

Just the Facts: Reimagining Wartime Investigations Concerning Attacks Against NGOs[†]

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Since October 2015, the United States has been in conflict with an NGO—Doctors Without Borders—over the bombing of the NGO’s hospital in Kunduz, Afghanistan, early that month. Various fact-finding efforts by the US Central Command, the UN Mission in Afghanistan, NATO, and Doctors Without Borders focused on one question: whether the bombing conduct constituted a war crime. This focus on issues of law, guilt, and blame diverted attention from the more basic questions of what actually happened, why it happened, and what might be done to prevent similar incidents in the future. Moreover, the fact-finding efforts ended up exacerbating the controversy and exposing the inherent disbelief and mistrust between States, NGOs, and legal institutions. The attack on the Kunduz hospital and the controversy that followed exemplify a broader phenomenon. Legal fact-finding efforts aimed at resolving factual disputes often trigger more controversies, as the aforementioned entities are generally ill-equipped to gather sensitive military information and to facilitate cooperation among interested parties. This is particularly true when the controversy relates to attacks harming non-State actors, such as Doctors Without Borders. Fact-finding efforts surrounding such attacks generally suffer from structural, political, and legal weaknesses, particularly with regard to gathering sensitive military information.

By utilizing literature from three disciplines—international law, international relations, and organizational sociology—this Article offers an interdisciplinary framework to design fact-finding processes for conflicts between States and non-State actors. In particular, by exploring the complex social environment enabling wartime atrocities, this Article suggests moving away from criminalization, legal blame, and individualizing guilt in favor of an organizational “learning from failure” approach focused on future prevention, organizational change, and improving decision-making processes.

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INTRODUCTION

Since October 2015, the United States has been in conflict with an NGO—Doctors Without Borders (*Médecins Sans Frontières*, or MSF)—over the bombing of the NGO’s hospital in Kunduz, Afghanistan, early that month. The United States and Doctors Without Borders disagree over the facts of the case, as well as issues of accountability and prevention. But there are no disagreements concerning the severe results of the attack: forty-two people were killed, dozens were injured, and the main hospital building was acutely damaged and subsequently closed. Other issues however, have been gravely contested, such as the timeline of the attack, the concrete factors that enabled and escalated the attack, and the appropriate legal analysis and consequences. Various fact-finding efforts by the US Central Command, the UN Mission in Afghanistan, NATO and Doctors Without Borders exacerbated the controversies and exposed the inherent disbelief and mistrust between States, NGOs, and legal institutions.

This unique conflict raises several important questions. In what forum can States and NGOs settle disputes, given the inherent imbalance of power (political, financial, and other) as well as the confidentiality or unavailability of critical materials? What role, rights, and remedies do NGOs have in international and domestic accountability mechanisms during armed conflicts? How can the international legal order accommodate NGOs and their concerns in an asymmetrical and mostly nonbinding conflict resolution paradigm? Lastly, how can the international legal order improve the efficacy of its existing fact-finding mechanisms in a world where fake news and alternative facts frustrate almost any effort to disseminate credible information to conflicting parties and communities?

This Article focuses on factual controversies during armed conflicts, particularly when the controversy is between a State party to an armed conflict and non-State actors such as Doctors Without Borders. The Article examines methods of resolving factual disputes or at least enhancing existing mechanisms designed to “determine what happened.” By utilizing literature from three disciplines—international law, international relations, and organizational sociology—this Article offers an interdisciplinary framework to design fact-finding processes for conflicts between States and non-State actors. It analyzes the failures of existing bodies to resolve basic controversies concerning the Kunduz hospital attack through political, organizational, diplomatic, ethical, and legal lenses to shed light on the questions highlighted above, and to explore new

avenues for conflict resolution tailored for such conflicts. In particular, by understanding the complex social environment enabling such wartime atrocities, this Article suggests moving away from criminalization, assigning legal blame, and individualizing guilt, and toward an organizational “learning from failure” approach that focuses on future prevention, organizational change, and improving decision-making processes.

The Article begins, in Section I, with an analysis of the legal status accorded to NGOs under international law, as well as the challenges stemming from the insufficient international legal regime. Section II then presents the facts concerning the US military’s attack on Doctors Without Borders’ hospital in Kunduz, Afghanistan on October 3, 2015. After describing the event, the Section surveys the various international and domestic interventions that followed the attack. Focusing on fact-finding practices concerning wartime attacks harming humanitarian-aid NGOs, Section III explores three main challenges to such fact-finding efforts: the contingency of legal facts; the detrimental impact of criminalization and legal blame on information gathering; and institutional design flaws, including goal ambiguity and mismatched goals, processes, and structures. Finally, Section IV applies an interdisciplinary framework to the Kunduz hospital bombing to suggest the adoption of an organizational, blame-free approach to wartime investigations.

I.

THE LEGAL STATUS AND LIMITS OF NGOs DURING ARMED CONFLICTS

NGOs have long been involved in armed conflicts in a variety of ways, including through active support for particular parties and efforts to provide humanitarian aid. Some NGOs have provided military or civil support to State parties to a conflict.¹ Some have maintained neutrality while advocating for the peaceful resolution of conflicts.² Others have contributed humanitarian aid or medical assistance.³ This Article focuses on humanitarian-aid NGOs that operate in conflict zones as neutral third parties, such as Doctors Without Borders, the

¹ See generally FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES (Simon Chesterman & Chia Lehnardt eds., 2007); CHRISTOPHER KINSEY, CORPORATE SOLDIERS AND INTERNATIONAL SECURITY: THE RISE OF PRIVATE MILITARY COMPANIES (2006); THOMAS R. MOCKAITIS, CIVIL-MILITARY COOPERATION IN PEACE OPERATIONS: THE CASE OF KOSOVO (2004); Doug Brooks, *Messiahs or Mercenaries? The Future of International Private Military Services*, 7 INT’L PEACEKEEPING 129 (2000); Oldrich Bures, *Private Military Companies: A Second Best Peacekeeping Option?*, 12 INT’L PEACEKEEPING 533 (2005).

² See generally MITIGATING CONFLICT: THE ROLE OF NGOs (Henry F. Carey & Oliver P. Richmond eds., 2004); David G. Chandler, *The Road to Military Humanitarianism: How the Human Rights NGOs Shaped a New Humanitarian Agenda*, 23 HUM. RTS. Q. 678 (2001).

³ See generally Daniel Byman, *Uncertain Partners: NGOs and the Military*, 43 SURVIVAL 97 (2001); Nigel Hawkes, *Attacks on Doctors Rise as Rules of Conduct in Conflict Zones Are Abandoned*, 344 BRITISH MED. J. 6 (2012); Donna Winslow, *Strange Bedfellows: NGOs and the Military in Humanitarian Crises*, 7 INT’L J. PEACE STUD. 35 (2002);.

International Committee of the Red Cross (ICRC), and Amnesty International. These neutral organizations are not involved in the conflict or do not support one of the parties to the conflict.

Despite the recent growth in the number and diversity of humanitarian-aid NGOs involved in armed conflicts,⁴ these organizations, in general, do not enjoy legal personality under international law (as opposed to most domestic legal systems, which attach legal status to various types of organizations).⁵ While efforts to develop an international convention granting legal personality to international NGOs began as early as 1910, not much progress has been made more than a century later.⁶ Mary Ellen O'Connell has argued that humanitarian-aid NGOs, such as Doctors Without Borders, enjoy an enhanced status under international law, as a variety of international treaties, including the Geneva Conventions, grant them certain rights.⁷ However, these limited rights, which include access to and presence in war zones and occupied territories, do not alleviate several significant weaknesses of this legal regime, including the lack of legal standing in international institutions and tribunals.⁸ The following paragraphs details five weaknesses of the legal regulation of humanitarian-aid NGOs operating in conflict zones.

First, due to their diminished capacity under international law, humanitarian-aid NGOs have very limited avenues for demanding and enforcing compensation for damages and injuries caused by war actions. Under international law, the injuring State must theoretically provide compensation for violations of international humanitarian law (IHL). Article 3 of Hague Convention IV clearly states that “a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation.”⁹ However, enforcement of this provision has been limited to rare and exceptional circumstances.¹⁰ In the domestic context, the injuring State typically enjoys

⁴ See generally Andrew S. Natsios, *NGOs and the UN System in Complex Humanitarian Emergencies: Conflict or Cooperation?*, 16 *THIRD WORLD Q.* 405 (1995).

⁵ Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 *AM. J. INT'L L.* 348, 355 (2006); Kerstin Martens, *Examining the (Non-)Status of NGOs in International Law*, 10 *IND. J. GLOBAL LEGAL STUD.* 1, 2 (2003).

⁶ Charnovitz, *supra* note 7, at 356. See also Janne E. Nijman, *Non-State Actors and the International Rule of Law: Revisiting the “Realist Theory” of International Legal Personality I*, in *NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW* 91–124 (Math Noortmann & Cedric Ryngaert eds., 2016).

⁷ Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror*, 43 *COLUM. J. TRANSNAT'L L.* 435, 440 (2004).

⁸ See *id.*

⁹ HAGUE CONVENTION (IV) RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND ART. 3, OCT. 18, 1907, 36 *STAT.* 2277, T.S. 539; HUGO GROTIUS, *DE JURE BELLI AC PISIS LIBRI TRES [ON THE LAW OF WAR AND PEACE]* 719 (Francis W. Kelsey trans., Oxford Univ. Press 1925) (1646).

¹⁰ Gilat J. Bachar, *Collateral Damages: Domestic Monetary Compensation for Civilians in Asymmetric Conflict*, 19 *CHI. J. INT'L L.* 375, 387 (2019). See also Yael Ronen, *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict*, 42 *VAND. J. TRANSNAT'L L.* 181 (2009).

sovereign immunity in other countries' domestic courts, and is not likely to grant war victims access to its own courts.¹¹ In the international context, compensation for war victims is quite rare, as international tribunals for individual claims are limited and the right to compensation under international law normally attaches to the targeted State rather than to injured individuals or other non-State actors such as humanitarian-aid NGOs.¹² While some NGOs may occasionally be awarded damages by the injuring State, such instances are typically treated as gestures of "good will" in response to standalone incidents, often immune to liability claims as acts of war.¹³

Second, humanitarian-aid NGOs are also limited in their capacity to affect immediate change on the ground and to protect teams in hostilities zones. The lack of clear legal obligations or transparent and consistent processes dictated by international law often leads to unsatisfactory outcomes, even in cases where NGOs do receive damages.¹⁴ Compensation does not equal accountability, nor does it mandate organizational changes to prevent future harm. As repeat players in the battlefield, humanitarian-aid NGOs place particular importance on effective protection of their teams and facilities on the ground.¹⁵ However, NGOs have a very limited ability to mitigate external threats. In contrast to State parties to a conflict, humanitarian-aid NGOs can neither implement a ceasefire nor tactically or strategically influence the intensity of the hostilities. As neutral third parties, humanitarian-aid NGOs may facilitate conflict-resolution processes, offer good offices, or serve as mediators or arbitrators.¹⁶ However, ceasing fire, respecting temporary ceasefire agreements, or ending the hostilities remain in the hands of the State parties to the conflict.

