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Designing International Fact-Finding: Facts, Alternative Facts, and National Identities

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ARTICLE

DESIGNING INTERNATIONAL FACT-FINDING:
FACTS, ALTERNATIVE FACTS, AND NATIONAL
IDENTITIES

*Shiri Krebs**

*“After every war
someone has to clean up.
Things won’t
straighten themselves up, after all.*

*...
Those who knew
what was going on here
must make way to
those who know little.
And less than little.
And finally as little as nothing.*

*In the grass that has overgrown
causes and effects,
someone must be stretched out,
blade of grass in his mouth,
gazing at the clouds.”*

*-Wisława Szymborska, *The End and the Beginning****

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** WISŁAWA SZYMBORSKA, *The End and the Beginning*, in *MIRACLE FAIR: SELECTED POEMS OF WISŁAWA SZYMBORSKA* 48-49 (Joana Trzeciak trans., 2001).

ABSTRACT

One of the most certain facts about conflicts is uncertainty about facts. To establish the truth and find out what really happened, the international community has been sending fact-finding missions to conflict areas around the world. These missions have been designed to produce legal reports, based on binary legal dichotomies. This article builds on social psychology studies to argue that these missions' reliance on abstract and adversarial legal norms triggers backlash and rejection of factual findings by the perpetrators' societies. Instead of agreeing on a simple set of brute facts, such as the number of fatalities, or concrete causes of death, the focus of attention is shifted to abstract legal norms and to the threat they pose to collective beliefs and identities. Focusing on the U.N. Fact-Finding Mission on the Gaza Conflict as a case study, this article demonstrates how international efforts to provide conflicting societies with new, credible facts may instead end up intensifying the conflict over 'what happened.' Particularly, the article sheds light on several contemporary challenges to international fact-finding, including their factual contingency, their ambiguous goals and flawed institutional design processes, and their dissemination deficit.

Based on an interdisciplinary normative framework and empirical analysis of the Goldstone Mission, the article suggests a new framework to design international fact-finding missions. First, the concept of truth should not be associated exclusively with legal truth, and facts should not be interpreted and evaluated based solely on legal categorization and interpretation; second, long-term goals should be carefully clarified, prioritized, and tailored to the concrete social circumstances; third, fact-finding processes should be matched with the mission's core goal, with a special attention given to institutional structures, participation, and social legitimacy. Finally, in this era of constant challenges to knowledge and information, where 'alternative facts' are frequently produced to counter unwelcomed information, and when critical findings are denounced as 'fake news', international fact-finding missions should be sensitive to the various contingencies of their findings, and adopt a humbler approach concerning the 'indisputable' nature of these findings. By reimagining international fact-finding and rethinking their design processes, International fact-finding missions may contribute to dissemination of threatening information during intractable conflicts in a way which is unattainable by existing legal institutions.

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I. INTRODUCTION

How many Palestinian civilians were killed during Operation Cast Lead? Was the killing of twenty-one family members at the Al-Samouni house an intentional targeting of civilians, or an unfortunate mistake based on erroneous intelligence? Were war crimes and crimes against humanity committed by Israel or Hamas (or both) during these twenty-two days in December 2008 and January 2009? These and many other questions concerning Operation Cast Lead have troubled many organizations and individuals around the world. Amnesty International urged the international community to intervene,¹ Israeli human rights organizations called on the Israeli Government to halt the threat to civilians in Gaza,² and various international organizations pressed the Security Council to ‘take action.’³

The United Nations (“UN”) Human Rights Council decided to intervene: on January 12, 2009, while hostilities were still ongoing in Gaza, it established the UN Fact-Finding Mission on the Gaza Conflict (hereinafter the Goldstone Mission) to investigate violations of international law.⁴ After months of intensive work collecting evidence and hearing testimonies, the Goldstone Mission issued a detailed 452-page report.⁵ After recounting ‘factual findings,’ the

1. *Amnesty International Calls for an Immediate Humanitarian Truce in Gaza*, AMNESTY INTERNATIONAL (Jan. 7, 2009), <https://www.amnesty.org/en/latest/news/2009/01/amnesty-international-calls-immediate-humanitarian-truce-gaza-20090107/> [https://perma.cc/87X5-H52Y] (archived Dec. 31, 2017); *End Unlawful Attacks and Meet Gaza’s Emergency Needs*, AMNESTY INTERNATIONAL (Dec. 29, 2008), <https://www.amnesty.org/en/latest/news/2008/12/end-unlawful-attacks-and-meet-gaza039s-emergency-needs-20081229/> [https://perma.cc/PD9U-CYH8] (archived Dec. 31, 2017).

2. Donald Macintyre, *Civilian Casualties: Human Rights Groups Accuse Israelis of War Crimes*, INDEPENDENT (Jan. 15, 2009), <https://www.independent.co.uk/news/world/middle-east/civilian-casualties-human-rights-groups-accuse-israelis-of-war-crimes-1366727.html> [https://perma.cc/LL6W-YASN] (archived Dec. 31, 2017).

3. Press Release, Press Conference by Humanitarian, Human Rights Organizations on Gaza, UNITED NATIONS (Jan. 7, 2009), http://www.un.org/press/en/2009/090107_Humanitarian.doc.htm [https://perma.cc/XN3C-CD9V] (archived Dec. 31, 2017).

4. *The Grave Violations of Human Rights in the Occupied Palestinian Territory, Particularly Due to the Recent Israeli Military Attacks against the Occupied Gaza Strip*, Human Rights Council, U.N. Doc. A/HRC/S-9/L.1 (Jan. 12 2009), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G09/102/84/PDF/G0910284.pdf?OpenElement> [https://perma.cc/6CMS-FQHA] (archived Dec. 31, 2017).

5. Report of the Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009), <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> [https://perma.cc/GQ5Q-S95E] (archived Jan. 18, 2018) [hereinafter *the Goldstone Report*].

Report further described the Mission's 'legal findings,' and concluded that some of the actions of the Government of Israel and of the Palestinian armed groups constitute war crimes and may amount to crimes against humanity.⁶

The Jewish-Israeli public rejected the Report altogether as biased and unfounded.⁷ The Israeli Government contested the Report's findings and issued its own alternative reports.⁸ The facts produced by the Israeli counter-reports stood in stark contradiction to the facts established by the Goldstone Report.⁹ Consequently, the Goldstone Report became, in itself, a part of the conflict.¹⁰ Soon enough, the Report sparked another debate concerning the legal standards to be applied by international fact-finding missions.¹¹ But in spite of all the attention and the resources invested, and almost a decade later, to this

6. *Id.* at 284, 417-19.

7. An Israeli public opinion poll found that among Jewish-Israelis that were familiar with the report's main conclusion, an overwhelming majority (93.5%) believed that the report was biased against Israel; and 79% rejected the finding that IDF soldiers committed war crimes. Data and questionnaires courtesy of the Guttman Center for Surveys at the Israel Democracy Institute (RA) and the Evens Program in Mediation and Conflict Resolution at Tel Aviv University. See EPHRAIM YAAR & TAMAR HERMANN, WAR AND PEACE INDEX - SEPTEMBER 2009 1 (2009), http://www.peaceindex.org/files/peaceindex2009_9_3.pdf [<https://perma.cc/9PQ9-WHRC>] (archived Jan. 19, 2018).

8. *Initial Response to Report of the Fact-Finding Mission on Gaza Established Pursuant to Resolution S-9/1 of the Human Rights Council*, ISRAELI MINISTRY OF FOREIGN AFFAIRS (Sept. 24, 2009) http://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GoldstoneReportInitialResponse240909.pdf; *Gaza Operation Investigations: An Update*, ISRAELI MINISTRY OF FOREIGN AFFAIRS (Jan. 29, 2010), http://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaOperationInvestigationsUpdate.pdf [<https://perma.cc/3NPG-JJBB>] (archived Dec. 31, 2017).

9. With regard to several incidents described in the Goldstone Mission, the Israeli counter-report contained an opposing factual description of the events, specifically concerning the identification of various targets as military or civilian targets, the munition used, and the intent or knowledge of the commanders in the field. Compare Goldstone Report, *supra* note 5, at 199-201, and Israeli counter-report, *supra* note 8, at 41-44 (concerning the destruction of the El-Bader flour mill), with Goldstone Report, *supra* note 5, at 208-10, and Israeli counter-report, *supra* note 8, at 37-38 (concerning the attack on the Namar Wells).

10. Tom Farer, *The Goldstone Report on the Gaza Conflict: An Agora*, 16 GLOBAL GOVERNANCE 139 (2010). See also Jerome Slater, *The Attacks on the Goldstone Report*, in THE GOLDSTONE REPORT: THE LEGACY OF THE LANDMARK INVESTIGATION OF THE GAZA CONFLICT 360-374, 360 (Adam Horowitz, et al. eds., 2011) (stating that the report "has been so relentlessly and bitterly attacked in Israel and the United States that it has become toxic.").

11. See, e.g., Abraham Bell, *Critique of the Goldstone Report and Its Treatment of International Humanitarian Law* 104 AM. SOC'Y INT'L L. PROC. 79 (2010); Laurie R. Blank, *Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare* 43 CASE W. RES. J. INT'L L. 279 (2011); William A. Schabas, *Gaza, Goldstone, and Lawfare* 43 CASE W. RES. J. INT'L L. 307 (2011); Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict* 2 HARV. NAT'L SECURITY J. 31 (2011).

day we still don't know for certain how many Palestinians were killed during Operation Cast Lead, and how many of them were unarmed civilians. Similarly, we do not know for sure whether some of the attacks described in the Report constituted war crimes or crimes against humanity, and if so, who was responsible for these crimes, and how similar incidents might be prevented in the future.

In fact, similar incidents did take place not long after the Goldstone Report was published, and they continue to occur. For example, in the summer of 2014, another Israeli-Palestinian war took place in Gaza (Operation Protective Edge), and new factual and legal controversies immediately began to rage. The UN Human Rights Council ("UNHCR") established a new commission of inquiry to investigate international law violations committed by Israel during the 2014 Gaza war;¹² Israelis and Palestinians have rounded up the Facebook and Twitter troops to fight this bitter public opinion battle over the perception of law and facts; international law scholars have published contrasting legal opinions concerning Israel Defense Forces ("IDF") actions;¹³ and the Israeli media went so far as to name those lawyers defending IDF actions as "Legal Iron Dome."¹⁴ Once again, the legal debates have taken over the discussions concerning what happened, serving as yet another weapon in the war for public support.

This article argues that during intractable conflicts such as the Israeli-Palestinian conflict, fact-finding missions which center their efforts – as the Goldstone Mission did – on legal questions, may trigger backlash and denial, encourage the production of alternative reports and factual accounts, and ultimately intensify the very controversies they were set to resolve. Specifically, I argue that the unnecessary focus of current international fact-finding mechanisms

12. Human Rights Council Res. S-21/1, (July 23, 2014), <http://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session21/Pages/21stSpecialSession.aspx> [<https://perma.cc/YMN6-5QQQ>] (archived Dec. 31, 2017).

13. AVI BELL, ISRAEL MAY STOP SUPPLYING WATER AND ELECTRICITY TO GAZA (July 24, 2014), <http://en.kohelet.org.il/wp-content/uploads/2016/02/israel-may-stop-supplying-water-and-electricity-to-Gaza-updated.pdf> [<https://perma.cc/S7J9-VMBA>] (archived Dec. 31, 2017); Yuval Shany et. al., *Legal Opinion Concerning Supply of Electricity and Water to the Gaza Strip* (July 20, 2014), <http://gisha.org/UserFiles/File/publications/letters/letter-en-20-7-14.pdf> [<https://perma.cc/FV5J-UW8G>] (archived Dec. 31, 2017).

14. 'Iron Dome' is the missile defense system that protects Israeli cities from Palestinian rockets. See Gilad Grossman, *Legal Iron Dome*, WALLA! NEWS (Nov. 18, 2012), <http://news.walla.co.il/?w=/1/2587639> [<https://perma.cc/J77Q-SA9A>] (archived Jan. 18, 2018).

(including the Goldstone Mission) on the ‘legal truth’¹⁵ triggers various socio-psychological biases, which impede efforts to disseminate information. The *abstract* nature of legal norms creates a psychological distance between the facts and their audience, thus making it easier to reject the findings altogether. The *adversarial* nature of legal norms, leading to mutually exclusive conclusions, motivates conflicting societies to completely reject information that deviates from the national narrative. As a result, the adoption of dichotomous legal categories may unintentionally intensify distortion (rather than assertion) of facts.

