REV.* 87, 94–95 (2008).

⁴ The occupation of the West Bank, East Jerusalem, and the Gaza Strip (as well as other territories) began in June 1967. See generally IDITH ZERTAL & AKIVA ELDAR, *LORDS OF THE LAND: THE WAR OVER ISRAEL'S SETTLEMENTS IN THE OCCUPIED TERRITORIES, 1967–2007* (2007) [hereinafter ZERTAL & ELDAR].

⁵ Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 539 T.S. 631 [hereinafter Hague Convention (IV)]. The term occupation framework includes treaty-based provisions, primarily the Hague Regulations and the Fourth Geneva Convention, as well as the various interpretations that have evolved around these. See also Yutaka Arai-Takahashi, *Preoccupied With Occupation: Critical Examinations of the Historical Development of the Law of Occupation*, 94 *INT'L REV. RED CROSS* 51 (2012) (For an overview of the occupation framework's historical development) [hereinafter Arai-Takahashi, *Preoccupied With Occupation*].

⁶ See Prosecutor v. Naletilic, IT-98-34-T, Trial Chamber Judgment, ¶ 211 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003). See also Marco Sassòli, *The Concept of Belligerent Occupation*, in *THE 1949 GENEVA CONVENTIONS: A COMMENTARY* 1390, 1393 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015).

⁷ AEYAL GROSS, *THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION* 3–4 (2017) [hereinafter GROSS, *WRITING ON THE WALL*].

⁸ See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 15–16 (2d ed. 2012) (Benvenisti notes that, “as part of the *jus in bello*, the lawfulness of the occupation regime or its authorities did not depend on the *jus ad bellum* issues that led to the invasion and the occupation.”).

⁹ Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 *EUR. J. INT'L L.* 721, 726 (2005).

framework does not set firm durational requirements. Instead, it protects the inalienability of sovereignty. It strictly regulates the occupying power's ability to alter the territory's legal or political status. Thus, the legal framework is structurally conservationist.¹⁰

Prolonged occupation presents myriad challenges. These emanate from the occupation's extended duration. They derive from the structural inability of the occupation framework to provide more than temporary consideration to a population that faces extended subjugation. The framework's ephemeral conception of occupation is ill-suited to regulate the enduring needs of a population bereft of self-governance. This incompatibility between international law's conservationist orientation and the reality of prolonged occupation has long provoked questions regarding the appropriateness of the legal framework.¹¹ Throughout the West Bank, a legal regime that is understood as exceptional and temporal continues to regulate an occupation that has now exceeded a half-century in duration. International law is persistently employed to govern a *fait accompli*—evidenced by the prevailing normality of life in the settlements—whose continuation is partially facilitated by appeals to international law.

As an occupation's length increases, year-by-year, its challenges become further embedded and the associated framework further exposed. Most commonly, responses to these challenges are grounded within an interpretative approach that favors a factual or non-normative understanding of occupation.¹² This prominent reading recognizes a temporary conception of occupation, but accepts that the framework's application is not disrupted by duration. Although international humanitarian law (IHL) envisions occupation as a temporary state, both in accordance with its historical origins and as a requisite means of preserving sovereignty, the prominent interpretative approach accentuates the legal framework's absence of a durational limitation. The resulting de-emphasis of the framework's innate temporality projects a conception of IHL that is constrained in its treatment of prolonged occupation. Temporariness, when juxtaposed with the framework's lax durational requirements, becomes intangible. It becomes a concept devoid of meaning or precision.¹³

Occupation is undesirable. Factually conceived and legally acknowledged, occupation is regulated because it is an inherent characteristic of war. Yet when an occupation becomes prolonged, it is less likely to serve a necessary military need. The means and character of the occupation alters. The interests of the occupying power depart from the purpose of the occupation framework. Commonly, however, the legal treatment of occupation does not respond to the altered form of foreign control. It continues to regulate a situation that threatens permanence through a legal framework that provides provisional respite. As prominently

¹⁰ Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 199 (2005).

¹¹ See generally Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 47 (1990) [hereinafter Roberts, *Prolonged Occupation*].

¹² See, e.g., U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* 28–29 (2004) [hereinafter U.K. Military Manual]. See also Kristen E. Boon, *The Future of the Law of Occupation*, 46 CAN. Y.B. INT'L L. 107, 116 (2008).

¹³ The Hague Regulations did not consider the likelihood of a prolonged occupation and operated under the assumption that a peace treaty between the occupying power and the occupied government would be expedited. See BENVENISTI, *supra* note 8, at 144–45.

interpreted, it fails to articulate a clear legal basis as to why occupation, despite its undesirability, must be terminated.

Prolonged occupation should not be exclusively defined by an occupation's duration. The principle of temporality is not only contingent upon the passage of time. It is also illustrative of the conditions that exist and the form that the occupation has assumed. An occupation will become prolonged when it shifts from a regulated phase that preserves sovereignty and ensures uninterrupted humanitarian consideration to a form of foreign control that threatens to become permanent. By adopting a non-normative interpretation of occupation and fixating on the challenges that stem from an occupation's duration, the legal framework engages with the daily administration of the occupation but neglects the fundamental purposes of this legal regime.

This article explores international law's efficacy. Attempts to remedy the challenges emanating from the occupation framework's inapposite relationship with prolonged occupation result from an interpretative choice. This is between the prominent, non-normative reading of the occupation framework, which responds to the challenges caused by a prolonged occupation's duration, and a normative approach that wishes to engage with the causes of this altered form of foreign control. Corresponding efforts may be both benevolent and necessary. Yet, when grounded within the prominent interpretative approach, responses to prolonged occupation are limited. In accordance with this interpretative approach, the user seeks to *better* employ the law. The prominent interpretation purports to more effectively regulate the occupying power's ability to respond to the challenges of prolonged occupation. Additionally, however, these efforts provide the occupying power with an opportunity to justify initiatives that entrench its control. Ostensibly, these are presented as compensating for the occupation framework's incomplete conception of occupation.

The following pages trace and engage with debates concerning the legal regulation of prolonged occupation. They query how the prominent, non-normative interpretation of the occupation framework influences or enables responses to the challenges posed by prolonged occupation. Though these challenges evoke a diverse array of responses, this article identifies a commonality. Collectively, responses premised upon a non-normative interpretation of the occupation framework are limited by an understanding of international law that only allows efforts promoting the better management of occupation. Whether the 'manager' is attempting to externally address the challenges presented by prolonged occupation or internally operate within the framework's confines, this management approach is motivated by an unconstrained notion of occupation. It neglects the occupying power's intentions. Ignoring the new form of control that the prolonged occupation establishes, the user seeks to *better* engage with various provisions of the legal framework to mitigate the results, but not the cause, of prolonged occupation.

What is characterized here as the management approach is derived from a non-normative interpretation of the occupation framework. It refers to the diverse and preferred methods of regulating prolonged occupation. Commonly, the management approach is prioritized by state actors, courts, and international lawyers. It accompanies a shift from a formal occupation, premised in necessity and based on temporality, to a quasi-permanent administrative relationship. Various actors, each with distinct motivations, apply the management approach in

several forms. An occupying power or an international actor may appeal to this approach to justify a benevolent policy intended to serve the occupied population.¹⁴ The occupying power may also appeal to the management approach to legitimize measures that fortify its control of, or interests in, the occupied territory. This approach, however, derives from an interpretation of the legal framework that accentuates occupation's factual character and lax temporal requirements. Upon an interpretation that accepts the framework's application, and neglects a holistic conception of temporality, management becomes either the only or the preferred method of addressing prolonged occupation.

This article begins from the assumption that in 1967, following war between Israel and neighboring Arab states, the West Bank, East Jerusalem, the Gaza Strip, the Sinai Peninsula, and the Golan Heights came under Israeli control.¹⁵ These events triggered the application of the occupation framework. The following sections, however, do not directly address the occupation or legal status of the Gaza Strip. This omission is not a commentary on Gaza's post-disengagement status. Neither, is it an assertion that there is a legal or political distinction between Gaza and the West Bank.¹⁶ The focus of this article is on the legal framework governing instances of prolonged occupation. Gaza cannot be ignored within the context of the Israeli-Palestinian conflict. But to understand the implications and inadequacies of the occupation framework for the purpose of governing prolonged occupation, this article limits its observations to the West Bank. It is here that the Israeli presence is greatest and most entrenched.¹⁷ Extensive settlement developments mark the West Bank and continue to expand.¹⁸ Again, this does not suggest that Gaza holds a separate territorial status, but instead recognizes that the issues regarding the current occupation of Gaza are less concerned with the particular challenges presented by prolonged occupation.

The following considers how international law is employed in response to and in furtherance of prolonged occupation. Part I provides a brief overview of the occupation framework. It reviews the well-established challenges that manifest during prolonged occupation. This begins with the pioneering work of Adam Roberts and describes how, due to the occupation framework's

¹⁴ JAMES PETTIFER & MIRANDA VICKERS, *THE ALBANIAN QUESTION: RESHAPING THE BALKANS* 236 (2007).

¹⁵ See generally MICHAEL B. OREN, *SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST* (2003).

¹⁶ Following Israel's unilateral disengagement from the Gaza Strip in 2005, there has been significant debate as to whether Gaza remains under formal Israeli occupation. In 2008, the Israeli Supreme Court held in *Bassiouni* that Gaza, following Israel's disengagement, was no longer occupied (though it held that Israel still owed limited humanitarian duties to the Gazan population). See HCJ 9132/07 Gaber Al-Bassiouni v. Prime Minister (2008) (Isr.). For a variety of views on Gaza's status, see Geoffrey Aronson, *Issues Arising from the Implementation of Israel's Disengagement from the Gaza Strip*, 34 J. PALESTINE STUD. 49 (2004-2005); Elizabeth Samson, *Is Gaza Occupied? Redefining the Status of Gaza Under International Law*, 25 AM. U. INT'L L. REV. 915 (2010); Marko Milanovic, *Is Gaza Still Occupied by Israel?*, EJIL: TALK! (Mar. 1 2009), <http://www.ejiltalk.org/is-gaza-still-occupied-by-israel/>; Yuval Shany, *Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement*, 8 Y.B. INT'L HUM. L. 369 (2006).

¹⁷ See generally GERSHOM GORENBERG, *THE ACCIDENTAL EMPIRE: ISRAEL AND THE BIRTH OF THE SETTLEMENTS 1967-1977* (2006). [hereinafter GORENBERG, ACCIDENTAL EMPIRE].

¹⁸ See generally YEHEZKEL LEIN & EYAL WEIZMAN, *LAND GRAB: ISRAEL'S SETTLEMENT POLICY IN THE WEST BANK* (Yael Stein ed., 2002).

conservationist structure, prolonged occupation is understood to require particular forms of administration.

Part II traces the implications of these responses. It queries how the prominent, non-normative interpretation influences the regulation of prolonged occupation. This section demonstrates that widespread appeals to the occupation framework, as traditionally conceived, facilitate continued recourse to the management approach. Set within the West Bank, this section assesses state engagements, juridical interventions, and scholarly debates. Though the desire to better manage a prolonged occupation may be compelling, this section demonstrates how perpetual management threatens to entrench occupation and forsake the requirement of temporality.

Part III considers alternative interpretations of the occupation framework. These reject the prominent, non-normative readings that permeate much of the discourse. They increasingly feature within debates regarding the effective legal treatment of prolonged occupation and raise important questions regarding the legal status of this form of occupation.

Finally, Part IV offers a third interpretative approach. Drawing upon identified sources of international law, this article proposes a novel, normative interpretation of the occupation framework. This accentuates the requirement of temporality. Conceived holistically, this interpretation considers not only the length of an occupation, but also the form that an occupation has assumed. Engagements with the framework, responses to the challenges presented by prolonged occupation, may pivot from a limiting interpretative approach that professes neutrality and emphasizes durational neglect. This will nurture attempts to end, not simply manage or better endure, prolonged occupation. The proposed interpretative approach will require an occupying power to satisfy a good faith obligation to refrain from actions that facilitate or perpetuate occupation. Once an occupation can no longer be justified as a temporary necessity that preserves sovereignty and provides humanitarian consideration, it abandons its legal purpose and must terminate. The proposed interpretative approach is more consistent with the spirit of IHL. It better matches the ethos of the occupation framework. And it will better align the purpose of the occupation framework with diplomatic and state-building initiatives that are grounded in the principle of self-determination.

Identifying the motive of management as a causal factor, this article argues that common responses to prolonged occupation may be necessary, but when taken within the occupation framework's traditional, non-normative confines, they risk perpetuating occupation. They entrench a legal framework that is understood to neglect duration and curtail the requirement of temporality. This interpretation of the occupation framework becomes susceptible to manipulation. The proposed approach, offered here, shifts the interpretative focus of the occupation framework. It emphasizes a temporary conception of occupation and facilitates efforts to end the occupation. This is not a complete theory or reimagining of the law of occupation. Instead, this article offers an alternative point of departure and seeks to shift the discourse that accompanies prolonged occupation from management to termination.

I. THE OCCUPATION FRAMEWORK AND THE CHALLENGES OF PROLONGED OCCUPATION

Article 42 of the Hague Regulations denotes when territory becomes occupied.¹⁹ It supports the widely-assumed position that since the 1967 War, the West Bank and other territory captured by Israel, was or remains under occupation. The article states that “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”²⁰ Accordingly, as prominently interpreted, international law conceives of occupation as a neutral phenomenon. With scant consideration for the *jus ad bellum*, the legal framework accepts the existence of an occupation.²¹ The occupying power may be waging a war of aggression or it may be the victim of aggression. Although the *jus ad bellum* distinguishes between these origins and attaches the label of illegality to the former, the legal framework is commonly interpreted to accept the existence of occupation. Regardless of cause or duration, occupation is viewed as a neutral, non-normative, fact.²²

War’s inevitability prompts occupation’s regulation. The occupation framework is founded upon the principle of the inalienability of sovereignty.²³ Its early development and codification was influenced by a nineteenth century European desire to preserve sovereign prerogative.²⁴ International law became a placeholder. Upon the factual existence of an occupation, the occupation framework preserves the status quo ante bellum.²⁵ Regardless of cause, it operates to manage the spatial problem that results from the suspension of sovereignty and the imposition of foreign control.²⁶ Article 43 of the Hague Regulations compels the occupying power to, “restore and ensure, as far as possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the country.”²⁷

The Hague Regulations, however, conveyed minimal regard for the interests of the occupied population. They sought to preserve state prerogatives, protect property rights, and deny sovereignty by conquest.²⁸ Despite its selective Eurocentric origins, the occupation framework’s subsequent development corresponded with international law’s growing humanitarian

¹⁹ Hague Convention (IV), *supra* note 5 art. 42.

²⁰ *Id.* art. 42.

²¹ See Rotem Giladi, *The Jus Ad Bellum/Jus in Bello Distinction and the Law of Occupation*, 41 *ISR. L. REV.* 246, 269–72 (2008). See also *In re List and Others (Hostages Trial)*, 15 *Ann. Dig.* 632, 637 (U.S. Military Trib. at Nuremberg 1948) [hereinafter *Hostages Trial*]; *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 *I.C.J. Rep.* 168, 306, ¶ 58 (Dec. 19) (separate opinion of Judge Kooijmans).

²² YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 2–3 (2009) [hereinafter *DINSTEIN, BELLIGERENT OCCUPATION*]. See also BENVENISTI, *supra* note 8, at 15–16; YUTAKA ARAI-TAKAHASHI, *THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW* 5 (2009) [hereinafter *ARAI-TAKAHASHI, LAW OF OCCUPATION*].

²³ BENVENISTI, *supra* note 8, at 6.

²⁴ Bhuta, *supra* note 9, at 729–30.

²⁵ Fox, *supra* note 10, at 230. See also BENVENISTI, *supra* note 8, at 1–2.

²⁶ *Id.* at 1.

²⁷ Hague Convention (IV), *supra* note 5, art. 43.

²⁸ BENVENISTI, *supra* note 8, at 29. See also Jean L. Cohen, *The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for “Interim Occupations”*, 51 *N.Y.L. SCH. L. REV.* 498, 506–507 (2006–2007).

overtures.²⁹ Alongside the Hague Regulations, the Fourth Geneva Convention would form the core of IHL. Historically, upon the imposition of foreign control, territory was either subsumed or neglected.³⁰ Resigned to war, the occupation framework acknowledges that foreign control often accompanies or succeeds hostilities.³¹ The occupation framework intends to protect sovereign interests from annexation and safeguard the local population from disregard.³² The Fourth Geneva Convention expanded upon the Hague formulation.³³ Article 64 prescribes, that while subject to notable exceptions, “[t]he penal laws of the occupied territory shall remain in force. . . .”³⁴ This is understood to expand upon Article 43’s preservationist character. It shifts emphasis from political to humanitarian interests and provides the occupying power with a further, yet still limited, duty to proactively regulate the territory.³⁵

The occupation framework was now informed by humanitarian intentions. Yet, as codified by Articles 43 and 64, the legal framework’s primary purpose continued to ensure that an occupying power may not acquire sovereignty. With limited exceptions, the legal and political foundations of the occupied territory would be preserved.³⁶ Collectively, these provisions establish the conservationist principle.³⁷ The legal framework, however, maintained a nineteenth century conception of occupation. Within, “occupations were of relatively short duration, during which occupants, by and large, retained existing legislation as much as possible.”³⁸

Although occupation is clearly understood to be a temporary regime, international law is largely silent on questions of duration. The prominent interpretative approach seizes upon this. A meeting of legal experts, convened by the International Committee of the Red Cross (ICRC), agreed that IHL did not impose formal limits on the length of an occupation. Based upon a non-normative reading—focused exclusively on duration and neglecting the altered form of control that accompanies prolonged occupation—the expert panel accentuated the framework’s failure to denote a temporal limitation. The group stated that, “nothing under IHL would prevent occupying powers from embarking on a long-term occupation and that occupation law would continue to provide the legal framework applicable in such circumstances.”³⁹

The framework’s efforts to regulate the tripartite relationship between local inhabitants, the displaced sovereign government, and the occupying power developed alongside the presumption

²⁹ Fox, *supra* note 10 at 229. *See generally* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239 (2000); Cohen, *supra* note 28, at 502–13.

³⁰ *See generally* SHARON KORMAN, *THE RIGHT TO CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* (1988).

³¹ Adam Roberts, *What is a Military Occupation?*, 55 BRIT. Y.B. INT’L L. 249, 251 (1984) [hereinafter Roberts, *Military Occupation*].

³² Fox, *supra* note 10, at 229–30.

³³ *Id.* at 235.

³⁴ Geneva Convention Relative to the Protection of Civilian Persons in Time Of War art. 64, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

³⁵ BENVENISTI, *supra* note 8, at 72–74.

³⁶ Fox, *supra* note 10, at 236.

³⁷ *Id.* at 235–36.

³⁸ BENVENISTI, *supra* 8, at 70.

³⁹ Rep. of the Int’l Comm. of the Red Cross [ICRC], *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territories*, at 74 (2012). [hereinafter ICRC Expert Meeting].

that the triggering conflict would be of limited duration.⁴⁰ Promptly, upon the establishment of peace, normality would revert.⁴¹ In accordance, an occupation was understood to end in one of two ways: (1) either the fortunes of war are altered and the occupying power loses military control of the territory it formally held, or (2) the occupation is brought to an end through a negotiated agreement.⁴² Often, however, both historical and contemporary occupations failed to match the paradigmatic vision that informed the legal framework.⁴³

As a result, protection gaps and structural discrepancies emerged. In as early as 1949, the inconsistencies between observed manifestations of occupation and the newly formulated occupation framework's ability to effectively govern prolonged occupation were considered. The crux of the critique provided by Doris Appel Graber was direct. Graber plainly asserted that the existing legal treatment appeared fragmented. The legal framework had developed within and was influenced by a non-analogous historical period of relative peace. This was not suited to govern the complexity of contemporary occupations.⁴⁴

The conservationist principle prohibits an occupying power from imposing enduring or fundamental changes. Yet as any society evolves, effective regulation requires political, economic, social, and legal development. Often, these needs appeared in tension with the occupation framework's preservationist character. Adam Roberts's defining work on prolonged occupation advances this notion. Roberts demonstrated that an inherent inconsistency existed between the legal framework's treatment of occupation as constituting a provisional state and contemporary manifestations of occupation.⁴⁵ In response to this apparent incompatibility, Roberts asked, "To what extent are international legal rules formally applicable, and practically relevant, to a prolonged military occupation?"⁴⁶ Writing over a quarter-century ago, Roberts argued that this question had assumed prominence due to the exceptional duration of Israel's presence within the territory that came under its control in 1967.⁴⁷

⁴⁰ Michael Bothe, *The Administration of Occupied Territory*, in *THE 1949 GENEVA CONVENTIONS: A COMMENTARY* 1455, 1456 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015).

⁴¹ BENVENISTI, *supra* note 8, at 28. See Raymond T. Yingling & Robert W. Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393 (1952) (For a general history of the drafting and development of the Fourth Geneva Convention.).

⁴² Roberts, *Prolonged Occupation*, *supra* note 11. See also DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 22, at 271–72.

⁴³ See Roberts, *Military Occupation*, *supra* note 31, at 261–94 (Adam Roberts provided a list of seventeen forms of military occupation, the vast majority of which do not directly conform to the traditional legal framework's conception of occupation).

⁴⁴ See D.A. GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863–1914: A HISTORICAL SURVEY* 37 (1949). See also Iain Scobbie, *International Law and the Prolonged Occupation of Palestine*, U.N. ROUNDTABLE ON LEGAL ASPECTS OF THE QUESTION OF PALESTINE 3 (2015), https://www.researchgate.net/publication/277290147_International_law_and_the_prolonged_occupation_of_Palestine.

⁴⁵ See Roberts, *Prolonged Occupation*, *supra* note 11, at 47 (Roberts cites the Allied occupations of Japan and Germany, the South African occupation of Namibia, the Turkish occupation of Northern Cyprus, the Moroccan presence in Western Sahara, and the Vietnamese invasion of Kampuchea as modern examples).

⁴⁶ *Id.* at 44.

⁴⁷ *Id.* See also ZERTAL & ELDAR, *supra* note 4; GORENBERG, *ACCIDENTIAL EMPIRE*, *supra* note 17 (For general historical accounts of Israel's presence within the Palestinian territories.).

The point at which an occupation becomes prolonged will, as Adam Roberts observed, remain a contentious issue.⁴⁸ Commentators have proposed durational limits. An occupation is declared prolonged when it exceeds a predetermined timescale.⁴⁹ This determination, however, is not suited to a fixed chronological limit. It must be cognizant of the form of control that an occupation has assumed. An occupation becomes prolonged when it no longer adheres to the principle of temporality. Temporality is understood holistically. It is informed by an occupation's duration but also its condition.

This article suggests that an occupation becomes prolonged when it constitutes a form of control that threatens to become permanent. A prolonged occupation is a quasi-permanent administrative relationship that constitutes something other than a temporarily imposed humanitarian arrangement. This is more of a competence and observational-based trigger than one focused on the precise temporal scope of an occupation. This proposed understanding recognizes that the hallmark of a prolonged occupation is apparent when the factual accounting of the occupation threatens the regulatory ability of international law. This risks an occupation becoming indefinite and eventually irreversible.

Many of the challenges presented by prolonged occupation are widely understood. Roberts explained that the law of occupation is often interpreted to provide the occupying power with a large measure of authority. Although this may be justifiable in times of direct hostilities, Roberts believed this arrangement was not sustainable. It accentuated the likelihood, as the occupation's duration increased, that the legal framework's conservationist orientation would hinder the socio-economic development of the occupied territory.⁵⁰ Roberts argued that if the existing framework was not adapted to recognize the characteristics and challenges posed by prolonged occupation, the framework itself could leave a society politically and economically underdeveloped.⁵¹

According to Roberts, responses to these challenges cannot be indefinitely neglected due to the conservationist nature of the occupation framework. Roberts, however, notes that providing an occupying power with additional latitude carries risk. The danger, said Roberts, "in making such a suggestion is that it may seem to imply the further suggestion that those parts of the law of war that deal with military occupations may not be fully applicable, and that departures from the law may be permissible."⁵²

Resulting engagements with prolonged occupation are commonly structured by the prominent, interpretive approach. These legal engagements attempt to better utilize the legal framework. Efforts by states, courts, and scholars to address the challenges created by prolonged occupation are grounded within a factual notion of occupation. They avoid normative assessments. Instead,

⁴⁸ Roberts, *Prolonged Occupation*, *supra* note 11, at 47.

⁴⁹ *Id.* at 47 (Adam Robert, for example, defined prolonged occupation as lasting for more than five years and extend into a period when hostilities are sharply reduced). *See also* Richard Falk, *Some Legal Reflections on Prolonged Israeli Occupation of Gaza and the West Bank*, 2 J. REFUGEE STUD. 40, 45–47 (1989) (Alternatively, Richard Falk has suggested imposing specific obligations on an occupying power whose occupation has researched ten years in duration.).

⁵⁰ Roberts, *Prolonged Occupation*, *supra* note 11, at 96.

⁵¹ *Id.* at 52.

⁵² *Id.* at 51.

they accept that regardless of the occupation's duration, a traditionally-interpreted occupation framework continues to govern prolonged occupation. To address the myriad challenges posed by this form of occupation, competing interests must be effectively managed.

The critiques and premise offered by Roberts continue to provide a point of departure for subsequent responses. Although Roberts acknowledged the challenges posed by prolonged occupation—identifying the tension of addressing these challenges through a legal regime built upon the conservationist principle—subsequent responses have maintained fidelity to the prominent interpretation of the occupation framework. The ensuing debate fixates on the extent to which, and the means by which, an occupying power should or should not be accorded additional latitude to manage the intrinsic challenges presented by prolonged occupation.⁵³

Christine Chinkin explains that the “inherent dilemma” within this debate is that the prolonged nature of the occupation may be invoked both in favor of and in opposition to increasing the allowances that an occupying power receives.⁵⁴ Certainly, there are instances where broadening the occupying power's discretion will appear prudent. If the necessity of prolonged occupation inevitably breeds inherent challenges, if over time the failure to respond to demographic shifts and economic stagnation threatens the interests of the occupied population, the provision of expansive latitude will exhibit moral pull. Equally, however, one can envision numerous scenarios in which such latitude would convey a disproportionate focus on the rights of the occupying power.

Chinkin neatly captures the confines of the discourse that surrounds prolonged occupation. The identified dilemma, however, is premised on the prominent interpretative approach. This common legal framing responds exclusively to managerial challenges that result from the occupation's duration. Fixation on these governance challenges purport to ensure the occupied population's long-term needs. These will demand attention. Yet, an exclusive managerial approach neglects the causes and consequences of the altered form of control embodied by prolonged occupation. Upon this interpretative approach, the challenges presented by prolonged occupation may only be managed. Management is facilitated and improved by either increasing or limiting the occupying power's control of the seized territory. Upon this prominent interpretative approach, the elicited replies regularly elect management as the necessary, or only, response.

This singular view of prolonged occupation allows duration to become either a guise or a justification for quasi-permanent control. Israel's occupation of the West Bank provides numerous examples of an occupying power both appealing to and employing this approach to justify a novel form of regulation. Adhering to a non-normative reading of the occupation framework that links prolonged occupation to duration – not conditions – confines the forms of legal engagement that an actor may take when responding to the challenges posed by prolonged occupation. It allows an occupying power to justify initiatives that purport to remedy these

⁵³ Vaios Koutroulis, *The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time?*, 94 INT'L REV. RED CROSS 165, 176 (2012).

⁵⁴ See Christine Chinkin, *Laws of Occupation*, in MULTILATERALISM AND INTERNATIONAL LAW WITH WESTERN SAHARA AS A CASE STUDY 167, 178 (Neville Botha, Michèle Olivier & Delarey van Tonder eds. 2010).

challenges. Such an approach—the reliance upon continual management to alleviate the effects of prolonged occupation—risks further entrenching or perpetuating occupation within the West Bank and beyond.

II. THE PROMINENT INTERPRETATIVE APPROACH: THE FACILITATION AND CONSEQUENCES OF THE PERPETUAL MANAGEMENT OF PROLONGED OCCUPATION

Immediately following the 1967 War, legal considerations were overshadowed by the dawn of a new regional reality. Soon, however, international law became a prominent feature of Israel's newfound control of the territory it assumed upon victory.⁵⁵ This began gradually and proceeded haphazardly. Days after the cessation of hostilities, Israel pledged to apply the occupation framework. It emphasized its commitment to the well-being of the local Palestinian populace.⁵⁶ Israel, however, shifted from its initial pronouncement and began questioning the West Bank's legal status. Weeks after the war had ended, Yaakov-Shimshon Shapira, then Minister of Justice, addressed the Knesset. Shapira argued that Israel should not assume the status of an occupying power within the recently “liberated territory.”⁵⁷ Israel then passed an ordinance permitting its government to extend Israeli law, jurisdiction, and administration “to any area of Eretz Israel (Palestine)” that it deemed necessary.⁵⁸

The ordinance was swiftly invoked.⁵⁹ It extended Israeli jurisdiction into East Jerusalem but was not applied within the West Bank.⁶⁰ Official references to the Fourth Geneva Convention were removed.⁶¹ The following year, Israel formally abandoned the term West Bank, reverting to the region's historical Hebrew names, Judea and Samaria. Despite these changes, Israel refrained from formally extending jurisdiction to or claiming sovereignty of the West Bank. It did, however, continue to question the territory's legal status.⁶² As Israel moved away from its initial commitment to the occupation framework, the notion of settling the West Bank entered the public discourse.⁶³

⁵⁵ See AVI SHLAIM, *THE IRON WALL: ISRAEL AND THE ARAB WORLD* 250–264 (2001) (For an account of the events that immediately followed the 1967 War).

⁵⁶ See, e.g., U.N. Secretary-General, *Report Under General Assembly Resolution 2254 (ES-V) Relating to Jerusalem*, U.N. Doc. S/8146, annex II (Sept. 12, 1967) (For an account of the various claims and efforts made by Israeli officials). See Transcript No. 126 of the Constitution, Law and Justice Committee, 5727–1967, Sixth Knesset, Second Session (Akevot trans., 1967) (Isr.), available at <http://akevot.org.il/wp-content/uploads/2016/09/MAG-Briefing-Eng.pdf>. (For an account of recently released archival material that demonstrates Israel's intention to adhere to the occupation framework in the weeks following the war.)

⁵⁷ ALLAN GERSON, *ISRAEL, THE WEST BANK AND INTERNATIONAL LAW* 111 (1978).

⁵⁸ *Id.* See also Law and Administrative Ordinance (Amendment No. 11), 5727–1967, 21 LSI 75 (1966–67) (Isr.).

⁵⁹ Ian S. Lustick, *Has Israel Annexed East Jerusalem?*, 5 MIDDLE EAST POL. 35, 36–37 (1997).

⁶⁰ Gerson, *supra* note 57, at 111.

⁶¹ *Id.*

⁶² See Ministry of Foreign Affairs, Director Memo 765, Israel State Archives File A-7371/4 (Akevot trans., Mar. 20, 1968) (Isr.), available at <http://akevot.org.il/wp-content/uploads/2016/09/Comay-Meron Cable-Eng.pdf>. (Recently released diplomatic cables, from within Israel's Foreign Ministry, dispute the sincerity of these queries. The exchanges indicate that officials within the Ministry understood that the occupation framework was legally applicable and that certain actions – taken and intended – within the territories would violate the framework.)

⁶³ ZERTAL & ELDAR, *supra* note 4, at 333–34. See also SHAFIR, *supra* note 2, at 96.

Despite Israel's evolving position, the international community remained steadfast. The Security Council called upon the involved governments to ensure respect for the Geneva Conventions.⁶⁴ Israel was condemned during successive emergency sessions of the General Assembly. These denunciations ranged in tenor and called upon Israel to remove its military from the territories it now held.⁶⁵ In response to the growing international consensus, Israel refuted the premise that its presence within the West Bank constituted an occupation. Israeli officials adopted an amended version of the "missing reversioner thesis" developed by Yehuda Blum.⁶⁶ This drew upon the notion of terra nullius. Though it avoided such framing by name, Blum's thesis emphasized the perceived sovereign void that existed within the West Bank.⁶⁷ An altered, and partially moderated, version of the approach initially articulated by Blum gained further credence when presented as official policy by Meir Shamgar, then the Attorney General and later the President of the Israeli Supreme Court. Writing within his official capacity in the inaugural volume of the *Israel Yearbook on Human Rights* following a symposium at Tel Aviv University, Shamgar concluded that:

the Israeli Government tried therefore to distinguish between theoretical juridical and political problems on the one hand, and the observance of the humanitarian provisions of the Fourth Geneva Convention on the other hand. Accordingly, the Government of Israel distinguished between the legal problem of the applicability to the territories, and decided to act *de facto*, in accordance with the humanitarian provisions of the Convention.⁶⁸

Israel's occupation of the West Bank moved swiftly from acknowledgement to indeterminacy. Shlomo Gazit, who upon conclusion of the war was appointed as Coordinator of Activities in the Territories, was tasked with overseeing Israel's administration of the West Bank.⁶⁹ Gazit explained that the occupation's architects ensured that "the establishment of military government

⁶⁴ S.C. Res. 237, ¶ 2 (June 14, 1967).

⁶⁵ See, e.g., U.N. GAOR, 5th Sess., 1526th plen. mtg. at ¶ 82, U.N. Doc. A/PV.1526 (June 19, 1967) (The strongest accusations levied against Israel came from the Arab and Soviet delegations). See, e.g., U.N. GAOR, 5th Sess., 1554th plen. mtg. at ¶ 91, U.N. Doc. A/PV.1554 (July 14, 1967) (For a more tempered approach.).

⁶⁶ See DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 33–34 (2002) [hereinafter KRETZMER, *OCCUPATION OF JUSTICE*] (A variety of state representatives presented direct and amended versions of the *missing reversioner* thesis before various UN bodies as debates within the legal sphere increasingly raised questions concerning the status of Israel's assumed governance of the West Bank.).

⁶⁷ See Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samara*, 3 *ISR. L. REV.* 279, 283–84 (1968) (Yehuda Blum, a legal scholar and expert in international law at the Hebrew University who would later become Israel's Ambassador to the United Nations, published an influential article that provided the foundation for Israel's legal approach to the question of the West Bank's status. Blum's thesis, known as the missing reversioner theory, was premised on the assertion that Jordan's presence throughout the West Bank prior to 1967 was the result of illegal aggression. Following the termination of the British Mandate in 1948, the relevant territory lacked a legitimate sovereign. While the question of Jordanian sovereignty over the West Bank had been emphatically denounced by the international community, Blum contended, "the legal standing of Israel in the territories in question is thus that of a state which is lawfully in control of territory in respect of which no other state can show a better title.").

⁶⁸ Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 *ISR. Y.B. HUM. RTS.* 262, 266 (1971) [hereinafter Shamgar, *Observance of International Law*].

⁶⁹ SHLOMO GAZIT, *THE CARROT AND THE STICK: ISRAEL'S POLICY IN JUDEA AND SAMARIA, 1967–68* 7 (1995).

in occupied territory be seen as a temporary phenomenon.”⁷⁰ Privately, however, Israeli officials acknowledged that their presence within the territories would likely endure. Moshe Dayan, Israel’s Defense Minister, instructed Gazit to prepare for an “extended stay.”⁷¹

A factual conception of occupation facilitated Israel’s prolonged presence. Meir Shamgar, then a Justice of the Israeli Supreme Court, offered a traditional reading of the occupation framework. This forwarded a singular notion of temporality. It accentuated the absence of a durational limitation and remained silent on the form of control that an unconstrained occupation would assume. Shamgar wrote that “according to International Law the exercise of the right of military administration over the territory and its inhabitants had no time-limit, because it reflected a factual situation and pending an alternative political or military solution this system of government could, from the legal point of view, continue indefinitely.”⁷² This common interpretative approach became the foundation of Israel’s subsequent legal engagements with the occupation framework.⁷³

Writing in 1990, Adam Roberts correctly predicted Israel’s continued occupation of the Palestinian territories.⁷⁴ The entrenchment of Israel’s presence throughout the West Bank accentuated questions concerning the occupation framework’s appropriateness. As Israel continued to govern the West Bank and establish its presence through the construction of settlements and their associated infrastructure, it would increasingly appeal to the occupation framework and management approach. As with the scholarly and juridical deliberations that acknowledged the occupation framework’s inadequacies, Israel purported that many of its legal engagements were in response to the challenges presented by this particular form of occupation. Imposed policies were justified in response to the occupation’s duration. Grounded within a non-normative conception of occupation, these responses managed the results, and neglected the causes, of prolonged occupation. Collectively, they contributed to the quasi-permanent form of control that the occupation would assume.

A. The Challenge of Economic Development

On May 30, 1967, King Hussein of Jordan and Egyptian President Abdel Nasser signed a joint defense agreement.⁷⁵ Regional tensions escalated. Nasser declared that “our basic objective will be the destruction of Israel.”⁷⁶ A little more than a week later, Israel would gain control of the West Bank and Gaza Strip. Combat forces gave way to military government units who expeditiously established an administrative structure.⁷⁷ Duties were divided between the Israel

⁷⁰ *Id.*

⁷¹ *Id.* at x.

⁷² Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government — The Initial Stage, in MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967–1980: THE LEGAL ASPECTS* 14, 43 (Meir Shamgar ed., 1982) [hereinafter Shamgar, *Legal Concepts*].

⁷³ GROSS, *WRITING ON THE WALL*, *supra* note 7, at 3.

⁷⁴ Roberts, *Prolonged Occupation*, *supra* note 11, at 103.

⁷⁵ Laura M. James, *Egypt: Dangerous Illusions, in THE 1967 ARAB-ISRAELI WAR: ORIGINS AND CONSEQUENCES* 56–70 (William Roger Lewis & Avi Shlaim eds., 2012).

⁷⁶ MARTHA GELLHORN, *THE FACE OF WAR* 283 (1988).

⁷⁷ Nimrod Raphaeli, *Military Government in the Occupied Territories: An Israeli View*, 23 *MIDDLE E. J.* 177, 178–79 (1969).

Defense Forces (IDF) and Israel's Government. Security and near-term economic needs came under the purview of military command. Political considerations and long-term economic matters would be addressed by ministerial committees.⁷⁸ The Military Government declared that its primary objective was to oversee the resumption of normality. Corresponding efforts were largely guided by economic objectives.⁷⁹

Under the direction of Moshe Dayan, Israel implemented policies intended to foster economic integration with the assumed territories. The resulting governance structure claimed to provide for the “legitimate needs of local inhabitants and the security requirements of Israel itself.”⁸⁰ Ostensibly, this was consistent with the obligations imposed by the occupation framework. Article 43 of the Hague Regulations requires an occupying power to restore and ensure public order and civil life throughout the occupied territory.⁸¹ The precise meaning of the provision and the extent of the obligations that it imposes are, however, unclear.⁸² Yet despite interpretative discord, it is widely assumed that Article 43 compels the occupying power to, *inter alia*, “restore order and normal economic life in the occupied territory.”⁸³

Israel's earliest interventions appear consistent with the provision. The Military Government worked to liberalize trade, manage produce surpluses, protect the agricultural sector, and provide development loans.⁸⁴ The passage of time would, however, witness the evolving needs of the occupied population. It would bring shifting priorities amongst the occupying power. The conventional application of the occupation framework appeared insufficient to pacify the involved interests. The uncertainty conveyed by the occupation framework, observations of its selective application, and its conservationist orientation prompted Adam Roberts to ask whether the framework unnecessarily confined economic development.⁸⁵ During prolonged occupation, the desire for economic stewardship—in response to market changes, anticipated societal needs, technological advancements, and demographic shifts—creates tension with the occupation framework's conservationist stance.⁸⁶ To resolve this discordancy, to begin responding to the

⁷⁸ Gerson, *supra* note 57, at 110–111.

⁷⁹ Raphaeli, *supra* note 77, at 179.

⁸⁰ *Id.* at 180.

⁸¹ See Hague Convention (IV), *supra* note 5, art. 43 (The Article states, “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”).

⁸² See Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 EUR. J. INT'L L. 661, 663 (2005) [hereinafter Sassòli, *Legislation and Maintenance*].

⁸³ *Id.* at 663. See, e.g., S.C. Res. 1483 (May 22, 2003) (Following the US-led invasion of Iraq, the Security Council required the occupying power to, “promote the welfare of the Iraqi people through the effective administration of the territory.”) See also Bothe, *supra* note 40, at 1467.

⁸⁴ Raphaeli, *supra* note 77, at 179–80. See also NEVE GORDON, ISRAEL'S OCCUPATION 64–65 (2008).

⁸⁵ Roberts, *Prolonged Occupation*, *supra* note 11, at 52.

⁸⁶ See Trial of Alfred Felix Alwyn Krupp von Bohlen Und Halbach and Eleven Others (The Krupp Trial) (U.S. Military Trib. at Nuremberg 1948), in U.N. War Crimes Comm'n, 10 Law Reports of Trials of War Criminals 135 (1949) (The Military Tribunal at Nuremberg expressing the conservationist principle. In the Krupp Trial, the Tribunal held, *inter alia*, that “the economic substance of the belligerently occupied territory must not be taken over by the occupant or put to the service of his war effort”).

challenge of economic development within prolonged occupation, Israel referenced the occupation's duration to justify "more effective" means of management.⁸⁷

Since 1967, the West Bank has been governed as an economic union with Israel.⁸⁸ The guiding policy of economic integration was presented as a benevolent necessity. Israel proclaimed that "[t]he Six Day War abolished to all intent and purposes the 'Green Line' that in the past demarcated the Israeli sector from the administered territories. Naturally and unavoidably, these areas are becoming dependent upon Israel for all their economic and service needs."⁸⁹ A fundamental economic transformation followed. Various sectors, including agriculture, trade, taxation, and natural resources, came under Israeli control. Initially, the imposed single market generated economic gains within the occupied territories.⁹⁰ Though the successful development of the West Bank was understood as a mutual benefit, integration aligned with Israel's (exclusive) economic interests.⁹¹

Many of Israel's economic interventions were challenged. Their legality was repeatedly questioned.⁹² In reply, Israel referenced the need to respond to the particular quandaries evoked by the occupation's duration. Corresponding appeals to the management approach were grounded in a non-normative reading of the occupation framework. In 1972, a labor dispute occurred between hospital employees and a charitable association in Bethlehem. In response, the Military Government initiated settlement proceedings, amended preexisting legislation, and imposed mandatory arbitration. The petitioner claimed these actions were beyond the competence of an occupying power. It claimed that the imposed measures contravened the occupation framework's conservationist ethos.⁹³

In the *Christian Society case*, Israel's High Court of Justice considered the aforementioned claims. In response, it offered a broad interpretation of Article 43.⁹⁴ Following five years of occupation, the Court drew upon Israel's elongated presence within the territories. It identified and responded to the resulting challenges. The occupying power was deemed responsible for ensuring the, "whole social, commercial and economic life of the community."⁹⁵ The Court concluded that Israel must acknowledge changing conditions. It must attend to the resulting

⁸⁷ See generally KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66.

⁸⁸ See Raja Khalidi & Sahar Taghdisi-Rad, *The Economic Dimensions of Prolonged Occupation: Continuity and Change in Israeli Policy Towards the Palestinian Economy*, U.N. Doc. UNCTAD/GDS/2009/2 (Aug. 2009).

⁸⁹ See Ministry of Defence, Coordinator of Government Operations in the Administered Territories, *The Administered Territories 1967/1971 — Data on Civilian Activities in Judea and Samaria, the Gaza Strip and Northern Sinai* (Isr.), cited in BENVENISTI, *supra* note 8, at 224.

⁹⁰ *Id.* at 241–42. See also Hisham Awartani, *Israel's Economic Policies in the Occupied Territories: A Case for International Supervision*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF ISRAELI OCCUPATION OF THE WEST BANK AND GAZA STRIP 399, 401–02 (Emma Playfair ed., 1992).

⁹¹ *Id.* See also GORDON, *supra* note 84 at 70.

⁹² See generally Osama A. Hamed & Radwan A. Shaban, *One-Sided Customs and Monetary Union: The Case of the West Bank and Gaza Strip under Israeli Occupation*, in THE ECONOMICS OF MIDDLE EAST PEACE 117 (Stanley Fischer, Dani Rodrik & Elias Tuma eds., 1993).

⁹³ KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 58–59.

⁹⁴ See H CJ 337/71 *Christian Society for the Holy Places v. Minister of Defense* 26(1) PD 574 (1971) (Isr.) (An English summary of the decision is available at, *Court Decisions, Christian Society for the Holy Places v. Minister of Defense*, 2 ISR. Y.B. HUM. RTS. 354 (1972)) [hereinafter *Christian Society*].

⁹⁵ *Id.*

challenges. The Court obliged Israel to adopt measures needed to ensure “civil life.”⁹⁶ This broad reading of Article 43 was justified by reference to the prolonged nature of the occupation. As an occupation’s duration increases, the Court held, “[I]f life does not stand still, and no administration, whether an occupation administration or another, can fulfil its duties with respect to the population if it refrains from legislating and from adapting the legal situation to the exigencies of modern times.”⁹⁷

Soon after, a Palestinian utilities provider challenged a Military Government decision appointing an Israeli company to provide electricity to the Hebron area.⁹⁸ Prior to the order, a municipal generator supplied the city. Demand, however, increased following the development of Kiryat Arba, the early Israeli settlement located in the hills outside of Hebron. The former Palestinian provider argued that the military order was incompatible with a conservationist reading of Article 43.⁹⁹ The petition was dismissed. The High Court of Justice reaffirmed its expansive understanding of the occupation framework. It held that the military order was intended to ensure basic needs. The Court invoked the local population’s economic welfare and ruled that the military commander did not violate the conservationist approach by ensuring the provision of electricity.¹⁰⁰

Israel continued to cultivate an expansive interpretation of Article 43. This was based on a dual affirmation. The occupation framework would remain applicable regardless of the occupation’s duration, but due to the occupation’s duration, particular management was required. The Court affirmed that economic initiatives that altered the status quo ante were permissible when benevolent.¹⁰¹ These early decisions legitimized foundational aspects of the occupation that purported to better manage the economic and social needs of the local population.¹⁰²

The economic union that guided many of Israel’s early policies vis-à-vis the West Bank was justified in accordance with Article 43.¹⁰³ Such economic management was deemed necessary to

⁹⁶ *Id.* See also KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 58.

⁹⁷ Christian Society, *supra* note 94, at 582. See also, BENVENISTI, *supra* note 8, at 246.

⁹⁸ BENVENISTI, *supra* note 8 at 221–22. See also KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 64–65.

⁹⁹ See H CJ 256/72 Electric Company for the District of Jerusalem v. Minister of Defence 27(1) PD 124 (1972) (Isr.) [hereinafter Electric Company]. See also KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 65 (The Palestinian Electric Company for the Jerusalem District had been authorized by the Jordanian authorities to supply utilities throughout much of the West Bank prior to 1967).

¹⁰⁰ *Id.* See also Electric Company, *supra* note 99.

¹⁰¹ See generally KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66 at 57–74.

¹⁰² See H CJ 351/80 Electricity Company for the District of Jerusalem v. Minister of Energy 35(2) PD 673 (1980) (Isr.) (For the High Court of Justice’s expansive view on what constituted the local population’s welfare.). See also KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 65–68.

¹⁰³ See generally H CJ 69/81 Abu Aita et al. v. Commander of Judea and Samaria et al. 37(2) PD 197, 105 (1983) (Isr.), translated in H CJ 69/81 Abu Aita et al. v. Regional Commander of the Judea and Samaria Area et al. Judgement, HAMOKED, <http://www.hamoked.org/Document.aspx?dID=290> (last visited Oct. 31, 2018) [hereinafter Abu Aita] (In *Abu Aita*, the High Court of Justice upheld the imposition of a value-added tax (VAT) within the West Bank. Israel asserted that the imposed VAT was necessary to, “protect the local residents from a situation in which VAT was imposed only in Israel.” In such a case, they reasoned, “Israel would have had to resurrect the economic borders and impose restrictions on the free flow of goods and services.” This, Israel argued, would be detrimental to the local population and inconsistent with the requirements of Article 43.). See also BENVENISTI, *supra* note 8, at 241.

“ensure a return to orderly life and prevent the effective observance of the duty regarding the assurance of *la vie publique*.”¹⁰⁴ These decisions entrenched an expansive understanding of Article 43.¹⁰⁵ They provided the occupying power with broad discretion to impose economic policies. Ostensibly, these policies were intended to better manage prolonged occupation. They were premised upon an interpretation of the occupation framework that accepts occupation as fact and the framework’s uninterrupted relevancy.

In *Yesh Din v. Commander of IDF Forces in Judea and Samaria et al.*, the High Court directly referenced the prolonged nature of the occupation. The case addressed Israel’s operation of several quarries within the West Bank.¹⁰⁶ The Court considered and applied Article 55 of the Hague Regulations and, correspondingly, the rules of usufruct.¹⁰⁷ It promoted a “broad and dynamic” reading of the obligations bestowed upon an occupying power within a prolonged occupation.¹⁰⁸ Article 55 implies that an occupying power may derive benefit from the territory’s natural resources. It is widely understood, however, that an occupying power is prohibited from imposing changes to production levels and that any changes must not be to the detriment of the local population.¹⁰⁹

Although the Court held that Israel’s operation of the quarries was consistent with the rules of usufruct, it nevertheless pivoted to Article 43.¹¹⁰ It noted that Israel’s operation of the quarries served the welfare of the local population.¹¹¹ The Court’s decision was premised on the prominent interpretation of the framework. It endorsed the framework while coupling its application with the view that management initiatives were required to benefit the local

¹⁰⁴ See Abu Aita, *supra* note 103, at 104 (In which the Court referenced the original French text of Article 43.). See also BENVENISTI, *supra* note 8, at 224.

¹⁰⁵ See H CJ 2164/09 *Yesh Din v. Commander of IDF Forces in Judea and Samaria*, ILDC 1820 (Isr.), translated in H CJ 2164/09 *Yesh Din v. Commander of the IDF Forces in the West Bank et al.*, Judgement, HAMOKED, <http://www.hamoked.org/Document.aspx?dID=Documents2185> (last visited Oct. 31, 2018) [hereinafter *Yesh Din*]. See also David Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, 94 INT’L REV. RED CROSS 207, 218 (2012) [hereinafter Kretzmer, *Law of Belligerent Occupation*].

¹⁰⁶ See generally Valentina Azarova, *Exploiting a Dynamic Interpretation: The High Court of Justice and Israel’s Quarries in the Occupied Palestinian Territory*, EJIL TALK! (Feb. 12 2012), <http://www.ejiltalk.org/exploiting-a-dynamic-interpretation-the-israeli-high-court-of-justice-accepts-the-legality-of-israels-quarrying-activities-in-the-occupied-palestinian-territory> [hereinafter Azarova, *Dynamic Interpretation*] (On Israel’s operation of quarries throughout the West Bank from the 1970s onward.).

¹⁰⁷ See Hague Convention (IV), *supra* note 5, art. 55 (Article 55 states that, “the occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.”). See also Aeyal Gross, *Israel is Exploiting the Resources of the Occupied West Bank*, HAARTZ (Dec. 28, 2011), <http://www.haaretz.com/israel-is-exploiting-the-resources-of-the-occupied-west-bank-1.403988> [hereinafter Gross, *Israel Exploiting Resources*].

¹⁰⁸ Gross, *Israel Exploiting Resources*, *supra* note 107.

¹⁰⁹ Azarova, *Dynamic Interpretation*, *supra* note 106. See also ARAI-TAKAHASHI, LAW OF OCCUPATION, *supra* note 22, at 196–97.

¹¹⁰ Kretzmer, *Law of Belligerent Occupation*, *supra* note 105, at 221–22.

¹¹¹ *Id.* at 222 (Kretzmer describing that the High Court of Justice noted that the quarries produced stone that could be used by local Palestinians, paid royalties to the civil administration that could be reinvested in local projects, employed a segment of the local population, and contributed to the area’s modernization.).

population. The High Court acknowledged that this management approach became necessary due to the occupation's duration:

the traditional occupation laws require adjustment to the prolonged duration of the occupation, to the continuity of normal life in the Area and to the sustainability of economic relations between the two authorities—the occupier and the occupied. . . . This kind of conception supports the adoption of a wide and dynamic view of the duties of the military commander in the Area, which impose upon him, inter alia, the responsibility to ensure the development and growth of the Area in numerous and various fields, including the fields of economic infrastructure and its development.¹¹²

This hints at the notion of a benevolent occupier. The risks of Israel's economic management would, however, become apparent. Following an initial period of growth, the Palestinian economy began a sustained decline.¹¹³ Israel derived benefit from its economic control of the West Bank. It gained access to a large, affordable, labor pool.¹¹⁴ This increased economic prosperity within Israel.¹¹⁵ At the same time, however, Shlomo Gazit explains that “the Israeli authorities and the military government did little to develop the local economic infrastructure.”¹¹⁶

Israel's economic approach to the West Bank continued to shift.¹¹⁷ The policy of pacification through increased prosperity was replaced by initiatives that fortified Israel's control of the territory.¹¹⁸ Customs arrangements heavily favored Israeli goods, which benefited from unfettered access to the West Bank and Gaza. Palestinian imports were restricted.¹¹⁹ Imposed policies increasingly prioritized Israel's economic objectives. By the mid-2000s, the Palestinian economy teetered. Its GDP had plummeted. Following the Second Intifada, unemployment soared. The World Bank estimated that nearly 70 percent of the Palestinian population now lived in poverty.¹²⁰

¹¹² Yesh Din, *supra* note 105, ¶ 10. *See also* Azarova, *Dynamic Interpretation*, *supra* note 106.

¹¹³ Arie Arnon, *Israeli Policy Towards the Occupied Palestinian Territories: The Economic Dimension, 1967–2007*, 61 MIDDLE E. J. 573, 576–79 (2007).

¹¹⁴ Zeev Rosenhek, *The Political Dynamics of a Segmented Labour Market: Palestinian Citizens, Palestinians from the Occupied Territories and Migrant Workers in Israel*, 46 ACTA SOCIOLOGICA 231, 238–41 (2003).

¹¹⁵ *Id.*

¹¹⁶ Arnon, *supra* note 113 at 581–582. *See also* GAZIT, *supra* note 69, at 235.

¹¹⁷ *See generally* SHIR HEVER, *THE POLITICAL ECONOMY OF ISRAEL'S OCCUPATION: REPRESSION BEYOND EXPLOITATION* (2010).

¹¹⁸ *See* GORDON, *supra* note 84, at 9, 14–22, 62–66.

¹¹⁹ Leila Farsakh, *The Political Economy of Israeli Occupation: What is Colonial About It?*, 8 MIT ELECTRONIC J. MIDDLE E. STUD. 41, 47 (2008).

¹²⁰ *Id.* at 41. *See also* World Bank, *Investing in Palestinian Economic Reform and Development: Report for the Pledging Conference* (Dec. 17, 2007), <http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/294264-1166525851073/ParisconferencepaperDec17.pdf>.

Israel's economic management was condemned.¹²¹ In the late 1980s, the General Assembly urged the international community to provide economic assistance to the Palestinians.¹²² Despite acknowledging that economic aid was not a substitute for a “genuine and just solution to the question of Palestine,” the General Assembly recognized the continued relevance of the occupation framework.¹²³ It too opted in favor of better management. The international community pressed Israel to better ensure Palestine's economic needs.¹²⁴ The United Nations Conference on Trade and Development favored working within the international community to “encourage Israel to allow wide-ranging economic policy reform and liberalization in the Occupied Palestinian Territory, including the right to economic policy formulation and management by the Palestinian people.”¹²⁵

The economic challenges that resulted from the prolonged nature of the occupation have spurred continuous debate. While evoking diverse perspectives and encouraging an array of policy proposals, these debates rarely question the occupation framework's continued relevance. Instead, they assume a non-normative conception of occupation. They seek to provide a more effective means of managing the resulting situation. Despite Israel's increasingly entrenched presence throughout the West Bank, notwithstanding the precariousness of the Palestinians' economic conditions, variants of the management approach remain the favored means of addressing the exigencies of prolonged occupation. Within scholarly debates, proposals often contest what Christine Chinkin identified as the “inherent dilemma” of determining the extent to which an occupying power should receive additional latitude. The prominent debates recognize that the occupation framework's conservationist design impedes economic adaptability. All agree that this requires specific management.¹²⁶ Despite the benevolent intentions that accompany these deliberations, they largely neglect the possibility that perpetual management often contributes to perpetual occupation.

B. The Challenge of Legislative Competence and Long-term Planning

The consequences of Israel's territorial acquisition consumed its political and legal establishments in debate. Government officials contemplated their newly imposed duties and rights. Meir Shamgar, then the IDF's Military Advocate General, told a Knesset Committee:

¹²¹ See G.A. Res. 43/178, ¶ 13 (Dec. 20, 1988) (Condemning Israel for its “brutal economic and social policies and practices against the Palestinian people in the occupied Palestinian territory.”).

¹²² *Id.* See also, G.A. Res. 42/166, ¶ 5 (Dec. 11, 1987).

¹²³ See G.A. Res. 43/178, *supra* note 121, at ¶ 15.

¹²⁴ See Khalidi & Taghdisi-Rad, *supra* note 88, at 7.

¹²⁵ *Id.* See also U.N. Conference on Trade & Development (UNCTAD), *Recent Economic Developments in the Occupied Palestinian Territory*, U.N. Doc. UNCTAD/TD/B/1221 (1989).

¹²⁶ See, e.g., ERNST H. FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 89 (Johnson Reprint Corp., 1971). See also Roberts, *Prolonged Occupation*, *supra* note 11, at 53 (acknowledging a need to recognize the occupier's ability to affect prolonged occupation. This would facilitate (necessary) efforts to make “drastic and permanent changes in the economy or the system of government”). See Marco Sassòli, *Article 43 of The Hague Regulations and Peace Operations in the Twenty-First Century*, INT'L HUMANITARIAN L. RES. INITIATIVE 15 (2004) [hereinafter Sassòli, *Article 43*] (claiming that, “sooner or later, a prolonged military occupation faces the need to adopt legislative measures in order to let the occupied country evolve”).

Our aim is to minimize legislation on pure security and administrative matters, based on Article 64 of the Geneva Conventions, help restore life to its previous course through our actions and enable a smooth operation of civil courts as soon as possible. All of this while maintaining the principle of ensuring the interests of military control over the areas.¹²⁷

Immediately following the 1967 War, Israel announced its first military orders. Existing law, in force prior to June 1967, would be retained unless it contravened a subsequent military directive.¹²⁸ This pronouncement accorded with Article 43 of the Hague Regulations. The order empowered the Military Commander to issue legislative decrees deemed necessary to administer the assumed territory. During the following months and then years, military officials issued a vast network of orders.¹²⁹ Though these orders formally maintained much of the preexisting legislative structure, they developed the occupation's legal foundation.¹³⁰

The preferred use of administrative actions—the lessening of legislative initiatives—embraces a conservationist interpretation of the occupation framework. The occupying power's legislative competence to introduce, annul, or amend laws within the controlled territory is delineated in both the Hague Regulations and the Fourth Geneva Convention.¹³¹ Traditionally, the occupying power's ability to legislate is read restrictively.¹³² As with the economic development debate, however, this raises various questions. These query the efficacy of the occupation framework. When applied to prolonged occupation, they ask whether the framework frustrates the implementation of necessary legislative initiatives. They consider whether it impairs the imposition of policies intended to affect long-term change.¹³³

Eyal Benvenisti explains that historically, “the occupant was not expected, during the anticipated short period of occupation, to have pressing interests in changing the law to regulate the activities of the population except for what was necessary for the safety of its forces.”¹³⁴ By the First World War, however, this restrictive reading of Article 43 was deemed untenable. Occupying powers became increasingly proactive. They desired flexibility.¹³⁵ Article 64 of the Fourth Geneva Convention provided broader exceptions to the framework's legislative

¹²⁷ See Transcript No. 126 of the Constitution, Law and Justice Committee, *supra* note 56.

¹²⁸ See Israel Defence Forces, Proclamation Concerning Law and Administration (Judaea and Samaria), 5727–1967, no. 2–7 (Isr.). See also, BENVENISTI, *supra* note 8, at 212.

¹²⁹ RAJA SHEHADEH, *THE LAW OF THE LAND: SETTLEMENTS AND LAND ISSUES UNDER ISRAELI MILITARY OCCUPATION* 5 (1993).

¹³⁰ See Raja Shehadeh, *The Legislative Stages of the Israeli Military Occupation*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES* 151, 152–166 (Emma Playfair ed., 1992).

¹³¹ See Fourth Geneva Convention, *supra* note 5, arts. 64–75.

¹³² Sassòli, *Legislation and Maintenance*, *supra* note 82, at 668.

¹³³ See, e.g., MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 225–26 (1959). See also Harris, *supra* note 3, at 103; Sassòli, *Legislation and Maintenance*, *supra* note 82, at 679.

¹³⁴ See BENVENISTI, *supra* note 8 at 91 (This, according to Benvenisti, was driven by the prevailing laissez-faire approach which influenced minimalist interpretations of the Regulation's provisions.).

¹³⁵ *Id.*

limitations.¹³⁶ While this increased the occupier’s ability to impose legislation or policy designed to create long-term change, the occupation framework maintained its conservationist purpose.¹³⁷

The nature of occupation evolved throughout the latter-half of the twentieth century. Initiatives imposed by occupiers were increasingly framed as responses to the exigencies of prolonged (or transformative) occupations.¹³⁸ The occupation framework’s traditional laissez-faire approach to governance was presented as implausible.¹³⁹ Morris Greenspan argued that human existence requires organic growth. It is impossible for a state to mark time indefinitely. Pragmatically, Greenspan noted the need for adaptive management, arguing that, “political decisions must be taken, policies have to be formulated and carried out.”¹⁴⁰

Increasingly, legislative initiatives were understood as a necessary means of responding to social, economic, and political changes.¹⁴¹ These changes are unavoidable, the inevitable by-products of the passage of time. They produce challenges and legal systems adapt accordingly. Initiatives and policies are introduced to meet evolving needs. Within a prolonged occupation, however, these unavoidable developments risk neglect. Proponents favored ensuring that the occupying power was not constrained by a conservationist reading of the framework. The longer an occupation lasts, Dinstein explains, “the more compelling the need to weigh the merits of a whole gamut of novel legislative measures designed to ensure the societal needs in the occupied territory do not remain too long in a legal limbo.”¹⁴²

The Likud Party’s electoral ascendancy in 1977 heralded the expansion of the settlement project.¹⁴³ Israel began imposing legislation and enacting policy designed to have permanent or long-term influence on the affected territory.¹⁴⁴ A large transportation network was developed to modernize roadways within the West Bank. This would link various settlements to Jerusalem.¹⁴⁵

¹³⁶ See Yutaka Arai-Takahashi, *Law-Making and the Judicial Guarantees in Occupied Territories*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY 1421, 1422–23 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015) [hereinafter Arai-Takahashi, *Law-Making and Judicial Guarantees*]. See also Fourth Geneva Convention, *supra* note 5, art. 64 (Allowances for the “repeal or suspension” of existing legislation, deemed either a security threat or an imposition to the Convention’s application, and the positive formulation of the Article’s second paragraph (enabling the occupying power to fulfil its obligations under the Convention, maintain orderly government, and ensure security) were now read permissively). See DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22, at 110 (describing Article 64 as an “amplification and clarification” of Article 43 of the Hague Regulations). See also BENVENISTI, *supra* note 8, at 90, 96.

¹³⁷ *Id.* at 120, 126. See also Bothe, *supra* note 40, at 1483.

¹³⁸ See Steven R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 16 EUR. J. INT’L L. 695, 706 (2005).

¹³⁹ See, e.g., Harris, *supra* note 3, at 103.

¹⁴⁰ See GREENSPAN, *supra* note 133.

¹⁴¹ See generally Arai-TAKAHASHI, LAW OF OCCUPATION, *supra* note 22 at 91–136.

¹⁴² DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22 at 116–17.

¹⁴³ See generally GORENBERG, ACCIDENTAL EMPIRE, *supra* note 17.

¹⁴⁴ See generally KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 76.

¹⁴⁵ *Id.* at 94–95 (noting that planners and the relevant authorities explicitly acknowledged the strategic significance of the proposed transportation networks. The creation of highways linking the settlements to Israel was determined to facilitate varied political objectives).

The initiative was challenged in *Ja'amait Ascan v Commander of the IDF in Judea and Samaria*.¹⁴⁶ The petitioners, whose land would be expropriated to enable construction, argued that the planning initiative primarily served Israeli interests and that the project's permanence was inconsistent with a temporary notion of occupation.¹⁴⁷

Israel refuted these claims. It asserted that the project benefited local residents and cited the existing infrastructure's inability to serve the growing population.¹⁴⁸ Israel referenced Article 43. It argued that due to the occupation's duration, it could not be required to preserve a distant status quo. A military government was obliged to further the local population's interests.¹⁴⁹ Long-term planning initiatives were framed as requirements. To ensure effective management, the occupier was to anticipate local needs and respond accordingly.¹⁵⁰

In *Ja'amait Ascan*, the High Court of Justice endorsed Israel's appeal to the management approach. In response to the requirements of prolonged occupation, the Court favored an interventionist response. Citing Morris Greenspan's call for increased legislative competence, it held that:

the power of the military government extends to taking all necessary measures to ensure growth, change and development. The conclusion that follows is that a military government may develop industry, trade, agriculture, education, health and welfare and other such matters which are related to good governance and are required in order to ensure the changing needs of the population in an area under belligerent occupation.¹⁵¹

The Court explored the policy's motives.¹⁵² Ultimately, it accepted the Government's claim that the proposed changes were made necessary by the passage of time. It accepted that they would serve local interests and were thus compliant with Article 43 of the Hague Regulations.¹⁵³

Israeli initiatives, ostensibly intended to respond to the challenges of prolonged occupation, were deemed legitimate if they benefited the local population. They were required to refrain from altering the basic institutions of the occupied territory.¹⁵⁴ Article 43 was reinterpreted by the Court to better respond to prolonged occupation. Despite the conservationist principle's

¹⁴⁶ See generally H CJ 393/82 *Ja'amait Ascan v. Commander of the IDF in Judea and Samaria*, 37(4) PD 785 (1983) (Isr.), translated in H CJ 393/82 *Jam'iat Iscan Al-Ma'almoun v. IDF Commander in the Judea and Samaria Area — Judgment*, HAMOKED, <http://www.hamoked.org/Document.aspx?dID=160> (last visited Oct. 31, 2018) [hereinafter *Ja'amait Ascan*]. See also KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 97–98.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 97.

¹⁴⁹ *Id.*

¹⁵⁰ See BENVENISTI, *supra* note 8, at 246.

¹⁵¹ *Ja'amait Ascan*, *supra* note 146, ¶ 26.

¹⁵² *Id.* See KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 98 (noting that the Court understood, in accordance with the Hague Regulations, that the dominant motive must be to serve the interest of the local population. It asked whether the planning initiative had been taken to meet Israel's exclusive interests or if the good of the local population had been a guiding factor in the decision).

¹⁵³ *Id.*

¹⁵⁴ Kretzmer, *Law of Belligerent Occupation*, *supra* note 105, at 220. See also BENVENISTI, *supra* note 8, at 246.

historical origins, the Court held that contemporary manifestations of occupation should now guide the framework's application. Article 43 must distinguish between short and long-term occupations. Its application would consider the passage of time. It would respond to altering conditions when establishing the requirements of civil life and public order. The High Court held that the military government, "may require long-term investments that will effect changes that will remain after the occupation ends."¹⁵⁵

This need to impose change and address the inevitable results of prolonged occupation guided the Court's subsequent oversight. It justified the Military Government's desire to move beyond a conservationist conception of the occupation framework.¹⁵⁶ Unconfined and with extensive discretion, it directed Israeli efforts purporting to better manage prolonged occupation. This facilitated the imposition of legislation and policy that would impose long-term changes. Despite the benevolent façade of the Court's expansive interpretation of Article 43, David Kretzmer notes, "that there is no lack of evidence to show that [the resulting initiatives were] carried out as part of a general plan for the West Bank that was based on the planner's perception of Israeli interests."¹⁵⁷

Settlement growth was accompanied by massive infrastructure investments. The transportation network, established in accordance with the *Ja'amait Ascan* decision, expanded. Approximately 1660 kilometers of roadways now link settlements to urban centers in Israel.¹⁵⁸ As of 2005, the formal boundaries of Israel's settlements constituted a mere 3 percent of the West Bank. The associated infrastructure, however, extended Israel's physical presence to over 40 percent of the territory.¹⁵⁹

This creates significant impediments for the Palestinian population. Beyond linking the settlements to Israel, the road network that stretches throughout the West Bank impedes Palestinian movement. Due to a closure regime that employs checkpoints, road blocks, and access permits, Palestinian entry to the roads is limited. The physical presence of the roads often separate Palestinian communities into enclaves.¹⁶⁰ This strengthens Israel's control of the territory and impacts the quotidian experience of much of the West Bank's Palestinian population.¹⁶¹

Israel's engagements with Article 43 are grounded within a traditional interpretation of the occupation framework. They build upon the prevalent supposition that prolonged occupation justifies legislative management. The challenges posed by prolonged occupation require long-

¹⁵⁵ KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 69. *See also* Ja'amait Ascan, *supra* note 146, ¶¶ 21–22.

¹⁵⁶ Emma Playfair, *Playing on Principle? Israel's Justification for its Administrative Acts in the Occupied West Bank*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 205, 210 (Emma Playfair ed., 1992).

¹⁵⁷ KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 82.

¹⁵⁸ *See* Office for the Coordination of Humanitarian Affairs, The Humanitarian Impact on Palestinians of Israeli Settlements and other Infrastructure in the West Bank, 58 (June 2007).

¹⁵⁹ *Id.* at 8, 19.

¹⁶⁰ *Id.* at 58, 65–66.

¹⁶¹ *Id.* at 58. *See also* World Bank, *Movement and Access Restrictions in the West Bank: Uncertainty and Inefficiency in the Palestinian Economy* (May 9, 2007).

term solutions, attuned to the evolving needs of the local population. Israel contends that if the imposed initiatives provide for the local population, they are consistent with the legal framework.¹⁶² This interpretative approach acknowledges, but does not question, the nature of the occupation. Formally, it professes to preserve sovereignty and ensure local needs.