Third, as third parties, humanitarian-aid NGOs do not enjoy *bargaining power based on reciprocity*. Reciprocity has become an important element in the functioning of international law; some scholars consider it a meta-rule of the system of international law.¹⁷ International scholar Robert Keohane defined the concept of reciprocity as resting on two basic elements, both of which humanitarian-aid NGOs lack: the ability to return ill for ill and good for good, and

¹¹ Ronen, *supra* note 12, at 217.

¹² *Id.* at 218-20; Bachar, *supra* note 132, at 387.

¹³ Compensation to third parties under the US Foreign Claims Act (FCA) is one example. *See* Bachar, *supra* note 12, 403-06.

¹⁴ *See id.* at 415.

¹⁵ Indeed, three weeks after the attack on its hospital in Kunduz, Doctors Without Borders published a primer on the protection of medical services under international humanitarian law. *The Protection of Medical Services Under International Humanitarian Law: A Primer*, DOCTORS WITHOUT BORDERS (Oct. 21, 2015), <https://www.doctorswithoutborders.org/what-we-do/news-stories/research/protection-medical-services-under-international-humanitarian-law>.

¹⁶ *See generally* HENRY F. CAREY & OLIVER P. RICHMOND, MITIGATING CONFLICT: THE ROLE OF NGOS (2004); Chandler, *supra* note 2.

¹⁷ ELIZABETH ZOLLER, PEACETIME UNILATERAL REMEDIES 15 (1984); Francesco Paris & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT'L L.J. 93, 94 (2003).

the prospect of equivalent exchange.¹⁸ While in recent decades significant developments in the laws of war seemed to reject reciprocity as a core principle,¹⁹ reciprocity has nonetheless remained an important consideration that affects State behavior.²⁰ Legal scholar Sean Watts has concluded that the law of war has long been conditioned on notions of reciprocal obligation and observation, which have persisted below the surface.²¹

Fourth, non-State actors generally cannot refer their cases to international tribunals, such as the International Court of Justice (ICJ) or the International Criminal Court (ICC). The ICC statute reinforces the traditional view that for a group's actions to be considered a war or armed conflict, there must be a connection to a State.²² Furthermore, only States can become members of the ICC and grant the ICC jurisdiction over the case.²³ One of the most contentious international debates concerning the ICC relates to these provisions, and particularly to the definition of a "State" under the Rome Statute.²⁴

Fifth, humanitarian-aid NGOs have limited fact-finding capabilities with regard to facts concerning military decision-making and processes. NGOs often engage in fact-finding as part of their monitoring activities²⁵ or as victims of military attacks.²⁶ They increasingly employ trained staff members to collect information on the ground, interview witnesses, review documents and recordings, and produce fact-finding reports.²⁷ Yet they lack the institutional mechanisms and political power required to access evidence related to military actions, and in particular, to the military decision-making processes that lead to indiscriminate attacks.²⁸ Without this critical information, NGOs' fact-finding

¹⁸ Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1, 5–6 (1986).

¹⁹ JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 498 (2005).

²⁰ As recently as 2002, the United States explicitly cited concerns of nonreciprocity in its decision to deny application of the law of war to Taliban fighters in Afghanistan. THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 18, 121 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

²¹ Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L.J. 365, 368 (2009).

²² O'Connell, *supra* note 9, at 444.

²³ Rome Statute of the International Criminal Court arts. 12–14, July 17, 1998, 2187 U.N.T.S. 90.

²⁴ See, e.g., Daniel Benoliel & Ronen Perry, *Israel, Palestine, and the ICC*, 32 MICH. J. INT'L L. 73 (2010); Yaël Ronen, *Israel, Palestine and the ICC—Territory Uncharted but not Unknown*, 12 J. INT'L. CRIM. JUST. 7 (2014).

²⁵ Andrea Bartoli, *NGOs and Conflict Resolution*, in THE SAGE HANDBOOK OF CONFLICT RESOLUTION 392, 395 (Jacob Bercovitch, Victor Kremenyuk & I. William Zartman eds., 2009); Marie Törnquist-Chesnier, *NGOs and International Law*, 3 J. HUM. RTS. 253 (2004).

²⁶ See, e.g., DOCTORS WITHOUT BORDERS, INITIAL MSF INTERNAL REVIEW: ATTACK ON KUNDUZ TRAUMA CENTRE, AFGHANISTAN (Nov. 4, 2015), http://www.msf.org/sites/msf.org/files/msf_kunduz_review_041115_for_public_release.pdf [hereinafter MSF REPORT].

²⁷ See, e.g., Louise Mallinder, *Law, Politics and Fact-Finding: Assessing the Impact of Human Rights Reports* 1 J. HUM. RTS. PRAC. 166, 166 (2010).

²⁸ Christopher Stokes, *One Year After Kunduz: Battlefields Without Doctors*, in *Wars Without Limits*, DOCTORS WITHOUT BORDERS (Oct. 3, 2016), <http://www.msf.org/en/article/one-year-after-kunduz>.

efforts remain incomplete.²⁹ As a result, their fact-finding reports often prove ineffective at promoting accountability or mobilizing domestic condemnation and institutional changes.³⁰

In sum, humanitarian-aid NGOs face various challenges when they become the victims of war acts: They have limited negotiating powers with regard to reparations or prosecutions; they are powerless to direct (or divert) the continuation of hostilities; they are unable to refer the case to international tribunals; and they only have access to partial and limited information. These problems, which stem from an inadequate international legal regime, intensify as the number and variety of humanitarian-aid NGOs rises and their participation in international processes becomes more impactful and nuanced.

How should humanitarian-aid NGOs respond to indiscriminate attacks harming their personnel and facilities? What methods are open for them to protect their teams and promote much-needed military reform? This Article focuses on one possible avenue for improving protection of humanitarian-aid NGOs operating in conflict zones: preventive fact-finding focused on organizational reform rather than on individual responsibility and blame. The subsequent Sections analyze the US military attack on Doctors Without Borders' hospital in Kunduz and the various interventions that followed to shed light on the challenges to wartime investigations in a conflict-resolution scheme between States and humanitarian-aid NGOs. After discussing the attack, various fact-finding efforts conducted to investigate the incident, and the outcomes of these interventions, the Article offers an interdisciplinary dispute system framework to design and evaluate investigations of wartime attacks against humanitarian-aid NGOs. This framework focuses on alternatives to legal blame and individual accountability as a means of promoting preventive measures and overcoming institutional failures. In particular, the Article suggests a "learning from failure" approach designed to facilitate organizational reform rather than individual accountability and punishment.

II.

THE US ATTACK ON DOCTORS WITHOUT BORDERS' HOSPITAL IN KUNDUZ

On October 3, 2015, at 2:08 a.m., a US Special Operations AC-130 gunship attacked a Doctors Without Borders hospital in Kunduz, Afghanistan with heavy

battlefields-without-doctors-wars-without-limits.

²⁹ See, e.g., Richard Goldstone, Opinion, *Reconsidering the Goldstone Report on Israel and war crimes*, WASH. POST, Apr. 11, 2011, https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html (clarifying that the Goldstone Report would have had different findings if he had access to the military information that was later included in the Israeli report about one of the investigated incidents). Krebs, Shiri, *Designing International Fact-Finding: Facts, Alternative Facts, and National Identities*, 41 *FORDHAM INT'L L.J.* 337, 378 (2017).

³⁰ Shiri Krebs, *The Legalization of Truth in International Fact-Finding*, 18 *CHI. J. INT'L L.* 83 (2017).

fire. Forty-two people were killed, mostly patients and hospital staff members. Dozens of others were injured. The main hospital building—the only free trauma care hospital in Northern Afghanistan—was severely damaged and subsequently closed.³¹ In the aftermath of the attack on the hospital, many international organizations, including Doctors Without Borders and various bodies of the United Nations, called for an international fact-finding investigation to establish the truth and to bring those responsible to justice. UN Secretary-General Ban Ki Moon strongly condemned the airstrike and called for a “thorough and impartial investigation into the attack in order to ensure *accountability*.”³² The UN High Commissioner for Human Rights demanded an investigation and suggested that the attack might amount to a *war crime*.³³ Human Rights Watch called on the United States to establish “an independent panel outside the military chain of command with the aim of establishing the facts and assessing possible *culpability* for the strike.”³⁴ Doctors Without Borders General Director Christopher Stokes stated that they operate “[u]nder the clear presumption that a *war crime* has been committed,”³⁵ and demanded that a full and transparent investigation into the event be conducted by an independent international body.³⁶ In a separate statement, Doctors Without Borders International President, Dr. Joanne Liu, urged that the investigation be conducted by the International Humanitarian Fact-Finding Commission (IHFFC), a “body set up specifically to *investigate violations of international humanitarian law*.”³⁷

These calls for action shared a clear focus: an impartial investigation concerning the possible commission of war crimes. Days after the attack, Dr. Joanne Liu, President of Doctors Without Borders International, described the

³¹ Matthew Rosenberg, *Pentagon Details Chain of Errors in Strike on Afghan Hospital*, N.Y. TIMES, April 29, 2016, <https://www.nytimes.com/2016/04/30/world/asia/afghanistan-doctors-without-borders-hospital-strike.html>.

³² *Statement attributable to the Spokesman for the Secretary-General on attack in Kunduz*, UNITED NATIONS (Oct. 3, 2015), <http://www.un.org/sg/statements/index.asp?nid=9095>.

³³ *Kunduz Hospital Airstrikes “Inexcusable” – Zeid*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Oct. 3, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16564&LangID=E>.

³⁴ *Afghanistan: US Inquiry Must Go Past Admitting Mistakes*, HUMAN RIGHTS WATCH (Oct. 6, 2015), <https://www.hrw.org/news/2015/10/06/afghanistan-us-inquiry-must-go-past-admitting-mistakes>.

³⁵ *Afghanistan: Kunduz Trauma Centre Bombing, statement from Christopher Stokes, MSF General Director*, DOCTORS WITHOUT BORDERS (October 4, 2015) <https://www.doctorswithoutborders.org/what-we-do/news-stories/story/afghanistan-kunduz-trauma-center-bombing>.