The article begins, in Part II, by identifying several contemporary challenges to international fact-finding, including the contingency of their findings, the ambiguity of their goals, and their dissemination deficit. Part III explores various socio-psychological processes and dynamics affecting the dissemination of information during armed conflicts. Part IV applies this interdisciplinary theoretical framework to the Israeli-Palestinian conflict, and sheds light on the concrete socio-psychological barriers to fact-finding, faced by the Goldstone Mission. Finally, Part V suggests some possible directions for a positive change in the design and implementation of international fact-finding missions.

II. INTERNATIONAL FACT-FINDING: CONTEMPORARY CHALLENGES

From Palestine to Syria, to Afghanistan and Iraq; from Ukraine to Chechnya, to Serbia, to Congo: one of the most certain facts about conflicts is uncertainty about facts.¹⁶ The disagreement about facts may include the history and roots of the conflict, as well as details concerning ongoing hostilities. Many times, disputes over facts

15. ‘Legal truth’ refers to the adoption of legal categories to construct and interpret facts. See Shiri Krebs, *The Legalization of Truth in International Fact Finding*, 18 CHI. J. INT’L L. 83, 92-93 (2017). See also, Jack M. Balkin, *The Proliferation of Legal Truth*, 26 HARV. J. L. & PUB. POL’Y 5, 6 (2003); Michael S. Moore, *The Plain Truth about Legal Truth*, 26 HARV. J. L. & PUB. POL’Y 23, 25 (2003).

16. Bothe, for example, highlights the importance of ascertaining facts in a variety of conflicts, be they of a social, political or legal character. See Michael Bothe, *Fact-Finding as a Means of Ensuring Respect for International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 249-67 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007).

become so intense they nourish and intensify the conflict,¹⁷ and thus pave the way to reoccurrence of crimes and abuses.¹⁸

To resolve such controversies and determine “what happened,” international organizations (including UN bodies, such as the Office of the Secretary-General and the Human Rights Council) have increasingly employed international commissions of inquiry or fact-finding missions.¹⁹ These missions serve as a way to ascertain facts by way of gathering immediate, credible, and first-hand information,²⁰ based on rigorous methodology,²¹ adequate recourses,²² and qualified personnel.²³

In recent decades, there has been a tremendous increase in the number of fact-finding institutions, as well as increasing variety in their mandates and establishing bodies.²⁴ Nonetheless, many of these international fact-finding missions share two common structures: the

17. For an elaborated discussion on the disagreement on facts as a socio-psychological barrier to conflict resolution, see Suzanne Retzinger & Thomas Scheff, *Emotion, Alienation, and Narratives: Resolving Intractable Conflict*, 18 *MEDIATION Q.* 71-85 (2000); Peter T. Coleman, *Characteristics of Protracted, Intractable Conflict: Toward the Development of a Metaframework-I*, 9 *PEACE & CONFLICT: J. PEACE PSYCHOL.* 1, 19 (2003).

18. For a comprehensive analysis of preservation of conflicting narratives and beliefs in intractable conflict, see Daniel Bar-Tal, *Sociopsychological Foundations of Intractable Conflicts*, 50 *AM. BEHAV. SCIENTIST* 1430 (2007). See also Neta Oren & Daniel Bar-Tal, *The Detrimental Dynamics of Delegitimization in Intractable Conflicts: The Israeli-Palestinian Case*, 31 *INT’L J. INTERCULTURAL REL.* 111 (2007).

19. Krebs, *supra* note 15, at 94-95.

20. See generally H. VICTOR CONDÉ, *A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY* 88, 127 (2004); Bertrand G. Ramcharan, *Introduction to INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS* (2013); see also G.A. Res. 46/49 (Dec. 9, 1991).

21. Diane F Orentlicher, *Bearing Witness: The Art and Science of Human Rights Fact-Finding*, 3 *HARV. HUM. RTS. J.* 83, 85 (1990); see generally Théo Boutruche, *Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice*, 16 *J. CONFLICT & SECURITY L.* 105 (2011).

22. M. Cherif Bassiouni, *Appraising UN Justice-Related Fact-Finding Missions*, 5 *WASH. U. J.L. & POL’Y* 35, 42 (2001).

23. Bertrand G. Ramcharan, *INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS*, *supra* note 20, at 42. Indeed, fact-finding efforts in a variety of contexts “requires one to perfect strategies for information gathering, interpersonal communication, and analysis of both the legal and non-legal dimensions of a particular socio-legal problem.” Johanna Bond, *The Global Classroom: International Human Rights Fact-Finding as Clinical Method*, 28 *WM. MITCHELL L. REV.* 317, 328 (2001).

24. For a brief overview of fact-finding mechanisms established by the international community since 1913, see Rob Grace & Claude Bruderlein, *Building Effective Monitoring, Reporting, and Fact-finding Mechanisms* 3-9 (Program on Humanitarian Pol’y and Conflict Res., Harv. Univ. Working Paper, 2012).

lack of compulsory jurisdiction or enforcement capacity;²⁵ and the adoption of legal categories (such as war crimes and crimes against humanity) to interpret the facts and infuse meaning into their findings.²⁶ The combination of these common structures of international fact-finding mechanisms separates them from other accountability mechanisms (such as international tribunals), and generates several challenges for the production and dissemination of fact-finding reports. The next Sections will focus on three of these challenges to international fact-finding missions, including the contingency of their findings, the ambiguity of their goals, and their dissemination deficit.

A. Factual Contingency

What are facts for the purposes of international fact-finding missions? What types of facts are to be included in the fact-finding process? Should all types of facts be treated equally, using the same methodology and subject to the same burden of proof? In fact, during fact-finding processes various types of facts are collected, produced and interpreted. Some facts are brute or physical facts, for example, the number of fatalities or weapons' remains found at the scene; other facts are inferences and predictions, such as risk assessments or anticipated levels of threat; value-judgments, such as the excessiveness of harm, represent yet another kind of fact; and lastly, there are legal facts or legal interpretations, which include categorizing an individual as a 'civilian,' or determining that a certain behavior constitutes a crime. Each of these types of facts presents a different challenge with regard to fact-finding processes, appropriate methodologies, and burdens of proof.

Nonetheless, fact-finders in a variety of legal contexts often disregard the unique empirical challenges raised by each type of fact, and adopt similar processes to obtain and interpret facts.²⁷ The

25. Geoffrey Palmer, *Reform of UN Inquiries*, in FOR THE SAKE OF FUTURE GENERATIONS-ESSAYS ON INTERNATIONAL LAW, CRIME JUSTICE IN HONOUR OF ROGER S. CLARK 597, 610-615 (2015).

26. In another study, I compiled a data set of UN fact-finding missions throughout the years, and analyzed their mandates and goals, finding that a large majority were tasked with promoting legal accountability based on legal categories and interpretation. See Krebs, *supra* note 15, at 94-96.

27. Michael D. Risinger, *Searching for Truth in the American Law of Evidence and Proof*, 47 GA. LAW REV. 801 (2013); see, also Michael S. Moore, *The Plain Truth about Legal Truth*, 26 HARVARD J. L. & PUB. POL'Y 23, 24-26 (2003) (distinguishing between propositions

Goldstone Mission, for example, adopted an “inclusive approach to gathering information and seeking views” and held public hearings which “covered facts as well as legal and military matters.”²⁸ In establishing its findings, the Goldstone Mission referred to objective and subjective elements of the crimes in question, yet clarified that its findings did not reach the standard of proof applicable in criminal trials.²⁹ The Goldstone Mission did not elucidate which standard of proof was adopted instead. Similarly to many other fact-finding bodies, the Goldstone Mission entertained the idea that a “[fact-finding] report speaks for itself.”³⁰ However, the facts produced by fact-finding missions almost never speak for themselves; rather,

of fact, general law, interpretation, value, and logic). Instead, facts have been treated as objects, waiting to be ‘found’ through a neutral process of fact-finding. 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, 125-26 (1992).

28. *The Goldstone Report*, *supra* note 5, at 15.

29. *Id.* at 16 (clarifying that its findings do not attempt to identify the individuals responsible for the commission of offences).

30. In a press conference following the release of the Goldstone Report, Justice Goldstone expressly stated that “the report speaks for itself” in documenting crimes committed by both Israel and Hamas. Human Rights Council, *Unofficial transcript of 29 September 2009 Press Conference at the Palais des Nations in Geneva by Members of the UN Fact Finding Mission on the Gaza Conflict - Justice Richard Goldstone, Hina Jilani, Professor Christine Chinkin, Colonel Desmond Travers*, at 7 (Sept. 29, 2009) <http://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session9/Pages/FactFindingMission.aspx>. Former UN Secretary-General, Ban Ki-Moon, opined, similarly, that “the facts speak for themselves,” while referring to the findings of the UN Commission of Inquiry that “[Syrian] Government and pro-government forces have committed murder, enforced disappearances, extrajudicial executions, rape and torture against civilians,” and determining that these actions and the use of chemical weapons by Syrian forces amount to war crimes and crimes against humanity. *The United Nations Secretary-General’s remarks to the Security Council on the report of the United Nations Missions to Investigate Allegations of the Use of Chemical Weapons on the incident that occurred on 21 August 2013 in the Ghouta area of Damascus*, UNITED NATIONS SEC’Y GEN., (Sept. 16, 2013), <https://www.un.org/sg/en/content/sg/statement/2013-09-16/secretary-generals-remarks-security-council-report-united-nations> [<https://perma.cc/PGV6-U7X5>] (archived Dec. 31, 2017). Also, former UN Secretary-General Kofi Annan presented the report of the fact-finding mission to Iraq to the UN Security Council by stating that “the report of the fact-finding mission speaks for itself.” U.N. Secretary-General, Letter dated Feb. 23, 2004 from the Secretary-General to the President of the Security Council, U.C. Doc. S/2004/140 (Feb. 23, 2004), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/140 [<https://perma.cc/PU6T-9AKL>] (archived Jan. 19, 2017); *see also The Facts Speak for Themselves: The Preliminary Report on Disappearances of the National Commissioner for the Protection of Human Rights in Honduras*, HUMAN RIGHTS WATCH (July 1, 1994), <https://www.hrw.org/report/1994/07/01/facts-speak-themselves/preliminary-report-disappearances-national-commissioner> [<https://perma.cc/KG5L-62RD>] (archived Dec. 31, 2017); Rob Grace, *Communication and Report Drafting in Monitoring, Reporting, and Fact-finding Mechanisms* 13, 53 (Program on Humanitarian Pol’y and Conflict Res., Harv. Univ. Working Paper, 2014).

various institutional and design choices speak for them. Specifically, the decision to adopt legal categories to interpret the facts, produces a contingent version of reality, as it adheres to legal rules and processes that frame the story, infuse it with meaning, and dictate 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.³¹ Terms such as ‘genocide,’ ‘civilian,’ ‘terrorist,’ ‘torture,’ or even ‘responsibility’ have unique meanings as legal terms, and potentially other meanings outside the law, within political, ethical, or moral discourses. When we adopt legal categories to interpret reality and determine the truth, the findings relate to the legal reality, which may be very different from the moral, ethical, or political interpretation of reality.³² For example, a finding that 764 Palestinian civilians were killed by Israeli security forces during operation cast lead depends on the interpretation of the legal category ‘civilians.’³³ Applying a moral or ethical interpretation, a political interpretation, or even a different legal interpretation – may dramatically change our findings concerning the number of *civilians* killed. Additionally, legal categories are often dichotomous, coercing complex reality into simplified categories such as ‘combatant’ or ‘civilian,’ ‘lawful,’ or ‘unlawful.’ The categorization itself forces meaning onto the facts, and simplifies compound and nuanced representations.³⁴

31. See Michael S. Moore, *Legal reality: A naturalist approach to legal ontology*, 21 *LAW & 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.”); Balkin, *supra* note 15, at 7 (“law’s truth is not the only truth, and law’s vision of reality is not the only reality.”)

32. See Balkin, *supra* note 15, at 7 (arguing that law’s power to enforce its vision of the world can clash with other practices of knowledge, and with other forms of truth).