The High Court of Justice, however, has interpreted “local population” to include Israeli citizens who live within the West Bank’s many settlements.¹⁶³ This builds upon the Court’s early judgment in the *Christian Society* case. Here, the Court understood Article 43 as compelling intervention into a range of sectors. Expansive legislative management was justified in response to the exigencies of prolonged occupation.¹⁶⁴ In *Electric Company for the District of Jerusalem v. Minister of Defense*, however, the Court included the residents of Kiryat Arba within its considerations. The occupying power was compelled to consider and ensure the needs of Kiryat Arba’s residents alongside the requirements of the Palestinian population.¹⁶⁵ Eyal Benvenisti recalled how the Court’s decision provided the occupying power with the necessary legislative competence to develop the settlement enterprise.¹⁶⁶ This facilitated the movement of the occupant’s population from Israel to the territories. It permanently tilted the calculus that evaluated imposed measures to favor the West Bank’s Israeli population.¹⁶⁷

Proposals to alter the legislative competence of the occupying power vary. Commonly though, contestations adhere to a non-normative reading of the occupation framework. They accept, in some cases as axiomatic, that the challenges created by the occupation’s duration must be managed.¹⁶⁸ The European Court of Human Rights (ECtHR) and the International Court of Justice (ICJ) have reached similar conclusions.

In *Demopoulos v. Turkey*, the ECtHR addressed the admissibility of a property claim brought by a group of Greek-Cypriots. In response to a 1974 coup, led by the Cypriot National Guard and pro-unification supporters of Greece’s military junta, Turkey assumed control of the northern-third of Cyprus. Upon establishment in 1983, the Turkish Republic of Northern Cyprus (TRNC) was widely recognized as an occupying power, a proxy for Turkish control of the territory it had

¹⁶² Ja’amait Ascan, *supra* note 146, ¶ 13. *See also* H CJ 2056/04 Beit Sourik Village Council v. Government of Israel, et al. 48(5) PD ¶ 34 (2004) (Isr.), *translated in* H CJ 2056/04 — Beit Sourik Village Council et al. v. The Government of Israel, et al., Judgement, HAMOKED, <http://www.hamoked.org/Document.aspx?dID=6520> (last visited Oct. 31, 2018) [hereinafter Beit Sourik]; Kretzmer, *Law of Belligerent Occupation*, *supra* note 105, at 221–22.

¹⁶³ *Electric Company*, *supra* note 99. *See also* KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 65.

¹⁶⁴ *Christian Society*, *supra* note 94, at 582.

¹⁶⁵ *Electric Company*, *supra* note 99, at 138. *See also* KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 65.

¹⁶⁶ *See* H CJ 5808/93 Economic Corporation for Jerusalem Ltd. v. IDF Commander in Judea and Samaria 49(1) PD 89 (1993) (Isr.) (Settlement development was further facilitated by the High Court of Justice’s position that engagements with Article 43 must acknowledge and address “changing conditions” within occupied territory. The Court ruled that settlements constituted such change). *See also* KRETZMER, OCCUPATION OF JUSTICE, *supra* note 66, at 215.

¹⁶⁷ BENVENISTI, *supra* note 8, at 221–22.

¹⁶⁸ *See* DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22, at 120. *See also* Harris, *supra* note 3, at 103; Sassòli, *Legislation and Maintenance*, *supra* note 82, at 679.

assumed.¹⁶⁹ The TRNC introduced a pilot-judgment procedure to address property claims by individuals displaced from Northern Cyprus.¹⁷⁰ This raised questions regarding the TRNC's legislative competence.¹⁷¹ The ECtHR was asked to decide on the admissibility of the applicant's petition.¹⁷²

The Court's judgment was grounded in international human rights law and the ECtHR's admissibility requirements. IHL scarcely featured within the decision.¹⁷³ Yet the ECtHR acknowledged the influence of the occupation's duration. When rendering its decision, the Court prioritized the need to ensure the uninterrupted provision of individual rights by effectively managing the status quo.¹⁷⁴ Acknowledging the complexities posed by duration, the Court held, "This reality, as well as the passage of time and the continuing evolution of the broader political dispute must inform the Court's interpretation and application of the Convention which cannot, if it is to be coherent and meaningful, be either static or blind to concrete factual circumstances."¹⁷⁵

The ECtHR drew upon the ICJ's advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*.¹⁷⁶ South Africa assumed control of Namibia during the First World War. This continued under the Mandate system until the League of Nations was superseded by the United Nations.¹⁷⁷ South Africa resisted the imposition of a trusteeship agreement and began a period of de facto administration.¹⁷⁸ The ICJ's *Namibia Opinion* facilitated the establishment of the international community's preferred management

¹⁶⁹ Only Turkey has since recognized the TRNC. See Elihu Lauterpacht, *The Right of Self-Determination of the Turkish Cypriots*, REP. TURK., MINISTRY FOREIGN AFF. (Mar. 9, 1990), <http://www.mfa.gov.tr/chapter1.en.mfa>. See also Elihu Lauterpacht, *The Status of the Two Communities in Cyprus*, REPUBLIC TURK., MINISTRY FOREIGN AFF. (July 10, 1990), <http://www.mfa.gov.tr/chapter2.en.mfa>. See also G.A. Res. 3212 (XXIX), (Nov. 1, 1974). See also G.A. Res. 3395 (XXX), (Nov. 20, 1975); See S.C. Res. 541, (Nov. 18, 1983) (examples of the General Assembly and the Security Council denouncing the Turkish presence in Cyprus, rejecting resulting unilateral actions taken by Turkey, labeling its presence as an occupation, and branding the TRNC's declaration of independence as legally invalid). See also BENVENISTI, *supra* note 8, at 192.

¹⁷⁰ Demopoulos v. Turkey, App. No. 46113/99, Eur. Ct. H.R. at ¶ 50 (2010) [hereinafter Demopoulos]. For further context, see Xenides-Arestis v. Turkey, App. No. 46347/99, Eur. Ct. H.R. at ¶ 37 (2006).

¹⁷¹ See Demopoulos, *supra* note 170, ¶¶ 55, 63.

¹⁷² *Id.* (This case required the Court to determine whether the TRNC's judgment procedure constituted a domestic remedy. The ECtHR held, for the purposes of admissibility, that the procedure created a local remedy and thus required exhaustion.)

¹⁷³ Much of the discourse regarding both Northern Cyprus and Western Sahara is grounded within human rights law. See Bothe, *supra* note 40, at 1459.

¹⁷⁴ See Demopoulos, *supra* note 170, ¶ 96.

¹⁷⁵ *Id.* ¶ 85.

¹⁷⁶ See Cyprus v. Turkey, App. No. 25781/94, Eur. Ct. H.R. 101–102 (2001) (separate opinion by Palm, J.). See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J Rep. 16, ¶ 125 (June 21) [hereinafter *Namibia Opinion*].

¹⁷⁷ See generally JOHN DUGARD, *THE SOUTH WEST AFRICA/NAMIBIA DISPUTE: DOCUMENTS AND SCHOLARLY WRITINGS ON THE CONTROVERSY BETWEEN SOUTH AFRICA AND THE UNITED NATIONS* (1973).

¹⁷⁸ See G.A. Res. 2145 (XXI), (Oct. 26, 1966) (The General Assembly terminating the South African mandate and rejecting South Africa's subsequent claims). See also S.C. Res. 246, (Mar. 20, 1969). See also BENVENISTI, *supra* note 8, at 3; Yaël Ronen, *Illegal Occupation and Its Consequences*, 41 ISR. L. REV. 201, 213–14 (2008).

approach. Famously, it obliged the mandatory power to ensure the daily administration of the controlled territory through the creation or maintenance of basic services. The ICJ held:

In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.¹⁷⁹

The Court's reasoning is inherently pragmatic. It seeks to preserve Namibian self-determination. Yet by instilling the notion that the illegitimacy of foreign administration must not compromise the provision of local services, it has contributed to the entrenchment of the management approach.¹⁸⁰

Neither the ECtHR or the ICJ engaged deeply with the legal framework. Their decisions, however, provide credence to the notion that the occupation framework must only interpret occupation as a fact. Yet both Courts read this framework to address the challenges spurred by an occupation's duration. They provide weight to the belief that despite the acknowledged illegitimacy of the occupation regimes, the fact of occupation must be managed. In response, the conservationist principle is amended to meet the challenges of prolonged occupation.

C. The Challenge of Security and Ensuring Public Order and Safety

Following two decades of occupation, a banal event triggered the First Intifada. An Israeli truck collided with a Palestinian passenger van near the Jabalia Camp at the northern point of the Gaza Strip. Four Palestinians were killed. Many Gazans believed the incident was in retaliation, a response to the stabbing of an Israeli citizen days earlier.¹⁸¹ Mass demonstrations—in Jabalia, throughout Gaza, and then across the West Bank—harnessed decades of Palestinian discontent and frustrated nationalist ambition. Israel's engagements with the occupation framework shifted in response. Policies, professedly benevolent and ostensibly intended to manage the occupation, were no longer justified by appealing to local interests. Increasingly, Israel recalled the occupation framework's security provisions to validate its actions and policies within the West Bank.¹⁸²

¹⁷⁹ Namibia Opinion, *supra* 176, ¶ 125.

¹⁸⁰ KATHARINE FORTIN, *THE ACCOUNTABILITY OF ARMED GROUPS UNDER HUMAN RIGHTS LAW* 260–61 (2017).

¹⁸¹ JEAN-PIERRE FILIU, *GAZA: A HISTORY* 199 (2014). *See also* Michael Omer-Man, *The Accident that Sparked an Intifada*, *JERUSALEM POST* (Apr. 12, 2011), <http://www.jpost.com/Features/In-Thespotlight/The-accident-that-sparked-an-Intifada>.

¹⁸² *See* BENVENISTI, *supra* note 8, at 238 (noting that by the late 1980s and the start of the First Intifada, Israel was unable to credibly cite the improvement of local interests as a motivating factor for the occupation's policies).

This justificatory transition reflects IHL's dual purposes.¹⁸³ The occupation framework's myriad humanitarian assurances are coupled with numerous security-based exceptions.¹⁸⁴ Several military manuals cite security as the most relevant justification for the annulment or introduction of legislation within an occupied territory.¹⁸⁵ An occupying power receives broad discretion.¹⁸⁶ Under Article 27(4) of the Fourth Geneva Convention, the occupier is entrusted with, "such measures of control and security in regard to protected persons as may be necessary as a result of the war."¹⁸⁷ Efforts to balance the demands of military necessity with the requirements of humanitarianism initially focused on conduct during general belligerency.¹⁸⁸ Yet prolonged occupation creates distance between the present and the triggering conflict.¹⁸⁹

This distance poses questions regarding the function of the occupation framework. These query whether an occupation's duration influences how the framework balances both military and humanitarian considerations. They ask if duration tempers recourse to exceptions.¹⁹⁰ A prolonged occupation—as seen in the West Bank, Northern Cyprus, and Western Sahara—has moved from a military contest and become an administrative relationship. Although this shift

¹⁸³ See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 16–17 (1st ed. 2014).

¹⁸⁴ See, Fourth Geneva Convention, *supra* note 5, arts. 18, 35, 46, & 53 (For example, Article 53 of the Fourth Geneva Convention prohibits the destruction of public or private property, "except where such destruction is rendered absolutely necessary by military operations." Article 48 allows non-nationals of the occupied territory to depart from the territory unless, as per Article 35, their departure, "is contrary to the national interests of the state." In accordance with Article 18, parties to the conflict are required to indicate the presence of civilian hospitals, "in so far as military considerations permit." Under Article 46, individual or mass transfer is prohibited, however, the occupying power may "undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand"). See Hague Convention (IV), *supra* note 5, art. 52 (Article 52 of the Hague Regulations permits requisitions in kind and service when required by the needs of the army of occupation). See also Koutroulis, *supra* note 53, at 191.

¹⁸⁵ See, e.g., U.K. Military Manual, *supra* note 12, at 286–88; U.S. DEP'T OF ARMY, *FIELD MANUAL 27–10: THE LAW OF LAND WARFARE* 143 (1956) (revised 1976), <http://nile.ed.umuc.edu/~nstanton/FM27-10.htm>. See also Arai-Takahashi, *Law-Making and Judicial Guarantees*, *supra* note 136, at 1425.

¹⁸⁶ See JEAN S. PICTET, *THE GENEVA CONVENTIONS OF 12 AUGUST 1949, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: COMMENTARY* 1, 339 (1958) (stating that, "Article 64 authorizes the Occupying Power to subject the inhabitants of the occupied territory to whatever measures it considers necessary for its own security and to ensure that the present Convention is enforced and the territory properly administered") [hereinafter PICTET, COMMENTARY].

¹⁸⁷ See Fourth Geneva Convention, *supra* note 5, art. 27(4) (the Article states, inter alia, that "the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war"). See also DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 22, at 112.

¹⁸⁸ See generally Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities*, 42(3) N.Y.U. J. INT'L L. & POL. 831 (2010). See also Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795 (2010).

¹⁸⁹ Koutroulis, *supra* note 53, at 189.

¹⁹⁰ See Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, Advisory Opinion, 2004 I.C.J. Rep. 131 (July 9) [hereinafter *Legal Consequences of the Construction of a Wall*]; Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, Written Statement of the Swiss Confederation, at 6, ¶ 26 (Jan. 30, 2004), <https://www.icj-cij.org/files/case-related/131/1577.pdf> [hereinafter *Swiss Statement*]. See also F. Llewellyn Jones, *Military Occupation of Alien Territory in Time of Peace*, 9 TRANSACTIONS GROTIUS SOC'Y 149, 159–60; Roberts, *Prolonged Occupation*, *supra* note 11, at 96; Koutroulis, *supra* note 53, at 190–92.

does not discount the possibility of security threats or periodic incidents of violence, recourse to military necessity and the security needs of the occupier become less immediate.

Many articulations of the management approach begin from the premise that the occupation's duration presents challenges that the legal framework is ill-suited to address. Efforts to manage these challenges and meet the needs of the local population are heavily-weighted. Inversely, security or military necessity-based exceptions surrender much of their normative pull. Attempts to rebalance the military-humanitarian calculus represent yet another response to the challenges of prolonged occupation. Whether corresponding appeals propose strengthening humanitarian protection or (less commonly) assert broader security exceptions, they seek a better means of managing prolonged occupation.

During proceedings for the ICJ's Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Swiss Confederation considered the influence of duration on the relationship between military necessity and humanitarianism.¹⁹¹ Switzerland submitted that:

In the context of an occupation, international humanitarian law ensures consistency between humanitarian aims and the occupier's security needs and reduces the risk of a deterioration in relations between the occupying Power and the occupied. Any examination of necessity and proportionality in circumstances of prolonged occupation when hostilities have ceased must be more rigorous, since stricter conditions govern the imposition of restrictions in such circumstances on the fundamental rights of protected persons.¹⁹²

Israel has not directly pursued justifications that rely upon the unconventional view that an occupation's duration expands the occupier's recourse to military necessity. Instead, the High Court of Justice noted that "military and security needs predominate in a short-term military occupation. Conversely, the needs of the local population gain weight in a long-term military occupation."¹⁹³ Despite the Court's conventional approach, Israel's presence within the West Bank brought mounting security challenges. Israel reverted to Article 43 of the Hague Regulations. It embraced a factual conception of occupation and appealed to the exigencies of duration in response to these challenges.¹⁹⁴

The promotion of safety, as per the English translation of Article 43, is commonly invoked to justify amendments to local legislation.¹⁹⁵ In *Ja'amait Ascan*, the High Court of Justice claimed that the establishment and scope of the military government's powers to manage "public order and safety" are influenced by the occupation's duration.¹⁹⁶ The Court recalled the early work of Doris Appel Graber. Reciting the consensus opinion that the occupation framework is ill-suited to regulate prolonged occupation, the Court claimed that, "this distinction between a short-term

¹⁹¹ *Id.* at 189.

¹⁹² Swiss Statement, *supra* note 190, at 6, ¶ 26. *See also* Koutroulis, *supra* note 53, at 193.

¹⁹³ *See* Ja'amait Ascan, *supra* note 146, ¶ 22. *See also* Koutroulis, *supra* note 53, at 191–92.

¹⁹⁴ *See* BENVENISTI, *supra* note 8, at 238.

¹⁹⁵ Boon, *supra* note 12, at 124.

¹⁹⁶ Ja'amait Ascan, *supra* note 146, at ¶ 22.

military government and a long-term military government has significant influence over the content which is to be infused into securing “public order and safety.”¹⁹⁷

The Court reached a similar determination in *Abu Aita et al. v. Commander of Judea and Samaria*. It confirmed that duration influences the implied balance between military requirements and humanitarian considerations. Interpreting Article 43, the Court held:

It is true that this article contains no rules as to adjustment or reclassification bound up with, or conditional upon the time element, but the effect of the time dimension is implicit in the wording, according to which there is a duty to ensure, as far as possible, order and public life, which patently means order and life at all times, and not only on a single occasion. The element of time is also decisively involved in the question of whether it is absolutely impossible to continue acting in accordance with existing law, or whether it is essential to adapt that law to new realities. In the legal interpretation of Article 43, the relationship between the time element, and the form taken by the provisions of Article 43 is stressed more than once. It follows that the time element is a factor affecting the scope of the powers, whether we regard military needs, or whether we regard the needs of the territory, or maintain equilibrium between them.¹⁹⁸

These decisions adhere to the prominent interpretation of the occupation framework. They are premised upon and cite directly from scholars who forward the prevalent view that, within prolonged occupation, the legal framework is unable to regulate the needs of the occupier and the occupied. Without questioning the nature or normative structure of the occupation, they offer a means of better managing the challenges that result from prolonged occupation.

The implications of Israel’s expansive conception of the “public order and safety” provision would, however, become apparent. Despite the Article’s intended focus on the needs of the occupied population, Article 43 was again interpreted to include the influx of Israeli settlers that now resided in the West Bank.¹⁹⁹ Initiatives, justified in accordance with the Hague Regulations, were implemented to ensure the settler population’s security needs. Often, this elevated the interests of the occupying power above efforts to ensure the welfare of protected persons.²⁰⁰ As tensions rose and the occupation endured, Israel employed initiatives and policies that purported to manage the deteriorating security situation. A fence was erected around the Beit Hadassah building in Hebron. It was justified as a security measure, necessary for the protection of the Israeli families that had settled in the building’s upper stories. Its construction, however, restricted access to the Palestinian-owned shops at ground-level. The Military Commander declared the fence an essential security requirement.²⁰¹ The High Court ruled that the

¹⁹⁷ *Id.*

¹⁹⁸ *Abu Aita*, *supra* note 103, at 133–134.

¹⁹⁹ *See* *Electric Company*, *supra* note 99, at 138 (Ruling that the Israeli residents of Kiryat Arba were part of the local population for the purposes of Article 43’s positive provisions). *See also* Kretzmer, *Law of Belligerent Occupation*, *supra* note 105, at 223.

²⁰⁰ Kretzmer, *Law of Belligerent Occupation*, *supra* note 105, at 223–24.

²⁰¹ *Id.*

Commander's authority to impose security-based policies extended to arrangements that safeguarded the settler population.²⁰²

This reasoning has created an artificial distinction. It has diluted the restraining influence of Article 43. The legal regulation of Israeli settlements and the needs of their population were placed under the auspices of the occupation framework.²⁰³ Israeli authorities consistently cited the challenges of prolonged occupation. They forwarded realist contentions regarding the nature and demands of the occupation and in justification of policies imposed throughout the West Bank.²⁰⁴ These appeals were grounded within an interpretation of the legal framework that treats occupation, regardless of duration or cause, as a fact that required regulation. Many Israeli initiatives were condemned. The foundational interpretative approach assumed by both Israel and its detractors was, however, consistent. Divergences, while significant and often framed as legal violations, primarily concerned the most effective means of managing prolonged occupation.

III. THE NORMATIVE INTERPRETATIVE APPROACH: ASSESSING THE LEGALITY OF OCCUPATION

Despite its civilian presence, notwithstanding its increasing control of the territory, Israel has refrained from claiming sovereignty of the West Bank. It has instead appealed to IHL in justification of its settlement initiatives. Maiden development projects were linked to Israel's security apparatus.²⁰⁵ Later, following judicial intervention, settlement policy increasingly focused on the allocation of "public" land.²⁰⁶ Both approaches went beyond the mere denial of the occupation framework's relevancy. Instead, Israel justified its settlement policy—the source of much international opprobrium—as consistent with various provisions of IHL.

Israel presented expansionist interpretations of the occupation framework's military necessity and property provisions. It read, restrictively, the framework's humanitarian clauses and its prohibition on the transfer of civilian populations.²⁰⁷ These engagements are emblematic of what

²⁰² See HCJ 72/86 *Zalum v. Military Commander of the Judea and Samaria Area* 41(1) PD 528 (1987) (Isr.), translated in HCJ 72/86 — *Zalum et al. v. Military Commander of the Judea and Samaria Area et al.*, Judgment, HAMOKED, http://www.hamoked.org/files/2013/1158750_eng.pdf (last visited Oct. 31, 2018). See also Kretzmer, *Law of Belligerent Occupation*, *supra* note 105, at 224.

²⁰³ Kretzmer, *Law of Belligerent Occupation*, *supra* note 105, at 226.

²⁰⁴ *Id.*

²⁰⁵ See KRETZMER, *OCCUPATION OF JUSTICE*, *supra* note 66, at 75 (explaining that Under a Labour-led Government, Israel's early approach to the settlements was largely, if not officially, premised on the Allon Plan. This favored the retention of areas with low Palestinian populations in the West Bank that would eventually host strategically-located settlements along the Jordan Valley and around Jerusalem.). See also SHLAIM, *supra* note 55, at 256–68. See also KENNETH W. STEIN, *HEROIC DIPLOMACY: SADAT, KISSINGER, CARTER, BEGIN AND THE QUEST FOR ARAB-ISRAELI PEACE* 168–69 (1999).

²⁰⁶ See HCJ 390/71 *Izzat Muhammad Mustafa Duweikat v. Government of Israel (Elon Moreh Case)* 34(1) PD (1979) (Isr.). See also KRETZMER, *OCCUPATION OF JUSTICE*, *supra* note 66, at 75–100; RAJA SHEHADEH, *OCCUPIER'S LAW: ISRAEL AND THE WEST BANK* 17–48 (Inst. for Palestine Stud. ed., 1985).

²⁰⁷ See *Do Israeli Settlements Constitute an Obstacle to Peace?*, ISR. MINISTRY FOREIGN AFF. (Dec. 30, 2009), http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/FAQ_Peace_process_with_Palestinians_Dec_2009.aspx#Settlements3 (response to the widely-acknowledged interpretation that an occupying power is not permitted to settle its population within occupied territory, Israel reads Article 49(6) of the Fourth Geneva Convention restrictively). See also *Israeli Settlements and International Law*, ISR. MINISTRY FOREIGN AFF. (Nov. 30, 2015),

Aeyal Gross terms the “pick and choose” approach. Israel selectively applies the occupation framework, accepting the application of the Hague Regulations and denying the formal applicability of the Geneva Conventions.²⁰⁸ This has allowed Israel to treat the West Bank as either occupied territory under military control or as its own territory where civilian laws are applicable to Israeli settlements.²⁰⁹

These selective appeals were often justified in tandem with references to the occupation’s duration. They could not, however, mollify the principal purpose of the occupation framework—ensuring the inalienability of sovereignty. They failed to assuage criticisms that Israel’s presence in the West Bank purposefully impeded Palestinian self-determination. Contemporary manifestations of occupation, traditionally perceived as compatible with self-determination, had altered. Since the era of decolonization, occupation was increasingly framed as a symptom of foreign domination.²¹⁰

The High Court of Justice addressed the void between Israel’s appeals to specific Hague provisions and the framework’s guardianship of self-determination and sovereignty. *In Saliman Tawfiq Ayub et al., v. Minister of Defense et al. (the Beth El Case)*, the Court pondered, “how can a permanent settlement be erected on land which was seized for temporary use only?”²¹¹ It accepted the state’s position that “civil settlement may continue to exist in that location only so long as the IDF holds the area by virtue of the confiscation order.”²¹²

The High Court of Justice has confirmed that an occupying power does not assume sovereign prerogative.²¹³ The Court recognized the corresponding requirement that an occupation must remain temporary. It, however, coupled these pronouncements with the declaration that “this temporariness may be long-term.”²¹⁴ Israeli officials and the High Court referenced the legal framework’s neutral conception of occupation and temporal neglect. They drew upon the prominent interpretative approach. The Court contended, correctly, that “international law does not set a time limit thereto and [the occupation framework] continues as long as the military government effectively controls the areas.”²¹⁵

<http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx>; ISRAEL SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS, *THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL* 55 (1981).

²⁰⁸ GROSS, *WRITING ON THE WALL*, *supra* note 7, at 45, 152. *See also* Aeyal Gross, *The Dual Legal System*, Address at the Palestine-Israel Journal Conference (May 17, 2016), *available at* <http://www.pij.org/TheDualLegalsystem.pdf>.

²⁰⁹ GROSS, *WRITING ON THE WALL*, *supra* note 7, at 162.

²¹⁰ *See* Chinkin, *supra* note 54, at 168. *See also* BENVENISTI, *supra* note 8, at 17.

²¹¹ *See* HCJ 606/78 *Saliman Tawfiq Ayub v. Minister of Defense (Beth El Case)* 33(2) PD at 14 (1978) (Isr.), *translated in* HCJ606/78, HCJ 610/78 — *Ayub et al. v. Minister of Defense et al.*, Judgment, HAMOKED, <http://www.hamoked.org/Document.aspx?dID=3860> (last visited Oct. 31, 2018) [hereinafter *Beth El Case*].

²¹² *Id.* at 14–15, 17. *See also* DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 22, at 246.

²¹³ *See* Ja’amait Ascan, *supra* note 146, ¶¶ 8–12.

²¹⁴ *Id.* ¶ 12. *See also* Koutroulis, *supra* note 53, at 166–67.

²¹⁵ Ja’amait Ascan, *supra* note 146, ¶ 12. *See* Abu Aita, *supra* note 103, ¶ 10 (noting that the authority of the Military Governor is temporary and lasts for as long as military control is maintained in the relevant area. International law sets no restrictions on duration). *See also* Beit Sourik, *supra* note 162 (The Court reiterated the position that international law does not limit occupation.).

Though this is an accurate reading of the occupation framework, it is ultimately incomplete.²¹⁶ The prominent interpretative approach privileges considerations of the *jus in bello*. By embracing an interpretation that accentuates the framework's durational neglect and uninterrupted relevancy, the requirement of temporality is diminished. Legal considerations, expressing *jus ad bellum* principles and conveyed by a holistic conception of temporality, are relegated alongside the normative pronouncements that they contain.²¹⁷

Israel increasingly claimed that controversial – and seemingly permanent – aspects of the occupation were, in fact, provisional. This coupled appeals to specific allowances, often under the Hague Regulations, with a limited conception of temporality. Senior IDF officials testified that the construction of the West Bank barrier was a “temporary fence erected for security needs.”²¹⁸ Settlements were described as non-permanent. Following Israel's 2005 disengagement from the Gaza Strip, a group of settlers challenged a legislative act that required the dismantlement and evacuation of several settlements in Gaza. Again, the High Court stressed the temporary nature of the occupation and the rules imposed by international law. The Court held,

most Israelis do not have ownership in the land on which they built their homes and businesses in the evacuated area. They acquired their rights from the military commander or from those acting on his behalf. These are not the owners of the property, and they cannot transfer more rights than they have.²¹⁹

These contentions have created a judicially endorsed concept of temporality that privileges a literal notion of non-permanence above transitory characteristics.²²⁰ It is premised upon the prominent interpretation of the occupation framework. This continues to view occupation, regardless of its assumed form, as a factual phenomenon. While practice and commentary largely adhere to this interpretive approach, some have attempted to move the resulting discourse beyond its traditional boundaries. They have forwarded normative interpretations of the occupation framework. These accentuate aspects of the framework that Israel's facilitatory legal engagements sought to indefinitely defer or failed to credibly address.

Aeyal Gross favors a normative conception of occupation. This, Gross contends, is necessary to hold an occupying power accountable.²²¹ As occupation is both a fact and a norm, it may not continue indefinitely. Recognition of occupation's normative character—based upon the requirement of temporariness and the principle of sovereign preservation—is necessary to maintain an occupation's legitimacy. It is essential to ensure that imposed foreign control may not become indefinite.²²² Gross correctly and convincingly recognizes how the occupation framework, traditionally interpreted, may prolong subjugation. The pivot towards normative

²¹⁶ Giladi, *supra* note 21, at 284–85.

²¹⁷ *Id.* at 247–48, 263–65.

²¹⁸ Beit Sourik, *supra* note 162, ¶ 29.

²¹⁹ See H CJ 1661/05 Gaza Beach Regional Council v. Knesset of Israel 59(2) PD (2005) (Isr.). This aspect of the decision is recounted and discussed in, DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22, at 245–46.

²²⁰ See generally Koutroulis, *supra* note 53, at 167.

²²¹ GROSS, WRITING ON THE WALL, *supra* note 7, at 17.

²²² *Id.* at 3–4.

content becomes crucial when engagements with the occupation framework preference a factual conception that perpetuates or neglects the occupation regime's sovereign encroachments.

Within the Palestinian territories, the resulting state of affairs prompted Hani Sayed to propose a more radical departure from the occupation framework. Sayed argues that the:

post Oslo regime of Israeli control over the West Bank and the Gaza Strip is objectionable on normative grounds because it is perpetuating Palestinian subordination and forcing on the Palestinians a particular unviable final settlement of the conflict that is unrepresentative of the political dynamics inside the Palestinian polity in the [West Bank and Gaza Strip], inside the green line and in exile. The challenge is ultimately to imagine a legal framework for understanding the situation in the [West Bank and Gaza Strip] that does not link the Palestinian right to self-determination to the law of occupation.²²³

Although Sayed does not fully articulate what form this framework would assume, he acknowledges the necessity of a normative focus and a shift from the traditional legal approach to occupation. Such a shift has now occurred. Departures from a strict factual conception of occupation increasingly identify the framework's normative structure to assess the legality of particular forms of occupation.

A. *The Illegality Approach*

Recently, Michael Lynk, the UN's Special Rapporteur to the Palestinian territories, has urged the international community to amend its legal treatment of prolonged occupation. Lynk asserted that Israel's occupation has, "become a legal and humanitarian oxymoron: an occupation without end."²²⁴ Lynk cited the prevalence of a factual conception of occupation. His report noted that "the prevailing approach of the international community has been to treat Israel as the lawful occupant of the Palestinian territory. . . ."²²⁵ This, the Rapporteur suggested, had long become an inaccurate legal characterization.²²⁶ The report proposes a means of assessing when an occupation is rendered illegal.²²⁷

This draws upon a history of past practice. The international community has, on several occasions, reached determinations of illegality.²²⁸ The General Assembly described the Palestinian territories as controlled through an illegal occupation.²²⁹ Since the 1980s, however, these classifications of Palestine's occupation have decreased. Elsewhere though, South Africa's presence in Namibia, Portuguese control of Guinea-Bissau, the Vietnamese invasion of

²²³ Hani Sayed, *The Fictions of the "Illegal" Occupation in the West Bank and Gaza*, 16 OR. REV. INT'L L. 79, 126 (2014).

²²⁴ S. Michael Lynk (Special Rapporteur), *Second Rep. on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, ¶ 15, U.N. Doc. A/72/43106 (Oct. 22, 2017).

²²⁵ *Id.* ¶ 18.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Ronen, *supra* note 178, at 202.

²²⁹ See G.A. Res. 32/20, *supra* note 3, preamble. See also G.A. Res. 33/29, preamble (Dec. 7, 1978); Ronen, *supra* note 178, at 216–21.

Kampuchea, Iraq's conquest of Kuwait, and the regular presence of Ugandan forces in Congolese territory have been pronounced illegal.²³⁰

Such pronouncements prompted Yaël Ronen to identify the existence of a juridical category of illegal occupation.²³¹ Ronen explains that an occupation becomes illegal upon violation of a preemptory norm of *erga omnes* character.²³² This acknowledgement, however, is not ubiquitous. Yoram Dinstein and Rosalyn Higgins both suggest that there is a strong doctrinal basis for the dismissal of the illegality claim.²³³ Dinstein argues that a myth surrounds the legal regime of belligerent occupation. This implies that a particular occupation is, or in time becomes, illegal.²³⁴ Alluding to the prominent interpretative approach, Dinstein asserts that “far from viewing belligerent occupation as innately unlawful, there is a whole body of international law regulating this state of affairs.”²³⁵

The dismissal of the illegality approach is facilitated by a factual conception of occupation. This moderates the significance of the occupation framework's normative requirements. By preferencing international law's regulation of occupation, by privileging the view that the existence of an occupation is a neutral legal phenomenon, the accompanying discourse remains fixated on the means of management. This diminishes the significance of the occupation framework's fundamental purpose. Yet many of the international community's references to the illegality of a particular occupation fail to articulate their legal reasoning.

The recent report by the Special Rapporteur did, however, present a normative framework to assess the legality of occupation. The report prescribed that an occupant may not: (1) annex territory; (2) that an occupation shall remain temporary and not become permanent or indefinite; (3) that the best interests of the occupied population guides the occupying power's interventions; and (4) that the territory must be administered in good faith and in accordance with international law.²³⁶ An occupying power whose administration breaches these identified principles verges into illegality.²³⁷

These criteria draw heavily upon the work of Orna Ben-Naftali, Aeyal Gross, and Keren Michaeli.²³⁸ The authors propose identifying “a norm that governs the [occupation] phenomenon,

²³⁰ Ronen, *supra* note 178, at 213–16, 222–26 (for a detailed summary).

²³¹ *Id.* at 203.

²³² *Id.* at 206–08 (noting that this is often the prohibition on the use of force or the violation of the obligation to respect the right of peoples to self-determination).

²³³ See Rosalyn Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AM. J. INT'L L. 1, 8 (1970).

²³⁴ DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22, at 34.

²³⁵ See, e.g., Yoram Dinstein, *Arab-Israeli Conflict in International Law*, 43 U. NEW BRUNSWICK L.J. 301, 313–14 (1994). See also ARAI-TAKAHASHI, LAW OF OCCUPATION, *supra* note 22, at 46.

²³⁶ See Lynk, *supra* note 224, ¶¶ 27–37, 42 (explaining that these principles are derived from the ICJ's *Namibia* opinion).

²³⁷ *Id.* ¶ 64.

²³⁸ *Id.* ¶ 27 (noting the additional influence of Aeyal Gross' recent work and Eyal Benvenisti's contention that an occupant who stalls efforts to terminate an occupation would be tainted with illegality. These are described as providing the “intellectual foundation” for the proposed criteria).

differentiating between a legal and illegal occupation.”²³⁹ They identify three evaluative principles: (1) the notion that sovereignty or title does not vest in the occupying power; (2) the maintenance of public or civil life by the occupying power in accordance with the principle of self-determination; and (3) that occupation must be temporary and may not become either permanent or indefinite.²⁴⁰ Should the occupying power violate any of these principles, the occupation becomes illegal.²⁴¹

The desire to brand a particular occupation illegal, especially one which is prolonged, reflects a perceived failure of law and an accompanying sense of injustice. It is, however, worth recognizing a practical impediment. Applied to Israel’s occupation of the Palestinian territories, a normative assessment of the occupation’s legality would likely be resisted by influential states. Mainstream political and legal engagements with the conflict are inherently pragmatic. Security Council Resolution 242, for example, begins by emphasizing the “inadmissibility of the acquisition of territory by war.”²⁴² Its enduring legacy, however, is seen through its entrenchment of the land for peace formula.²⁴³ This provides a highly-incentivized calculation designed to both encourage and guide negotiations.

The international community’s exchanges with the Israelis and Palestinians are steeped in the custom, diplomacy, and law that seek to manage this enduring conflict. A normative assessment of legality would likely struggle to influence this dominant approach. As the international community continues to prioritize engagement, declared illegality would presumably be viewed by, amongst others, the United States, the European Union, and the United Kingdom as facilitating isolation. Some may see benefit in such a result. This would, however, be resisted by dominant elements within the international community and, accordingly, raise questions regarding the approach’s effectiveness.

Considerations of effectiveness raise subsidiary questions. It is unclear how a determination of illegality would alter subsequent legal engagements with the occupation regime. It is uncertain whether it would influence the application of the occupation framework. As Yaël Ronen notes, “for the category of illegal occupation to be meaningful, it must have consequences that advance the removal of the illegality.”²⁴⁴ The Special Rapporteur report suggests several such ramifications. These include encouraging member states and judicial bodies to prevent the cooperation of various entities that indirectly sustain the occupation.²⁴⁵ The report contends that a declaration of illegality would “invite the international community to review its various forms

²³⁹ Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT’L L. 551, 553 (2005).

²⁴⁰ *Id.* at 553–55 (locating the “occupation within a normative framework that differentiates between legality and illegality and may both resolve the specific question of the legality of the Israeli occupation and redefine the contours of the legal discourse on occupation”).

²⁴¹ *Id.* at 555, 559, 586 (the authors determine that the “Israeli occupation . . . violates the three basic tenets of the normative regime of occupation and is, therefore, intrinsically illegal”).

²⁴² S.C. Res. 242, ¶ 1 (Nov. 22, 1967).

²⁴³ See, e.g., WILLIAM B. QUANDT, *PEACE PROCESS: AMERICAN DIPLOMACY AND THE ARAB-ISRAELI CONFLICT SINCE 1967* 392 (Berkeley, CA: Univ. of Cal. Press, 2001).

²⁴⁴ Ronen, *supra* note 178, at 227.

²⁴⁵ Lynk, *supra* note 224, at 65.

of cooperation with the occupying power as long as it continues to administer the occupation unlawfully.”²⁴⁶

Ben-Naftali, Gross, and Michaeli suggest that normative results follow a declaration of illegality.²⁴⁷ Citing the Draft Articles on State Responsibility, they recall that conduct constituting an internationally wrongful act must cease.²⁴⁸ They concede that law does not replace statesmanship and cannot compel an occupation’s termination. The recognition of illegality may, however, affect subsequent legal considerations including the occupying power’s recourse to security measures and efforts to frame the illegal occupation as an act of aggression.²⁴⁹

Declarations of illegality have been accompanied by the requirement to make reparations. This, too, is consistent with the Draft Articles on State Responsibility.²⁵⁰ In the *Armed Activities on the Territory of the Congo* case, the ICJ found Uganda liable for its illegal presence in the Democratic Republic of the Congo and required the Ugandan Government to make reparations.²⁵¹ This rebuked an illegal occupation. Confirmed illegality, however, is not a harbinger of legal consequence or sanction.

In its Advisory Opinion *on the Legal Consequences of the Construction of a Wall*, the ICJ did not declare the Israeli occupation to be illegal.²⁵² Nevertheless, it acknowledged numerous violations of the occupation framework.²⁵³ This compelled legal redress. Israel was obliged to comply with and cease violations of its international obligations.²⁵⁴ It was required to provide reparations, ensure restoration, and offer compensation to those impacted by the Wall’s construction.²⁵⁵ Referencing *Barcelona Traction, Light, and Power Co. Ltd.*, the Court found Israel to have violated international obligations of an erga omnes character.²⁵⁶ The occupation did not require a declaration of illegality in order for the Court to recognize violations that compel state concern and protection.²⁵⁷ Where the Special Rapporteur report called upon the international community to review its forms of cooperation with the occupying power, so too did the ICJ’s Advisory Opinion. The Court held that states were forbidden from recognizing the situation resulting from the construction of a wall. It stated that they may not render aid or

²⁴⁶ *Id.*

²⁴⁷ Ben-Naftali et al., *supra* note 239, at 612.

²⁴⁸ *Id.* See also Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 88–91 (2001) [hereinafter Draft Articles on State Responsibility].

²⁴⁹ Ben-Naftali et al., *supra* note 239, at 612–13.

²⁵⁰ See Draft Articles on State Responsibility, *supra* note 248, art. 31. See generally Ronen, *supra* note 178, at 228–32.

²⁵¹ Dem. Rep. Congo v. Uganda, *supra* note 21, at 257, ¶ 259, 279–83, ¶ 345. See also S.C. Res. 674, ¶ 8 (Oct. 29, 1990) (compelling Iraq to compensate Kuwait, “as a result of the invasion and illegal occupation...”). See also Ronen, *supra* note 178, at 228–29.

²⁵² Ben-Naftali et al., *supra* note 239, at 552.

²⁵³ Legal Consequences of the Construction of a Wall, *supra* note 190, ¶¶ 114–37.

²⁵⁴ *Id.* ¶¶ 149–50.

²⁵⁵ *Id.* ¶¶ 152–53.

²⁵⁶ *Id.* ¶ 155.

²⁵⁷ See *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, Judgment, 1970 I.C.J. Rep. 3, ¶ 33 (Feb. 5).

assistance in maintaining the existing status quo. Members of the international community held a positive duty to end impediments, which stemmed from the wall's construction, to Palestinian self-determination.²⁵⁸

It is unclear whether the categorization of illegal occupation offers legal import not otherwise present within international law. Violations of the occupation framework inevitably taint prolonged occupation. Prolonged occupation is defined by subsidiary failures to adhere to various aspects of IHL. Common Article 1 of the Geneva Conventions requires High Contracting Parties to “respect and to ensure respect for the present Convention in all circumstances.”²⁵⁹ The general rules relating to compliance with IHL fully apply to situations of occupation.²⁶⁰ These are not contingent upon the occupation's legal status.

Significantly, the development of settlements is perhaps the most controversial feature of the occupation. They are almost universally viewed as a blatant violation of the Fourth Geneva Convention.²⁶¹ They constitute a grave breach of the Convention and are punishable under the Rome Statute.²⁶² Again, the severity of these sanctions is not influenced by the occupation's legal status. Recourse to such sanctions, however, is contingent on political and diplomatic will. Appeals to state responsibility, to the non-recognition of wrongful acts, or to reparations do not appear more attainable if grounded in the illegality approach.

Declarations of illegality do, however, carry rhetorical weight. Adam Roberts acutely observed that the categorization of an illegal occupation is “invariably used to refer to an occupation which is perceived as being the outcome of aggressive and unlawful military expansion.”²⁶³ Often, though with exception, evocations of “illegality” are devoid of legal specificity. Perception, however, is important. The legitimacy attributed to an occupation regime greatly influences the international community's reaction to the occupant. It affects its treatment of the occupation. A prolonged occupation will inevitably suffer a deficit of legitimacy. Yet the source of illegitimacy that shrouds Israel's occupation of the Palestinian territories is largely derived from the myriad features of the occupation that themselves constitutes violations of the legal framework. The continued expansion of settlements, restrictions on the Palestinian right to self-determination, and the chronic violation of human rights are both sources of illegitimacy and violations of the occupation framework. It is doubtful that labeling the occupation illegal, in its totality, would alter or lessen the legitimacy calculus of a reality that is already widely denounced.

Determining when an occupation becomes illegal will remain contested. Whether the implications of such a determination introduce otherwise unavailable legal consequences appears

²⁵⁸ Legal Consequences of the Construction of a Wall, *supra* note 190, ¶ 159.

²⁵⁹ Fourth Geneva Convention, *supra* note 5, art. 1.

²⁶⁰ Bothe, *supra* note 40, at 1483.

²⁶¹ See, e.g., G.A. Res. 66/225, ¶ 4 (Dec. 22, 2011) (167 in favor, 7 opposed, and 6 abstentions).

²⁶² See Rome Statute of the International Criminal Court, art. 8(2)(a), July 17, 1998, 2187 U.N.T.S. 900, 37 I.L.M. 999. See also Gilles Giacca, *Economic, Social and Cultural Rights in Occupied Territories*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY 1485, 1513 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015).

²⁶³ Roberts, *Military Occupation*, *supra* note 31, at 293.

uncertain. It is improbable that the label of illegality will further delegitimize an occupation already perceived as apocryphal. This should not discount the value of the determination. Ben-Naftali, Gross, and Michaeli note that reaching an assessment of illegality – through a normative account of an occupation regime – allows the observer to move beyond obfuscation and blurred boundaries.²⁶⁴ Israel’s myriad engagements with the occupation framework appeal to the indeterminacy that follows from a factual conception of occupation. Infusing normative content into considerations of an occupation regime is essential to gain legal clarity regarding the consequences of the occupying power’s efforts to manage prolonged occupation.

Yet, as the ICJ claimed in its *Namibia* Opinion, “the qualification of a situation as illegal does not by itself put an end to it. It can only be the first, necessary step in an endeavor to bring the illegal situation to an end.”²⁶⁵ In accordance, efforts to meet the challenges of prolonged occupation should neither seek complete *disassociation* from the existing legal framework nor attempt to effectively manage the ongoing situation *within* the existing framework. Rather, they should embrace the occupation framework’s normative content. These efforts must move to identify a legal basis to encourage the termination of prolonged occupation.

IV. FROM MANAGEMENT TO TERMINATION: AN ALTERNATIVE APPROACH TO PROLONGED OCCUPATION

In the ICJ’s 2004 *Advisory Opinion on the Legal Consequences of the Construction of a Wall*, Judge Elaraby offered a common-sense observation. Tasked with determining the legality of Israeli actions and policies, Judge Elaraby simply concluded, “the only viable prescription to end the grave violations of international humanitarian law is to end the occupation.”²⁶⁶ As the occupier becomes increasingly distant from the interests that led to the occupation’s initiation, as the occupied population faces growing subjugation and the continued suspension of their civil and political rights, the reality of prolonged occupation unavoidably fosters continued violations of international law.

The benevolent occupier may successfully provide basic social or economic rights. The occupation framework, however, is structurally precluded from addressing many of prolonged occupation’s inescapable challenges. Consequentially, myriad responses to these challenges attempt to circumvent the framework. Political, diplomatic, and grassroots initiatives often favor ending the occupation. International law, however, remains fixated on an unattainable status quo. Guided by the prominent interpretative approach, these legal appeals endeavor to better regulate the present so as to preserve the past.

Attempts to manage prolonged occupation may be benevolent. They may come in response to undeniable challenges that demand redress. They also, however, promote an interpretation of the occupation framework that perpetuates occupation. This prominent interpretative approach allows an occupying power to strengthen its control of the territory and of the population. Commonly and regardless of intention or motive, responses to prolonged occupation contort the

²⁶⁴ Ben-Naftali, et al., *supra* note 239, at 609.

²⁶⁵ *Namibia* Opinion, *supra* note 179, ¶ 111.

²⁶⁶ *Legal Consequences of the Construction of a Wall*, *supra* note 190, at 256 (separate opinion of Elaraby, J.).

legal framework. They expand its provisions. In response to prolonged occupation, they claim latitude, while pledging fidelity to a factual, *alegal* conception of occupation that may continue indefinitely.

Instead, responses to prolonged occupation must embrace a normative reading of the legal framework. They must situate their engagements, their management efforts, in an interpretative approach that identifies and accentuates a holistic conception of temporariness. This is intended to move from responses that produce perpetual management. The interpretative approach proposed here remains cognizant of both the occupation's duration and the form that it assumes. The proposed interpretative approach harnesses a good faith obligation to terminate prolonged occupation. This must be preferred to interpretations whose silence on the question of duration facilitates the selective employment of international law, the perpetual management of identified challenges, and, by design or by default, the eventual entrenchment of foreign control.

This proposed shift, taken under the framework's auspices and cognizant of its confines, cannot unilaterally terminate occupation. Ben-Naftali, Gross, and Michaeli are correct. International law does not replace diplomacy.²⁶⁷ Yet it may facilitate or hinder its efforts. The interpretative approach offered here recognizes that engagements with the occupation framework are premised on a choice. This is between a factual, *alegal* conception of occupation and one that rests on normative acknowledgements regarding the nature and purpose of occupation. Further, it is amongst legal appeals that rely exclusively upon the *jus in bello* and those that additionally acknowledge the relevancy of the *jus ad bellum*. Engagements based on the latter interpretation are more likely to constrain the occupation regime. They are better equipped to safeguard the preservation of sovereignty, maintain competing relations, ensure the occupying power's military needs, and protect the occupied population. Legal appeals, grounded in this interpretative approach, are more consistent with the spirit of IHL and the principles espoused by the *jus ad bellum*.

The proposed good faith approach to enable termination provides an alternative path. This is based on a normative recognition. It places the principle of temporality at the center of the legal regulation of occupation. Adherence to this approach will facilitate three objectives. These collectively strengthen international law's relationship with prolonged occupation. First, it will recognize the significance of the interpretative choices that structure subsequent legal engagements with prolonged occupation. These reflect either an unconstrained or temporal conception of occupation. Such interpretative choices are further grounded within either exclusive appeals to the *jus in bello* or those engagements that draw upon a wider array of principles that exist in both IHL and the law governing the use of force. Next, it will appeal to the notion of good faith to accentuate the principle of temporariness and the objective of termination. This provides a more efficacious means of structuring and evaluating the legal regulation of prolonged occupation. Finally, it will contribute to a necessary shift in legal discourse. This shift follows the direction of diplomatic appeals by preferencing calls to terminate prolonged occupation above attempts to manage its unconstrained duration.

²⁶⁷ Ben-Naftali et al., *supra* note 239, at 612–13.

The interpretative approach proposed here links engagements with the legal framework to the framework's fundamental purpose—ensuring temporality. Appeals to identified tenets of international law facilitate a reemphasized interpretation of the occupation framework's normative structure. This can moderate the framework's lax temporal dimensions by elevating the innate requirement to enable the occupation's termination. Such a reading of the occupation framework will provide a clear legal basis requiring an occupying power to delimit actions that perpetuate occupation. And it will preference interim initiatives, taken to address the challenges of prolonged occupation, that may stretch the framework's conservationist origins but do not frustrate the requirement to enable termination. This alternative reading of the occupation framework is firmly grounded in international law.

A. Recognition of an Interpretative Choice

Many of Israel's engagements with the occupation framework are conventional. Ostensibly, they draw upon a widely endorsed interpretative approach.²⁶⁸ This prominent approach and the responses to prolonged occupation stemming from it are, however, the result of a deliberate choice. This exists between readings that emphasize the framework's lax temporal limitation and those that accentuate a holistic conception of temporality.²⁶⁹ Adherence to the prominent interpretative approach is influenced by the traditional distinction between the *jus ad bellum* and the *jus in bello*. Devoid of context, these choices constitute accurate readings. The occupation framework privileges temporariness and fails to ensure precision.²⁷⁰ In practice, however, these interpretative approaches become antinomies. They allow Meir Shamgar to claim that an occupation may continue indefinitely and they support Lassa Oppenheim's contention that "there is not an atom of sovereignty in the authority of an occupying power."²⁷¹

Shamgar's interpretative choice enabled the legal architecture of Israel's occupation.²⁷² Distinguishing between "political problems" and the "observance of the humanitarian provisions of the Fourth Geneva Convention," the then Attorney General delineated considerations of the *jus ad bellum* and the *jus in bello*.²⁷³ This distinction is firmly grounded within international law.²⁷⁴ The collective legal treatment of war separates the regulation of the use of force from the means by which force is used. Israel has elsewhere cited the importance of this distinction.²⁷⁵

²⁶⁸ See GREENSPAN, *supra* note 133, at 225–26. See also FEILCHENFELD, *supra* note 126, at 12 (both for early examples of such endorsements).

²⁶⁹ See ICRC Expert Meeting, *supra* note 39, at 74 (for an example of the former). See also FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD 3–4 (1863) (for an example of the latter) [hereinafter Army General Order 100].

²⁷⁰ See BENVENISTI, *supra* note 8, at 6. See also DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 22, at 3.

²⁷¹ See Shamgar, *Legal Concepts*, *supra* note 72, at 43. See also Lassa Oppenheim, *The Legal Relations Between an Occupying Power and the Inhabitants*, 33 LAW Q. REV. 363, 364 (1917).

²⁷² GROSS, WRITING ON THE WALL, *supra* note 7, at 3.

²⁷³ Shamgar, *Observance of International Law*, *supra* note 68, at 266.

²⁷⁴ Giladi, *supra* note 21, at 250.

²⁷⁵ See THE STATE OF ISR., THE OPERATION IN GAZA 27 DECEMBER 2008 – 18 JANUARY 2009: FACTUAL AND LEGAL ASPECTS, ¶ 35 (2009).

Traditionally, the exclusive legal treatment of the *jus ad bellum* and the *jus in bello* ensures that the latter applies regardless of the former's assessment. This was conveyed, in relation to occupation, by an American Military Tribunal at Nuremberg. In the *Hostages Trial*, the Tribunal submitted that:

international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.²⁷⁶

The separate and non-contingent application of the *jus ad bellum* and the *jus in bello* was read into Common Article 1 of the Geneva Conventions. This requires High Contracting Parties to “respect and ensure respect for the present Convention *in all circumstances*.”²⁷⁷ The distinction received explicit recognition in the preamble to the First Additional Protocol. Accordingly, the provisions of the Geneva Conventions and of the Protocol “must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict. . . .”²⁷⁸

As Yoram Dinstein explains, “the law of belligerent occupation is a branch of the *jus in bello*.” The rights and obligations attributed to the occupying power are not altered by “the chain of events in which the belligerent occupation was brought about.”²⁷⁹ This is reflective of strong policy considerations.²⁸⁰ It is grounded within the realist contention that despite war's prohibition, armed conflict continues to occur. War's inevitability compels legal regulation and humanitarian moderation.²⁸¹ In practice, however, the distinction between the *jus ad bellum* and the *jus in bello* becomes absolute. It is interpreted to require “a total normative separation.” The norms of one regime may not affect the “validity, application, compliance, or interpretation of the other.”²⁸²

²⁷⁶ See *Hostages Trial*, *supra* note 21, at 637. See also *Re Christiansen*, 15 I.L.R. 412, 413 (Holland, Special Court of Arnhem, 1948) (The following year a Dutch Special Court ruled, “The rules of international law, in so far as they regulate the methods of warfare and the occupation of enemy territory, make no distinction between wars which have been started legally and those which have been started illegally.”). See also DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 22, at 3.

²⁷⁷ See Fourth Geneva Convention, *supra* note 5, art. 1–2 [emphasis added] (a similar distinction was derived from the wording of Common Article 2 which held that the “present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties...”). See also Giladi, *supra* note 21, at 251.

²⁷⁸ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) preamble, June 8, 1977, 1125 U.N.T.S. 3.

²⁷⁹ DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 22, at 3.

²⁸⁰ See *Dem. Rep. Congo v. Uganda*, *supra* note 21, at 321, ¶ 58. See also Giladi, *supra* note 21, at 257–61. See also MARCO SASSÒLI AND ANTOINE A. BOUVIER, *HOW DOES LAW PROTECT IN WAR?* 103 (2d ed. 2006).

²⁸¹ Giladi, *supra* note 21, at 258.

²⁸² *Id.* at 262.

The duality of international law's relationship with armed conflict is deeply rooted in the legal orthodoxy that regulates occupation. Rotem Giladi has termed this the "total separation paradigm."²⁸³ This distinction "prohibits answering IHL questions by recourse to jus ad bellum issues. It assumes that the jus in bello is neutral or autonomous."²⁸⁴ Political or diplomatic considerations regarding the nature or status of the occupation are discounted by engagements grounded in IHL. The legal regulation of occupation is distinguished from politicized considerations that contest the cause, effect, and legitimacy of occupation.²⁸⁵ The influence of this rigid distinction is evidenced by the general reluctance of humanitarian and legal organizations—those otherwise consumed with tempering and critiquing occupation—to refrain from assessing the occupation's legality. Accordingly, legal approaches deemphasize temporality's significance. The pursuit and fulfillment of termination becomes the concern of the political sphere.

Strict adherence to the total separation paradigm is, however, an interpretative choice. It facilitates the prominent approach to prolonged occupation. Grounded in the jus in bello, this preferred reading portrays occupation as fact. Subsequent considerations fixate on duration but neglect the fundamental principles that are compromised when the character of an occupation alters to become a form of quasi-permanent control. Accompanying legal engagements neglect the occupation's origins. They do not engage with causes of occupation or those influences that contribute to its continuation. These factors—queries concerning the occupation's duration—remain within the political sphere. They are beyond the reach and relevancy of IHL. As the ICRC expert panel noted, since IHL did not impose formal limits on the occupation's duration, it is incapable of preventing prolonged occupation.²⁸⁶ An unconstrained notion of occupation supersedes temporariness. It becomes the function of international law to manage, not resolve, occupation.

The implications of this interpretative choice neglect the primacy of temporality. They negate its prominence within the occupation framework and they abandon its relevance to foundational considerations of the jus ad bellum. These are unnecessary concessions. While aspects of prolonged occupation will demand management, it need not come at the expense of broader considerations. Though the occupation framework is correctly assumed to form part of the jus in bello, this does not discount the continued significance of the jus ad bellum.

Commentators have long-acknowledged the simultaneous relevancy of the jus ad bellum and the jus in bello.²⁸⁷ Christopher Greenwood notes, "while the former will always operate before the

²⁸³ Giladi, *supra* note 21, at 263.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 264.

²⁸⁶ ICRC Expert Meeting, *supra* note 39, at 74.

²⁸⁷ See generally Christopher Greenwood, *The Relationship Between Jus ad Bellum and Jus in Bello*, 9 REV. INT'L STUD. 221, 222 (1983) [hereinafter Greenwood, *Jus ad Bellum Jus in Bello*]. See also, Giladi, *supra* note 21, at 266–67.

latter comes into play, once hostilities have commenced it is necessary to consider both. The relationship between them thus becomes of considerable importance.”²⁸⁸

Rotem Giladi extends this reasoning to the case of occupation.²⁸⁹ While the applicability of the occupation framework continues without distinction, “jus ad bellum considerations . . . play an important role in bringing about and shaping specific cases of occupation.”²⁹⁰ Giladi convincingly illustrates how the phenomenon of occupation requires reference to the jus ad bellum. The occupation framework is bound in duality. It is concerned, “like other IHL norms, with the humane treatment of individuals. It also uniquely addresses questions of governance and sovereignty.”²⁹¹ Accordingly, the norms of occupation are reliant upon the norms of the jus ad bellum.²⁹² This reliance is reflected in the occupation framework’s prohibition of annexation.²⁹³ As Giladi explains, “the prohibition on annexation is still implicit in the transient, *alegal* nature of the occupation, but at the same time also serve to ensure the preservation of world order by removing one legal incentive for war.”²⁹⁴

An interpretative choice that preferences a factual conception of occupation neglects the centrality of jus ad bellum norms. Responses to prolonged occupation that favor management while remaining silent on temporality surrender a principal function of the occupation framework. This implied deference is unnecessarily dismissive of the position that temporariness holds within the occupation framework and of the centrality that jus ad bellum norms claim both within general international law and for the legal regulation of occupation. Instead, a revised interpretative approach to the legal treatment of prolonged occupation should opt to accentuate the principle of temporariness and the subsequent requirement to enable occupation’s termination.

B. Accentuating Temporariness and a Good-Faith Standard to Terminate Prolonged Occupation

On the eve of the occupation’s fifth decade, a Military Appeals Court in the West Bank ruled that it possessed the authority to review the compatibility of military orders with the law of occupation. The Court pronounced that the occupation framework was “the grundnorm of the occupation regime, and judicial review was the only check against [the] unrestrained exercise of power by the military commander.”²⁹⁵ Elsewhere, Martti Koskeniemi described the High Court

²⁸⁸ Greenwood, *Jus Ad Bellum Jus In Bello*, *supra* note 287, at 222.

²⁸⁹ Giladi, *supra* note 21, at 266–85.

²⁹⁰ *Id.* at 268.

²⁹¹ *Id.* at 298.

²⁹² *Id.* at 268.

²⁹³ Bothe, *supra* note 40, at 1461.

²⁹⁴ Giladi, *supra* note 21, at 274.

²⁹⁵ See Mil. Appeal 5/06 Military Court of Appeals (Judea & Samaria), Eran Schwartz v. Commander of IDF Forces in the Religion (Sept. 17, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.), *translated in* Eran Schwartz v. the Commander of IDF Forces in the Region, at 11–12, INT’L COMM. RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=61C330FB85F051E1C12575BC00429F83&action=openDocument&xp_countryS elected=IL&xp_topicSelected=GVAL-992BUG&from=state (last visited Oct. 31, 2018). See also BENVENISTI, *supra* note 8, at 326 (referring to the Appeals Board decision).

of Justice’s reliance upon the principle of proportionality as constituting “the Grundnorm against which the activities of the occupation authority must be measured.”²⁹⁶

Identifying a basic norm reflects the interpreter’s conception of what the occupation framework should achieve. It constitutes how the framework should be understood. To be effective—to accurately capture the spirit of IHL and the purposes of the jus ad bellum—this determination must not be influenced by a factual, indefinite conception of occupation. Instead, the proposed good faith approach to enable termination offers an alternative foundation. It is structured around two interconnected elements: the understanding that occupation constitutes a provisional state and the principle of good faith. These two factors collectively support the proposed interpretative shift. They identify and accentuate the principle of temporariness and invoke fundamental norms of international relations.

Temporality’s identification is not innovative. The notion that occupation constitutes a provisional state remains undisputed.²⁹⁷ Article 55 of the Hague Regulations holds that an occupying power assumes the status of a temporary administrator.²⁹⁸ With reference to the objectives of the conservationist principle and the purposes of Article 43, the ICRC Commentaries define an occupying power as “merely being a de facto administrator.”²⁹⁹ The 2015 Clapham Commentaries simply note that “occupation is a temporary situation, not equivalent to annexation.”³⁰⁰ Eyal Benvenisti surmises that “because occupation does not amount to sovereignty, the occupation is also limited in time and the occupant has only temporary managerial powers, for the period of time until a peaceful solution is reached.”³⁰¹

The prominent normative approaches proposed elsewhere recognize temporariness’s centrality. This is reflective of temporality’s ubiquity. Ben-Naftali, Gross, and Michaeli acknowledge that “the temporary, as distinct from the indefinite, nature of occupation is thus the most necessary element of the normative regime of occupation.”³⁰² The consequences of the approach proposed here, however, diverge from the foundational normative and non-normative approaches identified elsewhere.

The abovementioned approaches associate the failure to ensure temporality with declared illegality. The proposed approach, however, imposes a positive obligation—the enablement of termination. It articulates a means of shifting the international legal discourse from the prominent, management-focused approach to an understanding that better responds to the altered form of control that prolonged occupation represents. Referencing the Draft Articles on State

²⁹⁶ Martti Koskeniemi, *Occupied Zone — A Zone of Reasonableness?*, 41 ISR. L. REV. 13, 18 (2008).

²⁹⁷ See Orna Ben-Naftali, *PathoLAWgical Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 129, 159 (Orna Ben-Naftali ed., 2011). See also Malcolm Shaw, *Territorial Administration by Non-Territorial Sovereigns*, in THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY 369, 381 (Tomer Broude & Yuval Shany eds., 2008).

²⁹⁸ See Hague Convention (IV), *supra* note 5, art. 55 (The Article governs the use of private property.).

²⁹⁹ See PICTET, COMMENTARY, *supra* note 186, at 273.

³⁰⁰ See Bothe, *supra* note 40 at 1460.

³⁰¹ See BENVENISTI, *supra* note 8, at 6.

³⁰² See Ben-Naftali et al., *supra* note 239, at 599.

Responsibility, the illegality approach notes the obligation to cease wrongful acts.³⁰³ While this is a compelling legal argument, to extend its relevancy beyond a particular, recurring violation of the occupation framework, requires a holistic understanding of temporality.

The proposed good faith obligation to enable termination provides this. It acknowledges that temporality is defined both by duration and the character of the occupation. The illegality approach offers a more limited notion of temporality that is linked to the occupation's duration. Ben-Naftali, Gross, and Michaeli call upon the international community to establish a clear durational limitation. An occupation exceeding one year, they suggest, be transferred to an international authority.³⁰⁴ Further, the qualification of an occupation as “illegal” does not affect the continued application of the occupation framework.³⁰⁵ This maintains the risk of perpetual management. The proposed approach provides a means of coupling the employment of the occupation framework with a holistic conception of temporality that is conscience of and responsive to the form that the occupation has assumed.

Temporality's prominence reflects both political and humanitarian purposes. These are crucial features of international law's relationship with occupation. They are expressive of the norms governing relations amongst states and between nations and individuals. Accordingly, employment of the occupation framework must embrace this holistic conception of temporariness. It must harness these grander meanings and preference a reading that facilitates the objective of termination. Engagements with the occupation framework, in response to prolonged occupation, must accentuate both this principle and reflect its origins and purposes.

1. The Political and Humanitarian Purposes of the Occupation Framework Are Premised on a Holistic Notion of Temporality

The legal construct of occupation developed as a rejection of conquest.³⁰⁶ International society discounted the validity of sovereign title that historically followed *debellatio*. *Occupatio bellica* became an intermediate status. It recognized a military authority's territorial control and began establishing a temporary regulatory framework. This framework provided that an occupying force would administer the territory “on a provisional basis, but has no legal entitlement to exercise the rights of the absent sovereign.”³⁰⁷

The emergent principle—that “belligerent occupation is in essence a temporary condition in which the powers of the belligerent occupant are not without limit”—was initially codified in Francis Lieber's *General Order No. 100*.³⁰⁸ Further articulation and codification followed. A host of military manuals acknowledged a temporary conception of occupation. This temporal

³⁰³ See Draft Articles on State Responsibility, *supra* note 248, art. 30. See also Ben-Naftali et al., *supra* note 239, at 599.

³⁰⁴ *Id.* at 613.

³⁰⁵ *Id.* at 612.

³⁰⁶ See Arai-Takahashi, *Preoccupied With Occupation*, *supra* note 5, at 54–56. See also SHARON KORMAN, *THE RIGHT TO CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* (1988).

³⁰⁷ Bhuta, *supra* note 40, at 725–26.

³⁰⁸ See Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, 87 (2003). See also Army General Order 100, *supra* note 269, at 4.

conception informed, and was formalized by, the international law-making initiatives of the mid-nineteenth and twentieth centuries.³⁰⁹ These efforts continued to premise occupation's regulation upon the notion of a durational limitation. They infused both political and humanitarian objectives into international law's relationship with the occupation of foreign territory.³¹⁰ Temporality undergirds initiatives to both preserve sovereignty and to protect a vulnerable population subject to foreign control.

Sovereignty's divergence from the historical right to conquest necessitated the construction of a provisional phase. This existed during the period between when a foreign state established control of a hostile's territory and when the belligerents completed a peace treaty determining the territory's status. This temporary state was to ensure that “de facto power did not immediately translate into de jure sovereignty, conquest, and subjugation.”³¹¹ Though the occupation framework's origins reflected the desire to preserve European order, the notion that occupation constituted a provisional, de facto phenomenon privileged sovereign preservation.

The prioritization of European order waned. Global initiatives structured the community of nations around the principles of sovereign equality and the prohibition of the acquisition of territory by force.³¹² Temporality assumed a constitutive function. It facilitated many of the foundational principles of international order. These principles received expression within the occupation framework. Prominently, temporality is reflected in the framework's prohibition of annexation.³¹³ This remains part of customary international law and receives articulation within Article 2(4) of the UN Charter and in the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Amongst States.³¹⁴

Temporality is reflected in the rules regulating an occupier's authority. These rules establish the occupier as an administrator whose power is derived from its factual presence—not its sovereign entitlement.³¹⁵ The requirement to preserve existing legislation—articulated within Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention—both constitutes and is reliant upon the principle of temporality.³¹⁶

Engagements with prolonged occupation that accentuate temporality better represent the political objectives conveyed within the occupation framework. They are reflective of fundamental international norms. Temporality's relationship with and support of these norms go beyond

³⁰⁹ Imseis, *supra* note 308, at 87–92.

³¹⁰ As such, these alternative purposes may be conveyed, as in tension. See Cohen, *supra* note 28, at 502–20 (contrasting a humanitarian conception of the law of belligerent occupation with a realist or Schmittian reading of the law).

³¹¹ *Id.* at 503.

³¹² See U.N. Charter art. 2, ¶¶ 1, 4. See also G.A. Res. 2625 (XXV), annex, Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970) [hereinafter Declaration on Friendly Relations].

³¹³ Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L. L. 580, 582–85 (2006) [hereinafter Roberts, *Transformative Military Occupation*].

³¹⁴ See U.N. Charter, art. 2, ¶4. See also Declaration on Friendly Relations, *supra* note 312.

³¹⁵ See Roberts, *Transformative Military Occupation*, *supra* note 313, at 585–86.

³¹⁶ *Id.* at 586–89.

political considerations and structural components of the jus ad bellum. It is expressive of the occupation framework's humanitarian purposes. Temporality constitutes a requisite condition of the framework's jus in bello function.

The occupation framework's humanitarian purpose has become paramount. Article 4 of the Fourth Geneva Convention establishes the status of protected persons.³¹⁷ The International Criminal Tribunal for the Former Yugoslavia described the Convention's "object and purpose" as safeguarding those individuals "who do not enjoy the diplomatic protection, and . . . are not subject to the allegiances and control, of the State in whose hands they may find themselves."³¹⁸ Humanitarian requirements are imbued throughout the Convention.³¹⁹ Benvenisti remarked that "the very decision to dedicate the Fourth Geneva Convention to persons and not governments signified a growing awareness in international law of the idea that peoples are not merely the resources of states, but rather that they are worthy of being subjects of international norms."³²⁰

These developments, however, proceeded sequentially. The Hague Regulations made minimal reference to explicit humanitarian requirements.³²¹ Nevertheless, the early willingness to deny an occupying power sovereignty forbade foreign control from becoming a means to subjugate a local population. The limitation of the right to conquest, through the temporal conception of occupation, accompanied the increasing humanization of conflict. Gregory Fox describes this lineage. The law governing occupation, "emerged in the late eighteenth century as a humanizing trend in the law of war, modifying a state's previously unencumbered right to subjugate conquered foreign territories."³²² Though the use of force maintained legitimacy, these modifications tempered a foreign power's rule. By establishing occupation as a temporary phenomenon, contingent upon a negotiated agreement, regulatory attempts endeavored to modify the "harsh but common consequences of foreign control over territory."³²³

The humanitarian purpose of the occupation framework evolved in tandem with the legal regulation of war. Now, an occupying power assumes responsibility for an array of humanitarian considerations. These directly influence the lived experiences of the occupied population. Corresponding humanitarian considerations are privileged by contemporary readings of the occupation framework.³²⁴ The management approach, ostensibly, endeavors to ensure humanitarian requirements. It seeks to fill a void. This exists when the needs created by an occupation's duration exceeds the allowances that an occupying power may take to fulfill its humanitarian obligations. The ability of the occupied population to fully address their

³¹⁷ Fourth Geneva Convention, *supra* note 5, art. 4.