³⁶ *Id*; see also Alissa J. Rubin, *Doctors Without Borders Says It Is Leaving Kunduz After Strike on Hospital*, N.Y. TIMES (Oct. 4, 2015), <http://www.nytimes.com/2015/10/05/world/asia/doctors-without-borders-says-it-is-leaving-kunduz-after-strike-on-hospital.html>.

³⁷ *Afghanistan: Kunduz Trauma Centre Bombing, statement from Dr. Joanne Liu, MSF International President*, DOCTORS WITHOUT BORDERS (October 7, 2015) <https://www.doctorswithoutborders.org/what-we-do/news-stories/story/afghanistan-kunduz-trauma-center-bombing>.

attack as not only a “war crime,”³⁸ but also “an attack on the Geneva Conventions.”³⁹ Thereafter, academics,⁴⁰ non-governmental organizations,⁴¹ activists,⁴² and even poets⁴³ adopted both of these phrases in connection with the incident.

In the days and months following the attack, the US military, NATO, the UN Assistance Mission in Afghanistan (UNAMA), and Doctors Without Borders all carried out their own investigations.⁴⁴ But thirty months and four fact-finding reports later, uncertainty surrounded almost every aspect of the attack and its consequences. Even basic facts, such as the timeframe of the attack, remained contested.

About a month after the attack on its hospital, Doctors Without Borders released its initial fact-finding report concerning the attack.⁴⁵ The report described what happened before, during, and after the airstrikes, and included details concerning the magnitude of the damages, the functionality of the hospital, and Doctors Without Borders’ failed attempts to halt the attack through various communications means.⁴⁶ This report concluded that the airstrike lasted about an hour, from about 2:00-2:08 a.m. until about 3:00-3:15 a.m.⁴⁷ Importantly, the report clarified that Doctors Without Borders’ main concern was the future

³⁸ Joanne Liu, *Médecins Sans Frontières (MSF) Denounces Blatant Breach of International Humanitarian Law*, DOCTORS WITHOUT BORDERS (Oct. 6, 2015), <http://www.msf.org/en/article/m%C3%A9decins-sans-fronti%C3%A8res-msf-denounces-blatant-breach-international-humanitarian-law>.

³⁹ Joanne Liu, *Afghanistan: Enough. Even War Has Rules*, DOCTORS WITHOUT BORDERS (Oct. 7, 2015), <https://www.msf.org.za/stories-news/stories-and-news/msf-even-war-has-rules>.

⁴⁰ See, e.g., Phyllis Bennis, *The Pentagon Shouldn’t Get to Absolve Itself for Bombing a Hospital*, FOREIGN POLICY IN FOCUS (May 3, 2016), <http://fpif.org/pentagon-shouldnt-get-absolve-bombing-hospital>.

⁴¹ See, e.g., Press Release, Statement from the START Network on the Kunduz Hospital Bombings, START NETWORK (Oct. 12, 2015), <https://startnetwork.org/news-and-blogs/statement-start-network-kunduz-hospital-bombings>.

⁴² See, e.g., *Kunduz Hospital Bombing = War Crime*, WAR RESISTERS LEAGUE, <https://www.warresisters.org/kunduz-hospital-bombing-war-crime> (last visited Nov. 11, 2019).

⁴³ See, e.g., *Kunduz Hospital Bombing Is a War Crime: Public Responses*, POETRY AND CHOCOLATE (May 2, 2016), <https://ancientruned.wordpress.com/tag/Kunduz>.

⁴⁴ U.S. CENTRAL COMMAND, SUMMARY OF THE AIRSTRIKE ON THE MSF TRAUMA CENTER IN KUNDUZ, AFGHANISTAN ON OCTOBER 3, 2015: INVESTIGATION AND FOLLOW-ON ACTIONS (Apr. 2016) [hereinafter CENTCOM REPORT]; NATO, EXECUTIVE SUMMARY: COMBINED CIVILIAN CASUALTY ASSESSMENT OF AN AIRSTRIKE ON A MEDICAL FACILITY IN KUNDUZ CITY ON 03 OCTOBER 2015 (Nov. 2015), https://shape.nato.int/resources/3/images/2015/saceur/Exec_sum.pdf [hereinafter NATO REPORT]; U.N. MISSION IN AFGHANISTAN, HUMAN RIGHTS AND PROTECTION OF CIVILIANS IN ARMED CONFLICT: SPECIAL REPORT ON KUNDUZ PROVINCE (Dec. 2015), https://unama.unmissions.org/sites/default/files/special_report_on_kunduz_province_12_december_2015.pdf [hereinafter UNAMA REPORT]; MSF REPORT, *supra* note 28.

⁴⁵ MSF REPORT, *supra* note 28.

⁴⁶ *Id.*

⁴⁷ *Id.* at 7.

protection of hospitals, medical facilities, and personnel.⁴⁸ The report also demanded a commitment to the Geneva Conventions and an affirmation that the United States would adhere to the laws of war moving forward.

In December 2015, UNAMA published its *Special Report on Kunduz* (UNAMA Report).⁴⁹ The UNAMA Report was based on both independent interviews conducted by UNAMA's fact-finding team, and on statements and information provided by Doctors Without Borders.⁵⁰ UNAMA reached similar conclusions as Doctors Without Borders. UNAMA determined that the attack on the hospital lasted about an hour, from 2:07 a.m. until 3:00 or 3:15 a.m., and continued for at least forty minutes after hospital personnel first contacted US authorities in Afghanistan, at 2:19 a.m., to inform them that the hospital was under fire.⁵¹ According to the UNAMA Report, the attack possibly amounted to a war crime.⁵² However, UNAMA could not conclusively determine the status of the attack because the US military refused to cooperate with the mission and did not provide the information UNAMA needed to make firm determinations of responsibility.⁵³ Accordingly, the UNAMA Report concluded that the United States should initiate criminal investigations against—and potentially prosecute—those involved.⁵⁴

The US Central Command investigation was concluded in November 2015, and General John F. Campbell, then Commander of US Forces in Afghanistan, announced the key findings at a press conference on November 25, 2015.⁵⁵ The written report—the Centcom Report—was released to the public in April 2016, after being reviewed and redacted by the military.⁵⁶ The Centcom Report described different facts and reached different conclusions than Doctors Without Borders and UNAMA. In particular, the Centcom Report found that the attack lasted only thirty minutes, from 2:08 a.m. until 2:38 a.m., and concluded that the “tragic errors” that lead to the attack on the hospital did not amount to a “war crime.”⁵⁷ Moreover, the Centcom Report left many factual questions undecided. Centcom was unable to conclusively determine how many people were killed in the attack and emphasized its inability to verify the numbers provided by Doctors

⁴⁸ *Id.* at 1.

⁴⁹ See generally UNAMA REPORT, *supra* note 46.

⁵⁰ *Id.* at 9.

⁵¹ *Id.* at 7–8; MSF REPORT, *supra* note 28, at 7–8.

⁵² UNAMA REPORT, *supra* note 46, at 10.

⁵³ *Id.*

⁵⁴ See UNAMA REPORT, *supra* note 46, at 11–12.

⁵⁵ Department of Defense Press Briefing by General Campbell via Teleconference from Afghanistan, U.S. DEPARTMENT OF DEFENSE (November 25, 2015), <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/631359/departments-of-defense-press-briefing-by-general-campbell-via-teleconference-from/>.

⁵⁶ CENTCOM REPORT, *supra* note 46, at 1.

⁵⁷ *Id.* at 3.

Without Borders.⁵⁸ Nor did the Centcom Report explain what caused the series of errors that led to the hour-long attack on the trauma center, other than the general fog of war.⁵⁹ The Centcom Report thus embraced the uncertainty encountered during combat operations as the main factor contributing to the tragic course of events.⁶⁰ Moreover, in a single sentence, the Centcom Report dismissed calls to initiate criminal proceedings, concluding that “the label ‘war crimes’ is typically reserved for intentional acts,” and that in this case, “the errors were unintentional.”⁶¹ Based on this version of the facts, the US military adopted administrative and disciplinary measures against the sixteen individuals who were identified as responsible for the errors.⁶²

In conjunction with General Campbell’s press conference, NATO concluded its internal investigation in November 2015 and released a short executive summary of its findings.⁶³ The NATO executive summary acknowledged the death and injury of civilians in the airstrike but found no evidence that the commander of the US forces or the aircrew knew that the targeted compound was a medical facility or that the hospital was deliberately targeted.⁶⁴ Additionally, the executive summary found no evidence that key commanders involved in the operation had access to a No Strike List identifying the location of the Doctors Without Borders medical facility, and found that the maps used by the United States Space Force (USSF) Commander did not label the Doctors Without Borders compound as a medical facility.⁶⁵ At the same time, NATO thought it was “unclear” whether the USSF Commander had the grid coordinates for the medical facility available to him at the time he authorized the airstrike.⁶⁶ Ultimately, the NATO executive summary concluded that the misidentification of and attack on the Doctors Without Borders compound resulted from “a series of human errors, compounded by failures of process and procedure, and [from] malfunctions of technical equipment which restricted the situational awareness of those Resolute Support forces supporting ASSF operations.”⁶⁷ The language used by the NATO executive summary closely resembled the language used in the Centcom Report, which concluded that the attack resulted from a “combination of human errors, compounded by process and equipment failures.”⁶⁸

⁵⁸ *Id.* at 2–3.

⁵⁹ *Id.*

⁶⁰ *Id.* at 2.

⁶¹ *Id.* at 3–4.

⁶² *Id.* at 4.

⁶³ See NATO REPORT, *supra* note 46, at 1.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ CENTCOM REPORT, *supra* note 46, at 1.

Both UNAMA and Doctors Without Borders expressed an inherent skepticism toward the Centcom and NATO investigations and the trustworthiness of their findings.⁶⁹ The UNAMA Report explicitly questioned the impartiality of both the Centcom and NATO investigations for their lack of independence and effectiveness.⁷⁰ As a result, Doctors Without Borders and UNAMA both continued their calls for an independent international investigation of the attack.⁷¹ The factual controversies and uncertainties described above served as fertile ground for law professors and legal scholars and practitioners to highlight disagreements over the legal analysis of the applicable norms.⁷²

Due to Doctors Without Borders' high profile, its international network, and the apparent unlawfulness of striking a functioning hospital, investigations of the attack on the hospital in Kunduz had the potential to produce transparent, consistent, and credible findings. Yet instead of settling the dispute over what happened, the four reports only exacerbated existing controversies and exposed the inherent mistrust between different organizations and communities. In the end, each side remained committed to its own version of the truth. To close this gap, both Doctors Without Borders and UNAMA reiterated their demand for the establishment of an independent international fact-finding mission authorized to collect the necessary evidence, investigate the incident, and produce authoritative legal findings.⁷³ A year after the attack on the hospital, Doctors Without Borders' General Director, Christopher Stokes, criticized the lack of an impartial investigation.⁷⁴ He further stated that the heavily redacted report published by the

⁶⁹ See UNAMA REPORT, *supra* note 46, at 12; Press Release, Initial reaction to Public Release of U.S. Military Investigative Report on the Attack on MSF Trauma Hospital, DOCTORS WITHOUT BORDERS (Apr. 29, 2016), <https://www.msf.org/kunduz-initial-reaction-public-release-us-military-investigative-report-attack-msf-trauma-hospital> [hereinafter Press Release].