33. This indeed raised heated controversies following the release of the Goldstone Report, especially concerning the appropriate legal categorization of the 248 Palestinian police officers who were killed by Israeli forces at the outset of the war. See, e.g., Michael N. Schmitt, *Military necessity and humanity in international humanitarian law: preserving the delicate balance*, in *ESSAYS ON LAW AND WAR AT THE FAULT LINES* 89, 116 (2011); see also *Israel/Gaza: Civilians Must Not Be Targets*, HUMAN RIGHTS WATCH (Dec. 30, 2009), <https://www.hrw.org/news/2008/12/30/israel/gaza-civilians-must-not-be-targets> [<https://perma.cc/RZH4-CZPV>] (archived Dec. 31, 2017); *Israel’s Gaza Toll Far Lower Than Palestinian Tally*, REUTERS (Mar. 27, 2009), <https://www.reuters.com/article/idUSLQ977827> [<https://perma.cc/3XCZ-WK5M>] (archived Jan. 20, 2018).

34. Sherwin explores, 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. See generally Richard K.

Epistemologically, legal categories limit and define what is considered 'true' in various ways. First, legal conventions, jurisdiction and rules of evidence join in to carve the boundaries of the story they tell, by limiting the universe of facts that are included in the legal account of 'what happened.' Rooted rules of admissibility may serve to exclude various facts from the fact-finding process, even if they do not formally apply. For example, it is often the case that only facts that are specifically relevant to answering the legal question - such as causes of death or intent of the perpetrator - are included. Other facts, relating, for example, to the more distant roots of the conflict, broader social processes of dehumanization, or acts committed outside the temporal or geographical jurisdiction of the fact-finding body - are excluded.³⁵ Second, legal epistemology further restructures the story by determining the weight and reliability of the relevant facts. Legal rules determine the value and strength of the information collected, preferring some facts over others.

While many of these rules are designed to promote an accurate account of events,³⁶ they nonetheless represent a deliberate choice concerning how to construct reality. Moreover, some rules of evidence depart from the goal of ascertaining the truth and favor other purposes, such as protecting national security, deterring police misconduct, or even controlling the direction of errors. These rules determine how facts should be treated and interpreted, what the required burden of proof is, and which evidence should be suppressed (because it is considered hearsay, because the information is privileged, because it was obtained unlawfully, or because of several other reasons). Either way, law requires us to determine 'what happened' while ignoring important facts that describe some aspects of the events in question.

Ultimately, facts collected to answer a legal question, based on legal categories, are not neutral or natural; rather, they create a contingent description of certain events. As Jack Balkin pointed out, "law's truth is not the only truth, and law's vision of reality is not the

Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 *STAN. L. REV.* 39, 40-41 (1994).

35. Sara Kendall & Sarah M. H. Nouwen, *Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda*, 110 *AM. J. INT'L L.* 212, 223 (2016) ("Historical accounts produced through international criminal trials are notoriously incomplete").

36. *See Fed. R. Evid.* 102.

only reality.”³⁷ There are many other forms of knowledge acquisition in the world, and many other conventions through which people assess information and determine what is true or false.³⁸ In this era of constant challenges to knowledge and information, where ‘alternative facts’ are frequently produced to counter unwelcomed information, and when critical findings are denounced as ‘fake news’, the outputs of international fact-finding missions are particularly sensitive to competing findings. Therefore, international fact-finding missions should be sensitive to the various contingencies of their findings, and adopt a humbler approach concerning the ‘indisputable’ nature of these findings. As fact-finding reports do not speak for themselves, it is imperative that fact-finding missions would carefully choose the voice that speaks for them.

B. Goal Ambiguity

‘Ascertaining facts’ is a core purpose of any fact-finding body. Nonetheless, it is usually not the only, or even the main, goal of international fact-finding. Typically, international organizations invest a great deal of resources in fact-finding efforts in order to utilize the ascertained facts for a further purpose. Throughout the years, international fact-finding missions (or commissions of inquiry) have been established to promote a variety of goals, such as promoting accountability, preventing future atrocities, facilitating reconciliation or advancing peaceful resolution of international conflicts.³⁹ 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 both in goals and in processes, international fact-finding has been increasingly used by the international community within a narrow legalistic context. In the past few decades, international fact-finding missions have become a

37. Balkin, *supra* note 15, at 7; *see also* RICHARD A. WILSON, *WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS* 9 (2011) (“Because courts follow law’s own exceptional principles rather than those of historical inquiry, they can reduce complex histories to a defective legal template, and thereby distort history.”).

38. *See* Balkin, *supra* note 15, at 11.

39. *See* Erin Daly, *Truth skepticism: An inquiry into the value of truth in times of transition*, 2 *INT’L J. TRANSITIONAL JUST.* 23, 24 (2008); Krebs, *supra* note 15, at 95-97; *see generally* Boutruche, *supra* note 21; 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; Orentlicher, *supra* note 21.

dominant method to ensure the implementation of and to promote respect for international law, mainly international human rights law (“IHR”) and international humanitarian law (“IHL”).⁴⁰ Similarly, most of the relevant literature on international fact-finding missions have focused on the legal aspects of international fact-finding: the required standard of proof 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.⁴¹ The long-term goals of fact-finding in this context have been to promote legal accountability and to establish a basis for national or international adjudication processes. Nonetheless, the mandates of these international fact-finding missions have often failed to identify, clarify, and prioritize the core goals of the missions.

This goal ambiguity is problematic due to several reasons. First, it hinders attempts to clarify policy direction *ex ante*, and to assess the missions’ success *ex post*.⁴² Second, it prevents a more thoughtful design process, which would enable tailoring appropriate processes to the specified goals. For example, the goal of promoting legal accountability requires access to evidence and witnesses, resting on either voluntary or compulsory cooperation. Third, it diminishes the significance of finding facts for the sake of establishing truth(s). The focus on legal questions suggests that fact-finding is meaningless without a legal interpretation of the facts, and that some vague form of legal accountability is more important than creating a historical record or promoting a dual-narrative rather than an adversarial legal truth.

40. See generally Boutruche, *supra* note 21, at 107-08; Krebs, *supra* note 15, at 94-95; Orentlicher, *supra* note 21, at 83-85.

41. See, e.g., INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS: REVISED AND EDITED REPRINT (Bertrand G. Ramcharan ed., 2014); Michael Bothe, *supra* note 16, at 249; Grace & Bruderlein, *supra* note 24, at 31. See generally Boutruche, *supra* note 21; Orentlicher, *supra* note 21, at 85. Until recently, the political, moral, ethical, and social aspects of international fact-finding have been rarely dealt with. An important contribution in this regard is THE TRANSFORMATION OF HUMAN RIGHTS FACT-FINDING (Philip Alston & Sarah Knuckey eds., 2016), which raises political, moral and critical aspects of the practice of fact-finding.

42. Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123 (2009), at 129-130.

C. Dissemination of Information

In his oral remarks from March 22, 2016, Christof Heyns, UN Special Rapporteur on extrajudicial, summary, or arbitrary executions and member of the UN Independent Investigation on Burundi, stated that “it is crucial to ascertain the disputed facts in an *indisputable* manner.”⁴³ Similarly, international tribunals, such as the International Criminal Tribunal for the Former Yugoslavia, have emphasized their roles in creating indisputable and undeniable historical records of otherwise controversial wartime events.⁴⁴ Nonetheless, it is evident that denialism is still thriving, in the former Yugoslavia and elsewhere.⁴⁵ Indeed, it is often the case that fact-finding reports fail to resolve the very controversies they were sent to investigate, and may even intensify them.⁴⁶ For example, the Rwandan Government rejected the 2010 Democratic Republic of the Congo Report and named it “dangerous and irresponsible”;⁴⁷ the Israeli Government

43. Oral update by Christof Heyns, U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, Member of the United Nations Independent Investigation on Burundi (UNIIB), on the Enhanced Interactive Dialogue on Burundi, Human Rights Council (Mar. 22, 2016), <http://www.refworld.org/docid/5728500c4.html>.

44. See *Achievements*, U.N. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about/tribunal/achievements> [https://perma.cc/BPM7-JX6J] (last visited Dec. 31, 2017); Sara Kendall and Sarah MH Nouwen, *supra* note 35, at 216 (2016) (citing Judge Dennis Byron’s Address to the UN General Assembly, ICTR NEWSLETTER 1 (Oct. 2008), <http://www.unmict.unictr.org/sites/unictr.org/files/news/newsletters/oct08.pdf> [https://perma.cc/A8T9-234N] (archived Dec. 31, 2017)).

45. Marko Milanovic, *The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Post-Mortem*, 110 AM. J. INT’L L. 233, 235 (2016). While similar public opinion data from Rwanda is not available, the prosecutions brought against ‘genocide deniers’ and the many laws recently enacted to prevent denialism, may demonstrate that the phenomenon persists. See generally Yakaré-Oulé (Nani) Jansen, *Denying Genocide or Denying Free Speech? A Case Study of the Application of Rwanda’s Genocide Denial Laws*, 12 NW. J. INT’L HUM. RTS. 191 (2014); Filip Reyntjens, *Constructing the Truth, Dealing with Dissent, Domesticating the World: Governance in Post-genocide Rwanda*, 110 AFR. AFF. 1 (2011).

46. Alston et al., *supra* note 41, at 3. In a recent UN publication, the High Commissioner for Human Rights welcomed such controversies as “publicity,” and argued that they increase the public profile of the investigations and thus highlight the important role of the investigations in promoting accountability. U.N. Human Rights Office of the High Comm’r, Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice, at 7, U.N. Doc. HR/PUB/14/7 (2015), http://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf [https://perma.cc/43VC-9VP5] (archived Dec. 31, 2017).

47. *Statement by the Government of Rwanda on Leaked Draft UN Report on DRC*, RWANDA NEWS AGENCY (Aug. 27, 2010), <http://rnanews.com/politics/4080-statement-by-the-government-of-rwanda-on-leaked-draft-un-report-on-drc> [https://perma.cc/EX9H-FGZD] (archived Dec. 31, 2017).

fought against the 2009 Goldstone Report and insisted that it was “false and distorted,”⁴⁸ while an overwhelming majority of Jewish-Israelis opined that the Report was biased and untrustworthy;⁴⁹ and the UN High Commissioner for Human rights criticized the Sri Lankan Government’s attacks on the integrity of the UN fact-finding mission on Sri Lanka, referring to it as a “continuing campaign of distortion and disinformation.”⁵⁰

Nonetheless, the resources that international organizations devote to compiling fact-finding reports are not matched by attention to how reports are disseminated or what impact they might have on their target audiences.⁵¹ Little attention (if any) has been given thus far to their effect on communal attitudes and beliefs and public opinion in affected communities.⁵² As evidence of backlash and denial mount, international fact-finding bodies should devote significant attention to the dissemination of their findings to a variety of audiences. Creating a historical record and mitigating controversy and denial cannot be achieved by simply releasing fact-finding reports. The processes and structures adopted to document abuses inevitably influence how well reports navigate the obstacles to successful dissemination of information and, ultimately, their persuasive power. The next Part will discuss a variety of socio-psychological biases that may hinder the dissemination of fact-finding reports, and frustrate efforts to resolve factual controversies and create a shared historical record.

48. Barak: Goldstone Report “False, Distorted, and Irresponsible,” HAARETZ (Jan. 28, 2010), <http://www.haaretz.com/news/barak-goldstone-report-false-distorted-and-irresponsible-1.265821> [<https://perma.cc/YFV6-K2XC>] (archived Dec. 31, 2017).

49. Following the release of the 2009 Goldstone Report, an Israeli public opinion poll found that 93.5% of Jewish Israelis believed the report was biased against Israel. See Yaar et al., *supra* note 7. For a more elaborate discussion of Israeli reaction to the Goldstone Report see *infra* Section IV.D.

50. Zeid condemns persistent disinformation designed to discredit UN investigation on Sri Lanka, UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Nov. 7, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15263> [<https://perma.cc/ZP5G-JY33>] (archived Dec. 31, 2017).

51. Stanley Cohen, *Government Responses to Human Rights Reports: Claims, Denials, and Counterclaims*, 18 HUM. RTS. Q. 517, 518 (1996).

52. Alston and Knuckey, *supra* note 41, at 4.

III. SOCIO-PSYCHOLOGICAL BARRIERS TO INTERNATIONAL FACT-FINDING DURING INTRACTABLE CONFLICTS

Every intractable conflict is intractable in its own way.⁵³ Yet all intractable conflicts share a common source of their intractability, in the form of resistance to information that deviates from core social beliefs and narratives.⁵⁴ This Part discusses the socio-psychological barriers to the dissemination of fact-finding reports in the context of intractable conflicts, shedding light on some of the processes which compromise social receptiveness to fact-finding reports. These include a variety of socio-psychological dynamics, including cognitive consistency and biased assimilation of new information,⁵⁵ confirmation bias,⁵⁶ motivated cognition,⁵⁷ and collective memories and beliefs,⁵⁸ which may trigger distortion or rejection of threatening

53. "Happy families are all alike, every unhappy family is unhappy in its own way." LEO TOLSTOY, *ANNA KARENINA* (1980). For a discussion of persistent conflicts and their intractability, see generally Peter T. Coleman et al, *Intractable conflict as an attractor: A dynamical systems approach to conflict escalation and intractability*, 50 *AM. BEHAV. SCIENTIST* 1454 (2007).

