

THE LEGALIZATION OF TRUTH IN INTERNATIONAL FACT-FINDING

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ABSTRACT

Do legal judgments influence people's attitudes and beliefs concerning contested events? This article builds on studies from three disciplines – law, psychology, and political science – and employs experimental methods to shed light on the impact of legal institutions on their intended audiences. The article identifies a rising 'legalization of truth' phenomenon – the adoption of legal discourse to construct and interpret facts outside the courthouse. It argues that legal truth, while providing a framework of legal terminology and conventions to analyze and understand facts, comes with a price tag: it triggers cognitive and emotional biases that frustrate efforts to disseminate controversial information and to resolve factual disputes; and it lacks the emotional appeal, participatory value, and social cues that moral expressions or other types of social truth-telling entail.

To demonstrate the legalization of truth process and to measure its impact on attitudes and beliefs, this article focuses on the practice of international fact-finding. In recent years, international fact-finding has become a dominant response to armed conflicts and political violence around the world. Lacking compulsory jurisdiction, international fact-finding bodies have adopted legal discourse, assuming that legal reports uniformly inform the relevant publics with an authoritative account of what happened and motivate domestic sanctioning of in-group offenders.

This article challenges both assumptions. Based on two survey-experiments fielded in 2013 and 2014 on representative samples of 1,000 and 2,000 U.S. nationals, respectively, as well as on an original dataset of U.N. fact-finding missions, the study demonstrates that three elements of legal discourse - binary legal judgment, 'hot' legal terminology, and legal frame -

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harm the perceived credibility and persuasive value of fact-finding reports: the legal judgment of the fact-finding report is likely to trigger cognitive biases and belief polarization; 'hot' legal terminology is likely to trigger emotional biases and reduce the perceived fairness of the report; and the legal frame appears to be less effective than moral frame in influencing attitudes on accountability.

The article concludes that international and domestic organizations should rethink their current design and practice of fact-finding bodies, acknowledge the limitations of adopting a legal discourse to interpret facts, and recognize the questionable efficacy of legal fact-finding in influencing attitudes and beliefs. Accordingly, the goals, structures, and processes of fact-finding should be reorganized, matching goals with appropriate structures and processes. By revealing the impact of the legalization of truth on people's beliefs and attitudes, this article creates a new framework to understand the failures and successes of legal fact-finding in particular and the practice and output of legal institutions more broadly.

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Write it down. Write it. With ordinary ink
on ordinary paper; they weren't given food,
they all died of hunger. *All. How many?*
It's a large meadow. How much grass per head?
Write it down: I don't know.¹

What happens to these reports when they are 'released'?
The resources that organizations devote to compiling all this
information are not matched by attention to how reports are
disseminated or what impact they might have on target
audiences.²

A. INTRODUCTION

October 3, 2015, 2:08 a.m.: a U.S. Special Operations AC-130 gunship attacked a Doctors Without Borders [*Médecins Sans Frontières*, MSF] hospital in Kunduz, Afghanistan, with heavy fire. Forty-two people were killed, mostly patients and hospital staff members. Dozens of others were injured. The main hospital building – the only free trauma care hospital in northern Afghanistan – was severely damaged and subsequently closed. In the aftermath of the attack on the hospital, many international organizations, including MSF and various bodies of the United Nations, called for an international fact-finding investigation to establish the truth and to bring those responsible to justice.³

In the days and months following the attack several investigations were carried out by the U.S. military, NATO, the United Nations Assistance Mission in Afghanistan [UNAMA] and

¹ WISLAWA SZYMBORSKA, *Starvation Camp Near Jaslo*, in *MIRACLE FAIR: SELECTED POEMS OF WISLAWA SZYMBORSKA* 38 (Joanna Trzeciak trans., 2001).

² Stanley Cohen, *Government Responses to Human Rights Reports: Claims, Denials, and Counterclaims*, 18 *HUM. RTS. Q.* 517, 518 (1996).

³ For example, U.N. Secretary-General Ban Ki Moon strongly condemned the airstrike and called for a “thorough and impartial investigation into the attack in order to ensure accountability” (*Statement attributable to the Spokesman for the Secretary-General on attack in Kunduz*, UNITED NATIONS (Oct. 3, 2015), <http://www.un.org/sg/statements/index.asp?nid=9095>). The U.N. High Commissioner for Human Rights demanded an investigation and suggested that the attack may amount to a war crime (*Kunduz hospital airstrikes “inexcusable” – Zeid*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Oct. 3, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16564&LangID=E>). Human Rights Watch called the U.S. to establish “an independent panel outside the military chain of command with the aim of establishing the facts and assessing possible culpability for the strike” (*Afghanistan: US Inquiry Must Go Past Admitting Mistakes*, HUMAN RIGHTS WATCH (Oct. 6, 2015), <https://www.hrw.org/news/2015/10/06/afghanistan-us-inquiry-must-go-past-admitting-mistakes>). And Doctors Without Borders demanded a “transparent and independent investigation” (Alissa J. Rubin, *Doctors Without Borders Says It Is Leaving Kunduz After Strike on Hospital*, N.Y. TIMES (Oct. 4, 2015), <http://www.nytimes.com/2015/10/05/world/asia/doctors-without-borders-says-it-is-leaving-kunduz-after-strike-on-hospital.html>).

MSF.⁴ Seven months and four fact-finding reports later, one thing became certain: uncertainty surrounded almost every aspect of the attack and its consequences. Due to MSF's high profile, its international network, and the apparent unlawfulness of striking a functioning hospital, investigating the attack on the MSF hospital in Kunduz had a strong potential to produce transparent, consistent, and credible findings. Yet instead of settling the dispute over what happened, the four reports only refined the controversies and exposed the inherent disbelief and mistrust between different organizations and communities. The factual findings reported by UNAMA were challenged by counter-facts produced in the U.S. Central Command Report, and at the end each side remained committed to its own version of the truth.⁵ Even basic facts, such as the time frame of the attack, were just as contested as the sophisticated legal analysis.⁶ This served

⁴ U. S. Central Command [Centcom], *Summary of the Airstrike on the MSF Trauma Center in Kunduz, Afghanistan on October 3, 2015; Investigation and Follow-on Actions* (Apr. 2016), [https://www6.centcom.mil/FOIA_RR_Files/5%20USC%20552\(a\)\(2\)\(D\)Records/1.%20Airstrike%20on%20the%20MSF%20Trauma%20Center%20in%20Kunduz%20Afghanistan%20-%203%20Oct%202015/00.%20CENTCOM%20Summary%20Memo.pdf](https://www6.centcom.mil/FOIA_RR_Files/5%20USC%20552(a)(2)(D)Records/1.%20Airstrike%20on%20the%20MSF%20Trauma%20Center%20in%20Kunduz%20Afghanistan%20-%203%20Oct%202015/00.%20CENTCOM%20Summary%20Memo.pdf) [hereinafter Centcom Report]; NATO, *Executive Summary: Combined Civilian Casualty [CIVCAS] Assessment of an Airstrike on a Medical Facility in Kunduz City on 03 October 2015* (Nov. 2015), https://www.shape.nato.int/resources/3/images/2015/saceur/exec_sum.pdf [hereinafter NATO Report]; U.N. Assistance Mission in Afghanistan, *Human Rights and Protection of Civilians in Armed Conflict: Special Report on Kunduz Province* (Dec. 2015), https://unama.unmissions.org/sites/default/files/special_report_on_kunduz_province_12_december_2015.pdf [hereinafter UNAMA Report]; Doctors Without Borders, *Initial MSF Internal Review: Attack on Kunduz Trauma Centre, Afghanistan* (Nov. 2015), http://www.msf.org/sites/msf.org/files/msf_kunduz_review_041115_for_public_release.pdf [hereinafter MSF Report].

⁵ Both UNAMA and MSF expressed an inherent disbelief in the findings of the military investigations. See UNAMA Report, *supra* note 4, at 12; Doctors Without Borders, *Initial Reaction from MSF to Public Release of US Military Investigative Report on the Attack on MSF Trauma Hospital in Kunduz, Afghanistan*, (Apr. 2016), <http://www.doctorswithoutborders.org/article/initial-reaction-msf-public-release-us-military-investigative-report-attack-msf-trauma>. The UNAMA report explicitly criticized both Centcom and NATO investigations for their lack of independence and effectiveness. UNAMA Report, *supra* note 4, at 12. The U.S. and NATO fact-finding reports seemed coordinated, using almost identical words to describe their identical conclusions: for example, the NATO report concluded that the attack on the hospital resulted from a “series of human errors, compounded by failures of process and procedure, and malfunctions of technical equipment,” NATO Report, *supra* note 4 at 1; and the Centcom Report concluded, similarly, that the attack resulted from a “combination of human errors, compounded by process and equipment failures,” Centcom Report, *supra* note 4, at 1. Therefore, the UNAMA Report called to establish another independent, impartial, prompt, transparent, and effective investigation of the attack against the hospital. UNAMA Report, *supra* note 4 at 12.

⁶ UNAMA published its Special Report on Kunduz in December 2015. UNAMA Report, *supra* note 4. The report adopted the findings elaborated in the MSF Report, concluding that the attack on the hospital lasted about an hour, from 2:07 a.m. until 3:00 or 3:15 a.m., continuing for at least 40 minutes after the hospital personnel first contacted U.S. authorities in Afghanistan, at 2:19 a.m., informing them that the hospital was under fire. *Id.* at 7-8; MSF Report, *supra* note 4, at 7. The UNAMA Report concluded that the attack possibly amounted to a war crime – the conclusions were not final because the U.S. military refused to cooperate with the Mission and did not provide the necessary information to make firm determinations of responsibility and guilt – and that those involved should be

as a fertile ground for law professors and legal scholars and practitioners to further the debates and to intensify and highlight the disagreements over the legal analysis of the applicable norms.⁷

To close this gap, both MSF and UNAMA reiterated their demand to establish an international fact-finding mission to investigate the incident.⁸ The repeated and uniform calls for an international investigation – whether by the International Humanitarian Fact Finding Commission (IHFFC) or some other ad-hoc mechanism – are not surprising. In recent years, international fact-finding has become a dominant response to many crisis situations around the world. Since the beginning of the twenty-first century, the U.N. alone has dispatched forty-eight fact-finding missions,⁹ tasked with responsibility to establish the *legal* facts by documenting violations of human rights and international humanitarian law.¹⁰ Lacking compulsory jurisdiction,

criminally investigated and prosecuted. *See id.* at 11-12. A few months later, in April 2016, the U.S. Central Command published its own report, following a thorough internal investigation. Centcom Report, *supra* note 4. The Centcom Report produced counter-facts, finding that the attack lasted only 30 minutes, from 2:08 a.m. until 2:38 a.m., and concluding that the ‘tragic errors’ that lead to the attack on the hospital did not amount to a ‘war crime’. *Id.* at 3. Moreover, the Centcom Report, like its NATO twin, left many factual questions undecided: it was unable to conclusively determine how many people were killed in the attack (emphasizing it was unable to verify the numbers provided by Doctors Without Borders), or what caused the series of errors that led to the hour-long attack on the trauma center, other than the ‘fog of war.’ *Id.* at 2, 3. The Centcom Report embraced the uncertainty encountered during combat operations as the main factor contributing to the tragic course of events. *See id.* Based on these counter-fact, the U.S. military adopted administrative and disciplinary measures against the sixteen individuals who were identified as responsible for the errors. *Id.* at 4.

⁷ *See, e.g.*, Peter Margulies, *Centcom Report on the Kunduz Hospital Attack: Accounting for a Tragedy of Errors*, LAWFARE (May 2, 2016), <https://www.lawfareblog.com/centcom-report-kunduz-hospital-attack-accounting-tragedy-errors>; Alex Whiting, *Recklessness, War Crimes, and the Kunduz Hospital Bombing*, JUST SECURITY (May 3, 2016), <https://www.justsecurity.org/30871/recklessness-war-crimes-kunduz-hospital-bombing/>; Jonathan Horowitz, *Why the US Should Cooperate With Investigations Into the Hospital Bombing*, JUST SECURITY (Dec. 23, 2016), <https://www.justsecurity.org/28472/cooperate-investigations-hospital-bombing/>; Jens David Ohlin, *Was the Kunduz Hospital Attack a War Crime?*, OPINIO JURIS (May 2, 2016), <http://opiniojuris.org/2016/05/01/was-the-kunduz-hospital-attack-a-war-crime/>; Kevin Jon Heller, *Thoughts on Jens’s Post About the Kunduz Attack*, OPINIO JURIS,, (May 3, 2016), <http://opiniojuris.org/2016/05/03/thoughts-on-jens-post-about-the-kunduz-attack/>.

⁸ MSF specifically demanded an international investigation by the International Humanitarian Fact-Finding Commission (IHFFC). Doctors Without Borders, *Kunduz: Initial Reaction to Public Release of U.S. Military Investigative Report on the Attack on MSF Trauma Hospital* (Apr. 29, 2016), <http://www.msf.org/en/article/kunduz-initial-reaction-public-release-us-military-investigative-report-attack-msf-trauma>; *see also* Eve Bring, *The Kunduz Hospital Attack: The Existence of a Fact-Finding Commission*, EJIL TALK! (Oct. 15, 2015), <http://www.ejiltalk.org/the-kunduz-hospital-attack-the-existence-of-a-fact-finding-commission/> (encouraging the international community to turn to the International Humanitarian Fact-Finding Commission to investigate this – and other – events). UNAMA required an independent, impartial, prompt, transparent, and effective investigation. *See* UNAMA Report, *supra* note 4, at 60.

⁹ This data is based on qualitative information available at the United Nations Library, <http://libraryresources.unog.ch/factfinding/europe>. Quantitative analysis of the data is my own.

¹⁰ G.A. RES. A/RES/46/59, Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security (Dec. 9, 1991). For an elaborate account of U.N. fact-finding missions throughout the years, see Section B(i) below. For a brief overview of fact-finding mechanisms established by the international

the fundamental goal of these missions is to persuade relevant audiences to accept their findings and adopt their recommendations. The assumptions underlying these efforts are that legal fact-finding bodies are well-suited to settle disputes over ‘what happened,’ and that by producing credible facts, their findings and conclusions will mobilize domestic accountability measures.

This article challenges both assumptions. It argues that legal fact-finding, while providing a framework of legal conventions and social discourse to analyze and understand facts, comes with a price tag: the binary legal *judgment* is likely to trigger cognitive biases and belief polarization; the ‘hot’ legal terminology (such as ‘war crimes’) is likely to trigger emotional biases and reduce the perceived fairness of the report; and the overall legal frame is less likely than other social frames (including moral frames) to influence attitudes on accountability and to mobilize public support to prosecute in-group offenders and to compensate out-group victims. Therefore, legal discourse may not be an optimal choice for influencing attitudes and beliefs concerning contested events. This price is particularly detrimental for international fact-finding, because, in contrast to international tribunals, international fact-finding bodies suffer from an enforcement deficit and are therefore designed to influence their intended audiences through soft power, dialogue, and persuasion. While MSF understandably desires to find the truth about what happened the day of the attack on their hospital – and to punish those responsible – this article suggests that yet another legal fact-finding report is probably not what is needed to resolve the controversy and mobilize sanctioning.