⁷⁰ See UNAMA REPORT, *supra* note 46, at 12.

⁷¹ See, e.g., Press Release, *supra* note 71.

⁷² See, e.g., Kevin Jon Heller, *Thoughts on Jens's Post About the Kunduz Attack*, OPINIO JURIS (May 3, 2016), <http://opiniojuris.org/2016/05/03/thoughts-on-jens-post-about-the-kunduz-attack/>; Jonathan Horowitz, *Why the US Should Cooperate With Investigations Into the Hospital Bombing*, JUST SECURITY (Dec. 23, 2016), <https://www.justsecurity.org/28472/cooperate-investigations-hospital-bombing/>; Peter Margulies, *Centcom Report on the Kunduz Hospital Attack: Accounting for a Tragedy of Errors*, LAWFARE (May 2, 2016), <https://www.lawfareblog.com/centcom-report-kunduz-hospital-attack-accounting-tragedy-errors>; Jens David Ohlin, *Was the Kunduz Hospital Attack a War Crime?*, OPINIO JURIS (May 1, 2016), <http://opiniojuris.org/2016/05/01/was-the-kunduz-hospital-attack-a-war-crime/>; Alex Whiting, *Recklessness, War Crimes, and the Kunduz Hospital Bombing*, JUST SECURITY (May 2, 2016), <https://www.justsecurity.org/30871/recklessness-war-crimes-kunduz-hospital-bombing/>.

⁷³ MSF specifically demanded an international investigation by the International Humanitarian Fact-Finding Commission (IHFFC). Press Release, *supra* note 71; see also Eve Bring, *The Kunduz Hospital Attack: The Existence of a Fact-Finding Commission*, EJIL TALK! (Oct. 15, 2015), <http://www.ejiltalk.org/the-kunduz-hospital-attack-the-existence-of-a-fact-finding-commission> (encouraging the international community to turn to the International Humanitarian fact-finding Commission to investigate this—and other—events). UNAMA required an independent, impartial, prompt, transparent, and effective investigation. See UNAMA Report, *supra* note 46, at 60.

⁷⁴ Stokes, *supra* note 30.

US military was both unsatisfactory and troubling, as it concealed important information and indicated that the United States failed to take necessary precautions to avoid harming civilians.⁷⁵ This kind of factual ambiguity, Stokes warned, leads to wars with no limits, which may then give rise to battlefields without doctors.⁷⁶

III.

CHALLENGES TO LEGAL FACT-FINDING DURING ASYMMETRICAL CONFLICTS: FROM FARAH TO KUNDUZ

“History counts its skeletons in round numbers.
A thousand and one remain a thousand,
As though the one had never existed”
(Wisława Szymborska, *Hunger Camp at Jasło*)⁷⁷

The contradictory reports concerning the attack on the hospital in Kunduz represent a broader phenomenon of factual uncertainty with regard to wartime events. In another striking example, numerous fact-finding efforts concerning a single incident from May 2009 in Farah Province, Afghanistan, announced strikingly different numbers of civilian casualties.

On the night of May 4, 2009, following a day of heavy fighting between Taliban, Afghan, and US Marines forces in the Bala Baluk District of Farah Province, four FA-18F fighter planes supporting the Marines were replaced with a B-1B bomber.⁷⁸ In three strikes, the B1-B fired five 500-pound and three 2,000-pound bombs on several buildings in the vicinity of Gerani village.⁷⁹ Controversies about the number of civilians killed in the bombings arose immediately, with estimates ranging from 26 to more than 140 casualties. An Afghan Government investigation determined that the US airstrike had killed one hundred and forty civilians, including ninety-three children;⁸⁰ an independent Afghan organization, Afghanistan Rights Monitor, announced that at least 117 civilians had been killed, including 26 women and 61 children;⁸¹ an investigation

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ WISŁAWA SZYMBORSKA, *POEMS NEW AND COLLECTED, 1957-1997* (1998).

⁷⁸ U.S. CENTRAL COMMAND, U.S. CENTRAL COMMAND INVESTIGATIONS INTO CIVILIAN CASUALTIES IN THE FARAH PROVINCE, AFGHANISTAN, ON MAY 4, 2009 (2009) [hereinafter FARAH CENTCOM REPORT], at 7.

⁷⁹ *Id.* at 7–9.

⁸⁰ Hamid Shalizi & Peter Graff, *U.S. Strikes Killed 140 Villagers: Afghan Probe*, REUTERS (May 16, 2009), <http://www.reuters.com/article/2009/05/16/us-afghanistan-civilians-idUSTRE54E22V20090516>.

⁸¹ Carlotta Gall and Taimoor Shah, *Afghan Villagers Describe Chaos of U.S. Strikes*, N.Y. TIMES

conducted by the Afghanistan Independent Human Rights Commission (AIHRC) concluded that 86 civilians were killed;⁸² an ICRC investigation established that eighty-nine civilian were killed in the attack;⁸³ UNAMA established that 63 women and children were killed (excluding males of military age from the count, as it found it too difficult to determine whether they were combatants or non-combatants);⁸⁴ and the US Central Command investigation identified twenty-six civilian casualties.⁸⁵ The Centcom report acknowledged, however, that its findings in this regard might not be accurate, and that the number of civilian casualties could be much higher. The Centcom Report cited the Afghan Independent Human Rights Commission report as a ‘balanced, thorough investigation into the incident.’⁸⁶

The disparities between these many fact-finding efforts are puzzling: Did some fact-finders overlook one hundred and fourteen bodies, or did other fact-finders count non-existent bodies? There were witnesses to the attack, and there were bodies on the ground in the village of Gerani.⁸⁷ Joint fact-finding efforts could have settled these vast disparities, at least to some extent. Yet to this day, more than ten years after the attack, all we are left with is Centcom’s pessimistic view that “no one will ever be able conclusively to determine the number of *civilian casualties* that occurred on May 4, 2009,”⁸⁸ a sentiment echoed in New York Times’ report on the attack.⁸⁹ Grim as it is, this sentiment holds the key to understanding what seems to be a factual controversy: the legal definition of “civilian” and its application.

The focus of fact-finding efforts on civilian casualties is understandable. IHL permits the killing of civilians in only limited circumstances: when they directly participate in the hostilities, or when their death is evaluated to be proportionate with the anticipated military gain.⁹⁰ However, the legal definition of “civilian” is gravely contested, as is the extent of their protections under IHL.⁹¹ Additional

(May 14, 2009), <https://www.nytimes.com/2009/05/15/world/asia/15farah.html>.

⁸² FARAH CENTCOM REPORT, *supra* note 80, at 11.

⁸³ ICRC Report On Farah Civcas Incident States 89 Civilians Were Killed, Ambassador Karl Eikenberry Cabl from Cabul, Afghanistan, on 2009 June 24.

⁸⁴ EurasiaNet, *Afghanistan: UN report documents steady increase in civilian deaths*, 4 August 2009, <https://www.refworld.org/docid/4a8414f924.html> (last visited Nov. 7, 2019)

⁸⁵ FARAH CENTCOM REPORT, *supra* note 80, at 11.

⁸⁶ *Id.* at 11.

⁸⁷ Elizabeth Bumiller and Carlotta Gall, *U.S. Admits Civilians Died in Afghan Raids*, N.Y. TIMES (May 7, 2009), <https://www.nytimes.com/2009/05/08/world/asia/08afghan.html>.

⁸⁸ FARAH CENTCOM REPORT, *supra* note 80, at 11.

⁸⁹ “The number of *civilians* killed by the American airstrikes in Farah Province last week may never be fully known.” Gall and Shah, *supra* note 83.

⁹⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 51(3), 51(5)(b), Jun.8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

⁹¹ See, e.g., Michael N. Schmitt, *Deconstructing direct participation in hostilities: the constitutive elements*, 42 NYU J. INT’L. L. & POL. 697 (2009); Crawford, Emily, IDENTIFYING THE ENEMY:

controversy surrounds the methodology utilized to count civilian casualties of war.⁹² It is not only that varying legal definitions and methodologies lead to different body-counts; they also overemphasize quantitative information about individuals at the expense of important qualitative factors: Who were the victims? How old were they? Did they have families and loved ones? What were they doing when they were hit from the bomb that ended their lives? All this is lost in numerical debates about casualties. Analogizing from Szyborska's poem, legal fact-finding efforts count their skeletons in legal terms, stripping the victims of war from their individuality and humanity. Instead of being called by their names and recognized by their faces, they are collectively grouped into the deep bucket of collateral damage.

Similarly, the legal focus of the investigations into the attack on the Doctors Without Borders hospital in Kunduz and its aftermath did not provide an opportunity for investigators to sort out factual discrepancies. Therefore, Doctors Without Borders' continuous calls for an independent investigation of the attack by the International Humanitarian Fact-Finding Commission (IHFFC) seem redundant. An additional investigation by the IHFFC would likely only replicate the problem of focusing on legal questions at the expense of broader factual and organizational issues. Choosing the IHFFC means putting the law at the center of the investigation. Article 90 of Additional Protocol (I) to the Geneva Conventions established the IHFFC to investigate violations of IHL.⁹³ In other words, Doctors Without Borders' choice is consistent with a general move towards legal fact-finding and the preference of legal truth over other types of truth.⁹⁴

Despite of this growing popularity of legal fact-finding as a mechanism to enhance accountability for wartime actions, empirical studies reveal some of their weaknesses. A series of comparative experiments this author conducted in the US and Israel has shown that legal fact-finding reports on war crimes committed by US Marines in Afghanistan and by Israeli Armed forces in Gaza, were ineffective at both (i) resolving controversies over contested events, and (ii) motivating domestic sanctioning of the perpetrators.⁹⁵ Doctors Without Borders, a third party

CIVILIAN PARTICIPATION IN ARMED CONFLICT (2015). In another article I survey the main controversies around the definition of civilians and the extent of their protection under international humanitarian law. Shiri Krebs, *Rethinking Targeted Killing Policy: Reducing Uncertainty, Protecting Civilians from the Ravages of Both Terrorism and Counterterrorism*, 44 Fla. St. Univ. L. Rev. 943 (2017).