54. Coleman, *supra* note 17, at 6.

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

56. Confirmation bias connotes the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or hypothesis in hand. See Raymond S. Nickerson, *Confirmation bias: A ubiquitous phenomenon in many guises*, 2 *REV. GEN. PSYCHOL.* 175 (1998).

57. Kunda explains that a motivation to arrive at particular conclusions may affect reasoning through reliance on a biased set of cognitive processes (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 (1990).

58. Societal beliefs and collective memories are cognitions shared by society members on topics and issues that are of special concern for the particular society, and which 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, 25-26 (1998); Daniel Bar-Tal, *Collective Memory of Physical Violence: its Contribution to the Culture of Violence*, in *THE ROLE OF MEMORY IN ETHNIC CONFLICT* 77 (Ed Cairns & Michael D. Roe eds., 2003).

information. Generally, the construction and evaluation of information in social settings is influenced by prior beliefs, ideologies and interests,⁵⁹ as well as group identities and commitments.⁶⁰

These processes become more pronounced in the context of intractable conflicts, which are broadly defined as “conflicts that are recalcitrant, intense, deadlocked, and extremely difficult to resolve.”⁶¹ Each intractable conflict can differ by level of importance (from superficial to existential concerns), centrality (to one’s identity, esteem, and sense of reality), pervasiveness (number of interconnections with other conflicts and experiences), and duration.⁶² Importantly, each of the disputing groups develops a dominant narrative, emphasizing the “objective” goodness of one side’s claims over the other side’s claims. As a result, contradictory narratives emerge for each of the disputing groups and become promoted to unquestioned fact or truth.⁶³ It is principally this subjective process of perception and interpretation, which drives reactions and behaviors and generates resistance to more nuanced information, which deviates from each group’s narrative.⁶⁴

The following Sections focus specifically on the dynamic of threatened social identities during intractable armed conflicts, and explain how fact-finding processes may frustrate efforts to disseminate information that is inconsistent with national narratives and core societal beliefs. Afterwards, this socio-psychological framework will be used to explain some of the backlash against the Goldstone Report expressed by the Jewish-Israeli society.

59. Ifat Maoz et al., *Reactive Devaluation of an “Israeli” vs. “Palestinian” Peace Proposal*, 46 J. CONFLICT RESOL. 515, 543 (2002).

60. Dan M. Kahan et al., *They Saw a Protest: Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012); see also: LYNN EDEN, *WHOLE WORLD ON FIRE: ORGANIZATIONS, KNOWLEDGE AND NUCLEAR WEAPONS DESTRUCTION* 37–60 (2004).

61. Coleman, *supra* note 17, at 6.

62. *Id.*

63. *Id.* at 19; see also Daniel Bar-Tal and Gavriel Salomon, *Narratives of the Israeli-Palestinian Conflict: Evolution, Contents, Functions and Consequences*, in *ISRAELI AND PALESTINIAN NARRATIVES OF CONFLICT: HISTORY’S DOUBLE HELIX* 19 (Robert I. Rotberg ed., 2006); Barbara Tint, *History, memory, and intractable conflict* 27 CONFLICT RESOL. Q. 239 (2010).

64. Coleman, *supra* note 17, at 19.

A. Social Identities

Identity is an individual's sense of self, of being a human agent.⁶⁵ It is a product of self-consciousness, a process in which a person or a group possesses distinct qualities as an entity, which differentiates him or her from others.⁶⁶ An important component of an individual's identity is his or her social identity, which captures the individual's knowledge that she belongs to certain social groups, together with some emotional significance to her of these group memberships.⁶⁷ To enhance their social identities, individuals tend to behave in ways that make their own group acquire positive distinctiveness in comparison to other groups.⁶⁸

An individual's social identity is composed of multiple identities based on social classifications.⁶⁹ These may include familial, territorial, class, religious, ethnic, gender, and national classifications. National identity is a social identity based on elements such as historic territory or homeland; common myths and historical memories; common mass public culture; and common legal rights and duties for all the members of the community.⁷⁰ Unlike a state, which refers exclusively to public institutions relating to the monopoly of coercion within a given territory, a nation signifies a bond that is both cultural and political, uniting in a single political community all who share a historic culture and homeland.⁷¹

The most salient political function of national identity is its legitimization of legal institutions that define the values and character

65. CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 3 (1989).

66. SAMUEL P. HUNTINGTON, *WHO ARE WE?: THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* 21 (2004).

67. John C. Turner, *Towards a Cognitive Redefinition of the Social Group*, in *SOCIAL IDENTITY AND INTERGROUP RELATIONS* 15, 18 (Henri Tajfel ed., 1982).

68. Ed Cairns, *Intergroup Conflict in Northern Ireland*, in *SOCIAL IDENTITY AND INTERGROUP RELATIONS* 277, 278 (Henri Tajfel ed., 1982); Huntington, *supra* note 66, at 25.

69. ANTHONY D. SMITH, *NATIONAL IDENTITY* 4 (1991); Jan. E. Stets & Peter J. Burke, *Identity Theory and Social Identity Theory*, 63 *SOCIAL PSYCHOL. Q.* 224, 225 (2000).

70. Smith, *supra* note 69, at 14; *see also* Anna Triandafyllidou, *National Identity and the 'Other'*, 21 *ETHNIC AND RACIAL STUDIES* 593, 599 (1998) (emphasizing the notion of the others as an inherent characteristic of nationalism and national identity); BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 6 (2006).

71. Smith, *supra* note 69, at 14-15. Blum further analyzes the relations between nations and states, and discusses the applications of identity theory on both the relations between citizens and their state, and between sovereign states. *See* WILLIAM BLUM, *PERSONAL IDENTITY, NATIONAL IDENTITY AND INTERNATIONAL RELATIONS* 1-5 (1990).

of the nation and reflect the customs of the people.⁷² Therefore, the appeal to national identity has become the main legitimization for social order and solidarity.⁷³ Additionally, national identity serves as a tool for the socialization of group members as nationals and citizens, through compulsory, standardized, public, mass education systems.⁷⁴ By using state-controlled primary education, state-organized propaganda, official rewriting of history, and militarism, the national identity is affirmed and reaffirmed by political institutions.⁷⁵ As a result, Smith finds that these systems enable state authorities to inculcate national devotion and a distinctive, homogeneous culture.⁷⁶ Furthermore, by the use of symbols such as flags, anthems, uniforms, monuments, and ceremonies, group members are reminded of their common heritage and cultural kinship, and their sense of belonging is enhanced.⁷⁷

B. Societal Beliefs, Collective Memory, and Ethos of Conflict

History is highly contextual, defined by social psychological processes and constructed by collective memories and beliefs.⁷⁸ Understanding memory as a group, rather than individual, phenomenon, highlights its contextual and collective dimension, as well as the institutional processes and techniques used to create, reinforce and commemorate it.⁷⁹ Tint mentions various such techniques, including selective omission, fabrication, exaggeration and embellishment, implication of causal linkages, blaming the enemy, and reframing contextual factors.⁸⁰

According to Bar-Tal, societal beliefs, which are shared by the majority of the society members, define cues for the interpretation and evaluation of information.⁸¹ In the context of intractable conflicts,

72. Smith, *supra* note 69, at 16.

73. *Id.*

74. *Id.*

75. Anderson, *supra* note 70, at 104.

76. Smith, *supra* note 69, at 16.

77. *Id.*, at 16-17.

78. James W. Pennebaker and Becky L. Banasik, *On the Creation and Maintenance of Collective Memories: History as Social Psychology*, in *COLLECTIVE MEMORY OF POLITICAL EVENTS: SOCIAL PSYCHOLOGICAL PERSPECTIVES* 3, 19 (James W. Pennebaker et al. eds., 2013).

79. Tint, *supra* note 63, at 241.

80. *Id.*, at 243.

81. Bar-Tal, *supra* note 18, at 1435 (2007) (defining ‘societal beliefs’ as “cognitions shared by society members on topics and issues that are of special concern for their society and

societal beliefs of collective memory present the history of the conflict to society members, and create a socially constructed narrative that has some basis in actual events but is biased, selective, and distorted in ways that meet the nation's present needs.⁸² Similarly, societies in conflict may further develop a particular 'ethos of conflict,' which provides each group with a clear image of the conflict, its goals, and its development, as well as rigid perceptions of the in-group and of the enemy.⁸³

The combination of these collective memories, beliefs, and ethos creates a holistic national narrative that serves to view the in-group as a victim, to delegitimize the adversary, and to justify acts of violence and destruction toward the enemy.⁸⁴ Importantly, it explains why, too often, communities in conflict entertain contradictory and selective histories of the same event, thus perpetuating the conflict.⁸⁵

C. Dissemination of Information and the Dynamic of Threatened National Identities

During intractable conflicts, core information concerning the conflict, the actions of the in-group and the adversary, and significant events, is therefore institutionalized as collective memories or societal beliefs, and form a part of the national narrative. Therefore, information which is inconsistent with such identity-preserving beliefs threatens not only the concrete outlook concerning the relevant events, but also the individual's national identity.⁸⁶ In the context of an intractable conflict, a threat to the national identity (as long as it is a part of the social identity which is core to the self) typically results in a protective response.⁸⁷ Northrup explains that to protect and sustain the existing beliefs, and to minimize the threat, it is likely that the new invalidating information will be rejected, distorted, or

contribute to their sense of uniqueness. They provide a basis for common understanding of reality, good communication, interdependence, and the coordination of social activities, all of which are necessary for the functioning of the social system.”).

82. *Id.*, at 1436.

83. Bar-Tal, *supra* note 18, at 1438.

84. *Id.*, at 1439-1441.

85. Tint, *supra* note 63, at 242.

86. Kelly terms such beliefs “core constructs.” GEORGE KELLY, *A PSYCHOLOGY OF PERSONAL CONSTRUCTS* (1955).

87. Terrell A. Northrup, *The Dynamics of Identity in Personal and Social Conflict, in INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION* 55, 66, 68 (Louis Kriesberg, Terrell A. Northrup, & Stuart J. Thorson eds., 1989).

misperceived.⁸⁸ the distortion of such threatening information may take different forms, such as denial and rejection of the invalidating information as false, or redefining its content.⁸⁹ Cohen terms this later form of distortion “interpretive denial,” where the raw facts are accepted, but are given a different meaning from what seems apparent to others.⁹⁰ As this process persists over time, the threatened group develops a rigid interpretation of the world, and increasingly perceives the other group as entirely different from the in-group.⁹¹

These distortion and hardening processes account for stereotyping, which generally leads to depersonalization and dehumanization of the other group.⁹² The dehumanization process attributes ‘evil’ qualities to the other group, construes it as less than human, and thus makes violence against the other more tolerable (since it is easier to harm something or someone who is inhumane).⁹³ Northrup emphasizes that a part of the dehumanization process involves accepting less and less information about the enemy, and relying solely on a distorted psychological construction.⁹⁴ As a result, each of the conflicting groups perceives the adversary to be more hostile than they actually are, and at the same time, perceive their own side as less threatening than it appears to the other party.⁹⁵

These socio-psychological processes of denial, misperception and misinterpretation of new information which is inconsistent with core societal beliefs are institutionalized in various ways: governmental censorship of information, use of punishments against providers of alternative information, control of mass media, de-legitimization of alternative information and its sources, closure of archives, encouragement and reward of cultural products supporting

88. *Id.*

89. *Id.* at 69. See also ROBERT JERVIS, PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS 143 (1976) (defining this process “assimilation of information to pre-existing beliefs,” while implementing it to decision-making process in international relation.).

90. Stanley Cohen, States of Denial: Knowing about Atrocities and Suffering 6, 7-8 (2013).

91. Markus Kemmelmeier & David G. Winter, *Putting Threat into Perspective: Experimental Studies on Perceptual Distortion in International Conflict*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 795, 796 (2000).

92. Turner, *supra* note 67, at 8.

93. Northrup, *supra* note 85, at 72-74. For a full analysis of the dehumanization process and its implication on intergroup conflict, see Nick Haslam, *Dehumanization: An Integrative Review*, 10 PERSONALITY & SOC. PSYCHOL. REV. 252 (2006).