Indeed, international fact-finding missions have often been at the center of intense controversies about alleged atrocities and abuses.¹¹ The Rwandan reaction to the 2010 Democratic Republic of the Congo Report (“dangerous and irresponsible”),¹² and the Israeli response to the

community since 1913, see Rob Grace & Claude Bruderlein, Building Effective Monitoring, Reporting, and Fact-finding Mechanisms 3-9 (April 12, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038854.

¹¹ Philip Alston and Sarah Knuckey, *The Transformation of Human-Rights Fact-Finding: Challenges and Opportunities*, in THE TRANSFORMATION OF HUMAN RIGHTS FACT-FINDING 3 (Philip Alston & Sarah Knuckey eds., 2016). In a recent U.N. 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. Office of the High Commissioner of Human Rights [OHCHR], *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law Guidance and Practice*, at 7, HR/PUB/14/7 (2015), http://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf [hereinafter UNHCHR Fact-Finding Guidance].

¹² *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->

2009 Gaza Report (“false and distorted”),¹³ are merely two recent examples of the heated controversies generated by the release of many of the U.N. fact-finding reports.¹⁴ Analyzing public opinion polls in the former Yugoslavia, Marko Milanovic revealed that factual controversies continue to thrive even when the factual determinations are made by a competent court, whose judgements are binding and final.¹⁵ While the International Criminal Tribunal for the former Yugoslavia [ICTY] prides itself in “creating a historical record, combatting denial and preventing attempts at revisionism,”¹⁶ Milanovic demonstrated that denialism is thriving, that each ethnic group in the former Yugoslavia is still firmly attached to its own version of history, and that the tribunal failed to persuade the relevant target populations that the findings in its judgments are true.¹⁷ Nonetheless, as Milanovic points out, the Yugoslav surveys do not provide us with a direct measure of any impact that ICTY has had on people’s attitudes about crimes in the Yugoslav wars, or what the situation would look like had the ICTY done things differently. He concludes, therefore, that “the best thing we can do is speculate, if in an informed way.”¹⁸

This article takes a different methodological approach – one that obviates the need to speculate. It complements existing observational studies by leveraging the use of experiments embedded in a pair of U.S. national surveys. Using survey-experiments, this article provides systematic evidence of the consequences of international fact-finding reports on people’s attitudes and beliefs. It directly measures individuals’ reactions to both positive and negative information (sanctioning or absolving in-group members); different legal terminologies (‘cold’ violations terminology versus ‘hot’ war crimes terminology); and different frames (legal frame versus moral frame.) Based on these components of legal fact-finding reports – judgment, terminology, and frame – the article demonstrates how cognitive and emotional biases influence people’s reactions

¹³ 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>.

¹⁴ 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. Efraim Ya’ar & Tamar Herman, PEACE INDEX - SEPTEMBER 2009 (2009), <http://www.tau.ac.il/peace/>.

¹⁵ Marko Milanovic, *The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Post-Mortem*, AM. J. INT’L L., (forthcoming 2016) (manuscript at 33, 35) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755505).

¹⁶ U.N. International Criminal Tribunal for the Former Yugoslavia, *Achievements*, <http://www.icty.org/en/about/tribunal/achievements>.

¹⁷ Milanovic, *supra* note 15, at 33, 35.

¹⁸ *Id.* at 28-30.

to new information about war crimes committed by their fellow nationals. Querying mass publics also allows me to examine more directly the impact of ‘doing things differently’ – of various framings, processes, and institutional designs – on willingness to believe threatening facts. Additionally, using an experimental design minimizes problems posed by selection effects that characterize much of the existing research on international law and institutions.¹⁹ And lastly, focusing on the social impact of international fact-finding is especially instructive, because, unlike the ICTY and similar tribunals, fact-finding missions do not give binding judgments or decisions, and their main contribution is by disseminating facts and making recommendations through otherwise unenforceable reports.

The two experiments discussed in this article were fielded in 2013 and 2014 on representative samples of 1,000 and 2,000 U.S. nationals, respectively. The findings demonstrate that international fact-finding reports on war crimes committed by U.S. Marines in Afghanistan are ineffective in both (i) resolving controversies in the U.S. over contested events; and in (ii) motivating domestic condemnation of U.S. war criminals. Additionally, I find that a moral discourse is more effective than a legal discourse in influencing attitudes on sanctioning and mobilizing public support to prosecute U.S. war criminals and to compensate Afghan victims.

Based on these findings, I conclude that international organizations, including the U.N., should rethink their current design and practice of international fact-finding, acknowledge the limitations of adopting a legal discourse to interpret facts, and recognize the questionable efficacy of legal fact-finding in influencing attitudes and beliefs. Accordingly, the goals, structures, and processes of international fact-finding should be reorganized, matching goals with appropriate structures and processes: for example, if the main goal of a fact-finding mission is legal accountability, a court-like structure, complete with enforcement powers, is advisable; if, however, conflict resolution is the primary goal, then a narrative or restorative approach to truth, through a social process of truth and reconciliation, is preferable. Ultimately, international fact-finding, in its current form, carries mainly institutional and social disadvantages.

¹⁹ See Adam S. Chilton & Dustin H. Tingley, *Why the Study of International Law Needs Experiments*, 52 COLUM. J. TRANSNAT'L L. 173 (2013). For a similar approach, see Geoffrey P.R. Wallace, *International Law and Public Attitudes Toward Torture: An Experimental Study*, 67 INT'L ORG. 105 (2013).

While these findings have concrete implications for the design and practice of international fact-finding bodies, they also have broader significance concerning the impact of legal institutions – international or domestic – on their intended audiences, and on the role of legal discourse in shaping attitudes and beliefs.²⁰ The ‘legalization of truth’ process I identify in this article characterizes not only the discourse adopted by international organizations, but also the discourse adopted by many human rights organizations, social movements, and domestic institutions. From police violence to sexual harassment to torture, the most burning social controversies of our time have been analyzed in the social sphere through legal lenses, using legal discourse, including binary legal judgment, legal terminology and legal frames. However, this article demonstrates that the popularity of legal discourse in fact-finding efforts is probably unjustified and might be counter-productive. By revealing the impact of legal discourse on people’s beliefs and attitudes, this article creates a new framework to understand the failures and successes of legal fact-finding in particular and the practice and output of legal institutions more broadly.

The article begins, in Section B, with an interdisciplinary theoretical framework on the legalization of truth in international fact-finding. This section combines legal scholarship on war crimes investigations, fact-finding, and legal discourse with social-psychology literature on selective information processing, cognitive and emotional biases, attitude formation, and persuasion; and political science literature on ideological bias and the efficacy of fact-finding reports. Additionally, this section presents data from an original dataset of U.N. fact-finding missions, including their mandates and goals. Based on this rich literature and data, I develop my argument and present my hypotheses concerning the impact of legalization of truth in international fact-finding on attitudes and beliefs. Sections C and D present the design of the two experiments and report their findings. Section E then discusses the contribution of these findings to our understanding of the impact of legal discourse on attitudes and beliefs; and section F offers several recommendations for the design of fact-finding bodies, including rethinking their goals, and adopting alternative structures to promote accountability.

²⁰ In a future paper, *When More Information Means Less Knowledge: A Comparative Analysis of the U.S., Canada and Israel* (work-in-progress), I will test the generalizability of these findings to other societies, including Canada and Israel. This forthcoming paper will report the results of experiments fielded in Israel and Canada in 2016. These comparative experiments – replicating the U.S. experiments, with the necessary changes – will enable me to compare the impact of international fact-finding reports on factual beliefs and attitudes in different societies.

B. THE LEGALIZATION OF TRUTH: THEORY AND HYPOTHESES

The ‘legalization of truth’ process refers to the adoption of *legal discourse* to construct and interpret facts. Discourse is the foundation of the process of social construction upon which social reality depends. It relates to the practices of talking and writing, which produce reality or ‘truth’ through the production, dissemination, and consumption of texts.²¹ Legal discourse is a socially institutionalized meaning-making process, dictating meanings, interpretations, and ideological preferences, through a variety of compositional, stylistic, and semantic mechanisms.²² It influences perceptions, attitudes, and beliefs through a commitment, among other things, to binary legal judgments, to the closure of controversies, to one true meaning of texts, and to legal rhetoric, terminology, and voice.²³

This article examines the social outcomes of the prevailing legal discourse in international fact-finding. To operationalize legal discourse and measure its unique influence on social attitudes and beliefs, I focus on three distinct dimensions of legal discourse which are present in most fact-finding reports: binary judgments (incriminating or absolving), legal terminology or semantics (‘war crimes’ versus ‘violations’), and legal frame (referring specifically to ‘law’ or ‘legal standards’ rather than, for example, ‘moral standards’). This article argues that under some circumstances, the adoption of legal discourse to produce facts and create meaning, may elicit not assent but, instead, distrust, resistance, and distortion.²⁴ In the following sections I lay out my argument concerning the distinctive – and sometimes negative – social impact of legal discourse. First, I describe the institutionalization of legal discourse in international fact-finding efforts. Second, I discuss the theoretical foundations of this argument, focusing on two of the main weaknesses of legal discourse: its limited ability to resolve social controversies and disseminate contested information, and its bounded efficacy in influencing social attitudes and mobilizing people for action.

²¹ Cynthia Hardy, *Researching Organizational Discourse*, 31 INT’L STUD. MGMT. & ORG. 25, 26-27 (2001).

²² PETER GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS 170, 203-204 (1987).

²³ Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1551-1553 (1990).

²⁴ *Id.* at 1546 (suggesting that lawyers’ style of argument is not uniformly effective).

1. Legal Fact-Finding as an International Strategy

From Palestine to Lebanon, to Darfur and to Lybia; from Georgia to Ukraine, to Serbia and to Sri Lanka, one of the most certain facts about conflicts is uncertainty about facts.²⁵ 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 become so intense they nourish and intensify the conflict,²⁶ and thus pave the way to further crimes and abuses.²⁷

For decades, the international community has been struggling to find constructive methods to stop such abuses and to promote justice and accountability.²⁸ One of the most important and common strategies adopted by many international organizations (including U.N. bodies, such as the Security Council, the General Assembly, the Human Rights Council, the Secretary-General, and the High Commissioner for Human Rights) is international fact-finding.²⁹ Already in 1991 the United Nation's General Assembly signed the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, urging United Nations organs to undertake fact-finding activities and to obtain detailed knowledge about the factual circumstances of any dispute in order to maintain international peace and security.³⁰

To provide a complete analysis and identify the legalization of truth in U.N. fact-finding missions, I compiled an original dataset which includes all U.N. fact-finding missions from 1945 to 2015. The coding scheme includes the year the fact-finding mission was created (or its mandate was revised); the U.N. organ establishing the mission; the countries that were the subject of investigation; and the declared goals of the mission (including investigating violations of

²⁵ Bothe, for example, highlights the importance of ascertaining facts in the context of all kinds of conflicts, be they of a social, political, or legal character. Michael Bothe, *Fact-finding as a Means of Ensuring Respect for International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 249, 249-267 (Wolff Heintschel Heinegg & Volker Epping eds., 2007).

²⁶ For a detailed discussion of the disagreement over 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 (2000); Peter T. Coleman, *Characteristics of Protracted, Intractable Conflict: Toward the Development of a Metaframework-I*, 9 PEACE & CONFLICT 1, 19 (2003).

²⁷ For a comprehensive analysis of the 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).

²⁸ This paper does not deal with the few international mechanisms which enjoy mandatory jurisdiction and enforcement power, but only with voluntary fact-finding mechanisms that depend on states' cooperation.

²⁹ UNHCHR Fact-Finding Guidance, *supra* note 11, at 2; see also *supra* notes 1-6.

³⁰ G.A. Res. A/RES/46/59, *supra* note 10.

international law, promoting accountability, assisting domestic authorities, promoting reconciliation, preventing future atrocities, determining facts, and ascertaining the truth). The dataset is based on information which is available online at the U.N. Library in dozens of previously unorganized and understudied documents, including U.N. resolutions, reports, and decisions. The following paragraphs introduce the main findings of this analysis.

Throughout its long history, the United Nations, through its various organs, has established 66 fact-finding missions. Of these 66 missions, 38 (57%) were established in the last decade. The U.N. Human Rights Council [UNHRC], a U.N. organ established in 2006, is responsible for the establishment of 29 (44%) of these 66 missions; UNHRC missions comprise 76% of the missions established in the last decade. Overall, about half of all missions were sent to investigate atrocities in Africa, and the other half concentrated in Asia and the Pacific. Four missions were tasked with investigating atrocities in the Americas and one was established to investigate atrocities in the former Yugoslavia.³¹

Figure 1. U.N. Fact-Finding Missions, by Decade

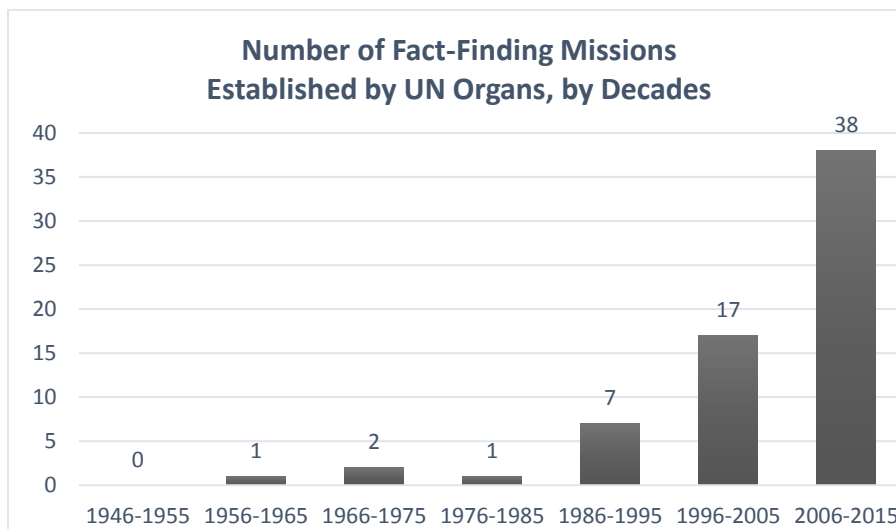


Figure displays the number of fact-finding missions established by U.N. organs, by decade.

³¹ This data is based on qualitative information available at the United Nations Library, <http://libraryresources.unog.ch/factfinding/europe>. Quantitative analysis of the data is my own.

In recent decades, the variety of fact-finding mechanisms has tremendously expanded, not only in numbers, but also in mandates, capacities, institutional affiliations, and goals.³² Nonetheless, while the 1991 General Assembly resolution defined fact-finding in terms of “obtaining knowledge of the relevant facts,”³³ most U.N. fact-finding missions were not created to fulfill the goal of ascertaining facts alone. Instead, these fact-finding missions were specifically tasked with other goals, such as determining state and individual responsibility for violations of international law, making recommendations regarding reform and reparations, and promoting accountability.³⁴ The mandate of the most recent UNHCR fact-finding mission – the Burundi Mission – does not even mention ascertaining facts as one of its purposes, and instead focuses on long-term goals such as preventing further deterioration of the human rights situation, making legal determinations on possible violations of international law, assisting the state to fulfil its human rights obligations, and ensuring accountability for human rights violations and abuses.³⁵

Analyzing the mandates of these 66 fact-finding missions, I found that an overwhelming majority of these missions – 63 of the 66 missions – were established to investigate alleged violations of international law, requesting the mission members to rely on legal norms in their analysis and to adopt legal discourse in the description of their findings. Half of those missions – 33 missions – were specifically instructed to further the goal of accountability. Of the 38 missions established after 2006, 24 (63%) were specifically tasked with the goal of promoting accountability, while of the 28 missions established prior to 2006, only 9 (32%) were instructed to focus on accountability. Only three missions were instructed to promote the goal of reconciliation; an additional three missions were instructed to assist domestic authorities; and the goal of only one mission was to prevent future atrocities. Of the 66 fact-finding missions, only 17 mandates included reference to “fact-finding” in their mandate, and the mandate of one mission alone included reference to ascertaining the “truth.”³⁶ It is clear from this data that the past decade has

³² For a brief overview of fact-finding mechanisms established by the international community since 1913, see Grace & Bruderlein, *supra* note 10, at 3-9.