³¹⁸ *See* Prosecutor v. Tadic, Case No. IT-94-1-A, Appeal Judgment, ¶ 168 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). *See also* Cohen, *supra* note 28, at 509–10.

³¹⁹ Fourth Geneva Convention, *supra* note 5, art. 27–33.

³²⁰ EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 106 (1st ed. 1993) [hereinafter Benvenisti 1st ed.]. *See also* Cohen, *supra* note 28, at 508.

³²¹ *Id.* *See also* Meron, *supra* note 29, at 245–46.

³²² *See* Fox, *supra* note 10, at 228.

³²³ *Id.*

³²⁴ *See generally* Meron, *supra* note 29.

humanitarian needs—to fulfill their political, economic, and cultural wants through the realization of self-determination—becomes contingent upon the principle of temporality.³²⁵

The occupation framework embodies international norms. It sets particular objectives. These are widely acknowledged. They contend that occupation is not equivalent to annexation. The legal framework imposes duties of good governance and humanitarian concern upon the occupying power. And it provides the occupying power with specified allowances to ensure its military's wellbeing and to provide effective administration of occupied territory.³²⁶ Again, each of these principles are contingent upon temporality.

The purpose here is not to reiterate these principles. Their existence is not in doubt. The purpose here, instead, is to preference an interpretation of the occupation framework that accentuates a holistic, not merely durational, notion of temporality. It is to disentangle prolonged occupation's treatment from the prominent interpretative approach. Attempts to manage prolonged occupation continue to cite, or are premised upon, an interpretation that emphasizes the absence of a firm durational limitation. Engagements that appeal to the management approach do not question whether initiatives taken under the framework's auspices are conducive with enabling the occupation's termination. They deemphasize a central and constitutive purpose of the occupation framework—ensuring an occupation's temporality. For if an occupation is to constitute a temporary state, if sovereignty will revert, if the occupying power is to serve as a trustee and not a sovereign, then the occupation must end. While the framework may be silent on the chronology of such termination—and an exclusive focus on the question of duration may support the position assumed by Yoram Dinstein, the ICRC expert meeting, and others—to permit that such silence equates to or facilitates the implied permanence of prolonged occupation would render the entire framework an absurdity.

2. Termination Is the Necessary Corollary of Temporality

When the Namibian Mandate terminated, South Africa was deprived of the international recognition that legitimized its control as a Mandatory Power. The Mandate's termination, however, did not compel South Africa to vacate the foreign territory.³²⁷ The proposal presented within these pages does not purport to exact occupation's termination. It is mindful of international law's limitations.³²⁸ The proposal recognizes that the occupation framework cannot

³²⁵ See S.C. Res. 1483, *supra* note 83, preamble (This emphasized “the right of the Iraqi people freely to determine their own political future and control their own natural resources, welcoming the commitment of all parties concerned to support the creation of an environment in which they may do so as soon as possible, and expressing resolve that the day when Iraqis govern themselves must come quickly. . . .”). See also ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 319 (1995); Eyal Benvenisti, *The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective*, 1 IDF L.R. 19, 36 (2003).

³²⁶ See, e.g., Bothe, *supra* note 40, at 1460. See also BENVENISTI, *supra* note 8, at 6–7; EYAL BENVENISTI, MAX PLANK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (s.v. “occupation, belligerent,” 2009); Ben-Naftali, et al., *supra* note 239, at 554–55.

³²⁷ Ronen, *supra* note 178, at 215–16.

³²⁸ Boon, *supra* note 12, at 110–12.

coerce an occupying power to end its prolonged control of foreign territory when a predetermined threshold is reached.

As noted, such determination is not suited to a fixed chronological scale.³²⁹ Yet, when the situation on the ground becomes one where neither The Hague Regulations nor the Fourth Geneva Convention can competently protect sovereignty or effectively balance the relationship between the occupier and the occupied, resulting legal engagements must recognize that the occupation has or risks becoming indefinite. The proposed approach wishes to reject the creeping prevalence of an indeterminate conception of occupation. By moving from a factual, unconstrained notion of occupation, this favored interpretation links the principle of temporality to its inevitable corollary, termination.

The requirement to cease unlawful activity is firmly grounded in international law. The Draft Articles on State Responsibility compel an offending party to end unlawful activity and provide assurances of non-repetition.³³⁰ This suggests that a state, occupying foreign territory without legal justification, is required to immediately terminate the occupation.³³¹ Calls for cessation are often contingent upon the perception that an occupation is itself illegal.³³² Yaël Ronen illustrates, however, that such declarations are themselves predicated upon acknowledgement of violations that affect the constitutive nature of the occupation regime. Accordingly, “the cessation of a violation necessarily means termination of the occupation.”³³³

In its *Namibia* opinion, the ICJ required South Africa to withdraw from and end its occupation of the administered territory. Again, this decision was reliant upon the Court’s determination of illegality.³³⁴ Similarly, the international community often predicates calls to terminate occupation on the assumption of illegality.³³⁵ A declaration that an occupying power is obliged to end its territorial control follows, as Benvenisti suggested, the burden to resolve the underlying political stalemate.³³⁶ This determination is influenced by the perceived legitimacy of the occupation.

Such perception, however, does not reactively prompt a declaration of illegality. The international community has not reverted to the determinative language that the General Assembly employed in the late 1970s when describing the Israeli occupation.³³⁷ This has prompted the Special Rapporteur’s recent initiative to establish a framework assessing occupation’s legality. As noted, the Rapporteur’s report accurately observed that “the prevailing

³²⁹ There should, of course, be no doubt as to whether Israel’s presence within the West Bank satisfies this classification.

³³⁰ See Draft Articles on State Responsibility, *supra* note 248, art. 30.

³³¹ Olivier Corten, *The Obligation of Cessation*, in OXFORD COMMENTARIES ON INTERNATIONAL LAW: THE LAW OF INTERNATIONAL RESPONSIBILITY 545, 545 (James Crawford et al. eds., 2010).

³³² Ariel Zemach, *Can Occupation Resulting from a War of Self-Defense Become Illegal?*, 24 MINN. J. INT’L L. 313, 316–17 (2015).

³³³ Ronen, *supra* note 178, at 228.

³³⁴ *Namibia Opinion*, *supra* note 176, ¶ 133. See also S.C. Res. 301, ¶ 6 (Oct. 20, 1971); Ronen, *supra* note 178, at 228.

³³⁵ Ronen, *supra* note 178, at 228. See also G.A. Res. 3061 (XXVIII), ¶ 3 (Nov. 2, 1973); S.C. Res. 661, at 19, 20 (Aug. 6, 1990).

³³⁶ BENVENISTI, *supra* note 8, at 244.

³³⁷ See G.A. Res. 32/20, *supra* note 229, preamble. See also G.A. Res. 33/29, *supra* note 229, preamble.

approach of the international community has been to treat Israel as the lawful occupant of the Palestinian territory.”³³⁸

The interpretative approach presented here separates the objective of termination from assessments of legality. This distinction is motivated by the abovementioned apprehensions concerning the illegality approach.³³⁹ The proposed approach does not deny that an occupation may be, or may become, illegal. It instead recognizes that a determination of illegality, within a context as fraught as Israeli-Palestinian relations, is inseparable from politics. To move beyond the political resistance that would accompany such a declaration, to bypass the pragmatic challenges of selecting which individuals or what mechanisms possess the authority to render such a determination, the proposed approach embraces the more modest standard of *enabling* the occupation’s termination. This requirement is associated not with the occupation’s legal status, but with its duration and form.

Despite the prevalence of the management approach, the requirement to enable an occupation’s termination is indicative of international will. Notwithstanding the common association between termination and illegality, calls to conclude occupation are not dependent on the occupation’s legal status. Following the U.S. and British occupation of Iraq, the Security Council held that the Iraqi right to self-determination was contingent upon the occupation’s expeditious termination.³⁴⁰ Termination thus becomes the necessary fulfillment of the occupation framework’s fundamental purposes. It is the prerequisite of the principle *pacta sunt servanda*.³⁴¹

Linking the enablement of termination to temporality provides an objective. If an occupant is determined to violate international law, it provides a subsequent step—a means of redress—that is not immediately conveyed by the illegality approach. Devoid of a legal determination, it acknowledges that termination is not merely a means to rectify a legal wrong. It is a positive requirement compelled by the occupation framework’s normative purpose. This durational limitation is effectively absent from the prominent interpretative approach, which maintains that nothing under IHL prevents an occupant from embarking on a long-term occupation.³⁴²

Temporality’s dependency on termination reiterates an inescapable truth. This holds that the principles conveyed by the occupation framework—preserving sovereignty, safeguarding local needs, ensuring self-determination—prevent an occupation from becoming prolonged. These principles are contingent on the basic norm of temporality and the fulfillment of this primary requirement compels termination. To avoid perpetual management, to better capture the spirit of IHL, an amended interpretative approach that accentuates temporality and preferences termination may derive facilitatory support from the principle of good faith.

³³⁸ Lynk, *supra* note 224, ¶ 18.

³³⁹ See *supra* Part III.A.

³⁴⁰ See S.C. Res. 1483, *supra* note 40, preamble. See also Lynk, *supra* note 224, ¶ 32.

³⁴¹ Corten, *supra* note 331, at 545–46.

³⁴² ICRC Expert Meeting, *supra* note 39, at 74. r

3. *The Relevance and Potential of the Principle of Good Faith*

In 1973, largely in response to Israel's continuing occupation of the Palestinian territories, the General Assembly passed Resolution 3171. The resolution supported the rights of peoples living under foreign occupation to "regain control of their natural resources."³⁴³ Eyal Benvenisti remarked that Resolution 3171 conveyed that an occupying power may not purposefully delay a conflict's peaceful settlement. It may not perpetuate occupation.³⁴⁴ The occupant, Benvenisti noted, "has a duty under international law to conduct negotiations in good faith for a peaceful solution."³⁴⁵

The second element of the proposed interpretation appeals to the principle of good faith. This reinforces an amended normative approach that views temporality as a basic norm and termination as an objective imbued throughout the occupation framework. Within the Israeli-Palestinian context, the notion of good faith often appears as a rhetorical device. It assumes the form of a loaded allegation that both parties enthusiastically accuse the other of lacking.³⁴⁶

Alongside this popular usage, the principle of good faith has become an evaluative criterion. It provides a standard of compliance against which an occupation's legality is assessed. Proponents of the illegality approach link determinations of malfeasance to particular violations of the occupation framework.³⁴⁷ Commonly, these violations amount to de facto annexation. They manifest through the refusal to "engage in good faith negotiations toward ending the occupation."³⁴⁸ Benvenisti has long contended that an occupant, acting in bad faith to stall an occupation's termination, becomes an aggressor and is tainted with illegality.³⁴⁹

The present invocation of good faith, however, assumes a more fundamental purpose. It protects against the misuse of international law. It ensures that legal interpretations and engagements with the occupation framework maintain consistency with the framework's ostensible purposes.³⁵⁰ Good faith is firmly rooted in international law and underpins many preeminent legal rules.³⁵¹ It

³⁴³ G.A. Res. 3171, (Dec. 17, 1973).

³⁴⁴ BENVENISTI, *supra* note 8, at 245.

³⁴⁵ *Id.*

³⁴⁶ *See, e.g.,* JAMES L. GELVIN, *THE ISRAEL-PALESTINE CONFLICT: ONE HUNDRED YEARS OF WAR* 240–41 (2007) (for a broader use of the notion of good faith in the formal peace talks between Israel and the Palestinians).

³⁴⁷ *See* Ben-Naftali et al., *supra* note 239, at 553–55. *See also* Ronen, *supra* note 178, at 206–08; Lynk, *supra* note 224, ¶¶ 27–37.

³⁴⁸ Zemach, *supra* note 332, at 316.

³⁴⁹ *See* Benvenisti 1st ed., *supra* note 320, at 215. *See also* BENVENISTI, *supra* note 8, at 245–46.

³⁵⁰ This foundational legal requirement is expressed through the rule, *pacta sunt servanda*, and is codified in Article 26 of the Vienna Convention on the Law of Treaties. This is described as a cornerstone of international relations. *See* Vienna Convention on the Law of Treaties art. 26, May 23, 1969, T.S. No. 58, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. *See also* MARK E. VILLIGER, *COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 363 (2009).

³⁵¹ The duty to act in good faith is found in Article 2(2) of the U.N. Charter, Articles 26 and 31 of the Vienna Convention, and in the preamble to the Declaration on Friendly Relations. *See* U.N. Charter, art. 2, ¶ 2; Vienna Convention, *supra* note 350, arts. 26 & 31; Declaration on Friendly Relations, *supra* note 312, preamble. *See* Certain Norwegian Loans (Fr. v. Nor.), Judgment, 1957 I.C.J. Rep. 9, 48 (Jul. 6) (separate opinion of Lauterpacht, J.) (Judge Lauterpacht held that, "Unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law."). *See* Lynk, *supra* note 224, ¶ 35 (The Special Rapporteur report noted that

is expressive of the international community's desire to preserve order and avoid arbitrariness and chaos.³⁵² In its *Nuclear Tests Case*, the ICJ explained that, "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential."³⁵³

The good faith principle governs the conduct of international negotiations. It requires, "negotiating in a way that is likely to yield an agreement."³⁵⁴ The ICJ further elucidates. The Court has explained that good faith negotiations must demonstrate willingness to contemplate alternative proposals, avoid preconditions, and accept assistance from third-parties.³⁵⁵ This is supportive of the view, expressed by Benvenisti and others, that bad faith conduct compels illegality. However, the good faith obligation to enable termination does not purport to oblige negotiations. It does not assess the legality of an occupation regime. Instead, this proposal recognizes that responses to the challenges posed by prolonged occupation are the result of interpretative discordance between a temporal understanding of occupation and one that accentuates the framework's failure to assert a firm durational limit. It is between a factual and a normative conception of occupation. And it contests an *alegal* and an illegal vision of the occupation regime.

Each interpretative account is premised upon a particularized reading of the occupation framework. Despite temporality's incontestability, despite its embodiment and expression of the occupation framework's constitutive norms, it continues to be relegated through an interpretative approach that views occupation as an unconstrained fact. A reading of the occupation framework that appeals to the requirements of good faith is better situated to emphasize temporality's preeminence. It better facilitates an interpretative approach that, recalling Article 31 of the Vienna Convention, accentuates the "object and purpose" of the occupation framework.³⁵⁶ The proposed approach creates a link between a treaty's interpretation and its performance.³⁵⁷ It clearly articulates the claim, established within the occupation framework, that temporality is contingent upon termination. Such an interpretation offers a more purposeful reading of the occupation framework and a more efficacious means of engaging with the myriad challenges posed by prolonged occupation.

4. Ensuring an Effective Safeguard Against Misuse

The desire to move from a factual, unconstrained notion of occupation and the corresponding management approach does not discount the challenges posed by prolonged occupation. These challenges are real and often urgent. As noted, occupations traditionally conclude when the

the principle of good faith is a cornerstone principle of the international legal system and of all legal relationships in modern international law).

³⁵² See Steven Reinhold, *Good Faith in International Law*, 2 BONN RES. PAPER PUB. INT'L L. 1, 2 (2013).

³⁵³ *Nuclear Tests (N.Z. v. Fr.)*, Judgment, 1974 I.C.J. Rep. 253, ¶ 49 (Dec. 20).

³⁵⁴ Barry O'Neill, *What Does it Mean for Nations to "Negotiate in Good Faith"?*, CTR. INT'L SECURITY & COOPERATION, STAN. U. 2 (2001), available at <http://www.sscnet.ucla.edu/polisci/faculty/boneill/goodfaith5.pdf>.

³⁵⁵ *Id.* See also *The Gabčíkovo-Nagymaros Project (Hung. v. Slov.)*, Judgment, 1997 I.C.J. Rep. 7, ¶ 142 (Sept. 25).

³⁵⁶ Vienna Convention, *supra* note 350, art. 31.

³⁵⁷ Villiger, *supra* note 350, at 425.

fortunes of war are altered or upon a negotiated agreement.³⁵⁸ The good faith obligation to enable termination seeks to facilitate the latter. In the West Bank, the first traditional means—the changing fortunes of war—is improbable due to Israel’s disproportionate military strength. Equally, it is undesirable in a region plagued by instability and violence. Yet it is these regional realities that heighten the risk of an already prolonged occupation continuing indefinitely. An occupying power, disinclined to withdraw from territory and harboring security-based apprehensions, is unlikely to make concessions that stray from its immediate interests. An occupied population, politically divided and hamstrung by ineffective leadership, will struggle to represent its constituent’s objectives.

The approach proposed here presupposes that temporality compels termination. The posited interpretation is immediately concerned with ensuring that the legal framework is not interpreted to facilitate occupation or resigned to its perpetual management. It recognizes that an adjustment to the occupation framework will not usurp geopolitical and regional dynamics and simply compel an occupation’s termination. Thus, certain management is inescapable. It is a required means of ensuring the interests of a population bereft of political and economic autonomy. It is obliged by the occupation framework.³⁵⁹ In accordance, the enablement of termination becomes an accompaniment to and an objective of management initiatives. The proposed interpretative shift intends to alter understandings of the legal framework so that termination moves from the background to the forefront of relevant legal engagements. Thus, the objective of termination becomes a bulwark against initiatives—masquerading as management efforts and compelled by the occupation’s duration—that frustrate, rather than facilitate, the principle of temporality.

The proposed imposition of a check is not novel. Often, however, the prescribed restraint accompanies engagements with prolonged occupation that adhere to the prominent interpretative approach. This permeates much of the academic literature. The aforementioned “inherent dilemma”—concerning the latitude required to effectively treat prolonged occupation—often fails to link purported management initiatives with the principle of temporality or the obligation to terminate occupation.

In as early as 1942, E.H. Feilchenfeld argued that an occupying power may disregard the conservationist principle by providing “appropriate justification.”³⁶⁰ This would provide the occupying power with what Feilchenfeld believed was the necessary latitude to address the economic challenges of prolonged occupation. Yoram Dinstein proposed a litmus test. It is axiomatic, Dinstein held, that an occupying power requires increased legislative latitude to effectively manage prolonged occupation.³⁶¹ Misuse, however, could not be discounted. If the occupying power truly requires further legislation to meet the needs of the occupied population, if it endeavors to successfully manage the prolonged occupation, it must, Dinstein concluded,

³⁵⁸ Roberts, *Prolonged Occupation*, *supra* note 11, at 47. *See also* DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 22, at 271–72.

³⁵⁹ *See* BENVENISTI, *supra* note 8, at 6. *See also* Roberts, *Military Occupation*, *supra* note 31, at 295 (Both Benvenisti and Roberts capture this purpose of the occupation framework by defining the occupying power as serving as a trustee for the limited duration of the occupation.).

³⁶⁰ *See* FEILCHENFELD, *supra* note 133, at 89.

³⁶¹ *See* DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 22, at 120.

exhibit a similar (legislatively enacted) concern for its own population.³⁶² In *Abu Aita*, the High Court of Justice adopted Dinstein's litmus test.³⁶³ The Court held that imposed initiatives, ostensibly intended to benefit the local population, were valid if "the military government is filled with the same concern in regard to its own people and applies the same measures taken in the area of military government in its own area."³⁶⁴

Subsequent efforts to both increase and regulate the legislative latitude received by an occupant maintained fidelity to the prominent interpretative approach. These initiatives rarely linked the proposed means of preventing abuse with the principle of temporality. Adam Roberts, for example, acknowledged the need to amend the occupation framework. Such alterations would, however, be susceptible to misuse. To safeguard against potential abuse, Roberts favored limiting particular allowances while extending only those deemed necessary to effectively manage prolonged occupation.³⁶⁵

Similar proposals followed. The scholarly treatment of prolonged occupation offered an array of regulatory methods. These intended to both better manage occupation and safeguard against legislative overreach by the occupying power. Marco Sassòli proposed appealing to the Security Council.³⁶⁶ Eyal Benvenisti suggested a consultative process that solicits local participation and input.³⁶⁷ While Benvenisti's response lends a degree of democratic legitimacy to the management process, others seek a broader international mandate. Richard Falk has proposed the development of an international convention. If an occupation continues for ten years, the convention would direct the management of the prolonged occupation and safeguard local interests.³⁶⁸ Similarly, Brian Walsh and Ilan Peleg call for the creation of an "occupation document." To effectively manage prolonged occupation, the proposed mechanism would identify imposed foreign control as a "special legal condition which requires specific legal doctrine designed to meet the needs of an occupation."³⁶⁹ Effective management is derived from

³⁶² *Id.* at 121. See also Yoram Dinstein, *The Legislative Power in Administered Territories*, 2 TEL AVIV L. REV. 505, 511 (in Hebrew) (1972); BENVENISTI, *supra* note 8, at 92 (In accordance, the existence of a law in the occupant's own territory will provide evidence of the lawfulness of a similar law's introduction within the occupied territory. Both Dinstein and Benvenisti note, however, this may only serve as a prima facie test that requires specific examination within a particular case.).

³⁶³ See *Abu Aita*, *supra* note 103, at 5, 135–36.

³⁶⁴ *Id.* (Justice Shamgar, delivering the judgment, concluded, as had Dinstein, that this criterion was not exhaustive. This reflected the belief that circumstances may arise where "conditions in a territory and special circumstances demand legislative steps not required at the time, or at all, in the home country.).

³⁶⁵ Roberts, *Prolonged Occupation*, *supra* note 22, at 51, 53.

³⁶⁶ To prevent abuse, the UN body would evaluate and authorize necessary departures from the occupation framework to ensure the required management initiatives. See Sassòli, *Article 43*, *supra* note 126, at 15–16. See also David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 843 (2003) (offers a similar appeal in relation to the U.S. and British-led occupation of Iraq and "transformative" occupations more broadly).

³⁶⁷ BENVENISTI, *supra* note 8, at 146–247. See Christopher Greenwood, *The Administration of Occupied Territory in International Law*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 241, 264 (Emma Playfair ed., 1992) (offering a similar suggestion in relation to local governance).

³⁶⁸ See Falk, *supra* note 49, at 45–47 (suggesting the creation of an internationally supervised plebiscite or a mechanism to evaluate whether the law governing belligerent occupation remains relevant).

³⁶⁹ Brian Walsh & Ilan Peleg, *Human Rights Under Military Occupation: The Need for Expansion*, 2 INT'L J. OF HUM. RTS. 62, 62–63 (1998).

human rights law. This, according to Walsh and Peleg, balances protections that safeguard the local population and the occupier's right to pursue genuine security interests.³⁷⁰

Other proposals indirectly allude to temporality's importance. Most often, though, these fail to reference the requisite criterion of termination. Proponents of a self-determination-based standard, such as Alain Pellet, acknowledge the discordance between the legal framework and the challenges posed by prolonged occupation. This discordance compels initiatives to better facilitate effective management. Pellet asserts that "humanitarian" responses, necessary to address these challenges, are lawful to the extent that they do not threaten the occupied population's right to self-determination.³⁷¹

Considerations of an occupying power's legislative discretion consistently fail to build upon an interpretation of the legal framework that accentuates temporality. This process begins before an occupation becomes prolonged. Scholarly deliberations concerning how and when an occupant may introduce legislation remain within the direct wording of Articles 43 and 64.³⁷² Legislation may be introduced to maintain order, to ensure the safety of the occupant's military forces, or to realize the legitimate purposes of the occupation.³⁷³ Subsequent efforts to reconcile the framework's conservatism with prolonged occupation followed this approach. They permit expansive authority to better manage the exigencies of prolonged occupation but fail to couple these allowances with the principle of temporality or the requirement to enable termination of prolonged occupation.

The proposed good faith approach offers an alternative. It insists that initiatives, undertaken for the ostensible benefit of the local population, must remain consistent with the occupation framework's purposes. These must not compromise a notion of temporality that is cognizant of the foundational norms that this principle encapsulates. Instead, they must enable its termination. This is justified by a simple assumption. This holds that responses to the challenges posed by prolonged occupation are most effective when premised upon temporality. That the interests of the occupied population, the requirements of the occupying power, and the demands of international order are best satisfied when occupation terminates. Too often, the international law governing the phenomenon of occupation preferences a factual, unconstrained notion of occupation. Where diplomatic appeals and the principle of self-determination have constantly called for the occupation to end, international law is largely silent. The good faith approach to enable termination seeks to more accurately represent the spirit of IHL. It wishes to realign legal appeals with the principle of self-determination and diplomatic calls for the conclusion of prolonged occupation.

³⁷⁰ *Id.* Noam Lubell, *Human Rights Obligations in Military Occupation*, 885 INT'L REV. RED CROSS 317, 329 (2012) (for an example of similar proposal to Walsh and Peleg).

³⁷¹ Alain Pellet, *The Destruction of Troy Will Not Take Place*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 169, 192, 201–02 (Emma Playfair ed., 1992).

³⁷² Hague Convention (IV), *supra* note 5, art. 42. *See also* Fourth Geneva Convention, *supra* note 5, art. 64.

³⁷³ *See generally* LORD ARNOLD D. MCNAIR & ARTHUR D. WATTS, THE LEGAL EFFECTS OF WAR (4th ed. 1966). *See also* BENVENISTI, *supra* note 8, at 91–92; GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON LAW AND PRACTICE OF BELLIGERENT OCCUPATION 97 (1957); Sassòli, *Legislation and Maintenance*, *supra* note 82

C. Aligning the Occupation Framework with Diplomatic Appeals to Terminate Prolonged Occupation and the Principle of Self-Determination

Shortly following the 1967 War, the Security Council gathered in New York. On November 22, it adopted Resolution 242. The Security Council cited the illegality and inadmissibility of the acquisition of territory by force.³⁷⁴ It directly referenced the recent war. Continuing, the resolution famously affirmed that the establishment of a “just and lasting peace” required Israeli withdrawal from the recently occupied territories.³⁷⁵ The termination of belligerency was premised upon respect for the sovereignty, territorial integrity, and political independence of all states in the region.³⁷⁶ The resulting “land for peace” formula compelled the nascent occupation’s termination and the normalization of relations.³⁷⁷ This formula became the foundation of the diplomatic approach to the enduring conflict between Israel and the Palestinians.

A decade later, Egyptian President Anwar Sadat journeyed to Jerusalem and addressed the Knesset. A new era of optimism was heralded. Sadat declared that “peace cannot be worth its name unless it is based on justice, and not on the occupation of the land of others.”³⁷⁸ The Egyptian leader evoked the international consensus that had developed around Resolution 242. Sadat pronounced that the call for a “permanent and just peace, based on respect for the United Nations resolutions, has now become the call of the whole world. It has become a clear expression of the will of the international community. . . .”³⁷⁹ The following year, Egypt and Israel signed the Camp David Accords. A framework for Middle East peacemaking was reestablished. Palestinian autonomy would be implemented over five years. Transitional arrangements would be negotiated. Upon Palestinian self-governance, Israel was required to withdraw from the West Bank and Gaza Strip.³⁸⁰

Similar optimism accompanied Yitzhak Rabin and Yasir Arafat on the White House lawn in 1993. The symbolism of an Israeli Prime Minister embracing the hand of a Palestinian Chairman was momentous. The era of Oslo and the Declaration of Principles again premised a negotiated peace upon Israeli withdrawal and Palestinian self-governance.³⁸¹ Yet optimism would flounder following an intifada, a series of deadly wars in Gaza, and the continued entrenchment of Israel’s

³⁷⁴ S.C. Res. 242, ¶ 1 (Nov. 22, 1967).

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ See Bruce D. Jones, *The Security Council and the Arab-Israeli Wars: Responsibility Without Power*, in *THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945* 298, 308 (Vaughn Lowe et al. eds., 2008).

³⁷⁸ Anwar Sadat, Egypt President, Address at the Israeli Knesset (Nov. 20, 1977), reprinted in *THE ISRAELI-PALESTINIAN CONFLICT: A DOCUMENTARY RECORD 1967–1990* 136, 139, 142 (Yehuda Lukacs ed., 1992).

³⁷⁹ *Id.*

³⁸⁰ A Framework for Peace in the Middle East, Isr.-Egypt, Sept. 17, 1978, 1136 U.N.T.S. 196, in *THE ISRAELI-PALESTINIAN CONFLICT: A DOCUMENTARY RECORD 1967–1990* 155, preamble, sec. 1 (Yehuda Lukacs ed., 1992).

³⁸¹ Declaration of Principles on Interim Self-Government Arrangements, Isr.-P.L.O., art. 1, 7(2), Sept. 13, 1993, 32 I.L.M. 1525.

civilian presence throughout the West Bank. Still, however, the international community remains steadfast. It continues to insist that Israel end its occupation of the Palestinian territories.

Since at least 1980, the international community has referenced the prolonged character of the occupation. It has directly appealed to Israel to end its control of the West Bank and Gaza. Security Council Resolution 476 cites the “overriding necessity to end the prolonged occupation of Arab territories occupied by Israel since 1967.”³⁸² Similar calls have become ubiquitous.³⁸³ From widely endorsed UN resolutions to the activist’s placard, appeals to terminate the occupation are ever-present. Yet international legal engagements, premised on the prominent interpretive approach, assume that the occupation’s duration is neither limited nor affected by the occupation framework. Alternative interpretations that draw upon occupation’s normative character find that an occupation regime violates fundamental principles of the legal framework. Often, the occupation is declared illegal. It is unclear, however, whether this declaration triggers legal consequences not otherwise elicited by the underlying violation(s). It is not immediately apparent what subsequent steps follow declared illegality.

Both interpretative approaches diverge from the international community’s affirmed diplomatic course. The proposed good faith approach to enable termination offers an alternative. It better represents the spirit of IHL. It aligns the occupation framework with the prominent diplomatic treatment of the occupation. International law is understood to inform diplomatic engagement. Though it may not always be a decisive factor, “the rules of international law frequently [provide] the framework in which diplomatic negotiations, arguments, and positions [are] formulated.”³⁸⁴ International law shapes the content of and the positions offered in “multilateral forums and in bilateral diplomatic representations.”³⁸⁵ As observed throughout the Israeli-Palestinian conflict “the long-term framework for [normalizing] relations between hostile actors” has been articulated in a legal vernacular and imposed through numerous diplomatic initiatives.³⁸⁶

To influence and support diplomatic initiatives, international law must be effective. The international law of occupation, as prominently interpreted, threatens to frustrate the principles espoused by the international community. These principles directly align with the occupation framework’s normative character. Yet, they are continuously neglected by an interpretative approach that is either resigned to benevolent attempts to humanize a purportedly unalterable situation or vulnerable to manipulation. International law, the former Secretary General Javier Pérez de Cuéllar declared, must become more effective in governing international relations. It must not “stagnate but keep pace with change in the conditions of international life. . . . It must

³⁸² S.C. Res. 476, ¶ 1 (June 30, 1980).

³⁸³ See, e.g., G.A. Res. 71/23, (Nov. 30, 2016). See also Lynk, *supra* note 224, ¶ 15.

³⁸⁴ ANDREW JACOVIDES, INTERNATIONAL LAW AND DIPLOMACY: SELECTED WRITINGS BY AMBASSADOR ANDREW JACOVIDES 234 (2011).

³⁸⁵ Francois O. Wilcox et al., *International Law in Diplomacy*, 77 PROCEEDINGS OF THE ANN. MEETING OF THE AM. SOC’Y OF INT’L L. 99, 100 (1983).

³⁸⁶ Tom Farer, *Diplomacy and International Law*, in THE OXFORD HANDBOOK OF MODERN DIPLOMACY 493, 493 (Andrew F. Cooper, Jorge Heine & Ramesh Thakur eds., 2013).

evoke a shared understanding and it must be seen to derive from the morality of international behavior.”³⁸⁷

General Assembly Resolution 44/23 announced the “decade of international law.”³⁸⁸ The General Assembly spoke of the need to strengthen the “rule of law in international relations.”³⁸⁹ It reaffirmed the role of international law in promoting the “means and methods for the peaceful settlement of disputes between states.”³⁹⁰ The proposed good faith approach facilitates the alignment of legal and diplomatic discourses. In accordance with the demands of the international community and the constitutive principles upon which they draw, engagements with the occupation framework that accentuate temporality are better suited to present termination as the required means of preserving sovereignty, protecting local interests, and ensuring self-determination. An occupying power may not legitimize initiatives that appeal to the occupation’s duration but do not enable its termination. An interpretative approach that acknowledges occupation as fact and merely seeks to manage its effects compromises international law’s efficacy and thus its relevancy.

Diplomatic appeals to terminate occupation are often grounded in the principle of self-determination. Building upon Palestinian nationalism and the spirit of Camp David, formal appeals to self-determination accompanied American and Egyptian calls to terminate the occupation.³⁹¹ The principle of self-determination vests in Article 1 of the UN Charter.³⁹² It is confirmed in both the international human rights covenants.³⁹³ Its normative development, however, corresponds with the era of decolonization. Self-determination would associate with state-building initiatives.³⁹⁴ These advancements, however, proved difficult to reconcile with the occupation framework’s conservationist design. The law of occupation is described as antithetical to state-building initiatives.³⁹⁵ Several have questioned its compatibility with the principle of self-determination.³⁹⁶

This poses an important distinction. Consideration of self-determination’s compatibility with the occupation framework followed the U.S.-led invasion of Iraq. This debate largely focuses on the

³⁸⁷ See Javier Pérez de Cuéllar, U.N. Secretary-General, Address at the University of Bordeaux (Apr. 24, 1991), in Press Release, Secretary-General’s Statement at University of Bordeaux, U.N. Press Release SG/SM/4560 (1991).

³⁸⁸ G.A. Res. 44/23, preamble, ¶ 2(b), (Nov. 17, 1989).

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ See NATHAN THRALL, *THE ONLY LANGUAGE THEY UNDERSTAND: FORCING COMPROMISE IN ISRAEL AND PALESTINE* 22 (2017).

³⁹² See U.N. Charter, art. 1, ¶ 2 (states that the purpose(s) of the United Nations are to, “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...”).

³⁹³ See International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171. See also, International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 3.

³⁹⁴ Manuela Melandri, *Self-Determination and State-Building in International Law: The Need for a New Research Approach*, 20 J. CONFLICT. & SEC. L. 74, 83 (2015).

³⁹⁵ Nigel D. White, *Settling Disputes: A Matter of Politics and Law*, in *THE LAW OF INTERNATIONAL LAWYERS: READING MARTTI KOSKENNIEMI* 61, 70 (Wouter Werner, Marieke De Hoon & Alexis Galán eds., 2017). See also Melandri, *supra* note 394, at 82–85.

³⁹⁶ Melandri, *supra* note 394, at 83. See also Steven Wheatley, *The Security Council, Democratic Legitimacy and Regime Change*, 17 EUR. J. INT’L L. 531 (2006).

phenomenon of transformative occupation.³⁹⁷ The notion of state-building evoked by this context differs from that discussed within this article. The proposed normative reading of the occupation framework is applicable to transformative occupations. This, however, raises various issues that are beyond the current scope but will be considered elsewhere. The form of control exhibited by prolonged occupation differs from that of transformative occupation. It is employed for alternative purposes and serves distinguishable ends.

Since Sadat's journey to Jerusalem, calls for Palestinian statehood increasingly appeal to self-determination.³⁹⁸ This provides a legal basis that favors the termination of occupation. Marco Sassòli notes that the fact of occupation may be construed as incompatible with the right to self-determination.³⁹⁹ Palestinian statehood, the two-state solution, and the realization of self-determination compels, and is contingent upon, termination. The occupation framework, traditionally conceived, does not facilitate this process. Sassòli explains that the right to self-determination cannot be implemented by an occupying power. To ensure self-determination, Sassòli continues, an occupying power need not legislate. Instead, it must withdraw.⁴⁰⁰

The consequences of the right to self-determination and the objective of the proposed interpretative approach are identical. Each identify termination as a constitutive requirement. Yet, adherence to the non-normative interpretative approach poses a conflict. Though Sassòli acknowledges that the fulfilment of self-determination compels cessation, this is described as an issue of the *jus ad bellum*. The self-determination argument "cannot be used to deny an occupying power the right to legislate under the *jus in bello*."⁴⁰¹ The proposed approach does not suggest the revocation of an occupant's legislative competence. It, however, aligns the purposes of the occupation framework with the right to self-determination. By acknowledging the relevancy of *jus ad bellum* norms by insisting that termination is the corollary of temporality, the proposed approach wishes to insulate the occupation framework. It intends to ensure that the law of occupation does not become an anachronism; that it is not dismissed in favor of more efficacious legal approaches that better align with prevailing normative standards or diplomatic objectives. This does not require radical restructuring. But it compels a recommitment to the object and purpose of the occupation framework.

The proposed interpretative approach operates within the confines of international law. Accordingly, it remains susceptible to many of its weaknesses.⁴⁰² Little here will move the hardened skeptic to reconsider the viability of international law and its place within the Israeli-Palestinian conflict. Yet it is important to recognize—even upon such dismissive terms—that simply rejecting the role assumed by international law as inept underestimates how the prominently interpreted occupation framework perpetuates occupation.

³⁹⁷ See generally Fox, *supra* note 10. See also Cohen, *supra* note 28.

³⁹⁸ THRALL, *supra* note 391, at 22.

³⁹⁹ Sassòli, *Legislation and Maintenance*, *supra* note 82, at 677.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² See Boon, *supra* note 12, at 110–12.

Still, one is entitled to wonder whether the proposed interpretative approach fares better than the specific provisions contained within the occupation framework. This, however, misunderstands the purpose of the approach. The proposed interpretive approach is not intended to replace treaty-based provisions. Instead, it wishes to complement them. Employment of the good faith obligation does not compel a choice between specific provisions and fundamental norms. The conformity of settlement development, for example, may be evaluated in accordance with both Article 49(6) of the Fourth Geneva Convention but also with broader legal considerations. As presently interpreted, the occupation framework engages with the symptoms of prolonged occupation. A non-normative interpretation of the legal framework, confined to management, does not acknowledge or address the altered form of control that a prolonged occupation imposes. The proposed approach facilitates engagement with the causes of this control.

Settlement construction perpetuates, and thus prolongs, occupation. Beyond Article 49(6), settlement construction may be construed as an act of aggression.⁴⁰³ The perpetuation of occupation, the altered form of quasi-permanent control that prolonged occupation has become may be understood to contravene Article 2(4) of the UN Charter. The occupation framework will contribute to a discourse grounded in uncontested principles—regarding the use of force, the annexation of territory, and the realization of self-determination—that resonate with and within international society.⁴⁰⁴

When the Cypriot government remonstrated with the international community, it called for the termination of Turkey's occupation of the northern-third of its territory. It did not, however, emphasize the occupation framework.⁴⁰⁵ It spoke clearly of occupation and invoked international law. The Cypriot government coupled calls to terminate the occupation with the principles of the *jus ad bellum*.⁴⁰⁶ It appealed to the prohibition of the use of force in international relations. It employed human rights law.⁴⁰⁷ Such foundational principles of international order vest within the occupation framework. They are inherent to the principle of temporality and their assurance logically compels termination. Should an occupying power choose to pursue permanent control, the proposed normative approach will strip away the façade provided by a factual conception of occupation. It will pivot the accompanying discourse from perpetual management to termination. And it will facilitate appeals to fundamental norms, neglected by the prominent interpretative approach, but which constitute cornerstones of the international order.

CONCLUSION

Israel's occupation of the West Bank has now reached fifty years in duration. It demonstrates little prospect of subsiding. Within this occupied landscape, strong legacies have been forged.

⁴⁰³ See, e.g., G.A. Res. 3314 (XXIX), art 3(a), annex (Dec. 14, 1974).

⁴⁰⁴ JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* 271–349 (2010).

⁴⁰⁵ See, e.g., *Latest Developments*, CYPRUS MINISTRY FOREIGN AFF., http://www.mfa.gov.cy/mfa/mfa2016.nsf/mfa09_en/mfa09_en?OpenDocument (last visited Oct. 31, 2018).

⁴⁰⁶ See, e.g., Permanent Rep. of Cyprus to the U.N., Letter Dated May 29, 2001 from the Permanent Rep. of Cyprus to the United Nations Addressed to the Secretary-General, U.N. Doc. A/55/970-S/2001/541 (May 31, 2001).

⁴⁰⁷ JACOVIDES, *supra* note 384, at 234.

These extend from clearly identifiable spaces that constitute settlements and their associated infrastructure to the increasingly fraught relations between the Israelis and Palestinians who live amongst these spaces—settler and indigenous; occupying power and protected person; other and other. IHL and the occupation framework are intended to manage these relations and confront their potential legacies so as they do not become eternal features of the conflict. With the passage of time, however, and the construction of a status quo, the traditional occupation framework has proven incapable of regulating the inevitabilities and challenges of prolonged occupation.

The proposals within this article, of a good faith obligation to enable termination, of a holistic notion of temporality, offer an amended normative approach. This approach is grounded in general principles of international law. It exclusively focuses, however, on the obligations of the occupying power. This is not intended to discount or undervalue the role the Palestinians and their leadership in Ramallah must assume to facilitate the occupation's termination and the normalization of relations with Israel. Instead, this singular focus acknowledges the position of strength that an occupying power assumes. Over the course of prolonged occupation, Israel's presence has become entrenched. As such, it faces a significant burden and responsibility in realizing the occupation's termination. The good faith obligation attempts to ensure that the occupying power is unable to apply the existing framework so as to indefinitely defer the consequences of this burden.

Naturally, this only represents a point of departure within the confines of international law. Many questions remain and untold obstacles will present. The good faith obligation to enable termination does not represent the extent to which the occupation framework requires reevaluation. Nor has this article considered all of the shortcomings or challenges of international law's relationship with prolonged occupation. Instead, the approach proposed here recognizes how a factual or *alegal* conception of occupation threatens the fundamental principles conveyed by the framework itself. In response, the good faith obligation is intended to challenge the legally manufactured status quo that has facilitated the occupation's duration. It must, however, remain conscious of its own limitations and recognize that international law—an amended legal framework or normative structure—does not provide all of the answers to the challenges or unintended consequences presented by prolonged occupation and entrenched conflict. Yet it may better contribute to their redress.

In relation to the West Bank, this is particularly pertinent. Many in Israel have long recognized that the occupation presents a self-imposed existential dilemma. This stems from the demographic realities of the West Bank's Palestinian population, which with the Palestinian citizens of Israel, will eventually become a majority. The consequences of this were succinctly conveyed by former Israeli Prime Minister Ehud Barak: "As long as in this territory west of the Jordan River there is only one political entity called Israel it is going to be either non-Jewish, or non-democratic."⁴⁰⁸

⁴⁰⁸ Rory McCarthy, *Barak: Make Peace with Palestinians or Face Apartheid*, GUARDIAN (Feb. 2, 2010), <http://www.theguardian.com/world/2010/feb/03/barak-apartheid-palestine-peace>.

The traditional occupation framework allows this dilemma to remain unaddressed. It facilitates a status quo that is viewed as indeterminate and legally neutral but in which specific violations, like settlement construction, create a far more powerful reality that frustrates the entire enterprise and purpose of the framework. The imposition of the good faith obligation may not directly result in the freeze of settlement development or the termination of the occupation. It can, however, move an occupying power to confront and no longer benefit from a manufactured status quo that has developed under the guise of the occupation framework. It can limit appeals to a facilitatory interpretation that discounts normative content.

Israeli society has long been split—left and right—in its response to the demographic dilemma posed by the occupation. This is often viewed as a point of ideological departure. It has defined elections and distinguishes political parties. The left favors recognition of the occupation, acceptance of its governing framework, and its eventual termination in accordance with a two-state solution and Palestinian self-determination. The right continues to deny its status, preferencing security justifications, and an accompanying notion of a Greater Israel. Yet when viewed in collaboration with the means by which international law has been engaged by proponents of settlement development, and those wishing to perpetuate the occupation, this fundamental political distinction presents an unexpected paradox.

While the occupation framework is most likely to be received by those who favor the occupation's termination and to be rejected by those who oppose territorial compromise, Joseph Weiler describes how the traditional framework favors rejectionists:

It is exactly here that the construct of belligerent occupation can be manipulated. For it presents those who would wish to retain the Territory with the preferred position: You exercise control over the territory (as a belligerent occupant) but you are able to deny the local citizens any political rights since they do not become citizens of the occupying state – and all of this with the penumbra of legality accorded to this status in international law. Legally you get the land without the people.⁴⁰⁹

The good faith obligation reemphasizes the normative structure of the traditional framework. It recognizes that with prolonged occupation, the traditional framework can serve as an unwilling accomplice, but an accomplice nonetheless, to the occupation's protraction and thus the conflict's perpetuation. Adopting a good faith obligation to enable termination, triggered by prolonged occupation, will begin to strip the occupying power of an indeterminate, legally-confirmed status that permits it to indefinitely maintain an advantageous status quo. Instilling a requirement to act in accordance with prolonged occupation's termination, the occupying power will be reduced in its ability to use the occupation framework as a legal guise to avoid the consequences of its prolonged occupation. Facing such consequences may prove a more

⁴⁰⁹ Joseph H.H. Weiler, *Israel, the Territories and International Law: When Doves are Hawks*, in *ISRAEL AMONG THE NATIONS: INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVES ON ISRAEL'S 50TH ANNIVERSARY* 381, 390 (Alfred E. Kellermann, Kurt Siehr & Talia Einhorn eds., 1998).

powerful motivator to move towards the occupation's termination than any codified legal provision has or could.

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

DAVID HUGHES*

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.

CONTENTS

I	Introduction	2
II	The Principle of Complementarity and the Obligation to Investigate	
	Violations of International Humanitarian Law	9
	A The Principle of Complementarity	10
	B The Obligation to Investigate Non-Criminal Violations of International Humanitarian Law.....	16
III	International Law, Legitimacy and the Use of Force	19
	A Israel's Early Appeals to International Law and Legitimacy.....	23
	B Lebanon and an Increased Reliance on International Law	25
IV	Investigation as Legitimation: Informal Complementarity and Gaza.....	31
	A The 2008–09 and 2014 Gaza Wars	34
	B Establishing Legal Capability and Esteem	39
	C Asserting Appropriateness and Standing.....	43
	D Development of a Legal Narrative through General Investigations of State Conduct.....	45
	E The Employment of Individual Criminal Proceedings	52

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V	Conclusion: The Uncertain Efficacy and Inherent Tension of Informal Complementarity	58
VI	Addendum	62

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'.¹ 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*')² and under art 12(3) of the founding treaty accepted ICC jurisdiction over alleged crimes committed throughout the Palestinian territories since 13 June 2014.³ 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.⁴ Predictably, the Israeli response to the Prosecutor's announcement was harsh, constituting a near ontological attack on the Court.⁵ 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'.⁶

¹ 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>>.

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

³ 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> archived at <<https://perma.cc/8U8Q-FA3C>>.

⁴ 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.

⁵ 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>>.

⁶ 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.⁷ In September 2016, Israel acquiesced to the Prosecutor's request to visit the region in coordination with the Court's preliminary inquiry.⁸ 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'.⁹

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.¹⁰ 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.¹¹ It incentivises domestic redress of international crimes by premising international intervention upon the absence of national proceedings.¹²

The obligation to investigate non-criminal violations of IHL compels states to monitor and assess compliance with *their* legal commitments.¹³ 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

⁷ 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>>.

⁸ 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>>.

⁹ Ravid, 'Netanyahu Weighs International Criminal Court', above n 8.

¹⁰ 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.

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

¹² 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.

¹³ 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.¹⁴

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.¹⁵ 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.¹⁶ 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.¹⁷ These queries, however, commonly fixate on formal legal questions. Often, they seek to reach

¹⁴ 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.

¹⁵ 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>>.

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

¹⁷ 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.¹⁸

These debates often allude to (or conflate) the principle of complementarity and the obligation to investigate non-criminal violations of IHL.¹⁹ 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'.²⁰ Valentina Azarova, for example, argued that 'Israel, well aware of the complementarity principle, is clearly taking steps to shield itself from ICC investigation'.²¹ 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.²²

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.²³

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.²⁴

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'.²⁵

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

¹⁸ 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.

¹⁹ See Hampson, above n 10, 16.

²⁰ 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.

²¹ Azarova, above n 20.

²² *Ibid.*

²³ Luban, above n 17 (emphasis added).

²⁴ Moreno Ocampo, above n 17.

²⁵ *Ibid.*

potential petition to the ICC inadmissible.²⁶ The other interpreted these same actions as a nefarious strategy designed to insulate the state from the Court's oversight.²⁷ 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.²⁸ 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.²⁹

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

²⁶ See Dershowitz, above n 17.

²⁷ 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> archived at <<https://perma.cc/XW7X-37HS>>.

²⁸ 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.

²⁹ See *Rome Statute* art 53(1).

art 17 of the *Rome Statute*, often do not fit with reality.³⁰ 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.³¹

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.³² 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*.³³

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.

³⁰ 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.

³¹ Ibid.

³² 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*’).

³³ 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.³⁴ 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 20th century — in Moscow, of Klaus Barbie, Slobodan Milošević, Saddam Hussein and others.³⁵ 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

³⁴ 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).

³⁵ 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.³⁶

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.³⁷ This blurs the formal distinction between

³⁶ 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.³⁸ 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.³⁹

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.⁴⁰

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

³⁷ 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*').

³⁸ 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, 61st sess, Agenda Item 17, UN Doc E/CN.4/2005/102/Add.1 (8 February 2005).

³⁹ 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.

⁴⁰ 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.⁴¹ 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.⁴²

Complementarity builds upon a succession of developments that occurred throughout the 20th century.⁴³ Most commonly, though, while various notions of complementarity have long existed, it is prominently associated with the ICC and the Court's jurisdictional governance.⁴⁴ Though the *Rome Statute* does not explicitly reference complementarity, the principle is articulated throughout art 17.⁴⁵ 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.⁴⁶

⁴¹ 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.

⁴² 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.

⁴³ 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.

⁴⁴ 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.

⁴⁵ 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.

⁴⁶ *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.⁴⁷ 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.⁴⁸ 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.⁴⁹ 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.⁵⁰

The criterion of 'unwillingness' is of more immediate relevance.⁵¹ 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'.⁵²

- (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.

⁴⁷ 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.

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

⁴⁹ 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.

⁵⁰ 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> 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).

⁵¹ 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.

⁵² 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.⁵³ 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.⁵⁴ 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.⁵⁵

Mohammed El Zeidy notes that the unwillingness requirement in art 17 is a 'test of the good faith of national authorities'.⁵⁶ The article's second paragraph provides preconditions to assure the test's effectiveness.⁵⁷ 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)⁵⁸ the orchestration of sham proceedings.⁵⁹ Still, it is difficult to qualify the totality of circumstances that may

⁵³ 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*').

⁵⁴ 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.

⁵⁵ *Rome Statute* arts 17(2)(a)–(c).

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

⁵⁷ *Ibid.*

⁵⁸ Mégret, above n 30, 376.

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

constitute shielding.⁶⁰ 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'?'⁶¹

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'.⁶² Historically, states were exceedingly reluctant to dilute sovereign rights and resisted initiatives to delegate their bestowed prerogatives beyond local structures.⁶³ 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.⁶⁴ 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.⁶⁵ 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.⁶⁶

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

⁶⁰ See *ibid.*

⁶¹ 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].

⁶² 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, 2nd ed, 2003) 301.

⁶³ 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.

⁶⁴ 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.

⁶⁵ 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.

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

international crimes that may come within its mandate.⁶⁷ Complementarity recognises that in many instances domestic legal systems are best suited to ensure appropriate remedies.⁶⁸ In practice, the Court would rather defer to a functional domestic system to provide protection and ensure against impunity.⁶⁹ 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.⁷⁰

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.⁷¹

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.⁷² 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.

⁶⁷ 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> 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.

⁶⁸ Sainati, above n 41, 204–5.

⁶⁹ *Complementarity in Practice*, above n 47, 3.

⁷⁰ 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> archived at <<https://perma.cc/7U6L-STZG>>.

⁷¹ 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.

⁷² 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’.⁷³ IHL provides states with the obligation to investigate non-criminal violations. Prominently, violations of IHL involve individual conduct.⁷⁴ The *Geneva Conventions*, however, address both individual criminal liability and the civil responsibility of states for the commission of international crimes and wrongful acts.⁷⁵ 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’.⁷⁶

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 ...⁷⁷

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.⁷⁸

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

⁷³ 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.

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

⁷⁵ 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*’).

⁷⁶ Sassòli, above n 74, 402.

⁷⁷ ‘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.

⁷⁸ Bonafè, above n 34, 71.

required investigations.⁷⁹ Instead, the substance and source of the obligation to investigate is derived from international human rights law.⁸⁰ 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*⁸¹ as presenting an affirmative duty to ‘prevent, investigate and punish any violation of the rights recognized by the Convention’.⁸² Several international human rights treaties, including the *International Covenant on Civil and Political Rights* (‘ICCPR’)⁸³ and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (‘CAT’),⁸⁴ contain language obliging states to undertake investigations of alleged legal violations.⁸⁵ 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*.⁸⁶ Further, in *Resolution 60/147* the General Assembly affirmed the

⁷⁹ 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, 56th sess, 85th 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.

⁸⁰ 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.

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

⁸² 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.

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

⁸⁴ *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’).

⁸⁵ See Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation on States Parties to the Covenant*, 80th sess, 2187th 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*’).

⁸⁶ 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.⁸⁷ 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.⁸⁸

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*.⁸⁹ This supposes a state obligation to both prevent violations and to act should a violation occur.⁹⁰ While the regulation of grave breaches instils individual criminal responsibility,⁹¹ 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'.⁹² 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.⁹³

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

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.

⁸⁷ 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, 60th sess, Agenda Item 71(a), UN Doc A/RES/60/147 (21 March 2006).

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

⁸⁹ 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.

⁹⁰ 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>>.

⁹¹ Hampson, above n 10, 13.

⁹² *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.

⁹³ 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.⁹⁴

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.⁹⁵ They argue and interpret the relevant provisions of international law and present corroborating facts to support their claim and assert legitimacy.⁹⁶ 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.⁹⁷ 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 2006.⁹⁸ States have long acknowledged an interconnectedness between legitimacy and the use of force.⁹⁹ M Cherif Bassiouni dates this relationship to antiquity.¹⁰⁰ From this time, states have coupled initiations of force with appeals to the legitimacy of their actions.¹⁰¹ International relations scholars ponder the source, purpose and effects of these

⁹⁴ 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/>>.

⁹⁵ 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.

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

⁹⁷ Ibid 34.

⁹⁸ 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.

⁹⁹ 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.

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

¹⁰¹ 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.¹⁰² Though these considerations are beyond the present scope, a broad recognition has emerged, that from at least the latter half of the 20th century, international law influences appeals to legitimacy. It now provides states a vocabulary to justify (or contest) the use of force.¹⁰³

It is, of course, possible to distinguish between legitimacy and legality.¹⁰⁴ However, since the post-World War II shift towards international institutions, the *Charter of the United Nations* ('*UN Charter*') prohibition of the use of force¹⁰⁵ 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'.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹

Law is also framed as an excuse. Critical legal scholars have traced the evolution of law's humanising endeavours.¹¹⁰ 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

¹⁰² 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, 2nd 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.

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

¹⁰⁴ 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.

¹⁰⁵ *Charter of the United Nations* art 2(4) ('*UN Charter*').

¹⁰⁶ 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.

¹⁰⁷ 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.

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

¹⁰⁹ *Ibid.*

¹¹⁰ 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.¹¹¹ 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.¹¹²

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.¹¹³ 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.¹¹⁴ Despite international law's acknowledged weaknesses — its deficient enforcement mechanisms and the absence of formal requirements compelling legal justifications — states willingly invoke law.¹¹⁵ 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.¹¹⁶

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'.¹¹⁷ 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'.¹¹⁸ 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.¹¹⁹ 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.¹²⁰

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

¹¹¹ 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.

¹¹² Kennedy, 'Lawfare and Warfare', above n 111, 160.

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

¹¹⁴ Kritsiotis, 'When States Use Armed Force', above n 106, 46.

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

¹¹⁶ See *One Humanity: Shared Responsibility — Report of the Secretary-General for the World Humanitarian Summit*, UN GAOR, 70th 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.

¹¹⁷ Armstrong and Farrell, above n 99, 10.

¹¹⁸ 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.

¹¹⁹ Hurrell, above n 102, 24.

¹²⁰ Ibid 24–5.

become ‘the rhetoric through which we debate and assert the boundaries of warfare’.¹²² 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.¹²³

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.¹²⁴ 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.¹²⁵ 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.¹²⁶

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.¹²⁷ 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*.

¹²¹ Kennedy, above n 96, 5.

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

¹²³ Kennedy, above n 96, 41.

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

¹²⁵ 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.

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

¹²⁷ 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’.¹²⁸ 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.¹²⁹ 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 20th century.¹³⁰

In 1948 Israel achieved statehood and a war began.¹³¹ In response to the Security Council, Israeli officials sought to illustrate the conformity of their actions with the *UN Charter*.¹³² 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.¹³³

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).¹³⁴ 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’.¹³⁵ 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

¹²⁸ 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).

¹²⁹ 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.

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

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

¹³² 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 295th Meeting Held on 18 May 1948*, UN SCOR, 295th sess, UN Doc S/753 (18 May 1948).

¹³³ *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.

¹³⁴ *Ibid.*

¹³⁵ *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.¹³⁶

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.¹³⁷

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.¹³⁸ 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.¹³⁹ 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.¹⁴⁰ 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.¹⁴¹

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.¹⁴²

¹³⁶ Ibid.

¹³⁷ 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.

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

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

¹⁴⁰ 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, 5th sess, 1526th plen mtg, Agenda Item 5, UN Doc A/PV.1526 (19 June 1967) 6 [82]. See also UN SCOR, 1348th mtg, UN Doc S/PV.1348 (6 June 1967) [49], [74], [113], [114].

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

¹⁴² 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.¹⁴³ 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.¹⁴⁴ 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 2000.¹⁴⁵ 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'.¹⁴⁶

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.¹⁴⁷ International efforts to produce a ceasefire were initially blocked by the

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

¹⁴⁴ *Ibid* 3–4.

¹⁴⁵ 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*').

¹⁴⁶ Harel and Issacharoff, above n 143, 76.

¹⁴⁷ 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.¹⁴⁸ When the UN-brokered ceasefire came into effect on 13 August, approximately 1200 Lebanese and over 40 Israeli civilians had been killed.¹⁴⁹

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.¹⁵⁰ 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.¹⁵¹

Initially, Israel's decision to launch a military operation received qualified international support.¹⁵² 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.¹⁵³ In response, Israel faced mounting condemnation.¹⁵⁴ 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.¹⁵⁵ Kofi Annan condemned the attack.¹⁵⁶ The Security Council expressed 'shock and distress'.¹⁵⁷ Following the conflict, the *UN Soares Report* held:

¹⁴⁸ 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>>.

¹⁴⁹ 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*, 3rd 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.

¹⁵⁰ See *Preserving Humanitarian Principles*, above n 145.

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

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

¹⁵³ Harel and Issacharoff, above n 143, 78–82.

¹⁵⁴ 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.

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

¹⁵⁶ 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.¹⁵⁸

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.'¹⁵⁹ It held that '[t]he particularly tragic impact on civilians and civilian property is certainly due to this deficit.'¹⁶⁰ 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.¹⁶¹

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.¹⁶²

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.¹⁶³ Israel claimed these facilities served dual-use purposes.¹⁶⁴ 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.¹⁶⁵ Al-Manar purportedly relayed messages to terrorists and incited acts of violence.¹⁶⁶ Israel claimed that pursuant to the Committee established to

¹⁵⁷ 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, 5499th mtg, UN Doc S/PV.5499 (30 July 2006).

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

¹⁵⁹ *Ibid* 27 [80].

¹⁶⁰ *Ibid*.

¹⁶¹ *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*.

¹⁶² *Ibid*.

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

¹⁶⁴ *Ibid*; *Preserving Humanitarian Principles*, above n 145.

¹⁶⁵ 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).

¹⁶⁶ See *Preserving Humanitarian Principles*, above n 145.

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

The Israeli assault on Qana was immediately described as a war crime.¹⁶⁸ 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.¹⁶⁹ The IDF were adjudged to have used disproportionate force. They were censured for the deaths of civilians.¹⁷⁰ Again, in response, Israel claimed that its actions did not constitute a violation of international law.¹⁷¹ 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.¹⁷²

In Jerusalem and at The Kirya in Tel Aviv, politicians and military officials discussed the likely international reactions to Israel's proposed response.¹⁷³ 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.¹⁷⁴ Military lawyers were deployed in theatre to evaluate proposed targets. They received broad discretion to veto targets that contravened IHL.¹⁷⁵ 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.¹⁷⁶

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

¹⁶⁷ 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.

¹⁶⁸ 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>>.

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

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

¹⁷¹ 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.

¹⁷² *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>>.

¹⁷³ Harel and Issacharoff, above n 143, 79–80.

¹⁷⁴ *Ibid* 86.

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

¹⁷⁶ *Ibid*.

an unprecedented international role in defending the legality of the war and mitigating legitimacy costs to the state.¹⁷⁷ Advocacy professed compliance. Daniel Reisner, the former head of the ILD, provided the Israeli Government's response to a Human Rights Watch report.¹⁷⁸ The report claimed the high numbers of civilian casualties resulted from Israel's failure to distinguish between military objectives and civilian objects.¹⁷⁹ 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*.¹⁸⁰

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.¹⁸¹ 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.¹⁸² 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.¹⁸³ The Winograd Commission was formed to evaluate political and military decision-making within the much-maligned campaign.¹⁸⁴ Testimonies from Attorney-General Mazuz and Mandelblit described the function of IDF lawyers and their

¹⁷⁷ 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.

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

¹⁷⁹ 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>>.

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

¹⁸¹ Kennedy, above n 96, 41.

¹⁸² 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.

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

¹⁸⁴ 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.¹⁸⁵ The Commission criticised what it perceived as an unnecessary deference to international law. It accused Mazuz of ‘taking international law too seriously’.¹⁸⁶ 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.¹⁸⁷ In order to both avoid criticism and to ensure against individual responsibility, the Attorney-General stressed international law’s strategic importance and legitimising potential.¹⁸⁸

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.¹⁸⁹ Although little direct attention was paid to the legitimising potential of formal investigations, this soon would change as Israel’s security and

¹⁸⁵ 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>>.

¹⁸⁶ *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.

¹⁸⁷ Craig, *The Struggle for Legitimacy*, above n 185, 34–5.

¹⁸⁸ 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.

¹⁸⁹ 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.¹⁹⁰

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.¹⁹¹ 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.¹⁹² The operation was condemned throughout the international community but Israel initially refused to conduct criminal

¹⁹⁰ 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.

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

¹⁹² 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.¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵

Following the Second Lebanon War, however, Israel had become increasingly mindful of international law's strategic potential.¹⁹⁶ 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'.¹⁹⁷ When a Spanish court began proceedings against a number of high-level Israeli officials a year later,

¹⁹³ 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.

¹⁹⁴ 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> archived at <<https://perma.cc/7R98-DNCC>>.

¹⁹⁵ 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>>.

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

¹⁹⁷ 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> 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.¹⁹⁸ Israel replied to the Spanish authorities that the Shehadeh incident was subject to a domestic inquiry. This would establish whether criminal proceedings were necessary.¹⁹⁹ The Israeli communication claimed that Spanish jurisdiction would infringe upon Israeli sovereignty, violate the principle of subsidiarity and contradict the principle of complementarity.²⁰⁰ 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.²⁰¹

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.²⁰² 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.

¹⁹⁸ 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.

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

²⁰⁰ 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.

²⁰¹ 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.

²⁰² *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.²⁰³ 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.²⁰⁴ 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.²⁰⁵

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'.²⁰⁶ Israeli society galvanised around the abduction and killing of the three students.²⁰⁷ 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.²⁰⁸

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

²⁰³ 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>>.

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

²⁰⁵ 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>>.

²⁰⁶ 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>>.

²⁰⁷ 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>>.

²⁰⁸ 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> 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.²⁰⁹

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.²¹⁰ As formal hostilities ceased, the parties presented competing legal narratives. Each vied for legitimacy.²¹¹ 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.²¹² 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.²¹³

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

²⁰⁹ See generally Thrall, above n 208, 11.

²¹⁰ 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, 6063rd 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, 2nd ed, 2013) 379–80.

²¹¹ 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>>.

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

²¹³ *Ibid.*

their policies'.²¹⁴ 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.²¹⁵

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.²¹⁶ 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.²¹⁷

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

²¹⁴ 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.

²¹⁵ 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, 6060th 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.

²¹⁶ 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, 10th 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>.

²¹⁷ 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.²¹⁸ These presented detailed accusation of legal violations by Israeli and Palestinian actors.²¹⁹ The most serious accusations were contained within the 2009 *Goldstone Report* and would become the source of considerable controversy.²²⁰ The report held that Israel had deliberately targeted Gaza's civilian population as part of its military operation.²²¹ 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.²²² Hamas was held to have, inter alia, engaged in indiscriminate attacks against a civilian population, actions which could amount to war crimes.²²³

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.²²⁴ Prime Minister Netanyahu announced

²¹⁸ 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, 12th 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*, 29th sess, Agenda Item 7, UN Doc A/HRC/29/CRP.4 (24 June 2015) ('*Report of the Detailed Findings of the Independent Commission*').

²¹⁹ 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, 9th sess, 3rd 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, 21st 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.

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

²²¹ *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].

²²² 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].

²²³ *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].

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

that such efforts must, in turn, be delegitimised.²²⁵ 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*.²²⁶ 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.²²⁷

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*)'.²²⁸ Israel addressed these accusations through a series of reports following both the 2008–09 and 2014 Gaza wars.²²⁹ The reports,

²²⁵ Ravid, 'Delegitimization of Israel', above n 211.

²²⁶ 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.

²²⁷ 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>. 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.

²²⁸ Sharvit Baruch, above n 190, 66.

²²⁹ 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*.²³⁰ 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

²³⁰ 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’.²³¹ 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.²³² When the Prosecutor initiates proceedings, she will often begin by examining an ‘entire situation’ before identifying specific cases for direct scrutiny and potential prosecution.²³³

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.²³⁴ 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.²³⁵

²³¹ Ravid, ‘Netanyahu Weighs International Criminal Court’, above n 8.

²³² 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> archived at <<https://perma.cc/LGW4-7TA5>>; Stigen, above n 14, 88.

²³³ 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.

²³⁴ 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.

²³⁵ 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.²³⁶ 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’.²³⁷ 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.²³⁸

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.²³⁹ 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’.²⁴⁰ 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.²⁴¹ 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’.²⁴²

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

²³⁶ See Weill, above n 191, 631.

²³⁷ *Operation in Gaza Report*, above n 32, 107 [283].

²³⁸ *Ibid* [306].

²³⁹ 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].

²⁴⁰ *Ibid* [312].

²⁴¹ *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, 64th sess, Agenda Item 64, UN Doc A/64/651 (4 February 2010) annex I (‘*Gaza Operation Investigations: An Update*’) 7, 10, 31–7.

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

Report.²⁴³ 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.²⁴⁴ 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.²⁴⁵

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.²⁴⁶ 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.²⁴⁷

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

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

²⁴⁴ 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*, 15th sess, Agenda Item 1, UN Doc A/HRC/15/21 (27 September 2010).

²⁴⁵ 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 32nd 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].

²⁴⁶ 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].

²⁴⁷ 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'.²⁴⁸ It claimed it is *capable* of fulfilling the requirements of the state's investigatory obligations.²⁴⁹ 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.²⁵⁰

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.²⁵¹ Following Operations Cast Lead and Protective Edge, Israel expressed willingness to investigate incidents in which the IDF were accused of violating international law.²⁵² 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'.²⁵³

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

²⁴⁸ 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, 15th 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*').

²⁴⁹ See Mandelblit and Aviram, above n 247.

²⁵⁰ 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>.

²⁵¹ 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.

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

²⁵³ 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'.²⁵⁴ 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.²⁵⁵

The Second Turkel Commission Report accentuates the appropriateness of domestic jurisdiction.²⁵⁶ 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.²⁵⁷ Complementarity, in part, appeased state concerns. It was presented to ensure that states would retain 'investigative and prosecutorial priority'.²⁵⁸ 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

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

²⁵⁵ *Operation in Gaza Report*, above n 32, 117 n 256.

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

²⁵⁷ 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.

²⁵⁸ 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.²⁵⁹ 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.²⁶⁰ 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).²⁶¹

²⁵⁹ 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.

²⁶⁰ Weizman, above n 196, 90. See generally Amichai Cohen, above n 177, 367.

²⁶¹ 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\(loetsz0npwuzelkraw3utlok\)\)/he/publication/Articles/Pages/2015.1.20-Tzuk-Eitan.aspx?AspxAutoDetectCookieSupport=1](http://www.mevaker.gov.il/(X(1)S(loetsz0npwuzelkraw3utlok))/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.²⁶² 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.²⁶³

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.²⁶⁴ Investigations of military actions remained mindful of this context. They were evaluated alongside a narrative of defence against a persistent,

²⁶² Sharvit Baruch, above n 190, 66.

²⁶³ *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].

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

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

Hammas' 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.²⁶⁶

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.²⁶⁷ 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.²⁶⁸

The Israeli reports, and the results of the various investigations, were in part a response to the demands of the international community.²⁶⁹ Following both the 2008–09 and 2014 Gaza wars, Israel expressed willingness to investigate any credible allegation of legal wrongdoing.²⁷⁰ 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.²⁷¹ After its initial response, the IDF conducted an overarching examination of its conduct during Operation Cast Lead. This was

²⁶⁵ Ibid 118 [315].

²⁶⁶ Ibid 8–9 [26] (emphasis in original).

²⁶⁷ Sharvit Baruch, above n 190, 66.

²⁶⁸ 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, 6063rd 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.

²⁶⁹ '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].

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

²⁷¹ *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.²⁷²

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'.²⁷³ 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.²⁷⁴ 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.²⁷⁵

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.²⁷⁶ 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'.²⁷⁷ 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

²⁷² 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>.

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

²⁷⁴ Ibid.

²⁷⁵ Ibid [617].

²⁷⁶ 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.

²⁷⁷ *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.²⁷⁸ 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.²⁷⁹ These resulted in numerous casualties, a torrent of international condemnation and competing discourses regarding the legitimacy of the IDF's targeting determinations.²⁸⁰ 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.²⁸¹ 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

²⁷⁸ 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].

²⁷⁹ 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>>.

²⁸⁰ 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>>.

²⁸¹ 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.²⁸² 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.²⁸³ 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.²⁸⁴ Numerous factual assertions were offered in substantiation of Israel's claim that the Gazan police forces served a military function.²⁸⁵ 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.²⁸⁶ Within these circumstances, police forces constitute a legitimate military target.²⁸⁷

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.²⁸⁸ This reading provided Israel with an advantageously interpreted legal framework, under which incident-specific evaluations were

²⁸² 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> archived at <<https://perma.cc/43NR-EG8D>>.