⁹² Auchter, Jessica, *Paying attention to dead bodies: the future of security studies?* 1 J. Global Security Stud. 36 (2016); COUNTING CIVILIAN CASUALTIES: AN INTRODUCTION TO RECORDING AND ESTIMATING NONMILITARY DEATHS IN CONFLICT (Taylor B. Seybolt, Jay D. Aronson, and Baruch Fischhoff, eds., 2013).

⁹³ Protocol I, *supra* note 92.

⁹⁴ Between 2006 and 2015, the UN alone has dispatched thirty-eight fact-finding missions, each tasked with responsibility to establish legal facts by reporting on violations of human rights and international humanitarian law. Krebs, *supra* note 32, at 94-95; see also ROB GRACE & CLAUDE BRUDERLEIN, BUILDING EFFECTIVE MONITORING, REPORTING, AND FACT-FINDING MECHANISMS 3-9 (2012).

⁹⁵ Krebs, *supra* note 93, at 91; Shiri Krebs, *Law Wars: How Legal Labels Shape Beliefs About Wartime Controversies*, HARV. NAT'L SECURITY J. (forthcoming 2019).

not directly involved in the armed conflict and without clear legal status under international law, lacks effective means to pressure the United States into collaboration, information sharing, and institutional change. This deficiency will not be resolved by another legal investigation by the IHFFC: Like Doctors Without Borders, the IHFFC's jurisdiction depends upon the relevant State's consent, and it lacks authority or competence to ensure cooperation and access to evidence during its investigation, or acceptance and implementation of its recommendations after its conclusion.⁹⁶

In addition to these structural weaknesses of legal fact-finding processes conducted by non-binding mechanisms, legal fact-finding efforts concerning wartime events are further limited in their ability to account for 'what happened,' in their capacity to disseminate their findings to different audiences, and in the long-term outcomes of their investigations. The following Subsections elaborate on these challenges to legal fact-finding. The first Subsection looks at factual contingencies of legal findings; the second Subsection focuses on the impact of legal blame and criminalization on information gathering, cooperation, and organizational change; and the third Subsection concerns dispute system design issues, including the mismatch between preventative goals and (some) legal processes. After discussing each of these challenges, this Article offers potential solutions and alternatives.

A. *Factual Contingency*

Truth is a fundamental objective of all adjudication.⁹⁷ Two of the working assumptions of the practice of adjudication are that accuracy in fact-finding constitutes a precondition for just decisions⁹⁸ and that fact-finding is a neutral practice,⁹⁹ aimed at ascertaining an objective "truth."¹⁰⁰ However, an

⁹⁶ Protocol 1, *supra* note 92, at art. 90. It is therefore not surprising that to date, almost three decades after its establishment, the IHFFC has not formally been tasked with conducting any investigation. IHFFC, REPORT ON THE WORK OF THE IHFFC ON THE OCCASION OF ITS 25TH ANNIVERSARY 4 (2016), <https://www.ihffc.org/Files/en/pdf/ihffc-presidential-report-2015-en.pdf>

⁹⁷ Mirjan R. Damaska, *Truth in Adjudication*, 49 HASTINGS L.J. 289, 301 (1997); LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 1 (2006); *See also* FED. R. EVID. 102.

⁹⁸ Damaska, *supra* note 99, at 289, 292.

⁹⁹ Kim Lane Scheppelle, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y. L. SCH. L. REV. 123 (1992).

¹⁰⁰ The International Criminal Tribunal for the former Yugoslavia (ICTY) prides itself on producing an undeniable truth, as well as "creating a historical record, combatting denial and preventing attempts at revisionism." *See, e.g., Achievements*, ICTY, <http://www.icty.org/en/about/tribunal/achievements> (last visited May 19, 2019). Christof Heyns, the former UN Special Rapporteur on extrajudicial, summary, or arbitrary executions and a member of the UN Independent Investigation on Burundi, stated: "It is crucial to ascertain [the disputed facts] in an indisputable manner." Christof Heyns, *Oral Update*, U.N. Human Rights Council Enhanced Interactive Dialogue on Burundi (March 22, 2016), <https://www.ohchr.org/EN/HRBodies/HRC/UNIIB/Pages/UNIIB.aspx>

inescapable tension exists between accuracy in fact-finding and some of the legal rules governing legal fact-finding. Ultimately, legal fact-finding produces a contingent version of reality—one that adheres to legal rules and processes that frame the story, infuses that story with meaning, and dictates how the relevant facts are construed.

Ontologically, law provides norms and rules that construct reality in a specific manner, and this legal reality—or “legal truth”—may differ from non-legal constructions of reality.¹⁰¹ Terms such as “genocide,” “civilian,” “terrorist,” “torture,” and “responsibility” have unique meanings as legal terms, and these terms potentially have other meanings within political, ethical, or moral discourses. When we adopt legal discourse to interpret reality and determine the truth, our findings relate to a legal reality that may be very different from the moral, ethical, or political interpretation of reality.¹⁰² For example, a legal finding that a victim of a war act is not a protected “civilian” depends on the interpretation and scope of this legal category. Applying legal lenses, this category is perhaps more restricted than the colloquial use of the term in that it excludes those directly participating in the hostilities (a term that in itself allows for different meanings and interpretations, as detailed above). Additionally, legal reality is often binary, coercing complex identities into simplified categories such as “combatant” or “civilian” and thereby losing information that could have been meaningful if a spectrum approach, rather than binary categorization, were in force.¹⁰³

Epistemologically, legal fact finders determine questions of fact based on legal conventions, procedures, and rules of evidence that guide them in their decisions regarding what is considered “true.”¹⁰⁴ These rules carve the boundaries of the story by limiting the universe of facts that are included in the legal account of “what happened.”¹⁰⁵ Only facts that are specifically relevant to answering the legal question, such as actions immediately preceding the event in question, causes of death, or intent of the perpetrator, are included.¹⁰⁶ Other facts

¹⁰¹ Michael S. Moore, *Legal Reality: A Naturalist Approach to Legal Ontology*, 21 L. AND PHIL. 619, 628 (2002) (“We thus can expect no precision in how to combine the very general moral, historical, scientific, and semantic facts that make a legal interpretation correct.”); see also Jack M. Balkin, *The Proliferation of Legal Truth*, 26 HARV. J. L. AND PUB. POL’Y 5, 7 (2003) (“Law’s truth is not the only truth, and law’s vision of reality is not the only reality”).

¹⁰² *Id.*

¹⁰³ Sherwin has explored more generally the clash between law’s demand for truth and justice and the modern mind’s demand for closure and certainty, leading lawyers and processes of adjudication to simplify reality by leaving the “messy things” out. Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 40–41 (1994).

¹⁰⁴ Damaška, Mirjan, *Epistemology and legal regulation of proof*, 2 LAW, PROBABILITY AND RISK 2.2 117 (2003); Laudan, Larry, *TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY* (2006).

¹⁰⁵ Scheppele, *supra* note 101 at 123. See also, Scheppele, Kim Lane, *PRACTICES OF TRUTH-FINDING IN A COURT OF LAW: THE CASE OF REVISED STORIES* (1994).

¹⁰⁶ Burgess-Jackson, Keith, *An Epistemic Approach to Legal Relevance*, 18 ST. MARY’S L.J. 463

relating to the roots of the conflict, social processes of dehumanization, or acts committed outside the temporal or geographical jurisdiction of the legal institution conducting the fact-finding efforts are excluded.¹⁰⁷

Legal epistemology further restructures the story by determining the weight, reliability, sufficiency, and admissibility of the relevant facts. Legal rules determine the value and strength of the information collected, elevating some facts over others. While many of these rules are designed to promote an accurate account of events, they nonetheless influence choices concerning how to construct reality.¹⁰⁸ Moreover, some rules of evidence and legal procedure depart from the goal of ascertaining the truth and favor other purposes, such as protecting national security.¹⁰⁹ This issue is particularly relevant in the context of wartime investigations, and predominantly affects non-State parties including NGOs, who lack access to sensitive information. Additionally, this sensitive information—typically intelligence assessments and evaluation—is collected and interpreted by security agencies that may be subject to groupthink and overconfident in their assessments.¹¹⁰ Among both NGOs and security agencies, legal fact-finding efforts may be further compromised by cognitive biases, including cognitive consistency, motivated reasoning, and denial.¹¹¹

Another aspect of the epistemological contingency of legal facts in the context of wartime investigations stems from the centrality of predictions and

(1986).

¹⁰⁷ Mohamed, Saira, *Leadership Crimes*, 105 CALIF. L. REV. 777 (2017).

¹⁰⁸ For example, common law jurisdictions place significant limitations on the admissibility of hearsay evidence that might be useful to establish disputed questions of fact. Richard D. Freidman, *Truth and its rivals in the law of hearsay and confrontation*, 49 HASTINGS L.J. 545 (1997).

¹⁰⁹ For example, in stark contradiction to the general approach to hearsay, legal processes in domestic jurisdiction often rely upon confidential intelligence in the national security context. Richard Morgan, *Latif v. Obama: The Epistemology of Intelligence Information and Legal Evidence*, 22 S. CAL. INTERDISC. L.J. 303 (2012); Daphne Barak-Erez & Matthew C. Waxman, *Secret Evidence and the Due Process of Terrorist Detentions*, 48 COLUM. J. TRANSN'L L. 3, 5 (2009); Shiri Krebs, *Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court*, 45 VAND. J. TRANSNAT'L L. 639 (2012).

¹¹⁰ IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* 9 (1982); Marleen O'Connor, *The Enron Board: The Perils of Groupthink*, 71 UNIV. OF CIN. L. REV. 1233, 1258 (2003); Robert Jervis, *War and Misperception*, 18 J. INTERDISC. HIST. 675, 688 (1988); Ephraim Kahana, *Analyzing Israel's Intelligence Failures*, 18 INT'L J. INTELLIGENCE AND COUNTERINTELLIGENCE 262, 274 (2005).