³³ G.A. Res. A/RES/46/59, *supra* note 10.

³⁴ Specifically, these goals include assessing the truth of allegations made; preparing reports designed for “name and shame” advocacy or as a basis for future litigation; constructing a historical record; and making recommendations to prevent future abuse. Alston & Knuckey, *supra* note 11, at 9.

³⁵ U.N. HUMAN RIGHTS COUNCIL Res. A/HRC/RES/S-24/1, Preventing the Deterioration of the Human Rights Situation in Burundi (Dec. 17, 2015), <http://www.ohchr.org/EN/HRBodies/HRC/UNIIB/Pages/UNIIB.aspx>.

³⁶ See Appendix I.1 for the full dataset of U.N. fact-finding mission goals.

brought a meaningful rise not only in the number of fact-finding missions, but also in the adoption of legal discourse and concrete legal goals – such as accountability.³⁷ The data further suggest that the process of establishing fact-finding missions reproduces ‘legalization of truth’ approach to fact-finding and a commitment to legal discourse without questioning its efficacy and without considering alternatives.³⁸

This legalization of truth in U.N. fact-finding missions echoes the ‘naming and shaming’ strategy adopted by many non-governmental organizations (NGOs).³⁹ ‘Naming and shaming’ is a fact-finding process designed specifically for the goal of exposing concrete violations of international humanitarian law and international human right law (‘naming’), and publicizing this information to condemn the relevant societies (‘shaming’), in the hope that the international condemnation will pressure the relevant societies to stop the abuses and bring the offenders to justice.⁴⁰ Fact-finding efforts designed to ‘name and shame’ abusive regimes typically convey their messages through legalized fact-finding reports, concluding with semi-judicial determinations that international law was (or was not) violated. There are various theories explaining why ‘naming

³⁷ The qualitative data further demonstrate the nature of this legalization of truth. For example, the language of the UNHRC resolution mandating a fact-finding mission in Burundi extended the mission’s mandate to investigate “violations and abuses of human rights,” UNHRC Res. S-24/1, *supra* note 35, ¶ 17(a). Other recent examples are the Security Council fact-finding mission to the DRC, which defined the mission’s mandate as “a mapping of the serious violations committed,” S.C. Res. S-2006/390, ¶ 54 (June 13, 2006); and the mandate of the 2009 Gaza mission, which called to “investigate all violations of international human rights law and international humanitarian law,” UNHRC Res. A/HRC/S-9/1, 153-156. *See also* G.A. Res. A/RES/68/165, ¶ 1, (Dec. 18, 2013) (stating that the organization “recognizes the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights”); UNHRC Res. A/HRC/RES/14/7, Proclamation of 24 March as the International Day for the Right to the Truth Concerning Gross Human Rights Violations and for the Dignity of Victims (June 23, 2010); Frédéric Mégret, *Do Facts Exist, Can They Be “Found”, and Does It Matter?*, in *THE TRANSFORMATION OF HUMAN RIGHTS FACT-FINDING*, *supra* note 11, at 34.

³⁸ For an elaborate criticism of the design process of international fact-finding mechanisms, see Q.C. Palmer, *Reform of UN Inquiries*, in *FOR THE SAKE OF FUTURE GENERATIONS – ESSAYS ON INTERNATIONAL LAW, CRIME, AND JUSTICE IN HONOUR OF ROGER S. CLARK*, 597, 610-615 (2015). *See also* Grace & Bruderlein, *supra* note 10 (calling on the international community to adopt a more systematic and informed process for establishing fact-finding mechanisms).

³⁹ For example, Human Rights Watch declares that its mission is to “investigate abuses, expose the facts widely, and pressure those with power to respect rights and secure justice,” *About*, HUMAN RIGHTS WATCH, <https://www.hrw.org/about>, and states that the organization’s founding strategy was to adopt “a methodology of publicly ‘naming and shaming’ abusive governments through media coverage and through direct exchanges with policymakers,” *Our History*, HUMAN RIGHTS WATCH, <https://www.hrw.org/our-history>. *See also*, Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT’L ORG. 689 (2008); Suzanne Katzenstein, *Reverse-Rhetorical Entrapment: Naming and Shaming as a Two-Way Street*, 46 VAND. J. TRANSNAT’L L. 1079, 1079 (2013).

⁴⁰ Amanda M. Murdie & David R. Davis, *Shaming and Blaming: Using Events Data to Assess the Impact of Human Rights INGOs*, 56 INT’L STUD. Q. 1, 56 (2012); Katzenstein, *supra* note 39, at 1079.

and shaming' works,⁴¹ but all rest on two fundamental assumptions: (a) that fact-finding reports resolve factual controversies concerning 'what happened' (which I refer to as the 'credibility assumption');⁴² and (b) that publicizing these reports pressures the relevant societies to stop the abuses and sanction the offenders (which I refer to as the 'mobilization assumption').⁴³

While the legal literature on the effects of fact-finding is underdeveloped,⁴⁴ political science scholars have examined its efficacy through various methods, both quantitative and qualitative. The data is mixed: while some scholars (and many international organizations) believe that fact-finding leads to decreased violations and promotes justice and accountability,⁴⁵ others argue that this strategy may prove to be counter-productive and prevent political compromises that could otherwise lead to peace and stability.⁴⁶ The debate is far from being settled,⁴⁷ and some scholars find that the answer is complex, and that the efficacy of this strategy depends upon many domestic and international factors, including the type of shamed regime,⁴⁸ the type of abuses,⁴⁹ and the identity of the condemning body.⁵⁰ Additionally, existing data is limited in scope and focuses on the impact of naming and shaming on governments and elites, or on levels of violence

⁴¹ Matthew Krain, *J'accuse! Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politicides?*, 56 INT'L STUD. Q. 574 (2012); James C. Franklin *Shame on You: The Impact of Human Rights Criticism on Political Repression in Latin America*, 52 INT'L STUD. Q. 187 (2008).

⁴² Davis, Murdie, and Steinmetz empirically tested and confirmed the hypothesis that Human Rights Organizations [HROs] are powerful conduits through which a population becomes informed of domestic human rights issues. David R. Davis, Amanda Murdie & Coty Garnett Steinmetz, *'Makers and Shapers': Human Rights INGOs and Public Opinion*, 34 HUM. RTS. Q. 199 (2012). More generally, Wallace summarizes the literature on the 'educational role' of international law as a tool to communicate messages to individuals. Wallace, *supra* note 19, at 111. *See also* Krain, *supra* note 41.

⁴³ Jacqueline H. R. DeMeritt, *International Organizations and Government Killing: Does Naming and Shaming Save Lives?*, 38 INT'L INTERACTIONS 597 (2012); Krain, *supra* note 41.

⁴⁴ In recent years, a scholarly literature describing and analyzing international fact-finding has developed steadily. Nonetheless, as Alston and Knuckey rightly identify, the vast majority of these studies are either essentially descriptive or largely uncritical. Alston & Knuckey, *supra* note 10, at 4.

⁴⁵ *See, e.g.*, Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1,5 (Thomas Risse, Stephen Ropp, & Kathryn Sikkink eds., 1999); E. M. Hafner-Burton & K. Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOCIOLOGY 1373 (2005).

⁴⁶ *See, e.g.*, Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY 5, 6 (2004); Franklin, *supra* note 41, at 187 (presenting a more nuanced argument and claiming that the positive impact of naming and blaming is temporary).

⁴⁷ Katzenstein, *supra* note 39.

⁴⁸ Anja Jetschke & Andrea Liese, *The Power of Human Rights a Decade After: From Euphoria to Contestation?*, in THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE 26 (Thomas Risse, Stephen Ropp, & Kathryn Sikkink eds., 2013).

⁴⁹ Hafner-Burton, *supra* note 39.

⁵⁰ Franklin, *supra* note 41.

and abuses.⁵¹ Very little work has been done to test the impact of fact-finding reports on the investigated societies more broadly or to directly examine either the credibility or mobilization assumptions.

No doubt it is important to pressure governments and oppressive regimes directly (especially when dealing with non-democratic regimes). Nonetheless, the international community should acknowledge the fact that some of the countries that engage in activities that violate international law are democracies, and that public opinion in those countries is important for their collaboration with non-binding international reports and institutions. In various studies, political scientists have demonstrated that public opinion affects policy in a variety of fields, and that such influence is well-maintained even in the face of activities by interest organizations, political parties, and political and economic elites.⁵² Moreover, the focus on governments and elites misses one of the most important aspects of international fact-finding: the prospect of providing conflicting societies with credible information on contested events, and creating a shared understanding of ‘what really happened.’ Can fact-finding be considered successful if it triggers more conflict and disagreements over what happened? Can it be considered effective if it fails to persuade the perpetrators’ society that offenders should be condemned and sanctioned?

A recent article published by the *Journal of Peace Research* took on the task of empirically testing the impact of ‘naming and shaming’ strategies on individuals. The article, by Jacob Ausderan, concluded that after being exposed to negative information on abuses conducted by their governments, individuals updated their beliefs accordingly to reflect more negative attitudes.⁵³ In other words, as expected by proponents of the ‘naming and shaming’ strategy, more information means *more* shared knowledge. Ausderan, however, acknowledged the potential of positive reaction to negative information, and admitted that further research is necessary to shed

⁵¹ BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009); JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2006); Cohen, *supra* note 2; DeMeritt, *supra* note 43; Jack Snyder & Leslie Vinjamuri, *supra* note 46 .

⁵² Benjamin I. Page & Robert Y. Shapiro, *Effects of Public Opinion on Policy*, 77 *AM. POL. SCI. REV.* 175-190 (1983); Paul Burstein, *The Impact of Public Opinion on Public Policy: A Review and an Agenda*, 56 *POL. RES. Q.* 29, 29 (2003). For a comprehensive survey of the impact of public opinion on decision of the U.S. Supreme Court, see Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why)*, 13 *U. PENN. J. CONST. L.* 263 (2010).

⁵³ Jacob Ausderan, *How Naming and Shaming Affects Human Rights Perceptions in the Shamed Country*, 51 *J. PEACE RES.* 81 (2014).

more light on this issue.⁵⁴ Additionally, this main effect, which was detected by his analysis of observational data (limited in its ability to constitute a direct test of the causal mechanism – that perceptions are affected by individual exposure to naming and shaming reports), was not supported by the results of his experimental data, which were statistically insignificant. Finally, the article did not test directly either one of the fundamental assumptions underlying the naming and shaming strategy: the credibility assumption and the mobilization assumption.⁵⁵

This article takes on this challenge. It tests both the credibility and mobilization assumptions underlying international fact-finding efforts, and provides data that reveal how people process and respond to new information concerning war crimes committed by their fellow nationals. It directly tests individuals' reactions to both positive and negative information, and demonstrates how ideological beliefs and political commitments influence people's reactions to new information about war crimes. As a first step, this article begins with the U.S. society and uses the war in Afghanistan as its context. In a separate article, I will present comparative evidence on the impact of legalization of truth on attitudes and beliefs in the U.S., Israel and Canada.

2. Challenging the Credibility Assumption: More Information, More Bias

Fact-finding is defined as a way to ascertain facts by way of gathering immediate, credible, and first-hand information.⁵⁶ The credibility of a fact-finding report is therefore a central part of its core definition and it encompasses its methodology,⁵⁷ recourse,⁵⁸ and personnel.⁵⁹

⁵⁴ *Id.* at 83.

⁵⁵ In a comprehensive article surveying the literature on credibility and persuasion, Chanthika Pornpitakpan highlights the need for studies that investigate the effect of negative initial dispositions on perceived credibility of new information and persuasion. Chanthika Pornpitakpan, *The Persuasiveness of Source Credibility: A Critical Review of Five Decades' Evidence*, 34 J. APPLIED SOC. PSYCHOL. 243, 270 (2004).

⁵⁶ H. VICTOR CONDÉ, A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY 88, 127 (2004); Bertrand G. Ramcharan, *Introduction*, in INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS IX (Bertrand G. Ramcharan ed., 2014).

⁵⁷ Diane F. Orentlicher, *Bearing Witness: The Art and Science of Human Rights Fact-Finding*, 3 HARV. HUM. RTS. J. 83, 85 (1990); Théo Boutruche, *Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice*, 16(1) J. OF CONFLICT & SECURITY LAW 105.

⁵⁸ M. Cherif Bassiouni, *Appraising UN Justice-Related Fact-Finding Missions*, 5 WASH. U. J.L. & POL'Y 35, 42 (2001).

⁵⁹ Ramcharan, *supra* note 59, at 42. Indeed, with regard to the experience of fact-finding it is considered that fact-finding 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).

International fact-finding rests on the basic assumption that more information means more credible – and thus shared – knowledge, and that by disseminating their findings fact-finding missions combat denial and resolve controversies concerning disputed facts.⁶⁰ Fact-finders are regarded as ‘the eyes and ears’ of the relevant communities,⁶¹ and there is a sense that ‘the report speaks for itself.’⁶² However, facts very rarely speak for themselves. In his book, *States of Denial*, influential sociologist Stanley Cohen explains how individuals select information that fits their existing perceptual frames, while information which is inconsistent with their existing beliefs or which is too threatening is shut out altogether.⁶³ Cohen further develops the concept of interpretive denial, where the raw facts are accepted, but are given a different meaning from what seems apparent to others.⁶⁴ In Cohen’s words, “a perceptual filter is placed over reality” and some knowledge has to be rejected or be given a different meaning.⁶⁵

The perceived credibility of fact-finding reports may be affected by several aspects of the reports: its message (the binary legal judgment);⁶⁶ its terminology (the legal labels used to describe the relevant behavior, such as ‘war crimes’);⁶⁷ and its source (the institution producing the report or establishing the fact-finding mission, such as the U.N. and its organs, national or transnational NGOs, or domestic institutions, including militaries).⁶⁸ As credibility is typically assumed, or treated as a prerequisite of fact-finding mechanisms, it is rarely discussed or studied as a dependent variable, influenced by the message content, its language, delivery, and source.⁶⁹ Since the fundamental goal of any fact-finding institution is to produce a credible description of specific events, the thriving legal literature on international fact-finding could benefit from lessons learned

⁶⁰ The High Commissioner for Human Rights, Zeid Ra’ad Al Hussein, emphasized that “the public nature of these reports is important for them to contribute to the historical recording of events, strengthen the calls for accountability and promote implementation of the recommendations.” UNHCHR Fact-Finding Guidance, *supra* note 11, at 92. Similarly, Similarly, Christof Heyns, U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions and member of the U.N. Independent Investigation on Burundi, stated that “it is crucial to ascertain the disputed facts in an indisputable manner.” *Enhanced Interactive Dialogue on Burundi*, HUMAN RIGHTS COUNCIL (Mar. 22, 2016), <http://libraryresources.unog.ch/c.php?g=462695&p=3162785#21493049>.