94. Northrup, *supra* note 85, at 74.

95. Kemmelmeier & Winter, *supra* note 88, at 795.

this narrative, are merely a few such examples.⁹⁶ Though these mechanisms are most often introduced by the Government or other formal institutions, they also operate on the individual level.⁹⁷ Self-censorship, for example, may be practiced by a significant portion of society as a method of restricting the flow of information in order to protect the in-group.⁹⁸

In summary, the dissemination of information concerning controversial wartime events, in the context of intractable armed conflicts, is influenced by prior beliefs and national identities of its audiences.⁹⁹ The socio-psychological infrastructure described above influences cognitive processes of the society members as individuals as well as a collective.¹⁰⁰ It leads to a selective, biased, and distortive flow of information which, in essence, prevents people from absorbing and accepting alternative information that could have otherwise provided clarity about the conflict and its possible solutions.¹⁰¹ During these processes, information that threatens the national identity or contradicts any of its core elements may be misperceived or rejected, and control mechanisms may be employed – at both the individual and social levels – to ensure the stability and dominance of the national narrative.¹⁰²

D. What's Law Got To Do With It?

In the context of wartime investigations, legal categories are particularly prone to trigger threat. First, legal categories tend to rely on binary dichotomies and often fail to recognize ambiguous or complex situations.¹⁰³ They require clear-cut categorization of facts into pre-determined bins: lawful or unlawful; guilty or not guilty;

96. Bar-Tal, *supra* note 18, at 1445.

97. Boaz Hameiri et al., Support for Self-Censorship Among Israelis as a Barrier to Resolving the Israeli-Palestinian Conflict, 38 *POL. PSYCHOL.* 795, 797 (2017).

98. *Id.*, at 799.

99. Ifat Maoz et al., *Reactive Devaluation of an "Israeli" vs. "Palestinian" Peace Proposal*, 46 *J. CONFLICT RESOL.* 515, 543 (2002).

100. Chan, Burtis and Bereiter's study on knowledge construction found that individuals distort and twist information to make it fit with prior beliefs. Carol Chan, Jud Burtis & Carl Bereiter, *Knowledge Building as a Mediator of Conflict in Conceptual Change*, 15 *COGNITION & INSTRUCTION* 1, 5 (1997). See also Baumeister & Hastings, *supra* note 80, at 287.

101. Daniel Bar-Tal et al., *Socio-Psychological Barriers to Peace Making: The Case of the Israeli Jewish Society*, 4 *SOC. ISSUES & POL'Y REV.* 63, 97 (2010).

102. Bar-Tal, *supra* note 18, at 1445.

103. Yuval Shany, *Binary Law Meets Complex Reality: The Occupation of Gaza Debate*, 41 *ISR. L. REV.* 68, 69 (2008).

combatant or civilian. This adversarial nature of legal categories may be perceived by disputing societies as particularly threatening of preconceived narratives and beliefs. That is because by their very nature, binary legal categories create inconsistency between the legal category and at least one of the conflicting narratives. For that reason, lawyers and legal arguments may be “better equipped for confrontation than for other less costly means of resolving disputes.”¹⁰⁴ As a result, the adoption of binary legal categories may unintentionally intensify distortion, rather than assertion, of facts.

Second, legal categories in the context of wartime investigations may be exceptionally threatening to core social narratives and beliefs because of their high cost. Legal categories represent a strong sense of blame and condemnation, often accompanied by severe implications. Specifically, classifying concrete acts into legal categories of “war crimes,” “crimes against humanity,” or “genocide” may backfire, as these are some of the most heinous crimes known to mankind, representing a high level of blame, social ostracism and disgust, as well as, at least potentially, a lifetime in prison.¹⁰⁵

Third, the abstract nature of legal norms may generate a psychological distance between the facts and their audience, thus making it easier to ignore the concrete circumstances or the harmed individuals, and to focus on the abstract legal argumentation.¹⁰⁶ Indeed, individual, concrete human voices, and abstract, general legal rules, often conflict.¹⁰⁷ In *Lowering the Bar*, Marc Galanter argued that “[l]awyers corrupt discourse by promoting needless complexity, mystifying matters by jargon and formalities, robbing life’s dealings of their moral sense by recasting them in legal abstractions, and offending common sense by casuistry that makes black appear white

104. Gerald B. Wetlaufer, *Rhetoric and its denial in legal discourse*, 76 VA. L. REV. 1545, 1546 (1990).

105. See, e.g., Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT’L. L. 78 (1994); Thomas W. Smith, *Moral hazard and humanitarian law: The International Criminal Court and the limits of legalism*, 39 INT’L POL. 175 (2002).

106. Psychological distance is a subjective experience that something is close or far away from the self, here, and now. Trope and Liberman established that as the level of abstraction increases, so too would the psychological distances people envisage. See generally Yaacov Trope & Nira Liberman, *Construal-level theory of psychological distance*, 117 PSYCHOL. REV. 440 (2010).

107. Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2101 (1989).

and vice versa.”¹⁰⁸ In the context of international fact-finding during intractable armed conflicts, these legal abstractions and complexities may grab attention at the expense of the brute or physical facts. As a result, they may promote an adversarial approach to facts and fact-finding more generally, attributing the argumentative nature of legal interpretations to the brute facts interpreted using legal lenses.

IV. SOCIO-PSYCHOLOGICAL BARRIERS TO THE DISSEMINATION OF THE GOLDSTONE REPORT

A. Resistance to Facts Relating to the Israeli-Palestinian Conflict Within the Jewish-Israeli Society

The Israeli-Palestinian conflict is at its core a conflict between two national movements.¹⁰⁹ It is a prototypical case of an intractable conflict: it is a long and violent conflict, which greatly occupies the society members, and is perceived as irresolvable.¹¹⁰ Its prolonged duration increases its intractability, since the current populations of both conflicting societies have been raised from infancy knowing nothing else than a perpetual state of war with the ‘other.’¹¹¹ The intensity of the Israeli-Palestinian conflict is particularly high, since the national identities of the conflicting groups invalidate each other.¹¹² In the perception of both groups is it a zero-sum conflict - not only with respect to territory but, most importantly, with respect to national identity and national existence.¹¹³

Based on both public opinion polls and on public speeches by high profile politicians, Bar-Tal, Halperin, and Oren demonstrated the resistance of the Jewish-Israeli society to acknowledging the Palestinian society’s narrative. In fact, the level of resistance to the Palestinian narrative has grown in recent years to the point that the prevailing view in the Israeli society is that the West Bank is not

108. MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* 17 (2005).

109. Herbert C. Kelman, *The Interdependence of Israeli and Palestinian National Identities: The Role of the Other in Existential Conflicts*, 55 J. SOC. ISSUES 581, 588 (1999).

110. Bar-Tal et al., *supra* note 101, at 64.

111. Stephen Cohen, *Intractability and the Israeli-Palestinian Conflict*, in *GRASPING THE NETTLE: ANALYZING CASES OF INTRACTABLE CONFLICT* 343, 343 (Chester A. Crocker, et al. eds., 2005).

112. Northrup, *supra* note 85, at 68.

113. Kelman, *supra* note 110, at 588.

occupied (but liberated).¹¹⁴ Public opinion polls further demonstrate strong opposition among Jewish-Israelis to any attempt to recognize the Palestinian narrative. For example, a Peace Index poll, conducted in June 2009, found that 56% of the Jewish-Israeli public oppose Israel taking even partial responsibility for the suffering caused to the Palestinians by the 1948 war.¹¹⁵ Bar-Tal, Halperin and Oren further demonstrated that 79% of Jewish Israelis agreed with the statement that dishonesty has always characterized the Palestinians and the Arabs.¹¹⁶ Additionally, another study found that 61% of the Jewish Israelis agreed, at least to some extent, with the position that through the years of the conflict, Israel has been the victim while the Arabs and the Palestinians are the perpetrators.¹¹⁷ The construal of the out group – the Palestinians – as ‘evil’ have always gone hand in hand with the perception of the in-group – the Jewish Israelis – as victims. It is within this social context that the Goldstone Mission was created, and within which its fact-finding report was introduced.

B. Historical Background and the Creation of the Goldstone Mission

On December 27, 2008, Israeli Defense Forces started a twenty-two day attack on the Gaza Strip, known as Operation Cast Lead. Israel described the attack as a response to constant rocket attacks fired from the Gaza Strip into Israel’s southern cities, causing damage and instilling great fear. By the operation’s end, both sides had suffered casualties and damage. In the southern Israeli cities, rockets and mortars damaged houses, schools, and cars; three Israeli civilians

114. Bar-Tal et al., *supra* note 101, at 79. See also THE LEVY COMMISSION REPORT ON THE LEGAL STATUS OF BUILDING IN JUDEA AND SAMARIA 8 (2012) (determining that the West Bank is not an occupied territory); David Kretzmer, *Bombshell for the Settlement Enterprise in the Levy Report*, HAARETZ (Oct. 7, 2012), <http://www.haaretz.com/opinion/bombshell-for-the-settlement-enterprise-in-levy-report-1.450170> [https://perma.cc/2SGH-SA74] (archived Dec. 31, 2017).

115. EPHRAIM YAAR & TAMAR HERMANN, WAR AND PEACE INDEX - JUNE 2009 2 (2009), http://www.peaceindex.org/files/peaceindex2009_6_3.pdf [https://perma.cc/3TX4-WPLF] (archived Jan. 19, 2018).

116. Bar-Tal et al., *supra* note 101, at 82.

117. Daniel Bar-Tal et al., *A Sense of Self-Perceived Collective Victimhood in Intractable Conflicts*, 91 INT’L REV. OF THE RED CROSS 229 (2009), <https://www.icrc.org/eng/assets/files/other/irrc-874-bartal-chernyakhai-schori-gundar.pdf> [https://perma.cc/L3WA-XWGA] (archived Jan. 19, 2018) (“about 40.6% of respondents highly agreed or agreed with the statement that, ‘Throughout all the years of conflict, Israel has been the victim and the Arabs and the Palestinians are the side causing harm’, and an additional 0.8% somewhat agreed with it.”).

were killed and more than a thousand were injured.¹¹⁸ On the Palestinian side, the outcome of this war was much more devastating: public buildings were destroyed, thousands civilians lost their homes, many were injured, and about 1,400 were killed.¹¹⁹

While the ongoing hostilities continued, the UN Human Rights Council issued an urgent resolution, strongly condemning Israel for its “massive violations of the human rights of the Palestinian people,”¹²⁰ and calling for an urgent international action “to put an immediate end to the grave violations committed by the occupying Power, Israel.”¹²¹ Along with these and other condemnations, the council also established an international fact-finding mission to “investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people.”¹²² The President of the Council was authorized to appoint the mission’s members.

Almost three months later, on April 3, 2009, the President of the Human Rights Council, Nigerian ambassador Martin Ihoeghian Uhomobhi, appointed Justice Richard Goldstone to lead the mission.¹²³ Justice Goldstone insisted upon an equal and unbiased mandate, however, and the mission’s mandate was changed at his request. The final resolution authorized the mission “to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from December 27, 2008 and January 18, 2009, whether before, during or after.”¹²⁴

118. *The Goldstone Report*, *supra* note 5 at 31.

119. Israel claims that 1,166 Palestinians lost their lives, of which 706 are ‘unlawful combatants.’ The Gaza authorities claim that the number of casualties is 1,444, and the Goldstone mission found that the correct number varies between 1,387 to 1,417, without distinguishing between civilians and combatants. *Id.* at 90-91.

120. U.N. Human Rights Council Res. U.N. Doc. A/HRC/S-9/L.1 (Jan. 12, 2009), <https://unispal.un.org/DPA/DPR/unispal.nsf/0/404E93E166533F828525754E00559E30> [<https://perma.cc/R47N-LPJP>] (archived Jan. 22, 2018).

121. *Id.*

122. *Id.* at 3.

123. The Three other members that were appointed are: Prof. Christine Chinkin from the United Kingdom, Hina Jilani from Pakistan, and Colonel Desmond Travers from Ireland. See *United Nations Fact Finding Mission on the Gaza Conflict*, UNITED NATIONS HUMAN RIGHTS, OFFICE OF THE HIGH COMMISSIONER, <http://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session9/Pages/FactFindingMission.aspx> [<https://perma.cc/FV9H-M8Q8>] (archived Dec. 31, 2017).

124. *The Goldstone Report*, *supra* note 5, at 13.