¹¹¹ See Lee Ross & Andrew Ward, *Psychological Barriers to Dispute Resolution*, in 27 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 255, 263–64 (Mark P. Zanna ed., 1995). For literature concerning motivated cognition, see Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19 (2012). For literature concerning denial, see STANLEY COHEN, *STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING* 6 (2013). Fact-finders may further be influenced by the false-positive-false-negative bias, meaning a mistake will only be discovered if a dangerous person is set free, but not if he or she is targeted or continues to be preventively detained. See Kitai-Sangero, Rinat, *The Limits of Preventive Detention*, 40 MCGEORGE L. REV. 903, 909 (2009); Gus Van Harten, *Weaknesses of Adjudication in the Face of Secret Evidence*, 13 INT'L J. EVID. AND PROOF 1, 1 (2009).

value judgments.¹¹² In the context of ongoing hostilities, decision makers are tasked with predicting and calculating probabilities about the future rather than describing past occurrences. For example, assessing how many civilians will be harmed by an attack requires some learned guesswork concerning the presence of civilians at a specific place at a future time. Additionally, some facts seem easily severable from value judgments: for example, “Were there traces of Sarin gas in the blood of the victims?” However, in warfare it is often the case that crucial facts consist of complex social evaluations; for example, “How viable is the target?” or “How reliable is the intelligence?”¹¹³ Future predictions and value judgments are subjective and depend on institutional framing and processes. As a result, even when analyzing similar information, military and NGO factfinders may reach different conclusions.¹¹⁴ Thus, there is often a meaningful gap between findings produced by NGOs and third parties, and those produced by military and security organizations.¹¹⁵

The challenges described above highlight several characteristics of legal fact-finding that make it particularly prone to producing different—and sometimes contradictory—findings concerning wartime events during asymmetrical conflicts. The existence of contradictory reports concerning wartime events exacerbates belief polarization and strengthens the emergence of conflicting narratives, frustrating information dissemination and the emergence of a shared understanding regarding what really happened.¹¹⁶ A variety of sociopsychological dynamics further compromise public receptiveness to legal fact-finding, including cognitive consistency and biased assimilation of new

¹¹² For a more general discussion of these challenges, see Damaska, *supra* note 99 at 299-300.

¹¹³ *Id.* Faigman has argued that the principal reason for the US Supreme Court’s inconsistent use of science is that it continues to approach factual questions as a matter of normative legal judgment rather than as a separate inquiry aimed at information gathering, claiming that “the Court ‘interprets’ facts, it does not ‘find’ them.” David L. Faigman, *Normative Constitutional Fact-Finding: Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 544-45, 549 (1991).

¹¹⁴ Compare with Benvenisti’s claim that security agents and human rights advocates often interpret the law of war differently, giving its concrete rules different scope and meanings. Benvenisti, Eyal. *The legal battle to define the law on transnational asymmetric warfare*, 20 DUKE J. COMP. & INT’L L. 339 (2009).

¹¹⁵ Consider the gap between the findings of the Israeli military and the Goldstone Mission with regard to the killing of twenty-four members of the Al-Samouni family in Gaza in 2009, and the following op-ed by Richard Goldstone explaining this gap. Shiri Krebs, *Designing International Fact-Finding: Facts, Alternative Facts, and National Identities*, 41 FORDHAM INT’L L.J. 337, 387-88 (2017). This gap is partly explained by the Israeli investigatory commission regarding the targeted killing operation of Salah Shehadeh, also in Gaza, which resulted in the death of thirteen civilians. Shiri Krebs, *Reducing Uncertainty in Targeted Killing Decision-Making: Protecting Civilians from Both Terrorism and Counterterrorism*, 44 FLA. ST. U. L. REV. 943, 983 (2017).

¹¹⁶ See Alan Jern, Kai-Min K. Chang & Charles Kemp, *Belief Polarization is Not Always Irrational*, 121 PSYCHOL. REV. 206, 218 (2014).

information,¹¹⁷ confirmation bias, ¹¹⁸ motivated cognition,¹¹⁹ and collective memories and beliefs,¹²⁰ each of which may trigger distortion or rejection of threatening information.

B. Criminalization and Legal Blame

Legal discourse, especially in the context of criminal law and accountability, is focused on individualized blame.¹²¹ While individualizing guilt serves several purposes, it has its own problems and dangers. As Professor Barbara Fried has pointed out, “we have gotten nothing from our 40-year blame fest except the guilty pleasure of reproaching others for acts that, but for the grace of God, or luck, or social or biological forces, we might well have committed ourselves.”¹²² Discussing the South African Truth and Reconciliation Commission, political scientist James Gibson argued that promoting an alternative of “shared blame” was the single most successful characteristic of that process.¹²³ As he explained: “Sharing responsibility, blame, and victimhood creates a common identity, which can provide a basis for dialogue. If people are no longer dogmatically attached to a ‘good versus evil’ view of the struggle, then perhaps a space for reconciliation

¹¹⁷ According to cognitive consistency theories, the mutual interaction among pieces of psychological knowledge substantially affects human cognition. Mounting evidence further demonstrates processes of biased assimilation of new information, meaning that people tend to interpret subsequent evidence so as to maintain their initial beliefs. *See generally* Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY AND SOC. PSYCHOL. 2098 (1979); Dan Simon, Chadwick J. Snow, & Stephen J. Read, *The Redux of Cognitive Consistency Theories: Evidence Judgments by Constraint Satisfaction*, 86 J. PERSONALITY AND SOC. PSYCHOL. 814 (2004).

¹¹⁸ The term “confirmation bias” connotes the seeking or interpreting of evidence in ways that are “partial to existing beliefs, expectations, or a hypotheses in hand.” Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. OF GEN. PSYCHOL. 175, 175 (1998).

¹¹⁹ Ziva Kunda has explained that a motivation to arrive at particular conclusions “may affect reasoning through reliance on a biased set of cognitive processes—that is, strategies for accessing, constructing, and evaluating beliefs . . . that are considered most likely to yield the desired conclusion. There is considerable evidence that people are more likely to arrive at conclusions that they want to arrive at, but their ability to do so is constrained by their ability to construct seemingly reasonable justifications for these conclusions.” Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 480 (1990).

¹²⁰ Societal beliefs and collective memories are cognitions that are shared by society members on topics and issues that are of special concern for the particular society and that contribute to the sense of uniqueness of the society’s members. Daniel Bar-Tal, *Societal Beliefs in Times of Intractable Conflict: the Israeli Case*, 9 INT’L J. CONFLICT MGMT. 22, 25 (1998); Daniel Bar-Tal, *Collective Memory of Physical Violence: its Contribution to the Culture of Violence*, in THE ROLE OF MEMORY IN ETHNIC CONFLICT 85 (Ed Cairns & Mícheál D. Roe eds., 2003).

¹²¹ *See generally* MICHAEL S. MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW (2010); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7 (2001).

¹²² Barbara H. Fried, *Beyond Blame*, BOS. REV. (Jul/Aug. 2013).

¹²³ James L. Gibson, *The Contributions of Truth to Reconciliation: Lessons from South Africa*, 50 J. CONFLICT RESOL. 409, 417 (2006).

is opened.”¹²⁴ Replacing the criminal legal discourse of individualized guilt with a social discourse of “shared blame” could potentially transform the binary legal discourse of guilt and innocence into a constructive social discourse supporting reconciliation.

Alternatively, scientific and medical literature has challenged the criminalization of human errors and the culture of blame altogether. Some scholars have argued that escalating punishments for errors results in suppressing, stonewalling, and covering up by clinicians and healthcare organizations.¹²⁵ Other scholars have emphasized that the culture of blame hinders investigations into why an error occurred and how to prevent future errors.¹²⁶ Exploring the social causes and psychological and organizational consequences of the criminalization of human error in aviation and healthcare, Sidney Dekker concluded that criminal prosecution may threaten safety, as it has a detrimental effect on willingness to report and disclose safety-related information.¹²⁷ Dekker demonstrated that the threat of judicial involvement can be enough to prevent people from coming forward with information about an incident that they were involved in.¹²⁸ Judicial involvement, he argued, can therefore engender a climate of fear and silence, in which it can be difficult, if not impossible, to access to information that may be critical to finding out what happened and preventing similar errors in the future.¹²⁹ Similarly, other scholars have maintained that cultures of blame—intensified by lawyers and the media—could lead individuals and organizations to blame others rather than take responsibility for their errors, thereby frustrating their ability to explore and create solutions to address the problem.¹³⁰ Medical scholars have further demonstrated that openly sharing experiences in a confidential setting helps defuse feelings of guilt and challenges the culture of shame and isolation that often surrounds medical errors.¹³¹

Official policy-making bodies and experts in medical and human error have called for a shift to a blame-free culture within healthcare systems, predicated on the notion that errors are largely attributable to systems rather than individuals.¹³²

¹²⁴ *Id.* at 414.

¹²⁵ Lucian L. Leape et al., *Promoting Patient Safety by Preventing Medical Error*, 280 JAMA 1444, 1447 (1998).

¹²⁶ Geoffrey Thomas, *A Crime Against Safety*, AIR TRANSPORT WORLD, Jan. 2007, at 57 (discussing the culture of blame in aviation).

¹²⁷ Sidney Dekker, *The Criminalization of Human Error in Aviation and Healthcare: A Review*, 49 SAFETY SCI. 121, 125 (2011).

¹²⁸ SIDNEY DEKKER, JUST CULTURE: BALANCING SAFETY AND ACCOUNTABILITY 103–05 (2012).

¹²⁹ *Id.* at 123–24.

¹³⁰ Jamie Dickey, Ralph J. Damiano & Ross Ungerleider, *Our Surgical Culture of Blame: A Time for Change*, 126 J. THORACIC AND CARDIOVASCULAR SURGERY 1259 (2003).

¹³¹ See generally Richard T. Penson et al., *Medical Mistakes: A Workshop on Personal Perspectives*, 6 ONCOLOGIST 92 (2001).

¹³² See generally Molly E. Collins et al., *On the Prospects for a Blame-Free Medical Culture*, 69 SOC. SCI. & MED. 1287 (2009).

One could argue that the root cause of healthcare and aviation catastrophes is human error rather than intentional action, which renders healthcare and aviation different from indiscriminate military attacks. However, human error, including errors in decision making, interpreting intelligence, identifying targets, and assessing risk, remains a key factor in many wartime controversies as well. Like many aviation and healthcare workers implicated in negligence cases, civilian casualties during armed conflicts often result from flawed systems and faulty organizational structures and processes, rather than from human pathology.¹³³ Preventing future harm requires identifying the military processes and institutional culture that enable—and sometimes even encourage—indiscriminate attacks, rather than pointing the finger at a few rotten apples.