⁶¹ Grace & Bruderlein, *supra* note 10, at 31.

⁶² Rob Grace, *Communication and Report Drafting in Monitoring, Reporting, and Fact-finding Mechanisms*, 13 (July 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2462590.

⁶³ STANLEY COHEN, *STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING* 6 (2013).

⁶⁴ *Id.* at 7-8.

⁶⁵ *Id.* at 13.

⁶⁶ See section B(2)(a), *infra*.

⁶⁷ See section B(2)(b), *infra*.

⁶⁸ See section B(2)(c), *infra*.

⁶⁹ See, e.g., UNHCHR Fact-Finding Guidance, *supra* note 11.

through decades of intense research on perceived credibility of new information in other disciplines, including social psychology, political science, sociology, and communications.

The following sections describe cognitive and emotional biases influencing the assimilation and perceived credibility of new information. These sections does not offer a one-size-fits-all social response mechanism, but rather suggest that fact-finding reports trigger various biases which influence the way information is being processed and perceived. Additionally, different cognitive and emotional biases may have opposite effects on individuals and groups. For example, ‘hot’ war crimes terminology may trigger defensive reactions and rejection of information blaming one’s nation with the commission of war crimes, while holding a liberal ideology could motivate individuals to question anything that looks like an attempt to whitewash atrocities.

(a) Cognitive biases and receptiveness to fact-finding reports

Research in the fields of social psychology and communications examines how message characteristics, including structure, content, and language, impact perceptions of believability of the message.⁷⁰ Scholars of information processing have found that the use of opinionated language – which is perceived as domineering and intolerant – can decrease the credibility of a message, depending on the legitimacy of the source and the ability of the audience to cope with potential threat.⁷¹ Message discrepancy (the distance between the message position and the pre-message position of the receiver) is important to understanding the relationship between opinionated language and credibility:⁷² discrepant messages, and those that use more intense and opinionated language, are rated most negatively in terms of credibility.⁷³

Related to message discrepancy, there is evidence that receivers are likely to believe messages that reaffirm existing beliefs.⁷⁴ Social-psychology studies have long ago demonstrated

⁷⁰ Miriam J. Metzger et al., *Credibility for the 21st Century: Integrating Perspectives on Source, Message, and Media Credibility in the Contemporary Media Environment*, 27 COMMUNICATIONS YEARBOOK 293, 302 (2003).

⁷¹ Mark A. Hamilton, *Message Variables that Mediate and Moderate the Effect of Equivocal Language on Source Credibility*, 17 J. LANGUAGE & SOC. PSYCHOL. 109, 116 (1998).

⁷² Generally, evaluations of credibility are higher when message discrepancy is low. Metzger, *supra* note 67, at 303.

⁷³ *Id.*; Hamilton, *supra* note 68, at 136-137.

⁷⁴ This is “the illusory-truth effect.” Metzger, *supra* note 67, at 303 (citing Ian Maynard Begg et al., *Dissociation of Processes in Belief: Source Recollection, Statement Familiarity, and the Illusion of Truth*, 121 J. EXPERIMENTAL PSYCHOL. 446 (1992); see also Alice Dechêne et al., *The Truth About the Truth: A Meta-analytic Review of the Truth Effect*, 20(10) PERSONALITY AND SOC. PSYCHOL. REV. 1 (2009).

that individuals tend to search and absorb information that is in line with their core social beliefs, while omitting or distorting contradictory information.⁷⁵ The construction and evaluation of information in social settings is influenced by the prior beliefs, ideologies, and interests of those involved,⁷⁶ as well as their group identities and commitments.⁷⁷ In heterogeneous societies, in which different groups hold conflicting social beliefs and ideologies, new information and its specific framing might trigger belief perseverance or polarization.⁷⁸ Perceptions of facts are pervasively shaped by individuals' commitments to shared but contested sets of values, beliefs, and identities. Therefore, reaction to new facts or new information is shaped by values-motivated cognition and identities.⁷⁹ In a seminal study from 1979, Lord, Ross, and Lepper demonstrated that exposure to empirical evidence does not typically narrow the gap between those who hold opposed views at the outset. In fact, exposure to such evidence was found to make initial disagreements even more pronounced.⁸⁰ In his book *The Righteous Mind – Why Good People are Divided by Politics and Religion*, Jonathan Haidt explains that:

Once people join a political team, they get ensnared in its moral matrix. They see confirmation of their grand narrative everywhere, and it's difficult – perhaps

⁷⁵ Among the various psychological mechanisms which contribute to biased assimilation of information are: cognitive consistency and confirmation bias, Lee Ross & Andrew Ward, *Psychological Barriers to Dispute Resolution*, in 27 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 255, 263-64 (Mark P. Zanna & James M. Olson eds., 1995); motivated cognition, Dan Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 *HARV. L. REV.* 1, 19 (2012); and threatened social identities, Terrell A. Northrup, *The Dynamics of Identity in Personal and Social Conflict*, in *INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION* 55-82 (Louis Kriesberg et al. eds., 1989); Anne Maass & Mark Schaller, *Intergroup Biases and the Cognitive Dynamics of Stereotype Formation*, 2 *EUR. REV. SOC. PSYCHOL.* 189 (1991); Bar-Tal, *supra* note 27, at 1445-1446.

⁷⁶ Ifat Maoz et al., *Reactive Devaluation of an "Israeli" vs. "Palestinian" Peace Proposal*, 46 *J. CONFLICT RESOL.* 515, 543 (2002); see also Roy F. Baumeister & Stephen Hastings, *Distortions of Collective Memory: How Groups Flatter and Deceive Themselves*, in *COLLECTIVE MEMORY OF POLITICAL EVENTS: SOCIAL PSYCHOLOGICAL PERSPECTIVES* 277, 287 (James W. Pennebaker et al. eds., 1997). 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).

⁷⁷ Dan M. Kahan et al., *They Saw a Protest: Cognitive Illiberalism and the Speech-conduct Distinction*, 64 *STAN. L. REV.* 851, 859 (2012).

⁷⁸ Thomas Kelly, *Disagreement, Dogmatism, and Belief Polarization*, 105 *J. PHIL.* 611 (2008).

⁷⁹ Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 *HARV. L. REV.* 837, 842-43, 879 (2009).

⁸⁰ Charles Lord, Lee Ross & Mark Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 *J. PERSONALITY & SOC. PSYCHOL.* 2098 (1979).

impossible – to convince them that they are wrong if you argue with them from outside of their matrix.⁸¹

Political science literature has explained the current ‘cultural war’ in the U.S. relying on these message discrepancy and belief polarization or perseverance theories.⁸² By now, it is well-established that partisans and ideologues in the U.S. express differences in factual beliefs.⁸³ Ideological partisanship affects both how the public learns new information, and which information it learns.⁸⁴ Taber and Lodge demonstrated that strong partisans make every effort to maintain their existing opinions by seeking out confirming evidence, counter-arguing information that does not fit their preexisting conceptions, and attributing more strength to arguments that match their opinions.⁸⁵ The impact of political identification on biased assimilation of information has been confirmed by Shapiro and Bloch-Elkon regarding a number of foreign-policy and national security issues.⁸⁶ For example, they have demonstrated a sharp gap between Democrats and Republicans on various factual beliefs relating to the war in Iraq, including whether Iraq had possessed WMDs and whether clear evidence had been found that Iraq had been supporting al Qaeda.⁸⁷ Another study emphasized that even when partisans hold similar factual beliefs, they interpret this information differently, and these interpretations drive their opinions.⁸⁸ More specifically, the study, conducted by Gaines et al., demonstrated that both Democrats and Republicans updated their factual beliefs about the war in Iraq as conditions changed, but interpreted the same factual beliefs quite differently. Democrats consistently interpreted a given level of troop casualties as higher than Republicans did. Similarly, Democrats interpreted the

⁸¹ JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 312 (2012).

⁸² Dan M. Kahan et al., *The Second National Risk and Culture Study: Making Sense Of - and Making Progress In - the American Culture War of Fact* (G.W.U. Legal Studies Research Paper No. 370, 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1017189.

⁸³ Brian J. Gaines et al., *Same Facts, Different Interpretations: Partisan Motivation and Opinion on Iraq*, 69 J. POL. 957 (2007); John G. Bullock et al., *Partisan Bias in Factual Beliefs About Politics* (Nat’l Bureau of Econ. Research, Working Paper No. 19080, 2013).

⁸⁴ Robert Y. Shapiro & Yaeli Bloch-Elkon, *Do the Facts Speak for Themselves? Partisan Disagreement as a Challenge to Democratic Competence*, 20 CRITICAL REV. 115, 116 (2008).

⁸⁵ Charles S. Taber & Milton Lodge, *Motivated Skepticism in the Evaluation of Political Beliefs*, 50 AM. J. POL. SCI. 755, 767 (2006).

⁸⁶ Shapiro & Bloch-Elkon, *supra* note 81, at 123-24.

⁸⁷ *Id.*

⁸⁸ Gaines et al., *supra* note 80.

failure to find weapons of mass destruction in Iraq as evidence that they never existed, while Republicans inferred that the Iraqi leadership had moved, destroyed, or hidden the weapons.⁸⁹

For several decades now, party identification in the U.S. has been strongly correlated with ideological preferences and beliefs.⁹⁰ Specifically, people have sorted into the party-ideology combination of liberal Democrats and conservative Republicans.⁹¹ As early as 1998, Abramowitz and Saunders demonstrated that voters have been choosing their party identification on the basis of their ideological preferences rather than maintaining the party allegiance that they inherited from their parents. Conservatives who were raised by Democratic or independent parents have moved dramatically toward the Republican Party.⁹² Mason found that the increasing alignment of partisan and ideological identities in U.S. society intensifies partisan bias and anger toward the outgroup party. She argues that the result of this process is *a nation that agrees on many things but is bitterly divided nonetheless*.⁹³

To summarize, perceived credibility of new information is influenced by prior beliefs and ideologies, and this effect is exacerbated by the use of intense or opinionated language (such as language used to express binary legal judgments). In the U.S., liberals and conservatives, who hold different sets of factual beliefs, respond differently to new information, based on its consistency with their priors.

Based on this theoretical background, this study challenges the fundamental assumption underlying international fact-finding: that more information means more shared knowledge; and that legal fact-finding reports resolve controversies concerning war crimes and other violations of international law. Specifically, I argue that we should expect fact-finding reports concerning war crimes to be trusted by some social sub-groups, while rejected by others, depending on the report's *judgment* (whether it incriminates or absolves the relevant society from responsibility). For example, in the U.S., I expect that individuals holding conservative ideological beliefs (who are

⁸⁹ *Id.* at 958.

⁹⁰ Alan Abramowitz, THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY 37 (2010).

⁹¹ Lilliana Mason, 'I Disrespectfully Agree': The Differential Effects of Partisan Sorting on Social and Issue Polarization, 59 AM. J. POL. SCI. 128, 128 (2015).

⁹² Alan I. Abramowitz & Kyle L. Saunders, *Ideological Realignment in the US Electorate*, 60 J. POL. 634, 649 (1998).

⁹³ Mason, *supra* note 88, at 142.

less critical of the U.S. military) will be more likely to discredit information that incriminates U.S. soldiers for committing war crimes in Afghanistan than those holding liberal views (who are more critical of the U.S. military). Similarly, individuals who hold conservative ideological beliefs will be more likely to trust information absolving the U.S. from responsibility for war crimes than those holding liberal ideological beliefs.⁹⁴

(b) Emotional biases and receptiveness to fact-finding reports

Different legal terms have a distinct impact on people's attitudes and beliefs.⁹⁵ Research on 'hot cognition' – cognition colored by feeling – suggests that cognitive and affective determinants often work together to produce people's judgments of what they think is just or unjust and right or wrong.⁹⁶ Words are agents of emotional judgment-making, as they automatically activate affective, as well as semantic, associations.⁹⁷ Lodge and Taber extended the affective and semantic priming research into the political domain,⁹⁸ and Morris et al. found that the emotional evaluation of a political issue is stored with the concept.⁹⁹ Later, when thinking about or called on to evaluate this issue, the affective charge is spontaneously activated from long-term memory and colors all subsequent cognitive and evaluative judgments about that issue.¹⁰⁰ 'Genocide,' 'crimes against humanity,' and 'war crimes' are all charged political terms which trigger negative

⁹⁴ The study will therefore test the following hypothesis: If judgment=incriminating, Report Fairness(liberal)>50 and Report Fairness(conservative)<50; If judgment=absolving, Report Fairness(liberal)<50 and Report Fairness(conservative)>50.

⁹⁵ For example, in a study from 1995, McCaffery, Kahneman, and Spitzer demonstrated how different legal framings of jury instructions led to substantive difference in compensation awards. Edward J. McCaffery, Daniel J. Kahneman & Matthew L. Spitzer, *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341, 1344 (1995). In a later study, focused on the framing effects of two different legal doctrines – strict liability versus negligence – Cupp and Polage found that jurors are more likely to award damages if the information they receive is presented using a negligence framing (a moral failing by the manufacturer to act reasonably) than if the information is presented to them using a strict liability framing (a 'cold' legal doctrine that allows liability regardless of blameworthiness). Richard L. Cupp Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874, 900 (2002).

⁹⁶ Kees Van Den Bos, *Hot Cognition and Social Justice Judgments: The Combined Influence of Cognitive and Affective Factors on the Justice Judgment Process*, in David De Cremer, ed., *ADVANCES IN THE PSYCHOLOGY OF JUSTICE AND AFFECT* 59, 61 (2007). For a general introduction on hot cognition, see: ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* (1999); PAUL THAGARD, *HOT THOUGHT: MECHANISMS AND APPLICATIONS OF EMOTIONAL COGNITION* (2008).

⁹⁷ Milton Lodge & Charles S. Taber, *The Automaticity of Affect for Political Leaders, Groups, and Issues: An Experimental Test of the Hot Cognition Hypothesis*, 26 POL. PSYCHOL. 455 (2005).

⁹⁸ *Id.*

⁹⁹ James P. Morris et al., *Activation of Political Attitudes: A Psychophysiological Examination of the Hot Cognition Hypothesis*, 24 POL. PSYCHOL. 727, 741 (2003).

¹⁰⁰ *Id.* at 727-28.

associations. They are commonly referred to by the media and are thus stored, together with their negative emotional evaluation, in the long-term memory of individuals. When these terms are invoked by fact-finding missions, they might trigger a spontaneous activation of these negative emotional evaluations. For international lawyers, naming these violations is necessary to accurately analyze events which might – or might not – violate international law, as defined by the relevant legal framework. For society members, these legal terms – and their negative ‘hot’ political meaning — may trigger negative emotional bias by society members in the shamed communities, reactions that may frustrate attempts to introduce credible new information.

As previously explained, evaluation of information in social settings is influenced by a complex set of beliefs, ideologies, and identities.¹⁰¹ People appear unable to break free of their prior sentiments when evaluating arguments on political issues, even when they are motivated to be impartial.¹⁰² While the previous section analyzed cognitive bias based on pre-existing ideological commitments, this section focuses on emotional bias coupled with national identity sentiment.