To fulfill its duties, the Goldstone Mission conducted 188 individual interviews. It reviewed more than 300 reports, submissions, and other documentation, amounting to more than 10,000 pages, as well as over thirty videos and 1,200 photographs.¹²⁵ The methodology was based on international investigative standards developed by the United Nations.¹²⁶ While the Palestinian authority and various human rights organizations fully cooperated with the Mission, the State of Israel chose not to participate in the proceedings, refused to surrender evidence or witnesses to the Mission, and declined the Mission's requests to get access to either Israeli territory or the West Bank.

The Report specifies that credibility determinations concerning the evidence collected were based on interpersonal impression of the witnesses that appeared before the Mission; on verification of the sources and the methodology used in the reports and documents produced by others; on cross-referencing the relevant material and information; and on a determination of whether, considering all the circumstances, there was sufficient credible and reliable information for the Mission to make a finding.¹²⁷ Based on the abovementioned sources of information, in almost all of the investigated instances the Mission determined not only the factual findings, but also the corresponding legal findings (whether the acts described constitute international crimes).¹²⁸ Finally, on September 15, 2009, the Mission issued its comprehensive report, concluding that some of the actions of the Government of Israel and of the Palestinian armed groups constitute war crimes and may amount to crimes against humanity.¹²⁹

C. The Immediate Aftermath of the Release of the Goldstone Report

Following the release of the Goldstone Report, "the Israeli Military conducted some 400 command investigations in relation to Operation Cast Lead."¹³⁰ Based on these, the Israeli Military Advocate General has opened 52 criminal investigations into

125. *Id.* at 15.

126. *Id.*

127. *Id.*

128. *Id.* at 16.

129. *Id.* at 284, 417-19.

130. Rep. of the Committee of Independent Experts in International Humanitarian and Human Rights Law Established Pursuant to Council Resolution 13/9, U.N. Doc. A/HRC/16/24, at 6 (2011) [hereinafter Rep. of the Committee of Independent Experts].

allegations of wrongdoing.¹³¹ Of these 52 investigations, four cases were submitted to prosecution, and three ended in convictions.¹³² One of these cases was a credit card theft case, and the accused soldier was convicted and sentenced to a prison term of seven and a half months.¹³³ In another case, two soldiers were convicted of “conduct unbecoming” for forcing a 9-year-old Palestinian child to search bags suspected of being booby trapped. They were demoted and received suspended sentences of three months each.¹³⁴ Lastly, a soldier who killed two Palestinian women holding a white flag reached a plea bargain with the military prosecution, and pled guilty to “illegal use of weapon” (the charge was reduced from “manslaughter”) and “conduct unbecoming,” and was sentenced to 45 days imprisonment and probation.¹³⁵

D. National Identity, Social Bias and the Goldstone Report

The release of the Goldstone Report sparked a new battle: this time, between competing narratives, perceptions, and societal beliefs. Instantly, Israel adopted a defensive attitude and blamed the Mission for embracing a false, one-sided, and politically-biased viewpoint. The Palestinians upheld the Report as supportive of their standpoint (mostly ignoring the parts which accused Hamas of committing war crimes and crimes against humanity).¹³⁶ Both sides entrenched themselves in their positions, and ironically, the Report itself became a part of the conflict. As Slater concluded, “the report has been so relentlessly and bitterly attacked in Israel and the United States that it has become toxic.”¹³⁷

Within Jewish-Israeli society, a peace-index public opinion poll found that among those who were familiar with the Report’s main findings, an overwhelming majority (93.5%) believed that the Report was biased against the IDF.¹³⁸ Additionally, a large majority of 79%

131. *Id.*

132. *Id.*

133. *Id.*, at 12.

134. 150/10 *The Military prosecutor v. A. S. and G. S.* [2010].

135. THOMAS SMITH, HUMAN RIGHTS AND WAR THROUGH CIVILIAN EYES 137 (2017).

136. *See, e.g.*, Barak Ravid, Natasha Mozgovaya & Reuters, *Hamas: Goldstone Retreat Doesn't Negate War Crimes Committed in Gaza*, HAARETZ (Apr. 3, 2011), <https://www.haaretz.com/israel-news/hamas-goldstone-retreat-doesn-t-negate-war-crimes-committed-in-gaza-1.353716> [<https://perma.cc/R6LC-KN8L>] (archived Dec. 31, 2017).

137. Slater, *supra* note 10, at 360.

138. YAAR ET. AL., *supra* note 7, at 1.

rejected the Goldstone Report's finding that during Operation Cast Lead the IDF committed war crimes, and considered it to be false.¹³⁹ In the Israeli Arab public only 5% rejected this finding.¹⁴⁰ A majority of the Jewish public (64%) further discounted the testimonies of IDF soldiers who participated in Operation Cast Lead and who provided the Goldstone Mission with first-hand information concerning their experiences.¹⁴¹ Thus, the Jewish-Israelis discredited not only the Goldstone Mission, but also anyone who cooperated with it, including their own soldiers.

The rejection of the Goldstone Report's main findings was further strengthened by statements from senior Government officials who contested the Report and its findings. For example, Defense Minister, Ehud Barak, accused the Report of being "distorted, false, and irresponsible"¹⁴² and reaffirmed the core societal belief that "the IDF is the most moral army in the world";¹⁴³ Israel's president, Shimon Peres, called Goldstone "a small man, devoid of any sense of justice";¹⁴⁴ and Finance Minister, Yuval Steinitz, attacked Justice Goldstone Personally as an anti-Semite, and added that "we won't let Jews go again like lambs to the slaughter."¹⁴⁵ Some Israelis put their opposition to the Report into action by launching various legislative initiatives to outlaw the activities of NGOs and individuals who cooperated with the Goldstone Mission, and to condemn them as traitors. In April 2010, for example, more than twenty Knesset members submitted a bill forbidding the registration of any voluntary

139. *Id.*

140. *Id.*

141. EPHRAIM YAAR & TAMAR HERMANN, WAR AND PEACE INDEX - MARCH 2009 2 (2009), http://peaceindex.org/files/peaceindex2009_3_3.pdf [https://perma.cc/8JM4-C2D9] (archived Jan. 19, 2018).

142. *Barak: Goldstone Report False, Distorted, and Irresponsible*, HAARETZ (Jan. 28, 2010), <https://www.haaretz.com/news/barak-goldstone-report-false-distorted-and-irresponsible-1.265821> [https://perma.cc/P2FA-7YYK] (archived Dec. 31, 2017).

143. Ronen Medzini, *Barak: No Doubt IDF is Most Moral Army in the World*, YNET NEWS (Mar. 25, 2009), <http://www.ynetnews.com/articles/0,7340,L-3692383,00.html> [https://perma.cc/LGC3-Q4UV] (archived Dec. 31, 2017). *See also Finance Minister: UN Backing of Goldstone Report is Anti-Semitic*, HAARETZ, (Oct. 18, 2009), <https://www.haaretz.com/news/finance-minister-un-backing-of-goldstone-report-is-anti-semitic-1.5909> [https://perma.cc/KW49-UWTD] (archived Dec. 31, 2017) [hereinafter *UN Backing of Goldstone Report*].

144. Chris McGreal, *Goldstone Family Drawn into Raw Over Gaza Report*, THE GUARDIAN (May 1, 2010), <https://www.theguardian.com/world/2010/apr/30/richard-goldstone-south-africa-jews> [https://perma.cc/PRM9-9TMC] (archived Dec. 31, 2017).

145. *UN Backing of Goldstone Report*, *supra* note 142.

association reasonably believed to be involved in war crime lawsuits abroad against Israeli politicians or army officers, or to have supplied information to foreign bodies regarding such lawsuits. This bill would have applied to the transmission of such information whether true or false, and was initiated directly in response to the Goldstone Report.¹⁴⁶ Elaborating on the various responses in Israeli society to the Goldstone Report, Sheizaf concluded that the Report itself became a symbol of identity and social affiliation: “Reject it, and you are with us; listen to it, acknowledge it, and you are against us.”¹⁴⁷

Applying the theoretical framework summarized above to the Jewish-Israeli society’s response to the Goldstone Report demonstrates the impact of legal categorizations on dissemination of information concerning controversial wartime events. The Goldstone Report introduced its factual findings by categorizing them into “war crimes” and “crimes against humanity” legal categories: some of the most heinous crimes known to mankind, representing both legal and moral blame.¹⁴⁸ By doing so, the Goldstone Report threatened core societal beliefs within the Jewish-Israeli community, including the deeply rooted belief that “the IDF is the most moral army in the world.”¹⁴⁹ Consistent with the Jewish-Israeli narrative, which includes a positive self-image and strong victimization belief,¹⁵⁰ the popular Israeli perception of Operation Cast Lead saw the Israeli society as a victim while Hamas and the Palestinian leadership had ‘forced’ Israelis to kill Palestinians.¹⁵¹ Moreover, victimization beliefs in the Jewish-Israeli society extended beyond the Israeli-Palestinian conflict, to the perception of Israel as a victim of a hostile world which includes the Western states and international organizations such as the United Nations.¹⁵² These views reflect the well-entrenched ‘siege mentality’ that characterizes the Jewish-Israeli

146. Mordechai Kremnitzer & Shiri Krebs, *From Illiberal Legislation to Intolerant Democracy*, 26 *ISR. STUD. REV.* 4 (2011).

147. Noam Sheizaf, *Israel’s Siege Mentality*, in *THE GOLDSTONE REPORT* *supra* note 81, at 407.

148. *See, e.g.*, Meron, *supra* note 105; Smith, *supra* note 105.

149. Neta Oren, Rafi Nets-Zehngut, & Daniel Bar-Tal, *Construction of the Israeli-Jewish-Conflict: Supportive Narrative and the Struggle Over its Dominance*, 36 *POL. PSYCHOL.* 215, 219 (2015); Medzini, *supra* note 143.

150. Bar-Tal, *supra* note 58, at 32.

151. Noa Schori-Eyal, Eran Halperin, and Daniel Bar-Tal, *Three Layers of Collective Victimhood: Effects of Multileveled Victimhood on Intergroup Conflicts in the Israeli-Arab Context*, 44 *J. APPLIED SOC. PSYCHOL.* 778, 781-782 (2014).

152. Bar-Tal et al., *supra* note 101, at 84.

society.¹⁵³ By finding that “some of the actions of the Government of Israel might justify a competent court finding that crimes against humanity have been committed,”¹⁵⁴ the Goldstone Report threatened core societal beliefs engrained within the Jewish-Israeli society, resulting in a complete rejection of this information as false and biased.¹⁵⁵

V. REIMAGINING INTERNATIONAL FACT-FINDING

The Goldstone Mission was designed and established by a political body - the UN Human Rights Council - to investigate violations of international law. Its initial mandate was one-sided, and its authorizing resolution had already condemned Israel for committing the violations it was set to investigate. This flawed process shadowed the work of the Mission from the start, and frustrated the possibility of Israeli cooperation. As a result, the Mission had very limited access to significant information necessary to establish legal conclusions. Nonetheless, the Mission followed through with its focus on legal categorization, and adopted the methodology, terminology, and structure of legal adjudication. At the same time, the Mission did not adopt the burden of proof required in criminal proceedings (in fact, it is unclear what burden of proof was adopted by the Mission). The focus on legal accountability - without the tools required to establish it - created a meaningful gap between the mission’s mandate, goals, processes, and its potential outcomes. The following Sections strive to reimagine the design process for international fact-finding missions, with a focus on their goals, processes, and structures.

153. Two thousand years of Diaspora is viewed as one long period of persecution, with the climax of the Holocaust as a national trauma, leaving their marks on the collective psyche. *Id.* at 85.

154. *The Goldstone Report*, *supra* note 5, at 26.

155. As Cohen points out, international intervention in the Israeli-Palestinian conflict has almost always been seen by the international intervener as an act of humanitarian assistance, and is always perceived by one or both of the main parties as a coercive imposition of external will. *See* Cohen, *supra* note 12, at 244.

A. Prioritizing Fact-Finding Goals and Purposes

1. Immediate Goal: Finding the Truth

The most basic, immediate, 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 TRC, for example, developed and promoted four different aspects of truth: a forensic truth, focused on the objective information; a narrative truth, focused on the personal stories and experiences of individuals - both victims and perpetrators - and on creation of a united, restored memories; a social truth, established through interaction, discussion and debate; and a healing/restorative truth, enabled through public acknowledgment and common memories of the events.¹⁵⁶ Understanding, analyzing and highlighting these various aspects of truth enabled the commission to reconcile its main two goals - truth and reconciliation - and to strive to achieve them both.

