The Development and Use of Informal Complementarity

States that engage in the use of force often seek to legitimize their actions, both *jus ad bellum* and *jus in bello*, through appeals to international law. Uses of force are defined as constituting self-defence, they are held to be proportionate responses to an identified threat, targets are defined as legitimate military objectives, and the appropriateness and legality of a particular munition or means of attack is asserted. States have long appealed to the language, the prescriptions, and accommodating interpretations of international law – formally and rhetorically – as a means of self-endorsing the virtue of their actions within instances of international and non-international armed conflict.

Equally, non-state actors, opponents of a military action, and groups or non-governmental organizations who seek to hold a state that employs the use of force to account appeal to the legitimizing effect and political currency of international law. This has caused David Kennedy to remark 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."

This proposed paper and presentation, titled *The Development and Use of Informal Complementarity: A Case Study of the 2008-2009 and 2014 Gaza Wars* explores how state actors are increasingly appealing to the principle of complementarity to insulate their actions from the formal jurisdiction of the International Criminal Court as well as from general international oversight. It introduces the notion of informal complementarity. This differs from formal understandings of complementarity as commonly associated with Article 17 of the Rome Statute and as used to assess the admissibility of a particular case that comes before the Court in The Hague. Instead, engagement with this notion of informal complementarity may be understood as occurring independent of ICC intervention, beyond the strictures of statutory requirements, and outside considerations of a particular case or referral. It draws upon complementarity's ordering of domestic jurisdiction to assert that a state that takes measures to investigate and redress alleged violations of international law has effectively and legitimately satisfied its international legal commitments.

In developing this understanding, the paper explores the ways in which this notion of complementary has been developed and engaged by Israeli and Palestinian actors in response to the 2008-2009 and 2014 Gaza wars. These engagements alongside the increased likelihood that the Office of the Prosecutor at the ICC will commence a formal investigation into "the situation in Palestine" raises a host of formal legal questions. These range from the legality of Israeli and Palestinian actions that occurred following the commencement of hostilities in Gaza to questions of admissibility and associated considerations regarding Palestinian statehood. This paper, however, assumes an agnostic approach to such associated legal questions. It is instead concerned with the ways by which actors are drawing upon the proposed understanding of complementarity and what the implications of these legal engagements, intended to legitimize, are for the role of international humanitarian law upon the use of force.

These may be significant. Engagement with this amended notion of complementarity can facilitate state efforts to forestall formalist measures. It often endeavours to nationalize

international scrutiny of state actions during instances of armed conflict and upon the use of force by demonstrating the appropriateness of domestic legal systems to ensure redress and prevent against impunity should an accused violation of international law become substantiated. Appeals to this pre-emptive, informal understanding of complementarity often focus on individual indiscretions and violations. Such a limited focus, while justified in many instances, promotes an understanding of international humanitarian law that favours redress of deviations from state or military policy while neglecting (or insulating) the policies and state actions that often drive such violations. Collectively, this threatens to promote a conception of international humanitarian law that understands breaches as occurrences requiring redress not prevention. A violation becomes something that must be rectified not avoided. This contributes towards an ordering of international humanitarian law which preferences the achievement of military objectives above the assurance of humanitarian obligations.