Identity is an individual's sense of self.¹⁰³ It includes social identity, which captures her knowledge that she belongs to certain social groups, together with some emotional significance to her of this group membership.¹⁰⁴ To enhance their social identities, individuals tend to behave in ways that make their own group acquire positive distinctiveness in comparison to other groups.¹⁰⁵ By the use of symbols such as flags, anthems, uniforms, monuments, and ceremonies, the society members are reminded of their common heritage and cultural kinship and their sense of belonging is enhanced.¹⁰⁶ When beliefs regarding the national identity or national narrative begin to be invalidated by incoming information, the individual experiences threat,¹⁰⁷ and responds in a

¹⁰¹ Maoz et al., *supra* note 73, at 543.

¹⁰² Lodge & Taber, *supra* note 94, at 456.

¹⁰³ CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 3 (1989).

¹⁰⁴ John C. Turner, *Towards a Cognitive Redefinition of the Social Group*, in *SOCIAL IDENTITY AND INTERGROUP RELATIONS* 15, 18 (Henri Tajfel ed., 1982).

¹⁰⁵ Ed Cairns, *Intergroup Conflict in Northern Ireland*, in *SOCIAL IDENTITY AND INTERGROUP RELATIONS*, *supra* note 101, at 278; SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* 25 (2004).

¹⁰⁶ ANTHONY D. SMITH, *NATIONAL IDENTITY* 17 (1991); *see also* BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 104 (2006); ERNEST GELLNER, *NATIONS AND NATIONALISM* (1983).

¹⁰⁷ Kelly terms such beliefs 'core constructs.' GEORGE KELLY, *A PSYCHOLOGY OF PERSONAL CONSTRUCTS* (1955).

protective manner.¹⁰⁸ Therefore, it is likely that the new invalidating information will be rejected or distorted in order to fit the national narrative.¹⁰⁹ As a shared national identity unites both liberals and conservatives in the U.S., we should expect subjects to respond to threatening information concerning their national identity in a nonpartisan manner. Unlike many other areas in American politics, in which people tend to respond based on partisan affiliation, research shows that a ‘national interest’ framing of a topic prevents partisan divide. For example, Levendusky and Horowitz demonstrated that presidential decisions which are framed in terms of national interest influence the public to evaluate the president’s actions in a nonpartisan manner, wanting to support the nation.¹¹⁰

Therefore, we should expect that condemning one’s nation using ‘hot’ political terms such as war crimes, which have strong negative associations attached to them, may backfire. Specifically, I argue that we should expect the ‘hot’ war crimes terminology concerning U.S. military actions to trigger a defensive reaction that decreases the perceived credibility of the information among U.S. nationals, regardless of their political ideology, in comparison to the ‘cold’ violation terminology. Even moderates, who are not expected to equally trust both absolving and incriminating judgments (as they do not express strong ideological commitments concerning the military), are predicted to respond negatively to the invocation of ‘war crimes’ terminology.¹¹¹ Confirmation bias and cognitive consistency theories explain why liberals and conservatives respond in opposite ways to new information, based on their pre-existing beliefs and ideological commitments. However, hot cognition theory, together with threatened identity dynamics, explain why a ‘war crimes’ framing negatively influences the perceived fairness and credibility of fact-finding reports among U.S. nationals uniformly.

¹⁰⁸ Northrup, *supra* note 72, at 66.

¹⁰⁹ *Id.*, at 69-70. Jervis defines this process as the "assimilation of information to pre-existing beliefs" while implementing it to decision-making process in international relations. ROBERT JERVIS, PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS 143 (1976).

¹¹⁰ Matthew S. Levendusky & Michael C. Horowitz, *When Backing Down Is the Right Decision: Partisanship, New Information, and Audience Costs*, 74 J. POL. 323-38 (2012).

¹¹¹ The study will therefore test the following hypothesis: report’s perceived fairness hypothesized main effect: IJ > WC; Liberals: IJ > WC > AJ; Conservatives: AJ > IJ < WC (IJ=incriminating judgment; AJ=absolving judgment WC=war crimes).

(c) *Judging truth by its cover: institutional legitimacy and receptiveness to fact-finding reports*

Can acceptance of threatening information, or information that is inconsistent with prior beliefs, be increased by deference to trusted legal institutions? Empirical research on source credibility began in the twentieth century, and focused on the impact of source credibility on attitude change and persuasion.¹¹² Communications and social psychology literature on source credibility has found evidence demonstrating that different perceptions of source credibility differentially affect message evaluations.¹¹³ Hovland and Weiss defined source credibility in terms of expertise and trustworthiness,¹¹⁴ and suggested that credibility dimensions will differ depending upon the type of source being evaluated and the context in which the evaluation occurs.¹¹⁵ Following their studies, many researchers found evidence for both source expertise and source trustworthiness as important dimensions influencing perceived credibility.¹¹⁶ Additionally, it was established that positive regard for and similarity to the source influence audience perceptions of trustworthiness and expertise.¹¹⁷ While the majority of these studies focused on individuals giving a speech, recent studies tested the credibility of organizational sources, finding similar results.¹¹⁸ Nonetheless, while source credibility is an important factor in studying message evaluations, the majority of the research suggests that the effects of source credibility are situational, and that various factors have mediating effects on the impact of source credibility on message evaluations (including factors relating to the message content, receivers' characteristics, and a person's initial attitude toward the advocated position).¹¹⁹

Another dimension influencing message evaluations, stemming from a different theoretical framework, is the perceived fairness of the process producing the relevant information. Procedural justice studies have examined the impact of perceived fairness of the legal process on people's acceptance of their judgments. In their book *Trust in the Law*, Taylor and Huo find that acceptance

¹¹² C.I. Hovland & W. Weiss, *The Influence of Source Credibility on Communication Effectiveness*, 15 PUB. OPINION Q. 635 (1951).

¹¹³ Eric Haley, *Exploring the Construct of Organization as Source: Consumers' Understandings of Organizational Sponsorship of Advocacy Advertising*, 25 J. ADVERTISING 19 (1996).

¹¹⁴ Hovland & Weiss, *supra* note 112, at 635-650.

¹¹⁵ *Id.* at 635.

¹¹⁶ For a meta-analysis surveying the relevant literature, see Metzger, *supra* note 67; see also Pornpitakpan, *supra* note 55, at 247.

¹¹⁷ Metzger, *supra* note 67, at 298.

¹¹⁸ *Id.* at 299; Haley, *supra* note 113.

¹¹⁹ Haley, *supra* note 113.

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.¹²⁰

Based on this theoretical literature, I suggest that discrepant or threatening messages will be evaluated more positively coming from a trusted institution than from an untrusted one. As public opinion polls show, conservatives in the U.S. are more likely to have favorable opinions of U.S. military courts than liberals, and liberals are more likely to have favorable opinions of the U.N. than conservatives. Accordingly, I argue that conservatives will be more likely to trust counter-attitudinal information (reports incriminating U.S. soldiers for killing Afghan civilians), if that information is conveyed by a U.S. military court rather than a U.N. fact-finding mission. Similarly, I argue liberals will be more likely to trust counter-attitudinal information (absolving fact-finding reports) coming from the U.N. rather than a U.S. Military Court.¹²¹

3. Challenging the Mobilization Assumption: Legal Truth Does Not Affect Attitudes

The previous section challenged the assumption that fact-finding reports concerning war crimes resolve factual controversies concerning what happened (the credibility assumption). I hypothesized that the perceived credibility of a fact-finding report is determined by the consistency of the report's legal *judgment* with ideological commitments and prior beliefs, as well as by the concrete legal *terminology* used to describe the events. The following section focuses on the impact of legal *frames* on social attitudes, and challenges the assumption that exposure to incriminating legal reports motivates in-group condemnation of the perpetrators. It argues, that fact-finding reports face complex social dynamics which frustrate or diminish their ability to meaningfully influence attitudes on accountability measures concerning war crimes.

(a) Naming, shaming and legal framing

Does incriminating legal framing mobilize people to support penalizing their compatriots for committing war crimes against their enemies? Does international condemnation of the U.S., for example, for committing war crimes in Afghanistan, instigate a public outcry for punishing the offenders? Many international and domestic advocacy organizations assume that it does. Their

¹²⁰ TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 7 (2002).

¹²¹ Therefore, the study tests the following hypotheses: Liberals: if judgment=absolving (AJ), then fairness(UN) > fairness(MC); Conservatives: if judgment=incriminating(IJ), then fairness(MC) > fairness(UN).

model is simple: incriminating fact-finding reports inform the public that crimes were committed, and the public forms attitudes on sanctioning based on these findings. This article suggests a different model. It argues that fact-finding reports have little impact on social attitudes concerning accountability due to several psychological mechanisms.

First, some individuals are likely to reject the information altogether due to cognitive inconsistency, based on their pre-existing beliefs and attitudes. Social-psychology literature has demonstrated time and again that exposure to credible evidence is not enough to change people's attitudes on some issues. Mounting scientific evidence on the benefits of vaccinations, the ineffectiveness of the death penalty, or the existence of global warming fail to change the attitudes of those who oppose vaccinations, support the death penalty, or deny that global warming is happening.¹²²

Second, while some deny the factual evidence altogether, others accept the facts but interpret them in a way that validates their pre-existing attitudes.¹²³ For example, both Democrats and Republicans in the U.S. accepted the fact that weapons of mass destruction were not found in Iraq, but gave this fact a different meaning: for Democrats, the failure to find weapons of mass destruction in Iraq meant that such weapons never existed, while Republicans inferred that Iraq had moved, destroyed, or hidden the weapons.¹²⁴

Third, others may accept the facts and agree on their interpretation, but disagree on the solution or policy to address the issue. Acceptance of a set of facts does not necessarily mean agreement on the appropriate course of action. For example, Campbell and Kay demonstrated that Republicans' increased skepticism toward environmental sciences may be partly attributable to a conflict between specific ideological values and the most popularly discussed environmental solutions.¹²⁵ Interestingly, Republicans tripled their acceptance of scientific evidence on global

¹²² Brendan Nyhan et al., *Effective Messages in Vaccine Promotion: A Randomized Trial*, 133 PEDIATRICS e835-42 (2014); Donald Braman et al., *Modeling Facts, Culture, and Cognition in the Gun Debate*, 18 SOC. JUST. RES. 283 (2005); Dan M. Kahan et al., *The Polarizing Impact of Science Literacy and Numeracy on Perceived Climate Change Risks*, 2 NATURE CLIMATE CHANGE 732-35 (2012); Lord, Ross & Lepper, *supra* note 77.

¹²³ Gaines et al., *supra* note 80; *see also* George Loewenstein & Don A. Moore, *When Ignorance Is Bliss: Information Exchange and Inefficiency in Bargaining*, 33 J. LEGAL STUD. 37 (2004).

¹²⁴ Gains et al., *supra* note 80.

¹²⁵ Troy H. Campbell & Aaron C. Kay, *Solution Aversion: On the Relation Between Ideology and Motivated Disbelief*, 107 J. PERSONALITY & SOC. PSYCHOL. 809 (2014).

warming when it was coupled with a free-market-friendly solution rather than a government-regulation solution.¹²⁶

Similarly, we should not expect that attitudes on sanctioning soldiers who allegedly violated the laws of war will change simply because a fact-finding report determines that they should. Literature on crime and punishment demonstrates that sanctioning attitudes – just like attitudes on gun control or global warming – are primarily determined by political and ideological values and not by factual evidence concerning the circumstances of individual cases.¹²⁷ As liberals tend to be more critical of the U.S. military than conservatives, liberals are expected to be more likely to condemn U.S. soldiers for misconduct on the battlefield. However, being critical of the military and accepting incriminating evidence does not necessarily translate into unequivocal support for prosecuting and punishing the soldiers. Some may believe that criminal prosecution is too harsh, some may feel sympathy for the soldiers, some may find it sufficient to simply acknowledge the wrongdoing, and some may assign blame to commanders and political leaders rather than the soldiers on the ground, and argue that those higher up the chain of command should bear responsibility. Therefore, even among those who find the incriminating judgment credible, we should expect variation in the willingness to impose any penalties on soldiers. In the end, the legal judgment of a fact-finding report in itself is not sufficient to influence attitudes and mobilize domestic sanctioning of in-group offenders. I therefore predict that only a minority of U.S. nationals will support penalizing U.S. soldiers after being exposed to a fact-finding report accusing them of committing war crimes, and that the legal judgment – whether incriminating or absolving – will not determine the willingness to penalize the soldiers.¹²⁸

(b) Are moral judgments more powerful than legal judgments?

If, indeed, legal discourse is ineffective in mobilizing domestic condemnation of in-group offenders, is there a better way to mobilize domestic support for accountability?¹²⁹

¹²⁶ Campbell and Kay, *id.*

¹²⁷ Tom R. Tyler & Renee Weber, *Support for Death Penalty: Instrumental Response to Crime, or Symbolic Attitude?*, 17 LAW & SOC'Y REV. 21, 43 (1982).

¹²⁸ Therefore, this article tests the following hypotheses: If legal judgment=incriminating: Prosecute(0-100)<50, Condemn(0-100)<50, Compensate(0-100)<50; prosecute(IJ)=Prosecute(AJ).

¹²⁹ In *Lowering the Bar*, Marc Galanter documented the social perception of law and lawyers in the U.S. He found that law and lawyers have typically been associated with negative traits such as greed, aggressiveness, indifference to justice, manipulation, and opportunism. “Lawyers corrupt discourse by promoting needless complexity,

In her article *Words and the Door to the Land of Change*, Martha Minow explores the potential power of words to effectuate social change. She observes that judges use a certain language – like that of a remote clinical evaluation – and adopt neutral and obscure phrases like “abuse,” “multiple bruises and abrasions,” and “suspicious injuries,” which undermine the sense of personal connection and individual obligation to effectuate change.¹³⁰ She wonders “whether words by lawyers and judges differ from words by journalists, and whether the more intimate and yet more widely accessible languages of literature and popular music lyrics may change minds and prompt actions.”¹³¹ Minow suggests that different forms of expression solicit different responses, and argues that “finding languages to persuade judges, to empower victims, and to mobilize onlookers present linked yet distinct difficulties.”¹³² Drawing on Minow’s argument, I suggest that the use of legal discourse to describe facts might be counter-productive. To test this argument, I compare the impact of legal and moral condemnations on willingness to sanction in-group offenders and to compensate out-group victims.¹³³

4. The Legalization of Truth: Problems and Solutions

This article argues that the most common organizational structure of international fact-finding – a legal-discourse-based structure, lacking enforcement capacity – is based on a flawed understanding of the relevant socio-psychological processes and dynamics. The binary legal *judgment* or outcome of the fact-finding report triggers ideological-based belief polarization; the adoption of ‘hot’ legal *terminology* reduces the perceived fairness of the report; and the legal *frame* is less effective than a moral frame in influencing attitudes. Overall, the legal discourse is ineffective in creating a shared history, disseminating an authoritative account of contested facts, and mobilizing domestic attitudes to condemn in-group offenders. When faced with unsettling facts, various cognitive and emotional biases prevent individuals from accepting these facts at face value and modifying their attitudes accordingly. Some individuals are likely to reject the

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 causistry that makes black appear white and vice versa.” MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* 17 (2005).