In contrast, the Goldstone Mission - similarly to many international fact-finding missions - focused on legal truth - 'the truth in the eyes of the law'¹⁵⁷ or the legal interpretation and meaning of certain physical facts.¹⁵⁸ As the dynamics which followed the release of the Goldstone Report demonstrate, the adoption of contentious legal categories may have contributed to the wave of backlash and denial (due to both the insufficiency of the evidence to make conclusive legal determinations, and the threat these legal categories posed to national narratives and identities). Captured in their national narrative and threatened by harsh accusations that invalidate core societal beliefs, the Jewish-Israeli society rejected the findings of the Goldstone Report and entrenched in its victimization belief.

The attribution of legal fault and blame shifted attention towards debates over the legal interpretation of the facts, instead of focusing on the brute facts (such as numbers of casualties and magnitude of destruction) or on individual victims and their narratives. It missed an opportunity to infuse the Israeli-Palestinian conflict with more nuanced perceptions. Any solution to this intractable, violent, conflict

156. Alex Boraine, *Truth and Reconciliation in South Africa: The Third Way*, in TRUTH V. JUSTICE: THE MORALITY OF THE TRUTH COMMISSIONS 141, 151-153 (Robert I. Rotberg & Dennis Thompson eds., 2000).

157. Balkin, *supra* note 15, at, 6.

158. Moore, *supra* note 15, at 25.

will have to include some sort of co-existence, of living together and of overcoming demonization and de-humanization processes. The two nations - the Israeli nation and the Palestinian nation - share territory and recourses, past and future. Unfortunately, they do not share the same interpretation of history and the same account of important events; on the contrary - their national narratives and identities exclude one another. Under these circumstances, rigid legal categories may not be the best form of fact-finding, as they may strengthen social biases and trigger denial and rejection. To be sure, any fact-finding effort in the context of the Israeli-Palestinian context is likely to encounter resistance. Nonetheless, linking brute facts to threatening legal accusations is more likely to generate strong rejection. Importantly, facts matter. They have meaning outside the familiar legal categories. And this meaning should not be undermined or ignored by fact-finding bodies.

Taking in mind the socio-psychological dynamics described above, of distortion or rejection of threatening information, the Goldstone Mission may have benefited from considering broader, more inclusive aspects of truth.¹⁵⁹ The adversarial legal truth (which leads to binary dichotomies, such as ‘guilty’ or ‘not guilty’), could have been replaced, for example, with forensic truth, allowing to focus (and perhaps agree) on the brute facts, or with narrative truth, allowing for the coexistence of various narratives and perspectives. Such an approach may encourage public acknowledgment of the events, as well as the creation and promotion of a shared narrative.¹⁶⁰ By rethinking their commitment to legal categories and legal interpretation, fact-finding mechanisms may be able to dismantle some of the threat and distortion, and be better equipped to disseminate information.

159. Marco Sassoli, for example, called the international community not to use international criminal law as an alibi for not engaging in cooperative and diplomatic efforts to resolve the conflict itself. Marco Sassoli, *The Implementation of International Humanitarian Law: Current and Inherent Challenges*, 10 Y.B. INT'L. HUMANITARIAN L. 45, 55 (2007).

160. Similarly, the medical and psychological literature already revealed the potential contribution of this broader understanding of truth for therapy. See generally 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).

2. Long Term Goals: Accountability versus Conflict Resolution

While truth is usually the immediate goal of fact-finding, many times it is employed as a tool to achieve other, long-term, goals. Such goals include creating a historical record, encouraging domestic accountability, fostering reconciliation, and preventing future abuses.¹⁶¹ To develop suitable fact-finding processes that can maximize the efficacy of a fact-finding mission in relation to its goals, and to better evaluate its outcomes, the institutional goals of an international fact-finding mission should be organized and prioritized carefully.¹⁶² Unfortunately, the concrete goals of many fact-finding missions are not clearly defined or prioritized.

Moreover, even when goals are mentioned in the mandating process they are often mixed, sometimes conflicting, as the fulfillment of some of these goals may impede the achievement of others. Such tension exists between the desire to promote accountability by conducting criminal trials, and the struggle for a peaceful change of regime;¹⁶³ another tension exists between justice and truth, as the criminal legal process limits the permissible evidence.¹⁶⁴ The documents concerning the United Nations Independent Investigation on Burundi (“UNIIB”), for example, mention several goals and purposes for the investigation, including

161. See, e.g., Bassiouni, *supra* note 22, at 46 (arguing that the goal of international fact-finding is accountability). Others describe a multiplicity of interconnected goals, and emphasize the importance of fact-finding to establishing when certain allegations of IHL and human rights violations were unfounded and did not occur, and to undermining exaggerated stories or myths that, if not questioned, fuel resentment and perpetuate the cycle of violence between communities. Boutruche, *supra* note 21, at 36. For an expansive elaboration on the various possible goals of any dispute resolution system, see Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 130 (2009).

162. Drawing on the work of the influential sociologist Charles Perrow, Yuval Shany offered an analytical framework to organize and prioritize the institutional goals of international tribunals, by distinguishing between official and operational goals, and by analyzing the goals’ source (external or internal), hierarchical level (ultimate ends or intermediate), and method or articulation (explicit, implicit, or unstated). See Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT’L L. 225, 232, 270 (2012).

163. Which can sometime be achieved only by promising powerful dictators full amnesties. See Andrea Kupfer Schneider, *The Intersection of Dispute Systems Design and Transitional Justice*, 14 HARV. NEGOT. L. REV. 289, 292 (2009).

164. 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).

‘preventing further deterioration of the human rights situation,’ making recommendations ‘on the improvement of the human rights situation’ in Burundi, assisting reconciliation efforts, ensuring ‘accountability for human rights violations and abuses, including by identifying alleged perpetrators,’ adopting ‘appropriate transitional justice measures,’ and issuing a final report and participating in an enhanced interactive dialogue on the human rights situation in Burundi.¹⁶⁵ While all of these goals are valuable and important, it seems unlikely that a fact-finding mission could accomplish them all at the same time, 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 by promising powerful leaders full or partial amnesty.¹⁶⁶

Therefore, it is important to prioritize the goals of fact-finding efforts, and to choose between long-term normative goals, such as justice or accountability, and pragmatic objectives such as stopping the violence or managing (or even resolving) the conflict.¹⁶⁷ Taking in mind the complexity of some conflicts, international fact-finding missions should not be limited to goals of adjudication and accountability. While international criminal tribunals ought to be supported by certain fact-finding mechanisms, not all international fact-finding mechanisms should be designed in their shadow. This is especially true with regard to ongoing violent conflicts, such as the Israeli-Palestinian conflict, which can benefit from efforts to infuse the conflict with new perspectives and information. Socio-psychological research has thus far demonstrated that third parties - such as international fact-finding mechanisms - can potentially play a valuable role in the process of re-evaluating social narratives and beliefs.¹⁶⁸

165. See, e.g., Human Rights Council Res. S-24/1, U.N. Doc. A/HRC/RES/S-24/1 (Dec. 17, 2015).

166. See Andrea Kupfer Schneider, *supra* note 161, at 291-92; see also Jane E. Stromseth et al., CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 253 (2006).

167. 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 under analyzed. See Stromseth et al., *supra* note 166, at 253.

168. Bar-Tal, *supra* note 58, at 43. Others found that third-party activities to open or maintain lines of communication are the most consistently effective conflict management techniques for preventing escalation. See William J. Dixon, *Third-Party Techniques for*

3. Institutional goals: reputation, legitimacy, and compliance

The reputation of the fact-finding body is determined by its perceived independence, impartiality, effectiveness and legitimacy. This last indicator is especially important, as a fact-finding mission's ability to attain its goals largely depends on its perceived legitimacy in the eyes of key constituencies.¹⁶⁹ Legitimacy is, fundamentally, a collective process. It depends on apparent consensus among the relevant actors, accepting the object - in our case, the fact-finding mission - as legitimate.¹⁷⁰ In international justice thus far, the most well-known structures - including fact-finding missions - have been designed by international elite.¹⁷¹ This top-down designing process creates a dual legitimacy deficit: first, it distances the relevant societies from the fact-finding body, and diminishes its capacity to harness domestic institutions to promote its objectives and implement its outputs. Second, it challenges the structural independence of the fact-finding body, as it subjects the decision-making process to the political agenda and balance of power of the international community.¹⁷² Therefore, while designing international fact-finding bodies, it is important to think not only about the goals, processes and structures, but also about the identity of the mandate provider and its perceived or actual political ties.

The Goldstone Mission was established by the UN Human Rights Council, an international body infamous for its political anti-Israeli agenda, which prompted both the former and the current UN Secretary-Generals to strongly criticize the Council's anti-Israeli focus.¹⁷³ Moreover, the resolution establishing the Mission already

Preventing Conflict Escalation and Promoting Peaceful Settlement, 50 INT'L ORG. 653, 671 (1996).

169. Shany, *supra* note 172, at 266.

170. Cathryn Johnson et al., *Legitimacy as a Social Process*, 32 ANN. REV. SOC. 53, 57 (2006).

171. Schneider, *supra* note 162, at 297. This top-down design of the ICTY and ICTR, for example, has led to a criticized distance of the tribunals - both geographically and psychologically - from the relevant societies. See Stromseth et al., *supra* note 166, at 268, 271. The same is also true with regard to truth commissions. The 1992 El-Salvadorian truth commission did not initially gain public trust and support, partly because it was established without public participation. Zinaida Miller, *Settling with History: A Hybrid Commission of Inquiry for Israel/Palestine*, 20 HARV. HUM. RTS. J. 293, 316 (2007).

172. See Bassiouni, *supra* note 22, at 37.

173. Secretary-General Urges Human Rights Activists To 'Fill Leadership Vacuum', Hold World Leaders to Account, in Address to International Day Event, U. N. Press Release, SG/SM/10788-HR/4909-OBV/6018, (Dec. 8, 2006), <http://www.un.org/press/en/2006/>

determined that Israel is responsible for massive violations against the Palestinian people.¹⁷⁴ Similarly, the Mission's mandate was severely flawed, and had to be revised by Justice Goldstone himself. The identity of the establishing institution, the initial one-sided mandate and the language of the establishing resolution, created a significant legitimacy deficit, at least in the eyes of the Jewish-Israeli society. Consequently, it frustrated Israeli cooperation with the Mission, and triggered bias towards its findings even before it embarked on its mission.

What can be done to enhance the legitimacy of fact-finding bodies – and thus improve the level of acceptance of their findings and recommendations? In their book *Trust in the Law*, Taylor and Huo find that acceptance of legal decisions increases when people regard the agents of the legal system as acting in a way they perceive to be fair and trustworthy.¹⁷⁵ In a study focused on police legitimacy, Tyler demonstrates how perceived fairness of the institution's procedures influences evaluations of legitimacy.¹⁷⁶ He finds, that when authorities act in ways that people experience as being fair, people are more willing to voluntarily accept the authorities' decisions.¹⁷⁷ Tyler makes several recommendations to increase the procedural fairness – and legitimacy - of an organization:¹⁷⁸ first, enhance *participation* - people are more satisfied with procedures that allow them to participate by explaining their situations and communicating their views. Participation is especially important for international fact-finding institutions lacking binding force or enforcement capabilities. To enhance participation, it is important to first identify all of the relevant stakeholders, and to invite them to

sgsm10788.doc.htm [https://perma.cc/X8RC-HACS] (archived Dec. 31, 2017) (stating “I am worried by its disproportionate focus on violations by Israel”); Secretary-General Urges Human Rights Council to Take Responsibilities Seriously, Stresses Importance Of Considering All Violations Equally, U.N. Press Release, SG/SM/11053-HRC/8, (June 20, 2007), <http://www.un.org/press/en/2007/sgsm11053.doc.htm> [https://perma.cc/7V4L-XAC2] (archived Dec. 31, 2017). See also John Shamran, *UK puts UN Human Rights Council ‘on notice’ over ‘anti-Israel bias’*, INDEPENDENT (Mar. 25, 2017), <http://www.independent.co.uk/news/world/middle-east/uk-un-human-rights-council-on-notice-israel-bias-palestinian-settlement-a7649171.html> [https://perma.cc/P3S4/NYV7] (archived Dec. 31, 2017).