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

²⁸⁴ 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, 64th sess, Agenda Item 64, UN Doc A/64/890 (11 August 2010) annex I ('*Gaza Operation Investigations: Second Update*') 64 [82].

²⁸⁵ 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].

²⁸⁶ *Ibid* 89 [238].

²⁸⁷ *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.

²⁸⁸ 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.²⁸⁹ 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'.²⁹⁰ Despite the professed legality of the attack, a number of civilians had been killed while shopping at a nearby market.²⁹¹ 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.²⁹²

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.²⁹³ 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

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

²⁹⁰ *Ibid* 24 [83].

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

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

²⁹³ 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.²⁹⁴ 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.²⁹⁵ 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.²⁹⁶ 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

²⁹⁴ 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> archived at <<https://perma.cc/4PLM-JQRH>>.

²⁹⁵ Nye Jr, above n 276, 10.

²⁹⁶ 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'.²⁹⁷ 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.²⁹⁸

Israeli officials have of course, recognised the importance of individual prosecutions as a means of ensuring domestic accountability, discipline and structure within the IDF.²⁹⁹ 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.³⁰⁰ The Turkel Commission sought to facilitate these efforts.³⁰¹ 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*'.³⁰²

Israel presented its post-conflict investigative efforts as in accordance with international obligations.³⁰³ 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.'³⁰⁴ Investigations were conducted by the Military Police Criminal

²⁹⁷ 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>>.

²⁹⁸ 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>. 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*').

²⁹⁹ 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>>.

³⁰⁰ Sharvit Baruch, above n 190, 70.

³⁰¹ Harel, 'Preempting The Hague', above n 40.

³⁰² *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'.

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

³⁰⁴ *Operation in Gaza Report*, above n 32, 107 [284].

Investigation Division ('MPCID'), the MAG and the Military Courts.³⁰⁵ The scope of these investigations was considerable. They included legal assessments of numerous incidents that had evoked concern amongst international observers.³⁰⁶ 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.³⁰⁷ 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.³⁰⁸

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.³⁰⁹ 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'.³¹⁰ In cases where investigations found that international law had been breached, such breaches also constituted violations of the IDF's rules of engagement.³¹¹ In one incident 'a Brigadier General and a Colonel had authorized the firing of

³⁰⁵ Ibid 108 [286].

³⁰⁶ 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].

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

³⁰⁸ 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].

³⁰⁹ 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].

³¹⁰ *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].

³¹¹ 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'.³¹² This was held to be a violation of IDF orders limiting the use of artillery fire in such areas.³¹³

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.³¹⁴ The principal Israeli report noted the significant number of complaints that Israel had received and was reviewing following the war.³¹⁵ 126 incidents were under consideration by March 2015.³¹⁶ 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.³¹⁷

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.³¹⁸ 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

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

³¹³ 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.*

³¹⁴ *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].

³¹⁵ *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].

³¹⁶ *2014 Gaza Conflict Report*, above n 53, 233 [449].

³¹⁷ *Ibid* 234 [452].

³¹⁸ *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.³¹⁹

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.³²⁰ 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.³²¹

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

³¹⁹ Ibid.

³²⁰ 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].

³²¹ 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*, 16th 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.³²² 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.³²³ Some remained pending and many had been closed.³²⁴ 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.³²⁵

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.³²⁶ 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'.³²⁷ 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.³²⁸ Soon after, however, the IDF announced that it was investigating the events.³²⁹

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'.³³⁰ In accordance, the MAG began a formal investigation.³³¹ 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

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

³²³ 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>>.

³²⁴ 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*.

³²⁵ *Ibid*.

³²⁶ 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>>.

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

³²⁸ Pfeffer, above n 326.

³²⁹ *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>>.

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

³³¹ *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.³³² 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'.³³³ The attack was not 'expected to result in any collateral damage to civilians or to civilian property' and several precautionary measures were taken.³³⁴

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.³³⁵

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.³³⁶ 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.³³⁷ 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.

³³² Ibid.

³³³ Ibid.

³³⁴ Ibid.

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ 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.³³⁸ 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.³³⁹ 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 war³⁴⁰ — 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'.³⁴¹ 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.³⁴²

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

³³⁸ See, eg, Byers, *War Law*, above n 103, 3.

³³⁹ 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.

³⁴⁰ 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> archived at <<https://perma.cc/CG45-TTMD>>.

³⁴¹ Goldstone, above n 340.

³⁴² *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.³⁴³

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.³⁴⁴ The conclusion, however, that '[i]f a state is unwilling, it will generally be unwilling all the way'³⁴⁵ 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.³⁴⁶ 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'.³⁴⁷

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

³⁴³ 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>>.

³⁴⁴ Mégret, above n 30, 376.

³⁴⁵ *Ibid.*

³⁴⁶ See, eg, Luban, above n 17; Moreno Ocampo, above n 17; Dershowitz, above n 17; Azarova, above n 20.

³⁴⁷ *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.³⁴⁸

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'.³⁴⁹

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'.³⁵⁰ 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.³⁵¹ The extent to which investigation as legitimisation facilitates the use of

³⁴⁸ 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.

³⁴⁹ See *Complementarity in Practice*, above n 47, 2.

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

³⁵¹ 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.³⁵² 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'.³⁵³ 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"'.³⁵⁴ 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.³⁵⁵ 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.³⁵⁶

The State Comptroller cited the strategic benefits of the proposed investigation when announcing its audit of the Gaza war.³⁵⁷ 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

³⁵² 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*').

³⁵³ Kershner, above n 250.

³⁵⁴ *State Comptroller Report 2018*, above n 352, 6.

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid* 6–7.

³⁵⁷ 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'.³⁵⁸ 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'.³⁵⁹ This is framed around contestations of legitimacy.³⁶⁰

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.³⁶¹ 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.³⁶² The Comptroller report, however, focuses abstractly on broader policy.³⁶³ 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.³⁶⁴ 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.³⁶⁵

³⁵⁸ *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.

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid* 19.

³⁶¹ 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.

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

³⁶³ 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'.

³⁶⁴ 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.

³⁶⁵ *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’.³⁶⁶

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’.³⁶⁷ 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*’.³⁶⁸

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

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.³⁷¹ 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.³⁷² 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.³⁷³ 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.³⁷⁴

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

³⁶⁶ Ibid 167.

³⁶⁷ Ibid 72.

³⁶⁸ 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].

³⁶⁹ *State Comptroller Report 2018*, above n 352, 79–80.

³⁷⁰ Ibid 78.

³⁷¹ See, eg, *ibid* 79, 144–65.

³⁷² 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.

³⁷³ Ibid 89.

³⁷⁴ 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.³⁷⁵

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.³⁷⁶ They become another means through which the state may contest and assert both the legitimacy of substance and the legitimacy of process.

³⁷⁵ Ibid 144.

³⁷⁶ Ibid 164–8.

WHAT DOES LAWFARE MEAN?

*David Hughes**

1. “LAWFARE DESCRIBES A METHOD OF WARFARE WHERE LAW IS USED AS A MEANS OF REALIZING A MILITARY OBJECTIVE.”2
2. “THE FIRST TYPE OF LAWFARE IS ASYMMETRICAL WARFARE. DURING THE RECENT CONFLICT WITH IRAQ, ALLIED FORCES WERE THE TARGET OF A PERSISTENT LAWFARE CAMPAIGN. EVEN BEFORE THE CONFLICT BEGAN, INTERNATIONAL ACTIVISTS USED LEGAL MEANS TO TRY TO DECLARE MILITARY ACTION ILLEGITIMATE. IN COORDINATION WITH IRAQI AUTHORITIES, HUMAN SHIELDS WERE POSITIONED AT PROSPECTIVE TARGETS TO DISRUPT AMERICAN WAR PLANS.”7
3. “OUR STRENGTH AS A NATION WILL CONTINUE TO BE CHALLENGED BY THOSE WHO EMPLOY A STRATEGY OF THE WEAK USING INTERNATIONAL FORA, JUDICIAL PROCESSES, AND TERRORISM.”14
4. “LAST YEAR THE AMERICAN CIVIL LIBERTIES UNION (ACLU) AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) ESTABLISHED THE JOHN ADAMS PROJECT TO “SUPPORT MILITARY COUNSEL AT GUANTANAMO BAY.” THE MISSION BEHIND THIS TREACHEROUS ENTERPRISE WAS TO IDENTIFY INTELLIGENCE OFFICERS INVOLVED IN INTERROGATING GUANTANAMO BAY

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- DETAINEES AND THEN PROVIDE THAT INFORMATION TO MILITARY DEFENSE ATTORNEYS REPRESENTING DETAINEES SO THAT THEY COULD ATTEMPT TO CALL INTELLIGENCE PERSONNEL TO TESTIFY.” 19
5. “AT THE BEGINNING OF THE TRIAL, ONCE MORE THE BROTHERS MUST INSIST ON PROVING THAT TORTURE WAS INFLICTED ON THEM BY STATE SECURITY [INVESTIGATORS] BEFORE THE JUDGE.” 26
6. “SUCH LAWFARE – THE MANIPULATION OF WESTERN LAWS AND JUDICIAL SYSTEMS TO ACHIEVE STRATEGIC MILITARY ENDS – OFTEN MANIFESTS AS FRIVOLOUS LAWSUITS DESIGNED TO SILENCE, PUNISH, AND DETER THOSE WHO PUBLICLY SPEAK AND REPORT ON MILITANT ISLAM, TERRORISM AND THEIR SOURCES OF FINANCING.” 31
7. “TRUTH BE TOLD, WE HAVE EVERY REASON TO EMBRACE LAWFARE, FOR IT IS VASTLY PREFERABLE TO THE BLOODY, EXPENSIVE, AND DESTRUCTIVE FORMS OF WARFARE THAT RAVAGED THE WORLD IN THE 20TH CENTURY...I WOULD FAR PREFER TO HAVE MOTIONS AND DISCOVERY REQUESTS FIRED AT ME THAN INCOMING MORTAR OR ROCKET-PROPELLED GRENADE FIRE.”35

1. “*LAWFARE DESCRIBES A METHOD OF WARFARE WHERE LAW IS USED AS A MEANS OF REALIZING A MILITARY OBJECTIVE.*”

— *Major General Charles J. Dunlap Jr., USAF (Ret.)*¹

When four planes, commandeered by al-Qaeda hijackers, struck the economic and military heart of the United States, international

1. Charles J. Dunlap, Jr., Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts 4 (Carr Ctr. Human Rights, John F. Kennedy Sch. Gov’t, Harvard Univ., Working Paper, 2001) [hereinafter Dunlap Working Paper].

law's relationship with terrorism, war, and national security was altered.² The proliferation and institutionalization of international law that had followed the Second World War was suddenly met with increased resistance.³ The term “lawfare,” upon entering the concurrent discourse, initially described what observers perceived as the novel use of international law within situations of traditional or asymmetrical conflict, before later developing into a blanket term of competing meanings.

Major General Charles J. Dunlap Jr. of the United States Air Force first popularized lawfare in a paper describing the challenges posed by international law when engaging in a modern military intervention. Lawfare, he posited, was an innovative form of warfare in which law was employed to achieve a traditional military objective.⁴ Years later Dunlap would evolve his understanding of the term, holding that lawfare constituted “the strategy of using – or misusing – law as a substitute for traditional military means to achieve a warfighting objective.”⁵ When Dunlap sought to define the term, he claimed ideological neutrality. Lawfare, like traditional weaponry, could be wielded for legitimate or illegitimate purposes.⁶ Furthermore, lawfare conveyed limited descriptive potential. Dunlap would later explain that lawfare was intended to focus “principally on circumstances where law can create the same or similar effects as those ordinarily sought from conventional warmaking approaches.”⁷ Yet when the term lawfare entered the public vernacular and policy

2. For a discussion of how the events of September 11, 2001 have effected or been used to justify a ‘new paradigm’ in international law, see Stephen P. Marks, *International Law and the ‘War on Terrorism’: Post 9/11 Responses by the United States and Asia Pacific Countries*, 1 ASIA PAC. L. REV. 43, 48 (2006). See also Anthea Roberts, *Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11*, 15 EUR. J. INT’L L. 721 (2004). See generally DOMINIC MCGOLDRICK, FROM 9-11 TO THE ‘IRAQ WAR 2003’: INTERNATIONAL LAW IN AN AGE OF COMPLEXITY (2004).

3. For a detailed and critical overview of the Bush Administration’s approach to international law, see JENS DAVID OHLIN, THE ASSAULT ON INTERNATIONAL LAW (2015).

4. As Dunlap recognized, the term is widely believed to have originated in a paper published as part of an edited volume in 1975. See Dunlap Working Paper, *supra* note 1. The authors used the term lawfare to decry the adversarial nature of western legal systems. See John Carlson & Neville Yeomans, *Whither Goeth the Law – Humanity or Barbarity*, in THE WAY OUT: RADICAL ALTERNATIVES IN AUSTRALIA 155 (David Crossley & Margaret Smith eds., 1975).

5. Charles J. Dunlap Jr., *Lawfare Today...and Tomorrow*, 87 INT’L L. STUD. SER. US NAVAL WAR COL. 315, 315 (2011) [hereinafter Dunlap Today and Tomorrow].

6. *Id.* at 315-16.

7. Charles J. Dunlap, Jr., *Does Lawfare Need an Apologia?*, 43 CASE W. RES. J. INT’L L. 121, 122 (2010) [hereinafter Dunlap Apologia].

discourses that followed the September 11th attacks, its meaning became blurred and its uses varied.

Today, there is no consensus as to lawfare's meaning.⁸ It has, however, moved from Dunlap's purportedly neutral connotations to assume a pejorative or polemic tone within popular and political speech.⁹ The propagation of the term lawfare that followed Dunlap's early framing of the neologism, its influence on the concurrent discourse, has occurred on the margins of the US-led War on Terror, though it is not limited to these events.

Within such a context, lawfare has evolved to describe and denounce various forms of international legal engagement.¹⁰ Often, though not exclusively, these usages are directed towards non-state actors: individuals, non-governmental organizations, international institutions, or sub-state militant groups. Descriptions or accusations of lawfare have occurred in relation to the general and the specific. Lawfare has been understood as the imposition or manipulation of international legal standards to confine traditional military means and operations and to limit both state responses to terrorism and the use of force.¹¹ Those who employ the precepts of international law, often before international fora, to shame countries like the United States or Israel have been accused of engaging in lawfare.¹² The use of human

8. See Michael P. Scharf & Elizabeth Andersen, *Is Lawfare Worth Defining? - Report of the Cleveland Experts Meeting - September 11, 2010*, 43 CASE W. RES. J. INT'L L. 11, 13-15 (2010); see also *Lawfare, the Latest in Asymmetries – Part Two*, COUNCIL ON FOREIGN REL. (May 22, 2003), <http://www.cfr.org/defense-and-security/lawfare-latest-asymmetries—part-two/p6191>; *Lawfare, the Latest in Asymmetries*, COUNCIL ON FOREIGN REL. (Mar. 18, 2003), <http://www.cfr.org/defense-and-security/lawfare-latest-asymmetries/p5772>.

9. David Luban, *Carl Schmitt and the Critique of Lawfare*, 43 CASE W. RES. J. INT'L L. 457, 458 (2010).

10. For a more detailed account of how the term “lawfare” has evolved since being reintroduced by Charles Dunlap, see Susan W. Tiefenbrun, *Semiotic Definition of Lawfare*, 43 CASE W. RES. J. INT'L L. 29, 51-57 (2011). See also Wouter G. Werner, *The Curious Career of Lawfare*, 43 CASE W. RES. J. INT'L L. 61 (2010).

11. For example, the position assumed by the Council on Foreign Relations described lawfare as “a strategy of using or misusing law as a substitute for traditional military means to achieve military objectives.” This understanding of lawfare does not differ from Dunlap's offering but the Council held, in accordance with this meaning, that “[e]ach operation conducted by US military results in new and expanding efforts by groups and countries to use lawfare to respond to military force.” See *Lawfare, the Latest in Asymmetries*, *supra* note 8.

12. W. Chadwick Austin and Antony Barone Kolenc, for example, argue that the International Criminal Court is vulnerable to abuse by the United States' adversaries who may seek to shame the United States by misusing the Court's investigative processes, filing dubious complaints with the Court, or by engaging the media in relation to ICC proceedings to generate international pressure against the United States. See W. Chadwick Austin & Antony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of*

shields by non-state actors engaged in asymmetrical warfare has been held to constitute lawfare.¹³ Further, the use of libel laws to attempt to silence groups who “oppose” the threat of “militant Islam” and seek to expose the means of terrorist financing have been described as acts of lawfare.¹⁴ Lawfare has also been used to label and deride the efforts of lawyers and organizations representing foreign nationals held at the Guantánamo Bay detention camp in Cuba.¹⁵ Finally, and in close association to Dunlap’s intended use of the term, the label of lawfare has described the strategic use of international law by States for the purpose of achieving a particular, often military, objective.¹⁶

This paper is built around several prominent quotations which claim to either define lawfare or describe what the user deems as an act of lawfare. It will explore these varied uses of the term and attempt to understand what the significance of lawfare’s advent is for the practice and function of international law. It accepts that a consensus definition of the term will remain elusive and does not attempt to provide one. Instead, it borrows from Alison Young’s argument that to better understand a particular discourse, and our investment in it, we should “flow with the current meaning.”¹⁷ As such, it is not consumed by the definitional question of what lawfare is. Rather, it asks what the label of lawfare means for both the understanding and practice of international law.

In exploring this question, it attempts to (re)frame the debate that surrounds lawfare. Currently, this exists amongst three broad camps: those who understand lawfare as the use and abuse of international law to threaten state interests; those who view it as a rhetorical device intended to discredit parties who attempt to engage with international law as a means to ensure accountability and compliance; and those who describe lawfare as a weapon, the legitimacy of which is defined by its user’s intentions.

Asymmetric Warfare, 39 VAND. J. TRANSNAT’L L. 291 (2006); see also David Scheffer, *Whose Lawfare Is It, Anyway?*, 43 CASE W. RES. J. INT’L L. 215, 223 (2010); *infra* discussion in Sections 2, 3.

13. See *infra* Sections 2, 7.

14. See *infra* Section 6.

15. See *infra* Sections 4, 5.

16. See *infra* Section 7.

17. ALISON YOUNG, FEMININITY IN DISSENT 43 (1990); see also Anne Orford, *Muscular Humanitarianism: Reading the Narratives of the New Interventionism*, 10 EUR. J. INT’L L. 679, 682 (1999).

A 2010 symposium hosted by Case Western Reserve's School of Law, titled *LAWFARE!*, featured proponents of each view.¹⁸ Many from all sides of the lawfare debate presented positions that held the notion of lawfare as novel—an observed phenomenon that now assumed a prominent position within an increasingly internationalized environment.¹⁹ While this view was widely accepted, manifestations of what is commonly termed lawfare often predate the term's popularization. Alongside the proliferation of international law throughout the twentieth century it is, of course, possible to find myriad examples of legal engagements and arguments that may conform with what is now broadly termed lawfare. Furthermore, critical framings of lawfare that explicitly or implicitly view it as novel and contextual risk erroneously preserving it within a singular time and place. Most often this is the United States of George W. Bush and the War on Terror.²⁰ What is popularly held to constitute lawfare is neither novel nor contextual, yet the implications of the term's use may be significant.

Lawfare, however, as most commonly understood and applied, has evolved within political and popular discourses to serve as a warning of the corrosive effects and potential hazards of international law.²¹ Opponents of this framing have argued that the labelling of international legal engagements as lawfare has become a neoconservative doctrine whose “real target is international law itself.”²² Thus, lawfare is presented not as a legal argument, but

18. For an overview of the symposium, see Michael P. Scharf & Shannon Pagano, *Foreword: LAWFARE!*, 43 CASE W. RES. J. INT'L L. 1 (2010). The papers of the participants are contained throughout all of 43 CASE W. RES. J. INT'L L. (2010-2011).

19. E.g., Craig H. Allen, *Command of the Commons Boasts: An Invitation to Lawfare*, 83 INT'L L. STUD. SER. US NAVAL WAR COL. 21 (2007); see also Michael J. Lebowitz, *The Value of Claiming Torture: An Analysis of Al-Qaeda's Tactical Lawfare Strategy and Efforts to Fight Back*, 43 CASE W. RES. J. INT'L L. 357 (2010); Austin & Kolenc, *supra* note 12.

20. For example, see Michael Kearney's explanation of lawfare having “emerged in response to human rights litigation during the ‘war on terror’, and rapidly progressed from conservative newspaper opinions and blogs to legal and political academic journals.” Michael Kearney, *Lawfare, Legitimacy and Resistance: The Weak and the Law*, 16 PAL. Y.B. INT'L L. 79, 88 (2010).

21. The editorial board of the Wall Street Journal has warned about the dangers of lawfare, holding that “however well our troops do on the battlefield, a reality of modern times is that the U.S. can still lose the war on terror in the courtroom.” See *The Lawfare Wars*, WALL ST. J. (Sept. 2, 2010), <http://www.wsj.com/articles/SB10001424052748703467004575463721720570734>; see also David B. Rivkin, Jr. & Lee A. Casey, *Lawfare*, WALL ST. J. (Feb. 23, 2007), <http://www.wsj.com/articles/SB117220137149816987>.

22. Scott Horton, *The Dangers of Lawfare*, 43 CASE W. RES. J. INT'L L. 163, 167 (2010-2011); see also Scheffer, *supra* note 12, at 217.

instead as a policy prescription. Leila Nadya Sadat and Jing Geng have argued that the use of the term, popularly conceived, constitutes “an effort to attack and dismantle legal norms – and even some legal or international institutions – in order to promote the efforts of America’s (or Israel’s) military.”²³

When one observes contemporary applications of lawfare, it is often intended to decry or delegitimize arguments that themselves draw upon international legal principles. Viewed singularly, this provides credence to the understanding of lawfare espoused by Sadat and Geng. But as several observers have noted, nearly all States engage with international law in a manner that can fit comfortably within common conceptions of lawfare.²⁴ Thus, when observing the debate that surrounds the use of the term, it becomes evident that pejorative or polemic applications of lawfare are often decrying a *particular* use of international law by a *particular* type of actor. When framing the lawfare debate or articulating a response to accusations of lawfare that are intended to delegitimize such specific uses of international law, it is prudent to understand the application of the label not as a general means of attacking or dismantling legal norms, but as a particular strategy intended to limit access to international justice.

2. “THE FIRST TYPE OF LAWFARE IS ASYMMETRICAL WARFARE. DURING THE RECENT CONFLICT WITH IRAQ, ALLIED FORCES WERE THE TARGET OF A PERSISTENT LAWFARE CAMPAIGN. EVEN BEFORE THE CONFLICT BEGAN, INTERNATIONAL ACTIVISTS USED LEGAL MEANS TO TRY TO DECLARE MILITARY ACTION ILLEGITIMATE. IN COORDINATION WITH IRAQI AUTHORITIES, HUMAN SHIELDS WERE POSITIONED AT PROSPECTIVE TARGETS TO DISRUPT AMERICAN WAR PLANS.”

— *Council on Foreign Relations*²⁵

Lawfare, as initially described by Dunlap, was a reaction to the perception that international law was assuming a more prominent and

23. Leila Nadya Sadat & Jing Geng, *On Legal Subterfuge and the So-Called “Lawfare” Debate*, 43 CASE W. RES. J. INT’L L. 153, 160 (2010-2011).

24. Allen, *supra* note 19, at 36. *See generally* ORDE F. KITTRIE, *LAWFARE: LAW AS A WEAPON OF WAR* (2016).

25. *Lawfare, the Latest in Asymmetries*, *supra* note 8.

strategic role within situations of international armed conflict.²⁶ With increasing frequency, actors engaged in traditional conflict situations were believed to rely upon what Dunlap characterized as lawfare within “circumstances where law can create the same or similar effects as those ordinarily sought from conventional war making approaches.”²⁷ Upon popularizing the term, Dunlap evolved his understanding of lawfare to include what he perceived to be the cynical manipulation of particular uses of international law.²⁸ Accordingly, and with what was presented as increased frequency, the United States’ opponents were understood to nefariously engage the rule of law and the humanitarian values it represents to create a perception that the United States is waging war in violation of international law.²⁹

This notion of lawfare is emblematic of the view forwarded by the Council on Foreign Relations. This warned, in regards to the Iraq War, that international activists were turning to legal means to demonstrate the illegitimacy of the military operation.³⁰ Several commentators have lent credence to this notion of lawfare, holding that it endeavors to “gain a moral advantage over your enemy in the court of world opinion.”³¹ In response, they have declared that “[t]he U.S. must go on both the legal and public diplomacy offensive, utilizing such aggressive litigation tactics as seeking sanctions against lawyers who make frivolous arguments or violate security regulations.”³² Often, nongovernmental organizations (“NGOs”) are perceived as the primary perpetrators of this notion of lawfare and are increasingly held to function in opposition to a State’s security interests.³³

The currency that international law-based claims carry within the public sphere is viewed as an extension of the general influence that international law has assumed within occurrences of international

26. See Dunlap Working Paper, *supra* note 1, at 2-4.

27. Dunlap Apologia, *supra* note 7, at 122; see also Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st Century Conflicts?*, 54 JOINT FORCES Q. 34 (2009) [hereinafter Dunlap Conflicts].

28. Dunlap Apologia, *supra* note 7.

29. Dunlap Working Paper, *supra* note 1, at 4.

30. *Lawfare, the Latest in Asymmetries*, *supra* note 8.

31. Rivkin & Casey, *supra* note 21.

32. *Id.*

33. See generally Neve Gordon, *Human Rights as a Security Threat: Lawfare and the Campaign against Human Rights NGOs*, 48 L. & SOC’Y REV. 311, 311-12 (2014).

armed conflict.³⁴ Some, observing the increasing application of international law from within military establishments, have been inclined to interpret such uses as an obstruction. General Wesley Clark, who served as Supreme Allied Commander, Europe during the NATO mission in Kosovo, described the challenges posed by increased legal oversight within a military campaign:

The processes of approving the targets, striking the targets, reading the results, and restriking were confusing. The original plans had presumed that the [Supreme Allied Commander, Europe] would have the authority to strike targets within overall categories specified by NATO political leaders, but Washington had introduced a target-by-target approval requirement. The other Allies began to be increasingly demanding, too. It was British law that targets struck by any aircraft based in the United Kingdom had to be approved by their lawyers, the French demanded greater insight into the targeting and strikes, and of course there had to be continuing consultation with NATO headquarters and with other countries, too.³⁵

The NATO intervention in Kosovo and the accompanying campaign against Serbia are held by many, from an operational perspective (*jus in bello*), to represent “a high-water mark of the influence of international law in military interventions.”³⁶ Certain commentators, opposed to the heightened influence of international law on operational decision-making, described the perceived restrictive or prohibitive function of international law as lawfare. Often held to be encouraged by NGOs and as an impediment to the achievement of military or security objectives, opponents of the restrictive use of international law claimed:

One of the most striking features of the Kosovo campaign, in fact, was the remarkably direct role lawyers played in managing combat operations – to a degree unprecedented in previous wars . . . The role played by lawyers in this war should also be

34. Dunlap Working Paper, *supra* note 1, at 1.

35. WESLEY K. CLARK, WAGING MODERN WAR: BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT 224 (2001).

36. Dunlap Working Paper, *supra* note 1, at 1-2; *see also* MICHAEL IGNATIEFF, VIRTUAL WAR: KOSOVO AND BEYOND 197-98, 200, 207 (2000); Adam Roberts, *NATO's 'Humanitarian War' over Kosovo*, 41 SURVIVAL: GLOBAL POL. & STRATEGY 102, 102 (1999).

sobering – indeed alarming – for devotees of power politics who denigrate the impact of law on international conflict.³⁷

The term lawfare, in response, served as a descriptive denunciation of the perceived rise and prohibitive influence of international law within conflict situations. Though Dunlap and others would later insist that understandings of lawfare were intended to maintain a neutral connotation, these common applications of the term would retain a pejorative association.³⁸

As the asymmetrical warfare of the twenty-first century replaced the traditional wars of the twentieth century, an amended understanding of certain uses of international law – termed lawfare – employed as a means of achieving a military objective, increasingly became associated with the tactics of non-state militant groups.³⁹ The label of lawfare, now applied to an ever-broadening scope of legal engagements within instances of armed conflict, was held to define occasions of asymmetrical warfare in which “a group or state that is facing a nation committed to comply with the laws of war will choose to openly violate the law not only for the tactical advantage gained but for the strategic benefit that arises.”⁴⁰

The 2003 US-led war in Iraq provided the archetypical example. Lawfare came to describe the tactics of US adversaries. These included:

. . . attacking from protected places and using protected places or objects as weapons storage sites, fighting without wearing a proper uniform, using human shields to protect military targets, using protected symbols to gain military advantage, and murdering of prisoners or others who deserve protection.⁴¹

In each of these observed instances, the term lawfare is employed to describe “an inferior force [using] the superior force’s commitment to adhere to the law of war to its tactical advantage.”⁴²

37. Richard K. Betts, *Compromised Command: Inside NATO’s First War*, 80 FOREIGN AFF. 126, 129 (2001).

38. Dunlap Today and Tomorrow, *supra* note 5, at 315.

39. See Austin & Kolenc, *supra* note 12; see also Dale Stephens, *The Age of Lawfare*, 87 INT’L L. STUD. SER. US NAVAL WAR COL. 327, 330 (2011); Kittrie, *supra* note 24, at 340-41.

40. Eric Talbot Jensen, *The ICJ’s “Uganda Wall”: A Barrier to the Principle of Distinction and an Entry Point for Lawfare*, 35 DENV. J. INT’L & POL’Y 241, 269 (2007).

41. *Id.* at 269-70.

42. *Id.* at 270.

Thus, three related notions of lawfare emerged from the term's description of the use of international law within instances of armed conflict. The first, as initially identified by Dunlap, employed law and legal argumentation to imply that the United States was engaging in a war and actions that violated fundamental principles of international law. The second notion of lawfare held that through the increased influence of international law, law served as a prohibitive intrusion on US efforts to achieve operational and security-based objectives. The final notion suggests that the United States' adversaries used a variety of asymmetrical tactics, deemed lawfare, to disrupt the operational capabilities of, and gain tactical advantage against, a State committed to upholding the precepts of international law.

Such conceptions of lawfare, however, cannot be exclusively attributed to non-state actors. Dunlap, along with many others, has acknowledged that many states engage with international law through such means as to constitute lawfare.⁴³ He provides examples that include the US purchase of selected satellite imagery prior to the commencement of military operations in Afghanistan, the imposition of sanctions against Iraq to prevent the purchase of aircrafts or materials necessary for the maintenance of their existing fleet, efforts to enhance the rule of law as a strategic objective of counterinsurgency operations, and the use of legal means to confiscate financial assets from terrorist groups and their funders.⁴⁴

The use of international law, employed by state actors, however, goes well beyond these identified examples of strategic legal engagements. It manifests through instances in which international law is employed by States for similar purposes to those that prevalent uses of the lawfare label commonly accuse the United States' "adversaries" of undertaking. Of relevance to the Council on Foreign Relation's assertion that lawfare constitutes efforts to claim that US wars represent legal violations, David Kennedy notes:

But 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.⁴⁵

43. Dunlap Apologia, *supra* note 7; *see also* Scheffer, *supra* note 12.

44. Dunlap Apologia, *supra* note 7, at 123-24.

45. DAVID KENNEDY, OF WAR AND LAW 41 (2006).

Furthermore, claims that lawfare is demonstrative of the increasingly prohibitive application of international humanitarian law seeks to assign pejorative implications to what is purely a debate concerning the purpose or necessity of law and legal regulation within a particular context. Since the mid-twentieth century, when the Geneva Conventions opened for ratification, they have been subject to interpretative disagreement.⁴⁶ Yoram Dinstein explains that international humanitarian law is predicated on an equilibrium between opposing impulses – military necessity and humanitarian considerations.⁴⁷ This naturally facilitates interpretive discord: “[B]etween military commanders and humanitarian workers, there might be a different understanding of that which constitutes acceptable collateral damage, simply because their respective interpretations of the principle of proportionality are taken from different standpoints.”⁴⁸

The suggestion that the source of such disagreement concerning the applicability or necessity of legal regulation constitutes a notion of lawfare seeks to delegitimize a particular interpretation of international humanitarian law. It preferences the interpretation of the military commander, while denouncing, or assigning pejorative implications to, a humanitarian-focused reading of the law that becomes the form of legal engagement employed by the weak, employed by the adversary.

Furthermore, the described forms of legal engagement and denouncement that hold lawfare to have become a tactic employed by non-state actors against US interests and commitments to international law are scarcely limited to this context. Neither are they the sole manifestations of the asymmetrical wars fought in Iraq and Afghanistan. Human shields, often presented as a lawfare method in which opponents of a State committed to international law manipulate this commitment to gain an operational or moral advantage, are consistently discussed as tactics employed by US adversaries in the War on Terror.⁴⁹ The use of human shields for tactical purposes,

46. Jamie A. Williamson, *The Knight's Code, Not His Lance*, 43 CASE W. RES. J. INT'L L. 447, 447-48 (2010).

47. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 16 (2004).

48. Williamson, *supra* note 46, at 448.

49. See, e.g., Robert Gates, Sec'y of Defense, & Michael Mullen, Joint Chief of Staff, Secretary Gates, Admiral Mullen on U.S. Forces in Afghanistan, Press Conference from the Pentagon (May 12, 2009), available at <http://iipdigital.usembassy.gov/st/english/texttrans/20>

however, has been observed in such early military encounters as the American Civil War and the Franco-Prussian War.⁵⁰ The British Manual of Military Law, issued at the start of the First World War, denounced the practice, as did the Commentaries to the 1949 Geneva Conventions.⁵¹ Nevertheless, human shields have been employed within many of the conflicts that have occurred throughout the twentieth century.⁵²

Similar discourses as those observed in relation to the use of human shields against US interests and by sub-state armed groups have featured prominently in numerous conflict situations. These include Israel's official response to the international condemnation that followed its military operations within the Gaza Strip in 2014.⁵³ Russian forces commonly accused Chechen fighters of tactically employing human shields during the bombardment of Grozny in the late 1990s, and Pakistani Security Forces made similar claims during the siege of Lal Masjid in Islamabad.⁵⁴ Commonly, these claims hold that the employment of such tactics by non-state actors demonstrate not simply a violation of international law, but instead the manipulation of international law. This infers, often directly, that state actors, otherwise committed to upholding the various provisions of international humanitarian law within situations of international or non-international armed conflict, are placed in a manufactured environment in which compliance with international law is compromised. It serves to delineate two forms of international law –

09/05/20090512113947eafas0.118664.html#axzz4ErRG1ITZ (describing how the Taliban provokes and exploits civilian casualties); see also *Lawfare, the Latest in Asymmetries*, *supra* note 8; Dunlap Today and Tomorrow, *supra* note 5, at 315; Jensen, *supra* note 40, at 269-70; Austin & Kolenc, *supra* note 12, at 326.

50. Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT'L L. 292, 293 (2009).

51. *Id.* at 293-94.

52. *Id.* at 294-96.

53. See, e.g., *Behind the Headlines: Fighting Hamas terrorism within the law*, ISR. MINISTRY FOREIGN AFF. (Aug. 7, 2014), <http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Fighting-Hamas-terrorism-within-the-law.aspx>; see also *Hamas' Use of Human Shields is a War Crime*, ISR. DEF. FORCES (July 14, 2014), <https://www.idfblog.com/blog/2014/07/14/hamas-use-human-shields-war-crime/>; *Captured Hamas Manuel Explains Benefit of Human Shields*, ISR. DEF. FORCES (Aug. 4, 2014), <https://www.idfblog.com/blog/2014/08/04/captured-hamas-combat-manual-explains-benefits-human-shields/>.

54. *Chechens 'using human shields'*, BBC NEWS (Dec. 2, 1999, 7:37 AM), <http://news.bbc.co.uk/2/hi/europe/545672.stm>; see also *Pakistan's Red Mosque Showdown: Jihadists Using Girls as Human Shields?*, SPIEGEL ONLINE (July 5, 2007), <http://www.spiegel.de/international/world/pakistan-s-red-mosque-showdown-jihadists-using-girls-as-human-shields-a-492545.html>.

legitimate and illegitimate – that are employed by the state and non-state actor respectively.

From such origins, the notion of lawfare presented by Dunlap, evolved from its particular application to instances of traditional and asymmetric armed conflict and was increasingly viewed as a threat to US interests in a post-September 11th internationalized landscape. With newfound prominence, lawfare came to describe a host of international legal engagements. Its popularized usages would maintain a pejorative slant and would present a deep skepticism concerning the role and utility of international law within this environment. Denunciations of international law, however, were not absolute and instead focused specifically on the use of international law by non-state actors.

*3. “OUR STRENGTH AS A NATION WILL CONTINUE TO BE
CHALLENGED BY THOSE WHO EMPLOY A STRATEGY OF THE
WEAK USING INTERNATIONAL FORA, JUDICIAL PROCESSES,
AND TERRORISM.”*

— *United States of America, 2005 National Defense Strategy*⁵⁵

That the National Defense Strategy of the United States equated recourse to international law with acts of terrorism demonstrates the extent to which particular forms of legal engagement were viewed as a threat to US interests. Jack Goldsmith, an international lawyer and scholar, who served as the head of the Office of Legal Counsel in the Bush Administration, recalls the extent of this concern: “[Secretary of Defense] Rumsfeld had already been worrying about this problem under the rubric of ‘lawfare’, an idea that had been discussed in the Pentagon for years.”⁵⁶ Within the White House, the Department of Justice, and the Pentagon, lawfare provided an all-encompassing term to describe the means by which the United States’ foes engaged with international law to shame and attempt to weaken US efforts within the War on Terror and the broad security apparatus that developed in the wake of the September 11th attacks. Goldsmith explained this emergent notion of lawfare:

55. DEP’T DEF., THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 5 (2005), <http://archive.defense.gov/news/Mar2005/d20050318nds1.pdf>.

56. JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 58 (2007).

Enemies like Al Qaeda who cannot match the United States militarily instead criticize it for purported legal violations, especially violations of human rights or the laws of war. They hide in mosques so that they can decry U.S. destruction of religious objects when attacked. They describe civilian deaths as “war crimes” even when the deaths are legally permissible “collateral damage” or they complain falsely that they were tortured Lawfare works because it manipulates something Americans value: respect for law.⁵⁷

Yet the perceived threat of lawfare was not simply viewed as a tactic undertaken by non-state actors like al-Qaeda or the Taliban, with whom the United States was engaged in asymmetrical war. Secretary Rumsfeld and the Pentagon viewed lawfare as constituting an unwarranted, but potentially influential, check on US military power. The expressed commitment of the United States’ traditional allies in Europe and South America to human rights regimes caused Rumsfeld to believe “that opponents incapable of checking American military power would increasingly rely on lawfare weapons instead.”⁵⁸ A Department of Defense memorandum, authored by Secretary Rumsfeld, directly articulated the implied extent of the threat posed by such a notion of lawfare:

In the past quarter century, various nations, NGOs, academics, international organizations, and others in the “international community” have been busily weaving a web of international laws and judicial institutions that today threatens [US Government] interests Unless we tackle the problem head-on, it will continue to grow. The issue is especially urgent because of the unusual challenges we face in the war on terrorism.⁵⁹

Despite its broad usage, within a variety of contexts and by various actors, lawfare gained much of its political currency and popular practice amid the US-led wars in Iraq and Afghanistan and the emergent national security response to the terrorist attacks in New York and Washington, D.C.⁶⁰ Increasingly, law-based criticisms (both

57. *Id.* at 58-59.

58. *Id.* at 59.

59. Memorandum from Donald Rumsfeld, U.S. Sec’y of Def., on Judicialization of International Politics to Vice President et al. (Apr. 9, 2003), <http://library.rumsfeld.com/doclib/sp/221/2003-04-09%20to%20Vice%20President%20et%20al%20re%20Judicialization%20of%20International%20Politics.pdf>.

60. Horton, *supra* note 22, at 167.

international and municipal) of US actions and policies were met with accusations of lawfare. This popularized notion of lawfare had shifted considerably from Dunlap's professed neutrality.⁶¹ It developed a broad reach that extended well beyond the term's initial conception as a means of legal engagement focused on the achievement of a traditional military objective.⁶² This emergent reactive notion of lawfare was firmly embedded within neoconservative doctrine, an extension of an entrenched skepticism that viewed international law as a cumbersome and ultimately ineffective means of addressing national and global security challenges.⁶³

Many within the Bush Administration viewed this scant understanding of international law as an avoidable constraint on efforts to expand the boundaries of executive power and as constituting an affront to US sovereignty.⁶⁴ Yet despite their ideological disdain and the professed ineffectiveness of international law, neoconservatives, paradoxically, view particular forms of legal engagement as a direct (and potentially effective) threat to the United States' domestic and foreign interests.⁶⁵ Various conservative commentators and ideological allies echoed the Administration's cautions concerning the threat posed by international law.⁶⁶ They held that "the most significant common thread among all these actions is the clear desire to portray U.S. government actions as illegal and unprecedented" and that "international law constitutes a real and immediate threat to U.S. national interest."⁶⁷

61. Dunlap himself, in a later paper, noted this ideological shift and asserted that "despite the lawfare's [*sic*] frequent negative characterization as a tool of terrorists, it is vital to remember that it is not restricted to one side of a conflict." See Dunlap Apologia, *supra* note 7, at 123-24.

62. In relation to this development, Dunlap held that "lawfare was never meant to describe every possible relation between law and warfare. It focuses principally on circumstances where law can create the same or similar effects as those ordinarily sought from conventional warmaking approaches." See *id.* at 122.

63. Francis Fukuyama, *After Neoconservatism*, N.Y. TIMES MAG. (Feb. 19, 2006), <http://www.nytimes.com/2006/02/19/magazine/after-neoconservatism.html>.

64. Ohlin, *supra* note 3, at 8-9; see also Horton, *supra* note 22, at 167-68.

65. See generally JEREMY A. RABKIN, LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES (2005).

66. See, e.g., John Fonte, *Democracy's Trojan Horse*, NAT'L INT. (2004), <http://nationalinterest.org/article/democracys-trojan-horse-1155>; Clare Lopez, *SEALs Case Shows How Terrorists Use 'Lawfare' to Undermine U.S.*, HUM. EVENTS (Mar. 8, 2010), <http://humanevents.com/2010/03/08/seals-case-shows-how-terrorists-use-lawfare-to-undermine-us/>; David B. Rivkin, Jr. & Lee A. Casey, *The Rocky Shoals of International Law*, 62 NAT'L INT. 35 (2000-2001) [hereinafter Rocky Shoals]; Austin & Kolenc, *supra* note 12.

67. Rivkin & Casey, *supra* note 21; Rocky Shoals, *supra* note 66, at 35.

Though this strayed considerably from Dunlap's more limited iteration of lawfare, it came to represent the term's prevalent, politicized application.⁶⁸ Opponents of lawfare's current manifestation and ideological grounding often (though not exclusively) hold that, however defined, "lawfare is a potentially powerful term that reflects the importance of law in the conflicts of the twenty-first century."⁶⁹ Still, its most ardent critics argue that the accusation or labelling of lawfare, popularly understood, facilitates the critique and silencing of human rights advocacy, verges towards propaganda, and ultimately discredits the intended function of international law.⁷⁰

Sadat and Geng, continuing their argument that lawfare's common use serves to attack and dismantle legal norms, assert that the use of the term lawfare "poses a frontal challenge to our constitutional system, as well as the specific rules of war, international human rights law, and the international legal system, and even U.S. Constitutional rights, such as the right to habeas corpus." Opponents who view lawfare within this context, as attempting to silence or delegitimize international law-based criticisms of state actors, place the use of lawfare within a culture of international legal neglect and unchecked impunity. This understanding and rejection of such uses of lawfare often accompanies the view that the Bush Administration and neoconservative ideology express general hostility towards international law, that it dismisses its dictates.⁷¹

But framing lawfare, generally, as an attack on international law or as an attempt to dismantle legal norms perpetuates an overtly utopian view of international law. It reduces understandings of

68. The Cleveland Experts Meeting discussed whether the term lawfare had been hijacked by neoconservative interests and debated how best to respond to this. While there appeared broad consensus that the term had been manipulated along ideological lines, there was no broad agreement about how to best respond. Several participants expressed that "now that others have widely propagated an alternative definition of the term, the academy has lost the initiative and would be fighting a futile cause in trying to recapture the concept as a neutral term." See Scharf & Anderson, *supra* note 8, at 12-13.

69. This did not discount the view that "lawfare may not be a particularly useful term and may serve simply as an invented phenomenon useful only to anti-international humanitarian law hijackers as a tool of intimidation." *Id.* at 13, 15.

70. See, e.g., Kearney, *supra* note 20, at 88-89.

71. See, e.g., Mary Ellen O'Connell, *Crying War*, in INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: BRIDGING THEORY AND PRACTICE 93, 100 (Thomas J. Biersteker et al. eds., 2007). See generally JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR (2007); Ohlin, *supra* note 3.

international law to binary conceptions of conformity/violation, and fails to recognize the myriad forms of legal engagement that occur under the broad rubric of international law.⁷² The Bush Administration and its neoconservative allies, so often the recipients of allegations of international legal maleficence, nevertheless engaged consistently with international legal arguments.⁷³ Secretary Rumsfeld's Department of Defense memorandum, which warned of the international community's efforts to use international law to threaten US interests, continued to provide a host of potential responses to what was perceived as the judicialization of international politics.⁷⁴ These themselves drew heavily upon international law. They called for the formulation of legal arguments under the laws of armed conflict and belligerent occupation to justify a US presence and the use of force within and against Iraq. In attempting to delegitimize the International Criminal Court, Secretary Rumsfeld's prescriptions sought to strengthen and expand bilateral frameworks through Article 98 agreements to protect US officials from prosecution at the Court and proposed the enactment of legislation that would effectively sanction nations that pursue charges against US officials.⁷⁵

Such forms of legal engagement by the Bush Administration do not imply fidelity with international law or dismiss claims grounded within law that undertaken actions or policies by the Administration served to violate US legal commitments or international legal norms. Instead, this is intended to illustrate the folly of viewing lawfare

72. See generally EYAL WEIZMAN, *THE LEAST OF ALL POSSIBLE EVILS: HUMANITARIAN VIOLENCE FROM ARENDT TO GAZA* (2011); Kennedy, *supra* note 45.

73. For an account of the Bush Administration's legal argumentation in relation to many of its most controversial practices, see Curtis A. Bradley, *The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy*, 4 DUKE J. CONST. L. & PUB. POL'Y 57, 68 (2009). For an overall account of the role assumed by international law within successive US administrations and within the State Department, see MICHAEL P. SCHARF & PAUL R. WILLIAMS, *SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER* (2010).

74. Memorandum from the U.S. Sec'y of Defense, *supra* note 59.

75. Article 98 agreements reference Article 98(2) of the Rome Statute which holds, *inter alia*, that the ICC may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under an existing international agreement. On this basis, the United States has signed over one hundred bilateral immunity agreements with individual countries to ensure they do not surrender any American to the Court's jurisdiction. See Rome Statute of the International Criminal Court art. 98(2), July 17, 1998, 183 U.N.T.S. 9; see also David J.R. Frakt, *Lawfare and Counterlawfare: The Demonization of the Gitmo Bar and Other Legal Strategies in the War on Terror*, 43 CASE W. RES. J. INT'L L. 335, 352 (2010); Memorandum from the U.S. Sec'y of Defense, *supra* note 59.

through such a generalized lens – as a broad assault on the discipline of international law. What is often described, critically, as lawfare is not a total or ontological challenge to international law, but is instead a denouncement of particular groups of law’s users. It is therefore more prudent to understand lawfare not as a general dismissal of international law, but instead as a particular affront to international law. This affront seeks to limit the access of particular groups and individuals to international recourse and delegitimize the means and methods through which such recourse may be pursued.

4. “*LAST YEAR THE AMERICAN CIVIL LIBERTIES UNION (ACLU) AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) ESTABLISHED THE JOHN ADAMS PROJECT TO ‘SUPPORT MILITARY COUNSEL AT GUANTANAMO BAY.’ THE MISSION BEHIND THIS TREACHEROUS ENTERPRISE WAS TO IDENTIFY INTELLIGENCE OFFICERS INVOLVED IN INTERROGATING GUANTANAMO BAY DETAINEES AND THEN PROVIDE THAT INFORMATION TO MILITARY DEFENSE ATTORNEYS REPRESENTING DETAINEES SO THAT THEY COULD ATTEMPT TO CALL INTELLIGENCE PERSONNEL TO TESTIFY.*”

— *Florida Congressman Jeff Miller (R)*⁷⁶

Lawfare came to describe the efforts of lawyers and organizations attempting to challenge the bestowed legal status and detention of foreign nationals held in the US Naval base at Guantánamo Bay, Cuba. The foreign national detention program, initiated by the Bush Administration in 2002, became a notorious symbol of the US-led War on Terror. The location, and uncertain legal status of the detainees, constituted a deliberate strategy to place these individuals beyond the jurisdiction of US courts.⁷⁷ This initially served to create a legal gray area, where detainees were denied *habeas corpus* protections under the US Constitution and effectively

76. Jeff Miller, *Guest Blogger: Congressman Jeff Miller (R-FL) On Investigating the John Adams Project*, DAILY SIGNAL (May 21, 2010), <http://dailysignal.com/2010/05/21/guest-blogger-congressman-jeff-miller-r-fl-on-investigating-the-john-adams-project/>.

77. Fiona de Londras, *Guantanamo Bay: Towards Legality?*, 71 MOD. L. REV. 36, 36-37 (2008); Frakt, *supra* note 75, at 347 (recalling how alternative locations, like Andersen Air Force Base in Guam, were rejected due to the possibility that detainees held there may gain access to US Courts).

insulated from legal challenges that would contest the grounds of their detention.⁷⁸

The Administration's strategy evoked a torrent of criticism that drew upon domestic constitutional law and a human rights-based framework.⁷⁹ Foreign States, alongside regional and international organizations, joined the mounting chorus of condemnation.⁸⁰ The European Parliament called on the United States to "close the Guantanamo Bay detention facility and insist[] that every prisoner should be treated in accordance with international humanitarian law and tried without delay in a fair and public hearing by a competent, independent, impartial tribunal."⁸¹

Within the United States, the Bush-era detention program faced mounting domestic legal challenges.⁸² A series of petitions, coordinated through the Center for Constitutional Rights, brought

78. John Yoo, a former lawyer in the Office of Legal Counsel and architect of much of the Administration's legal framework concerning many of the most controversial aspects of the war on terror, confirmed this intention. See JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 142-46 (2006).

79. The US section of Amnesty International have been amongst the most high-profile critics of the Guantánamo Bay detention program, holding that "[f]rom day one, the USA failed to recognize the applicability of human rights law to the Guantanamo detentions." See Amnesty Int'l, *Guantanamo, A Decade of Damage to Human Rights*, AI Index No. AMR 51/103/2011 (2011). Numerous other human rights-focused NGOs expressed similar, rights-based, condemnations of the detention program. See e.g., *Locked Up Alone: Detention Conditions and Mental Health at Guantanamo*, HUM. RTS. WATCH (June 9, 2008), <https://www.hrw.org/report/2008/06/09/locked-alone/detention-conditions-and-mental-health-guantanamo>.

80. See, e.g., *Merkel: Guantanamo Mustn't Exist in Long Term*, SPIEGEL ONLINE (Jan. 9 2006, 9:58 AM), <http://www.spiegel.de/international/20uantan-interview-merkel-guantanamo-mustn-t-exist-in-long-term-a-394180.html> (comments of German Chancellor Angela Merkel); *Blair: Guantanamo is an anomaly*, GUARDIAN (Feb. 17, 2006, 7:38 PM), <https://www.theguardian.com/uk/2006/feb/17/politics.guantanamo> (comments of former British Prime Minister Tony Blair); see also *UK told US won't shut Guantanamo*, BBC NEWS (May 11, 2006, 2:55 PM), http://news.bbc.co.uk/2/hi/uk_news/politics/4760365.stm.

81. Resolution on Guantanamo, EUR. PARL. DOC. B6-0299/2006 (May 23, 2006); see also Press Release, Inter-Am. Comm'n on H.R., Inter-American Commission Urges United States to Close Guantanamo Without Delay, Resolution No. 1/06 (July 28, 2006); Juan E. Mendez (Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment), *Statement of the United Nations Special Rapporteur on torture at the Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay* (Oct. 3, 2013), delivered by Ms. Stephanie Selg, Associate Human Rights Expert, Office of the High Commissioner for Human Rights (OHCHR) to the Inter-American Commission on Human Rights, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13859&>.

82. See generally Meredith B. Osborn, *Rasul v. Bush: Federal Courts Have Jurisdiction over Habeas Challenges and Other Claims Brought by Guantanamo Detainees*, 40 HARV. C.R.-C.L. L. REV. 265 (2005); de Londras, *supra* note 77.

numerous writs of *habeas corpus* on behalf of various detainees. The representation provided by these lawyers, dubbed the Guantánamo Bay Bar, in bringing forth *habeas* petitions attracted instant controversy and would be viewed as an example of an expansive notion of lawfare.⁸³

Several commentators perceived the actions of these lawyers, and the intentions of their clients, as treacherous and equated the legal motions with national security threats:

Lawyers can literally get us killed We may never know how many of the hundreds of repatriated detainees are back in action, fighting the U.S. or our allies thanks to the efforts of the Guantanamo Bay Bar Allowing lawyers to subvert the truth and transform the Constitution into a lethal weapon in the hands of our enemies – while casting themselves as patriots – makes mockery of the sacrifices made by true patriots⁸⁴

Others assumed a critical but more measured response to the assigned intentions of the lawyers and the *habeas* petitions. While these did not reach the levels of hysteria displayed by some commentators, they served to provide an expansive understanding of how lawfare was understood:

Most instances of lawfare, such as the more than 400 *habeas corpus* lawsuits filed by detainees held at Guantanamo Bay, Cuba, simply seek to harass and burden our legal mechanisms. Like a computer virus or a hacker's denial-of-service attack on a network, meritless suits seek to grind the wheels of justice to a halt.⁸⁵

This emergent notion of lawfare moved well beyond Dunlap's conception of law as a substitute for a traditional military means to achieve an operational objective.⁸⁶ As David Frakt, a former Defense Counsel with the Office of Military Commissions, asks of this imposed notion of lawfare: “[W]hat exactly are the military ends

83. For an overview of the associated controversy, see Frakt, *supra* note 75, at 336-40. See also Scott Horton, *Silencing the Lawyers*, HARPER'S MAG. (May 26, 2010, 10:23 AM), <http://harpers.org/blog/2010/05/silencing-the-lawyers/> [hereinafter Horton *Silencing the Lawyers*].

84. Daniel Halper, *Lawfare Warning*, WKLY. STANDARD (Mar. 5, 2010), <http://www.weeklystandard.com/lawfare-warnings/article/422507>, quoted in Frakt, *supra* note 75, at 338.

85. C. Peter Dungan, *Fighting Lawfare: At the Special Operations Task Force Level*, 21 SPECIAL WARFARE 9, 10 (2008).

86. Dunlap *Apologia*, *supra* note 7, at 122.

pursued by [this] lawfare? What is it that a military enemy is theoretically trying to accomplish through manipulative legal actions?”⁸⁷

Yet when the Supreme Court of the United States held District Courts had jurisdiction to hear the *habeas* petitions and, later, that the Guantánamo detainees were entitled to protection under the US Constitution, accusations of lawfare were accompanied by firm policy prescriptions that served to further obfuscate the detainees’ access to judicial remedies and the ability of their lawyers to bring forth such petitions.⁸⁸ This emergent notion of lawfare, described in a *Washington Post* op-ed as the use of federal courts to undermine the military’s ability to keep dangerous enemy combatants off the battlefield, evoked a range of official responses.⁸⁹

From the time that the Bush Administration initiated the transfer of foreign detainees to Guantánamo Bay, efforts were taken to limit their access to both courts and lawyers.⁹⁰ Initially, many of the detainees were held *incommunicado* and had their identities concealed.⁹¹ In direct response to the early Supreme Court decisions in *Rasul v. Bush* and *Hamdi v. Rumsfeld*,⁹² which extended *habeas* protections to the detainees, the US Congress passed the 2005 *Detainee Treatment Act*, which, *inter alia*, held that:

[N]o court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.⁹³

Following the *Hamdi* decision, in which the Court held the detainees are entitled to some level of due process, the Government established Combat Status Review Tribunals.⁹⁴ These, however, were designed to deny detainees legal representation and prohibited the lawyers who

87. Frakt, *supra* note 75, at 341.

88. See *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 533 U.S. 723 (2008).

89. Marc A. Thiessen, *The ‘al-Qaeda seven’ and selective McCarthyism*, WASH. POST, (Mar. 8, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/08/AR2010030801742.html>.

90. See generally David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, 1987-98 (2008) [hereinafter Luban Lawfare].

91. *Id.* at 1989.

92. See generally *Rasul*, 542 U.S. 466; *Hamdi*, 542 U.S. 507.

93. Detainee Treatment Act, 28 U.S.C. § 2241 (2005).

94. See generally Robert A. Peal, *Combat Status Review Tribunals and the Unique Nature of the War on Terror*, 58 VAND. L. REV. 1629 (2005).

represented these clients in federal court from discussing the Review Tribunal procedure.⁹⁵

When defense counsel formally gained increased access following the Supreme Court decisions in 2004, they faced numerous practical obstacles in accessing their clients. Guantánamo's location, limiting travel logistics, federal oversight of lawyer-client communications, and the classified status of such information all contributed to a climate in which "the mechanics of meeting with [their] clients comprise[d] one important set of policies that [made] these representations unusually difficult."⁹⁶ These factors were compounded by several other intentional efforts that sought to deny the detainees' access to their lawyers and endeavored to compromise the lawyers' abilities to conduct their defense effectively. Deliberate efforts were taken to ensure that the detainees were unable or unwilling to meet with their lawyers:

They don't tell the detainee that his lawyer is there to see him. Instead, they tell him that he "has a reservation," which means an interrogation. The detainee says he doesn't want to go, so then they tell the lawyer that his client doesn't want to see him.⁹⁷

Numerous other methods were deliberately employed to strain the client-lawyer relationship. Detainees were told of their lawyer's sexual orientation, cultural or religious heritage, or given examples of their past clients. The detainees were told that their lawyer was gay, Jewish, or once represented the State of Israel (whether or not these claims were factual), and were encouraged by Guantánamo interrogators not to trust their lawyers as a result.⁹⁸

Beyond the restrictive environment manufactured in Guantánamo, Jeff Miller, the Congressman from Florida who equated the American Civil Liberties Union ("ACLU") and the National Association of Criminal Defense Lawyers' ("NACDL") efforts to support *habeas* petitions for several of the Guantánamo detainees with an act of treachery, compelled the Defense Department's Inspector General to investigate the "conduct and practice" of lawyers

95. Luban Lawfare, *supra* note 90, at 1987; *see also* JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER 159-70 (2006).

96. Luban Lawfare, *supra* note 90, at 1989-90.

97. *Id.* at 1990.

98. *Id.* at 1992-98.

who represented clients at Guantánamo.⁹⁹ Government officials publicly shamed the defense attorneys as a professional class and implicitly threatened the business interests of the firms where they were employed.¹⁰⁰ David Frakt asserted that “[t]he Bush Administration took their counterlawfare efforts to the extreme by denying detainees all access to lawyers or to courts, and by asserting that no laws or treaties, including Article 3 [of the Geneva Conventions], protected detainees”¹⁰¹

Again, though, this was not a blanket rejection of international law or an assertion that the exigency of the post-September 11th landscape compelled derogation from relevant legal frameworks. Instead, in establishing its response to this expansive notion of lawfare, the Administration presented intricate legal arguments that drew directly on interpreted notions of international law. The Geneva Convention Relative to the Treatment of Prisoners of War (The Third Geneva Convention) was held, based on a formalistic reading of the Convention’s provisions, to apply only to High Contracting Parties “which can only be states.”¹⁰² In following: “[N]one of the provisions of [the Third Geneva Convention] apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world.”¹⁰³

Common Article 3 of the Conventions, which provides protection to combatants captured during battle in instances of non-international armed conflict, was declared inapplicable due to the international status of the US military campaigns in Afghanistan and Iraq.¹⁰⁴ The Office of Legal Counsel and the State Department debated the application of this body of law to the detainees, each

99. This was required through a provision in a Defense Appropriations Act and compelled formal investigation when defense lawyers were believed to have “interfered with the operations” at Guantánamo or “violated any applicable policy of the department.” This was interpreted broadly so that almost any initiative undertaken by defense counsel could trigger a potential investigation. See Horton Silencing the Lawyers, *supra* note 83.

100. Gregory P. Noone, *Lawfare or Strategic Communications*, 43 CASE W. RES. J. INT’L L. 73, 77 (2010); see also *Top Pentagon Officials Calls for Boycott of Law Firms Representing Guantanamo Prisoners*, DEMOCRACY NOW (Jan. 17, 2007), http://www.democracynow.org/2007/1/17/top_pentagon_official_calls_for_boycott. These comments, however, were widely denounced. See Luban *Lawfare*, *supra* note 90, at 1982.

101. Frakt, *supra* note 75, at 346-47.

102. Memorandum from George W. Bush, U.S. President, on Humane Treatment of Taliban and al Qaeda Detainees to Vice President et al. (Feb. 7 2002), http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

103. *Id.*

104. *Id.*; see Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

putting forth international law-based arguments detailing how the President was required to act in response to the threat of terrorism.¹⁰⁵ These legal engagements, along with various legislative and policy initiatives taken by both the Administration and Congress, contrived to ensure that, until definitive Supreme Court intervention nearly seven years after Guantánamo Bay received its first detainees in the War on Terror, *habeas* petitions were severely limited.¹⁰⁶

Contested conceptions and interpretations of international law were at the core of the debate and controversy that surrounded the detention program at Guantánamo Bay. The policies and legislative framework that created the detention facility drew upon interpretations of international law.¹⁰⁷ These arguments failed to convince many beyond the Administration and its staunchest allies. The Supreme Court denounced many of the Government's policies and supporting legal arguments.¹⁰⁸ Yet, the efforts taken by the detainees themselves, by individual lawyers who offered their representation, and by private organizations who coordinated or supported these efforts merited the charge of lawfare. In response to this expansive understanding of lawfare, the Administration and Congress increased its efforts to further deny the Guantánamo detainees, the vast majority of whom were never charged, access to courts and access to legal representations.¹⁰⁹ Again, lawfare did not equate to a broad denouncement of international law, but instead to a particular and systematic effort to limit the use of international law and legal remedies by a particular actor, for a particular purpose.

105. Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., on Application of Treaties and Laws to al Qaeda and Taliban Detainees to William J Haynes II, Gen. Couns. Dep't Def. (Jan. 9, 2002), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.01.09.pdf>; Memorandum from William H. Taft, Dep't of State, on Your Draft Memorandum of January 9 to John C. Yoo, Deputy Assistant Att'y Gen. (Jan. 11, 2002), <http://nsarchive.gwu.edu/torturingdemocracy/documents/20020111.pdf>. For an account of these international law-based debates between the Office of Legal Counsel and the State Department, see Bradley, *supra* note 73, at 66-67.

106. See *Boumediene v. Bush*, 533 U.S. 723 (2008).

107. See Bradley, *supra* note 73, at 62-67.

108. See *supra* note 88.

109. Of the 779 individuals detained at Guantánamo, 674 were released without any charge and others await release. See *Guantanamo: Facts and Figures*, HUM. RTS. WATCH (Apr. 18, 2016), <https://www.hrw.org/video-photos/interactive/2016/04/18/guantanamo-facts-and-figures>.

5. “AT THE BEGINNING OF THE TRIAL, ONCE MORE THE BROTHERS MUST INSIST ON PROVING THAT TORTURE WAS INFLICTED ON THEM BY STATE SECURITY [INVESTIGATORS] BEFORE THE JUDGE.”

— *al-Qaeda Training Manual (The Manchester Manual)*¹¹⁰

The controversy that surrounded the detainees contributed towards another understanding of lawfare that carried beyond the boundaries of the US Naval base at Guantánamo Bay. This use of the term lawfare is of multifaceted purpose. It claims that accusations of torture or mistreatment by, or on behalf of, detainees constitute either a strategic effort to burden tactical operations within zones of combat or seek to shame the United States’ international reputation and generate public disapproval of its foreign policy.

The first accused motive holds that, “[r]ecently, insurgent forces in Iraq and Afghanistan have been waging a legal battle against tactical-level forces to extend the lines of operation of their leaders’ lawfare efforts and to attempt to blunt America’s tip of the spear.”¹¹¹ This understanding of lawfare, which manifests simply through the accusation of torture, abuse, or other forms of mistreatment, constitutes a strategic attempt to compromise the operational objectives of the state against whom the accusation is made:

[D]etainees may make claims of abuse at the point of capture by indigenous forces, claim abuse again when transferred to an American detachment or team, and then claim abuse once again when they reach the detention facility Knowing that U.S. forces are duty-bound to investigate all claims of detainee abuse, insurgents can effectively burden leaders at three different levels of tactical command with detailed investigations.¹¹²

Additionally, this notion of lawfare argues that claims of torture constitute a significant public relations victory for the United States’ enemies:

By latching onto the torture narrative through the confirmed instances of mistreatment, and further taking this narrative onto the record in various legal forums, the tactic served to irreparably

110. *Al Qaeda Manual, Part 21*, U.S. BORDER PATROL, http://www.usborderpatrol.com/Border_Patrol1803_21.htm (alteration in original).

111. Dungan, *supra* note 85, at 10.

112. *Id.*

harm the image of the United States, removed the benefit of the doubt pertaining to government efforts to combat torture allegations, and consequentially the government's ability to effectively prosecute both a war and its accused war criminals.¹¹³

Commentators who perpetuate this notion of lawfare have suggested that detainees of the War on Terror intentionally provoke US officials so as to "force" mistreatment and substantiate a claim of abuse.¹¹⁴ That these detainees (often, accused members of al-Qaeda or the Taliban) would manufacture an accusation of torture or abuse to gain a tangible advantage over their captors is described as "akin to malicious prosecution."¹¹⁵ This understanding of lawfare, however, extends beyond the individual detainee who claims torture or abuse.

Both non-governmental organizations and media outlets who have either reported or investigated accusations of torture have been charged with practicing this form of lawfare. Such groups and their representatives are believed to be forwarding an ideological agenda intent on damaging the United States' reputation and curtailing its hegemonic design.¹¹⁶ Amnesty International has been accused of disseminating its literature to detainees held by US forces and essentially directing detainees to claim torture.¹¹⁷ This particular claim of lawfare moved beyond the accusation made by the detainee, often with little regard for the merits of the accusation, and fixated on the intermediary who sought to substantiate or disseminate the varied claims.

NGOs and certain media outlets were declared as threats to US interests.¹¹⁸ Their actions were equated with terrorist organizations: "This new class of warrior consists of intergovernmental organizations, transnational guerrilla and terrorist groups, multinational organizations . . . and a rapidly growing number of nongovernmental organizations in a wide variety of functional

113. Lebowitz, *supra* note 19, at 362.

114. See Tung Yin, *Boumediene and Lawfare*, 43 U. RICH. L. REV. 865, 880 (2009).

115. *Id.* at 881.

116. See Austin & Kolenc, *supra* note 12, at 319-20; see also Frakt, *supra* note 75, at 342.

117. See Lebowitz, *supra* note 19, at 374; see also Debra Burlingame & Thomas Joscelyn, *Gitmo's Indefensible Lawyers*, WALL ST. J. (Mar. 15, 2010), http://www.wsj.com/articles/SB10001424052748704131404575117611125_872740.

118. Fonte, *supra* note 66.

areas.”¹¹⁹ These charges, however, went beyond simple accusations and talking-points espoused by various commentators who – in accordance with Michael Kearney’s understanding of lawfare as a “critique of human rights activism and advocacy” – viewed the role assumed by NGOs and certain media outlets as detrimental to US interests within the War on Terror.¹²⁰

Donald Rumsfeld introduced this notion of lawfare into the official discourse that surrounded the detainees held in US custody. The Secretary of Defense claimed, “[t]hese detainees are trained to lie, they’re trained to say they were tortured, and the minute we release them or the minute they get a lawyer, very frequently they’ll go out and they will announce that they’ve been tortured . . . The media jumps on these claims.”¹²¹ Secretary Rumsfeld would substantiate such accusations with reference to an al-Qaeda training manual, discovered by the Manchester Metropolitan Police during a raid of a home in the North-East of England. Dubbed the Manchester Manual, Secretary Rumsfeld repeated the claim that terrorists have been trained to lie about abuse and torture while in US captivity because “their training manual says so.”¹²²

The Manchester Manual served as purportedly uncontroversial evidence that al-Qaeda practiced aggressive forms of lawfare, were familiar with and able to advantageously manipulate US and international law, and employed a standard operating procedure that manufactured false claims of abuse to both burden and denigrate US objectives and interests.¹²³ David Frakt has claimed that the Bush

119. Austin & Kolenc, *supra* note 12, at 303-04; *see also* Davida E. Kellogg, *International Law and Terrorism*, 85 MIL. REV. 50, 50 (2005) (“The opinions of nongovernmental organizations (NGOs), terrorist sympathizers and apologists, and uninformed reporters with political agendas are not the law, and by our inaction we should not allow them to become new prerogative norms.”); Fonte, *supra* note 66.

120. Kearney, *supra* note 20, at 88.

121. Donna Miles, *Al Qaeda Manual Drives Detainee Behavior at Guantanamo Bay*, AM. FORCES PRESS SERV. (June 29, 2005), http://www.dodea.edu/Offices/Safety/upload/13_Detainee_Behavior_Guantanamo_Bay.pdf.