Irrespective of blameworthiness and individuation, an important additional similarity between international law violations and human errors in medicine and aviation relates to the psychological processes leading individuals to share information about, take responsibility for, find solutions to, and prevent repetition of the same errors.¹³⁴ Naturally, when individuals do not fear retaliation or prosecution, and when the focus of investigation is not individualized blame but rather institutional reform, individuals are encouraged to share what they know. Indeed, this perspective guided the South African Truth and Reconciliation Commission, which offered immunity from criminal prosecution to those who came forward and were willing to truthfully share their stories and experiences.¹³⁵

If criminalization and blame have a detrimental effect on willingness to report and disclose information, we should be motivated to explore blame-free alternatives to fact-finding, which could potentially motivate individuals to share information and experiences that would otherwise remain concealed. This is particularly important in the context of asymmetrical conflict, where limited access to information and the resulting emergence of contradictory narratives serve as constraints on both fact-finding and its consequences.

C. Truth, Accountability, and Prevention

“Ascertaining facts” is a core purpose of any fact-finding body.¹³⁶ Nonetheless, ascertaining facts is not usually the singular, or even the primary, goal of international fact-finding. International organizations typically invest a great deal of resources into fact-finding efforts in order to use the ascertained facts

¹³³ Rowe, Peter, *Military Misconduct during International Armed Operations: ‘Bad Apples’ or Systemic Failure?* 13 J. CONFLICT & SECURITY L. 165 (2008); Bar, Neta, and Eyal Ben-Ari, *Israeli snipers in the Al-Aqsa intifada: killing, humanity and lived experience*, 26 THIRD WORLD QUARTERLY 133 (2005).

¹³⁴ For a brief typology of human errors and failures, see generally Amy C. Edmondson, *Strategies for Learning from Failure*, 89 HARV. BUS. REV. 48 (2011).

¹³⁵ Gibson, James L., *The contributions of truth to reconciliation: Lessons from South Africa*, 50 J. CONFLICT RESOL. 409 (2006).

¹³⁶ Théo Bouterche, *Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice*, 16 J. CONFLICT & SECURITY L. 105 (2011).

for a further purpose. International fact-finding missions, or commissions of inquiry, have been established to promote a variety of goals, including promoting accountability, preventing future atrocities, facilitating reconciliation, and advancing the peaceful resolution of international conflicts.¹³⁷ These different purposes dictate a variety of fact-finding methods, processes, and tools, as well as diverse authorities, mandates, and jurisdictions.

In spite of this potential diversity of both goals and processes, the international community has increasingly used fact-finding within a narrow legalistic context. Over the past several decades, international fact-finding missions have become a dominant method of ensuring the implementation of, and promoting respect for, international law—particularly international human rights law (HRL) and IHL.¹³⁸ Most of the relevant literature on international fact-finding missions has similarly focused on legal aspects of international fact-finding, including the standard of proof necessary to assign responsibility, the gravity threshold of violations to be considered by a fact-finding body, and the implementation, interpretation, and enforcement of IHL and HRL.¹³⁹

The focus on legal fact-finding entails is problematic due to three reasons. First, it suggests that fact-finding is less important or even meaningless when facts are presented without a legal interpretation, and that some vague form of legal accountability is more important than a nuanced description of broader military processes and social dynamics. Second, it directs the fact-finding efforts to focus on future accountability processes, and to prefer individual accountability over promotion of other social goods, such as conflict resolution. Third, the ad hoc nature of legal fact-finding mechanisms prevents a thoughtful design process that would tailor processes to goals and consider broader implications of the fact-finding endeavor. I will now elaborate on each of these issues.

1. *Immediate Goal: Finding the Truth*

The most immediate, basic goal of any fact-finding mechanism is to ascertain facts. Nonetheless, the desire to find the truth necessitates making various choices and determinations, as the concept of truth has different meanings. The South African Truth and Reconciliation Commission, for example, developed four

¹³⁷ Erin Daly, *Truth Skepticism: An Inquiry Into the Value of Truth in Times of Transition*, 2 INT'L J. TRANSITIONAL JUST. 23, 23 (2008); Diane F. Orentlicher, *Bearing Witness: The Art and Science of Human Rights Fact-Finding*, 3 HARV. HUM. RTS. J. 83, 85 (1990); see generally Boutruche, *supra* note 138; Edwin Brown Firmage, *Fact-finding in the Resolution of International Disputes: From the Hague Peace Conference to the United Nations*, 1971 UTAH L. REV. 421 (1971).

¹³⁸ See generally Boutruche, *supra* note 138; Orentlicher, *supra* note 139.

¹³⁹ See, e.g., Rob Grace & Claude Bruderlein, *Building Effective Monitoring, Reporting, and Fact-Finding Mechanisms* 3–9 (Program on Humanitarian Policy and Conflict Resolution, Harvard University Working Paper, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038854; see generally INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS: REVISED AND EDITED REPRINT (Bertrand G. Ramcharan ed., 2014); Boutruche, *supra* note 138; Orentlicher, *supra* note 139.

different aspects of truth: a forensic truth, focused on objective information; a narrative truth, focused on the personal stories and individual experiences of both victims and perpetrators as well as the creation of united, restored memories; a social truth, established through interaction, discussion, and debate; and a healing or restorative truth, enabled through public acknowledgment and common memories of the events.¹⁴⁰ Understanding, analyzing, and highlighting these various aspects of truth enabled the commission to reconcile its two principal goals of truth and reconciliation and to strive to achieve them both.

The adversarial legal truth—which leads to binary dichotomies like “guilty” or “not guilty”—could be replaced with forensic truth focused on the brute facts, or with narrative truth allowing for the coexistence of multiple narratives and perspectives. Such an approach may encourage public acknowledgment of the events as well as the creation and promotion of a shared narrative.¹⁴¹ Additionally, rethinking the commitment to legal categories and interpretations may enable fact-finding bodies to access crucial information which persons involved might otherwise have concealed. Finally, basic, forensic, facts should not be disregarded, or overshadowed by their legal interpretation and evaluation. Legal interpretation is not necessary to infuse meaning into brute facts. As much as it is possible, there are benefits to letting the facts speak for themselves.

2. Long-Term Goals: Accountability Versus Prevention

While the immediate goal of the fact-finding process is discovering the truth, at times fact-finding is employed as a tool to achieve long-term goals such as creating a historical record, encouraging domestic accountability, fostering reconciliation, and preventing future atrocities.¹⁴² Doctors Without Borders’ repeated calls for a new investigation by the IHFFC focus on three goals: establishing the facts, providing accountability, and assuring future protection of their facilities and teams.¹⁴³ The problem is that tensions exist between these different goals, and the fulfilment of some of goals could impede the achievement of others.¹⁴⁴ Another example of mismatched goals in fact-finding mandates is

¹⁴⁰ Alex Boraine, *Truth and Reconciliation in South Africa*, in *TRUTH V. JUSTICE: THE MORALITY OF THE TRUTH COMMISSIONS* 151–53 (Robert I. Rotberg & Dennis Thompson eds., 2010).

¹⁴¹ Alan W. Schefin, *Narrative Truth, Historical Truth, and Forensic Truth*, in *THE MENTAL HEALTH PRACTITIONER AND THE LAW: A COMPREHENSIVE HANDBOOK* (Lawrence E. Lifson & Robert I. Simon eds., 1998).

¹⁴² See, e.g., Cherif Bassiouni, *Appraising UN Justice-Related Fact-Finding Missions*, 5 *WASH. UNIV. J.L. & POL’Y* 35, 46 (2001); Boutruche, *supra* note 138, at 36.

¹⁴³ MSF launches petition drive for Afghanistan attack investigation, MSF Press Release, DOCTORS WITHOUT BORDERS (Oct. 15, 2015) <https://www.msf.org/msf-launches-petition-drive-afghanistan-attack-investigation>; Initial reaction to public release of U.S. military investigative report on the attack on MSF trauma hospital, MSF Press Release, DOCTORS WITHOUT BORDERS, (Apr. 29, 2016) <https://www.msf.org/kunduz-initial-reaction-public-release-us-military-investigative-report-attack-msf-trauma-hospital>

¹⁴⁴ For instance, a tension exists between the desire to promote accountability by conducting criminal trials, and the struggle for a peaceful change of regime, which sometimes can be achieved only by

the mandate of the UN Independent Investigation on Burundi (UNIIB). The mandate includes several goals, including “preventing further deterioration of the human rights situation”; making recommendations “on the improvement of the human rights situation”; assisting reconciliation efforts; ensuring “accountability for human rights violations and abuses, including by identifying alleged perpetrators”; adopting “appropriate transitional justice measures”; issuing a final report; and participating in an enhanced interactive dialogue on the human rights situation in Burundi.¹⁴⁵ While all of these goals are valuable, it seems unlikely that a fact-finding body could accomplish all of them at the same time while relying on a single structure. A tension exists, for example, between the desire to promote accountability by identifying and prosecuting responsible individuals and the desire to prevent future abuses and to promote reconciliation, which can sometimes be achieved only by promising powerful leaders full or partial amnesty.¹⁴⁶

Therefore, it is important to prioritize the goals of fact-finding bodies and to choose between certain long-term goals, such as accountability, and other objectives, such as preventing future atrocities.¹⁴⁷ Keeping in mind the complexity of some conflicts, the goals of international fact-finding missions should not be limited to adjudication and accountability. While certain fact-finding mechanisms ought to support international criminal tribunals, not all international fact-finding mechanisms should be designed in their shadow.

3. *Matching Goals with Processes in Asymmetrical Wartime Fact-Finding*

As discussed above, an international fact-finding mechanism, like any other international institution, may be established to fulfil an array of goals and purposes. However, the structure and processes adopted by international fact-finding missions in recent years have been quite uniform, focusing on legal categories and legal violations frameworks to collect, interpret, and report

promising powerful dictators full amnesty. See Andrea Kupfer Schneider, *The Intersection of Dispute Systems Design and Transitional Justice*, 14 HARV. NEGOT. L. REV. 289, 292 (2009). Another tension exists between justice and truth, as the criminal legal process limits the permissible evidence. Moreover, the ICTY was criticized for fueling the Serb population’s antagonism and for failing to create a common and accepted account of the war’s history. See Patricia M. Wald, *ICTY Judicial Proceedings: An Appraisal From Within*, 2 J. INT’L CRIM. JUST. 466, 467 (2004).

¹⁴⁵ Human Rights Council Res., U.N. Doc. A/HRC/RES/S-24/1 (Dec. 17, 2015), <http://www.ohchr.org/EN/HRBodies/HRC/UNIIB/Pages/UNIIB.aspx> [hereinafter Burundi Fact-Finding Resolution].

¹⁴⁶ Schneider, *supra* note 146, at 291–92 (2009); see also JANE E. STROMSETH, DAVID WIPPMAN, & ROSA BROOKS, CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 253 (2006).