¹³⁰ Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1666 (1990).

¹³¹ *Id.* at 1673, 1685.

¹³² *Id.* at 1665-1666.

¹³³ Specifically, I will test the following hypothesis: Prosecute(IMJ) > Prosecute(ILJ); Condemn(IMJ) > Condemn(ILJ); Compensate(IMJ) > Compensate(ILJ).

information based on its inconsistency with their prior beliefs; some are likely to reinterpret the report to fit their ideological commitments; and others may accept the facts but reject their legal implications. Therefore, the core assumptions underlying international fact-finding efforts – that they contribute to resolving factual disputes and mobilizing domestic sanctioning – should be questioned.

To test these assumptions and to more directly study the domestic effects of fact-finding reports, while mitigating problems of selection effects, I designed and fielded a pair of survey-experiments for the U.S. public.¹³⁴ To operationalize my hypotheses concerning the impact of the legalization of truth on both the perceived credibility of the fact-finding report and the willingness to sanction in-group offenders, I focused on three main aspects of legal discourse: first, the binary legal *judgment* or outcome, comparing an incriminating judgment with an absolving one. Second, the legal *terminology*, comparing cold ‘violation’ language with hot ‘war crime’ language. Third, the legal *frame* itself, comparing legal and moral *frames* describing the exact same findings and outcomes. Experiment I (conducted in April 2014) measures the *perceived credibility* of a fact-finding report, given three legal judgments: two incriminating legal judgments (“violating international law” and “committing war crimes”) and one absolving legal judgment (“not violating international law”); and three institutions rendering these reports: the United Nations, a U.S. military court and a U.S. federal court. Experiment II (conducted in December 2013), measures the *persuasive power* of moral, as opposed to legal, framing of the report’s findings, and the respective impact on attitudes concerning accountability measures.

Random assignment increases the likelihood that treatment and control groups are similar to each other on average across all observed and unobserved factors. By comparing differences in responses between groups, an experimental design can estimate with greater certainty the effect of legal truth on factual beliefs and attitudes regarding domestic sanctioning of in-group offenders.¹³⁵ Unlike observational data (such as national surveys), the experimental approach provides us with a direct measure to assess the efficacy of fact-finding reports, depending on their main characteristics, including the legal discourse, the final judgment, and the institution establishing

¹³⁴ These experiments were back-translated and adjusted for use in other countries, including Israel and Canada, to provide comparative results.

¹³⁵ Wallace, *supra* note 19, at 116.

the mission. The limitations of experimental methods include, of course, their external validity – the degree to which results are generalizable to broader phenomena of interest. Experiments also reduce scenarios to a few key variables, often implemented over a short time period, compared to the complex and fluid nature of everyday relations. Subjects may act differently in laboratory settings than in real life conditions. I tried to alleviate these issues by conducting surveys at different points in time; using nationally representative samples; and providing vignettes that closely resemble real-world situations. Additionally, in two separate studies I test the generalizability of these findings, first, to other societies, by fielding similar experiments in other countries, including Canada and Israel; and, second, to domestic law, testing this theoretical framework on the current controversy in the U.S. concerning police violence against African Americans and the ‘Black Lives Matter’ movement. Taking these limitations in mind, the experimental evidence that follows provides a basis for further inquiry.

C. EXPERIMENT I: THE EFFECTS OF LEGAL TRUTH ON THE PERCEIVED CREDIBILITY OF FACTS

Experiment I was fielded in April 2014 as part of the 2014 American National Opinion Survey (ANOS), an original internet survey of U.S. citizens carried out by YouGov. YouGov uses sampling and matching techniques to generate a sample that approximates the demographic composition of the adult U.S. population.¹³⁶

1. Design

Two thousand respondents were randomly assigned to one of three legal judgments (judgment condition: ‘cold’ incriminating judgment (‘violating international law’ (IJ)), ‘hot’ incriminating judgment (‘committing war crimes’ (WC)), and ‘cold’ absolving judgment (‘not violating international law’ (AJ)), and to one of three institutions (United Nations (UN), United States Military Court (MC) and United States Federal Court (FC)).

Respondents were told that they would be asked questions about a military operation in Afghanistan which happened a few months ago. They were also told that since the facts of the case were unclear (especially how many people died, and whether the casualties were Al-Qaeda

¹³⁶ See Appendix I.2 for further information about the construction of the ANOS sample; see Table 1 for descriptive statistics of the sample.

members or innocent civilians), an investigation was conducted by one of the three institutions mentioned above. Respondents were then presented with the investigation's executive summary, which included two parts: a 'summary of facts' and a 'summary of the legal judgment.' Both parts were designed to look like a formal document, including the institution's logo, the document's serial number, and the date.

The summary of facts described an event that happened recently in Afghanistan, in which a Taliban fighter killed a U.S. Marine with an explosive device. Three Marines, who witnessed the explosion, chased the attacker into a nearby marketplace, shooting their guns repeatedly. Eventually, they were able to kill the attacker, but four unarmed Afghan bystanders were also killed by the Marines' gunfire. The wording of the 'summary of facts' was identical for all three conditions, and the only differences were the logo and name of the institution producing the report.

After reading the factual summary of the events, respondents were presented with the legal judgment. First, the report stated the relevant legal standard, according to which soldiers are obliged to exercise reasonable care to protect civilians during armed conflicts. Second, the report applied this standard to the facts of the case, concluding that the U.S. Marines violated international law, committed war crimes, or did not violate international law.

After reading the report's summary, respondents were then asked three questions on the credibility of the report (its accuracy, objectivity, and fairness). Additionally, the survey included demographic, political, social, and economic measurements, including gender, education, ideology, political identification, religiousness, interest in news, and financial situation.¹³⁷ The three judgment-condition structure implies a factorial design with three experimental groups. The full text for this and the subsequent survey instrument are provided in Appendix I.3.

This design was very carefully constructed to be as realistic as possible without inserting any bias for or against sanctioning the soldiers. First, I chose a scenario from the war in Afghanistan because this conflict is less politicized in American public opinion than the war in Iraq; moreover, it adds to the credibility of the scenario, as this conflict is ongoing, with American troops still deployed in Afghanistan. Second, I calibrated the scale or severity of the event to allow

¹³⁷ For a full description of the experimental treatments and the surveys questions, see Appendix I.3. For a full list of the measurements used, see Appendix I.2.

for credible variation in the legal judgment and decrease social desirability bias. Survey questions asking about sensitive issues often generate socially motivated misreporting and distort survey estimates.¹³⁸ In other words, due to self-presentation concerns, survey respondents underreport socially undesirable activities and overreport socially desirable ones. In this case, designing an experimental scenario in which U.S. soldiers are responsible for large-scale war crimes and crimes against humanity could have motivated respondents to conceal their true attitudes, finding it socially undesirable to support soldiers who are responsible for mass killings. Adopting an extreme scenario could have therefore triggered social desirability bias which would have generated estimate errors concerning willingness to condemn and prosecute soldiers who violated international law. Additionally, a mass killing scenario would have decreased the credibility of the vignette, as an absolving judgment may have seemed incongruous following a description of a large-scale massacre. To be able to credibly vary the legal judgment based on the same facts, it was necessary to design a smaller-scale incident. Third, typically, individuals are exposed to this type of information through the media. However, I decided against using media coverage of the report, and instead presented participants with a direct ‘quote’ of the executive summary of the report, in order to observe the reaction to the report and its source, rather than to the media outlet reporting about it. This design was carefully constructed to capture real-life reactions to fact-finding reports, and was pretested on 600 Amazon M-Turk users to test for manipulation checks and believability of the vignette, and to allow respondents to comment, express, and explain their reactions.

By design, random assignment improves the chances experimental groups differ only with respect to the treatment. As expected, tests indicate groups assigned to the three treatment groups were comparable across all observed characteristics.¹³⁹

¹³⁸ Ivar Krumpal, *Determinants of social desirability bias in sensitive surveys: a literature review*, 47(4) *QUALITY & QUANTITY* 2025, 2035-2036 (2013).

¹³⁹ I conducted an extensive series of balance tests comparing the distribution across treatment groups for all available baseline covariates that likely affect attitudes concerning war crimes, including gender, age, education, income, religion, and race.

2. Measures

Report's Credibility. The literature suggests that the perceived credibility of information has several dimensions, including accuracy, objectivity, and fairness.¹⁴⁰ On the basis of these previous studies, I used three items to assess the perceived credibility of the report, its factual findings, and its final conclusion/judgment (“*Do you think that the facts summarized by the investigators are: Completely inaccurate... Completely accurate?*”; “*Do you think that the report is: Completely unfair... Completely fair?*”; “*Do you think that the judgment is: Completely biased... Completely objective?*”). Respondents indicated their attitudes on a 6-point scale; these data were later recoded to range from 0 (completely unfair/inaccurate) to 100 (completely fair/accurate). The same response scale was used for all other measures in Experiment I unless otherwise noted. As these three items were highly correlated, for simplicity, the analysis presents the results for the fairness variable, which captured the overall reaction to the report as a whole.

Institution's favorability. Responders were asked for their opinion on the relevant institutions (the United Nations, U.S. federal courts and U.S. military courts). Participants indicated their attitudes on a 4-point scale, from ‘very favorable’ to ‘very unfavorable’; these data were later recoded to range from 0 (very unfavorable) to 100 (very favorable).

Political ideology. Respondents rated their political ideology on a 5-point scale (1=“very liberal”; 3=“moderate”; 5=“very conservative”), and indicated the level of their political party identification on a 7-point scale (1=“strong democrat”; 4=“independent”; 7=“strong Republican”).

Control Variables. Because of randomization, complex statistical models involving a battery of control variables are unnecessary for obtaining valid inferences regarding the effect of international fact-finding. Nonetheless, to increase confidence in any empirical findings, I conducted a set of regressions which controlled for demographic variables including gender,

¹⁴⁰ Andrew J. Flanagin & Miriam J. Metzger, *Perceptions of Internet Information Credibility*, 77 JOURNALISM & MASS COMM. Q. 515 (2000); Cecilie Gaziano & Kristin McGrath, *Measuring the Concept of Credibility*, 63 JOURNALISM Q. 451-62 (1986); Philip Meyer, *Defining and Measuring Credibility of Newspapers: Developing an Index*, 65 JOURNALISM Q. 567-74 (1988); John Newhagen & Clifford Nass, *Differential Criteria for Evaluating Credibility of Newspapers and TV News*, 66 JOURNALISM Q. 277-84 (1989); Tony Rimmer and David Weaver, *Different Questions, Different Answers? Media Use and Credibility*, 64(1) JOURNALISM & MASS COMM. Q. 28 (1987); Eugene F. Shaw, *Media Credibility: Taking the Measure of a Measure*, 50(2) JOURNALISM & MASS COMM. Q. 306 (1973); Mark Douglas West, *Validating a Scale for the Measurement of Credibility: A Covariance Structure Modeling Approach*, 71 JOURNALISM Q. 159-68 (1994).

education, income, and age. The effect of legal judgment became even more robust controlling for various demographic variables.

3. **Results**

(a) Legal discourse fails to resolve factual controversies

The main effect of the legal judgment (whether incriminating or absolving) was not significant across subjects ($t(1,312)=1.02, p=.3$). However, as shown in Figure 1, the effect of the legal judgment was significantly different for liberals and conservatives: liberal subjects showed a preference for incriminating legal judgment (mean difference $t(323)=-8.26, p=.000$), whereas conservatives showed a preference for absolving legal judgment (mean difference $t(447)=7.8, p=.000$). Moderates did not show any preference ($t(421)=.2, p=.84$). This means there is a distinction between what liberals and conservatives in the U.S. believe to be true: conservatives are especially skeptical of incriminating reports, particularly when compared with liberals, and liberals are skeptical of absolving reports, particularly when compared with conservatives. Figure 2 shows that, in contrast to individuals with pre-existing ideological convictions, individuals who self-report as moderates attribute similar levels of fairness to both incriminating and absolving reports, which are lower than the perceived credibility liberals and conservatives attribute to information consistent with their ideological commitments, but higher than the perceived credibility liberals and conservatives attribute to information inconsistent with their priors.¹⁴¹

Next, I conducted a linear regression of perceived fairness of the report (the dependent variable) on the legal judgment (dichotomous independent variable), ideology, and their interaction. As shown in Figure 1, the model revealed the predicted interactive pattern $b=-14.6, SE=1.2, t(1,193)=-11.6, p<0.001$. This confirms that different social groups respond in different ways to new evidence concerning war crimes.

¹⁴¹ See appendix I.4, table 3, for summary of treatment effects.

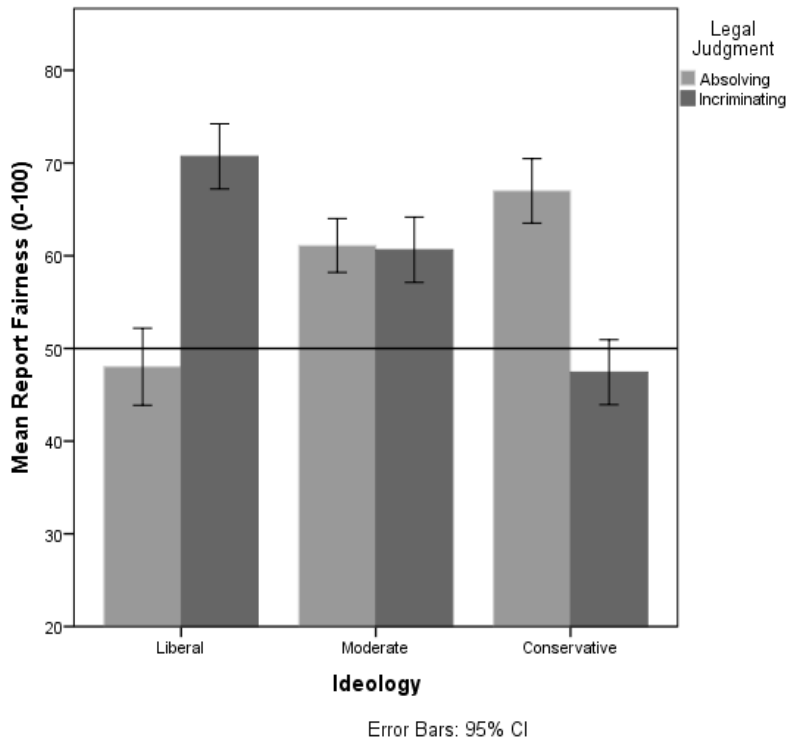
Figure 2. Report Fairness, by Judgment Condition and Ideology

Figure presents the mean values of the Report Fairness, by ideology. 95% CI's shown.

(b) The invocation of “war crimes” is counterproductive

I tested the impact of ‘war crimes’ on the perceived fairness of the report. As expected, the main effect for war crimes was significant and negative: $t(1320)=-2.75$, $p<.01$. In other words, invoking a ‘war crimes’ terminology decreases the perceived fairness of the report compared with a ‘violation’ terminology. While statistically significant, this effect is small (Cohen’s $d=0.15$) and accounts for about 5% change in the perceived fairness of the report. The negative effect of war crimes terminology on perceived fairness is not moderated by ideology. There was a significant difference between perceived fairness of war crimes and violation for conservatives ($t(410)=-2.3$, $p=.01$) and moderates ($t(442)=-1.9$, $p=.05$), but although the direction was as expected with regard to liberals (means difference -3.6), this difference was not significant ($t(352)=-1.44$, $p=.14$). Figure 3 demonstrates the main effect of the legal judgment framing (“war crimes” versus “violation”) on

perceived fairness of the report, and Figure 4 shows the means difference of war crimes and violations framings for liberals, moderates, and conservatives.