122. *Id.*

123. For example, during a Department of Defense briefing, Paul Butler, the Principal Deputy Assistant Secretary of Defense, asserted:

During questioning of the detainees, new information is constantly revealed, confirmed and analyzed to determine its reliability. Unfortunately, many detainees are deceptive and prefer to conceal their identities and actions. Some of you may be familiar with a document called the Manchester Manual. This was a document that was picked up in a search in Manchester, England and has surfaced in various other venues, including in Afghanistan. It’s really the al Qaeda manual, and in it is a large

Administration used the existence of the Manual to convince the public of the legitimacy of its enhanced interrogation program. He cites a Department of Defense official who argued that the Manchester Manual demonstrated al-Qaeda's ability to remain impervious to traditional interrogation techniques: "There is a very lengthy chapter on counter-interrogation techniques. These are sophisticated terrorists who know how to avoid interrogation."¹²⁴

The Manual, described as both an act and evidence of lawfare, was used by US officials to formally defend the United States against international law-based accusations of torture and prisoner mistreatment, despite the fact that the Manual had been discovered in 2000 – before the United States formally began its leadership role in the War on Terror.¹²⁵ In response to questions posed by the United Nation's Committee Against Torture to the US Government regarding allegations of abuse and torture, Charles Stimson, the Assistant Secretary of Defense for Detainee Affairs, replied to the UN monitoring body:

While the United States is aware of allegations of torture and ill-treatment, and takes them very seriously, it disagrees strongly with the assertion that such are widespread or systematic . . . these allegations must be placed in context: they relate to a minute percentage of the overall number of persons who have been detained. Moreover, not everything that is alleged is in fact truth. For example, it is well-known that al Qaeda are trained to lie. The "Manchester Manual" instructs all al Qaeda members,

section which teaches al Qaeda operatives counterinterrogation techniques: how to lie, how to minimize your role.

See *Briefing on Detainee Operations at Guantanamo Bay*, DEP'T DEF. (Feb. 13, 2004), <https://cryptome.org/dod-gulag.htm>; see also Jane Mayer, *The Experiment*, NEW YORKER (July 11, 2005), <http://www.newyorker.com/magazine/2005/07/11/the-experiment-3>.

124. Paul Butler, *The Detainees*, PBS NEWSHOUR (Feb. 13, 2004, 12:00 AM), <http://www.pbs.org/newshour/bb/terrorism/jan-june04/detainees2-13.html>, *quoted in* Frakt, *supra* note 75, at 350.

125. US efforts to reference the Manual as evidence of a lawfare strategy intended to undermine a variety of American interests was held by several commentators to be disingenuous. The Manual was discovered prior to September 11th, prior to Guantánamo Bay or Abu Ghraib, and prior to US initiation of the war on terror. This reading of the Manual did not appear to instruct detainees to fabricate claims of torture and abuse but instead to report it: "written in the expectation that its recruits would be detained by . . . enemy Arab regimes, the manual anticipates torture as an inevitable fact, and simply urges captives to report the treatment they receive." Larry Siems, *Chapter 5, Part 2 - The Battle Lab*, TORTURE REP. (Sept. 3, 2010, 3:54 PM), <http://www.thetorturereport.org/report/chapter-5-part-2-battle-lab>.

when captured, to allege torture, even if they are not subject to abuse.¹²⁶

The Administration's position in the debate over interrogation techniques and accusations of torture and other forms of mistreatment did not, however, disassociate from international legal reasoning. The enhanced interrogation program that gave rise to many allegations of torture leveled against the United States was based largely upon particular readings and interpretations of international law. The notorious definition of torture that would form the basis of the enhanced interrogation programs operated by the Central Intelligence Agency and the Department of Defense was effectively a legal argument about the necessary standard of conduct that must be achieved so as to remain in compliance with the United Nation's Convention Against Torture.¹²⁷ The Bush Administration and the Department of Justice drew directly upon international law when they sought to devise the means and methods of interrogation that would provide their desired security and intelligence outcomes. These legal arguments were, of course, abject failures that were routinely denounced and almost universally held to have strayed disastrously from any plausible account of state obligation pertaining to the treatment of detainees or the prohibition on torture.¹²⁸ Yet the merits of these arguments and legal engagements are not of direct concern, nor do they alter the fact that US officials attempted to draw directly upon international legal arguments to legitimize aspects of their interrogation tactics.

126. *United States' Response to the Questions Asked by the Committee Against Torture*, U.S. DEP'T ST. (May 5, 2006), <http://www.state.gov/j/drl/rls/68561.htm>.

127. The imposed standard was drafted by the Office of Legal Counsel and held that "physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture . . . it must result in significant psychological harm of significant duration, e.g. lasting for months or even years In short, reading the definition of torture as a whole, it is plain that the term encompasses only extreme acts." Off. Assistant Att'y Gen. On Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A to Alberto R. Gonzalez, Couns. to the President (Aug. 1, 2002), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf>; *see also* Bradley, *supra* note 73, at 70-72; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

128. *See* DAVID P. FORSYTHE, *THE POLITICS OF PRISONER ABUSE: THE UNITED STATES AND ENEMY PRISONERS AFTER 9/11 60-75* (2011). *See generally* DAVID COLE, *THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE* (2013); DAVID LUBAN, *TORTURE, POWER, AND LAW* (2014).

Individuals or organizations who claimed abuse or denounced these interrogation techniques and the treatment of detainees more broadly were accused of practicing lawfare. First, the accusation of lawfare would dismiss the substance of the claim, effectively (albeit informally) rendering the claim inadmissible due to the perceived and assigned motives of the individual or organization forwarding the claim. This allows the claim to be denied by accusing the claimant of lying as per the Manchester Manual. Second, it accuses third-party interests (often NGOs or international organizations) who make or publicize similar accusations of perpetuating a false claim. Collectively, this delegitimizes the use of international mechanisms and standards by such actors who seek to pursue or frame claims in accordance with international law. These particular forms of international legal engagement become an illegitimate and (informally) inadmissible means of achieving redress or demanding account.

6. “*SUCH LAWFARE – THE MANIPULATION OF WESTERN LAWS AND JUDICIAL SYSTEMS TO ACHIEVE STRATEGIC MILITARY AND POLITICAL ENDS – OFTEN MANIFESTS AS FRIVOLOUS LAWSUITS DESIGNED TO SILENCE, PUNISH, AND DETER THOSE WHO PUBLICLY SPEAK AND REPORT ON MILITANT ISLAM, TERRORISM AND THEIR SOURCES OF FINANCING.*”

— *Brooke Goldstein and Benjamin Ryberg (of the Lawfare Project)*¹²⁹

On the margins of the War on Terror, lawfare has come to describe the actions of individuals or organizations who employ libel or hate speech laws to “silence” criticism of “controversial Islamic organizations.”¹³⁰ This marked a significant departure from Dunlap’s description of law as a substitute for traditional military means to achieve an operational objective.¹³¹ Opponents of this notion of

129. Brooke Goldstein & Benjamin Ryberg, Note, *The Emerging Force of Lawfare: Legal Maneuvering Designed to Hinder Exposure of Terrorism and Terror Financing*, 36 *FORDHAM INT’L L.J.* 634, 637 (2003).

130. Alan Dershowitz & Elizabeth Samson, *The chilling effect of ‘lawfare’ litigation*, *GUARDIAN* (Feb. 9, 2010, 8:30 AM), <https://www.theguardian.com/commentisfree/libertycentral/2010/feb/09/libel-reform-radical-islamic-groups>.

131. Dunlap Apologia, *supra* note 7, at 338; *see also* Frakt, *supra* note 75, at 342.

lawfare hold that, “over the past ten years, there has been a steady increase in Islamist lawfare tactics directly targeting the human rights of North American and European civilians in order to constrain the free flow of public information about radical Islam.”¹³²

This notion of lawfare is believed to create a chilling effect on individuals disseminating information about such groups.¹³³ Alan Dershowitz and Elizabeth Samson have argued that “[radical Islamic groups] have learned to sue their critics for defamation, not with the intent to win the case, but with the hope of imposing an unaffordably high cost on criticism of their actions.”¹³⁴ According to opponents of this notion of lawfare, it is “effective because one lawsuit can silence thousands who have neither the time nor the financial resources to challenge well-funded terror financiers or the vast machine of the international judicial system.”¹³⁵

Despite the apparent departure from Dunlap’s intended meaning of the term, this notion of lawfare has strained its application to include national security considerations. Brooke Goldstein and Benjamin Ryberg of The Lawfare Project argue that the significance of such lawfare tactics has adversely impacted how the US Government approaches national security reporting.¹³⁶ This threat, according to Goldstein and Ryberg, has resulted from formal engagements with international legal mechanisms:

For more than ten years, an international movement to silence free speech about Islamist terrorism has emerged from the United Nations under the guise of “prohibiting discrimination on the basis of religion or belief” – with a marked focus on Islam.¹³⁷

Accordingly, this, coupled with the use of domestic courts to bring libel cases against groups or individuals who attempt to expose

132. Tiefenbrun, *supra* note 10, at 52; *see also* Aaron Eitan Meyer, *Islamist Lawfare*, AM. SPECTATOR (Sept. 15, 2009, 10:07 AM), http://spectator.org/40898_islamist-lawfare/>; Brooke Goldstein, *The Disproportionate Use of Lawfare*, GATESTONE INST. (Apr. 5, 2010, 5:00 AM), <http://www.gatestoneinstitute.org/1132/the-disproportionate-use-of-lawfare>>; Frakt, *supra* note 75, at 342; Dershowitz & Samson, *supra* note 130.

133. Tiefenbrun, *supra* note 10, at 52.

134. Dershowitz & Samson, *supra* note 130.

135. Tiefenbrun, *supra* note 10, at 52.

136. Goldstein & Ryberg, *supra* note 129, at 652-55.

137. Goldstein and Ryberg cite Human Rights Council Resolution 19/25, which reaffirms the “obligation of states to prohibit discrimination on the basis of religion or belief and to implement measures to guarantee the equal and effective protection of the law.” Goldstein & Ryberg, *supra* note 129, at 650 (*quoting* Human Rights Council Res. 19/25, U.N. Doc. A/HRC/RES/19/25, at 1 (Apr. 10, 2012)).

“terrorism or terrorist financing,” carries detrimental effects on domestic policy and security initiatives.¹³⁸ Domestically, this has manifested through a host of initiatives, largely undertaken by the Obama Administration, that Goldstein and Ryberg believe to evidence “how the Islamist lawfare strategy to politicize speech deemed ‘Islamophobic’, and to silence speech deemed blasphemous of Islam, is directly impacting U.S. domestic policy.”¹³⁹

While free speech receives broad formal protection under the First Amendment to the US Constitution, opponents of this form of purported lawfare draw upon the threat of “libel tourism.”¹⁴⁰ This supposes that a plaintiff will “forum shop” to find a sympathetic and legally advantageous jurisdiction to bring forth a libel claim against a foreign defendant. Most often, the United Kingdom, known for plaintiff-friendly libel laws and a burden of proof standard under which the accused must prove his or her own innocence, is the preferred venue.¹⁴¹ While such methods and legal tactics have increasingly been discussed in relation to an expansive notion of lawfare, the use of libel tourism, forum shopping, and the vexatious employment of domestic laws to silence criticism have long histories of strategic application.¹⁴² Yet it has not been until particular groups – primarily Muslims or Islamic organizations – began, or were at least

138. Goldstein and Ryberg cite American co-sponsorship of Human Rights Council Resolutions promoting religious tolerance as evidence of “the suppression of legitimate dialogue about real and imminent national security threats.” *Id.* at 650-52; *see also* Human Rights Council Res. 16/18, U.N. Doc. A/HRC/RES/16/18, at 1 (Apr. 12, 2011).

139. Goldstein and Ryberg provide examples including Secretary of State Clinton’s efforts to implement Human Rights Council Resolution 16/18; a revision of federal counterterrorism training materials to eliminate reference to “jihad” and “Islam”; the failure of the Obama Administration’s National Intelligence Strategy to reference Islam or characterize jihad as a form of holy war against the West; and the classification of the Fort Hood military base shooting as “workplace violence” rather than an act of terrorism. *See* Goldstein & Ryberg, *supra* note 129, at 652-53.

140. *See* Arlen Specter & Joe Lieberman, *Foreign Courts Take Aim at our Free Speech*, WALL ST. J. (July 14, 2008), <http://www.wsj.com/articles/SB121599561708449643>.

141. Trevor C. Hartley, *Libel Tourism and Conflict of Laws*, 59 INT’L & COMP. L.Q. 25 (2010); *see also* Sarah Staveley-O’Carroll, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?*, 4 N.Y.U. J. L. & LIBERTY 252 (2009).

142. *See* Richard Garnett & Megan Richardson, *Libel Tourism or Just Redress? Reconciling the (English) Right to Reputation with the (American) Right to Free Speech in Cross-border Libel Cases*, 5 J. PRIV. INT’L L. 471 (2009); *see also* Yasmine Lahlou, *Libel Tourism: A Transatlantic Quandary*, 2 J. INT’L MEDIA & ENT. L. 199 (2009); Raymond W. Beauchamp, *England’s Chilling Forecast: The Case for Granting Declaratory Relief to Prevent English Defamation Actions from Chilling American Speech*, 74 FORDHAM L. REV. 3073, 3074-76 (2006).

perceived to begin, engaging with libel laws that the term lawfare was applied and legislative and judicial measures were taken in response.

Following the 2003 publication of *Funding Evil: How Terrorism is Financed and How to Stop It*, a book in which author Rachel Ehrenfeld accused Khalid Salim Bin Mahfouz, a prominent Saudi banker, of providing financial support to al-Qaeda and other terrorist organizations, Bin Mahfouz filed a defamation claim in English court.¹⁴³ After Ehrenfeld refused to acknowledge the English Court's jurisdiction, Bin Mahfouz was awarded damages.¹⁴⁴ Bin Mahfouz did not attempt to enforce the ruling in the United States; however, Rachel Ehrenfeld filed for a declaratory judgment, arguing that "under federal and New York law, bin Mahfouz could not prevail on the libel claim against her and that the English default judgement was invalid."¹⁴⁵

The New York Court of Appeals declined jurisdiction on the matter but held that there was a need to protect New York residents from the chilling effect of foreign libel judgments but that such actions needed to result from state legislation.¹⁴⁶ In direct response, lawmakers in Albany passed the Libel Terrorism Protection Act, dubbed "Rachel's Law," which "was designed to address the issue of obtaining personal jurisdiction over a plaintiff in a foreign defamation action, as well as the substantive issue of whether a New York Court would enforce a foreign judgment."¹⁴⁷

The legislation focused on narrow jurisdictional issues and the compatibility of foreign judgments with afforded First Amendment protections. The accompanying discourse surrounding the drafting and passage of the legislation, however, fixated on issues of terrorism, terrorist financing, and the accompanying notion of lawfare.¹⁴⁸ Various States followed, passing similarly formed laws and the

143. Bin Mahfouz v. Ehrenfeld [2005] EWHC (QB) 1156 (Eng.).

144. *Id.*; see also Andrew R. Klein, *Some Thoughts on Libel Tourism*, 38 PEPP. L. REV. 375, 377 (2011).

145. See Michelle Feldman, *Putting the Breaks on Libel Tourism: Examining the Effects Test as a Basis for Personal Jurisdiction under New York's Libel Terrorism Protection Act*, 31 CARDOZO L. REV. 2457, 2458 (2010); see also Ehrenfeld v. Bin Mahfouz, 9 N.Y.3d 501, 507 (2007).

146. *Ehrenfeld*, 9 N.Y.3d at 507.

147. Klein, *supra* note 144, at 381.

148. See Rory Lanaman & Dean G. Skelos, *The Libel Terrorism Protection Act, Also Known as Rachel's Law, Signed by Governor*, AM. CTR. DEMOCRACY (May 1, 2008, 5:38 AM), <http://acdemocracy.org/the-libel-terrorism-protection-act-also-known-as-rachels-law-signed-by-governor/>.

following year federal legislation began moving through Congress.¹⁴⁹ While the resulting federal legislation sought to balance free speech protections with the principle of comity and did not directly mention issues of terrorism or lawfare, the legislation was largely driven by such influences.¹⁵⁰

Certainly, individuals or groups of litigants may attempt to advantageously or vexatiously apply libel laws, either within the United States or through foreign jurisdictions, but this is hardly an exclusive phenomenon attributable to a particular group. Yet, the identification of such legal actions, regardless of their respective merits, as lawfare, is reserved for what Alan Dershowitz and Elizabeth Samson dubbed “controversial Islamic organizations.”¹⁵¹ The singular focus of this notion of lawfare, and the at least partially implied intentions of accompanying reactive legislation, serves to brand any legal action brought by an Islamic group or individual as malicious and devoid of legal merit often before or without the substance of the legal claim receiving judicial treatment. This, in itself, creates a chilling effect. From the moment of commencement, legal actions brought by a particular class, under the supposed guise of lawfare, are reactively doubted, limited, and repressed.

7. “TRUTH BE TOLD, WE HAVE EVERY REASON TO EMBRACE LAWFARE, FOR IT IS VASTLY PREFERABLE TO THE BLOODY, EXPENSIVE, AND DESTRUCTIVE FORMS OF WARFARE THAT RAVAGED THE WORLD IN THE 20TH CENTURY...I WOULD FAR PREFER TO HAVE MOTIONS AND DISCOVERY REQUESTS FIRED AT ME THAN INCOMING MORTAR OR ROCKET-PROPELLED GRENADE FIRE.”

— *Phillip Carter (former US Army Officer)*¹⁵²

149. This culminated in the passage of the Securing the Protection of our Enduring and Established Constitutional Heritage Act. *See* Securing the Protection of Our Enduring and Established Constitutional Heritage Act, 28 U.S.C. § 4102 (2010); *see also* Klein, *supra* note 144, at 381-84.

150. Mark W. Holzer, *Offensive Lawfare and the Current Conflict*, HARV. NAT'L SEC. J. (Apr. 10, 2012, 1:17 AM), <http://harvardnsj.org/2012/04/offensive-lawfare-and-the-current-conflict/>.

151. Klein, *supra* note 144.

152. Phillip Carter, *Legal Combat: Are enemies waging war in our courts?*, SLATE, (Apr. 4, 2005, 5:51 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2005/04/legal_combat.html.

Much of what was originally termed lawfare is clearly preferable to the high costs and tragic certainties of war. Charles Dunlap has acknowledged that “there are many uses of what might be called ‘lawfare’ that serve to reduce the destructiveness of conflicts, and therefore further one of the fundamental purposes of the law of war.”¹⁵³ In such instances, it is not immediately evident why these uses of international law do not simply represent an intended or successful function of international law. Though if Dunlap is correct that acts such as purchasing satellite imagery, imposing sanctions against Iraq’s Air Force, strengthening the rule of law, or ceasing the finance of terrorist organizations enabled the evasion of sustained episodes of violence then such forms of legal engagement are plainly preferable.¹⁵⁴

States, however, have long partaken in such forms of legal engagement. An increasingly globalized and formalist international environment, mature legal mechanisms, and developed civil society organizations may provide greater opportunities for engagement but such forms of strategic legal employment are well-established.¹⁵⁵ The actions of a State or international actor that invokes international law in furtherance of a strategic objective do not frequently merit such general attention or a designated nomenclature.

Despite the ubiquity of much of what Dunlap’s evolved conception of lawfare describes, the term has gained prominence within media and amongst policymakers. It is tempting to place the rise of lawfare within the context of a post-September 11th, War on Terror, Bush Administration-dominated environment. It is here that lawfare has its origins, developed its diverse understandings and applications, and received prominent attention from the highest levels of political power. But lawfare should not be understood within this singular context. An analysis of the use of the term lawfare over a ten-year span found that while the term began appearing within the media in 2003, eighty-seven percent of total references to lawfare occurred between 2009 and 2013, when the study concluded.¹⁵⁶

153. Dunlap *Today and Tomorrow*, *supra* note 5, at 316.

154. Dunlap *Apologia*, *supra* note 7, at 123-24.

155. *See generally* PETER MAGUIRE, *LAW AND WAR: INTERNATIONAL LAW AND AMERICAN HISTORY* (2010); MARK WESTON JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS 1789-1914* (2004).

156. The analysis performed by Neve Gordon was global in scope and found that the term lawfare appeared in 43 of the 207 “Major World Publications” within the LexisNexis database. *See* Gordon, *supra* note 33, at 318-21.

Still, the question remains: Do we have every reason to embrace a state-led notion of lawfare, as many commentators have suggested?¹⁵⁷ Orde Kittrie argues that “the U.S. government’s lack of systematic engagement with lawfare is a tremendous missed opportunity” and that “lawfare, deployed systematically and adeptly, could in various circumstances save U.S. and foreign lives by enabling U.S. national security objectives to be advanced with less or no kinetic warfare.”¹⁵⁸

Again, it is evident that such uses of international law, while not necessarily novel, are to be welcomed. Kittrie, and many commentators engaged in the lawfare debate, however, understand law within this context to constitute a weapon of war. Dunlap, for instance, has argued that:

[H]arking back to the original characterization of lawfare as simply another kind of weapon, one that is produced, metaphorically speaking, by beating law books into swords . . . a weapon can be used for good or bad purposes, depending upon the mindset of those who wield it. Much the same can be said about the law.¹⁵⁹

If one, however, envisions law as a weapon, as opposed to a strategic tool or some less incendiary analogy, it will facilitate efforts to brandish such a weapon in instances that its user perceives as a just cause. Congruently, however, this view of international law also facilitates an inverse understanding of law’s use by one’s opponent. Whether an enemy on the battlefield or an ideological challenger, law becomes a weaponized threat requiring a firm and decisive response. Considerations of whether we have every reason to embrace lawfare should be made within this context. Often, when a legal engagement is branded as lawfare, the response to this particular form of legal engagement begins to demonstrate what lawfare means. This is not a definitional question but instead one focused on the implications of applying the term lawfare to such forms of legal engagement – as an action, a form of speech, and as a label.

As Neve Gordon demonstrates, the vast majority of literature dedicated to lawfare focuses on its definition and normative underpinnings.¹⁶⁰ Instead, he holds that “lawfare is not merely used to

157. Carter, *supra* note 152.

158. Kittrie, *supra* note 24, at 3.

159. Dunlap Apologia, *supra* note 7, at 123-24.

160. Gordon, *supra* note 33, at 312.

describe certain phenomena, but that it operates as a speech act that reconstitutes the human rights field as a national security threat.”¹⁶¹ Gordon’s understanding of what lawfare *does* asks both the correct question and is well demonstrated through the Israeli case study that substantiates his work.¹⁶² It is now, however, prudent to ask what lawfare means – to both understandings and functions of international law – from a more holistic perspective.

If we survey the literature and observe examples of how lawfare has been deployed and understood as both a description of a phenomenon and an act with normative implications varied examples emerge. The claim of torture, filing a *habeas* brief, and the use of a human shield are each held to constitute both an international legal engagement and an act of lawfare. Likewise, the imposition of sanctions against a foreign military or a defense lawyer, the signing of an Article 98 agreement to immunize a US official from ICC prosecution, or the confiscation of terrorist assets constitute both a legal engagement and a form of lawfare.

The critical view of lawfare, that it popularly constitutes an attack on or dismantlement of legal norms, serves to endow international law with a singular, likely virtuous, purpose. It does not recognize that international law is commonly used for a diversity of reasons, any of which may evoke their own competing moral pronouncements or normative attributions. This recalls David Kennedy’s understanding of international law as “a set of arguments, rhetorical performances and counter-performances, deployed by people pursuing projects of various kinds.”¹⁶³ Labeling certain legal engagements as lawfare serves to tip the balance of these pursuits.

Its pejorative application – that is, its framing of international legal engagement as a weapon, as a threat – serves to delegitimize and ultimately disenfranchise *particular* forms of legal engagement. It is thus accurate to view, understand, and frame, this most common application of the term lawfare, not as a dismantlement of legal norms or as an attack on the human rights field (though it may do such things), but instead as a limitation on access to international justice.

The concept of access to justice is well formed within many domestic jurisdictions. In comparison, however, its articulation within

161. *Id.*

162. *Id.* at 318-39.

163. DAVID KENNEDY, LAWFARE AND WARFARE IN THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 158, 173 (James Crawford & Martti Koskenniemi eds., 2012).

international law, while drawing upon established concepts, is recent in its use.¹⁶⁴ As international law's focus developed from its early state-centric conception to include considerations of the individual actor, the notion of access to international justice began to form.¹⁶⁵ Individualized international justice secured its modern foundation through the drafting of the United Nations Charter and the establishment of the Nuremburg Tribunal.¹⁶⁶ Article 2 of the Universal Declaration of Human Rights holds that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind”¹⁶⁷ Continuing, the Declaration holds that every individual possesses a right to an effective remedy for any acts that violate their fundamental rights and that all are “entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations”¹⁶⁸

These foundational principles, which gave license to individuals within international mechanisms, began the transformation of established domestic legal principles into international legal obligations.¹⁶⁹ These received further grounding through the host of global developments occurring throughout the latter-half of the twentieth century. Adoption of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights strengthened the legal effect of these provisions. The development of legally binding regional human rights treaties and accompanying enforcement mechanisms like the European Court of Human Rights further facilitated the ability of the individual to gain access to the promise of international justice and redress.¹⁷⁰

164. Patrick Keyzer, Vesselin Popovski, & Charles Sampford, *What is 'access to international justice' and what does it require?*, in ACCESS TO INTERNATIONAL JUSTICE 1, 2 (2015).

165. For an account of this development and international law's growing recognition of the individual subject, see ANTONIO AUGUSTO CANCADO TRINDADE, *THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE* 3-8 (2011). See generally BRUNO SIMMA, *FROM BILATERALISM TO COMMUNITY INTEREST IN INTERNATIONAL LAW* 217 (1994).

166. Keyzer et al., *supra* note 164, at 3.

167. G.A. Res. 217 (III) A, art. 2, Universal Declaration of Human Rights (Dec. 10, 1948).

168. *Id.* art. 8, 10.

169. For an account of these developments, see Keyzer et al., *supra* note 164, at 1-5.

170. *Id.* at 3; see also International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14, Nov. 4, 1950, E.T.S. 5,

Narrowly, access to international justice, like its domestic counterpart, can be understood as “the right to a judicial remedy before an independent court of law.”¹⁷¹ While it is not the purpose of this paper to trace the development of the concept of access to international justice, it is employed here in its broadest sense. This holds that under international law, respect for principles, provisions, and individual rights receive meaning and actualization through the ability of individuals to engage with them through formal and informal, state and non-state, systems or regimes.

As commonly employed, the accusation of lawfare serves to justify interference, or attempted interference, with this ability. It does not represent an ontological challenge to international law. Those who scream lawfare loudest and denounce the role and influence of international law rarely (if ever) intend their denouncement to discount the totality of ways which international law can be engaged. Often, their response to lawfare draws upon international law, at least in part and not always convincingly. But equally, they are actors under international law who engage and apply it accordingly.

The claim of lawfare, the perceived threat of international law that constitutes many of lawfare’s popularized usages, as they have developed, serves to limit particular forms of legal engagement. Most of these are by or on behalf of individual subjects or are directed towards state actors. Lawfare serves to resist or delegitimize these particular engagements. It serves to justify legal measures or policies that discount these engagements. Despite self-evident examples of international legal engagements that appear vastly preferable to warfare or the use of force, when one suggests that we have every reason to embrace lawfare it is necessary to understand what lawfare often means for the function and efficacy of international law, and the status of the individual or non-state actor.

available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680063765>.

171. FRANCESCO FRACIONI, THE RIGHT OF ACCESS TO JUSTICE UNDER CUSTOMARY INTERNATIONAL LAW IN ACCESS TO JUSTICE AS A HUMAN RIGHT 1, 3 (2007).

HOW STATES PERSUADE: AN ACCOUNT OF INTERNATIONAL LEGAL ARGUMENT UPON THE USE OF FORCE

David Hughes*

How States Persuade presents a theory of international legal communication. It considers and maps how persuasion, through international legal argument, shapes legal change and influences notions of compliance. Commonly, international law is portrayed as a medium for debate. Within the resulting debates, persuasion is understood as a tool to induce compliance. Yet this is only one side of the conversation. Persuasion is a two-way discourse. Efforts to alter the behavior of a “non-compliant” state through cogent communication are often met with or preempted by legal arguments put forth by the state. This is perhaps most apparent in the deliberative environments that accompany the use of force and the conduct of warfare. Built around a series of case studies in which states offer legal arguments in support of actions that, prima facie, extend beyond the limits of legal permissibility, this article presents a theory of persuasion and legal communication that differs from how legal argument and international law are commonly understood. It offers the first detailed and theorized account of the processes through which the non-compliant state argues, persuades, and employs international law. By mapping and conceptualizing persuasive techniques, I suggest that international law must be considered both in compliance and in violation. Switching emphasis and considering the actions and arguments offered by the “non-compliant” state facilitates a novel and complete understanding of the diplomatic, informal, and daily interactions that more commonly and more consequentially define how international law is understood, practiced, and altered.

I. INTRODUCTION

Barack Obama arrived at Oslo City Hall in December 2010 to deliver the Nobel Lecture and receive the Peace Prize. The President recalled the legacy of Henry Dunant.¹ In 1901, Dunant became the Prize’s inaugural recipient. He had founded the International Committee of the Red Cross (ICRC) and oversaw the adoption of the first Geneva Convention. The call for humanity that Dunant brought forth from the fields of Solferino initiated the legal regulation of warfare. Resulting efforts did not outlaw hostilities. They began an arduous process of codification, dictating both when and how states may use force. A legal vocabulary emerged in concurrence. This structured the discourse accompanying war. It provided a means to contest when force is justifiable. Legitimacy demanded transparency. In a later address, President Obama cited the need to publicly explain and justify US military actions. The inability to provide reasoning, the President warned, encouraged international suspicion, eroded legitimacy, and reduced accountability.²

States have long coupled the use of force with contestations of legitimacy.³ As the international legal framework governing both *jus ad bellum* and *jus in bello* matured, states increasingly harnessed a legal

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¹ Barack Obama, “A Just and Lasting Peace” (Nobel Peace Prize Lecture, delivered at Oslo City Hall, Oslo, 10 December 2009) [Obama Nobel Lecture].

² Barack Obama, “Remarks by the President at the United States Military Academy Commencement Ceremony” (delivered at U.S. Military Academy – West Point, New York, 28 May 2014).

³ M. Cherif Bassiouni, “Terrorism: The Persistent Dilemma of Legitimacy” (2004) 36 Case W. Res. J. Int’l L. 299 at 299.

vernacular.⁴ Diplomatic communications accompanied military forays. The battlefield expanded from the frontline into international fora. David Ben-Gurion, Israel's first Prime Minister, described the institutional relationship between his nation's Defense and Foreign Ministries. Ben-Gurion succinctly elucidated that, "the Minister of Defense is authorized to make defense policy; the role of the Foreign Minister is to explain that policy."⁵

The turn to legal rationale increased following the Second World War. The prohibition of the use of force and the proliferation of international humanitarian law (IHL) were a global response to war's unmitigated horror. These developments further facilitated the embrace of legal argument which would 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."⁶

As the nature of warfare evolved, as states perceived new dangers, the post-war legal vernacular was understood as incomplete. Responses to the altered nature of warfare feature inventive (and, at times, dubious) legal claims. These address the gaps, where the laws of war fall silent and fail to directly contemplate evolving scenarios and emerging threats. These discussions influence conceptions of permissibility, they establish new standards, and they formalize through state practice, *opinio juris*, authoritative argument, and the recognition of custom. States have, however, altered the ways that they invoke international law.⁷ Sophisticated legal appeals have moved the discourse accompanying the use of force beyond assertions of legal conformity. The use of force is coupled with appeals that attempt to persuade the international community that inventive legal arguments constitute an acceptable interpretation or application of international law. Legal arguments may be offered in good-faith, in response to a lawmaking moment. They may also accompany events that clearly violate international law. Legal arguments supplement state behaviour that stretches or exceeds the boundaries of legal permissibility. International law is invoked to persuade audiences that a particular action, interpretation, or policy is acceptable.

Yet the relationship between international law and persuasion is understood differently. Law is often portrayed as a medium for debate and agreement.⁸ Within this debate, persuasion is assigned a particular purpose. Steven Ratner explains that "for those international actors seeking to promote respect for international law, persuasion is at the core of the enterprise."⁹ Thus persuasion becomes a means to encourage fidelity towards international law. It forms a subset of the broader discussion

⁴ See, Michael Byers, *War Law* (New York: Grove Press, 2006) at 3, 43 [Byers War Law].

⁵ Dan Horowitz, "The Israeli Concept of National Security" in Avner Yaniv, ed, *National Security and Democracy in Israel* (London: Lynne Rienner Publishers, 1993) 11 at 12.

⁶ Dino Kritsiotis, "When states use armed force" in Christian Reus-Smit, ed, *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) 45 at 47.

⁷ Yahli Shereshevsky, "Back in the Game: The Re-Engagement of States in International Humanitarian Lawmaking," 36 Berkeley J. Int'l L. [forthcoming in 2018] [Shereshevsky Back in the Game].

⁸ Harlan Grant Cohen, "Finding International Law, Part II: Our Fragmenting Legal Community," (2011) 44 N.Y.U. J. Int'l L. & Pol. 1050 at 1067.

⁹ Steven R. Ratner, "Persuading to Comply: On the Deployment and Avoidance of Legal Argumentation" in Jeffery L. Dunoff & Mark A. Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013) 568 at 568 [Ratner Persuading to Comply].

regarding compliance. Through a communicative process, reliant upon legal argument, the non-compliant state is convinced to alter its behaviour and adhere to legal dictate.¹⁰

This is only one side of the conversation. Persuasion is a two-way discourse. It is both a means to ensure compliance and a method to define how international law should be understood. Efforts to alter the behaviour of a non-compliant state through cogent communication is often met with or pre-empted by legal argumentation put forth by the state. These pages consider how states employ persuasion upon or following the use of force. I emphasize instances in which states offer legal arguments in support of actions and legal interpretation that, *prima facie*, extend beyond the limits of legal permissibility. Persuasion is understood broadly. The state becomes not only the “engine and the target” of compliance but a participant actively engaged in defining what compliance means.¹¹

Section two of this paper poses the question: why do states persuade? This section begins abstractly before moving beyond the contestations of compliance that often frame considerations of persuasion. It explores reasons why a non-compliant state, devoid of obligation and absent coercion, may employ legal argument and engage in a persuasive discourse. These reasons vary and are non-exhaustive. A state – whose actions are broadly understood to be in violation of international law – may employ persuasive legal argument to supplement a lie (e.g. we did not do what you claim that we did). The state may appeal to persuasion in support of a particular legal interpretation (e.g. what you said happened but it is not illegal or the law is unclear). Or the state may invoke persuasive legal argument to generate legitimacy for its general policies or purposes (e.g. military action is a necessary response to an emerging threat).

Section three asks whom do states persuade? This section considers the audiences that states engage through legal argument. The target of persuasion alters alongside the form and purpose of persuasion. The target may be broad (e.g. the international community) or narrow (e.g. interpretative communities, another state, a key ally).

Section four considers how do states persuade? It provides an account of the communicative process that states employ when engaging in this particular form of legal argumentation. The described process – also non-exhaustive – offers five broad phases of engagement. First, the state identifies a “common lifeworld.” Second, the state establishes itself as a general norm-acceptor. Third, the state demonstrates its authority to interpret the law. Fourth, it establishes a standard of compliance based on the “acceptable legal argument.” And fifth, the state draws upon precedent and commonalities. Through these phases, the state forwards a particular form of legal argument. This argument intends to influence understandings of law and fact. It seeks to generate legitimacy for state action and policy. And it justifies the use of force in ways that often extend beyond previously endorsed limits.

Section five merges the question of why with the question of how. It presents a series of case studies. These correspond with the abovementioned categories, describing a state’s motives and methods of persuasion. Within, descriptive accounts chronicle uses of legal argumentation. The first case study describes Russia’s appeals to international law following the annexation of Crimea. It traces Russia’s reliance upon international law to supplement various lies that denied, excused, and then explained

¹⁰ *Ibid*, at 573. See also, Nicole Deitelhoff, “The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case” (2009) 63 *International Organization* 33.

¹¹ Ratner *Persuading to Comply*, *supra* note 9 at 570.

Russian actions in Ukraine. The second case study chronicles the United States and the United Kingdom's employment of international legal argument to persuade selected audiences of a particular legal interpretation's validity. Situated within the war on terror, this study retells the interpretative development of the unwilling and unable standard in accompaniment of the use of force against a non-state armed group in Syria. The final case study demonstrates the use of international law to legitimize a particular, controversial, use of force. It details Israel's reliance upon legal argument both during and in the aftermath of the 2014 Gaza war. In each instance, legal arguments, persuasive endeavours, are offered by a state whose actions are deemed non-compliant with conventional legal understandings. In each instance, the non-compliant state exhibits a similar persuasive methodology. Section six concludes. It identifies challenges in evaluating the effectiveness of persuasion and legal argumentation.

In *A Memory of Solferino*, Henry Dunant described the furious violence that defined nineteenth century warfare.¹² The nature of war has changed in the 108 years between Dunant's receipt of the first Peace Prize and President Obama's acceptance of the award. As violence assumes new forms and manifests through novel challenges, international law increasingly structures the discourse that accompanies the use of force. Often it prescribes limits and instills a standard of compliance. Yet, we remain in a constant conversation about the moments when the use of force is permissible. We evolve the boundaries that define acceptable conduct once force is invoked. Persuasion and legal argument assume a significant role within this debate. They become an invaluable resource for those who demand greater adherence to the laws governing war. Yet, considerations of the extent to which and the means by which states employ persuasion in response to the call for greater compliance – to define the moments and to set the boundaries – are often absent from these conversations.

II. WHY DO STATES PERSUADE?

Contemporary considerations of compliance are frequently premised on Louis Henkin's oft-quoted aphorism that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."¹³ International law's influence is disregarded by realists and neo-realists who view compliance as an unimportant by-product of unitary state interest.¹⁴ But beyond these dismissive understandings, Henkin's premise is widely embraced.¹⁵ Proponents of a liberal approach accentuate the role of domestic actors within the international sphere. Interactions amongst these groups and with national governments influence state policy and preference compliance with international law.¹⁶ The institutionalist approach seeks to explain the influence of international organizations (or regimes) on state behaviour. States are perceived as "utility-maximizers." International regimes contribute towards legal compliance by facilitating agreements that conform with or further the particular interests of states.¹⁷ And several prominent theories emphasize

¹² See generally, Henry Dunant, *A Memory of Solferino* (Geneva: International Committee of the Red Cross, 1959).

¹³ Louis Henkin, *How Nations Behave* (New York: Columbia University Press, 1979) at 47.

¹⁴ See generally, Kenneth W. Waltz, *Theory of International Politics* (Long Grove, IL: Waveland Press, 1979).

¹⁵ For an overview, see, Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?" (2002) 112 Yale L.J. 1935.

¹⁶ See, Anne-Marie Slaughter, "International Law in a World of Liberal States", (1995) 6 Eur. J. Int'l L. 503.

¹⁷ Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 2002).

international law's normative force. They posit that compliance stems from a state's acceptance and internalization of law's inherent features.¹⁸

Compliance is thus assumed. It is prevalent but it is not universal. Andrew Guzman notes, compliance mostly occurs, "in situations with many repeated interactions, each with relatively small stakes...the topics that have traditionally held center stage in international law – the laws of war, neutrality, arms control, and so on – are precisely those in which international law is least likely to be relevant."¹⁹ Observers quickly identify instances of non-compliance, violations of international law that exhibit legal disregard and precede or accompany tragedy. In response to these legal violations, it is clear why certain actors – both state and non-state – embrace persuasion as a means to secure legal adherence. A non-compliant state (or other powerful entity) becomes the target of persuasion.²⁰ To this extent, international law is a project, a form of advocacy. The persuader employs a familiar language of rights, obligations, incentives, and norms to convince the state to alter its behaviour.²¹ Persuasion's influence upon this process is either minimized (through focus on the fixed traits of parties or norms) or accentuated (by examination of the communicative process between the persuader and persuaded).²² Persuasion, however, remains linked to compliance. Communicative interactions move from those seeking to ensure adherence towards those whose behaviour is deemed impermissible.

Yet moments of non-compliance also produce instances of persuasion. A legal violation may question international law's efficacy but it does not discount law's relevancy.²³ Law is more than a constraint on state power. It is a discursive medium.²⁴ Constructivist scholars contend that, "actors assume the existence of a set of socially sanctioned rules, but international law 'lives' in the way in which they reason argumentatively about the form of these rules..."²⁵ Within this discourse, persuasion is not only a means to influence state behaviour. It is a form of interaction that accompanies the discussions and debates exhibited by law's transformative potential.²⁶ George Brandis, the Attorney General of Australia, explained that "it is vital that States (and their international legal advisers) have the courage

¹⁸ See, e.g., Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford: Oxford University Press, 1990); Thomas M. Franck, "Legitimacy in the International System," (1988) 82 Am. J. Int'l. L. 705; Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995) [Chayes & Chayes *The New Sovereignty*]; Abram Chayes & Antonia Handler Chayes, "On Compliance," (1993) 47 International Organization 175; Harold Hongju Koh, "Why Do Nations Obey International Law?" (1997) 106 Yale L. J. 2599 at 2600.

¹⁹ Andrew T. Guzman, "A Compliance-Based Theory of International Law," (2002) 90 Cal. L. Rev. 1823 at 1828 [Guzman *A Compliance-Based Theory*].

²⁰ Ratner *Persuading to Comply*, *supra* note 9 at 570.

²¹ See generally, David Kennedy, "Lawfare and Warfare" in James Crawford & Martti Koskenniemi, eds, *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012) 158.

²² See, Ratner *Persuading to Comply*, *supra* note 9 at 571.

²³ Frédéric Mégret, "International Law as Law" in James Crawford & Martti Koskenniemi, eds, *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012) 64 at 77.

²⁴ *Ibid*, at 8.

²⁵ Christian Reus-Smit, "The politics of international law" in Christian Reus-Smit, ed, *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) 14 at 41. See also, Charlotte Peevers, *The Politics of Justifying Force: The Suez Crisis, the Iraq War, and International Law* (Oxford: Oxford University Press, 2014) at 5 [Peevers *Politics of Justifying Force*].

²⁶ *Ibid*, at 10.

to explain and defend their legal positions.”²⁷ The state – so often the target of persuasion – engages in this communicative process. It too employs persuasive argument.

The assumption that international law is least relevant in areas where its weaknesses are apparent and compliance illusive encourages the present focus. Daniel Reisner, when head of the Israel Defense Force’s (IDF) International Law Division (ILD), claimed that:

“If you do something for long enough, the world will accept it. The whole of international law is now based on the notion that an act that is forbidden today becomes permissible if executed by enough countries... After we bombed the reactor in Iraq, the Security Council condemned Israel and claimed the attack was a violation of international law. The atmosphere was that Israel had committed a crime. Today everyone says it was preventive self-defense. International law progresses through violations.”²⁸

The laws governing the use of force provide compelling examples of law’s persuasive function. They illustrate myriad ways and reasons that a state – whose actions or policy preferences are deemed inconsistent with legal requirements – employs international legal argument and persuasion. Despite periodic violation, the norm prohibiting aggression has become so entrenched that states are compelled to justify military incursions. International law may appear as an ineffective constraint yet legal argument is ever present. States, upon the use of force, read international law permissibly. They argue that the world faces unforeseen threats. IHL, when drafted, failed to foresee these emergent dangers and must be interpreted to facilitate necessary responses.²⁹ Sir Daniel Bethlehem, the former legal adviser to the UK’s Foreign and Commonwealth Office (FCO), noted in defense of his efforts to reform the *jus ad bellum* that, “if the law is to influence, it must descend from the heights of broad principles to engage with the reality of particular circumstances that requires its attention.”³⁰ Humanitarians, acutely aware of law’s destructive potential, offer a restrictive reading of these same laws. They wish to limit the state’s ability to use force and constrain the forms of violence that are employed.³¹ This creates a deliberative environment. Within this environment, the prevalence, diversity, and purposes of a more expansive conception of persuasive legal argument may be better understood.

The willingness of states to offer legal argument is predictable. If we assume that international law is important, that states exhibit a propensity to comply, then persuasion becomes a form of justificatory discourse. It aligns the state’s tendency to couple uses of force with legal reasoning.³² Ryan Goodman has termed this the politics of justification. This entails, “the political mobilization of support for

²⁷ George Brandis, “The Right of Self-Defense Against Imminent Armed Attack in International Law” (25 May 2017) (blog), online: EJIL: Talk! <<https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/>> [Brandis The Right to Self-Defense].

²⁸ Yotam Feldman & Uri Blau, “Consent and Advise” *Haaretz*, 29 January 2009, online: <<http://www.haaretz.com/consent-and-advise-1.269127>> [Feldman & Blau Consent and Advise].

²⁹ See generally, Michael P. Scharf, “How the War Against ISIS Changed International Law,” (2016) 48 Case West Reserve J. Int’l L. 1 [Scharf The War Against ISIS]. See also, Victor Kattan, “Furthering the ‘war on terrorism’ through international law: how the United States and the United Kingdom resurrected the Bush doctrine on using preventive military force to combat terrorism,” (2018) 5 J. on the Use of Force & Int’l L. 97 [Kattan Furthering the War on Terrorism].

³⁰ Daniel Bethlehem, “Principles of Self-Defense – A Brief Response,” (2003) 107 Am. J. Int’l L. 579 at 581.

³¹ See generally, David Luban, “Military Necessity and the Cultures of Military Law,” (2013) 26 Leiden J. Int’l L. 315.

³² *Ibid.*, at 47. See also, Oscar Schachter, “In Defense of International Rules on the Use of Force,” (1986) 53 U. Chi. L. Rev. 113 at 117-120.

escalating hostilities.”³³ Often, this process is internalized. The state’s justificatory discourse targets domestic audiences. International norms are cited and governments employ legal vocabularies to establish policy preferences, explain undertaken initiatives, and justify institutional changes.³⁴

Of course, this process of justification goes beyond the domestic sphere. It occurs within international institutions, amongst allies, and in response to adversaries.³⁵ Here, as Chayes and Chayes demonstrate, questionable actions are explained and justified by foreign ministries which rationalize state behaviour through diplomatic exchanges. It is, “almost always an adequate explanation for an action, at least *prima facie*, that it follows the legal rule. It is almost always a good argument for an action that it conforms to the applicable legal norms, and against, that it departs from them.”³⁶ However, the discursive process, described by Chayes and Chayes, is primarily understood as a tool to influence state behaviour and, “as a principle method of inducing compliance.”³⁷

This underappreciates persuasion’s prevalence. For a variety of purposes and through a diversity of forms, legal argument extends beyond efforts to compel or demonstrate state compliance. Its uses are greater and more sophisticated than the justificatory tones habitually offered by states upon the use of force. When George Brandis called upon states to “explain and defend” their legal positions, the Attorney General clarified that this ensures that “states maintain control over the development of international law.”³⁸ Though state appeals to persuasion vary, exhibiting numerous motives, I identify three reasons why states persuade – to supplement a lie; to posit a preferred interpretation of law; or to legitimize a situation or establish policy involving the use of force. These are non-exhaustive, may be subjectively distinguished, often overlap, and only constitute broad categorizations. Commonly, the first two categorizations lead to the third. A state will lie. It will interpret the law. Or, it will do both to reach a determination that a particular situation is legitimate. Persuasive interactions may be more limited, singularly focuses on an episodic event, negotiation, or interpretative moment. Through confluence or as independent legal interactions each of the identified reasonings demonstrate how a state – in defense or in furtherance of a legal position or policy that is broadly held to be legally *impermissible* – employs persuasion and legal argument in ways that extend beyond a compliance-violation binary.

A. To Substantiate a Lie:

On 31 August 1939, Heinrich Himmler initiated a series of events that began the Second World War. Under Himmler’s direction, members of the German SS and SD undertook a false flag operation. Donning Polish military uniforms, they attacked German radio stations, railways, and custom posts. Reinhard Heydrich, then head of the SD, instructed his operatives to manufacture evidence of the attacks, “for the foreign press as well as for German propaganda purposes.”³⁹ Prisoners from a concentration camp were dressed in Polish apparel, killed, and left at the site of the raids. A radio

³³ Ryan Goodman, “Humanitarian Intervention and the Pretexts for War,” (2006) 100 Am. J. Int’l. L. 107 at 116.

³⁴ See, Andrew P. Cortell & James W. Davis, Jr., “Understanding the Domestic Impact of International Norms: A Research Agenda,” (2002) 2 Int. Stud. Rev. 65 at 70.

³⁵ Peevers Politics of Justifying Force, *supra* note 25 at 47.

³⁶ Chayes & Chayes The New Sovereignty, *supra* note 18 at 118-119.

³⁷ *Ibid*, at 25-26.

³⁸ Brandis The Right to Self-Defense, *supra* note 28.

³⁹ Lord Russell, *The Scourge of the Swastika: A History of Nazi war Crimes During World War II* (New York: Skyhorse Publishing, 2008) at 11-12.

station in Gleiwitz was overtaken. A Polish-speaking SD officer broadcast a call to arms, announcing that the time for conflict had arrived and that the Polish, “should unite and strike down any German from whom they met resistance.”⁴⁰ The following day Adolf Hitler commenced the invasion of Poland, citing the fiction of Polish aggression and the previous night’s events in justification of a “defensive” German response.⁴¹

Political leaders appear more willing to mislead domestic constituencies than they are international audiences.⁴² Within international affairs, Ian Johnstone explains that “purely self-serving arguments, or those seen as arbitrary or beside the point, are simply not persuasive. For that reason, they are rarely heard when public policy choices are being debated.”⁴³ Although true in most deliberative scenarios, distinguishable examples exist. States – in neglect of even a semblance of good-faith – may present legal arguments that are posited on a demonstrable falsehood. Such instances recall Hans Morgenthau’s sceptical assertion that states can always offer a legal argument to justify their policies.⁴⁴

These legal appeals constitute disingenuous misuses of law. However, they need not be understood singularly. A state, willing to violate international law, that feels compelled to offer a legal argument, reveals a broader purpose of persuasion. Legal argument allows the violating state to supplement a lie with legal language and attempt to persuade a particular audience that the state’s actions are not as they seem or meet some standard of permissibility. A liberal state may lie to justify or dismiss behaviour that contradicts the values that they otherwise espouse.⁴⁵ The British insistence that the bombing of Dresden targeted military installations – and the subsequent American claim that the operation constituted a strategic necessity – are irreconcilable with accounts of the civilian sites that were directly targeted during the campaign.⁴⁶

A state, outwardly committed to liberal values but that seeks an alliance or military partnership with an illiberal nation or group, may present a similar lie. The state will employ international legal rhetoric to excuse the illiberal behaviour of the strategic partner.⁴⁷ The United States has maintained numerous advantageous relationships with such regimes. From its efforts to portray Stalin’s Soviet Union as an aspiring democracy to its more recent interest-driven affiliation with Aliyev’s Azerbaijan, the United States has coupled a legal vernacular with misleading claims regarding the domestic reality of certain strategic partners.⁴⁸

⁴⁰ *Ibid*, at 12.

⁴¹ See, Adolph Hitler, “Address to the Reichstag” (delivered at the Reichstag Building, Berlin, 1 September 1939).

⁴² John J. Mearsheimer, *Why Leaders Lie: The Truth About Lying in International Politics* (Oxford: Oxford University Press, 2011) at 6 [Mearsheimer Why Leaders Lie].

⁴³ Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organization* (Oxford: Oxford University Press, 2011) at 5 [Johnstone The Power of Deliberation].

⁴⁴ Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Knopf, 1978) at 282.

⁴⁵ Mearsheimer Why Leaders Lie, *supra* note 42 at 77-79.

⁴⁶ See generally, Alexander McKee, *Dresden, 1945: The Devil’s Tinderbox* (New York: E.P. Dutton, 1982). See also, Dominic Selwood, “Dresden was a civilian town with no military significance. Why did we burn its people?”, *The Telegraph* (13 February 2015) online: < <https://www.telegraph.co.uk/history/world-war-two/11410633/Dresden-was-a-civilian-town-with-no-military-significance.-Why-did-we-burn-its-people.html> >.

⁴⁷ Mearsheimer Why Leaders Lie, *supra* note 42 at 78-79.

⁴⁸ *Ibid*, at 78-79. See also, Samuel Ramani, “Three reason the U.S. won’t break with Azerbaijan over its violations of human rights and democratic freedoms”, *Washington Post* (20 January 2016) online: <<https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/20/3-reasons-the-u-s-wont-break-with-azerbaijan-over-its-violations-of->

Actors may lie to dismiss a legal accusation. Following the April 2017 sarin-gas attack in Khan Sheikhoun, President Bashar al-Assad denied the use of, or intent to deploy, chemical weapons.⁴⁹ Russia furthered this narrative. Supplementing the Syrian denial with legal argument, Russian officials contended that the airstrike featured conventional weapons. Syrian warplanes, Russia claimed, directed the strike against legitimate military targets and thus acted consistently with legal requirements.⁵⁰

These invocations of international legal argument are often dismissed as abuses of law. Whether they wish to shift the discourse from a controversial event to an abstract legal discussion, illustrate a commitment to normative values, or simply provide the most expedient option, states may invoke legal argument to supplement a lie. These uses of legal argument are often aimed at a limited audience. They are intended to substantiate assertions of compliance. More commonly, however, persuasive legal argument is employed to influence conceptions of compliance. It is employed to preference a particular interpretation of law, to determine what precisely compliance entails.

B. To Posit a Preferred Interpretation of Law:

The Israel Defense Forces launched Operation Cast Lead in December 2008. Israel insisted that the 22-day military offensive was designed to eliminate Hamas' rocket-launching capacity and infrastructure.⁵¹ Officials immediately offered legal justification.⁵² Within Gaza, growing death tolls and mounting hardship caused many within the international community to amend their response to the hostilities. Initial calls for restraint and affirmations of Israel's right to self-defense were replaced by condemnation of IDF actions.⁵³ An international law-based discourse emerged in concurrence. The Israeli government and the Palestinian Authority (PA) presented an array of factual and legal assertions. Beyond common assurances of compliance, persuasive appeals were offered to support novel, often unsound, interpretative claims. Daniel Reisner, the former head of the ILD, described how military lawyers were tasked with forwarding such legal appeals: "we defended policy that is on the edge: the "neighbor procedure" [making a neighbor knock on the door of a potentially dangerous house], house demolitions, deportations, targeted assassination..."⁵⁴ The PA acknowledged that launching rockets at civilian populations violated international law. It, however, excused Hamas'

human-rights-and-democratic-freedoms/?utm_term=.32517b2ee3 b9>. See generally, Ernest R. May & Phillip D. Zelikow, eds, *Dealing with Dictators: Dilemmas of U.S. and Intelligence Analysis, 1945-1990* (Cambridge, MA: MIT Press, 2006).

⁴⁹ Laura Smith-Spark, "Assad claims Syria chemical attack was a 'fabrication', in face of evidence", *CNN* (13 April 2017) online: <<https://www.cnn.com/2017/04/13/middleeast/syria-bashar-assad-interview/index.html>>.

⁵⁰ See, Robert Lawless, "A State of Complicity: How Russia's Persistent and Public Denial of Syrian Battlefield Atrocities Violates International Law" (2018) 9 *Harv. Nat. Sec. J.* 180 at 187-188.

⁵¹ The State of Israel, *The Operation in Gaza 27 December 2008 – 18 January 2009: Factual and Legal Aspects*, July 2009, at para. 16 [The Operation in Gaza 2009].

⁵² See, Israel Ministry of Foreign Affairs, *Operation Cast Lead – Israel Defends its Citizens*, 27 December 2008, online: <<http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/GazaFacts/Pages/Operation-Cast-Lead-Israel-Defends-its-Citizens.aspx>>. See also, Israel Ministry of Foreign Affairs, Background Paper, *Responding to Hamas Attacks from Gaza – Issues of Proportionality*, December 2008, online: <http://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/Responding_to_Hamas_Attacks_from_Gaza_december_2008.pdf>.

⁵³ See, Joel Peters, "Gaza", in Joel Peters and David Newman, eds, *The Routledge Handbook on the Israeli-Palestinian Conflict* (New York: Routledge, 2013) 196 at 203. See also, Colin Shindler, *A History of Modern Israel*, 2nd ed (Cambridge: Cambridge University Press, 2013) at 379-380.

⁵⁴ Feldman & Blau Consent and Advise, *supra* note 28.

actions. They were not, the PA claimed, violations of the principle of distinction because the Gazan militants only possessed crude weaponry and were unable to control the projectiles.⁵⁵

States appeal to international legal argument to posit interpretative claims. Claims may follow a particular action that exists within a legal grey-area or that formally requires a legal response. This recalls Rebecca Ingber's notion of an "interpretation catalyst."⁵⁶ An interpretative assertion may be in response to a legal accusation. It may follow a clear violation. The state does not deny the factual context within which the interpretative claim arises. Instead, it suggests that the law is unclear or that it differs from that which is broadly assumed.

Interpretation is traditionally understood as a technique to discern meaning from legal texts.⁵⁷ More broadly, however, it constitutes a "persuasive phenomenon."⁵⁸ The interpreter's motives will range. They may simply wish to extract certainty from an imprecise legal formulation. This allows the state to operate in accordance with legal dictate or predict the intentions of other actors whose behaviour will be similarly influenced by the "correct" meaning of the legal text. Alternatively, as Martti Koskenniemi suggests, the interpreting state may wish to impose a subjective political position onto a broader policy or legal debate. Interpretation, Koskenniemi concludes, is not a method to discover meaning but instead a means to create it.⁵⁹

Interpretation becomes a game. The objective, "is to persuade one's audience that [a particular] interpretation of the law is the correct one."⁶⁰ The form of the interpretative appeal is determined by the intended audience. An interpretative claim presented to the International Court of Justice (ICJ) will likely be grounded in the Vienna Convention on the Law of Treaties.⁶¹ A broad assertion that a military action conforms with IHL may exhibit fewer rigid invocations of legal principles. Thus, uses of persuasion to interpret the law vary from official formulations of textual meaning to casual legal avowals.

The present focus is less concerned with the formal interpretative process. Instead, the invocations of persuasion, described throughout, emphasize legal argument's demotic appeal. Iain Scobbie explains that in domestic and international law alike, persuasive and interpretative arguments exist "in activities

⁵⁵ General Assembly, 64th Session, *Second follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict: Report of the Secretary General*, 11 August 2010, UN Doc. A/64/890 at paras. 19, 65, 69 in Annex II.

⁵⁶ Rebecca Ingber, "Interpretation Catalysts and Executive Branch Legal Decisionmaking," (2013) 38 *Yale J. Int'l L.* 359.

⁵⁷ This is prescribed by the Vienna Convention on the Law of Treaties and offers such concepts as good-faith, ordinary meaning, context, object, and, purpose. See, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 at Art. 31. See also, Daniel Peat & Matthew Windsor, "Playing the Game of Interpretation: On Meaning and Metaphor in International Law" in Andrea Bianchi, Daniel Peat & Matthew Windsor, eds, *Interpretation in International Law* (Oxford: Oxford University Press, 2015) 3 at 3.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, at 12-13. See also, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005) at 18, 531.

⁶⁰ Andrea Bianchi, "The Game of Interpretation in International Law: The Players, the Cards, and Why the Game is Worth the Candle" in Andrea Bianchi, Daniel Peat & Matthew Windsor, eds, *Interpretation in International Law* (Oxford: Oxford University Press, 2015) 34 at 36 [Bianchi The Game of Interpretation].

⁶¹ *Ibid.*, at 44.

such as advising clients, engaging in negotiations, research and the construction of academic arguments, or the presentation of a proposed text or its interpretation to non-judicial bodies.”⁶²

Less-formal interpretative appeals to international law are constant features of the broader deliberations that accompany the use of force. States employ such rhetoric for a variety of reasons. The state may offer an interpretative legal appeal to illustrate that a particular action conforms with international law. When, on 14 May 2018, IDF snipers killed over sixty Gazan protesters – participants in mass demonstrations near the border fence – the international community demanded answers.⁶³ In response to a joint petition by a group of Israeli NGOs, the Government offered an inventive legal appeal.⁶⁴ The mass protests were defined as part of an armed conflict between Israel and Hamas.⁶⁵ Israel claimed that a law enforcement paradigm, inspired by human rights law but applied under IHL, governed the applicable use of force. The protestors, constituting a mass of individuals, had become collectively active in hostilities. In response, the IDF’s use of live fire was deemed proportionate.⁶⁶

Such invocations of legal argument occur in response to a *particular* event. Similar interpretative appeals may also be presented to validate a *general* policy objective. Often, the policy has been received skeptically, as a violation of international law. The state, however, wishes to implement or justify the policy and engages in interpretative appeals to persuade a broader audience of the policy’s legality. In 2010, the Obama Administration detailed its legal support for the use of drones to aid in the United States’ global response to terrorism. The legality of using weaponised drones for targeted killing was increasingly questioned.⁶⁷ Harold Koh, then the Legal Adviser to the State Department, addressed the American Society of International Law’s Annual Meeting. Koh detailed the Administration’s claim. The US drone policy was limited to military targets. Koh assured that civilian casualties were proportionate to the military advantage gained. The general policy was thus a legitimate act of self-defense and consistent with IHL.⁶⁸

By interpreting international law to either exhibit compliance or validate a controversial policy, the state relies on persuasive legal appeals. These arguments identify an international legal question and

⁶² Iain Scobbie, “Rhetoric, Persuasion, and Interpretation in International Law” in Andrea Bianchi, Daniel Peat & Matthew Windsor, eds, *Interpretation in International Law* (Oxford: Oxford University Press, 2015) 61 at 74 [Scobbie Rhetoric Persuasion and Interpretation].

⁶³ UN Human Rights Council, 28th Special Session, *Violations of international law in the context of large-scale civilian protests in the Occupied Palestinian Territory, including East Jerusalem*, 18 May 2018, UN Doc. A/HRSC/S-28/L.I. See also, Amir Tibon, “U.S. Blocks Security Council Statement Calling for Investigation Into Gaza Violence”, *Haaretz* (15 May 2018) online: <<https://www.haaretz.com/israel-news/u-s-blocks-security-council-statement-calling-for-gaza-investigation-1.6091919>>.

⁶⁴ State of Israel, *Response of the State to the High Court of Justice* (30 April 2018) online (Hebrew): <<https://www.acri.org.il/he/wp-content/uploads/2018/04/bagatz-3003-18-Gaza-shooting-meshivim1-2-0418.pdf>>

⁶⁵ This was said to be because the weekly protests displayed high levels of violence and furthered Hamas’ operational interests. See, Eliav Lieblich, “Collectivizing Threat: An Analysis of Israel’s Legal Claims for Resort to Force on the Gaza Border” *Just Security* (16 May 2018) online: <<https://www.justsecurity.org/56346/collectivizing-threat-analysis-israels-legal-claims-resort-force-gaza-border/>>.

⁶⁶ *Ibid.*

⁶⁷ See, UN Human Rights Council, 14th Session, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 28 May 2010, UN Doc. A/HRC/14/24/Add.6. See generally, Mary Ellen O’Connell, “Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009 in Simon Bronitt, Miriam Gani, Saskia Hufnagel, eds, *Shooting to Kill: Socio-Legal Perspectives on the Use of Lethal Force* (Oxford: Hart Publishing, 2012) 263.

⁶⁸ Harold Hongju Koh, “The Obama Administration and International Law” (Keynote Speech at the Annual Meeting of the American Society of International Law, Washington, D.C., 25 March 2010). See also, Shereshevsky Back in the Game, *supra* note 7.

interpret a particular point of law. An established doctrine or treaty provision is read in accordance with the desired outcome. Beyond appeals to specific interpretative questions, states will also invoke international law broadly. These legal appeals may be independent acts or the end-product of a legal contention premised upon a lie or a counterintuitive interpretation. Similar to the interpretative arguments addressed here, the state employs international legal rhetoric and reasoning to persuade various audiences that a military action or particular use of force is legal and thus legitimate.

C. To Legitimize a General Situation or to Advance a Particular Policy:

During the 2002 State of the Union, President George W. Bush began building the case for war against Iraq. Hostile against the United States, the Iraqi regime was portrayed as a security threat. It was a source of regional and international instability. Saddam Hussein, the President explained, had committed egregious human rights violations and had expelled weapons inspectors. Indifference, in response to this mounting threat, would be catastrophic.⁶⁹ In the wake of the 11 September attacks, appeals to security – links to terrorism – carried significant currency.⁷⁰ In the United Kingdom, however, British participation in a US led coalition was framed as a “war of choice.” Policymakers accepted this. They sought to, “persuade public opinion that that choice was necessary to ensure freedom and security.”⁷¹

Throughout Whitehall, within the FCO, and across British society, questions of the pending war’s legality assumed prominence. Prime Minister Tony Blair’s Labour Government employed legal reason in justification of the use of force against Iraq. Following much internal debate – and staunch opposition from the FCO’s own lawyers – military action was initially premised on United Nations involvement.⁷² A weapons inspection regime would be re-imposed through the UN. When the Iraqis rejected or violated the initiative, the British could build a legal case justifying the use of force.⁷³ Internal deliberations adhered to traditional legal structures.⁷⁴ Doctrines and texts were interpreted and debated. *Lex lata* declarations were advanced alongside *lex ferenda* assertions.

States employ legal argument to exhibit legitimacy. Diplomats, military commanders, and elected officials all invoke legal vernacular as a persuasive and strategic asset.⁷⁵ Such legal arguments share much with the tendency of states to offer interpretative claims. However, where the aforementioned category comprises inventive assertions of specific legal meaning, the current designation captures a less intricate, redolent use of law. Of course, there is much overlap between these categorizations. Disparate arguments may be simultaneously employed. Either collectively or exclusively, a state may use either or both forms of legal argument to persuade diverse audiences.

⁶⁹ George W. Bush, “The President’s State of the Union Address” (The United State Capitol, Washington, D.C., 29 January 2009).

⁷⁰ Peevers Politics of Justifying Force, *supra* note 25 at 134-135. See also, Herbert W. Simons, “Rhetoric’s Role in Context, Beginning with 9/11,” (2007) 10 Rhetoric & Pub. Aff. 183.

⁷¹ Peevers Politics of Justifying Force, *supra* note 25 at 134.

⁷² For an example of such internal dissent, see, The UK Iraq Inquiry, Statement by Sir Michael Wood to the Iraq Inquiry (15 January 2010), online: <<http://webarchive.nationalarchives.gov.uk/20160512094556/http://www.iraquinquiry.org.uk/media/43477/wood-statement.pdf>>.

⁷³ Peevers Politics of Justifying Force, *supra* note 25 at 142.

⁷⁴ *Ibid.*, at 143-152.

⁷⁵ See, David Kennedy, *Of Law and War* (Princeton, NJ: Princeton University Press, 2006) at 8, 41.

Understood independently, this final purpose of persuasion occurs when states attempt to legitimize a general situation or policy through ill-defined legal (or legal-sounding) language. Such appeals are reminiscent of what Naz Modirzadeh has termed folk international law: “a law-like discourse that relies on a confusing and soft admixture of IHL, *jus ad bellum*, and [international human rights law] (IHRL).”⁷⁶ The use of such legal vernacular to exhibit legitimacy can be present for a variety of reasons. It may offer a persuasive argument that insists a military action is justifiable. It may facilitate a *sui generis* legal claim. This legitimizes a particular situation but denies the extension of broader meaning or precedential value. The use of general legal argument also enables the establishment of emergent norms through novel legal claims. The development of and appeals to humanitarian intervention illuminates each invocation of this form of persuasive legal argument.

The NATO military campaign in Yugoslavia began in 1999 and lasted for 78 days. It was justified in response to Serbian policies in Kosovo where Slobodan Milosevic was leading efforts to ethnically cleanse the Albanian majority. The North Atlantic Council defended its decision to use force with reference to the “massive humanitarian catastrophe” that resulted from an unrestrained assault by Yugoslav forces against Kosovo’s civilian population.⁷⁷ NATO members consistently cited humanitarian considerations. Explaining the collective use of force, the aversion of an atrocity provided legal and moral justification.⁷⁸ Canada’s Ambassador to the United Nations asserted that, “humanitarian considerations underpin our action.”⁷⁹ Similarly, the Dutch noted that military action found legal basis in prevention of the pending humanitarian crisis.⁸⁰ However, as Nicholas Wheeler notes, these actors did not specify the nature of this legal basis. They did not provide legal reasoning beyond generalized avowals of humanitarian interests.

The British Government offered further uses of legal language to persuade that the use of force was justifiable. Initially, Prime Minister Blair framed military action as a “battle for humanity.” Accordingly, it is, “a just cause, it is a rightful cause.”⁸¹ The British Secretary of Defense would later expand, noting that, “our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe...The use of force in such circumstances can be justified as an exceptional measure in support of purposes laid down by the Security Council, but without the Council’s express authorization, when that is the only means to avert an immediate and overwhelming humanitarian catastrophe.”⁸²

This directly implied that international law permitted a humanitarian basis for the use of force – a proposition that, devoid of Security Council authorization, is uncertain.⁸³ While this exhibits the tendency of states to make persuasive assertions of legitimacy through non-specific legal claims, the

⁷⁶ Naz K. Modirzadeh, “Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance,” (2014) 5 Harv. Nat. Sec. J. 225 at 229.

⁷⁷ NATO, *The Situation in and around Kosovo*, 12 April 1999 (Press Release N-NAC-1(99) 51) online: <<https://www.nato.int/docu/pr/1999/p99-051e.htm>>. See also, Scharf *The War Against ISIS*, *supra* note 29 at 42.

⁷⁸ See, Nicholas J. Wheeler, “Reflections on the legality and legitimacy of NATO’s intervention in Kosovo,” (2000) 4 Int’l J. Hum. Rts. 145 at 153.

⁷⁹ *Ibid.* See also, UNSCOR, 54th Year, 3988th Mtg, UN Doc. S/PV.3988.

⁸⁰ *Ibid.* See also, Scharf *The War Against ISIS*, *supra* note 29 at 43.

⁸¹ *Ibid.*, at 42-43.

⁸² *Ibid.*, at 43. See also, UK HC, *Parliamentary Debates*, vol 328, col 616-617 (25 March 1999) (Secretary of Defense George Robertson).

⁸³ See generally, Harold Hongju Koh, “The War Powers and Humanitarian Intervention,” (2016) 53 Hous. L. Rev. 971.