¹⁴⁷ In fact, this issue becomes much more complex, since the question of “whether and how accountability proceedings can contribute to strengthening domestic justice systems” is “surprisingly underanalyzed.” STROMSETH & WIPPMAN, *supra* note 148, at 253.

facts.¹⁴⁸ A possible explanation for this uniformity is that the mandates of fact-finding mechanisms are often crafted hastily, without identifying and prioritizing concrete goals, while atrocities are ongoing.¹⁴⁹ A lack of clarity concerning a mission's goals may motivate the adoption of existing or familiar processes and structures, without proper consideration of the appropriateness of these structures to achieve the desired goals, or of the existence of alternative structures.

Therefore, those designing fact-finding bodies investigating wartime attacks should first define, clarify, and prioritize the goals and purposes of the bodies' mission. Based on these goals and purposes, alternative processes and structures should be considered, matching goals to processes in order to maximize the efficacy of the fact-finding body. Instead of adopting a "one size fits all" approach, fact-finding efforts would benefit from careful consideration of alternative processes and structures, and from tailoring concrete processes and structures to specific goals. For example, if the main goal of a fact-finding exercise is legal accountability, a court-like structure, complete with enforcement powers, is advisable. If, however, the main goal is conflict resolution, then a narrative or restorative approach to truth would be preferable. Finally, if the main goal is to prevent future atrocities, a suitable fact-finding process should focus on systemic failures, flawed organizational processes, and faulty decision-making practices.

D. Returning to the Kunduz Hospital Bombing: Some Prospects for Effective Change

Applying the previous discussion to the case of the attack on the Doctors Without Borders hospital in Kunduz, the following Section proposes a shift away from legal blame and individual criminal responsibility and a renewed focus on necessary organizational reform.

1. Rethinking the Ontology and Epistemology of Asymmetrical Wartime Fact-Finding

Investigating the attack on the Kunduz hospital by the IHFFC, through its legal lens, dictates a focus on a set of legal questions that concern alleged violations of international law. By asking these questions alone, the investigation can only provide limited information about the legal issues at stake. Information concerning the intent of the perpetrators, or any other element of the relevant violations, will be collected, and the relevant law will be interpreted and applied. However, information concerning the broader institutional and social processes that enabled war crimes will be withheld. As a result, the organizational culture

¹⁴⁸ An analysis of the mandates of these sixty-six fact-finding missions established that an overwhelming majority of these missions—95 percent—were established to investigate alleged violations of international law. Krebs, *supra* note 32, at 96.

¹⁴⁹ See, e.g., *Burundi Fact-Finding Resolution*, *supra* note 147.

of the military, decision-making processes and dynamics, risk assessment strategies, and relevant precautionary methods and training will not be included in the fact-finding process. Questions about whether the soldiers violated international law or whether the attack constituted a war crime will probably be explored. Other questions, however, will likely remain unanswered, including questions pertaining to: how soldiers identified the target; what type of training and preparation soldiers had on dealing with mechanical failures and limited information during military operations; how information was transmitted between different units and divisions; how soldiers interpret and treat uncertainty during combat; and whether training programs existed to deal with battlefield stress and uncertainty.

The first set of (strictly legal) questions leads to binary outcomes: international law was violated or it was not; war crimes were committed or they were not. Answering these questions requires determining whether a crime as defined by the relevant law was committed, and whether a single individual (or a group of individuals) can be singled out as responsible for committing this crime. However, the second set of questions introduced above opens the stage for elaborate answers focused on organizational culture and processes within the military. These questions can point to institutional failures and identify problematic processes that increase the probability of misidentification and failed risk assessments.

Answering the legal questions, the US military investigation concluded that the attack on the Doctors Without Borders hospital did not amount to a war crime because it was not intentional.¹⁵⁰ Instead, Centcom found that the attack resulted from a human error.¹⁵¹ However, instead of examining the decision-making processes in great detail, the report simply attributed the error to the “fog of war.”¹⁵² Since the main question was whether a war crime was committed, Centcom did not need to explore the sources and causes of the error. Anything not related to the existence of a legal violation lost its significance.

Although today there is more public information about the events leading to the attack on the Doctors Without Borders hospital, it remains unclear what is needed to prevent such an error from happening again. It is time to reclaim fact-finding as a meaningful exercise in describing various aspects of wartime actions. Legal facts have their significance in defining and labelling wartime atrocities. Nonetheless, sheer facts, stripped of their potential legal meaning but interpreted within their social and organizational context, may be just as important in achieving military change and reform. This turn away from an exclusively legal focus resonates well within the context of asymmetrical conflicts in general, and resonates particularly well with regard to the conflict between the United States and Doctors Without Borders because this approach focuses on future prevention

¹⁵⁰ CENTCOM REPORT, *supra* note 46, at 2.

¹⁵¹ *Id.* at 1.

¹⁵² *Id.* at 2.

and reform rather than individual blame and the identification of a few “rotten apples.”

2. *From Legal Blame to “Learning from Failure”*

If, indeed, the main goal of Doctors Without Borders is to prevent future breaches of the protections afforded to medical objects, the adoption of legal discourse may be counterproductive. A binary legal judgment that either incriminates or absolves specific individuals might stand in the way of information sharing and creating a detailed and accurate understanding of what happened. The adversarial process triggers defensive responses and denial. Such a focus on individual actors might mask broader systemic failures.

A prevention paradigm requires going beyond the legal questions. Doctors Without Borders’ current commitment to criminalization and blame is likely to have detrimental effects on individuals’ willingness to report and disclose sensitive information concerning erroneous risk assessments and organizational failures. Instead, Doctors Without Borders should consider forsaking this commitment in favor of an organizational discourse that promotes a “learning from failure” approach, offering collaborative, blameless, fact-finding structures to motivate information sharing, disclosure, and organizational reform.¹⁵³ This approach would shift the organization’s focus away from individual criminal responsibility and toward broader social processes that may better account for the failures that led to the attack on the Kunduz hospital, including the organizational culture, decision-making practices, and structural biases that contribute to erroneous risk assessments. The literature surveyed above testifies to the potential of such an alternative discourse in instigating better practices of information sharing and organizational change.

3. *Dispute System Design: Restructuring Goals, Priorities, and Processes*

What is more important: determining what happened, or determining who is responsible? Prosecuting individual persons involved, or implementing long-term institutional changes? Of course, it is possible to envisage a way to pursue a combination of these goals in a single case. However, clarifying and prioritizing these goals will help fact-finding bodies decide which structures and processes best fit the particular situation. In a statement made a year after the attack on the hospital in Kunduz, Doctors Without Borders’ General Director, reiterated the organization’s greatest hope and goal: to prevent incidents like the attack on its hospital in Kunduz from happening again.¹⁵⁴ Based on this and other communications, it seems that the organization’s main goal is not individualized prosecutions for the sake of criminal justice, but rather identifying the institutional processes and decision-making practices that lead to the misidentification of

¹⁵³ See Edmondson, *supra* note 136.

¹⁵⁴ Stokes, *supra* note 30.

targets, intelligence failures, and erroneous attacks on humanitarian facilities and personnel.

Therefore, the real question in this case is what factors contributed to the US military's erroneous identification of the Kunduz hospital as a military target and its subsequent attack using heavy fire.¹⁵⁵ This is a challenging question, because as Doctors Without Borders' General Director accurately observed, "there is zero political will among governments to have their military conduct examined from the outside."¹⁵⁶ Nonetheless, there are ways to alleviate some of the resistance to external investigations and to encourage governments and military organizations to participate and cooperate in external fact-finding processes. For example, fact-finding bodies could relinquish their demand to hold individuals criminally accountable in return for a detailed account of the events, organizational processes, and the decision-making practices that were utilized.

CONCLUSION

As in Amichai's poem, the diameter of the 211 bombs fired at the Kunduz hospital encompasses the entire world, creating an endless circle of loss and grief. But the legal focus of the fact-finding efforts has made this enormous loss and human grief irrelevant. Focused solely on legal facts, the various investigations debated one question: whether US conduct constituted a war crime. Attempts to answer this question prompted discussions about the relevant laws and their proper interpretation, which in turn fueled disputes about specific facts relevant to those laws. Unfortunately, focusing on questions of law, guilt, and blame diverted attention from the more basic questions of what actually happened, why it happened, and most importantly, what might be done to prevent similar incidents in the future. Investigators' narrow legal focus may also have prevented deeper reflection and remorse, as the threat of legal proceedings tends to discourage those involved from taking responsibility out of fear of retribution.

The attack on the Kunduz hospital and the controversy that followed it exemplify a broader phenomenon. Legal fact-finding efforts aimed at resolving factual disputes often trigger further controversy, and are poorly equipped to gather sensitive information and facilitate cooperation. This is particularly true when the controversy relates to attacks harming non-State actors, such as Doctors Without Borders, which suffer from structural, political, and legal weaknesses in general and particularly when it comes to gathering evidence about wartime actions.

¹⁵⁵ See, e.g., *Kunduz: Some of MSF's Questions in Response to the U.S. Military Investigation into Their Attack on the Hospital*, DOCTORS WITHOUT BORDERS (Apr. 29, 2016), <http://www.msf.org/en/article/kunduz-some-msf%E2%80%99s-questions-response-us-military-investigation-their-attack-hospital>.

¹⁵⁶ Stokes, *supra* note 30.

Based on Doctors Without Borders' communications, the organization's main goal is not individualized prosecutions and adjudication, but rather protecting its people, medical facilities, and patients from future attacks. To achieve this goal, it would be wise to consider alternatives to legal fact-finding. Adversarial legal truth should not dominate wartime fact-finding efforts. Legal truth is not the only truth, and legal blame may be counterproductive when it comes to preventing future atrocities and mobilizing institutional change within inflexible military organizations. There are other types of knowledge that may be less threatening than legal truth and more sensitive to the nuances of complex wartime situations.

One such alternative approach would be to focus on systemic failures and processes rather than on individual blame. In investigations of medical and aviation catastrophes, a "learning from failure" approach can better prevent the recurrence of catastrophe by focusing on the organizational culture, decision-making processes, and structural biases that lead to erroneous risk assessments. This approach is better suited to motivate information sharing, disclosure, and organizational reform. Applying this approach to a wartime context would shift the focus of attention from issues relating to legal interpretation and individual criminal responsibility to broader structural biases and flawed decision-making practices, which may better account for the failures leading to the attack on the Kunduz hospital. By focusing less on issues of law, guilt, and blame, fact-finding bodies will be better able to disperse the "fog of war" and prevent future catastrophes.