174. See *supra* Section IV.B.

175. TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 7 (2002).

176. Tom R. Tyler, *Enhancing police legitimacy*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 91 (2004).

177. *Id.*

178. *Id.*, at 94-95.

participate in the process.¹⁷⁹ Second, after all potential participants have been identified, one way to motivate them to participate is by enhancing *structural flexibility* - the possibility of modifying fact-finding structures or procedures in response to changing needs or circumstances - and by offering a menu of processes and structures to choose from, as different processes entail diverse incentives for the relevant parties.¹⁸⁰ Third, *objectivity* - people think that decisions are being more fairly made when authorities are unbiased and make their decisions using objective indicators, not personal views. Fourth, improve *quality of interpersonal treatment* - people value being treated with dignity and respect by authorities. Fifth, *trustworthiness* - people feel that procedures are fairer when they trust the motives of decision makers.

Returning to the Goldstone Mission, legitimacy and legitimacy-enhancing techniques were not factored into the design of the Mission, nor did they influence its fact-finding structures and processes later on. In fact, all five aspects identified by Taylor as enhancing legitimacy were not considered by the UN Human Rights Council, and ultimately contributed to the backlash against the Mission's findings. While this was consistent with its general approach, which did not see the Jewish-Israeli society as its intended audience, it nonetheless sustained the international controversy concerning the Report and its findings.

First, with regard to *participation* - the legal focus required access to information held by Israel. To make credible legal conclusions, the Mission had to review information concerning military decision-making processes, including the knowledge and intent of the alleged perpetrators. Therefore, to achieve this goal, methods to enhance participation should have been seriously and creatively considered. To enhance the legitimacy of the fact-finding mission and the facts it produces - given partial participation - international fact-finding may benefit from focusing on non-legal truth, as suggested above, while leaving the legal interpretation of the

179. As Miller points out, public participation, civil society cooperation and popular support are crucial for the success of any truth commission. See Miller, *supra* note 169, at 316. See also Susan Summers Raines, *Perceptions of Legitimacy and Efficacy in International Environmental Management Standards: The Impact of the Participation Gap*, 3 GLOBAL ENVTL. POL. 47, 72 (2003).

180. Smith & Martinez, *supra* note 159, at 131. See also Carrie Menkel-Meadow, *Are There Systemic Ethics Issues in Dispute System Design - And What We Should [Not] Do About It: Lessons from International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195 (2009).

facts to competent courts or tribunals which may be better equipped to summon witnesses and collect evidence. By emphasizing the importance of participation I do not suggest that a refusal to participate in the fact-finding process should have frustrated any attempt to establish the truth; but it is important to be aware of the limitations that a participation gap imposes on the fact-finding process. Second, with regard to *structural flexibility* - the Israeli refusal to cooperate with the Mission should have prompted a discussion of alternative processes that may be adopted instead, in an effort to enhance the Mission's legitimacy and thus increase the potential impact of its findings. As with the discussion of the participation element, structural flexibility would have required focusing on the elements that were in the control of the Mission, such as recording witness' testimonies and focusing on brute facts. Third, the *perceived objectivity* of the Mission by its Jewish-Israeli audience was doomed from the start, in part, due to the politicized nature of its founding body, the UNHCR. Consequently, the perceived bias of the founding institution tainted the further elements of *trustworthiness* of the fact-finders and their *interpersonal skills*, and turned the de-legitimation of the Mission to a national task in Israel and a test of loyalty and social belonging.

B. Matching goals with processes in international fact-finding

As discussed above, international fact-finding missions – as any other international institution - may be established to fulfill 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 framework to collect, interpret and produce facts. A possible explanation for this uniformity is that their mandates are often crafted hastily, while atrocities are ongoing, without identifying and prioritizing concrete goals.¹⁸¹ A lack of clarity concerning the 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 the existence of alternative structures.

Therefore, while designing international fact-finding missions, the mandating institution should define, clarify, and prioritize the goals and purposes of this mission. Based on the mission's main

181. See H.R.C. Res. S-24/1, *supra* note 177.

goals, alternative processes and structures should be considered, matching goals to processes in order to maximize the mission's efficacy. Instead of adopting a 'one size fits all' approach, international fact-finding would benefit from careful consideration of alternative processes and structures, and from a learned process of tailoring concrete processes and structures to specific goals.

The analysis of the Goldstone Mission suggests that a mismatch existed between the main goal of the Mission – investigating violations of international law – and the structure of the Mission, which had no enforcement capabilities and had to rely on voluntary cooperation from the relevant stakeholders to get access to information. No cooperation meant partial data, and partial data meant legal findings that rest upon unsatisfactory evidence. One particular example from the Goldstone Report demonstrates the implications of this mismatch between goals and processes.

One of the incidents the Goldstone Report focused on was the shelling of the Al-Samouni family house. The Report determined, based on testimonies by family members and eyewitnesses, that on January 5, 2009, around 6:30-7:00 a.m., Israeli forces fired several projectiles at the Al-Samouni family house, located at Zeytoun area, south of Gaza city. The first two projectiles were fired at five men who stepped outside to bring firewood. Immediately after this initial attack, additional projectiles destroyed the house, were dozens of unarmed civilians took shelter, under explicit orders from IDF soldiers (who denied their pleas to leave the area and ordered them back into the house). As a result of the shelling, twenty-one family members were killed, and nineteen were injured.¹⁸²

Israel refused to cooperate with the Mission and did not provide any information concerning its military operations. Therefore, the Goldstone Mission did not have evidence concerning the military decision-making process, the reasons for the shelling, and the knowledge and intent of those who ordered the attack. Nonetheless, the Mission did not stop here, with the factual findings concerning this incident, and moved on to determine the legal categories for these actions. The Mission members found that the attack on the Al-Samouni house was “*a direct intentional attack against civilian population*” which may constitute a *crime against humanity*.¹⁸³

182. *The Goldstone Report*, *supra* note 5, at 161-62.

183. *Id.* at 182-83, 284.

In response, Israeli military authorities rejected this description altogether. A military investigation opened following the release of the Goldstone Report found that the brigade commander's order to bomb the Al-Samouni house was based on erroneous – yet legitimate – interpretation of drone photos shown in the war room, in which the men holding firewood seemed as terrorists holding RPG rockets.¹⁸⁴ In May 2012, the military prosecution announced that no legal steps will be taken against those responsible for the shelling of the Al-Samouni house,¹⁸⁵ as the killing of the Al-Samouni family members was not done knowingly and directly, or out of haste and negligence, in a manner that would indicate criminal responsibility.¹⁸⁶ In between, while the Israeli military investigation was still ongoing, Justice Richard Goldstone published an op-ed in the *Washington Post*, in which he specifically retracted from the Goldstone Report's legal findings concerning the Al-Samouni incident. In his op-ed, Justice Goldstone stated that the shelling of the Al-Samouni home “*was apparently the consequence of an Israeli commander's erroneous interpretation of a drone image,*” and that “*if I had known then what I know now, the Goldstone Report would have been a different document.*”¹⁸⁷ Goldstone's op-ed was vindicated by Israel as a proof that the Goldstone Report – including its factual findings – was biased and false, and that the IDF operates according to international law generally, and particularly in the shelling of the Al-Samouni house.¹⁸⁸

The Al-Samouni controversy demonstrates the importance of adopting fact-finding processes and structures that are consistent with

184. ISR. MINISTRY OF FOREIGN AFFAIRS, GAZA OPERATION INVESTIGATIONS: SECOND UPDATE 6 (2010), http://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaUpdateJuly2010.pdf [<https://perma.cc/93WU-3678>] (archived Jan. 19, 2018); Amira Hass, *What Led to IDF Bombing House Full of Civilians During Gaza War?*, HAARETZ (Oct. 24, 2010), <http://www.haaretz.com/israel-news/what-led-to-idf-bombing-house-full-of-civilians-during-gaza-war-1.320816> [<https://perma.cc/Y65P-HXM2>] (archived Dec. 31, 2017).

185. Amira Hass, *IDF Closes Probe Into Israeli Air Strike That Killed 21 Members of Gaza Family*, HAARETZ (May 1, 2012), <http://www.haaretz.com/israel-news/idf-closes-probe-into-israeli-air-strike-that-killed-21-members-of-gaza-family-1.427583> [<https://perma.cc/LSM6-G5SM>] (archived Dec. 31, 2017).

186. *Id.*

187. Richard Goldstone, Opinion, *Reconsidering the Goldstone Report on Israel and War Crimes*, WASH. POST (Apr. 1, 2011), https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html?utm_term=.597a7cb64bb9 [<https://perma.cc/6RLB-TU3U>] (archived Dec. 31, 2017).

188. ISRAELI DEF. FORCES, STRATEGIC DIV., THE GOLDSTONE REPORT: JUDGE RICHARD GOLDSTONE REVISES HIS POSITION (Apr. 5, 2011).

the main goal of the fact-finding institution. The legal categorization approach adopted by the Goldstone Mission is suitable for advancing legal accountability goals, but must rest on fact-finding processes that provide the evidence necessary to make legal conclusions. In the Goldstone Mission's case, without guaranteeing Israel's cooperation or external enforcement capacities that would result in gathering the required evidence, the legal conclusions rested on insufficient evidence. As a result, even Goldstone himself later retracted from the legal conclusions determined by the Report, in a way that robbed the brute facts from their independent meaning and significance. Israeli military did shell a house where numerous people, including infants, children, and elderly, took shelter. As a result, twenty-one family members were killed and many others injured. These facts should have been at the center of attention. Instead, the focus on binary legal categories turned the accusations on their head, reasserting that the IDF is indeed the most moral army in the world. The insufficiency of the evidence for attributing legal blame and responsibility projected on the factual findings as well – even though these *were* based on appropriate evidence. Goldstone apologized to Israel over the opinion pages of the Washington Post. Who will apologize to the Al-Samouni survivors?

VI. CONCLUSION

Through the glasses of Israeli national identity, Operation Cast Lead was nothing but a justified and necessary reaction to monstrous Palestinian terrorism. In contrast, the Goldstone Report accused Israel with committing atrocious international crimes against innocent civilians. The Report's focus on binary legal categories intensified Israelis' defensive response aimed at protecting and preserving their national narrative. At the same time, it shifted attention from the brute facts - the sounds and images, the voices and faces, the dust, ruins, hunger, blood and tears - to sophisticated and abstract debates over legal interpretations and definitions.

Truth is comprised of various layers of information and is subjected to different social perceptions and interpretations. During armed conflicts, many factors join-in to escalate conflicting assessments of "what really happened." Information that threatens core societal beliefs triggers defensive reactions and might be distorted to fit the national narrative. This socio-psychological dynamic presents a unique challenge to the dissemination of

international fact-finding reports during intractable armed conflicts. In order to overcome this challenge and to improve the positive effects of international fact-finding efforts, fact-finding missions should be carefully and thoughtfully designed.

First, the mechanism's goals should be clearly defined and prioritized. The immediate goal of finding the truth and determining 'what really happened' should not be jeopardized by or secondary to long terms goals such as accountability or reconciliation. With regard to long-term goals, the traditional goal of accountability should not overshadow other important goals, such as conflict resolution and reconciliation. This is especially true with regard to intractable armed conflicts, which can benefit from efforts to infuse the conflict with new dynamics, perspectives and information. Additionally, institutional goals, such as legitimacy, trust and participation, should also be considered and enhanced in order to improve their positive impact and mitigate backlash and resistance. Once its main goal is clearly defined, fact-finding processes could – and should - be tailored to the concrete goal of the fact-finding mission. The enforcement deficit of some fact-finding mechanisms, such as the Goldstone Mission, requires processes that highlight participation and cooperation.

Second, adversarial legal truth should not dominate international 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, which may be less threatening than legal truth, and more sensitive to the nuances of complex situations. By relinquishing legal categorization and interpretation of facts, along with its inherent attribution of blame and fault, fact-finding missions may be able to dismantle some the threat and distortion, and thus improve the dissemination of their findings by the conflicting groups.

Finally, in this era of constant challenges to knowledge and information, where 'alternative facts' are frequently produced to counter unwelcomed information, and when critical findings are denounced as 'fake news', the outputs of international fact-finding missions are particularly sensitive to competing findings. Therefore, international fact-finding missions should be sensitive to the various contingencies of their findings, and adopt a humbler approach concerning the 'indisputable' nature of these findings. Instead of

serving as a cheap substitute (politically and financially) to international adjudication, fact-finding missions may creatively contribute to dissemination of threatening information during intractable conflicts in a way that is unattainable by existing legal institutions. If designed thoughtfully, international fact-finding missions may encourage conflicting societies to re-evaluate some of their core societal beliefs, and accept new information concerning the conflict, their adversaries and perhaps even their own actions.