United Kingdom and the United States would subsequently amend their argumentative focus. States recognize that their legal arguments contribute to the formation of international law.⁸⁴ When justifying the Nixon Administration's use of force against the North Vietnamese in Cambodia, Legal Adviser John Stevenson argued that, "it is important for the Government of the United States to explain the legal basis for its actions, not merely to pay proper respect to the law, but also because the precedent created by the use of armed forces in Cambodia by the United States can be affected significantly by our legal rationale."⁸⁵

In Kosovo, Secretary of State Madeleine Albright was reluctant to provide precedential support for unrestricted humanitarian intervention.⁸⁶ Wishing to maintain claims that NATO action was legitimate, Albright argued that the military campaign was, "a unique situation *sui generis* in the region of the Balkans."⁸⁷ Prime Minister Blair reversed assertions regarding humanitarian intervention's normative potential. Instead, the Prime Minister argued that the Kosovo operation was exceptional.⁸⁸ NATO members made an explicit distinction. They differentiated between specific legal arguments (that would carry legal weight and give precedential value) and a general claim that employed legal language to imply that the particular event was legitimate but of no greater legal significance.⁸⁹ Michael Matheson, the State Department's Legal Adviser, would later note that, "we listed all the reasons why we were taking action and, in the end, mumbled something about it being justifiable and legitimate but not a precedent. So in a sense, it *was* something less than a definitive legal rationale – although it probably was taken by large parts of the public community as something like that."⁹⁰

Finally, a state that wishes to legitimize a general policy – and that may seek to foster the development of an underlying norm – may also appeal to non-specific legal language. When the United Kingdom had initially argued in favour of a norm permitting the unilateral use of force in response to humanitarian crisis, they offered general legal affirmations. Michael Scharf explains that how, "a custom pioneer describes a new rule of customary international law can greatly impact its international acceptance."⁹¹ When a Canadian-led initiative answered Kofi Annan's call to reconcile the traditional conception of sovereignty with collective efforts to prevent atrocity crimes, the resulting responsibility to protect (R2P) doctrine employed legal language to persuade. Borrowing from the *jus ad bellum* and just war theory, R2P would only justify military action that was based upon "right authority, just cause, right intention, last resort, proportional means and reasonable prospects."⁹²

The persuasive use of legal language by states may further good-faith efforts to progressively advance a policy or develop the law. They may constitute manipulative attempts to secure state interests.

⁸⁴ See generally, Harold Hongju Koh, "The Legal Adviser's Duty to Explain," (2016) 41 Yale J. Int'l L. 189 [Koh The Legal Adviser's Duty].

⁸⁵ *Ibid.* See also, John R. Stevenson, "Statement of the Legal Advisor," (1971) 65 Am. J. Int'l L. 933 at 935.

⁸⁶ Scharf The War Against ISIS, *supra* note 29 at 46.

⁸⁷ See, U.S. Department of State, Press Conference, "Press Conference with Russian Foreign Minister Igor Ivanov" (26 July 1999) online: <<https://perma.cc/EGX5-GGEF>>.

⁸⁸ Scharf The War Against ISIS, *supra* note 29 at 47. See also, UK HC, *Parliamentary Debates*, vol 330, col 30 (26 April 1999) (Prime Minister Tony Blair).

⁸⁹ See, Scharf The War Against ISIS, *supra* note 29 at 54.

⁹⁰ Cited in Michael P. Scharf & Paul R. Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (Cambridge: Cambridge University Press, 2010) at 124-125.

⁹¹ Scharf The War Against ISIS, *supra* note 29 at 41.

⁹² See, International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001) at 32.

Regardless of motivation, persuasion is employed and international legal argument is ubiquitous. The motivation that accompanies these persuasive appeals may appear obvious. In many instances they will be subjective. In 2013, when the Al-Assad regime launched a chemical weapons attack in eastern Damascus, the United Kingdom invoked the doctrine of humanitarian intervention.⁹³ The UK provided a general legal argument to justify the use of force without Security Council authorization. This required evidence of significant humanitarian distress; the absence of alternative methods; and the necessary, proportionate, and limited use of force.⁹⁴ This may be received as an attempt to provide a legal basis to achieve a necessary humanitarian objective. Russia's invocation of humanitarian intervention and R2P in 2008 assumed a similar argumentative structure. Yet, this justification of Russia's incursion into South Ossetia and Abkhazia was largely perceived as buttressing an increasingly aggressive foreign policy.⁹⁵ Often, the intention of the legal arguments forwarded by states, the extent to which persuasion is offered and received in demonstration of legality and legitimacy, is directed by the particular audience addressed by the state.

III. WHOM DO STATES PERSUADE?

Chaim Perelman explains that every argumentation is addressed to an audience. The audience may be large or small; competent or less competent.⁹⁶ Always, according to Perelman, it consists of "the ensemble of those whom the speaker wishes to influence..."⁹⁷ States, upon the use of force, direct persuasive argument towards a variety of audiences. The form and purpose of the argument correlates with the target of persuasion. The state may wish to persuade both domestic and international audiences. They may seek to convince the Security Council that a particular military action is legitimate. Or, they may hope to assure an interpretative community that a certain tactic, policy, or choice of weaponry is permissible. Persuasion's boundaries are broad and its intended audience varies. Most often, though, the use of legal argument targets a definable group.

Upon or in advance of the use of force, domestic constituencies become a target of persuasion. Legal argument is employed when a state wishes to advance a military policy. It is offered if the use of force is contingent upon the formal approval of a legislative body. As per Article One, Section Eight of the US Constitution, Congress possesses the power to declare war.⁹⁸ Though the Executive often employs force without congressional approval, persuasive appeals regarding the legality of military action commonly feature when a President builds the case for war.⁹⁹ These appeals also target broader society. A controversial military action, a war of choice, a foreign intervention will accrue significant costs.

⁹³ See, United Kingdom, *Chemical Weapon Use by Syrian Regime – UK Government Legal Position* (29 August 2013) online: <<http://i2.cdn.turner.com/cnn/2013/images/08/29/chemical-weapon-use-by-syrian-regime-uk-government-legal-position.pdf>>.

⁹⁴ *Ibid.* See also, United Kingdom, *Further supplementary written evidence from the Rt Hon Hugh Robertson MP, Minister of State, Foreign and Commonwealth Office: humanitarian intervention and the responsibility to protect* (14 January 2014) online: <<https://www.justsecurity.org/wp-content/uploads/2014/01/Letter-from-UK-Foreign-Commonwealth-Office-to-the-House-of-Commons-Foreign-Affairs-Committee-on-Humanitarian-Intervention-and-the-Responsibility-to-Protect.pdf>>

⁹⁵ See generally, Vladimir Baranovsky & Anatoly Mateiko, "Responsibility to Protect: Russia's Approaches" (2016) 51 *The International Spectator* 49.

⁹⁶ Chaim Perelman, *The Idea of Justice and the Problem of Argument* (London: Routledge, 1963) at 100.

⁹⁷ Chaim Perelman & Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (Notre Dame, IN: University of Notre Dame Press, 1969) at 19.

⁹⁸ See, U.S. Const. art. I, § 8(11).

⁹⁹ See generally, David J. Barron, *Waging War: The Clash Between Presidents and Congress 1776 to ISIS* (New York: Simon & Schuster, 2016).

Lives will be lost and huge sums of money will be spent. Governments employ legal argument to persuade the public that a military action is necessary and legitimate.¹⁰⁰ The action may be framed as a response to an immediate or existential threat. Devoid of an obvious defensive element, it may be presented as within the state's broader interest. In both instances, the state speaks to domestic audiences through the language of international law. In 2015, following a series of attacks by members of the National Socialist Council of Nagaland, the Indian Army conducted airstrikes inside Burma. Indian officials employed a legal vernacular to offer domestic justification. Rajyavardhan Singh Rathore, the Minister of State for Information and Broadcasting, invoked the notions of necessity and "hot pursuit" to validate the counter-insurgency operation.¹⁰¹

Often, however, when states employ a legal vernacular to profess legitimacy or assert the legality of a particular initiative, they engage in a two-level game.¹⁰² Arguments are advanced for both domestic and international purposes. Robert Putnam explains that within the domestic sphere, local groups and elected officials compete to advance interests through the mechanisms of government. Internationally, states "seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments."¹⁰³ International legal arguments target either or both audiences. When Bashar al-Assad deployed chemical weapons in 2013, the Obama Administration considered responding through military action. The proposed use of force, however, experienced domestic and international resistance.¹⁰⁴ In reply, the White House Counsel appealed to the international norm prohibiting the use of chemical weapons. They sought to influence both levels of opinion:

"[t]he president believed that it was important to enhance the legitimacy of any action that would be taken by the executive ... to seek Congressional approval of that action and have it be seen, again as a matter of legitimacy both domestically and internationally, that there was a unified American response to the horrendous violation of the international norm against chemical weapons use."¹⁰⁵

A state that attempts to persuade an international audience will target its arguments generally or specifically. Often, the audience's composition corresponds with the form of argument offered by the persuading state. When officials address the international community and claim that the state's actions, upon the use of force, adhere to international law they offer broad claims of legitimacy or legality. Persuasion is presented generally (i.e. towards the international community as a whole). Arguments that target general audiences may be formal. This will include official statements presented on behalf of the state, often through their foreign ministry or a diplomatic delegation to an international

¹⁰⁰ Michael J. Butler, *Selling a 'Just' War: Framing, Legitimacy, and US Military Intervention* (New York: Palgrave MacMillan, 2012) at 9.

¹⁰¹ "Rajyavardhan Singh Rathore lauds army operation in Myanmar, says it is beginning", *The Economic Times* (10 June 2015), online: <<https://economictimes.indiatimes.com/news/defence/rajyavardhan-singh-rathore-lauds-army-operation-in-myanmar-says-it-is-beginning/articleshow/47606435.cms>>. See also, Deepak Raju & Zubin Dash, "Balancing the language of international law and the language of domestic legitimacy – How well does India fare?" (2017) 57 *Indian J. Int'l L.* 63.

¹⁰² See generally, Robert Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games," (1988) 42 *International Organization* 427.

¹⁰³ *Ibid.*, at 434.

¹⁰⁴ Koh *The Legal Adviser's Duty*, *supra* note 84 at 204-206.

¹⁰⁵ *Ibid.* See also, Charlie Savage, "Obama Tests Limits of Power in Syrian Conflict", *New York Times* (8 September 2013) online: <<https://www.nytimes.com/2013/09/09/world/middleeast/obama-tests-limits-of-power-in-syrian-conflict.html>>.

organization. Informally, states will also attempt to persuade an array of additional actors. These will include social movements, media, and transnational civil society.¹⁰⁶

Specific audiences will be targeted through both broad and narrow legal arguments. Broad assertions – of legitimacy or legality – may be employed to influence the opinion of key allies. The persuading actor may target particular states with which they hope to form a military alliance or whose cooperation they desire to facilitate a military objective (e.g. to gain access to airspace).¹⁰⁷ Broad arguments may be directed towards members of a regional organization or bloc that hold particular influence (e.g. a P5 member of the Security Council). While the audience's identities vary, these persuasive engagements present broad claims of legal compliance. They target specific audiences whose influence is sought. Pnina Sharvit Baruch, the former head of the IDF's ILD contends:

“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 military actions.”¹⁰⁸

Specific audiences are also the target of intricate legal claims. These concern specific issues or interpretative contentions (e.g. the legal status of detainees within a non-international armed conflict).¹⁰⁹ They look to influence common legal assumptions or seek to develop new legal understandings (e.g. who constitutes a direct participant in hostilities).¹¹⁰ These arguments are directed towards strategic audiences. Identified audiences may exist within international organizations. Treaty regimes become persuasive venues.¹¹¹ A state that wishes to forward a legal position or defend a particular action – often one that challenges consensus or exceeds conceptions of permissibility – directs persuasive assertions at a particular audience. These audiences – which include other states, norm influencers, or regional and international organizations – overlap with the broad audiences targeted through general legal claims. Often, however, the persuading entity communicates directly with specific groups or communities that exist within the identified audience (e.g., members of the International Law Commission; foreign legal advisers, specific diplomats).

Persuasion is likely to be most prevalent when directed towards small groups that share common identities.¹¹² Interpretative or epistemic communities become the primary targets of narrow persuasive

¹⁰⁶ Johnstone *The Power of Deliberation*, *supra* note 43 at 43-44.

¹⁰⁷ In a 2016 address to the American Society of International Law, State Department Legal Advisor Brian Egan described the importance of illustrating international legal compliance for, *inter alia*, building and maintaining international coalitions. See, Brian Egan, “International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations” (110th Annual Meeting of the American Society of International Law, delivered in Washington, D.C., 1 April 2016) [Egan International Law, Legal Diplomacy, and the Counter-ISIL Campaign].

¹⁰⁸ Interview with Colonel (Ret.) Adv. Pnina Sharvit Baruch, (Tel Aviv, 20 March 2017).

¹⁰⁹ See e.g., U.S. Department of State, Response of the United States of America to Inquiry of the UNCHR Special Rapporteurs Pertaining to Detainees at Guantanamo Bay (21 October 2005), online: <<https://www.state.gov/documents/organization/87347.pdf>>.

¹¹⁰ See e.g., UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (1 July 2004) at §§ 2.5.2., 5.3.2., 5.3.3.

¹¹¹ Ryan Goodman & Derek Jinks, “How to Influence States: Socialization and International Human Rights Law,” (2004) 54 *Duke L.J.* 621 at 665-666 [Goodman & Jinks How to Influence States].

¹¹² Alastair Iain Johnston, “Treating International Institutions as Social Environments,” (2001) 45 *Int. Stud. Q.* 487 at 509 [Johnston Treating International Institutions].

arguments.¹¹³ These communities are “involved in the creation, implementation, and application of norms. Where both communities offer “knowledge and policy advice,” interpretative communities also present judgments regarding the meaning and actualization of norms. Ian Johnstone explains that “interpretative communities” describe the nature of interpretation and not the composition of interpreters. However, commonalities exist amongst the involved parties. When states direct international legal arguments towards interpretative communities, they first attempt to influence the individuals and entities “responsible for the creation and implementation of norms.”¹¹⁴ This includes those individuals, government agents, and organizational representatives that possess “expertise in international law and/or special knowledge in the relevant field.”¹¹⁵ Johnstone recalls that this will include, “political leaders, diplomats, government officials, international civil servants, scholars, and experts who participate in some way in the particular field of international law or practice.”¹¹⁶ Next, states that forward legal arguments will address a narrow network. This consists of governmental and inter-governmental representatives who “share a set of assumptions, expectations, and a body of consensual knowledge.”¹¹⁷

The membership of these communities is informally defined and often overlapping. These states, organizations, individuals, groups, and professional networks become the targets of persuasion. Interpretative communities are the preferred focus of these persuasive efforts because they possess expertise and have the ability to influence or determine legal meaning. Collectively, members of the interpretative community – including the persuading state – partake in “a shared enterprise with broadly similar understandings of what they are doing and why they are doing it.”¹¹⁸ Legal arguments or interpretations that concern the use of force often appeal to “security communities.”¹¹⁹ Initially a description of an informal unity amongst states grouped by their willingness to ensure that differences between parties were solved without resort to force, the notion of security communities has developed.¹²⁰ Emanuel Adler and Michael Barnett describe security communities as consisting of states that share common values and agree to formal cooperation.¹²¹ These may form through regional groupings, as with the Association of South East Asian Nations. They may actualize through an international organization like NATO or the Organization for Security and Cooperation in Europe. And they may result from bilateral relationships between certain states.¹²² Prominent security communities, both within and among states, will be more likely to accept arguments from partners with which they share a common identity. They will be open to explanations of behaviour and interpretations of law if they believe that they may face similar security challenges to the persuading entity; that they too may be required to use force in similar circumstances and for similar purposes.

¹¹³ See Section IV generally, Shereshevsky Back in the Game, *supra* note 7.

¹¹⁴ Johnstone The Power of Deliberation, *supra* note 43 at 41.

¹¹⁵ *Ibid.*, at 42.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ See, Emanuel Adler & Michael Barnett, “Security communities in theoretical perspective” in Emanuel Adler & Michael Barnett, eds, *Security Communities* (Cambridge: Cambridge University Press, 1998) 3 at 3-4 [Adler and Barnett Security Communities].

¹²⁰ See, Karl W. Deutsch, *Political Community and the North Atlantic Area: International Organization in the Light of Historical Experience* (Princeton, NJ: Princeton University Press, 1957) at 5.

¹²¹ Adler and Barnett Security Communities, *supra* note 119 at 4.

¹²² For example, see, Sean M. Shore, “No fences make good neighbors: the development of the US-Canada security community, 1871-1940” in Emanuel Adler & Michael Barnett, eds, *Security Communities* (Cambridge: Cambridge University Press, 1998) at 333.

Former Bush Administration Legal Adviser John Bellinger addressed both general and specific audiences. Bellinger was motivated by the contemptuous reception that many of the Bush-era policies received throughout the international community. In response, the Legal Adviser engaged in a process of “international legal diplomacy.”¹²³ This, Bellinger recounts, involved promoting the US commitment to international law. As Legal Advisor, Bellinger would travel extensively to conduct an international legal dialogue. Interlocutors – allies, international organizations, individuals, and NGOs – were targeted. In multilateral forums, through bilateral meetings and speeches, across the pages of legal blogs, newspaper op-eds, and law review articles, Bellinger addressed these various audiences.¹²⁴

This process of legal diplomacy, however, offered more than rebuttals of the Bush Administration’s perceived hostility towards international law. Bellinger lobbied members of the international community to adopt particular legal constructions. Positions and policies were advanced and advocated. Amongst allies, Bellinger promoted an extensive reading of the *jus ad bellum* pertaining to the US-led war on terror.¹²⁵ Legal arguments, the use of persuasion, were initially directed generally. At the regional level, Bellinger sought to convince European allies that the United States was in full compliance with international law. He proposed increased cooperation to determine the appropriate legal framework necessary to combat non-state armed groups.¹²⁶ Victor Kattan traces the resulting legal diplomatic process. When a schism emerged regarding the classification of the ongoing conflict in Afghanistan, Bellinger pivoted to a specific target audience.¹²⁷ This consisted of “a smaller but geographically more diverse group of countries who face serious terrorist threats and also engage in international military operations.”¹²⁸ Legal arguments were directed towards security communities. These, Kattan explains, consisted of members of the defence, intelligence, and security establishments of “a smaller, more select, group of legal advisers from states that rely on US military aid and technology.”¹²⁹

Brian Egan, who would become Legal Adviser in 2016, continued the process of international legal diplomacy. At the American Society of International Law’s Annual Meeting, Egan explained that “legal diplomacy builds on common understandings of international law, while also seeking to bridge or manage the specific differences in any particular State’s international obligations or interpretations.”¹³⁰ Continuing, Egan acknowledged the necessity of persuasive legal engagements:

“It is important that our actions be understood as lawful by others both at home and abroad in order to show respect for the rule of law and promote it more broadly, while also cultivating partnerships and building coalitions. Even if other governments or populations do not agree with our precise legal theories or conclusions, we must be able

¹²³ *Ibid*, at 135. See also, Kattan *Furthering the War on Terrorism*, *supra* note 29 at 115.

¹²⁴ Michael P. Scharf & Paul R. Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (Cambridge: Cambridge University Press, 2010) at 137, 145 [Scharf & Williams *Shaping Foreign Policy*].

¹²⁵ See, Kattan *Furthering the War on Terrorism*, *supra* note 29 at 114-117. See also, Scharf & Williams *Shaping Foreign Policy*, *supra* note 124 at 135-146.

¹²⁶ See, Kattan *Furthering the War on Terrorism*, *supra* note 29 at 119-120.

¹²⁷ *Ibid*, at 122.

¹²⁸ John B. Bellinger III, “Remarks to the Rule of Law Symposium” (International Bar Association Meeting, delivered in Vancouver, Canada, 8 October 2010).

¹²⁹ Kattan *Furthering the War on Terrorism*, *supra* note 29 at 122.

¹³⁰ Egan *International Law, Legal Diplomacy, and the Counter-ISIL Campaign*, *supra* note 107 at 244.

to demonstrate to others that our most consequential national security and foreign policy decisions are guided by a principled understanding and application of international law.”¹³¹

The dynamic of a state, articulating the legality of its action, of positing preferred interpretations of international law, or of presenting policy through an international legal lens is familiar. The substantive process that accompanies such appeals is, however, underexplored. The question thus becomes, how do states persuade?

IV. HOW DO STATES PERSUADE?

In Aristotle’s *Rhetoric*, persuasion and speech exist:

“to affect the giving of decisions – the hearers decide between one political speaker and another, and a legal verdict is a decision – the orator must not only try to make the argument of his speech demonstrative and worthy of belief; he must also make his own character look right and put his hearers, who are to decide, into the right frame of mind.”¹³²

State conduct – behaviour evoking controversy, that which is interpreted as a violation, or which occurs within a grey-area – must be explained and justified.¹³³ Yet, invocations of international legal argument are not often subject to formal adjudicative processes. In most instances, an independent decisionmaker does not evaluate contrasting assertions. Still, in the absence of an authoritative verdict, legal vernacular buttresses the justifications offered by states before or upon the use of force. The argumentative pattern employed by states reflects the Aristotelian form. Through a process of justificatory discourse, Ian Johnstone explains, “claims are made and criticized, actions approved and condemned, actors persuaded and dissuaded in an often cacophonous discursive interaction where legal norms loom large.”¹³⁴

Arguments are structured around these norms and a legalized discourse emerges. Assertions and exchanges, by and between states, employ the language of international law to convince and to justify. Chayes and Chayes note that the resulting “diplomatic conversation” constitutes an essential function of international relations.¹³⁵ These efforts “make up the ordinary business of foreign ministries as they seek to generate support for policy positions or to elicit cooperative action.”¹³⁶ Such observations, however, are commonly presented to explain state behaviour. The need to justify certain actions to both domestic and international audiences compels legal appeals and, through a process of internalization, induces compliance.¹³⁷

Persuasion is understood singularly. It constitutes a means to ensure desirable state behaviour. Martha Finnemore explains that being persuasive entails “grounding claims in existing norms in ways that emphasize normative congruence and coherence.”¹³⁸ When normative claims are persuasive they

¹³¹ *Ibid*, at 247.

¹³² Aristotle, *Rhetoric*, translated by W. Rhys Roberts (London; Aeterna Press, 2015) at Book II, Ch. 1 [Aristotle Rhetoric].

¹³³ Chayes & Chayes *The New Sovereignty*, *supra* note 18 at 118.

¹³⁴ Johnstone *The Power of Deliberation*, *supra* note 43 at 7.

¹³⁵ Chayes & Chayes *The New Sovereignty*, *supra* note 18 at 119.

¹³⁶ *Ibid*.

¹³⁷ *Ibid*, at 118.

¹³⁸ Marta Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996) at 141.

become a powerful means of influencing state behaviour.¹³⁹ The persuasive process is understood to result in the internalization of new norms. This affects the behaviour of states – the targets of persuasion – by redefining their interests and identities.¹⁴⁰ For Ryan Goodman and Derek Jinks, “the touchstone of this approach is that actors are consciously convinced of the truth, validity, or appropriateness of a norm, belief, or practice.”¹⁴¹ The actor “changes its mind” and state behaviour is altered.

Beyond dismissive realist accounts, the discursive process is widely assumed. However, the substance of this process – the function of legal argumentation and persuasion – remains underexplored.¹⁴² Steven Ratner explains that even the dynamic theories, those that emphasize the role of persuasion, do not “amply address the invocation of legal norms during the conversation about compliance.”¹⁴³ Offerings that provide accounts of the microprocesses of persuasive legal engagements focus on how law can affect state behaviour and ensure compliance.¹⁴⁴ I wish to complement these considerations by understanding how the non-compliant state – so commonly the target of persuasion – invokes legal argument within this discursive process. The state will become not merely the subject of persuasion but an actor whose diplomatic appeals and communicative actions are laced with legal justification. Compliance is not the only end sought by persuasive legal appeals. To lie, to interpret, and to legitimize, states employ legal argument. They too become persuading entities. The framework that I identify and suggest captures how the non-compliant state employs legal argument upon the use of force proposes five phases of persuasive engagement: (i) identification of a common lifeworld; (ii) establishing the state as a general norm-acceptor; (iii) demonstrating the authority to interpret; (iv) instilling the standard of the acceptable legal argument; and (v) drawing upon precedent and commonality. These phases will be considered in turn.

A. The Identification of a Common Lifeworld

In *Rhetoric*, the concept of *topoi* denotes shared ideas.¹⁴⁵ These common ideas exist amongst the proponents, the opponents, and the audiences that present and evaluate argument. The persuasiveness of a particular argument has since been understood as contingent upon the ability of the speaker to successfully appeal to these shared ideas.¹⁴⁶ The common ideas and beliefs that are held amongst states

¹³⁹ *Ibid.*

¹⁴⁰ Goodman & Jinks *How to Influence States*, *supra* note 111 at 635. See also, Johnston *Treating International Institutions*, *supra* note 112 at 488.

¹⁴¹ Goodman & Jinks *How to Influence States*, *supra* note 111 at 635.

¹⁴² Ratner *Persuading to Comply*, *supra* note 9 at 568.

¹⁴³ *Ibid.*, at 572.

¹⁴⁴ Steven Ratner explains that to “attempt a successful outcome regarding compliance, the persuading entity must base the contours of its communication strategy on four factors: the nature of the *dispute*; the nature of the *parties*, the nature of the *persuasive setting*, and the nature (as well as its sense) of *its own identity*. See, *Ibid.*, at 575. Elsewhere Ratner notes that the persuading entity’s deployment of legal norms requires choice regarding four core elements of legal argumentation – the publicity of legal argumentation; the density of legal argumentation; the directness of legal argumentation; and the tone of legal argumentation. See, Steven R. Ratner, “Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War,” (2011) 22 *Eur. J. Int’l L.* 459 at 492. Ryan Goodman and Derek Jinks wish to understand the microprocess of persuasion as a means to understand how norms influence actors. They accentuate two techniques – framing and cuing – to determine the “persuasiveness of counterattitudinal messages.” See, Goodman & Jinks *How to Influence States*, *supra* note 111 at 636-637.

¹⁴⁵ Aristotle *Rhetoric*, *supra* note 132 at Book I, Ch.2.

¹⁴⁶ Frank Schimmelfennig, *The EU, NATO and the Integration of Europe: Rules and Rhetoric* (Cambridge: Cambridge University Press, 2003) at 201.

and referenced during legal argumentation are often obvious. A familiar language of shared norms – opposition to aggression; a commitment to rights; the sanctity of humanitarianism – structures persuasive engagements. Universally endorsed values become stock phrases of international legal argument. Yet states do more than appeal to a recurrent vocabulary of values and beliefs. The non-compliant state that undertakes persuasive endeavours often begins by identifying a common premise. This will be shared amongst interlocutors. It provides the context against which the state’s legal assertions will be presented and received.

Jürgen Habermas contends that society may be conceived “as the lifeworld of the members of a social group.”¹⁴⁷ The lifeworld complements communicative action and is understood as “the context-forming background of processes of reaching understanding.”¹⁴⁸ Thomas Risse, who applies Habermasian communicative theory to international relations, describes the argumentative process undertaken by states. Effective communication, Risse contends, requires that actors “share a common lifeworld.”¹⁴⁹ The common lifeworld “consists of shared culture, a common system of norms and rules perceived as legitimate, and the social identity of actors being capable of communicating and acting.”¹⁵⁰ By appealing to the common lifeworld, states access “a repertoire of collective understandings to which they can refer when making truth claims.”¹⁵¹ Though international law provides a prosaic vocabulary, allowing states to articulate common norms and appeal to shared standards, the advancement of non-conventional or non-adherent legal argument often begins through the re-establishment of a non-legal, empathetic context.

The notion of the lifeworld, as applied here, departs significantly from Habermas’ usage. As Risse acknowledges, an anarchic conception of international relations is antithetical to a shared lifeworld.¹⁵² As initially conceived, the lifeworld is “holistically structured and unavailable (in its entirety) to conscious reflective control.”¹⁵³ Within these pages, however, the lifeworld is used to capture the identified commonalities, the shared understandings, truisms, and uncontroversial assumptions that undergird many persuasive interactions. Where Risse and Harald Müller contend that the lifeworld may be *constructed* as a means to build trust and authenticate exchanges, I employ the term to describe a prerequisite communicative phase that *identifies* and *accentuates* shared understandings.¹⁵⁴

The preliminary identification of a shared and relatable context, that tells of more than legal rules, precedes substantive legal contentions. The presumption that the state’s actions or policy – upon or following the use of force – violates international law, distances the state from the common (legal) norms described by Risse. A state that applies force, in a seemingly offensive fashion, may not plausibly appeal to the familiar language of non-aggression and Article 2(4). A state whose military is accused of systematically violating the principle of distinction can not credibly describe their

¹⁴⁷ Jürgen Habermas, *The Theory of Communicative Action, Lifeworld and System: A Critique of Functionalist Reason*, Vol.2, translated by Thomas McCarthy (Boston: Beacon Press, 1987) at 204.

¹⁴⁸ *Ibid.*

¹⁴⁹ Thomas Risse, “Let’s Argue!?: Communicative Action in World Politics” (2000) 54 *International Organization* 1 at 10 [Risse Let’s Argue].

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*, at 10-11.

¹⁵² *Ibid.*, at 14.

¹⁵³ A special thanks to Max Cherem for clarifying this point. See, Internet Encyclopedia of Philosophy: Jürgen Habermas (1929—) by Max Cherem, online: < <https://www.iep.utm.edu/habermas/> >.

¹⁵⁴ Risse Let’s Argue, *supra* note 149 at 15.

commitment to the protection of persons not partaking in hostilities. Instead, a state favouring a broad or inventive interpretation of international law, that has perhaps proposed using force in a manner deemed inconsistent with legal standards, accentuates non-legal experience. The non-compliant state identifies a relatable framework within which its actions are contextualized and shared amongst the target audiences that the state wishes to persuade.

Effective persuasion builds upon “propositions or premises [with] which the audience already agrees.”¹⁵⁵ Legal assertions that, for example, support the use of force against non-state actors establish a narrative concerning the global threat posed by terrorism and the susceptibility of states to an emergent danger that exceeds legal categorization and defies conventional defensive responses. They do not begin by supporting the resulting military action through a strict reading of the *jus ad bellum*. Such narratives, however, are not forwarded within an ideational vacuum.¹⁵⁶ The further a legal interpretation stretches conventional understandings or the extent to which a military policy appears contrary to legal dictate positions the persuasive claim in opposition to well-established legal norms. The premise developed by the non-compliant state “must compete with other norms and perceptions of interest.”¹⁵⁷

Constructivist scholars emphasize the usefulness of framing. Normative advancement is centred upon the ability of actors to “reinterpret” or “rename” a particular issue in a compelling way. Constructivists associate this process with norm entrepreneurs. The construction of cognitive frames is identified as an essential component of norm development. The norm entrepreneur is successful when “the new frames resonate with broader public understandings and are adapted as new ways of talking about and understanding issues.”¹⁵⁸ Ryan Goodman and Derek Jinks insist that framing is the “first and most important technique of persuasion.”¹⁵⁹

As with broader conceptions of persuasion, framing is presented as a means to influence state behaviour. It is a method to achieve compliance, to gain endorsement of an emergent norm, or to coax the state to embrace or repudiate a particular policy. Identification of a common lifeworld, while similarly focused on accentuating a relatable premise, allows for broader development. It becomes a technique employed by a non-compliant state. When states develop legal arguments upon the common lifeworld, they preference appeals to shared culture and familiar challenges. Rules and norms assume a significant role throughout the persuasive process. The state is not, however, immediately fixated on forwarding a particular norm or grounding its argument within a formal legal framework. Persuasive engagements by non-compliant states necessarily push against established norms. Upon developing a broad and relatable premise upon which a prohibited action can be reconceived as something other than a legal violation, the state moves to establish its credibility. Though the state may be in violation of a *particular* legal provision, it continues the persuasive process by emphasizing its *general* commitment to international law.

¹⁵⁵ Scobbie Rhetoric Persuasion and Interpretation, *supra* note 62 at 70.

¹⁵⁶ Rodger A. Payne, “Persuasion, Frames and Norm Construction” (2001) 7 Eur. J. Int. Rel. 37 at 38 [Payne Persuasion].

¹⁵⁷ Martha Finnemore & Kathryn Sikkink, “International Norm Dynamics and Political Change” (1998) 52 International Organization 887 at 897 [Finnemore & Sikkink International Norm Dynamics].

¹⁵⁸ *Ibid*, at 897.

¹⁵⁹ Goodman & Jinks How to Influence States, *supra* note 111 at 635.

B. *Establishing the State as a General Norm-Acceptor*

States strive to be perceived as compliant with international law. The state emphasizes its deference to legal norms. It professes respect for the rule of law. And the state positions itself as a member, in good-standing, of the post-war international order. A state whose behaviour betrays this outward projection of legal fidelity often continues to situate itself as in general acceptance of international law. A violation is an exception, not the standard. If, as Oscar Schachter suggests, international law provides a common language, states covet fluency.¹⁶⁰ An action that appears non-compliant, a favoured interpretation that stretches conventional understanding is explained through reiteration of the state's broad legal commitment. In alignment with the Aristotelian conception of persuasion, the non-compliant state builds its legal contention upon efforts to "make [its] own character look right."¹⁶¹

Harold Koh, drawing upon the perspective of the government lawyer, contends that public officials "almost always believe their actions are necessary, correct, and lawful."¹⁶² The state, Koh suggests, must provide public justification so that others will accept the resulting assertion of legal compliance. The justificatory discourse is understood as a necessary factor in establishing both domestic and international legitimacy.¹⁶³ Also, however, these legal articulations allow the state to cultivate its standing as a general norm-acceptor. States wish to maintain this standing within the international community and undertake efforts to avoid the perception of chronic legal disregard.¹⁶⁴ Where legality denotes legitimacy, persuasion builds upon more than the directly applicable legal norms. Persuasive efforts, in defense of a questionable action or in furtherance of a non-compliant policy, are established upon professed adherence to "the general values and principles of international law" that the state purports to cherish.¹⁶⁵

International lawyers do not question the proposition that states hold an interest in "maintaining a reputation for good faith compliance with the law."¹⁶⁶ This is understood to facilitate reciprocity and international cooperation. States desire predictability. Stability is associated with legal amenability.¹⁶⁷ A good reputation is maintained, Andrew Guzman explains, "as long as a country honors all of its previous international commitments."¹⁶⁸ A state's reputation appears more durable than this suggests.¹⁶⁹ While continued instances of legal violation erode credibility, a state may present its reputation to signal that a novel legal contention – one that strains interpretative likelihood or proposes illicit military action – is a marginal disagreement about the meaning of a legal norm. It is not, the state will suggest, an ontological claim regarding the validity of a dominant value. As Thomas

¹⁶⁰ Oscar Schachter, "The Quasi-Judicial Role of the Security Council and the General Assembly" (1964) 58 Am. J. Int'l 960 at 960-963. See also, Rosalyn Higgins, "The Place of International Law in the Settlement of Disputes by the Security Council" (1970) 64 Am. J. Int'l L. 1 at 1.

¹⁶¹ Aristotle Rhetoric, *supra* note 132 at Book I, Ch.2.

¹⁶² Koh The Legal Adviser's Duty, *supra* note 84 at 195.

¹⁶³ *Ibid.*

¹⁶⁴ Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995) at 31-33.

¹⁶⁵ Robert Fine, "Political argument and the legitimacy of international law: A case of distorted modernization" in Chris Thornhill & Samantha Ashenden, eds, *Legality and Legitimacy: Normative and Sociological Approaches* (Baden Baden: Nomos, 2010) 197 at 198-199.

¹⁶⁶ Johnstone The Power of Deliberation, *supra* note 43 at 7.

¹⁶⁷ *Ibid.*, at 33-34.

¹⁶⁸ Guzman A Compliance-Based Theory, *supra* note 19 at 1847.

¹⁶⁹ See, George W. Downs & Michael A. Jones, "Reputation, Compliance, and International Law" (2002) 31 Journal of Legal Stud. 95 at 96 [Downs & Jones Reputation].

Risse notes, the more a non-compliant state accepts the validity of international norms, the more it engages with others over the minutiae of a legal proposition.¹⁷⁰

Game theorists understand a player's reputation as a "summary of its opponents' current beliefs about the player's compliance strategy or set of strategies in connection with various commitments."¹⁷¹ States actively develop their reputation for general legal fidelity. They seek to nurture conceptions that they comply with law and honour undertaken commitments. In turn, the state promotes this reputation as a warrant when the state's actions deviate from its professed affinity to international law. A controversial policy, an assumed violation, is juxtaposed with the assertion that the state is a norm-acceptor. Prior to engaging in substantive accounts – in defense of a particular military action, in explanation of a permissive legal interpretation – the state recites its liberal credentials. A strong reputation, emphasizing legal like-mindedness, dampens the consequences of an action that betrays that affinity. It positions target audiences to receive and take seriously the state's legal assertions. And it further establishes a communicative context, upon which the non-compliant state may continue to build and to persuade by demonstrating its ability to provide authoritative legal interpretation.

C. Demonstrating the Authority to Interpret

Legal disputes often feature competing assertions of competence. Opposing legal propositions are supplemented with declarations accentuating the respective parties' capacity to make an authoritative legal claim. Beyond the core substantive question, competing actors contest expertise and authority.¹⁷² This form of persuasion assumes particular salience within international law. The sources of international law – treaties between states; customary international law; general principles; judicial decisions; and the writing of the most highly qualified publicists – compel interpretation.¹⁷³ These sources facilitate a range of possible meanings and can be applied in a diversity of ways.¹⁷⁴ Treaties are drafted in broad, agreeable language.¹⁷⁵ Customary international law is identified through an ill-defined and imprecise process.¹⁷⁶ Judicial decisions and the works of legal scholars are interpretative exercises that produce varying opinions.¹⁷⁷

As most international legal contentions are not subject to formal decision-making, their persuasive value is influenced by an actor's ability to exhibit authority and expertise. Efforts to accentuate the speaker's expertise further builds upon the Aristotelian notion of affecting the giving of a decision through making one's character look right.¹⁷⁸ As Charlotte Peever demonstrates, "the authority to speak the law is often determined by the status of the speaker of the invocation or imposition. Some

¹⁷⁰ Risse Let's Argue, *supra* note 149 at 30.

¹⁷¹ Downs & Jones Reputation, *supra* note 169 at 98.

¹⁷² Peever Politics of Justifying Force, *supra* note 25 at 246.

¹⁷³ Statute of the International Court of Justice, 59 Stat. 1055 (1945), TS No. 993 at Article 38.

¹⁷⁴ David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton, NJ: Princeton University Press, 2016) at 269-247 [Kennedy A World of Struggle].

¹⁷⁵ Katerina Linos & Tom Pegrar, "The Language of Compromise in International Agreements" (2016) 70 International Organization 587.

¹⁷⁶ See, e.g. Stefan Talmon, "Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion" (2015) 26 Eur. J. Int'l L. 417.

¹⁷⁷ Michael Peil, "Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice" (2012) 1 Cambridge J. Int'l & Comp. L. 136.

¹⁷⁸ Aristotle Rhetoric, *supra* note 132 at Book I, Ch.2.

actors appear to hold greater legitimacy in claiming powers than others.”¹⁷⁹ Often, a speaker’s authoritativeness is inherent or institutionalized. A particular state’s foreign ministry is understood to possess high-level expertise in a certain area or field. A specific court is deemed competent to determine particular legal questions that have repeatedly come before its docket. A jurist is recognized as a leading authority on a body of law.

The ability to demonstrate authority and expertise is a formative aspect of the persuasive process. Expertise, Peevers explains, are conveyed by lawyers, diplomats, academics, and technocrats to influence the justificatory discourse that accompanies uses of force.¹⁸⁰ In part, the turn to expertise was a reaction to the belief that “traditional approaches to international governance and the traditional institutions of international law would be ill-equipped to deal with the problems of a globalised world...”¹⁸¹ Expert networks provided an obvious means to ensure technocratic solutions.¹⁸² Also, however, they would become a means of exhibiting credibility. An actor brandishing expertise, whose foreign ministry and government lawyers wilfully engage in legal processes and offer a rarefied body of knowledge is better positioned to persuade. Alistair Iain Johnston notes that persuasion is contingent upon the authoritativeness of the messenger.¹⁸³ When a state proposes a counterattitudinal interpretation, when it engages in a military action that is perceived as a violation, the state couples accompanying legal rhetoric with an accounting of interpretative authority.

The demonstration of expertise bolsters this sense of interpretative authority. It facilitates state efforts to form or contribute to existing epistemic communities.¹⁸⁴ These groups, as defined by Peter Haas, are “networks of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area.”¹⁸⁵ Interpretative legal avowals are well received when addressed by an actor to an epistemic community of which the actor is a member or from which the actor may derive credibility. Whether the state wishes to engage with an epistemic community or make a broad claim, international legal assertions are built upon the professed expertise or authority of the speaker.

States actively cultivate authoritativeness and expertise. This enables access to and ensures influence within epistemic communities. It increases the persuasiveness of the state’s legal avowals when it targets general, non-expert audiences. As Yahli Shereshevsky details, states employ various persuasive strategies as they engage with formal and informal lawmaking processes.¹⁸⁶ States send legal experts to partake in international law conferences. They draw upon the professional reputations of their legal representatives.¹⁸⁷ Written outputs that convey the state’s legal positions are made accessible and

¹⁷⁹ Peevers *Politics of Justifying Force*, *supra* note 25 at 4. See also, Shereshevsky *Back in the Game*, *supra* note X at 10.

¹⁸⁰ Peevers *Politics of Justifying Force*, *supra* note 25 at 14.

¹⁸¹ Holly Cullen, Joanna Harrington & Catherine Renshaw, “Experts, Networks and International Law” in Holly Cullen, Joanna Harrington & Catherine Renshaw, eds, *Experts, Networks and International Law* (Cambridge: Cambridge University Press, 2017) 1 at 1 [Cullen, Harrington & Renshaw Experts].

¹⁸² See generally, Kennedy *A World of Struggle*, *supra* note 174.

¹⁸³ Johnston *Treating International Institutions*, *supra* note 111 at 509-510.

¹⁸⁴ These communities will also include members of international organization and civil society groups. See, Cullen, Harrington & Renshaw *Experts*, *supra* note 181 at 2.

¹⁸⁵ See, Peter Haas, “Introduction: epistemic communities and international policy coordination” (1992) 46 *International Organization* 1 at 3 [Haas Epistemic Communities and International Policy].

¹⁸⁶ Shereshevsky *Back in the Game*, *supra* note 7 at 51.

¹⁸⁷ Shereshevsky notes, for example, Harold Koh’s 2010 speech to American Society of International Law’s Annual Meeting. Shereshevsky suggests that Koh’s participation “can be seen as an attempt by the U.S. to once again become part

widely distributed. When relevant, they are translated into English. These outputs are presented in a “quasi-academic style” that relies upon extensive footnoting and elaborate legal reasoning.¹⁸⁸ This both draws upon and exhibits the state’s legal expertise. It places the legal contention, Shereshevsky notes, within an existing persuasive discourse as opposed to presenting a simple declaration of *opinio juris*.¹⁸⁹ Within this discourse and throughout these persuasive appeals, the state seeks to apply its expertise to a permissively established standard that permits the *acceptable* legal argument.

D. Instilling the Standard of the Acceptable Legal Argument

States project legal fidelity. They wish to maintain “a reputation for good faith compliance with the law...”¹⁹⁰ Yet, when a state employs legal argument to explain or to justify, it is often content to meet a minimum level of compliance or present only a plausible legal argument. A state whose actions are widely-assumed to violate international law will struggle to dislodge consensus legal opinion. In response to legal opposition – within the international community, throughout civil society, and amongst independent legal experts – the non-compliant state acts to instill and to meet the standard of the acceptable legal argument. Legal interpretations, applications of international law to complex fact patterns, move from the objective of persuading an audience that an argument is correct to suggesting that the legal contention is plausible.¹⁹¹ By establishing a reduced legal burden, the state’s persuasive appeals become more effective. The state benefits from the perception that it has engaged with the international legal process. Sometimes engagement alone is sufficient to project legitimacy. Recalling Daniel Reisner’s contention that international law advances through violations, the non-compliant state may begin to alter legal thresholds to further align legal requirements with state prerogatives.¹⁹²

As identified by the New Haven School, a discursive understanding of international law suggests that legal meaning is derived from argumentative reasoning.¹⁹³ The rhetorical nature of the reasoning process features a permissive standard of interpretative validity. Interpretations, Peevers identifies, “no longer *need* to make the claim of ‘truth’: rather they have to be ‘acceptable’.”¹⁹⁴ As Ian Johnstone explains, states rarely dismiss international law’s relevancy. Instead, when an action is deemed contrary to international law, the state responds that “this is how we interpret the law, and our interpretation is correct.”¹⁹⁵ Behind this discourse, however, states look to stretch the boundaries of plausibility. Though every legal or legal-sounding statement will not meet an amended standard of reasonableness, persuasive efforts appeal to a permissively constructed conception of what constitutes an acceptable legal argument.

of the conversation in a less confrontational way; to be received as an actor that participates in the legal debate rather than challenging existing norms.” See, *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ Johnstone The Power of Deliberation, *supra* note 43 at 7.

¹⁹¹ To recall the notion that the purpose of persuasion is to convince an audience that a particular interpretation is correct, see, Bianchi The Game of Interpretation, *supra* note 60 at 36.

¹⁹² Feldman & Blau Consent and Advise, *supra* note 28.

¹⁹³ See generally, W. Michael Reisman, “International Law-making: A Process of Communication” (1981) 75 Am. Soc’y Int’l L. Proc. 101.

¹⁹⁴ Peevers Politics of Justifying Force, *supra* note 25 at 5.

¹⁹⁵ Johnstone provides the example of U.S. efforts to “present the best case it could for military action against Iraq.” See, Johnstone The Power of Deliberation, *supra* note 43 at 34.

Much international law – as practiced by its institutions, as defined within its instruments, and as construed through its arbiters – favours broad and permissive legal formulations. International treaties are drafted in multivalent language. Human rights agreements converge around “the lowest common denominator.”¹⁹⁶ Such regimes are amenable to an expansive set of legal interpretations that result from the “diverse cultural and legal traditions embraced by each Member State.”¹⁹⁷ Though many treaties contain dense rules, broad legal arguments are typically removed from legal minutiae. Instead, arguments reference general principles. This facilitates a panoply of potential interpretations. States actively encourage the development of legal systems that tolerate an array of legal reasoning. The European Court of Human Rights’ (ECtHR) margin of appreciation, for example, provides member states discretion in fulfilling their obligations under the European Convention on Human Rights (ECHR).¹⁹⁸ The margin, first referenced in a 1958 European Commission report, is intended to ensure a minimum level of human rights protection while permitting a range of interpretative contentions.¹⁹⁹ Similarly, the ICJ has “rejected any assertion that in any given situation, only one action could possibly be considered reasonable.”²⁰⁰

The notion of reasonableness is used in international lawmaking to ensure discretion in the interpretation and application of legal rules. States include the term ‘reasonable’ in legal instruments to introduce a degree of flexibility.²⁰¹ Reasonableness is read into the judgements of international courts – often despite its textual absence – to ensure “adaptability” and to facilitate a diversity of state interpretations.²⁰² Interpretations of broadly constructed legal rules employ reasonableness to fill the legal lacunae that results from textual ambiguity and to support a preferred articulation.²⁰³ States preference interpretative flexibility and advocate for the acceptance of diverse legal responses. Within armed conflict, the notion of proportionality is subject to the assessment of the “reasonable military commander.”²⁰⁴ Citing the conclusion of the Committee Established to Review NATO Bombings in

¹⁹⁶ See, Janina Dill, “The Rights and Obligations of Parties to International Armed Conflict: From Bilateralism but Not Toward Community Interest?” in Eyal Benvenisti & Georg Nolte, eds, *Community Interests Across International Law* (Oxford: Oxford University Press, 2018) 430 at 436. See also, Clare Overy & Robin C.A. White, Jacobs & White: The European Convention on Human Rights (Oxford: Oxford University Press, 2006) at 52-54.

¹⁹⁷ Council of Europe, *The Margin of Appreciation*, online: <https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp>.

¹⁹⁸ See, Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 2000) at 5.

¹⁹⁹ The ECtHR has held that “national authorities are better placed to assess the content of limitations based on contextual considerations.” See, *Handyside v. United Kingdom* (1976), 1 EHRR 737. See also, Eleni Frantziou, “The margin of appreciation doctrine in European human rights law” (2014) UCL Policy Briefing 1.

²⁰⁰ Olivier Corten, “Reasonableness in International Law” (2013) Max Plank Encyclopedia of Public International Law [Corten Reasonableness].

²⁰¹ For example, Article 3 of the First Protocol to the ECHR requires that member state must hold elections at “reasonable intervals. See, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, E.T.S. 5 (3 September 1953) at Article 3 of the First Protocol. See also, Corten Reasonableness, *supra* note 200.

²⁰² *Ibid.* In the ECtHR’s Article 14 jurisprudence, the Court has held that “the principle of equal treatment is violated if the distinction has no objective and reasonable justification.” See, *Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (European Commission of Human Rights v Belgium) [Merits] (App. No. 1474/62) Series A, No. 6. Sec. 1.B (23 July 1968) at para. 10.

²⁰³ Corten Reasonableness, *supra* note 200.

²⁰⁴ 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* (13 June 2000) at para. 51 [Final Report to the Prosecutor]. See generally, Robert D. Sloane, “Puzzles of Proportion and the ‘Reasonable Military Commander’: Reflections on the Law, Ethics, and Geopolitics of Proportionality” (2015) 6 Harvard Nat. Sec. J. 299.

Yugoslavia – which held that a human rights lawyer and a military commander will likely posit opposing interpretative results – states endorse a standard of legal permissibility based upon the latter’s assessment.²⁰⁵

Efforts to instill the standard of the acceptable legal argument draw upon international law’s perceived subjectivity.²⁰⁶ Former British Foreign Secretary Jack Straw argued, in a correspondence debating the legality of the Iraq war, that “everyone knew that international law was uncertain and that, therefore, reasonable and honestly held differences of opinion could be held.”²⁰⁷ Parameters do, however, exist. Johnstone notes that, “there are limits to which any language, including the language of the law, can plausibly be stretched.”²⁰⁸ Good and bad legal arguments are advanced by states. Interpretative communities, Johnstone suggests, distinguish between these arguments and assess their credibility.²⁰⁹ Non-compliant states, however, target both narrow and broad audiences. Their legal contentions are often directed beyond interpretive communities. Legal arguments, dismissed by experts, may resonate amongst broader audiences. Dominant propositions that make legal claims may hold little salience within the international legal community but still drive public debates. When attempting to persuade, the non-compliant state draws upon legal ambiguity, an expansive notion of reasonableness, and the willingness (or necessity) of legal institutions to accept a plausible explanation. Upon this permissively construed interpretative foundation, the non-compliant state completes the persuasive process by appealing to precedent and commonality when applying law to fact.

E. Drawing Upon Precedent and Commonality

Effective speech, Aristotle claimed, requires the speaker to demonstrate that a contention is worthy of belief.²¹⁰ Worthiness is exhibited through the persuasive pull of past agreements, decisions, or actions. States appeal to precedent and commonality as they apply the law (that they interpret) to the facts (that they frame). Precedent’s appeal is unaffected by its formal status. As per Article 59 of the *Statute of the International Court of Justice*, decisions of the Court are held to have “no binding force except between the parties and in respect of that particular case.”²¹¹ The Statute embodies the general legal principle that “international courts are explicitly not bound by precedent.”²¹² Judicial decisions are recognized as “subsidiary means for the determination of rules of law.”²¹³

Notwithstanding precedent’s formal status, appeals to past decisions, established legal principles, and existing patterns of behaviour foreground international legal contentions. By invoking precedent, an actor implies that a legal contention is part of a tradition. It is an established tenet and not merely a

²⁰⁵ See, e.g. The State of Israel, *The Operation in Gaza 27 December 2008 – 18 January 2009: Factual and Legal Aspects* (July 2009) at para. 332.

²⁰⁶ See, e.g., Pnina Sharvit Baruch, “Operation Protective Edge: The Legal Angle” in Anat Kurz and Shlomo Brom, eds, *The Lessons of Operation Protective Edge* (Tel Aviv: Institute for National Security Studies, 2014) 65 at 66 [Sharvit Baruch Operation Protective Edge].

²⁰⁷ Letter from Foreign Secretary Jack Straw to Sir Michael Wood, 29 January 2003, “Iraq: Legal Basis for Use of Force”, cited in Peever, *Politics of Justifying Force*, *supra* note 25 at 146.

²⁰⁸ Johnstone *The Power of Deliberation*, *supra* note 43 at 25.

²⁰⁹ *Ibid*, at 34.

²¹⁰ Aristotle Rhetoric, *supra* note 132 at Book I, Ch.2.

²¹¹ See, *Statute of the International Court of Justice*, 59 Stat. 1055, 33 U.N.T.S. 933 (26 June 1945) at Article 59 [ICJ Statute].

²¹² Krzysztof J. Pelc, “The Politics of Precedent in International Law: A Social Network Application” (2014) 108 *Am. Political Sci. Rev.* 547 at 548 [Pelc Politics of Precedent].

²¹³ ICJ Statute, *supra* note 211 at Article 38 (1)(d).

self-serving claim. Harlan Grant Cohen explains that across international law, practitioners invoke, and tribunals apply, precedent. Continuing, Cohen explains that “reports from international investment arbitration, international criminal law, international human rights, and international trade all testify to precedent’s apparent authority.”²¹⁴

Precedent’s authoritativeness is, however, described as “informal.”²¹⁵ States deny – often vehemently – the binding force of past legal decisions.²¹⁶ Within international affairs, states value flexibility. Despite predictability’s appeal, states resist officially recognizing the lingering constraint of legal rules derived from the decisions of international tribunals. Yet, states often appeal to precedent. Individually, these legal appeals willingly recall supportive judicial decisions. Often, however, the use of precedent is not confined by a formalist application of *stare decisis*. States exhibit a persuasive tendency to recall legal measures that present as analogous to the contention or policy that the state wishes to advance.

Precedent becomes a means of persuasion. An advantageous past decision by a judicial or appellate body will be cited by a state that argues before that same body. Cross-fertilization occurs when a persuasive entity is cited in an alternative forum. Cohen notes that “decisions by international courts or tribunals with general jurisdiction over international law broadly or an area of international law specifically might be invoked as precedential with regard to that area of law regardless of the forum for the current argument.”²¹⁷ Applied expansively, a state’s use of precedent may accentuate a prior or similar interpretation of a legal rule.²¹⁸ The pre-existing interpretation may have been offered by another state or by a legal expert. Non-binding decisions by UN bodies are commonly invoked as a form of precedent.²¹⁹ States accentuate the interpretations of what Sandesh Sivakumaran terms “state empowered entities.”²²⁰ These include the decisions, judgements, or reasoning of organizations and bodies that include the International Law Commission, the ICRC, and the Human Rights Committee.

Understood broadly, precedent derives from a diversity of sources. Moving beyond the opinions of decision-making entities, Cohen notes that state behaviour is amongst the oldest forms of international precedent.²²¹ By recalling past acts, a non-compliant state may defend a controversial event as consistent with a pattern of state action. This lessens the potency of formal legal discourse. If a majority view the controversial event as a violation, recalling past state behaviour alters the analysis. Tangibility precedes abstraction, emphasizing what states do and not simply what the law requires. As Michael Reisman explains, “inferences about what other actors think is acceptable behavior are not derived from international judgments or from constitutional documents, statutes, or treaties. They are almost entirely derived from the responses of key actors to a critical event.”²²² If law is identified in

²¹⁴ Harlan Grant Cohen, “Theorizing Precedent in International Law” in Andrea Bianchi, Daniel Peat & Matthew Windsor, eds, *Interpretation in International Law* (Oxford: Oxford University Press, 2015) 268 at 269 [Cohen Theorizing Precedent].

²¹⁵ Pelc Politics of Precedent, *supra* note 212 at 547.

²¹⁶ Cohen Theorizing Precedent, *supra* note 214 at 269.

²¹⁷ *Ibid*, at 276.

²¹⁸ *Ibid*, at 275.

²¹⁹ *Ibid*, at 277.

²²⁰ See, Sandesh Sivakumaran, “Beyond States and Non-State Actors: The Role of State Empowered Entities in the Making and Shaping of International Law” (2017) 55 Colum. J. Transnat’l L. 343.

²²¹ Cohen Theorizing Precedent, *supra* note 214 at 269.

²²² W. Michael Reisman, “The International Incidents: Introduction to a New Genre in the Study of International Law” (1984) 10 Yale J. Int’l L. 1 at 2 [Reisman The International Incidents].

the ways that states interpret and apply norms in particular cases, the persuading state will accentuate those cases.²²³ A state bolsters the persuasiveness of its contention when it displays that analogous actions have been undertaken and implicitly or explicitly received by the international community.

Similarly, the persuading state may accentuate the commonality of a particular event. When a state pursues a military action or proposes a particular policy it may draw upon a shared (sometimes hypothetical) scenario. It challenges the target audience to consider how it has or would react in a comparable setting. If a dangerous non-state armed group were amassed on your border – the persuading state asserts – you too would be compelled to act in pre-emptive self-defense.²²⁴ If an attack against a major urban centre caused thousands of deaths and altered a city’s landscape you too would disregard legal formality.²²⁵ Appeals to commonality allow for variances in the analogy. Within a formal system of *stare decisis*, precedent’s effectiveness is contingent on the similarity between the past fact pattern and the current context.²²⁶ By illustrating commonalities, persuasion becomes a thought-experiment. Legal texts that support the consensus view that a particular action is illegal are presented as in tension with necessity. A particular incident becomes a “norm-indicator” or a “norm-generator.”²²⁷ Past actions and assumed responses provide persuasive licence to the non-compliant state.

Appeals to precedent encourage a target audience to accept a counterattitudinal message. A controversial military action, an expansive interpretation accentuates past practice to both illustrate a pattern of similarity and imply a broader sense of international acceptance. Through the creation of a common lifeworld, by positioning the state as a general norm-acceptor, in demonstrating the authority to interpret, instilling the standard of the acceptable legal argument, and when drawing upon precedent and commonality the non-compliant state applies law to fact. It engages in a persuasive process to lie, to interpret, or to legitimize. Legal arguments follow familiar patterns. International law provides an often-reiterated language and a set of discursive conventions. Mostly, states display a recognizable argumentative structure. When a state addresses a broad audience, it relies upon lofty contentions and recurrent themes. When the state targets its arguments narrowly, towards or within an interpretative community, it becomes more technocratic. It references favoured sources and a hierarchy of legal authority. However, persuasive engagements display idiosyncrasy. The phases discussed above are non-exhaustive. A particular use of legal argument, by a non-compliant state, will not necessarily invoke each of these phases or apply them in a linear fashion. These phases of engagement represent an amalgamation of the persuasive practices that states undertake. Application is necessarily specific to the context within which the non-compliant state wishes to persuade. This application will now be described.

V. WHEN STATES PERSUADE: ACCOUNTS OF LEGAL ARGUMENT UPON THE USE OF FORCE

The *Caroline* affair began in 1837 when British forces suspected that a privately-owned steamship in the Niagara River aided Canadian rebels in opposing British rule. Two British officers, leading a

²²³ *Ibid*, at 12.

²²⁴ See generally, Sean D. Murphy, “The Doctrine of Preemptive Self-Defense” (2005) 50 Villanova Law Rev. 699.

²²⁵ Steven Ratner has termed this the Eiffel Tower Factor. See, Steven R. Ratner, “*Jus ad Bellum* and *Jus in Bello* After September 11” (2002) 96 Am. J. Int’l. L. 905 [Ratner *Jus ad Bellum* and *Jus in Bello*].

²²⁶ Reisman *The International Incidents*, *supra* note 222 at 19.

²²⁷ *Ibid*, at 4.

contingent of volunteers, seized the ship. They burned and then sank the vessel. The *Caroline* was moored in American water and was owned by Buffalo native William Wells. During the raid a US citizen was killed. Anglo-American relations deteriorated.²²⁸ Amidst calls for reparations, reprisals, and the increasing prospect of war, a diplomatic discourse began between British and US officials.²²⁹ Legal explanations were offered in concurrence. The British argued that the *Caroline's* destruction was a public act justified under the law of nations.²³⁰ The US responded that the *Caroline* was not engaged in piracy, operated as a freight and passenger ship, and had been flying the US flag.²³¹

Harold Koh identifies this discourse as initiating a tradition of public explanation.²³² From the 19th century, US officials increasingly coupled actions with international legal justifications.²³³ Legal reasoning, assertions of compliance, reveal much about how international law is understood. Also, however, this conversive process provides opportunity for law to be formed, developed, or altered. The *Caroline* affair is paradigmatic. Following a letter sent by the US Secretary of State, Daniel Webster, to the British Ambassador, Henry Fox, a set of legal criteria were established. These required that the “necessity of self-defense was instant, overwhelming, leaving no choice of means and no movement of deliberations.”²³⁴ The requirements of imminence, necessity, and proportionality were identified and now inform the classic definition of self-defence under international law.²³⁵

The following case studies describe the discursive process accompanying the use and application of force by states. Each considers the role that persuasion and legal argument assume within the resulting discourse. The first study describes the use of international legal argument by the Russian Federation following its annexation of Crimea. This provides an example of the use of persuasive legal appeals to supplement a lie. The second study details the US and British advancement of the “unwilling or unable” test within the context of the “war on terror.” This constitutes an example of a state employing persuasive argument to establish a legal interpretation. A third case study describes the use of legal argument by Israel both during and after the 2014 Gaza war. This illustrates how a state employs international law to legitimize a particular action or event.

Despite the assigned motives – to lie; to interpret; to legitimize – I do not suggest that states use legal argument for a singular purpose. States appeal to international law in multifaceted ways. They are motivated, often simultaneously, by a diversity of reasons. The legal responses evoked by an incident or series of incidents as broad and enduring as, for example, the “war on terror” facilitate myriad legal engagements. These will overlap, contradict, and evolve. In one instance a state may employ international law to supplement a lie. Later, that same state will recall law to advance a good-faith legal interpretation. Whether a state is lying, whether it is offering a good-faith interpretation, or advancing

²²⁸ Howard Jones, “The *Caroline* Affair” (1976) 38 *The Historian* 485 at 485.

²²⁹ *Ibid.*, at 485, 489, 495-496.

²³⁰ Henry Fox, the British Ambassador to the US argued that “the ‘piratical character’ of the *Caroline* and the inability of New York to enforce American neutrality laws had justified destruction of the boat wherever found.” This draw upon international law as the Ambassador recognized that by labelling the ship “pirate” all concerned states were entitled to capture and destroy. See, *Ibid.*, at 495-497.

²³¹ *Ibid.*

²³² Koh *The Legal Adviser's Duty*, *supra* note 84 at 193.

²³³ *Ibid.*

²³⁴ Daniel Webster, “Letter to Henry Stephen Fox” in K.E. Shewmaker, ed, *The Papers of Daniel Webster: Diplomatic Papers, Vol. 1, 1841-1843* (Dartmouth, NH: Dartmouth Press, 1983) at 62.

²³⁵ *Ibid.* See also, Jan Kittrich, *The Right of Individual Self-Defense in Public International Law* (Berlin: Logos Verlag, 2008) at 153.

a self-serving legal argument will evade agreement. Motives may be obviously transparent but are often difficult to discern. The purpose of these categorizations is not to assess the validity of the particular legal arguments. Instead, it is to demonstrate how the persuasive process is employed in a diversity of scenarios to achieve generalizable purposes.

A. To Supplement a Lie: The Use of Persuasive Legal Argument following the Russian Annexation of Crimea

Almost without warning, Ukraine moved from the cusp of European integration and into Moscow's sphere of influence. President Viktor Yanukovich's tenure on Bankova Street commenced with familiar calls to ensure the requisite reforms necessary to facilitate EU membership.²³⁶ In early September 2013, President Yanukovich chaired a fractious meeting amongst members of his political party.²³⁷ The East-West divisions displayed by party loyalists became the harbinger of a tumultuous year that altered Ukraine's political trajectory. Following the suspension of a pending EU association agreement, thousands of protestors gathered in Kiev's Independence Square. The "Euromaidan" protests spread across the country. To quell opposition, Yanukovich employed increasingly anti-democratic tactics. His support dwindled. Members of the *Rada* passed legislation stripping Yanukovich's legal powers. Police abandoned their guard of the Presidential offices and the *Rada* voted to impeach.²³⁸

The disposed President called the events a coup.²³⁹ Pro-Russian, anti-government groups countered the Euromaidan protests. Violent outbreaks and large demonstrations began in Donetsk and Luhansk but attention soon turned to the Autonomous Republic of Crimea. As protests mounted throughout Ukraine, Sergei Aksyonov began forming a paramilitary force. Aksyonov led the Russian Unity party, a minor political faction in the Crimean State Council that held three seats in the regional legislature. Days after Yanukovich's impeachment, the State Council was seized by two dozen armed militants. Aksyonov mediated.²⁴⁰ Hours later, a quorum of parliamentarians was gathered and – under uncertain circumstances – Aksyonov was appointed as Crimea's Prime Minister.²⁴¹

On 6 March, under Aksyonov's stewardship, the State Council adopted a decree establishing the parameters of an "All-Crimean Referendum." Voters would indicate support for reunification of Crimea with the Russian Federation or favour restoration of the 1992 Crimean Constitution.²⁴² Five days later, the Crimean legislature and the Sevastopol City Council passed a joint resolution. This declared Crimea's independence and stated that, if voters choose to succeed, the State Council would

²³⁶ Steven Pifer, "External Influences on Ukraine's European Integration" *Brookings Institute* (1 April 2013), online: <<https://www.brookings.edu/articles/external-influences-on-ukraines-european-integration/>>.

²³⁷ Elizabeth Piper, "Special Report: Why Ukraine spurned the EU and embraced Russia" *Reuters* (19 December 2013), online: <<https://www.reuters.com/article/us-ukraine-russia-deal-special-report/special-report-why-ukraine-spurned-the-eu-and-embraced-russia-idUSBRE9BI0DZ20131219>>.

²³⁸ Kevin Bishop, "Ukrainian MPs vote to oust President Yanukovich" *BBC News* (22 February 2014), online: <<https://www.bbc.com/news/world-europe-26304842>>.

²³⁹ Interfax-Ukraine, "The Prosecutor General's Office probes coup in Ukraine in 2014 under Yanukovich's application" *Kyiv Post* (29 November 2017), online: <<https://www.kyivpost.com/ukraine-politics/prosecutor-generals-office-probes-coup-ukraine-2014-yanukovichs-application.html>>.

²⁴⁰ There has been speculation that the armed groups that seized the Parliament were acting under Aksyonov's command. Aksyonov, however, claims that the group acted "spontaneously." See, Simon Shuster, "Putin's Man in Crimea Is Ukraine's Worst Nightmare" *Time Magazine* (10 March 2014), online: <<http://time.com/19097/putin-crimea-russia-ukraine-aksyonov/>>.

²⁴¹ *Ibid.*

²⁴² Thomas D. Grant, "Annexation of Crimea" (2015) 109 *Am. J. Int'l. L.* 68 at 68-69 [Grant Annexation of Crimea].

declare total autonomy from Ukraine and move to join the Russian Federation.²⁴³ The referendum was held on 16 March 2014. The official results reported that 96.7% chose unification.²⁴⁴

Ukrainian officials denounced the events in Crimea.²⁴⁵ International observers added to the mounting condemnation.²⁴⁶ The General Assembly pronounced that the referendum had no validity.²⁴⁷ For a single day Crimea claimed sovereign status. Then, on 18 March, President Vladimir Putin informed the relevant Russian institutions that Crimean authorities sought accession into the Russian Federation.²⁴⁸ Immediately, a treaty was drafted and signed to formalize the annexation of Crimea.²⁴⁹ The United States announced that Russian actions in Crimea constituted a “brazen military incursion” and that annexation amounted to a “land grab.”²⁵⁰ Arseniy Yatsenyuk, Ukraine’s interim-Prime Minister, stated that events had moved from the political to the military stage.²⁵¹ The British held that “it is completely unacceptable for Russia to use force to change borders on the basis of a sham referendum held at the barrel of a Russian gun.”²⁵² A dominant narrative emerged.²⁵³ Crimea was assumed by Russia in violation of the prohibition on the forceful acquisition of territory.

Moscow contended that Yanukovich’s impeachment was illegal. The succeeding interim government was illegitimate.²⁵⁴ Russian officials claimed that Ukraine had come under the control of extremists

²⁴³ See, Danielle Wiener-Bronner, “What Would an Independence Vote Really Mean for Crimea?” *The Atlantic* (11 March 2014), online: <<https://www.theatlantic.com/international/archive/2014/03/cremea-independence-russia-us-ukraine/359058/>>.

²⁴⁴ There are doubts regarding both the procedure and results of the referendum. See, Grant Annexation of Crimea, *supra* note 242 at 69-70. See also, Anne Peters, “The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum” (2015) Max Planck Institute for Comparative Public and International Law, online: <<http://ssrn.com/abstract=2463536>>. Despite widely-acknowledged flaws in the referendum process, a plurality of Crimeans did appear to favour accession to the Russian Federation. See, Robin Geiß, “Russia’s Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind” (2015) 91 *Int’l L. Stud.* 425 at 427 [Geiß Russia’s Annexation of Crimea].

²⁴⁵ *Ibid.* See also, UNSC, Letter Dated 15 March 2014 from the Permanent Representative of Ukraine to the United Nations Addressed to the President of the Security Council, UN Doc. S/2014/193/ (17 March 2014); Ministry of Foreign Affairs of Ukraine, Judgement of the Constitutional Court of Ukraine on All-Crimean Referendum, 14 March 2014, online: <<http://mfa.gov.ua/en/news-feeds/foreign-offices-news/19573-rishennyakonstitucijnogo-sudu-v-ukrajini-shhodo-referendumu-v-krimu>>.

²⁴⁶ Grant Annexation of Crimea, *supra* note 242 at 70. See, e.g. European Commission for Democracy Through Law, Opinion on Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea’s 1992 Constitution is Compatible with Constitutional Principles” Doc. No. CDL-AD (2014) 002 (21 March 2014).

²⁴⁷ See, GA Res 68/262, *Territorial Integrity of Ukraine*, UN Doc. A/Res/68/262 (2014) at para. 5.

²⁴⁸ President of Russia Press Release, “The President Has Notified the Government, the State Duma and the Federation Council of Proposals by the Crimean State Council and the Sevastopol Legislative Assembly Regarding Their Admission to the RF and the Formation of New Constituent Territories” (18 March 2014), online: <<http://en.kremlin.ru/acts/news/20599>>. See also, Grant Annexation of Crimea, *supra* note 242 at 17.

²⁴⁹ *Ibid.* See also, President of Russia Press Release, Executive Order on Executing Agreement on Admission of Republic of Crimea into the Russian Federation (18 March 2014), online: <<http://en.kremlin.ru/acts/news/20600>>.