Figure 3.
Report Fairness,
by Legal Terminology

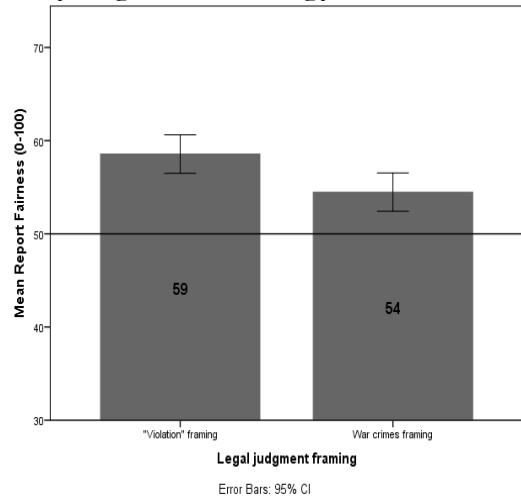


Figure 4.
Report Fairness,
by Legal Terminology and Ideology

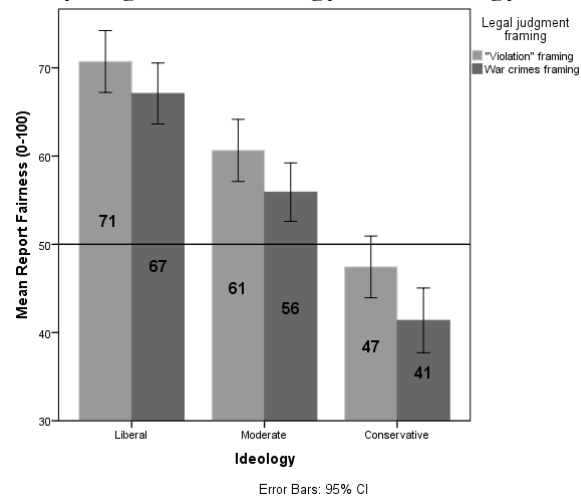


Figure presents the mean values of the Report Fairness, by Legal Terminology and Ideology. 95% CI's shown.

(c) Legal judgment trumps an institution's favorability

In general, U.S. nationals have a more favorable opinion of U.S. military courts than of the United Nations. A majority of Americans (62%) have a favorable opinion of U.S. military courts, while only about half of Americans (51%) have a favorable opinion of the United Nations.¹⁴² However, the level of support varies considerably by political ideology. A strong majority of liberals in the U.S. (77%) have a favorable view of the U.N., while a smaller majority of moderates (58%) agree. Meanwhile, support among conservatives trails at 24%. Conversely, a strong majority of conservatives in the U.S. (76%) have a favorable opinion of U.S. military courts, while a smaller majority of moderates (62%) and a minority of liberals (45%) agree. To demonstrate the moderating effect of political ideology on institution favorability, I conducted a linear regression of institution favorability on institution (UN/MC), ideology, and their interaction. The model revealed the predicted interactive pattern, $b=.6$, $SE=.04$, $t(1,093)=13.3$, $p<0.001$. This confirms the

¹⁴² As shown in Figure 5, I found a main effect for Military Court on favorability: $b=10.5$, $t(1,163)=5.7$, $p<.001$.

findings of previous studies on trust in international institutions,¹⁴³ which found that liberals demonstrate a more favorable opinion of the U.N. compared with conservatives.

I hypothesized that these institution-favorability trends translate to an increase in the perceived fairness of counter-attitudinal reports, when the counter-attitudinal report is issued by a trusted institution. Namely, liberals will be more likely to trust absolving reports issued by the U.N. than those issued by U.S. military courts, and that conservatives will be more likely to trust incriminating reports issued by U.S. military courts rather than those produced by the U.N. This hypothesis is further supported by the goals and agendas of both institutions: if the U.N. report which was specifically designed to ‘end impunity’ finds the U.S. Marines innocent, it must be true; and similarly, if the U.S. military court itself finds U.S. Marines guilty, then it must be so. However, as shown in Figures 5 and 6, the results failed to reject the null hypotheses that the identity of the institution has no effect on the perceived fairness of counter-attitudinal reports.¹⁴⁴ I found that both liberals and conservatives were slightly more willing to trust counter-attitudinal reports issued by the U.S. military court, but both findings were statistically insignificant.

Figure 5.
Report Fairness (Conservatives),
by Legal Judgments and Institution

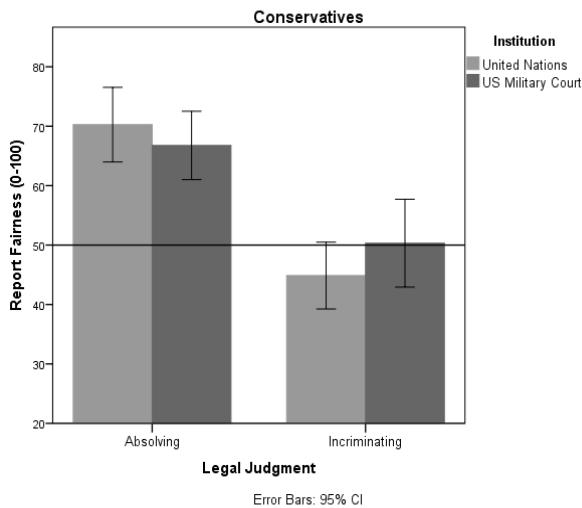
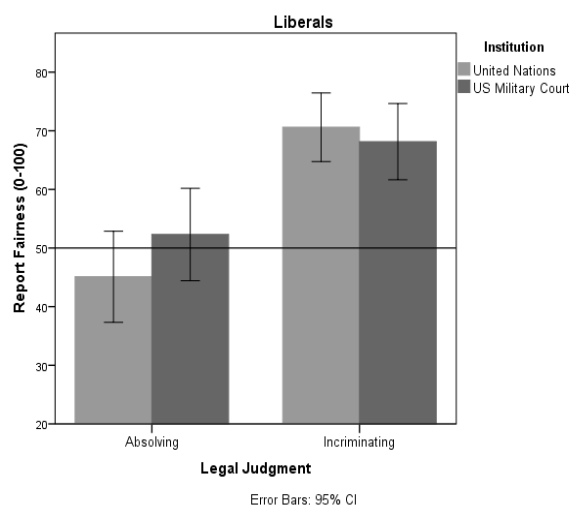


Figure 6.
Report Fairness (Liberals),
by Legal Judgments and Institution



Figures presents the mean values of the Report Fairness, by Legal Judgment and Institution. 95% CI's shown.

¹⁴³ *U.N. Retains Strong Global Image: Robust Support in America, Especially Among Democrats*, PEW RESEARCH CENTER (Sep. 2013), <http://www.pewglobal.org/2013/09/17/united-nations-retains-strong-global-image/>.

¹⁴⁴ For conservatives presented with an incriminating report, the difference of means had the predicted direction, but no statistical significance ($t(136)=-1.18$, $p=0.23$). For liberals presented with an absolving report, the difference of means did not have the predicted direction and was also not statistically significant ($t(101)=-1.3$, $p=0.19$).

Nonetheless, I did find that the polarizing effect of legal judgment on report fairness (the moderating effect of political ideology on report fairness given different legal judgments) was mitigated when the report was issued by the U.S. military court. That is to say, given an incriminating legal judgment, the difference of means for liberals and conservatives was 26.25 (Cohen's $d=1.06$, large effect size) if the U.N. issued the report and only 17.83 (Cohen's $d=0.66$, medium effect size) if the report was issued by the U.S. military court. Similarly, given an absolving legal judgment, the difference of means was -25.15 (Cohen's $d=0.9$) if issued by the U.N. and only -14.44 (Cohen's $d=0.5$) if issued by the U.S. military court.¹⁴⁵

D. EXPERIMENT II: THE EFFECT OF LEGAL AND MORAL FRAMINGS ON WILLINGNESS TO SANCTION IN-GROUP OFFENDERS

Experiment II was fielded within the 2013 American National Opinion Survey (ANOS), an original internet survey of U.S. citizens carried out by YouGov. One thousand respondents were randomly assigned to the control group (N=185) or one of four treatment groups: Incriminating Legal Judgment (N=199), Absolving Legal Judgment (N=206), Incriminating Moral Judgment (N=213), and Absolving Moral Judgment (N=197).¹⁴⁶

1. Design

The design was similar to that of Experiment I: subjects were told that they would be asked questions about a military operation in Afghanistan which happened a few months ago. They were also told that since the facts of the case were unclear (especially how many people died, and whether the casualties were Al-Qaeda members or innocent civilians), a team of international experts was asked to investigate. Treated subjects were then presented with the summary of the investigators' factual findings, followed by a summary of the investigators' judgment (that the investigation concluded that the Marines acted illegally, legally, immorally, or morally). Control-group subjects were only presented with the summary of the factual findings (no judgment/conclusion was provided).

¹⁴⁵ See appendix I.4, table 3, for summary of treatment effects.

¹⁴⁶ See Appendix I.2 for further information about the construction of the ANOS sample. See Table 2 for descriptive statistics of the sample.

The summary of facts was identical to the one used in Experiment I, and was presented to all participants. The summary of conclusions was similar to the one used in Experiment I, but in this experiment I introduced a non-legal conclusion, based on a moral standard. The moral conclusions were similar to the legal “violation” treatment used in Experiment I, but replaced the term ‘international law’ with ‘universal moral standards’ and the words ‘legal standards’ and ‘legal responsibility’ with ‘moral standard’ and ‘moral responsibility.’ Otherwise the experiment was identical to Experiment I.

2. Measures

Willingness to sanction. Three items were used to assess the degree of willingness to sanction in-group offenders. First, I measured the subjects’ opinion of the soldiers’ behavior, and their willingness to condemn the soldiers’ behavior (“*The U.S. Marines did the best they could under the circumstances.*”). This item was recoded as the reversed item (“*The U.S. Marines did not do the best they could under the circumstances.*”). Second, I measured the subjects’ support of prosecuting the soldiers (“*The U.S. Marines should be prosecuted.*”). Third, I measured the subjects’ support of compensating the Afghan victims (“*The US Government should compensate the Afghan victims.*”).

All other measures were identical to Experiment I.

3. Results

Before turning to discussion of the unique results of this experiment, I should mention that findings on the interaction model of legal judgment and ideology on report fairness were replicated in this experiment, thus providing further support for the findings of Experiment 1.

(a) The legalization of truth and attitude mobilization

To test the impact of legal judgments on attitude mobilization, I first conducted a linear regression of willingness to condemn the soldiers (dependent variable) on legal judgment. The model revealed the predicted pattern, $b=-2.08$, $SE=3.12$, $t(403)=-.66$, $p>.5$. I conducted another linear regression of willingness to prosecute the soldiers on legal judgment, and found a similar pattern: $b=-1.01$, $SE=3.14$, $t(403)=-0.32$, $p>.7$. In both cases, participants were just as unwilling to condemn the soldiers’ behavior or to support prosecuting them when told that the soldiers violated

the law or did not violate the law. All four means represent an unchanged negative attitude on condemning or prosecuting the soldiers. In short, the legal judgment did not influence attitudes or mobilize support for accountability measures.¹⁴⁷

Interestingly, the one variable that was affected by the legal judgment was willingness to compensate the victims. However, respondents were *more* willing to compensate the victims when told that the soldiers *did not violate* the law, rather than when they were told the soldiers did violate the law. In other words, given an absolving legal judgment, participants did not show a negative attitude on compensating the victims. Figure 7 summarizes these findings.

Figure 7. Willingness to Condemn, Prosecute, and Compensate, by Legal Judgment

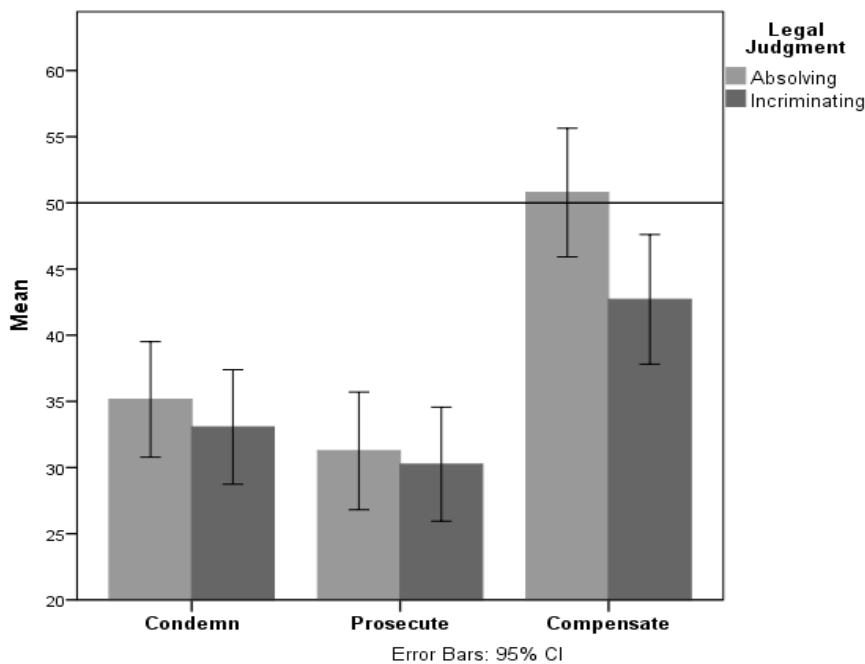


Figure presents the mean values of Willingness to Condemn the Soldiers, Willingness to Prosecute the Soldiers, and Willingness to Compensate the Victims, by Legal Judgment. 95% CI's shown.

Figures 8 and 9 reveal that, as expected, willingness to condemn or prosecute the soldiers is largely dependent on political ideology, and only marginally affected (if at all) by the legal judgment. In fact, the only effect of legal judgment that was statistically significant was the

¹⁴⁷ See appendix I.4, table 4, for summary of treatment effects.

positive effect of the absolving legal judgment (in comparison to the incriminating legal judgment) on willingness to compensate the victims.