²⁵⁰ Bridget Kendall, “Ukraine Crisis: Putin Signs Russia-Crimea treaty” *BBC News* (18 March 2014), online: <<https://www.bbc.com/news/world-europe-26630062>> [Kendall Ukraine Crisis].

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ Roy Allison, “Russia and the post-2014 international legal order: revisionism and realpolitik” (2017) 93 *Int. Aff.* 519 at 525 [Allison Russia and the post-2014 Legal Order].

²⁵⁴ Russia based its argument on the Ukrainian Constitution which held impeachment proceedings to require that the President is formally charged with a crime; the charges are reviewed by the Constitutional Court; and that the Rada secures a three-fourths majority vote in favour of impeachment. See, Janis Berzņiņš, “Russia’s New Generation of Warfare in Ukraine: Implications for Latvian Defense Policy” (2014) National Defence Academy of Latvia Center for Security and

who threatened the nation's Russian population and disrupted regional stability.²⁵⁵ Kremlin officials began building an international legal argument. A series of bilateral treaties – reached between Russia and Ukraine to, *inter alia*, ensure Ukraine's territorial integrity – were dismissed.²⁵⁶ Russia argued that regime change in Kiev created a new state with which Russia had not concluded formal agreements. Russian officials characterized Crimean “reunification” as the result of two independent legal acts.²⁵⁷ First, following a legitimate referendum, Crimea lawfully separated from Ukraine. Then, annexation was realized through a bilateral treaty between Russia and Crimea.²⁵⁸ Self-determination featured prominently within the Russian narrative.²⁵⁹

Initially, Russia denied using force.²⁶⁰ Claims that Russian militants were operating in Crimea, to bolster Aksyonov and to facilitate annexation, were rejected. In the weeks preceding the referendum, President Putin insisted that “no Russian troops – apart from those already stationed at the Russian Navy base in Sebastopol – were present anywhere in Crimea.”²⁶¹ Substantiated reports that hundreds of armed soldiers in “unmarked Russian uniforms” were positioned at military sites and government buildings throughout Crimea were dismissed.²⁶² Putin insisted that these individuals were “self-organized local forces” whose uniforms could have been “purchased at any store.”²⁶³ Information

Strategic Research Policy Paper No. 2 at 2 [Berzpiš Russia's New Generation of Warfare]. See also, Howard Amos, Shaun Walker & Haroon Siddique, “Ukraine's new government is not legitimate – Dmitry Medvedev” *The Guardian* (23 February 2014), online: <<https://www.theguardian.com/world/2014/feb/24/ukraine-viktor-yanukovych-arrest-warrant>>.

²⁵⁵ Berzpiš Russia's New Generation of Warfare, *supra* note 254 at 2-3.

²⁵⁶ For example, the Budapest Memorandum induced Ukraine to surrender nuclear weapons in exchange for a commitment to its territorial integrity from Russia, the United States, and the United Kingdom. See, Budapest Memorandum on Security Assurances, UN Doc. S/1994/1399I (19 December 1994) [Budapest Memorandum]. Ukraine's territorial integrity was reaffirmed in the 1997 Treaty on Friendship, Cooperation, and Partnership Between Ukraine and Russia. See, Treaty on Friendship, Cooperation and Partnership Between Ukraine and the Russian Federation, UN Doc. A/52/174, Annex I (31 May 1997) at Article 3 [Treaty of Friendship]. Finally, the Black Sea Fleet Status of Forces Agreement permits a Russian military presence in Crimea but restricts the public presence of Russian forces while also ensuring Ukrainian sovereignty over Crimea. See, Agreement Between the Russian Federation and Ukraine on the Status and Conditions of the Russian Federation Black Sea Fleet's Stay on Ukrainian Territory (Russia-Ukraine) (28 May 1997). See also, Grant Annexation of Crimea, *supra* note 242 at 78-80; Christian Marxsen, “The Crimea Crisis: An International Law Perspective” (2014) 74 *ZaöRV* 367 at 370-371.

²⁵⁷ Grant Annexation of Crimea, *supra* note 242 at 68.

²⁵⁸ *Ibid.*

²⁵⁹ The Russia-Crimea Accession Treaty premised “reunification” on “the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations according to which all peoples have the inalienable right to freely and without external interference determine their political status and to pursue their economic, social, and cultural development, and according to which every State has the duty to respect that right.” See, A Treaty Between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea to the Russian Federation and on Forming New Constituent Entities within the Russian Federation (18 March 2014), online: <https://en.wikisource.org/wiki/Treaty_on_the_Accession_of_the_Republic_of_Crimea_to_Russia>.

²⁶⁰ Kremlin Press Conference, “Vladimir Putin Answered Journalists' Questions on the Situation in Ukraine” (4 March 2014), online: <<http://en.kremlin.ru/events/president/news/20366>> [Putin Press Conference 4 March]. See also, Peter M. Olson, “The Lawfulness of Russian Use of Force in Crimea” (2014) 53 *Mil. L. & L. War Rev.* 17 at 20 [Olson Lawfulness of Russian Force].

²⁶¹ Natalia Antelava, “The Creeping Annexation of Crimea” *The New Yorker* (4 March 2014), online: <<https://www.newyorker.com/news/news-desk/the-creeping-annexation-of-crimea>>.

²⁶² Vitaly Shevchenko, “Little green men or Russian invaders?” *BBC News* (11 March 2014), online: <<https://www.bbc.com/news/world-europe-26532154>>.

²⁶³ *Ibid.*

spread through media reports.²⁶⁴ In the lead up to the referendum, these groups – the members of whom were dubbed “little green men” – began conducting military functions.²⁶⁵ NATO and American officials insisted there was a definitive connection between Russia and the armed groups.²⁶⁶ President Putin denied accusations that Russia acted in violation of international law, claiming “Russia’s Armed Forces never entered Crimea.”²⁶⁷

Putin’s claim proved false.²⁶⁸ The discourse shifted from questioning whether Russia maintained a presence in Crimea to interrogating the legality of that presence.²⁶⁹ In response to mounting accusations of wrongfulness, Russia offered a series of international legal arguments concerning the use of force. Broadly, Russia asserted that: (1) the interim Ukrainian government was illegitimate. Russian forces only entered Crimea upon invitation by President Yanukovich and the local Crimean authorities.²⁷⁰ (2) Intervention was justified in response to a mounting humanitarian crisis and to ensure the human rights of Ukraine’s Russian minority.²⁷¹ And, (3) the enduring political chaos posed a threat to Russia’s Black Sea Fleet and to Russian forces stationed in Sevastopol.²⁷²

Roy Allison contends that Russia’s legal appeals facilitated a “deniable intervention.”²⁷³ By appealing to international law, Allison notes that Russia blurred “the legal and illegal, to create justificatory smokescreens, in part by exploiting some areas of uncertainty in international law, while making “unfounded assertions of facts.”²⁷⁴ The contours of Russia’s legal appeals are now well-known. They have been dismissed and deconstructed by an array of international lawyers.²⁷⁵ Samantha Power, the US Ambassador to the UN quipped that Moscow “had just become the rapid response arm of the

²⁶⁴ See, e.g., Neil Buckley, et al., “Ukraine’s ‘little green men’ carefully mask their identity” *The Financial Times* (14 April 2014), online: <<https://www.ft.com/content/05e1d8ca-c57a-11e3-a7d4-00144feabdc0>>.

²⁶⁵ Veronika Bílková, “The Use of Force by the Russian Federation in Crimea” (2015) 75 *ZaöRV* 27 at 34-35 [Bílková *The Use of Force by the Russian Federation*].

²⁶⁶ See, Arron Merat & Hayley Dixon, “Ukraine Crisis as it happened: US puts military cooperation with Russia on hold” *The Telegraph* (4 March 2014), online: <<https://www.telegraph.co.uk/news/worldnews/europe/ukraine/10672417/Ukraine-crisis-as-it-happened-US-puts-military-cooperation-with-Russia-on-hold.html>>. See also, “NATO Commander: We need to Be Ready for Little Green Men” *VOA News* (17 August 2014), online: <<https://www.voanews.com/a/nato-commander-says-alliance-needs-to-be-ready-for-new-type-of-warfare/2416614.html>>.

²⁶⁷ Address by President of the Russian Federation (18 March 2014), online: <<http://en.kremlin.ru/events/president/news/20603>> [Address 18 March].

²⁶⁸ Shaun Walker, “Putin admits Russian military presence in Ukraine for first time” *The Guardian* (17 December 2015), online: <<https://www.theguardian.com/world/2015/dec/17/vladimir-putin-admits-russian-military-presence-ukraine>>. See also, Bílková *The Use of Force by the Russian Federation*, *supra* note 265 at 34.

²⁶⁹ Lauri Mälksoo, *Russian Approaches to International Law* (Oxford: Oxford University Press, 2015) at 191 [Mälksoo *Russian Approaches*].

²⁷⁰ Olson *Lawfulness of Russian Force*, *supra* note 260 at 18, 30-33. See also, UNSCOR, 69th Year, 7125th Mtg, UN Doc. S/PV/7125 (2014) at 3-4 [UNSC 7125th Meeting]; Putin Press Conference 4 March, *supra* note 260. Roy Allison, “Russian ‘deniable’ intervention in Ukraine: how and why Russia broke the rules” (2014) 90 *Int. Aff.* 1255 at 1264 [Allison *Deniable Intervention*].

²⁷¹ *Ibid.*, at 1262. See also, UNSC 7125th Meeting, *supra* note 270 at 3. Olson *Lawfulness of Russian Force*, *supra* note 260 at 34-35.

²⁷² See, Putin Press Conference 4 March, *supra* note 260; Presidential Address, “Vladimir Putin submitted appeal to the Federation Council” (1 March 2014), online: <<http://en.kremlin.ru/events/president/news/20353>>. See also, Olson *Lawfulness of Russian Force*, *supra* note 260 at 33-34; Allison *Deniable Intervention*, *supra* note 270 at 1263.

²⁷³ *Ibid.*, at 1259.

²⁷⁴ *Ibid.*

²⁷⁵ See, e.g., Thomas D. Grant, *Aggression Against Ukraine: Territory, Responsibility, and International Law* (New York: Palgrave MacMillan, 2015) [Grant *Aggression Against Ukraine*]. See also, Olson, *Lawfulness of Russian Force*, *supra* note 260; Allison *Deniable Intervention*, *supra* note 270; Allison *Russia and the post-2014 Legal Order*, *supra* note 253.

Office of the High Commissioner for Human Rights” and that the legal assertions presented by the Russian Federation “are without basis in reality.”²⁷⁶ The British Ambassador told the Security Council that Russian claims were “fabricated to justify Russian military action.”²⁷⁷ Also, however, the series of legal arguments presented by Russia illuminate how legal discourse moves beyond assessments of validity. These arguments illustrate how a non-compliant state employs international law to supplement a lie as it works to persuade audiences about the acceptableness of a military action.

1. The Identification of a Common Lifeworld

Russia formulated a shared and relatable context in the weeks preceding the formal annexation of Crimea. A lifeworld was identified. This was grounded in a historical narrative. Russian officials drew upon the notion of national identity as they accentuated Russia’s deep connection to Crimea. In a widely broadcast speech, President Putin announced that “in people’s hearts and minds, Crimea has always been an inseparable part of Russia.”²⁷⁸ Putin presented a historical account. Following the Bolshevik Revolution, large parts of Russia’s south were added to Ukraine. This occurred, Putin claimed, without “consideration for the ethnic make-up of the population.”²⁷⁹ In 1954, Nikita Khrushchev transferred Crimea and Sevastopol to Ukraine. The Communist Party, Putin continued, violated constitutional norms. Naturally, “in a totalitarian state nobody bothered to ask the citizens of Crimea and Sevastopol.”²⁸⁰

Following annexation, the Russian Ambassador to the UN furthered this narrative. Events in Crimea were said to have “restored historical justice.”²⁸¹ Vitaly Churkin told the General Assembly, “historical justice has triumphed. For ages Crimea has been an integral part of our country, we share history, culture, and the main thing, people. And only the voluntaristic decisions by the USSR leaders in 1954, which transferred Crimea and Sevastopol to the Ukrainian Republic, although within one state, has distorted this natural state of affairs.”²⁸²

The historical connection between Russia and Crimea, the conveyed sense of national identity, established a foundation upon which a lifeworld would further be described. Allison explains that this coupled a domestically-targeted, ethno-territorial evocation of the past with a statement of strategic intent.²⁸³ Restoration of a historical injustice was presented as both a security necessity and an expression of self-determination. Sevastopol was described as “a fortress that serves as the birthplace of Russia’s Black Sea Fleet.”²⁸⁴ Crimea was presented as a symbol of military glory and strategic

²⁷⁶ UNSC 7125th Meeting, *supra* note 270 at 4. See also, Nick O’Malley, “War of words at UN over Russia’s Crimea move” *The Sydney Morning Herald* (4 March 2014), online: <<https://www.smh.com.au/world/war-of-words-at-un-over-russias-crimea-move-20140304-hvg0c.html>>.

²⁷⁷ UNSC 7125th Meeting, *supra* note 270 at 7. See also, Allison Deniable Intervention, *supra* note 270 at 1262.

²⁷⁸ Address 18 March, *supra* note 267. See also, Geiß Russia’s Annexation of Crimea, *supra* note 244 at 438.

²⁷⁹ Address 18 March, *supra* note 267.

²⁸⁰ *Ibid.*

²⁸¹ See, Erika Leonaitė & Dainius Žalimas, “The Annexation of Crimea and Attempts to Justify It in the Context of International Law” (2015-2016) 14 *Lithuanian Annual Strategic Review* 11 at 49 [Leonaitė & Žalimas *The Annexation of Crimea*].

²⁸² UNGAOR, 68th Sess, 80th Mtg, UN Doc A/68/PV.80 at 3 [UNGA 80th Meeting].

²⁸³ This recalled the lost territories of “Novorossiia” which, in the 1920s were transferred from the Soviet Government to the Ukrainian Social Soviet Republic See, Allison Deniable Intervention, *supra* note 270 at 1266, 1282.

²⁸⁴ Address 18 March, *supra* note 267.

necessity.²⁸⁵ Russia possessed a historical duty, Ambassador Churkin told the Security Council, to guarantee regional stability and protect the ethnic population in the “near abroad.”²⁸⁶

Russia insisted that it was compelled to intervene. Appeals to the lifeworld told of universal values. Within, liberal norms were displaced by fascist tendencies and Ukraine descended into anarchy. President Putin framed events as a violent *coup d'état*. Those who perpetrated the events in Kiev, Putin declared, “were preparing yet another government takeover; they wanted to seize power and would stop short of nothing. They resorted to terror, murder and riots. Nationalists, neo-Nazis, Russophobes and anti-Semites executed this coup.”²⁸⁷ Russian officials documented alleged human rights violations and disseminated reports depicting post-revolution Ukraine as lawless.²⁸⁸ This facilitated subsequent legal assertions that evoked the sentiment of the responsibility to protect, claimed that intervention followed invitation, and asserted the right of states to protect nationals abroad.²⁸⁹ Invocations of a lifeworld – exhibiting an illiberal decline, marked by escalating violence and the persecution of a vulnerable ethnic group – contextualized Russia’s substantive legal arguments.

Russia professed that intervention was required to realize legitimate legal aims, to provide protection, and to ensure preservation of the threatened liberal norms. Legal arguments favouring self-determination were compromised by an anarchic society. Russian insistence that annexation was a legitimate expression “of the people of Crimea” was built upon the identified lifeworld. Russia held that:

“Following the unlawful and violent coup in Ukraine the possibility to exercise the right to self-determination within the Ukrainian state was eliminated. There was a spate of killings, mass violence, abductions, attacks on journalists and human rights activists, politically motivated imprisonments, egregious incidents with racist motives (including anti-Russian and anti-Semite), committed upon instructions or with the tacit approval of the Kyiv authorities. Moreover, a group of people supposedly controlled by the illegal authorities of Kyiv attempted to overthrow the legal government of Crimea. The authorities in Kyiv do not represent the Ukrainian people as a whole, especially the population of Crimea; they do not exercise effective control over the territory and do not maintain law and order.”²⁹⁰

²⁸⁵ *Ibid.*

²⁸⁶ See, Christopher J. Borgen, “Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea” (2015) 91 Int’l L. Stud. 216 at 274 [Borgen Law Rhetoric and Strategy].

²⁸⁷ Address 18 March, *supra* note 267.

²⁸⁸ See, The Ministry of Foreign Affairs of the Russian Federation, White Book on violations of human rights and the rule of law in Ukraine (9 October 2014), online: <http://www.mid.ru/en/diverse/-/asset_publisher/8bWtTfQKqtaS/content/id/698433> [White Book on violations of human rights].

²⁸⁹ See, UNSCOR, 69th Year, 7124th Meeting, UN Doc. S/PV/7124 (2014) at 5.

²⁹⁰ The Russian legal justification then pivoted to the issue of succession and self-determination, noting: “Under these circumstances on 17 March 2014, the Verkhovna Rada of the Republic of Crimea, guided by the results of the referendum held on 16 March, decided to proclaim the independence of Crimea (the Republic of Crimea). On 18 March the Republic concluded a treaty with Russia and was included in its territory.” See, Legal Justification of the position of the Russian Federation in respect of Ukraine and Crimea (27 October 2014), online: <<http://www.rusembdprk.ru/ru/press-relizy/155-pravovoye-obosnovaniya-pozitsii-rossii-po-krymu-i-ukraine>> [Russian]. Also cited in, Oleksandr Zadorozhnyi, “To Justify Against All Odds: The Annexation of Crimea in 2014 and the Russian Legal Scholarship” (2015) Polish Y.B. of Int’l L. 139 at 157 [Zadorozhnyi Justify Against All Odds].

When Yanukovich was deposed and Crimea voted to secede, Russia faced mounting condemnation. This told of foreign interference, unlawful annexation, and the use of force in contradiction of the most fundamental international norms.²⁹¹ In response, Russia developed a legal narrative. Substantive legal engagements were premised upon the identified lifeworld. This exhibited shared ideals and relatable fears. Persuasive endeavours and the subsequent development of contrarian legal arguments were built upon this context and would facilitate Russian insistence that its actions were reflective of a general commitment to international law.

2. Establishing the State as a General Norm-Acceptor

Expressions of legal fidelity featured throughout the Russian discourse that accompanied events in Crimea. Russian actions – the deployment of armed forces to facilitate annexation – were presented as both consistent with and in furtherance of international law. Prior to acknowledging that Russian forces were operating in Crimea, President Putin offered pre-emptive legal arguments. These insisted that Russian involvement in Crimea would either constitute a “humanitarian intervention” or an “intervention by invitation.”²⁹² In forwarding these arguments, Russian officials accentuated their *general* commitment to international law. President Putin declared:

“We proceed from the conviction that we always act legitimately. I have personally always been an advocate of acting in compliance with international law. I would like to stress yet again that if we do make the decision, if I do decide to use the Armed Forces, this will be a legitimate decision in full compliance with both general norms of international law, since we have the appeal of the legitimate President, and with our commitments...”²⁹³

Substantive legal arguments were coupled with general expressions of international legal alacrity. Attempts by Russian officials, to persuade varied audiences, drew upon international law’s rhetorical centrality in the foreign policies and strategy documents of the post-Soviet era.²⁹⁴ Since the mid-1980s, international law was afforded a prominent position in the reformist discourse that marked *perestroika*.²⁹⁵ Under the banner *more international law*, Mikhail Gorbachev recognized that expressions of legal devotion facilitated the transition from autocracy.²⁹⁶ The pivot toward international law was reflected in the Constitution of the Russian Federation. Article 15 dictates that “the universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system.”²⁹⁷

²⁹¹ See generally, UNGA 80th Meeting, *supra* note 282.

²⁹² Oleksandr Merezhko, “Crimea’s Annexation in the Light of International Law: A Critique of Russia’s Legal Argumentation (2016) 2 Kyiv-Mohyla Law and Pol. J. 37 at 76 [Merezhko Crimea’s Annexation].

²⁹³ Putin Press Conference 4 March, *supra* note 260.

²⁹⁴ Mälksoo Russian Approaches, *supra* note 269 at 1, 150. See also, The Ministry of Foreign Affairs of the Russian Federation, “The Concept of the Foreign Policy of the Russian Federation” (18 February 2013), online: <http://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptICk6BZ29/content/id/122186>; Edict of the Russian Federation President, “Russian National Security Strategy” (2015), online: <http://www.ieee.es/Galerias/fichero/Otras_Publicaciones/Internacional/2016/Russian-National-Security-Strategy-31Dec2015.pdf>.

²⁹⁵ Mälksoo Russian Approaches, *supra* note 269 at 154. See generally, John Quigley, “Perestroika and International Law” (1988) 82 Am. J. Int’l. L. 788.

²⁹⁶ Mälksoo Russian Approaches, *supra* note 269 at 154.

²⁹⁷ The Constitution of the Russian Federation (Adopted on 12 December 1993) at Article 15(4).

The centrality of Russia's formal commitment to international law was offered in defense of Russian actions in Crimea. These purported efforts – intervention by invitation, for humanitarian purposes, or to facilitate self-determination – were not merely consistent with legal dictate.²⁹⁸ They were in defence of legal norms, disregarded by Ukrainian actors and their western enablers. Speaking in Sochi, President Putin announced that the international system had become “seriously weakened, fragmented and deformed.”²⁹⁹ International relations, Putin continued, “must be based on international law, which itself should rest on moral principles such as justice, equality and truth.”³⁰⁰ Russia recalled its enduring commitment to law to impress that contemporary actions aligned with traditional commitments. This, Putin suggested, positioned Russia to become a world leader in “asserting the norms of international law.”³⁰¹

A general milieu – of legal reverence – preceded Russian claims that its actions in Crimea were not an unlawful use of force. On 3 March, Russia convened a meeting of the Security Council. Ambassador Churkin announced that President Yanukovich had formally requested Russia to “use the armed forces of the Russian Federation to establish legitimacy, peace, law and order and stability in defence of the people of Ukraine.”³⁰² Explicitly rejecting allegations of aggression, Churkin told the Security Council that the events in Ukraine must be redressed “in accordance with international obligations, including most importantly those related to international humanitarian law, in defence of human rights and the rights of national minorities.”³⁰³

On the eve of the referendum, Ukraine's interim-Prime Minister travelled to New York. Yatsenyuk told the Security Council that Russian actions violated Article 2(4) of the UN Charter and asked the Russian Federation whether it sought war.³⁰⁴ Churkin replied that Russia did not view events in Ukraine as an armed conflict but as a means of ensuring “the fundamental norms of international law.”³⁰⁵ Russia endorsed the scheduled referendum as an expression of equal rights. This, the Russian Ambassador insisted, was an extraordinary measure that was reflective of Russia's general commitment to territorial integrity and the requirements of self-determination.³⁰⁶

3. Demonstrating the Authority to Interpret

The Russian narrative advanced controversial legal claims. Arguments that intervention followed invitation, was motivated by humanitarianism, or that succession constituted a legitimate expression of self-determination were factually contentious and relied upon uncertain legal assumptions. Russian officials paired contrarian legal interpretations with expressions or displays of competence. The role of legal experts was accentuated. Appeals to expertise are emblematic of the persuasive process. They provide a means for the state to demonstrate interpretative authority.

²⁹⁸ Allison Deniable Intervention, *supra* note 270 at 1258.

²⁹⁹ Presidential Address, Meeting of the Valdai International Discussion Club (24 October 2014), online: <<http://en.kremlin.ru/events/president/news/46860>>.

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² UNSC 7125th Meeting, *supra* note 270 at 3-4.

³⁰³ *Ibid.*, at 3.

³⁰⁴ UNSCOR, 69th Year, 7134th Mtg. UN Doc. S/PV/7134 at 3-4.

³⁰⁵ *Ibid.*, at 14.

³⁰⁶ UNSCOR, 69th Year, 7138th Mtg. UN Doc. S/PV/7138 at 2.

When Russian officials began building legal arguments justifying intervention, observers recalled the series of agreements that Russia and Ukraine concluded during the 1990s.³⁰⁷ A Russian incursion would breach the resulting territorial assurances.³⁰⁸ Facing such questions, President Putin supplemented an inventive legal argument with an appeal to expertise. Asked whether Russian military involvement would violate the Budapest Memorandum, Putin responded:

“In such a case it is hard not to agree with some of our experts who say that a new state is now emerging on this territory. This is just like what happened when the Russian Empire collapsed after the 1917 revolution and a new state emerged. And this would be a new state with which we have signed no binding agreements.”³⁰⁹

Putin’s rejoinder drew upon Soviet-era legal scholarship. Leading international lawyers, from the USSR, had developed a counterintuitive argument regarding revolution’s influence on statehood.³¹⁰ Putin recalled how legal experts coalesced around the notion that the Bolshevik revolution heralded “a new subject of international law.”³¹¹ The absence of continuity, severed by revolutionary transformation, implied that the emergent state was not subject to agreements formed under the former (deposed) government.

Russia often invokes the expertise of its international lawyers. Foreign policy decisions are supported through consensus legal pronouncements. These commonly adhere to the state’s position.³¹² This process of reliance and adherence was exemplified during Russia’s opposition to the US led invasion of Iraq. A symposium, convened at St. Petersburg State University, featured a meeting between President Putin, President Chirac of France, and German Chancellor Schröder. The heads of state met with leading members of the Russian legal academy. Putin told the gathering: “Now as never before it is important to rely on the opinion of the expert community – lawyers, political scientists, specialists in different fields of international relations... We, of course, will impatiently wait for the results of your works, fresh ideas, suggestions.”³¹³

As events in Crimea transpired, a series of professional documents were offered to support Russia’s legal arguments. Purportedly independent, these supplementary avowals sought to accentuate the speaker’s interpretative authority and, by association, the endorsed argument’s validity. The Russian Association of International Law circulated a detailed letter.³¹⁴ This was addressed to the worldwide community of international lawyers and signed by Anatoly Kapustin, perhaps Russia’s foremost international legal expert.³¹⁵ The letter refuted allegations that Russian actions in Crimea breached

³⁰⁷ Merezhko Crimea’s Annexation, *supra* note 292 at 68-69.

³⁰⁸ See, Budapest Memorandum, *supra* note 256 at paragraph 1. See also, Treaty of Friendship, *supra* note 256 at Article 3.

³⁰⁹ Putin Press Conference 4 March, *supra* note 260. See also, Merezhko Crimea’s Annexation, *supra* note 292 at 63.

³¹⁰ Merezhko Crimea’s Annexation, *supra* note 292 at 69.

³¹¹ Soviet lawyers had claimed that the absence of continuity between the Russian Empire and Soviet Russia meant that the emergent Soviet Government was not responsible for the debts assumed by the Empire. See, *Ibid.*

³¹² See, Anthea Roberts, “Crimea and the South China Sea: Connections and Disconnects among Chinese, Russian, and Western International Lawyers” in Anthea Roberts, et al., eds, *Comparative International Law* (Oxford: Oxford University Press, 2018) 111 at 128 [Roberts Crimea and the South China Sea]. See also, Maria Issaeva, “The Case of Crimea in the Light of International Law: Its Nature and Implications” (2015) 3 Russ. L.J. 158.

³¹³ Mälksoo Russian Approaches, *supra* note 269 at 83-84.

³¹⁴ Circular Letter from the Russian Association of International Law to the Executive Council of the International Law Association (June 2014), online: <<http://www.ilarb.ru/html/news/2014/5062014.pdf>> [Russian Association Letter].

³¹⁵ Leonaitė & Žalimas The Annexation of Crimea, *supra* note 281 at 37-38.

international law. It sought to clarify “the basic facts, history and legal foundations” of the Russian incursion.³¹⁶ It offered an account that closely aligned with official state discourse.³¹⁷ In turn, this would be cited in support of Russia’s varied legal positions.³¹⁸ Elsewhere, Russian officials relied upon the “White Book on violations of human rights and the rule of law in Ukraine.”³¹⁹ This was published by the Ministry of Foreign Affairs and, at least outwardly, shared stylistic similarities with the US State Department’s Country Reports on Human Rights Practices. Published in English, these Russian documents sought to establish, endorse, and persuade. They advanced particular legal arguments while associating authoritativeness and professional competence with what were widely-received as contentious interpretative appeals.

4. Instilling the Standard of the Acceptable Legal Argument

Russia’s actions in Ukraine were certain to evoke a legal response. When Russian military forces became active in Crimea, when annexation was formalized, officials in Moscow were accused of violating a foundational tenet of the international legal order. The pervasive assumption that Russia employed force to acquire territory fuelled condemnation.³²⁰ In reply, the legal narrative that Russia presented was unlikely to sway a plurality of non-Russian international lawyers. It would not dislodge the consensus western belief that Russia had acted unlawfully.³²¹ However, as Christian Marxsen acknowledged, “since Russia is powerful enough to pursue its interests anyway, it does not need an ultimately convincing legal justification. A justification that is at least not totally absurd, but somehow arguable, is already good enough for making a case in the international political sphere.”³²²

Russia’s legal contentions – while straining credibility – targeted diverse (often non-legal) audiences.³²³ Inherent in Russian claims were efforts to impose or expand evaluative legal standards. Broad understandings of the use of force and aggression were advanced thus lessening the persuasive burden. These assertions moved beyond existing doctrine and forwarded permissive standards that lent to favourable legal assessments. Article 3(a) of the Definition of Aggression instructs that the unlawful act includes “the invasion or attack by the armed forces of a State of the territory of another State, or any military operation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.”³²⁴ Russia equated the use of force with active belligerency.³²⁵ The fact that Russia’s involvement in Crimea did not result in an exchange

³¹⁶ Russian Association Letter, *supra* note 314 at 6.

³¹⁷ This largely focused on the threat to the ethnically-Russian population in the Eastern and Southern regions of Ukraine, the grounds justifying humanitarian intervention, and the case for self-determination. See, *Ibid*.

³¹⁸ See, Borgen Law, Rhetoric and Strategy, *supra* note 286 at 239.

³¹⁹ White Book on violations of human rights, *supra* note 288. See also, Zadorozhnii Justify Against All Odds, *supra* note 290 at 141-142.

³²⁰ Kendall Ukraine Crisis, *supra* note 250.

³²¹ See, Roberts Crimea and the South China Sea, *supra* note 312 at 111.

³²² Christian Marxsen, “Crimea’s Declaration of Independence” (18 March 2014) (blog), online: EJIL Talk! <https://www.ejiltalk.org/crimeas-declaration-of-independence/>.

³²³ Borgen Law, Rhetoric and Strategy, *supra* note 286 at 236, 271-272.

³²⁴ Acts of aggression are further held to include “the blockade of the ports or coasts of a State by the armed force of another State” and the use of armed forces “of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement.” See, *Definition of Aggression*, GA Res 3314 (XXIX), UN Doc. A/Res/3314 (1974) at Article 3(a)(c)(e). See also, Leonaitė & Žalimas The Annexation of Crimea, *supra* note 281 at 16.

³²⁵ The concept of the indirect use of force is generally applied to situations in which the offending actor exhibits technical or organizational involvement in an armed conflict. This form of involvement may entail the provision of weapons or

of hostilities was presented as lessening legal responsibility. This implied that an act of aggression was contingent upon “a significant military confrontation or the actual use of arms.”³²⁶ President Putin dismissed the charge of aggression based upon this lessened standard of compliance. Putin noted: “they keep talking of some Russian intervention in Crimea, some sort of aggression. This is strange to hear. I cannot recall a single case in history of an intervention without a single shot being fired and with no human casualties.”³²⁷

5. Drawing Upon Precedent and Commonality

Russia invoked the Kosovo precedent. Legal contentions – that framed events in Crimea as an expression of self-determination and a lawful example of state succession – recalled western support for the Kosovo Assembly’s 2008 Declaration of Independence. They referenced the ICJ’s resulting Advisory Opinion that held the Declaration did not violate international law.³²⁸ Russia accentuated the legal and factual similarities between events in Crimea and the reaction and legal reasoning offered by various states and institutions in response to earlier occurrences in the Balkans. The Supreme Council of Crimea invoked the Kosovo precedent in its Declaration of Independence. The document premised succession on “the confirmation of the status of Kosovo by the [ICJ] ...which says that [a] unilateral declaration of independence by part of the country doesn’t violate any international norms.”³²⁹

President Putin made extensive use of the Kosovo precedent.³³⁰ In presenting the case that Crimean succession was an expression of self-determination that accorded with democratic procedures, Putin stated:

“the Crimean authorities referred to the well-known Kosovo precedent – a precedent that our western colleagues created with their own hands in a very similar situation, when they agreed that the unilateral separation of Kosovo from Serbia, exactly what Crimea is doing now, was legitimate and did not require any permission from the country’s central authorities. Pursuant to Article 2, Chapter 1 of the United Nations Charter, the UN International Court agreed with this approach and made the following comment in its ruling of July 22, 2010, and I quote: ‘No general prohibition may be inferred from the practice of the Security Council with regard to declarations of independence’.”³³¹

irregular forces. See, Sergey Sayapin, *The Crime of Aggression in International Criminal Law* (The Hague: Asser Press, 2014) 83-84. See also, Leonaitė & Žalimas *The Annexation of Crimea*, *supra* note 281 at 15.

³²⁶ *Ibid*, at 17.

³²⁷ Address 18 March, *supra* note 267.

³²⁸ As of 2017, 110 members of the UN have extended diplomatic recognition to Kosovo. See, Jieun Choi, “The cost of not being recognized as a country: The case of Kosovo” *Brookings* (16 November 2017), online: <<https://www.brookings.edu/blog/future-development/2017/11/16/the-costs-of-not-being-recognized-as-a-country-the-case-of-kosovo/>>. See also, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep 403 [Kosovo Opinion].

³²⁹ See, Supreme Council of Crimea, Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol (11 March 2014), online: <<http://www.voltairenet.org/article182723.html>>.

³³⁰ Merezhko *Crimea’s Annexation*, *supra* note 292 at 58.

³³¹ Address 18 March, *supra* note 267.

Russia directly cited the US written submission to the ICJ which asserted that “declarations of independence may, and often do, violate domestic legislation. However, this does not make them violations of international law.”³³²

When Russia was accused of using force to unlawfully acquire territory, officials pivoted to the Kosovo precedent. Sergey Lavrov, Russia’s Foreign Minister, stated that when western nations reproach Russia “we tell them that in Kosovo their policy was quite different.”³³³ Historical examples and instances of state behaviour were presented as analogous with or justifying Crimea’s accession to the Russian Federation. Putin likened the process of Crimean “reunification” to amalgamation of the Democratic and Federal German Republics.³³⁴ When the Russian narrative forwarded humanitarian justifications, officials linked Russia’s actions in Crimea with what they purported to be parallel state behaviour.³³⁵ Since its conflict with Georgia in South Ossetia and Abkhazia, Russia claimed it was the victim of a legal double standard: “we can’t understand why those who are talking about the responsibility to protect and about security of the person at every turn, forgot it when it came to the part of the former Soviet space where the authorities began to kill innocent people, appealing to sovereignty and territorial integrity.”³³⁶

Officials consciously “mimicked” the justificatory language that western states employed in defence of the NATO-led interventions in Kosovo and Libya.³³⁷ Moscow reasoned that a “looming humanitarian catastrophe” would cause 675,000 Russian-speakers to flee from Ukraine and into Russia.³³⁸ Roy Allison explains that since the Georgian war, Russia has made strategic use of legal arguments by “selectively mimicking western humanitarian discourses.”³³⁹ By drawing upon the Kosovo precedent, by phrasing legal contentions in a humanitarian vernacular and through the language of human rights, Russia insisted that it too was entitled to act in Crimea as the west had elsewhere.³⁴⁰

6. Conclusion

The discursive process began with a Russian lie. Soon, however, the affirmation that Russian forces were not active in Crimea was altered. Intricate legal justifications replaced factual dismissals. These arguments constructed an environment, often unsubstantiated, in which chaos had replaced order.

³³² *Ibid.* See also, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Written Statement of the United States of America [2009] at 51, online: <<https://www.icj-cij.org/files/case-related/141/15640.pdf>>.

³³³ “Sergey Lavrov: Throwing Russia off balance is ultimate aim” *TASS: Russian News Agency* (11 September 2014), online: <<http://tass.com/russia/748935>>. See also, Borgen Law, Rhetoric and Strategy, *supra* note 286 at 247-248.

³³⁴ Putin recalled Russia’s unequivocal support for the “sincere, unstoppable desire of the Germans for national unity.” See, Address 18 March, *supra* note 267. See also, Geiß Russia’s Annexation of Crimea, *supra* note 244 at 430.

³³⁵ Vasile Rotaru & Miruna Troncotă, “Continuity and change in instrumentalizing ‘The Precedent’: How Russia uses Kosovo to legitimize the annexation of Crimea” (2017) 17 *Southeast Eur. & Black Sea Stud.* 325 at 329 [Rotaru & Troncotă Continuity and Change].

³³⁶ The Ministry of Foreign Affairs of the Russian Federation, “Russian foreign minister assess new geopolitical situation” (30 December 2008), online: <<http://r2plive.org/russian-foreign-minister-assesses-new-geopolitical-situation/>>. See also, Borgen Law, Rhetoric and Strategy, *supra* note 286 at 246.

³³⁷ Allison Deniable Intervention, *supra* note 270 at 1264.

³³⁸ *Ibid.* See also, Ben Hoyle, “Exodus begins for the families fearing the future under Russian yoke” *The Times of London* (17 March 2014), online: <<https://www.thetimes.co.uk/article/exodus-begins-for-the-families-fearing-future-under-russian-yoke-8fctzr5wxz3>>.

³³⁹ Allison Russia and the post-2014 Legal Order, *supra* note 253 at 534.

³⁴⁰ Rotaru & Troncotă Continuity and Change, *supra* note 335 at 329.

They accentuated Russia's general commitment to international law and justified intervention as a manifestation of that commitment. Legal arguments were doctrinally weak. Beyond Russia's legal community, they carried little sway. Understood singularly, Russia's legal contentions were ineffective. Falsehoods were exposed.³⁴¹ International lawyers quickly deconstructed Russia's substantive assertions.³⁴² Various European institutions insisted that Moscow's formulations lacked legal validity.³⁴³ Russia's reasoning was rejected by numerous states as little more than efforts to sanitize a land grab.³⁴⁴

A majority of states held that Russia's territorial acquisition was unlawful and denied legal recognition.³⁴⁵ It is, however, unlikely that Moscow sought or assumed acceptance from such states. Persuasion's effectiveness is contingent upon whether the intended audience is moved or the desired objective is achieved. Innumerable legal and non-legal factors influence determinations of how the non-compliant state's persuasive appeals are received. Thomas Grant demonstrates that the responses of states facing secessionist movements are guided by local experiences.³⁴⁶ Nigeria, which had settled a boundary dispute with Biafra through adjudication, endorsed a similar process to address the Crimean crisis.³⁴⁷ The Indonesian experiences with Aceh and Western New Guinea influenced its strong affirmation of Ukraine's territorial integrity.³⁴⁸ Argentina, whose claim to the Falkland Islands risked being undermined if a nexus was established between self-determination and referendum, described the Crimean process as "worthless."³⁴⁹

Russia did, however, achieve identifiable objectives. Beyond the particularities of Russia's varied legal contentions, Roy Allison explains that Moscow sought to position itself at the forefront of states that sought differentiation from the western liberal order.³⁵⁰ Designed to increase global influence and regional control, Russian officials followed events in Crimea by proposing an international conference to reformulate international law since "there are no agreed rules and the world may become an

³⁴¹ Andrew Higgins, Michael R. Gordon & Andrew E. Kramer, "Photos Link Masked Men to East Ukraine to Russia" *New York Times* (20 April 2014), online: < https://www.nytimes.com/2014/04/21/world/europe/photos-link-masked-men-in-east-ukraine-to-russia.html?hp&_r=0>.

³⁴² See generally, Grant *Aggression Against Ukraine*, *supra* note 275. See also, Borgen Law, Rhetoric and Strategy, *supra* note 286.

³⁴³ See, Council of Europe, Committee of Ministers, "Situation in Ukraine", 1195th mtg. (19-20 March 2014). See also, Council of Europe Parliamentary Assembly, Resolution 1988 (9 April 2014); Council of Europe Parliamentary Assembly, Resolution 1990 (10 April 2014); European Council, Statement of the Heads of State or Government on Ukraine 6 March 2014).

³⁴⁴ "Ukraine: UK Condemns Russian 'land grab' of Crimea" *BBC News* (18 March 2014), online: < <https://www.bbc.co.uk/news/uk-politics-26632857>>. See also, "Biden: Russia Violated International Law With Crimea Annexation" *NBC News* (18 March 2014), online: < <https://www.nbcnews.com/storyline/ukraine-crisis/biden-russia-violated-international-law-crimea-annexation-n55511>>.

³⁴⁵ Grant *Aggression Against Ukraine*, *supra* note 275 at 64. See also, See statements by the United Kingdom and France, UNSCOR, 69th Year, 7244th Mtg, UN Doc. S/PV.7144 (2014) at 14-16, 20. See also the statement by the European Union, UNGA, 68th Sess, 80th Plen Mtg, UN Doc. A/68/PV.80 (2014) at 4-5; and by the United States, UNSCOR, 69th Year, 7144t Mtg, UN Doc S/PV.7144 (2014) at 10.

³⁴⁶ Grant *Aggression Against Ukraine*, *supra* note 275 at 67-68.

³⁴⁷ See, UNGA, 68th Sess, 80th Plen Mtg, UN Doc. A/68/PV.80 (2014) at 18-19.

³⁴⁸ Grant *Aggression Against Ukraine*, *supra* note 275 at 67.

³⁴⁹ *Ibid*, at 68. See also, "Crimea vote as worthless as Falklands poll – Argentina president" *Reuters* (19 March 2014), online: <https://www.reuters.com/article/ukraine-crisis-falklands/crimea-vote-as-worthless-as-falklands-poll-argentina-president-idUSL6N0MG3ZW20140319>

³⁵⁰ Allison *Deniable Intervention*, *supra* note 270 at 1267.

increasingly unruly place.”³⁵¹ Such developments are unlikely. But events in Crimea did allow Russian officials to herald the end of US hegemony and tell regional partners and strategic allies that the Russian Federation was pursuing a new world order that better reflected the interests of emergent powers.³⁵²

Many of Russia’s legal contentions appear designed to appease China.³⁵³ Legal arguments, references to process, and the historical connection between Russia and Crimea sought to pacify Beijing’s unease with “territorial revisionism.”³⁵⁴ China was deferential. It, alongside several strategically significant states including India, Brazil, and South Africa, abstained from the General Assembly Resolution that affirmed “commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine.”³⁵⁵ Only 52% of UN membership favoured the resolution. This prompted Vitaly Churkin to declare a “moral and political victory.”³⁵⁶

Russian actions in Ukraine received domestic support. Arguments that pulled upon national identity and historical bonds increased popular sentiment. Contentions that Russia’s claim to Crimea would ensure the safety and rights of a related ethnic group generated legitimacy in Russia, Crimea, and amongst the Russian-speaking population in Eastern Ukraine.³⁵⁷ These elements of Russia’s legal reasoning appealed to populist sentiments. They provided political consolidation as President Putin’s approval rating reached its zenith.³⁵⁸ Within the near abroad, Russia’s desire to extend its sphere of influence was reflected through its legal contentions. Appeals to humanitarian motives, democratic process, and western hypocrisy targeted Russian speaking populations in the former Soviet states. Russian efforts to position itself as a regional guardian, to ensure stability, and to protect vulnerable groups may appeal to various demographics within the near abroad. It, however, received a mixed reception from regional actors.³⁵⁹

The effectiveness of persuasion is most often intangible. Russia’s principle contention – that Western-led interventions in Kosovo and Iraq – have altered the international legal order was sympathetically received by select states. However, the collective efficacy of these efforts can not be understood episodically. As Roy Allison notes, while Russia will be unable to shift broad support for the prohibition on the use of force, it will attempt to persuade strategic allies and challenge the “right of the United States and other western powers to act as the privileged custodians and interpreters of core principles of international order.”³⁶⁰ The effectiveness of Russia’s legal engagements is inseparable from this broader context. It is contingent upon myriad factors, personalities, and interests. This is perhaps best illustrated by what Allison identifies as a new tactical opportunity – unknown upon

³⁵¹ *Ibid.* See also, Pavel Felgenhauer, “Ukraine as a battlefield for a new world order according to Putin” Eurasia Daily Monitor (3 July 2014), online: <<https://jamestown.org/program/putin-ukraine-is-a-battlefield-for-the-new-world-order/>>.

³⁵² *Ibid.*

³⁵³ *Ibid.*, at 1259.

³⁵⁴ *Ibid.*

³⁵⁵ Territorial Integrity of Ukraine, GA Res 68/262, UNGAOR, 69th Sess, UN Doc. A/Res/262, (2014). See also, Allison Deniable Intervention, *supra* note 270 at 1268.

³⁵⁶ Allison Deniable Intervention, *supra* note 270 at 1268.

³⁵⁷ *Ibid.*, at 1282.

³⁵⁸ *Ibid.*, at 1291-1292.

³⁵⁹ Borgen Law, Rhetoric and Strategy, *supra* note 286 at 274-275.

³⁶⁰ Allison Deniable Intervention, *supra* note 286 at 1268.

Crimea's annexation – in which Russia may influence a US Administration that has received the Atlantic Alliance skeptically, softened its condemnation of Russia, and may be amenable to a transactional relationship that would further empower Moscow to pursue the objective of “compelling Ukraine to accept a neutral status between Russia and NATO.”³⁶¹

B. To Posit a Preferred Interpretation: The Use of Persuasive Legal Argument to Apply and Advance the Unwilling or Unable Standard

President Obama declared that initial military action against ISIS would be limited to Iraq. The scope and duration of the airstrikes, that would begin in August 2014, were intended to “protect American personnel in Iraq by stopping the current advance on Erbil ... and to help forces in Iraq as they fight to break the siege of Mount Sinjar and protect the civilians trapped there.”³⁶² The US rationale alluded to self defence, intervention by invitation, and humanitarian motives. The preceding year's events – the rise of ISIS, the fall of Mosul – compelled a military response. In accompaniment, this required legal justification.³⁶³ Strategically, the US would conduct airstrikes in Iraq, arm Syrian factions combatting ISIS, and form an international coalition to continue counter-terror efforts.³⁶⁴ US officials offered a firm legal basis for military action in Iraq. President Obama, in a nationally televised address, insisted that the use of force was in response to a direct “request of the Iraqi government.”³⁶⁵ Formally, intervention was predicated upon invitation.³⁶⁶

During the following month, ISIS militants increased their gains in Syria. Soon after, the US expanded its scope of operations. President Obama announced that as part of a “comprehensive and sustained counterterrorism strategy,” coalition forces would pursue ISIS within the Syrian theater.³⁶⁷ On 22 September, in the early morning hours, the US led a series of strikes against ISIS targets in Raqqa and to the west of the Iraq border in Deir ez Zour and Al-Hasakah.

The Syrian expansion was presented as a necessary evolution of the international effort to combat ISIS. However, where the Iraqi phase of operations claimed a firm legal basis, *realpolitik* and a confluence of diplomatic and strategic considerations denied a similar extension of the intervention by invitation justification. Syria, though consenting to a Russian and Iranian presence, insisted that an

³⁶¹ Allison Russia and the post-2014 Legal Order, *supra* note 253 at 543.

³⁶² The White House, Press Release, *Letter from the President – War Powers Resolution Regarding Iraq* (8 August 2014), online: <<https://obamawhitehouse.archives.gov/the-press-office/2014/08/08/letter-president-war-powers-resolution-regarding-iraq>>.

³⁶³ Olivia Gonzalez, “The Pen and the Sword: Legal Justifications for the United States’ Engagement Against the Islamic State of Iraq and Syria (ISIS)” (2015) 39 *Fordham Int’l L.J.* 133 at 135.

³⁶⁴ *Ibid.*

³⁶⁵ The White House, Statement by the President (7 August 2014), online: <<https://obamawhitehouse.archives.gov/the-press-office/2014/08/07/statement-president>>. See also, Karine Bannelier-Christakis, “Military Intervention against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent” (2016) 29 *Leiden J. Int’l L.* 743 at 750-751 [Bannelier-Christakis Military Intervention against ISIL].

³⁶⁶ See, UNSC, *Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General*, U.N. Doc. S/2014/440 (25 June 2014). See also, UNSC, *Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to President of the UNSC*, U.N. Doc. S/2014/691 (22 September 2014).

³⁶⁷ The White House, Statement by the President on ISIL (10 September 2014), online: <<https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1>> [Obama 10 September Speech].

invitation was not extended to the US led coalition.³⁶⁸ Neither would US officials or members of the coalition seek Syrian consent. Following the Syrian civil war – which began in 2011 when Bashar al-Assad violently suppressed anti-government protests – many western states viewed the Damascus authorities as illegitimate. They supported al-Assad’s departure.³⁶⁹ The US plainly stated, “we’re not going to ask for permission from the Syrian regime.”³⁷⁰

When Samantha Power, the US Ambassador to the United Nations, presented the Secretary General with an Article 51 letter, military operations in Syria were predicated on an inventive legal justification. The US stated:

“ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the Charter of the United Nations, when as is the case here, *the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.*”³⁷¹

The legal argument advanced by the US and select members of the coalition, had gained salience amongst some international lawyers.³⁷² The unwilling or unable test was not, however, grounded in clear legal doctrine. Neither the relevant legal instruments or ICJ jurisprudence reference the test.³⁷³ It is instead identified through a lineage of select state practice.³⁷⁴ Appeals to some variant of the unwilling or unable test has long featured within US foreign policy though its prevalence increased in the wake of the 11 September attacks.³⁷⁵ States – notably the US, Israel, Russia, and Turkey – have explicitly invoked the unwilling or unable test to justify cross-border force against non-state actors.³⁷⁶

³⁶⁸ See, Bannelier-Christakis Military Intervention against ISIL, *supra* note 365 at 767. See also, UNSC, *Identical letters dated 17 September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, U.N. Doc. S/2015/719 (21 September 2015).

³⁶⁹ Bannelier-Christakis Military Intervention against ISIL, *supra* note 365 at 767.

³⁷⁰ See, Anne Gearan, “U.S. rules out coordinating with Assad on airstrikes against Islamists in Syria” *The Washington Post* (26 August 2014), online: < https://www.washingtonpost.com/world/national-security/us-rules-out-coordinating-with-assad-on-airstrikes-against-islamists-in-syria/2014/08/26/cda02e0e-2d2e-11e4-9b98-848790384093_story.html?utm_term=.57997b360442>.

³⁷¹ See, UNSC, *Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General*, U.N. Doc. S/2014/695 (23 September 2014) [emphasis added] [US 23 September Letter].

³⁷² See, Ashley S. Deeks, “Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense” (2012) 52 Va. J. Int’l L. 483 [Deeks Unwilling or Unable]. See also, The Chatham House, “Principles of International Law on the Use of Force by States in Self-Defence” (2006) 55 Int’l & Comp. L.Q. 963; Nico Schrijver & Larissa van den Herik, “Leiden Policy Recommendations on Counter-terrorism and International Law” (2010) 57 Netherlands Y.B. Int’l L. 531.

³⁷³ See, Olivier Corten, “The Unwilling or Unable Test: Has it Been, and Could it be, Accepted?” (2016) 29 Leiden J. Int’l L. 777 at 778-779 [Corten Unwilling or Unable Test].

³⁷⁴ See, Elena Chachko & Ashley Deeks, “Who is on Board with Unwilling or Unable?” *Lawfare* (10 October 2016), online: < <https://www.lawfareblog.com/who-board-unwilling-or-unable#UnitedKingdom>> [Chachko & Deeks Who is on Board].

³⁷⁵ *Ibid.* See also, Paulina Starski, “Silence within the process of normative change and evolution of the prohibition on the use of force: normative volatility and legislative responsibility” (2017) J. on the Use of Force & Int’l L. 14 at 61.

³⁷⁶ Monica Hakimi, “Defensive Force against Non-State Actors: The State of Play” (2015) 91 Int. L. Stud. 1 at 13 [Hakimi Defensive Force against Non-State Actors].

As Monica Hakimi notes, “third states, for the most part did not endorse the legal claim, but they tacitly condoned the actual operations.”³⁷⁷

Despite the test’s prevalence – and with several notable exceptions – states remain reluctant to legally endorse the unwilling or unable test.³⁷⁸ The ICJ has declined to embrace broad interpretations of the right to self-defence against non-state armed groups.³⁷⁹ And, proponents of the unwilling or unable test concede its legal formulation is ill-defined and that it may not constitute customary international law.³⁸⁰ Where the US and select coalition allies did not experience legal opposition to their military operations against ISIS in Iraq, the legal rationale accompanying the use of force in Syria required a persuasive account to posit their preferred legal interpretation.

1. The Identification of a Common Lifeworld

Ambassador Power’s Article 51 letter recalled the perils of terrorism.³⁸¹ Advancement of the unwilling or unable test – in justification of US operations in Syria – built upon a relatable context. The general menace of international terrorism and the particular threat posed by ISIS were accentuated. A common lifeworld was identified. This was premised upon three contentions. ISIS’s actions in Iraq and Syria – around Mount Sinjar and toward the Yazidi population – were framed as genocide or ethnic cleansing.³⁸² ISIS’s existence – their origins and their contemporary function – were linked with *al-Qa’ida* and the constant threat of transnational terrorism.³⁸³ And ISIS’s methods – the beheadings, mass rape, crucifixions, and public floggings – were presented as uniquely brutal.³⁸⁴ Collectively, the lifeworld evoked a conception of terrorism that was ever-present, extensive in reach, familiar yet novel, and that warranted a military reply.

Articulation of the lifeworld began before operations against ISIS extended into Syria. In mid-August 2014, Ambassador Power addressed the Security Council. ISIS were defined as greater than a regional issue. Power told the Council that ISIS and other *al-Qa’ida* affiliates threatened the people of Syria and Iraq but also endangered the world-at-large.³⁸⁵ Power illustrated the humanitarian consequences of ISIS’s advancement. Having seized Iraqi and Syrian infrastructure, ISIS possessed “the ability to block

³⁷⁷ *Ibid.*

³⁷⁸ Following an exhaustive reading of the letters sent to the Security Council from August 2014 to January 2016 and after analysing relevant UN debates, Olivier Corten concludes that, “it would be excessive to contend that the unwilling and unable standard has been accepted by the international community of states as a whole.” See, Corten *Unwilling or Unable Test*, *supra* note 373 at 786.

³⁷⁹ Marja Lehto, “The Fight against ISIL in Syria: Comments on the Recent Discussion of the Right of Self-defence against Non-state Actors” (2018) 87 *Nordic J. of Int’l L.* 1 at 7 [Lehto *The Fight Against ISIL*]. See also, *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 19 December 2005, 116 I.C.J. Reports at para. 147.

³⁸⁰ Ryan Goodman, “International Law – and the Unwilling and Unable Test – for US Military Operations in Syria” *Just Security* (12 September 2014), online: <<https://www.justsecurity.org/14949/international-law-unwilling-unable-test-military-operations-syria/>>. See, Daniel Bethlehem, “Principles Relevant to the Scope of a State’s Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors” (2012) 106 *Am. J. Int’l L.* 770 at 773 [Bethlehem *Principles*]. See also, Deeks *Unwilling or Unable*, *supra* note 372 at 500.

³⁸¹ US 23 September Letter, *supra* note 371.

³⁸² See, e.g., UNSCOR, 69th Year, 7271st Mtg. UN Doc. S/PV.7271 at 6 [UNSC 7271 Meeting]. See also, Obama 10 September Speech, *supra* note 367.

³⁸³ See, US Department of Defense, Department of Defense Press Briefing on Operations in Syria by Lt. Gen. Mayville in the Pentagon Briefing Room (23 September 2014), online: <<https://www.defense.gov/News/Transcripts/Transcript-View/Article/606931/>>.

³⁸⁴ Obama 10 September Speech, *supra* note 367.

³⁸⁵ See, UNSCOR, 69th Year, 7242st Mtg. UN Doc. S/PV/7241 at 3 [UNSC 7242 Meeting].

the flow of electricity and to control access to the water supplies on which people depend.”³⁸⁶ Recent ISIS attacks, Power noted, “have displaced an estimated 200,000 people, bringing the total number of internally displaced persons in Iraq since January to a staggering 1.4 million.”³⁸⁷ ISIS sought to eradicate the Yazidi population. “Yazidis have been buried alive, beheaded or killed in mass executions. Thousands were forced to flee to Mount Sinjar, where many ultimately perished from thirst or exposure to the elements.”³⁸⁸ Elsewhere in Syria, ISIS militants were evidenced to have purposefully exacerbated a humanitarian catastrophe by confiscating aid destined for civilians in the country’s east.³⁸⁹

President Obama furthered this theme in a national address. ISIS had “threatened a religious minority with genocide.”³⁹⁰ The President continued that if ISIS’s advancement continued unabated, “these terrorists could pose a growing threat beyond [the] region, including to the United States.”³⁹¹ This threat – ISIS’s ever-expanding capacity and global reach – recalled the war on terror. President Obama referenced the 11 September attacks.³⁹² Terrorism was identified as a global menace, the source of collective fear, and the recipient of unconditional condemnation. The argumentative process, embraced by US officials did not simply identify cause for defensive action. It acknowledged a lifeworld, emphasizing that ISIS was an affront to universal values, had committed the most egregious atrocity crimes, and sought departure from the shared ideals that coalition members would act to uphold. Retrospection structured current debates as old threats and common fears were repurposed as the “new front” in the global war against terrorism.³⁹³

These reflections did not preclude novel claims. Throughout the framing process, ISIS were represented as uniquely brutal. Their methods were presented through anecdotes and conveyed to various audiences. Ambassador Power described to the Security Council a meeting with a Bishop from Mosul who witnessed ISIS attack a hospital: “a Christian patient who refused to convert was shot in the head. Two who agreed to convert, denounced as infidels, had their throats slit.”³⁹⁴ Ambassador Power conveyed that 500 Yazidi women and children had been abducted, systematically raped, trafficked, or killed.³⁹⁵ President Obama would later note that “in a region that has known so much bloodshed, these terrorists are unique in their brutality. They execute captured prisoners. They kill children. They enslave, rape, and force women into marriage...”³⁹⁶

³⁸⁶ *Ibid.*

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

³⁹⁰ Obama 10 September Speech, *supra* note 367.

³⁹¹ *Ibid.*

³⁹² *Ibid.*

³⁹³ UNSC 7242 Meeting, *supra* note 385 at 3.

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.*

³⁹⁶ Obama 10 September Speech, *supra* note 367. See also, UNSC 7271 Meeting, *supra* note 382 at 6. For a similar sentiment, see, “Transcript: President Obama’s remarks on the execution of journalist James Foley by Islamic State” *The Washington Post* (20 August 2014), online: < https://www.washingtonpost.com/politics/transcript-president-obamas-remarks-on-the-execution-of-journalist-james-foley-by-islamic-state/2014/08/20/f5a63802-2884-11e4-8593-da634b334390_story.html?noredirect=on&utm_term=.ef93e8f546f5>. See also, Julie Hirschfeld Davis, “After Beheading of Steven Sotloff, Obama Pledges to Punish ISIS” *The New York Times* (3 September 2014), online: <<https://www.nytimes.com/2014/09/04/world/middleeast/steven-sotloff-isis-execution.html>>.

British Prime Minister David Cameron presented a similar narrative. When the British began airstrikes late in 2015, ISIS's devastating reach had been felt throughout Europe. Addressing Parliament, Prime Minister Cameron referenced recent attacks in Berlin, Istanbul, and at the *Bataclan* and *Stade de France* in Paris. The threat posed by ISIS became vicarious. It reached people in Europe and threatened those across the UK as they wended their way through their daily routines. The Prime Minister explained that ISIS “has already taken the lives of British hostages, and inspired the worst terrorist attack against British people since 7/7, on the beaches of Tunisia—and, crucially, it has repeatedly tried to attack us right here in Britain.”³⁹⁷

When the US (and later the UK) expanded operations into Syria, legal justifications were premised upon the shared ideas and collective understandings evoked through this pre-established context. The US was leading a global effort to combat terrorism. Regional and international actors were working to ensure a “common security.”³⁹⁸ Following the 22 September airstrikes, President Obama convened a Security Council meeting. The President emphasized terrorism's commonality, its enduring threat: “the tactic of terrorism is not new. So many nations represented here today, including my own, have seen our citizens killed by terrorists who target innocents.”³⁹⁹ ISIS was presented as a unique manifestation of a shared experience. Initially, broad appeals did not delineate a specific threat that would amount to an armed attack.⁴⁰⁰ Instead, they exhibited a group whose cruelty was limitless and whose potential displayed extensive reach.⁴⁰¹ They appealed to the common fears and vulnerabilities of a diverse collective of states that faced or perceived the threat of terrorism. Military force – formally justified through an interpretative appeal to the unwilling or unable test – was a necessary response, one that would reflect a general commitment to international law.

2. Establishing the State as a General Norm-Acceptor

Elucidation followed assuredness. Within a year, US officials provided a comprehensive legal account of the unwilling or unable standard. State Department Legal Advisor Brian Egan, addressed the Annual Meeting of the American Society of International Law (ASIL). Before detailing the Obama Administration's legal rationale for the use of force in Syria, Egan began by presenting the US as a general norm acceptor:

“the United States complies with the international law of armed conflict in our military campaign against ISIL, as we do in all armed conflicts. We comply with the law of armed conflict because it is the international legal obligation of the United States; because we have a proud history of standing for the rule of law; because it is essential to building and

³⁹⁷ UK HC, *Parliamentary Debates*, col 1491 (26 November 2015) (Prime Minister David Cameron) [Cameron 26 November Speech].

³⁹⁸ The White House, Statement by the President on Airstrikes in Syria (23 September 2014), online: <<https://obama.whitehouse.archives.gov/the-press-office/2014/09/23/statement-president-airstrikes-syria>>.

³⁹⁹ UNSCOR, 69th Year, 7272nd Mtg. UN Doc. S/PV/7272 at 3.

⁴⁰⁰ In his 10 September address, President Obama noted that “While we have not yet detected specific plotting against our homeland, ISIL leaders have threatened America and our allies.” See, Obama 10 September Speech, *supra* note 367.

⁴⁰¹ Continuing, the President noted that “Our Intelligence Community believes that thousands of foreigners — including Europeans and some Americans — have joined [ISIS] in Syria and Iraq. Trained and battle-hardened, these fighters could try to return to their home countries and carry out deadly attacks.” See, *Ibid.*

maintaining our international coalition; because it enhances rather than compromises our military effectiveness; and because it is the right thing to do.”⁴⁰²

The legal rules governing non-international armed conflicts (NIAC) were enumerated.⁴⁰³ Egan told the gathered legal experts that these rules, regarded as customary international law, received close scrutiny within the US Government and through domestic courts.⁴⁰⁴

Egan described the US as a leader in international legal compliance. Its general commitment to legal norms ensures that coalition members, as well as US forces, exhibit the highest standards of compliance. This commitment to legal order, Egan explained, “also extends to promoting law of armed conflict compliance by our partners...When others seek our assistance with military operations, we ensure that we understand their legal basis for acting. We also take a variety of measures to help our partners comply with the law of armed conflict and to avoid facilitating violations through our assistance...”⁴⁰⁵

Professions of legal fidelity were further bolstered. Egan explained that the US commitment to legal compliance surpassed that which was formally required. As a matter of international law, Egan insisted, the US is compelled to comply with IHL. In practice, however, the US “imposes standards on its direct action operations that go beyond the requirements of the law of armed conflict.”⁴⁰⁶ As US officials furthered the interpretative assertions undergirding operations in Syria, they accentuated the state’s reputation. From a position of legal fidelity and leadership, the US drew from a general sense of norm acceptance to illustrate the credibility of a specific interpretative claim.

British officials exhibited a similar approach. Prime Minister David Cameron told Parliament that the expansion of airstrikes into Syria constituted collective self-defence. They were legally permissible because the “Assad regime is unwilling and/or unable to take action necessary to prevent ISIL’s continuing attack on Iraq, or indeed attacks on us.”⁴⁰⁷ The ensuing process mirrored occurrences in the US. The British Attorney General addressed an expert audience at the International Institute for Strategic Studies (IISS) in London. In a speech titled “The Modern Law of Self-Defence”, the Rt. Hon. Jeremy Wright expanded upon the Government’s invocation of the unwilling or unable test.⁴⁰⁸ The Attorney General began, asserting that the UK “is a world leader in promoting, defending and shaping international law.”⁴⁰⁹ British legal contributions – to the slave trade’s eradication; to the formation of the imminence requirement; to the founding of the League of Nations; and to the UN

⁴⁰² Egan International Law, Legal Diplomacy, and the Counter-ISIL Campaign, *supra* note 107 at 236.

⁴⁰³ Egan noted the principle of distinction; the definition of military objects; the need to take precautions; targeting prohibitions specific to NIACs; the demands of proportionality; and the illegality of actions or threats which intend to spread terror amongst a civilian population. See, *Ibid*, at 242-243.

⁴⁰⁴ *Ibid*, at 242.

⁴⁰⁵ *Ibid*, at 245.

⁴⁰⁶ For example, Egan notes that “the U.S. military may impose an upper limit as a matter of policy on the anticipated number of non-combatant casualties that is much lower than that which would be lawful under the rule that prohibits attacks that are expected to cause excessive incidental harm.” Furthermore, Egan explains how despite the U.S. not being party to the Second Additional Protocol to the Geneva Conventions, US practice is consistent with the Protocol’s dictates the rules applicable in NIACs. See, *Ibid*, at 245-246.

⁴⁰⁷ Cameron 26 November Speech, *supra* note 397 at col. 1489.

⁴⁰⁸ The Rt. Hon. Jeremy Wright, “The Modern Law of Self Defence” (11 January 2017) (blog), online: EJIL Talk! <<https://www.ejiltalk.org/the-modern-law-of-self-defence/>> [Wright Modern Law of Self-Defence].

⁴⁰⁹ *Ibid*.

– were recounted. The UK’s role in drafting, and its willingness to sign, the Kellogg-Briand Pact, the Ottawa Treaty, and the Rome Statute were recalled.⁴¹⁰ By engaging with the legal questions that resulted following the use of force in Syria, the Attorney General pledged to continue the British tradition of “advocating, celebrating and participating in a rules-based international order.”⁴¹¹ The UK “should and will only use armed force, and will only act in self-defence, where it is consistent with international law to do so.”⁴¹² These parallel persuasive appeals, offered by US and UK officials, would next move to establish the credentials of the respective actors forwarding the inventive interpretative claim.

3. Demonstrating the Authority to Interpret

Both speeches targeted a specific epistemic community. The venues for each address – the IISS and at ASIL’s Annual Meeting – were indicative of a particular professional class. Interpretative appeals, to the applicability of the unwilling or unable test, were directed toward influential communities of international lawyers. They sought expert approval – that the justifications for the use of force in Syria were legally tenable. As Peter Haas suggests, interpretative claims are efficaciously received when directed towards a community from which the speaker derives credibility.⁴¹³ By addressing academic conferences, by emphasizing interpretative sources, and by accentuating the speaker’s reputation and credentials the persuading entity bolsters its authoritativeness.⁴¹⁴

Legal scholars initiated the interpretative advancement of the unwilling or unable test.⁴¹⁵ Academic endorsements of the standard were, however, closely linked with state practice.⁴¹⁶ The actions of states informed scholarly articulations of an amended self-defence doctrine.⁴¹⁷ States then emphasized academic contributions supportive of interpretations that departed from a strict reading of Article 51.⁴¹⁸ Most prominently, Sir Daniel Bethlehem published a list of principles intended to address the “scope of a state’s right to self-defense against an imminent or actual armed attack by nonstate actors.”⁴¹⁹ When such attacks emanate from a third state, the victim state may intervene without consent when the third state is, *inter alia*, “unwilling to effectively restrain the armed activities of the non-state actor” or when there is a reasonable basis “for concluding that the third state is unable to effectively restrain [these] armed activities...”⁴²⁰

Brian Egan’s interpretative endorsement of the unwilling or unable test drew heavily upon the Bethlehem Principles. Egan told the ASIL Annual Meeting, “when considering whether an armed attack is imminent under the *jus ad bellum* for purposes of the initial use of force against a particular non-State actor, the United States analyzes a variety of factors, including those identified by Sir Daniel

⁴¹⁰ *Ibid.*

⁴¹¹ *Ibid.*

⁴¹² *Ibid.*

⁴¹³ Haas Epistemic Communities and International Policy, *supra* note 185 at 3.

⁴¹⁴ See, Shereshevsky Back in the Game, *supra* note 7 at 51.

⁴¹⁵ See, Corten Unwilling or Unable Test, *supra* note 373 at 778.

⁴¹⁶ Lehto The Fight Against ISIL, *supra* note X at 17-18. See generally, Kattan Furthering the War on Terrorism, *supra* note 379.

⁴¹⁷ See generally, Deeks Unwilling or Unable, *supra* note 372.

⁴¹⁸ Oren Gross, “Unresolved Legal Questions concerning Operation Inherent Resolve” (2017) 52 Tex. Int’l L. J. 221 at 248 [Gross Unresolved Legal Questions].

⁴¹⁹ Bethlehem Principles, *supra* note 380 at 770.

⁴²⁰ *Ibid.*, at 776.

Bethlehem.”⁴²¹ Similarly, Attorney General Wright extensively cited the Bethlehem Principles when describing how the UK interprets “the long-standing rules of international law on self-defence to our need to defend ourselves against new and evolving types of threats from non-state actors.”⁴²² The Attorney General recognized Sir Daniel’s role as the former Legal Adviser to the FCO and that his principles were informed by “detailed official-level discussions between foreign ministry, defence ministry, and military legal advisers from a number of states who have operational experience in these matters.”⁴²³

Both the Legal Adviser and the Attorney General noted that the Principles were published in the *American Journal of International Law*. Repeated references to the Bethlehem Principles, allusions to the prestige of their author, exemplify authoritativeness. They, along with references to *The Chatham House Principles on International Law on the Use of Force by States in Self-Defence* and the *Leiden Policy Recommendations on Counter-Terrorism and International Law* accentuate the role of expert opinion in the drafting process of the respective documents. Invocations of these documents were both lauded as professional sources supporting a particular interpretative position and as the work product of influential epistemic communities. Appeals to the latter ensure that the documents’ source, their associated esteem, become indirect efforts to influence the justificatory discourse.⁴²⁴

To advance the favoured interpretation of the unwilling or unable test’s applicability, US and British officials conveyed their own professional competence. They noted their membership within the interpretative community that they now sought to influence. Brian Egan offered professional credentials. Egan told the Annual Meeting that prior to “my confirmation, I served as a Deputy White House Counsel and Legal Adviser to the National Security Council for nearly three years. Based on my experience in that position, I can tell you that the President, a lawyer himself, and his national security team have been guided by international law in setting the strategy for counterterrorism operations against ISIL.”⁴²⁵ The professional competence of the respective speakers, the authoritativeness of the documents that they would cite, became factors that lent credence to the particular interpretative claim.

4. Instilling the Standard of the Acceptable Legal Argument

The interpretative advancement of the unwilling or unable test is an effort to alter a legal standard. It is an attempt to expand the strictures of Article 51. Acceptance of a novel formulation facilitates subsequent legal arguments that accompany the use of force against non-state actors. The persuasiveness of legal appeals, claims of legitimacy, are bolstered when evaluated in accordance with this broad notion of legal compliance. Brian Egan explains that “if [a state] must rely on self-defense to use force against a non-State actor on another State’s territory, [they must] determine that the territorial State is “unable or unwilling” to address the threat posed by the non-State actor...”⁴²⁶

⁴²¹ Egan International Law, Legal Diplomacy, and the Counter-ISIL Campaign, *supra* note 107 at 239.

⁴²² Wright Modern Law of Self-Defence, *supra* note 408.

⁴²³ *Ibid.*

⁴²⁴ *Ibid.* See also, Peevers Politics of Justifying Force, *supra* note 25 at 4.

⁴²⁵ Egan International Law, Legal Diplomacy, and the Counter-ISIL Campaign, *supra* note 107 at 236.

⁴²⁶ *Ibid.*, at 240. This argument is similar to that offered by President Clinton to Congress in 1998 in defense of US strikes against Al Qaeda bases in Sudan and Afghanistan. See, “U.S. Fury on 2 Continents; Clinton’s Words: ‘There Will Be No Sanctuary for Terrorists’” *New York Times* (21 August 1998), online: <<https://www.nytimes.com/1998/08/21/world/us-fury-2-continents-clinton-s-words-there-will-be-no-sanctuary-for-terrorists.html>>.

Reconstructed as positive international law, the imposed reading was presented as a certain legal standard. Egan continued:

“in some cases international law does not require a State to obtain the consent of the State on whose territory force will be used. In particular, there will be cases in which there is a reasonable and objective basis for concluding that the territorial State is unwilling or unable to effectively confront the non-State actor in its territory so that it is necessary to act in self-defense...”⁴²⁷

The Article 51 letter that Ambassador Power presented to the Secretary General was the outcome of an ongoing attempt to amend the *jus ad bellum*.⁴²⁸ Transnational efforts, amongst aligned states, advocated in accordance with Attorney General Wright’s contention that “international law is not static and is capable of adapting to modern developments and new realities.”⁴²⁹ Several states long-favoured reformulation of the law governing the use of force. These states interpreted the 11 September attacks as urgent demonstrations of the need for legal reform.⁴³⁰ The military response to international terrorism featured numerous efforts to impose permissive legal standards.⁴³¹ Articulations of pre-emptive self-defence, application of the unwilling or unable test, constituted efforts to instil facilitatory legal standards.⁴³² Appeals to these imposed standards, notwithstanding their uncertain legal status and in several instances broad rejections, provided states the ability to exhibit an, at least, plausible legal argument.

Formulations of reduced burdens identified legal ambiguity. They emphasized the lack of consensus surrounding the legal standards relevant to the contemporary challenges posed by the use of force. A particular legal interpretation may not be doctrinally entrenched but would constitute an acceptable legal argument. John Bellinger, when serving as Legal Advisor, reminded European interlocuters that legal rules governing conflict with non-state actors were uncertain. Bellinger insisted that the lack of clarity regarding the relationship between international law, self-defence, and non-state actors “provided impetus for cooperation in determining the appropriate legal framework.”⁴³³ US actions, justified through inventive legal reasoning should not, Bellinger insisted, be construed as legal disregard. The US was not “violating *clear* legal norms” as “legal experts *differ* on the interpretation and implementation of [the] laws of war.”⁴³⁴ Ambiguity created potential. An array of feasible legal arguments, offered as acceptable if not certain, justified uses of force that appeared to go beyond a formalist reading of the UN Charter. These allowed the state to exhibit commitment to a legal process and provided members of the international community with an argument that could be received in satisfaction of a broad, but acceptable, legal standard.

5. Drawing Upon Precedent and Commonality

⁴²⁷ *Ibid*, at 241.

⁴²⁸ See generally, Kattan *Furthering the War on Terrorism*, *supra* note 29.

⁴²⁹ Wright *Modern Law of Self-Defence*, *supra* note 408.

⁴³⁰ Kattan *Furthering the War on Terrorism*, *supra* note 29 at 113-114.

⁴³¹ See, Ratner *Jus ad Bellum and Jus in Bello*.

⁴³² See generally, The National Security Strategy of the United States of America (September 2002), online: <<https://www.state.gov/documents/organization/63562.pdf>> [NSS-2002].

⁴³³ Public Library of U.S. Diplomacy, Legal Adviser Bellinger’s Meeting with Belgian Officials (8 March 2007), online: <https://wikileaks.org/plusd/cables/07BRUSSELS772_a.html> [Bellinger’s Meeting with Belgian Officials]. See also, Kattan *Furthering the War on Terrorism*, *supra* note 29 at 119-120.

⁴³⁴ Bellinger’s Meeting with Belgian Officials, *supra* note 433 [emphasis added].

Invocations of precedent featured throughout Brian Egan's ASIL address. An expansive reading of the self-defence criteria recalled a lineage of state behaviour. The use of force against non-state actors was presented as a commonality that long pre-dates the global war on terror. Contemporary legal arguments, preferred interpretations, were not inventive responses to a modern threat but instead manifestations of familiar state practice. Egan noted:

“the inherent right of individual and collective self-defense recognized in the U.N. Charter is not restricted to threats posed by States. Nor is the right of self-defense on the territory of another State against non-State actors, such as ISIL, something that developed after 9/11. To the contrary, for at least the past two hundred years, States have invoked the right of self-defense to justify taking action on the territory of another State against non-State actors. As but one example, the oft-cited *Caroline* incident involved the use of force by the United Kingdom in self-defense against a non-State actor located in the United States...”⁴³⁵

Two centuries of supportive state behaviour were emphasized. Appeals to the *Caroline* incident associated applications of force against non-state actors operating on a third state's territory with the origins of the self-defence doctrine.

Advancement of the unwilling or unable test accentuated the prevalence of similar state practice. Egan identified the increasing number of states that had offered legal justifications in support of the use of force against ISIS in Syria. Egan demonstrated that, “the United States is not alone in providing such public explanations. Over the last eighteen months, for example, nine of our coalition partners have submitted public Article 51 notifications to the UN Security Council explaining and justifying their military actions in Syria against ISIL.”⁴³⁶ While minimizing divergencies in legal reasoning, Egan continued, “though the exact formulations vary from letter to letter, the consistent theme throughout these reports to the Security Council is that the right of self-defense extend to using force to respond to actual or imminent armed attacks by non-State armed groups like ISIL.”⁴³⁷ These instances of similar state behaviour and the alike legal reasoning provided by a diversity of states were presented as “the clearest evidence” of the unwilling or unable test's relevancy.⁴³⁸

Earlier efforts to formalize the unwilling or unable test made similar use of precedent. John Bellinger told an audience at the London School of Economics that “over a century of state practice supports the conclusion that a state may respond with military force in self-defense to such attacks, at least where the harboring state is unwilling or unable to take action to quell the attacks.”⁴³⁹ Bellinger also would trace the origins of this interpretative account to the *Caroline* incident. As Victor Kattan identifies, Bellinger's appeal to state practice evoked the language advanced in the 2002 National Security Strategy.⁴⁴⁰ This too alluded to precedent, noting that “for centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack.”⁴⁴¹

⁴³⁵ Egan International Law, Legal Diplomacy, and the Counter-ISIL Campaign, *supra* note 107 at 239.

⁴³⁶ *Ibid.*, at 244.

⁴³⁷ *Ibid.*

⁴³⁸ *Ibid.*

⁴³⁹ John B. Bellinger, “Legal Issues in the War on Terrorism” (delivered at the London School of Economics, 31 October 2006), online: <<https://www.state.gov/s/l/2006/98861.htm>>.

⁴⁴⁰ Kattan Furthering the War on Terrorism, *supra* note 29 at 116.

⁴⁴¹ NSS-2002, *supra* note 432 at 15.

British appeals to precedent – in advancement of the unwilling or unable test – offered greater specificity. Attorney General Wright noted that the UK’s interpretative approach was common amongst several states who “have also confirmed their view that self-defence is available as a legal basis where the state from whose territory the actual or imminent armed attack emanates is unable or unwilling to prevent the attack...”⁴⁴² In support, the Attorney General referenced a *Lawfare* post by Elena Chachko and Ashley Deeks cataloging state articulations of the unwilling or unable test.⁴⁴³ The published version of the Attorney General’s speech includes an annex that links readers to the Article 51 letters of ten states that provided legal justifications favouring the use of force against ISIS targets in Syria.

6. Conclusion

The decision to use force in Syria demanded an innovative legal justification. The United States was required to distinguish from the rationale that supported coalition efforts in Iraq. The persuasive discourse accompanying operations in Syria advanced a preferred legal interpretation within a familiar justificatory framework. Despite acknowledging legal ambiguity, the unable or unwilling test was presented as a firm legal standard. This preferred interpretative position sought to both influence understandings of the *jus ad bellum* and legitimize a particular use of force. Collectively, this advocated approach derived persuasive value by positioning a legal interpretation as a necessary reformation within the war on terror, a reflection and formalization of state practice, a direct response to the rise of ISIS throughout the Levant, and a safeguard against an emergent threat that emanated from the eastern Mediterranean and into the western world.

The effectiveness of a persuasive claim is influenced by the broader policy objective that the specific legal argument wishes to further. Ambassador Power’s articulation of the unwilling or unable test is inseparable from efforts to justify and advance the legal framework regulating the war on terror. It must be considered alongside general, state-led efforts to expand the *jus ad bellum* to permit the use of force against non-state armed groups.⁴⁴⁴ The multitudinous factors that influence evaluations of this broad policy inevitably shape how the specific legal articulation is received. Accordingly, persuasion’s effectiveness is best considered incrementally.

The Article 51 letter in which the United States justified its decision to use force in Syria was not the first formal invocation of the unwilling or unable standard. While it has been periodically invoked since the 1960s, the test, as noted, does not “appear as such in any legal instrument, including recent ones, nor was it employed in relevant existing case-law, particularly by the ICJ.”⁴⁴⁵ Early articulations of unwilling or unable – by Israel in response to attacks by armed groups operating within Lebanon – were explicitly rejected by the Security Council and denounced throughout the international community.⁴⁴⁶ From absolute rejection, articulations of an unwilling or unable standard received

⁴⁴² Wright Modern Law of Self-Defence, *supra* note 408.

⁴⁴³ *Ibid.* See also, Chachko & Deeks Who is on Board, *supra* note 374.

⁴⁴⁴ See generally, Kinga Tibori-Szabó, “The ‘Unwilling or Unable’ Test and the Law of Self-defence” in Christophe Paulussen, et al., eds, *Fundamental Rights in International and European Law Public and Private Law Perspectives* (The Hague: Asser Press, 2016) 73 [Tibori-Szabó The Unwilling or Unable Test].

⁴⁴⁵ Corten Unwilling or Unable Test, *supra* note 373 at 778-779. See also, Tibori-Szabó The Unwilling or Unable Test, *supra* note 444 at 75-80.

⁴⁴⁶ See, UNSCOR, 36th Year, 2292nd Mtg. UN Doc. S/PV/2292 at para. 54. See also, Tibori-Szabó The Unwilling or Unable Test, *supra* note 444 at 77-78.

sequential support. As states identified the threat posed by transnational terrorist networks, legal contentions expanding restrictive readings of the *jus ad bellum* gained salience.⁴⁴⁷

Within the post-9/11 context, following explicit Security Council recognition of the lawful use of force against a non-state armed group, the unwilling or unable test became evermore prevalent.⁴⁴⁸ Appeals to the standard are increasingly accepted.⁴⁴⁹ They are not, however, universally endorsed.⁴⁵⁰ A majority of states have rejected both a general articulation of the test and its specific application in justification of US-led actions in Syria.⁴⁵¹ Amongst international lawyers, the test's formal legal status remains controversial.⁴⁵² Notwithstanding, the aforementioned persuasive appeals assuaged many coalition partners. Though the US's persuasive efforts have not altered the *jus ad bellum*, the United Kingdom, Canada, Australia, and Turkey have each cited some variant of the test in justification of the use of force (and in furtherance of US objectives) against ISIS in Syria.⁴⁵³

As with many persuasive contentions, the effectiveness of a particular claim is context dependant. When the US offered the unwilling or unable test in justification of its military operations in Syria it drew upon a cause many deemed just and a threat many believed visceral. A desired outcome, the perceived utility of a particular policy, and a sense of moral certitude all influence the reception, and thus effectiveness, of persuasive legal appeals. When, in 2002, Russia evoked the unwilling or unable standard to justify military action against Chechen groups positioned in the Pankisi Valley, the United States denounced the violation of Georgian sovereignty.⁴⁵⁴ Rwanda's incursion into Eastern Congo was justified in response to the DRC's inability to disarm and disband the *Interahamwe*.⁴⁵⁵ The international community's response was mixed. The Security Council recognized that the *Interahamwe*, perpetrators of the Rwandan genocide, were "a source of instability, a threat to civilian populations and an impediment to good neighbourly relations."⁴⁵⁶ Sovereignty was, however, deemed sacrosanct as the international community condemned Rwanda's unauthorized cross-border forays.⁴⁵⁷

When the US invoked Article 51 and cited the unwilling or unable standard in justification of the use of force against ISIS in Syria, the international response remained mixed. It had, however, moved considerably from the near unanimous denunciations of the late 1960s, demonstrating greater acquiescence to both the test's utility and legal status. The effectiveness of these persuasive engagements, whether the unwilling or unable standard has achieved legal status, remains unsettled. However, as Olivier Corten notes, there is a sense amongst commentators that the test will be "increasingly accepted in practice and [in] supporting statements of governments and international organizations."⁴⁵⁸ Determining whether and how US contentions influence the test's formalization,

⁴⁴⁷ *Ibid*, at 79.

⁴⁴⁸ See, SC Res 1368, UNSCOR, 4370th Mtg, UN Doc. S/Res/1368 (2001). See also, SC Res 1373, UNSCOR, 4385th Mtg, UN Doc. S/Res/1373 (2001).

⁴⁴⁹ See, Deeks Unwilling or Unable, *supra* note 372.

⁴⁵⁰ Chachko & Deeks Who is on Board, *supra* note 374.

⁴⁵¹ Corten Unwilling or Unable Test, *supra* note 373 at 798.

⁴⁵² Chachko & Deeks Who is on Board, *supra* note 374. See also, Tom Ruys, "Armed Attack and Article 51 of the UN Charter: Evolutions in Customary Law and Practice (Cambridge: Cambridge University Press, 2010) [Ruys Armed Attack]; Kevin Jon Heller, "Do Attacks on ISIS in Syria Justify the Unwilling or Unable Test" *Opinio Juris* (13 December 2014), online: <<http://opiniojuris.org/2014/12/13/attacks-isis-syria-justify-unwilling-unable-test/>>.

⁴⁵³ Chachko & Deeks Who is on Board, *supra* note 374.

⁴⁵⁴ See, Ruys Armed Attack, *supra* note 452 at 466.

⁴⁵⁵ *Ibid*, at 467.

⁴⁵⁶ *Ibid*. See also, UNSCOR, 5095th Mtg, UN Doc. S/Prst/2004/45 [UNSCOR 5095th Mtg].

⁴⁵⁷ Ruys Armed Attack, *supra* note 452 at 467-468. See also, UNSCOR 5095th Mtg, *supra* note 456.

⁴⁵⁸ Corten Unwilling or Unable Test, *supra* note 373 at 798.

requires a long-term perspective. It is nevertheless clear that the unwilling or unable standard has entered the legal, political, and justificatory lexicon that states employ to use force in response to the threat posed by non-state armed groups.

C. To Legitimize a General Situation or to Advance a Particular Policy: The 2014 Gaza War

In 2001, Hamas first aimed mortars beyond the Gaza Strip. They detonated in Nahal Oz, a kibbutz near Sderot. On 10 February 2002, the first rockets were launched towards communities in Israel's south.⁴⁵⁹ These early attacks were limited. They did not garner the same level of attention as the suicide bombings that had become the hallmark of the second *Intifada*. Still, Israel's response was considerable – striking Hamas and PA targets throughout Gaza.⁴⁶⁰ Israel framed its actions as a military necessity. Since the commencement of the second *Intifada*, Israel altered the defensive legal paradigm used to engage with non-state armed groups – from a law enforcement model to a military framework.⁴⁶¹ Daniel Reisner, who oversaw this policy shift when head of the IDF's ILD, recalled:

“when we started to define the confrontation with the Palestinians as an armed confrontation, it was a dramatic switch, and we started to defend that position before the Supreme Court. In April 2001, I met with American envoy George Mitchell and explained that above a certain level, fighting terrorism is armed combat and not law enforcement. His committee [which examined the circumstances of the confrontation in the territories] rejected that approach. Its report called on the Israeli government to abandon the armed confrontation definition and revert to the concept of law enforcement. It took four months and four planes to change the opinion of the United States...”⁴⁶²

The rockets continued, summarily preceded by strong military actions.⁴⁶³ Following Israeli disengagement from Gaza and the 2006 Palestinian elections – in which Hamas won 74 of the Legislative Council's 132 seats – inter-communal violence peaked. Hamas militants feuded with Fatah's security forces. In June 2007, Hamas assumed full control of the Gaza Strip.⁴⁶⁴ Within months, Israel listed Gaza as a “hostile territory.”⁴⁶⁵ Sanctions against the Hamas-controlled territory were instituted and so began the Israeli-Egyptian blockade of Gaza that continues to this day.⁴⁶⁶ A series of large-scale military operations followed. Operation Cast Lead in 2008-09 and, with predictable

⁴⁵⁹ The IDF noted that this was the first time such rockets had been launched towards targets in Israel. See, Israel Ministry of Foreign Affairs, *Palestinians launch rockets at Israel* (10 February 2002), online: <<http://www.mfa.gov.il/mfa/pressroom/2002/pages/palestinians%20launch%20rockets%20at%20israel%20-%2010-feb-200.aspx>>. See also, Jean-Pierre Filiu, *Gaza: A History* (Oxford: Oxford University Press, 2014) at 264 [Filiu Gaza History].

⁴⁶⁰ *Ibid*, at 263-268.

⁴⁶¹ See generally, Feldman & Blau Consent and Advise, *supra* note 28. See also, Amichai Cohen, “Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law” (2011) 26 Conn. J. Int'l L. 367 at 400.

⁴⁶² Feldman & Blau Consent and Advise, *supra* note 28. See also, Daniel Reisner, *International Law and Military Operations in Practice* (Jerusalem: Jerusalem Center for Public Affairs, 2009).

⁴⁶³ In response to the continued rocket attacks, the IDF engaged in several small-scale military operations during the mid-2000s. See generally, Human Rights Watch, *Razing Rafah: Mass Home Demolitions in the Gaza Strip* (17 October 2004), online: <<https://www.hrw.org/report/2004/10/17/razing-rafa/mass-home-demolitions-gaza-strip>>. See also, IDF Spokesperson, Briefing: Gaza Division Commander, Brig. Gen. Shmuel Zakai” (23 May 2004), online: <<http://www.imra.org.il/story.php3?id=20933>>.

⁴⁶⁴ Filiu Gaza History, *supra* note 459 at 302-303.

⁴⁶⁵ Israel Ministry of Foreign Affairs, *Security Cabinet Declares Gaza Hostile Territory* (19 September 2007), online: <<http://www.mfa.gov.il/mfa/pressroom/2007/pages/security%20cabinet%20declares%20gaza%20hostile%20territory%2019-sep-200.aspx>>.

⁴⁶⁶ See, James Kraska, “Rule Selection in the Case of Israel's Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea?” (2010) 13 Y. Int'l H.L. 367 at 375-379.

regularity, Operation Pillar of Defence in 2012. Israel presented the ensuing uses of force in Gaza as direct responses to the cascade of rockets launched by Hamas. A familiar pattern of actions and counteractions solidified what continues to resonate as Gazan rockets precede Israeli airstrikes which precede Gazan rockets in a ferocious carousel of violence and escalation buttressed by purported legal justifications.

Operation Protective Edge, in 2014, was the third military offensive that Israel launched against Hamas. The 2014 Gaza war was initiated by a series of events that began with the abduction and murder of three Israeli yeshiva students – Eyal Yifrach, Gilad Shaar, and Naftali Fraenkel – and the immolation of Mohammad Abu-Khdeir, a sixteen-year old Palestinian from East Jerusalem.⁴⁶⁷ Again, Israel framed its military operation as a defensive response to the increase in rocket attacks emanating from within Gaza.⁴⁶⁸ The war lasted for 51 days. It was of greater duration and brought higher casualties than preceding escalations.⁴⁶⁹ The international community reverted to many of the habitual postures assumed in response to violent outbreaks between Israel and Hamas. The right to self-defence received familiar avowals. Calls for restraint resonated. And, as the conflict continued, Israel would face mounting international criticism.⁴⁷⁰

Israel presented what it asserted to be a paradigmatic appeal to self-defence.⁴⁷¹ It cited assurances by world leaders that had spoken of Israel's inherent right to protect itself from the threat of terrorism.⁴⁷² However, Israel acknowledged that much of the ensuing criticism – that followed Operations Cast Lead and Protective Edge – addressed the *jus in bello*. Pnina Sharvit Baruch, who headed the ILD during the 2008-09 war, later noted: “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*).”⁴⁷³ An international legal discourse accompanied each conflict. Israel faced increasing accusations of legal wrongdoing. In reply, Israeli officials harnessed the language of international law. In an effort to persuade varied audiences of the military operations' legitimacy, Israeli officials presented detailed legal narratives. They engaged in ongoing efforts to, as Prime Minister Netanyahu declared, “delegitimize the delegitimization.”⁴⁷⁴

1. The Identification of a Common Lifeworld

⁴⁶⁷ See, Isabel Kershner, “Israeli Teenagers said to be kidnapped in West Bank” *New York Times* (13 June 2014), online: <http://www.nytimes.com/2014/06/14/world/middleeast/3-israeli-teenagers-said-to-be-kidnapped-in-west-bank.html?_r=0>. See also, Peter Beaumont & Orlando Crowcroft, “Bodies of three missing Israeli teenagers found in West Bank” *The Guardian* (30 June 2014) online: <<http://www.theguardian.com/world/2014/jun/30/bodies-missing-israeli-teenagers-found-west-bank>>; Adiv Starman, “Six Jewish extremists arrested in killing of Jerusalem teen” *The Times of Israel* (6 June 2014), online: <<http://www.timesofisrael.com/suspects-arrested-in-killing-of-east-jerusalem-teen/>>.

⁴⁶⁸ Israel Ministry of Foreign Affairs, *Behind the Headlines: Operation Protective Edge Question and Answer* (14 August 2014), online: <<http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Operation-Protective-Edge-QA.aspx>> [Israel MFA Behind the Headlines].

⁴⁶⁹ See, UN Office for the Coordination of Humanitarian Affairs, *Fragmented Lives: Humanitarian Overview 2014* (March 2015) at 6.

⁴⁷⁰ Members of the Security Council repeatedly called for the imposition of a ceasefire, demanded general compliance with IHL, and, while recognizing Israel's right to self-defence, held that many of its military actions were disproportionate and lead to unacceptable civilian casualties. See, UNSCOR, 69th Year, 7231st Mtg, UN Doc. SC/11502 (2014).

⁴⁷¹ See, e.g., UNSCOR, 63rd Year, 6060 Mtg, UN Doc. SC/6060 (2014) at 6.

⁴⁷² Israel MFA Behind the Headlines, *supra* note 468. See also, State of Israel, *The 2014 Gaza Conflict: Factual and Legal Aspects* (May 2015) at para. 65.

⁴⁷³ Sharvit Baruch Operation Protective Edge, *supra* note 206 at 66.

⁴⁷⁴ Barak Ravid, “Delegitimization of Israel Must Be Delegitimized” *Haaretz* (16 October 2009), online: <<https://www.haaretz.com/1.5250761>>.

Israeli officials referenced a lifeworld that was both general and specific. Situated on the frontline of the war against terrorism, they described two relatable contexts. Each context correlated with a series of arguments that appealed respectively to the *jus ad bellum* and the *jus in bello*. The first told of the threat of terrorism. The second conveyed the challenges of combatting this threat. During and in the aftermath of the 2014 Gaza wars, Israel grounded its legal appeals within these contexts. The struggle against Hamas, the realities of asymmetrical warfare, were positioned as reminiscent of the global war against terrorism and as a particular challenge that Israel was forced to confront.

Protective Edge began on 8 July 2014. Israeli F-16s targeted 200 sites across Gaza. Hamas launched upwards of 150 rockets into Israel.⁴⁷⁵ The operation's commencement was accompanied by a legal discourse. Initial appeals to Article 51 were supplemented. Officials conveyed a broader context. Within, Israelis were subject to the prolonged barrage of rocket and mortar fire. Gaza was aggressively consumed by Hamas, a designated terrorist organization that "violently seized control of the Gaza Strip and transformed it into a terror fortress."⁴⁷⁶ When hostilities commenced, the Israeli Permanent Representative to the UN addressed the Security Council. Ambassador Prozor identified a lifeworld besieged by terror:

"there is a storm of rockets being fired by the Hamas terrorist organization in Gaza. Hamas is indiscriminately threatening the lives of 3.5 million innocent men, women and children in Israel from the south to the north – from Beersheba to Tel Aviv and Haifa. In the past three days, 442 rockets have been fired into Israel. That is one every 10 minutes. Fifteen seconds is how much time one has to run for one's life. Imagine having only 15 seconds to find a bomb shelter. Now imagine doing that with small children, elderly parents or an ailing friend."⁴⁷⁷

Terrorism's threat was not limited. It was presented as an everlasting and inescapable reality predating the current military operation. Gaza was described as raucous. A place where public squares and hospitals took the names of terrorists. Where children dress as suicide bombers and chant death to Israel.⁴⁷⁸ Ambassador Prozor explained that a "generation of Israeli children [are] growing up under the shadow of that threat. Such an abnormal way of life has become the norm for many Israelis."⁴⁷⁹ Operation Protective Edge was presented within this context. It was a purely defensive exercise, a struggle to alter the intolerable reality caused by the culminative effects of Hamas' terror.

Efforts to control the international law-based narrative continued following the cessation of hostilities. The discourse coalesced around a lengthy report published by a UN Fact Finding Commission. Israeli and Palestinian officials were accused of significant legal violations.⁴⁸⁰ In response, the Israeli Ministries of Foreign Affairs and Defence prepared a series of reports.⁴⁸¹ Reverting to a practice that

⁴⁷⁵ Karen Yourish & Josh Keller, "The Toll in Gaza and Israel, Day by Day" *New York Times* (8 August 2014), online: <<https://www.nytimes.com/interactive/2014/07/15/world/middleeast/toll-israel-gaza-conflict.html>>.

⁴⁷⁶ Israel MFA Behind the Headlines, *supra* note 468.

⁴⁷⁷ UNSCOR, 69th Year, 7214th Mtg. UN Doc. S/PV/7214 (2014) at 6 [UNSC 7214th Meeting].

⁴⁷⁸ *Ibid*, at 8.

⁴⁷⁹ *Ibid*, at 6.

⁴⁸⁰ The most significant of these concerned Israeli airstrikes that were alleged to have targeted residential areas within Gaza. Israel was accused of failing to distinguish between combatants and civilians during the conduct of its military operations. See, UNHRC, *Human right 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*, UN Doc. A/HRC/29/CRP.4 (23 June 2015) at para. 112 [UN COI Report 2015].

⁴⁸¹ State of Israel, *The 2014 Gaza Conflict: Factual and Legal Aspects* (May 2015), online: <<http://mfa.gov.il/ProtectiveEdge/Pages/default.aspx>> [2014 Gaza Conflict Report].

began following Operation Cast Lead, Israeli officials presented a comprehensive “factual and legal account” of the war. Legal analysis, assurances of IHL conformity, were posited upon a relatable context. Hamas and the dangers emanating from Gaza were manifestations of the global threat posed by terrorism. Since its inception, Hamas orchestrated countless attacks – suicide bombings, abductions, rockets, and cross-border raids. The report continued, noting that Hamas “had killed at least 1,265 Israelis, wounded thousands more, and terrorised millions.”⁴⁸²

The lifeworld told of vulnerability. Though the incessant rocket attacks were specific to Israel, the report conveyed a relatable sense of susceptibility to what was framed as a common threat.⁴⁸³ In detail, it described Israel’s long history of subjection to terrorism. Pictures of children seeking shelter from rockets accentuated the report. The effects of the attacks were conveyed in a detailed chapter that described “life under the threat of terrorist rockets and cross-border tunnel attacks.”⁴⁸⁴ The report cited medical studies that “show that large percentages of Israeli citizens in range of Hamas fire suffer from long-term symptoms of post-traumatic stress disorder and other impairments to personal, social, and occupational functioning, including intense anxiety, flashbacks, feelings of powerlessness, and hypervigilance.”⁴⁸⁵

Likened to ISIS and *al-Qa’ida*, Hamas sought “to impose an extreme version of Sharia law.”⁴⁸⁶ They were presented as an affront to liberal values – the agents of gender-based oppression; an armed group who had banned displays of Christian symbols, called for the execution of the LGBT community, harassed journalists, and persecuted political opponents. Hamas were aligned with Syria, Iran, and *Hezbollah*. They were not confined to Gaza. Hamas had planned “attacks out of Turkey and Qatar” and viewed “Europe as a crucial arena for its *jihadist* movement.”⁴⁸⁷

Necessity demanded a military response. Additional aspects of the lifeworld were identified as Israeli officials addressed specific claims of legal disregard. Required defensive actions were juxtaposed with the challenges of asymmetrical conflict. A shared experience – albeit one that was limited to states or militaries engaged in conflict against non-state armed groups – was recalled.⁴⁸⁸ Israel described the environment in which it was required to confront Hamas. Identifiable challenges, long acknowledged by states engaged in such forms of warfare, were offered.⁴⁸⁹ Hamas was described as having cultivated an arena of belligerency within which increased civilian casualties became tragic inevitabilities but not legal wrongs. Ambassador Prossor told the Security Council that, “Hamas exploits our concern for human life by hiding in Palestinian homes, schools and mosques and by using the basement of a hospital in Gaza as its headquarters. They are committing a double war crime, targeting Israeli civilians while hiding behind Palestinian civilians.”⁴⁹⁰ As the fighting continued, the Foreign Ministry attributed civilian deaths in Gaza to Hamas’ legal disregard. They developed a narrative, drawing upon the shared experiences of states that confront non-state armed groups in urban centres. Hamas were accused of

⁴⁸² *Ibid*, at 9.

⁴⁸³ *Ibid*, at 10-14.

⁴⁸⁴ *Ibid*, at 106-135.

⁴⁸⁵ *Ibid*, at 15.

⁴⁸⁶ *Ibid*, at 13.

⁴⁸⁷ *Ibid*, at 13-14.

⁴⁸⁸ This recalls Harald Müller’s contention of the lifeworld. Within this phase of communicative exchange actors construct narratives that draw upon common experiences. Cited in, Risse Let’s Argue, *supra* note 149 at 15.

⁴⁸⁹ See generally, Eyal Benvenisti, “The Legal Battle to Define the Law on Transnational Asymmetric Warfare” (2010) 20 Duke J. Comp. & Int’l L. 339.

⁴⁹⁰ UNSC 7214th Meeting, *supra* note 477 at 7.

willfully placing their own population in danger by launching attacks from densely populated areas, by using human shields, and by transforming civilian sites into military targets.⁴⁹¹

The post-war Israeli report documented this supplementary feature of the identified lifeworld. Hamas were adjudged to have aggravated their own citizens' suffering for political gain. Common operational challenges, that resulted in heightened death tolls, property damage, and the optics of razed civilian sites, were presented as inevitabilities: "despite the extensive precautions taken by the IDF to avoid or minimise damage to civilian life and property, the strategy of conducting hostilities from densely-populated civilian areas significantly exacerbated damage."⁴⁹² The report recalled the challenges of urban warfare. It evidenced Hamas' strategy. A combat manual recovered from the *al-Qassam* Brigade was replicated to illustrate that Hamas militants embedded within civilian populations to, as the manual stated, "raise the hatred of our citizens towards the [IDF] and increase their support [for Hamas]."⁴⁹³ Specific incidents were described. Satellite images showed Hamas conducting operations from protected sites. These familiar challenges of asymmetrical warfare were presented throughout the report. In great detail, Israel purported, that the war took place within a context, manufactured by Hamas, that was "directly responsible for the scale of the civilian casualties and property damage."⁴⁹⁴ Evaluations of the war's legitimacy were to be situated within this context. Notwithstanding the described challenges, Israeli officials claimed that the resulting military response was guided by international law.

2. Establishing the State as a General Norm-Acceptor

"No other country and no other army in history have gone to greater lengths to avoid casualties among the civilian population of their enemies," said Prime Minister Netanyahu.⁴⁹⁵ Having traveled to New York to address the General Assembly following the conclusion of Operation Protective Edge, the Prime Minister told the gathered dignitaries, "this concern for Palestinian life was all the more remarkable given that Israeli civilians were being bombarded by rockets day after day, night after night. And as their families were being rocketed by Hamas, Israel's citizen army...upheld the highest moral values of any army in the world."⁴⁹⁶

Israel's efforts to assert legitimacy were premised upon claims that the IDF's actions throughout the Gaza war reflected Israel's commitment to international law. Affronts to this supposed commitment were subject to investigation and presented as anomalies.⁴⁹⁷ While Israeli officials acknowledged that Protective Edge's legitimacy would be contested, the subject of intense legal scrutiny, Israel's intricate legal arguments, interpretative contentions, and assertions of compliance were preceded by claims of general legal fidelity. During the war, the Foreign Ministry disseminated real-time accounts of the IDF's legal conduct. These asserted that Israel was bound by IHL and "committed to limiting itself

⁴⁹¹ See, Israel Ministry of Foreign Affairs, *Fighting Hamas terrorism within the law* (7 August 2014), online: <<http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Fighting-Hamas-terrorism-within-the-law.aspx>> [Israel MFA Fighting Hamas Terrorism].

⁴⁹² 2014 Gaza Conflict Report, *supra* note 472 at 97.

⁴⁹³ *Ibid.*, at 74. See also, Israel Defense Forces, *Captured Hamas Manual Explains Benefit of Human Shields* (4 August 2014), online: <<https://www.idfblog.com/blog/2014/08/04/captured-hamas-combat-manual-explains-benefits-human-shields/>>.

⁴⁹⁴ 2014 Gaza Conflict Report, *supra* note 472 at 97.

⁴⁹⁵ "Transcript of Benjamin Netanyahu's Address to the 2014 UN General Assembly" *Haaretz* (29 September 2014), online: <<https://www.haaretz.com/transcript-netanyahu-s-speech-to-unga-1.5308958>>.

⁴⁹⁶ *Ibid.*

⁴⁹⁷ See generally, David Hughes, "Investigation as Legitimation: The Development, Use and Misuse of Informal Complementarity" (2018) 19 *Melb. J. Int'l L.* 84.

to a lawful response.”⁴⁹⁸ Continuing, the Foreign Ministry described Israel’s dedication to the principles of distinction, proportionality, humanity, and precaution. These legal tenets guide operational decisions. Israeli officials conveyed, that in accordance with these requirements, the IDF uses “the most sophisticated weapons...in order to pinpoint and target only legitimate military objectives and minimize collateral damage to civilians; advance notice is given to the civilian population located in the vicinity of military targets; [and] attacks are called off in cases in which a sudden civilian movement [occurs] in the targeted areas...”⁴⁹⁹

General claims of legal compliance featured throughout the conflict. Ambassador Prozor told the Security Council: “throughout Operation Protective Edge, Israel has been committed to upholding international law. Our army is a moral army like no other in the world. It does not aspire to harm any innocent person. We are operating only against terrorist targets and genuinely regret any civilian loss.”⁵⁰⁰ Defence Minister Moshe Ya’alon – in response to the publication of the Fact-Finding Commission report – accused the UN body of delegitimizing Israel. The IDF had “acted in accordance with international law in Operation Protective Edge, and did all it could to prevent harm to civilians.”⁵⁰¹

Public justifications became declarations of legal intention. These affirmations of Israel’s commitment to both the *jus ad bellum* and the *jus in bello* were conveyed through the Foreign and Defence Ministries report. Presentation of intricate legal arguments, direct responses to varied legal accusations, began by recounting Israel’s general commitment to international law. The report signalled acceptance of the norms governing the use of force and the conduct of hostilities. The IDF, “maintains binding policies, procedures and directives that implement Israel’s legal obligations...[and] ensures that its forces receive adequate training on these obligations.”⁵⁰² Legal accountability, officials claimed, demanded that, “the IDF sought to achieve the goals set by the Government of Israel [during Operation Protective Edge] while adhering to the Law of Armed Conflict.”⁵⁰³ Efforts and policies, presented in accordance with Israel’s legal commitments were described throughout the report.⁵⁰⁴

The use of force was designated as a last resort. The report conveyed what officials claimed were efforts to deescalate and employ diplomacy to avoid military confrontation.⁵⁰⁵ Detailing the threat posed by Hamas, the report tells of a general commitment to the *jus ad bellum* process. Only when such efforts were exhausted, Israel asserted that it was left with “no choice but to launch a broader military operation in order to protect Israel’s civilian population.”⁵⁰⁶ Upon reaching this conclusion, Israel announced its commitment to the rules regulating the conduct of warfare.

A detailed chapter of the Israeli report – professing legitimacy through case-specific accounts and describing the IDF’s actualization of IHL – begins with a generalized avowal: “Israel conducted its military operations during the 2014 Gaza Conflict in accordance with the rules of the Law of Armed Conflict governing both international and non-international armed conflicts, including the rules

⁴⁹⁸ Israel MFA Fighting Hamas Terrorism, *supra* note 491.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ UNSCOR, 69th Year, 7220 Mtg. UN Doc. S/PV/7220 (2014) at 8.

⁵⁰¹ Yaakov Lappin, “Ya’alon: Israel Won’t Tolerate Attempts to Tarnish IDF Soldiers” *The Jerusalem Post* (22 June 2015), online: <<https://www.jpost.com/Israel-News/Yaalon-Israel-wont-tolerate-attempts-to-tarnish-IDF-soldiers-406796>>.

⁵⁰² 2014 Gaza Conflict Report, *supra* note 472 at 4.

⁵⁰³ *Ibid.*, at 4.

⁵⁰⁴ This included descriptions of the IDF’s employment of advance warning systems, targeting policies, and the use of unilaterally declared humanitarian pauses. See, *Ibid.*, at 4-5.

⁵⁰⁵ *Ibid.*, at 32.

⁵⁰⁶ *Ibid.*

relating to distinction, precautions and proportionality.”⁵⁰⁷ The report continues to describe Israel’s commitment to the international conventions governing armed conflict and its compliance with “all rules of customary international law, including rules embodied in conventions to which [Israel] is not party.”⁵⁰⁸ The report attempts to persuade audiences, that Israel exhibits a general sense of legal fidelity, through further substantiation. It details “strict procedures and oversight for compliance with the Law of Armed Conflict.”⁵⁰⁹ The IDF’s training procedures are explained over several pages.⁵¹⁰ A sub-section of the report recounts how “IDF military lawyers regularly provide advice on international law at all levels of command.”⁵¹¹ Operational regulations, directives, and orders – that “implement applicable rules of the Law of Armed Conflict” – are extensively cited.⁵¹²

3. Demonstrating the Authority to Interpret

Post-war legal contentions were coupled with displays of competence and authoritativeness. The style and presentation of the Foreign and Defence Ministries report; accentuation of the contribution made by military lawyers in the planning, conduct, and justification of Protective Edge; and the role attributed to independent experts supplemented Israel’s interpretative avowals. These persuasive appeals recall Charlotte Peevers’ suggestion that professional expertise is conveyed to influence the legal justifications offered upon the use of force.⁵¹³

The legal contentions – both general and specific – made throughout the Foreign and Defence Ministries report present in a “quasi-academic” style. The report is published in English. It contains extensive footnoting and elaborate legal reasoning.⁵¹⁴ Particular legal arguments, interpretative positions, are supported in a familiar manner. Experts are cited. Affirming legal materials are displayed.⁵¹⁵ The report itself is presented as the authoritative account of the war. It is framed as an “unprecedented effort to present the factual and legal aspects concerning the 2014 Gaza Conflict.”⁵¹⁶

The report’s thoroughness, the ability of its authors to draw upon intelligence briefings, access satellite images and interview witnesses, and to receive experiential accounts from decision-makers purport to lend credence to the report’s legal and factual contentions. Officials claim that the Israeli report is “far more comprehensive than reports issued by other organisations, including international organisations and non-governmental organisations, and is also unparalleled in its access to information from Israel, including information regarding the conduct of the terrorist organisations and the reasoning and details behind Israel’s conduct.”⁵¹⁷ The report’s professional composition, access, and substantiation, each demonstrate what Israeli officials present as authoritative accounts of legal legitimacy.

⁵⁰⁷ *Ibid*, at 137.

⁵⁰⁸ The report cites the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and Additional Protocols I and II to the Geneva Conventions as agreements to which Israel was not a signatory but which were viewed as constituting customary international law. See, *Ibid*, at 138.

⁵⁰⁹ *Ibid*.

⁵¹⁰ *Ibid*, at 138-140.

⁵¹¹ *Ibid*, at 140-141.

⁵¹² *Ibid*, at 141-147.

⁵¹³ Peevers Politics of Justifying Force, *supra* note 25 at 14.

⁵¹⁴ Shereshevsky Back in the Game, *supra* note 7 at 51.

⁵¹⁵ For example, the Israeli claim that it does not exercise effective control over Gaza and thus can not be considered as an occupying power is said to be “supported by leading international law scholars.” In support, the report cites academic contributions by Adam Roberts, Eyal Benvenisti, and Yuval Shany. Additionally, it cites decisions by the Israeli High Court of Justice and the First Report of the Turkel Commission. See, 2014 Gaza Conflict Report, *supra* note 472 at 17.

⁵¹⁶ *Ibid*, at 8.

⁵¹⁷ *Ibid*.

The role of legal expertise is accentuated. A chapter of the report – describing the IDF’s internalization of international law – details the influence of lawyers. Military commanders receive IHL training from the IDF’s legal experts. Legal advice is available when operations are planned, in real-time, and upon their conclusion.⁵¹⁸ The report prefaces its legal defense of Operation Protective Edge by informing that “the Military Advocate General [MAG] Corps deploys specially trained military lawyers at various levels of command in order to improve access to legal advice and enhance the implementation of international law during operations, as well as to assist with [the] ‘lessons-learned’ process following operations.”⁵¹⁹ Legal trainings are described, suggesting interpretative expertise. The resulting legal advice, the report notes, receives elevated status:

“IDF military lawyers regularly provide advice on international law at all levels of command. These lawyers...are not subordinate to the commanders they advise, because the [MAG] has an independent status outside the military hierarchy in relation to all legal issues...By positioning military lawyers in this manner within the IDF, Israel ensures that they can provide frank and professional advice. Legal opinions of the MAG Corps are binding upon the IDF, including with regard to the legality of individual attacks.”⁵²⁰

The ILD, upon the commencement of hostilities, is staffed by “dozens of additional Law of Armed Conflict experts.”⁵²¹ Functioning independently from the military command, the report explains that the legal experts advise the General Staff Command. They are deployed to provide IHL advice at the regional and divisional levels by assessing the “legality of decisions regarding rules of engagement, targeting, use of weapons, detainee treatment, and humanitarian efforts.”⁵²²

The endorsements of independent legal experts are accentuated. The capacity of Israel’s post-conflict accountability mechanisms is described and corroborated with reference to recommendations offered by the Turkel Commission – the independent expert body that evaluated Israel’s investigatory procedures.⁵²³ Prominent experts, having endorsed Israel’s legal capacity or proffered comparable legal interpretations were listed, their credentials provided in accompaniment.⁵²⁴ The IDF extended “unprecedented access” to Michael Schmitt and John Merriam to evaluate whether Israel’s “systems and processes for engaging in attacks promote compliance with the [Law of Armed Conflict].”⁵²⁵ Schmitt, a prominent IHL expert, and Merriam, a Major in the US Judge Advocate General’s Corps, were accompanied by IDF officials on a “staff ride” of the Gaza Strip. They were permitted to inspect an Israeli operations center that oversees combat missions, to see a “ Hamas infiltration tunnel,” and to review “IDF doctrine and other targeting guidance... [they received] briefings by IDF operators

⁵¹⁸ *Ibid*, at 138.

⁵¹⁹ *Ibid*.

⁵²⁰ *Ibid*, at 140.

⁵²¹ *Ibid*, at 141.

⁵²² *Ibid*.

⁵²³ The report noted that the Commission was led by the former Supreme Court Justice, Jacob Turkel and observed by international legal experts. Continuing, it noted that “although the Turkel Commission recommended additional best practices that Israel might implement, it found that Israel’s system ranks favourably with those of other democratic countries, including Australia, Canada, Germany, the Netherlands, the United Kingdom and the United States. See, *Ibid*, at 218. See also, 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* (February, 2013).

⁵²⁴ *Ibid*, at 231.

⁵²⁵ See, Michael N. Schmitt & John J. Merriam, “The Tyranny of Context: Israeli Targeting Practice in Legal Perspective” (2015) 37 U. Pa. J. Int’l L. 53.

and legal personnel who have participated in targeting.”⁵²⁶ Schmitt and Merriam published a law review article, in the University of Pennsylvania’s *Journal of International Law*, conveying the IDF’s targeting procedures and associated legal positions.⁵²⁷ This was presented as the “first look inside Israeli targeting.”⁵²⁸ Schmitt and Merriam continued, evaluating Israel’s contentions, and concluding that in many instances, “the IDF imposes policy restrictions that go above and beyond the requirements of the [law of armed conflict].”⁵²⁹ Israel’s interpretative contentions are deemed conventional. However, as with many states that forward persuasive appeals of legal legitimacy upon the use of force, these contentions often appeal to permissively construed legal standards.

4. Instilling the Standard of the Acceptable Legal Argument

Much of the international community denounced Israel’s conduct during the 2014 Gaza war. Mounting civilian casualties, the damage and displacement incurred from constant bombardment, caused significant segments of the international community to replace calls for restraint with accusations of legal violations.⁵³⁰ The UN Fact Finding Commission report charged that Israel’s targeting selection “did not take into account the requirement to avoid, or at the very least minimize, incidental loss of civilian life.”⁵³¹ Illustrating the sentiment – that states rarely dismiss law’s relevancy but instead make interpretative contentions – Israeli officials promoted permissive readings of IHL in response to accusations of legal violations.

Efforts to alter international law’s application accompanied formal affirmations of law’s relevancy.⁵³² Prime Minister Netanyahu and Ehud Barak, when serving as Minister of Defence, endorsed restructuring the legal standards that regulate hostilities between states and non-state armed groups. Barak noted that while Israel cannot change international law it could advantageously develop it.⁵³³ Following Operation Protective Edge, contestations of legitimacy were displayed through assertions that IDF conduct complied with broadly constructed legal standards. Favoured interpretations of IHL principles were offered. Premised upon expansive conceptions of reasonableness, Israeli officials sought to instill and then satisfy these facilitatory legal standards.

Israel asserts that it “scrupulously observed the principle of distinction.”⁵³⁴ Grounded in reasonableness, adherence and legitimacy were professed. The report claimed that the IDF limited targeting to “persons where there was reasonable certainty that they were members of organised armed groups or civilians directly participating in hostilities, and only [targeted] structures where there was

⁵²⁶ *Ibid*, at 56.

⁵²⁷ *Ibid*, at 94-136.

⁵²⁸ *Ibid*, at 139.

⁵²⁹ *Ibid*.

⁵³⁰ See generally, UNSCOR, 60th Year, 7222nd Mtg. UN Doc. S/PV/7222 (2014). See also, UNHRC, 29th Sess., Ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem, UN Doc. A/HRC/RES/29/25 (2015) (adopted 41-1 with 5 abstaining).

⁵³¹ Continuing the report claims that “the decision by the IDF to use mortars in this incident rather than availing themselves of more precise weapons, indicates that the IDF did not take all feasible precautions to choose means with a view to avoiding or minimizing civilian casualties.” See, UN COI Report 2015, *supra* note 480 at para. 446.

⁵³² See, e.g., Israel MFA Fighting Hamas Terrorism, *supra* note 491. See also, 2014 Gaza Conflict Report, *supra* note 472 at 137-138.

⁵³³ See, Eyal Weizman, *The Least of All Possible Evils: Humanitarian Violence from Arendt to Gaza* (London: Verso, 2011) at 93. See generally, Asa Kasher, “Operation Cast Lead and the Ethics of Just War” *Azuer* (2009), online: <<http://azure.org.il/article.php?id=502>>. See also, George E. Bisharat, “Violence’s Law: Israel’s Campaign to Transform International Legal Norms” (2013) 42 *J. Palest. Stud.* 68 [Bisharat Violence’s Law].

⁵³⁴ 2014 Gaza Conflict Report, *supra* note 472 at 155.

reasonable certainty that they qualified as military objectives.”⁵³⁵ Accentuating IHL’s most permissive features, an attack, the report noted, against an intended military target but which unintentionally struck a civilian object did not render the action unlawful.⁵³⁶ Israel professed that its precautionary measures were unprecedented in scale and rigor.⁵³⁷ Roof knocking – a method devised by the IDF during Operation Cast Lead to provide final warning of an impending attack – was described as exceeding the requirements of international law. It was deemed highly effective and would later be employed by US forces in Syria.⁵³⁸ The practice – the legal status of which remains contentious (even legally dubious) – imposed an uncertain legal standard in substantiation of an Israeli narrative of compliance and legitimacy.⁵³⁹

Proportionality is presented as an operational mandate.⁵⁴⁰ The Foreign and Defence Ministries report stresses that proportionality does not “forbid incidental harm to civilians and civilian property. Rather, under customary international law, this principle prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, or damage to civilian objects...that would be excessive in relation to the military advantage anticipated.”⁵⁴¹ Determinations, assessments of whether an attack meets this standard, could not be made in hindsight. Israel claimed that proportionality analysis was adjudged against the standard of the “reasonable military commander.”⁵⁴² The excessiveness of collateral damage and the anticipated military advantage are assessed in accordance with “the information reasonably available to [the military commander] at the time of the attack.”⁵⁴³ If the damage incurred becomes excessive, “the attack is nevertheless lawful as long as, when the attack was launched, the commander reasonably expected the collateral damage to be proportionate.”⁵⁴⁴

The Israeli report alters the burden of the proportionality assessment. Contending that because “third parties lack information about the aims, intelligence, operational circumstances and means of an attack,” they are ill-suited to discern “the military advantage anticipated by an individual commander...”⁵⁴⁵ The acceptableness of legal arguments – grounded in unattainable information – is altered.⁵⁴⁶ Plausibility replaces validity. Assessments of proportionality, corresponding assertions of legitimacy, become reliant upon particular valuations. This suggests that “only a military commander can properly make proportionality assessments.”⁵⁴⁷ An acceptable legal standard is imposed. Lieutenant Colonel Roni Katzir, in a paper presented to the IDF International Conference on the Law of Armed Conflict and published in a special issue of the *Vanderbilt Journal of Transnational Law*,

⁵³⁵ *Ibid.*

⁵³⁶ *Ibid.*, at 169.

⁵³⁷ These included the use of advanced warning systems, timing attacks to ensure minimal civilian risk, delaying planned attacks to allow evacuation of targeted areas, selection of munitions, and other methods. See, *Ibid.*, at 170.

⁵³⁸ *Ibid.*, at 180. See, Itamar Mann, “Roof Knocking and the Problem of Talking with Bombs” *Just Security* (31 May 2016), online: <<https://www.justsecurity.org/31319/roof-knocking-problem-talking-bombs/>>.

⁵³⁹ See, Janina Dill, “Israel’s Use of Law and Warning in Gaza” *Opinio Juris* (30 July 2014), online: <<http://opiniojuris.org/2014/07/30/guest-post-israels-use-law-warnings-gaza/>>.

⁵⁴⁰ 2014 Gaza Conflict Report, *supra* note 472 at 181.

⁵⁴¹ This language closely adheres to the First Additional Protocol to the Geneva Convention. See also, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict* (8 June 1977), 1125 U.N.T.S. 3 at 57(2)(a)(iii) [First Additional Protocol].

⁵⁴² *Ibid.*, at 181.

⁵⁴³ *Ibid.*, at 185.

⁵⁴⁴ *Ibid.*, at 186.

⁵⁴⁵ *Ibid.*

⁵⁴⁶ Bisharat Violence’s Law, *supra* note 533 at 76. See, Laleh Khalili, *Time in the Shadows: Confinement in Counterinsurgencies* (Palo Alto, CA: Stanford University Press, 2013) at 64.

⁵⁴⁷ Roni Katzir, “Four Comments on the Application of Proportionality under the Law of Armed Conflict” (2018) 51 *Vand. J. Trans. L.* 857 at 859.

states that reasonableness implies that “the law accepts that assessing excessiveness is not a matter of reaching the one and only answer to a determination. It would be a mistake to think that in each and every case of a proportionality assessment there is a single point on a scale where each and every reasonable military commander agrees that a proportionate attack becomes excessive.”⁵⁴⁸ This evaluative standard – that of the reasonable military commander – is not found in the First Additional Protocol to the Geneva Conventions.⁵⁴⁹ It is not deduced from international case law.⁵⁵⁰ Instead, Israeli officials draw upon select international precedent to persuade audiences that IDF actions in Gaza should be evaluated through this permissive legal standard.

5. Drawing Upon Precedent and Commonality

Israeli officials appealed to precedent and commonality. Efforts to legitimize Operation Protective Edge drew upon analogous legal interpretations to persuade varied audiences. The standard of the reasonable military commander – the imposed means of assessing (and subsequently asserting) conformity with IHL – derives from the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*.⁵⁵¹ Israel’s initial efforts to establish this evaluative standard began before the 2008-09 Gaza war and drew heavily upon the ICTY Prosecutor’s report.⁵⁵² Following Operation Cast Lead, Israeli officials extensively cited the report.⁵⁵³ The Prosecutor’s report, Israel contended, provided credence to the claim that “international law confirms the need to assess proportionality from the standpoint of a reasonable military commander, possessed of such information as was available at the time of the targeting decision and considering the military advantage of the attack as a whole.”⁵⁵⁴

Further attempts to impose an expansive notion of proportionality can again be traced to the discursive exchanges that followed the 2008-09 Gaza war. State practice was cited. The military manuals of various nations referenced. Statements by individuals who inhabited select epistemic communities were recalled. Israel recounted that Australia’s Defence Force Manual holds that “collateral damage may be the result of military attacks. This fact is recognised by [the Law of Armed Conflict] and, accordingly, it is not unlawful to cause such injury or damage.”⁵⁵⁵ Canada’s Law of

⁵⁴⁸ Katzir notes that the article is written in a personal capacity and “does not necessarily represent the official views of the Israel Defense Forces or the States of Israel.” See, *Ibid*, at 859.

⁵⁴⁹ See, First Additional Protocol, *supra* note 541 at 57(2)(a)(iii).

⁵⁵⁰ See, Ian Henderson & Kate Reece, “Proportionality under International Humanitarian Law: The Reasonable Military Commander Standard and Reverberating Effects” (2018) 51 Vand. J. Trans. L. 836 at 837-839.

⁵⁵¹ *Ibid*, at 841. The report contends that:

“it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the reasonable military commander. Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to noncombats or the damage to civilian objects was clearly disproportionate to the military advantage gained.”

See, *Final Report to the Prosecutor*, *supra* note 204 at para. 50.

⁵⁵² References to the standard of the reasonable military commander appeared throughout a lineage of official Israeli communications – Foreign Affairs statements, High Court of Justice decisions, diplomatic notes, background papers, and legal briefs. See, ICRC Database of Customary IHL, *Israel: Practice Relating to Rule 14: Proportionality in Attack*, online: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_il_rule14>.

⁵⁵³ The Operation in Gaza 2009, *supra* note 51 at 12, 35, 45-46, 49, 144.

⁵⁵⁴ *Ibid*, at 45.

⁵⁵⁵ *Ibid*, at 44. These were referred to through the ICRC Customary IHL Study. See also, Jean-Marie Henckaerts & Louise Doswald-Beck, eds, *Customary International Humanitarian Law, Volume II: Practice* (Cambridge: Cambridge University Press, 2005) at 299 [Customary International Humanitarian Law].

Armed Conflict Manual and the US Naval Handbook were referenced in substantiation.⁵⁵⁶ General A.P.V. Rogers, the former Director of British Army Legal Services, was cited at length. Israeli officials noted a lecture, delivered at the Lauterpacht Center for International Law, during which General Rogers stated that: “civilians and civilian objects are subject to the general dangers of war in the sense that attacks on military personnel and military objectives may cause incidental damage...Members of the Armed Forces are not liable for such incidental damage, provided it is proportionate to the military gain expected of the attack.”⁵⁵⁷

Writing after Operation Protective Edge in a publication by the Institute for National Security Services, Pnina Sharvit Baruch again recalled the reasonable military commander. With reference to the ICTY Prosecutor’s report, Sharvit Baruch reiterated that: “the laws of warfare state that the standard [to assess proportionality] is that of a reasonable military commander.”⁵⁵⁸ This preferred standard was referenced within a discussion regarding the challenges Israel would face when asserting legal legitimacy.⁵⁵⁹

6. Conclusion

The Foreign and Defence Ministries report, published following Operation Protective Edge, made extensive use of precedent. Legal contentions and factual assertions were supplemented with supportive materials. Israel’s responses, the series of reports, the diplomatic interactions, public declarations, and targeted addresses, are demonstrative of the ways that states appeal to international law to legitimize and to persuade. Persuasive appeals will, however, become fragmented. Considerations of effectiveness must account for the constitutive parts of an overall legal strategy. They must evaluate the varied receptions that correspond to a particular legal assertion or argumentative objective.

Israel’s legal narrative contained appeals to both the *jus ad bellum* and the *jus in bello*. Initial contentions – of defence against a persistent barrage of rockets and terror – received broad support. Partially, these familiar reactions were guided by ideology and partisanship. Reliable allies including the US, the UK, Australia, France, and Canada indicated their support of Israel’s military initiative.⁵⁶⁰ Israel’s staunchest critics denounced IDF aggression in Gaza.⁵⁶¹ Unexpected reactions featured alongside these predictable diplomatic postures. Egypt and Saudi Arabia condemned Hamas’ actions, accusing the Gazan group of exacerbating Palestinian suffering.⁵⁶² Following several meetings, the Security Council issued a balanced statement that called for an immediate ceasefire. This neither endorsed or denounced Israel’s actions.⁵⁶³

⁵⁵⁶ The Operation in Gaza 2009, *supra* note 51 at 44. See also, Customary International Humanitarian Law, *supra* note 555 at 300, 305.

⁵⁵⁷ The Operation in Gaza 2009, *supra* note 51 at 44-45.

⁵⁵⁸ Sharvit Baruch Operation Protective Edge, *supra* note 206 at 67.

⁵⁵⁹ See, *Ibid*, at 67-69.

⁵⁶⁰ For a summary of accounts, see, “World reacts to the conflict in Gaza” *Al Jazeera* (10 July 2014), online: <<https://www.aljazeera.com/news/middleeast/2014/07/world-reacts-conflict-gaza-201471073217736666.html>>.

⁵⁶¹ *Ibid*.

⁵⁶² See generally, Yoel Guzansky, “The Gaza Campaign: An Arena for Inter-Arab Confrontation” in Anat Kurz and Shlomo Brom, eds, *The Lessons of Operation Protective Edge* (Tel Aviv: Institute for National Security Studies, 2014) 167 [Guzansky The Gaza Campaign]. See also, Roi Kais & Elior Levy, “ Hamas Demonstratively Bypasses Egypt” *Ynet News* (19 July 2014), online: <<http://www.ynet.co.il/articles/0,7340>>.

⁵⁶³ UNSCOR, 69th Year, 7725 Mtg, UN Doc. S/Prst/2014/13.

Certain states were influenced by Israel's legal appeals. Canadian officials accepted a near verbatim account of the *jus ad bellum* arguments that Israel presented through its public pronouncements.⁵⁶⁴ Often, however, strategic and non-legal considerations affect the reception of a legal narrative. Egyptian and Saudi officials, offering unprecedented criticisms of Hamas' actions and aberrant silence in response to Israel's use of force, sought tactical benefit. Officials in Cairo and Riyadh viewed Hamas as an extension of the Muslim Brotherhood, a beneficiary of Turkey and Qatar, and as acting in the furtherance of Iranian interests.⁵⁶⁵ Political calculations, ever-present, affected the reception of the Israeli narrative and guided the responses of key regional actors.⁵⁶⁶

Support for or indifference towards Operation Protective Edge was not, however, absolute. Considerations of the cause of war were replaced by deliberations regarding military conduct. The *jus in bello* arguments presented by Israel were less impactful. Acquiescence dwindled. As the campaign continued, regional leaders and key allies altered their endorsements.⁵⁶⁷ King Abdullah claimed that Israeli actions in Gaza constituted war crimes. Jordan stated that mounting civilian casualties contradicted Israel's claim that the war was justified. The Egyptian Foreign Ministry denounced the inhumane blockade of Gaza.⁵⁶⁸ US officials would also adjust their often-steadfast support. While reaffirming Israel's right to use force against Hamas attacks, US officials became increasingly critical of particular Israeli actions.⁵⁶⁹

The war's optics – the scores of dead, the seemingly heedless destruction that marked Gaza's landscape – drove sentiment. Many critics remained unmoved by Israel's legal contentions. Others, however, accepted varying aspects of the Israeli narrative. Evaluations of persuasiveness must attempt to reconcile the fragmentation of both legal contentions and diplomatic receptions. Audiences will pick and choose which aspects of a broad legal appeal that they accept, that they understand as morally imperative, as strategically advantageous, as plausibly acceptable, or as materially insignificant. Assessments of persuasion's effectiveness, or whether legal argument influenced the perceived legitimacy of a particular military operation often evades a singular response. It necessitates long-term perspective, acknowledgement of sought objectives, and identification of the conspicuous and inconspicuous ways that legal discourse can affect non-legal considerations as a state contends that a particular use of force was, in fact and in law, legitimate.

⁵⁶⁴ "Stephen Harper accuses Hamas of using human shields, urges world leaders to side with Israel" *National Post* (13 July 2014), online: <<https://nationalpost.com/news/world/israel-middle-east/stephen-harper-accuses-hamas-of-using-human-shields-urges-world-leaders-to-side-with-israel>>. See also, Les Whittington, "John Baird condemns Hamas for rejecting ceasefire" *Toronto Star* (15 July 2014), online: <<https://www.thestar.com/news/canada/2014/07/15/hamas-not-interested-in-peace-john-baird-says.html>>.

⁵⁶⁵ Guzansky The Gaza Campaign, *supra* note 562 at 168-169.

⁵⁶⁶ See generally, David D. Kirkpatrick, "Arab Leaders, Viewing Hamas as Worse Than Israel, Stay Silent" *New York Times* (30 July 2014), online: <<https://www.nytimes.com/2014/07/31/world/middleeast/fighting-political-islam-arab-states-find-themselves-allied-with-israel.html>>.

⁵⁶⁷ Ariel Ben Solomon, "Israel not taking Jordan, Egypt, and the Saudi's Belated Criticism too Seriously" *Jerusalem Post* (13 August 2014), online: <<https://www.jpost.com/Arab-Israeli-Conflict/Israel-not-taking-Jordan-Egypt-and-the-Saudis-belated-criticism-too-seriously-370963>>.

⁵⁶⁸ *Ibid.* See also, Gilead Sher & Liran Ofek, "Reviving a Regional Approach" in Anat Kurz and Shlomo Brom, eds, *The Lessons of Operation Protective Edge* (Tel Aviv: Institute for National Security Studies, 2014) 159 at 161.

⁵⁶⁹ See generally, Oded Eran, "The United States and Israel in Crossfire" in Anat Kurz and Shlomo Brom, eds, *The Lessons of Operation Protective Edge* (Tel Aviv: Institute for National Security Studies, 2014) 183.

VI. CONCLUSION

Persuasion is a means to induce change.⁵⁷⁰ Whether employed by a non-compliant state seeking legitimacy, an international lawyer furthering her client's interest, a norm entrepreneur that desires social adaptation, or a non-governmental organization promoting a favoured interpretation, persuasion exemplifies international law's function. The relationship between persuasion and international law is often framed around questions of compliance. How can a non-compliant state be persuaded to act in accordance with legal dictate? The importance of this question is clear. Successful efforts to ensure compliance enable international law's ability to reform, to protect, to limit the use of force, to promote human rights, and to contribute to a stable world order. The preceding pages attempt to move considerations of persuasion beyond its common affiliation with compliance. They do not dismiss the relevancy of these questions or the view, assumed by many lawyers, that persuasion is an essential element of the trade. I instead offer a broader conception of international law's purpose. Within, persuasion becomes a two-way discourse between the non-compliant entity and a wider audience. It is both a means to promote compliance and to define what compliance means.

Compliance serves as a marker of international law's success. Yet compliance is a limited measure of international law's relevancy.⁵⁷¹ Persuasion's effectiveness is not only assessed by adjudging legal fidelity. While evaluating effectiveness is a natural corollary to understanding the methods of legal change, ruminations must consider a host of legal and non-legal factors. Multitudinous considerations – beyond the merits of a legal contention and the skill with which an argument is delivered – affect the reception of an international legal claim. Such factors will include: (i) economic considerations; (ii) strategic and/or security alliances; (iii) the value or desirability of precedent; (iv) effects on regional stability; (v) self-interest; (vi) political personalities and leadership; (vii) domestic political considerations; (viii) the anticipated reactions of other states; (ix) values that the state wishes to project/believes it represents; (x) whether the proposed legal action affects states or non-state actors; (xi) implications for sovereignty; (xii) emotional appeal; (xiii) framing and context; (xiv) whether the appeal facilitates a 'winning' approach; (xv) available information; (xvi) public perception; (xvii) media portrayal; (xviii) lobbying and private influence; (xix) history and the state's sense of its place within the global order; (xx) power politics and whether the persuading entity can pressure the state to accept its legal contention.

It is difficult to discern the effectiveness of a legal contention. Yet questions regarding factors, both legal and non-legal, that influence the reception of a persuasive appeal are unavoidable. In certain instances where multiple considerations interject and a decisionmaking process lacks transparency, considering how an international legal argument motivates responses and contributes towards outcomes will be an arduous, even improbable, task.⁵⁷² Such ambiguity is unavoidable even when a particular persuasive episode is articulated through a legal vernacular. The preceding case studies have only touched on the question of effectiveness. In concluding, each case study alludes to different factors that affect the reception of the respective persuasive appeals.

The legal arguments offered by Russian officials tell of the strategic significance of non-legal objectives and differentiated audiences. The demonstrable falsity and legal flaws in Russia's contentions resulted

⁵⁷⁰ Finnemore & Sikkink International Norm Dynamics, *supra* note 157 at 914.

⁵⁷¹ See generally, Lisa L. Martin, "Against Compliance" in Jeffery L. Dunoff & Mark A. Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013) 591.

⁵⁷² Rachel Brewster, "The effectiveness of international law and stages of governance" in Wayne Sandholtz & Christopher A. Whytock, eds, *Research Handbook on the Politics of International Law* (Cheltenham: Elgar Publishing, 2017) 55 at 61.

in their broad dismissal. However, evaluations of these appeals must consider more than their legal cogency. Assessments of persuasiveness must understand what the desired outcome of a legal appeal is and whether the associated appeal achieves or furthers this objective. The effectiveness of Russia's legal approach may be dismissed by the legal academy or international bodies but is also contingent on how it is received by BRIC nations, key allies such as China, and certain demographics within the near abroad.

Legal contentions, offered by US and British officials in justification of military action in Syria, tell of the influence of context and the necessity of incrementalism. Direct legal considerations ask whether the unwilling or unable test has achieved legal status. Did US and British arguments contribute towards the test's legal standing? Yet the extent to which the described arguments are effective, the manner by which they are received and contribute to the sought objective is inseparable from the war on terror and the motives, sentiments, and policies that it induces. Equally, evaluations of the argument's effectiveness cannot only be understood in relation to a specific military action. While the response of states in the Security Council and General Assembly are important indicators of an argument's effectiveness, full evaluation requires long-term perspective. It is necessary to understand how the particularities of one argumentative episode contribute to the gradual acceptance of a persuasive contention's political legitimacy as well as legal certainty.

Israel's attempts to justify its actions during the 2014 Gaza War tell of fragmentation. Assessments of persuasion's influence must consider how the component parts of a cohesive legal argument will pursue varying objectives, target disparate audiences, and be selectively received. The surety of an *ad bellum* contention will not necessarily equate to *in bello* acceptance. A state's argumentative strategy will pursue multiple objectives. Israel's efforts to legitimize its military actions in Gaza sought legal affirmation but also intended to maintain and develop diplomatic relations, shape a media narrative, and avoid scrutiny by the International Criminal Court.⁵⁷³

Further questions need to be asked. The purpose here has been to identify and map persuasive techniques. I suggest that international law matters. However, within deliberative environments understandings of persuasion and legal argument must look beyond conceptions of compliance and towards notions of effectiveness to further comprehend international law's influence and potential. Though this paper describes particular forms of legal argument, these core claims are generalizable beyond the contexts of the use of force and IHL. Questions regarding the successes and failures of persuasive appeals, though alluded to, require additional attention. This exceeds the current scope. A fuller understanding of international legal argument's ability to persuade should move to consider how persuasive efforts can be evaluated, what constitutes success, how to adjudge influence, and how to differentiate between the many factors that influence a legal appeal's reception. By asking such questions and observing such processes we can further our understanding of international law's broader function while better harnessing its strongest potentials and resisting its worst impulses.

⁵⁷³ See generally, David Hughes, "Investigation as Legitimation: The Development, Use and Misuse of Informal Complementarity" (2018) 19 Melbourne J. Int'l L. 84.

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