Figure 8.
Willingness to Prosecute,
by Legal Judgment and Ideology

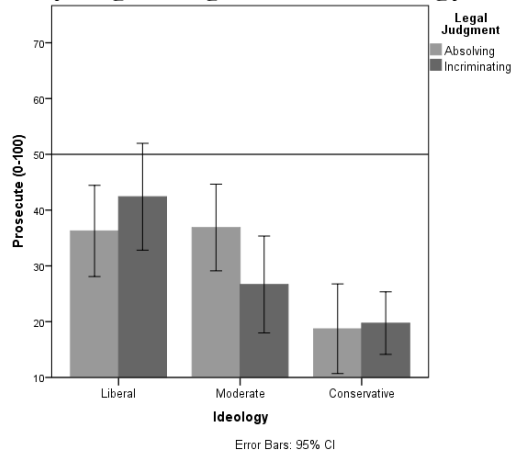
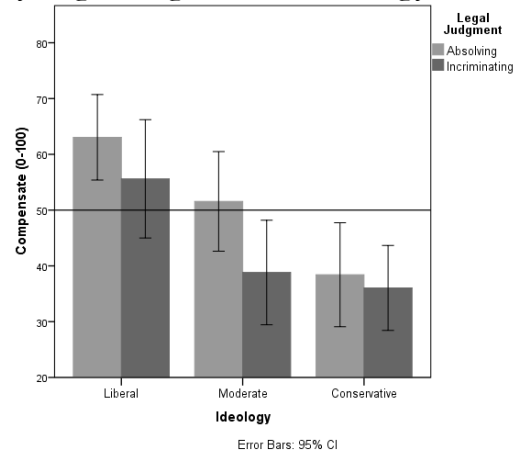


Figure 9.
Willingness to Compensate,
by Legal Judgment and Ideology



Figures presents the mean values of Willingness to Prosecute the Soldiers and Willingness to Compensate the Victims, by Legal Judgment and Ideology. 95% CI's shown.

Figure 10 summarizes the impact of incriminating legal reports on domestic beliefs and attitudes in the U.S.: a small majority of participants (56%) found the report fair, and of those, only about half (26% of all participants) supported prosecuting the perpetrators. Of the 44% of participants that found the report to be unfair, almost all were unwilling to support prosecuting the perpetrators. While I found both ideology and gender to be predictors of support in prosecuting in-group perpetrators, more data should be collected to fully explain why a belief that soldiers committed war crimes does not translate into willingness to sanction them.

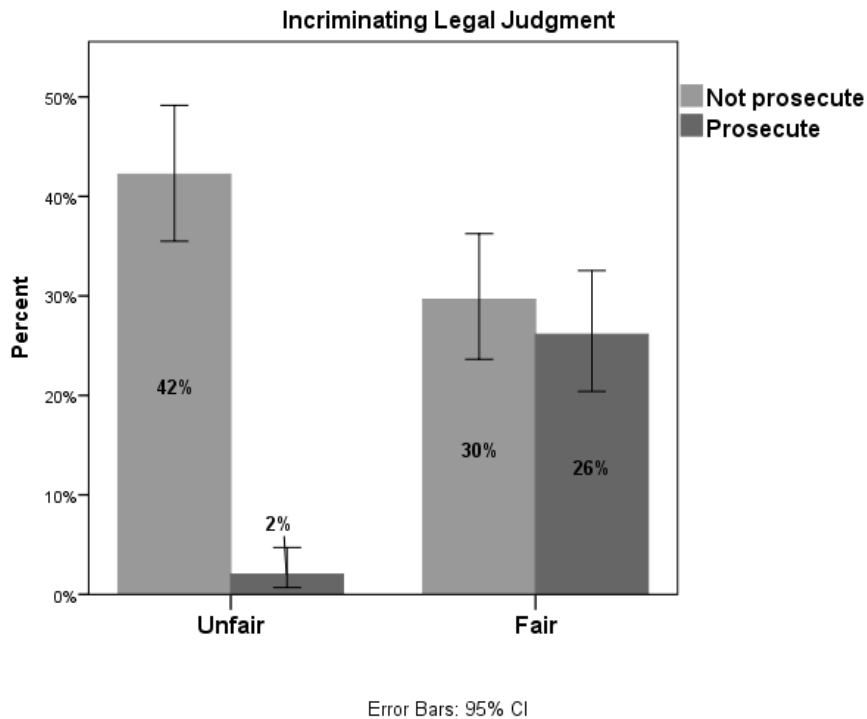
Figure 10. Willingness to Prosecute, by Report's Fairness (Incriminating Judgment Conditions)

Figure presents the percentage of individuals who indicated their support or opposition for prosecuting the soldiers, by acceptance or rejection of the Report Fairness. 95% CI's shown.

(b) Are there more effective alternatives to legal truth?

The results indicate that, as expected, legal truth was not effective in mobilizing domestic attitudes on war crimes. But can different language or framing of the events be more effective in influencing such attitudes?

To test the hypothesis that moral framing may be more effective in mobilizing domestic attitudes on war crimes, I conducted a linear regression of willingness to prosecute on incriminating judgment framing (dichotomous variable, moral judgment =1). The model revealed the predicted pattern, $b=9.1$, $SE=3$, $t(411)=2.9$, $p=.003$ (Cohen $d=-0.29$). This shows that respondents who were told that the soldiers violated moral standards were significantly more willing to prosecute the soldiers than those who were told that the soldiers violated legal standards. I repeated the regression analysis with both condemnation and compensation variables, with similar results: condemning the soldiers: $b=7.3$, $SE=2.9$, $t(411)=2.4$, $p=.01$; compensating the victims: $b=8.6$, $SE=3.31$, $t(411)=2.6$, $p<.01$.

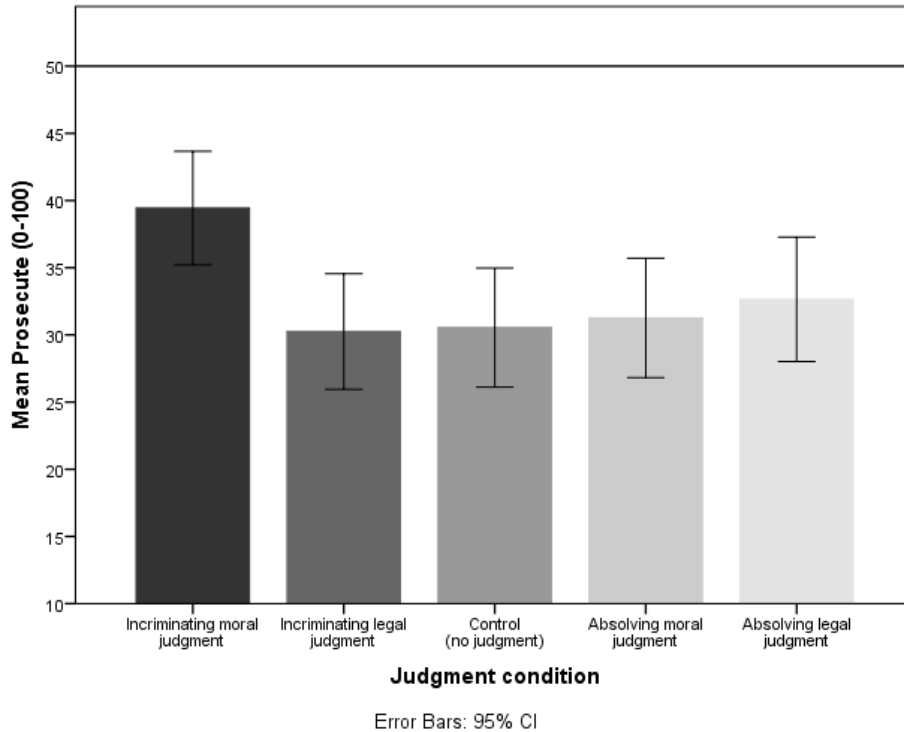
Figure 11. Willingness to Prosecute, by Judgment Condition

Figure presents the mean values of Willingness to Prosecute the Soldiers, by Experimental Condition (Legal Judgment and Framing). 95% CI's shown.

Next, I tested whether these findings are moderated by ideology. As reported in table 4, liberals are generally more willing to prosecute U.S. soldiers than moderates and conservatives. However, the main effect of moral frame of incriminating judgment is not moderated by ideology, and the incriminating moral frame treatment increased willingness to prosecute for liberals, moderates and conservatives.¹⁴⁸

¹⁴⁸ See appendix I.4, table 4, for summary of treatment effects.

E. DISCUSSION AND THEORETICAL IMPLICATIONS

What happens to these reports when they are “released?” The resources that organizations devote to compiling all this information are not matched by attention to how reports are disseminated or what impact they might have on target audiences.¹⁴⁹

This article sheds light on ‘what happens’ to international fact-finding reports when they are released. It focuses on their domestic audience, and examines how different legal and moral framings of incriminating and absolving judgments influence the perceived credibility of the reports and the willingness to sanction in-group offenders. Its main findings are as follows:

1. More Information, More Bias

Experiment I demonstrated that fact-finding reports are trusted by some social sub-groups, while rejected by others, depending on the report’s legal *judgment* (whether it incriminates or absolves the relevant individuals or social groups from responsibility). Specifically, it demonstrated that in the U.S., individuals who hold conservative ideological beliefs are more likely than those who hold liberal views to discredit information that incriminates U.S. soldiers for committing war crimes in Afghanistan. Similarly, it found that individuals who hold liberal ideological beliefs are more likely than those holding conservative ideological beliefs to discredit information absolving the U.S. from responsibility for war crimes. This finding was replicated in Experiment II. While these findings are consistent with similar findings relating to other sources of information (‘the hostile media bias’¹⁵⁰) and other areas of factual disagreements (death penalty,¹⁵¹ global warming¹⁵²), it is nonetheless important to establish that legal judgments conveyed by international or domestic institutions might trigger similar reactions with regard to issues such as war crimes. Establishing that perceived credibility of fact-finding reports is largely determined by political and ideological commitments has unique significance with regard to legal institutions, which unlike the media, are authoritative in making factual determinations concerning legal disputes.¹⁵³ One possible explanation for this finding lies in the fundamental disagreements

¹⁴⁹ Cohen, *supra* note 2, at 518.

¹⁵⁰ Robert P. Vallone, Lee Ross & Mark R. Lepper, *The Hostile Media Phenomenon: Biased Perception and Perceptions of Media Bias in Coverage of the Beirut Massacre*, 49 J. PERSONALITY & SOC. PSYCHOL. 577 (1985).

¹⁵¹ Lord, Ross & Lepper, *supra* note 77, at 2098.

¹⁵² Kahan et al., *supra* note 122, at 732.

¹⁵³ Kahan, Hoffman & Barman, *supra* note 76.

on substantive questions of international law and their applicability to different contexts. In the decentralized international legal system, the interpretation of international law raises many unresolved controversies. Eyal Benvenisti argues that the content of international humanitarian law (or law of armed conflict) depends on the identity of the interpreting body – whether it is a government involved in transnational armed conflict, or an international organization.¹⁵⁴ Adding a layer of disputable legal conclusions to factual determinations exposes the factual description to criticisms based on a disagreement with the legal conclusion, and shifts the attention from the facts to their legal meaning. If the content of international law is subjective, as some argue, it is not at all surprising that its legalized fact-finding reports are treated similarly to other sources of information, that their perceived credibility is moderated by political ideology, and that instead of a deliberative process of truth-seeking, as suggested by Thomas Risse,¹⁵⁵ we witness a growing polarization concerning both the facts and their meaning.

2. War Crimes Terminology Decreases Perceived Credibility of Fact-Finding Reports

The language and terms we choose influence how our message is being processed and assimilated. Just as with any other organizing themes, legal terminology creates frames under which information is being categorized and interpreted.¹⁵⁶ McCaffery, Kahneman, and Spitzer demonstrated how different legal terms used in jury instructions have led to substantive differences in compensation awards.¹⁵⁷ Cupp and Polage found that jurors are more likely to award damages if the information they receive is presented using a negligence framing (a ‘hot’ legal terminology which assigns responsibility based on blameworthiness) than if the information is presented to them using a strict liability framing (a ‘cold’ legal terminology, assigning responsibility regardless of blameworthiness).¹⁵⁸

The results of Experiment I demonstrate that similarly, the choice of legal terminology, and specifically, between ‘hot’ war crimes terminology and ‘cold’ violations terminology,

¹⁵⁴ Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT'L L. 339, 358-59 (2009).

¹⁵⁵ Thomas Risse, “Let’s argue!”: *Communicative Action in World Politics*, 54 INT’L ORG. 1 (2000).

¹⁵⁶ McCaffery, Kahneman & Spitzer, *supra* note 92, at 1353. See, also, Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47(1) *Stanford Law Review* 39 (1994).

¹⁵⁷ McCaffery, Kahneman & Spitzer, *supra* note 92, at 1340.

¹⁵⁸ Richard L. Cupp Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874, 900 (2002).

influenced the perceived credibility of fact-finding reports. The war crimes terminology decreased the perceived fairness of the report in comparison to the legal violation terminology. David Scheffer, who served as the United States Ambassador-at-Large for War Crimes Issues at the U.N., suggested that legal terms such as ‘war crimes’, ‘crimes against humanity,’ and ‘genocide’ are so tainted by political meanings that they should not be used by legal institutions at all.¹⁵⁹ While some Americans believe that the U.S. occasionally violates international law in the course of armed conflicts, they are less willing to go so far as to characterize these violations as war crimes. Interestingly, moderates, who did not hold strong priors and were just as likely to believe incriminating and absolving reports, were less likely to believe the report when the war crimes terminology was used. These findings suggest that several cognitive and emotional biases have distinct impacts on individuals from different social groups when processing new information. While cognitive consistency is at play when one confronts counter-attitudinal facts, hot cognition and threatened identity dynamics become more pronounced when national narratives are challenged.

As Scheffer correctly identified, when individuals think about ‘war crimes’ they attach a certain political meaning to the phrase. In this case, as is often the case in real life, the legal judgment of the case was debatable. In such a situation, while ‘war crimes’ might be the correct legal term, non-lawyers might adopt a political, rather than legal, interpretation of this term, and attach a different meaning to it, including concerning the gravity of events that might justify invoking it. In the context of the U.S. war in Afghanistan, these findings suggest that the use of war crimes terminology triggers emotional biases because of the salient negative political meaning of this term.

3. Legal Judgment Trumps the Issuing Institution’s Favorability

In contrast to my initial hypothesis, the study was unable to detect significant effects of the issuing institutions on perceived fairness of the reports. This result may be explained by the importance and salience of the legal judgment effect. Given a counter-attitudinal legal judgment, on such a ‘hot’ topic, the impact of source favorability was mitigated. Another alternative explanation is that the institution treatment was too subtle and not salient enough to trigger attitude

¹⁵⁹ David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUD. & PREVENTION 229 (2006).

change. Lastly, perhaps neither institution was trusted enough to trigger attitude change. It could be the case that to disseminate counter-attitudinal facts successfully, the information must come from an institution that enjoys broad approval and public confidence, or perhaps a trusted individual. Future studies should further explore the circumstances under which institutional legitimacy effectively mitigates individuals' tendency to reject facts that are inconsistent with their prior beliefs.

4. Exploring Alternatives to Legal Discourse

Experiment II demonstrated that legal discourse is ineffective in mobilizing for domestic condemnation and sanctioning of in-group offenders. It also suggested that a moral discourse may do a better job at influencing attitudes. The manipulation I used here was very subtle: I only replaced the word 'law' with the word 'moral'. The conclusion itself was still constructed in a very 'legalistic' structure. I did not mention the victims, did not use photos, videos, poems, or other emotion-triggering manipulations. The finding that moral discourse is more effective than legal discourse in influencing attitudes on war crimes is powerful, because it demonstrates that even when keeping the technical and formalistic structure of legal reports – and the exact same standards – individuals are more likely to be influenced by the report and to express empathy to the out-group victims when we frame the findings as moral, rather than legal. True, the effect size was quite small. But the fact that it mattered at all is remarkable, considering the subtlety of the manipulation.

A possible explanation for this finding is the alienating effect of legal discourse, and the perception of international law as a technical and marginalizing tool that speaks only to a small group of experts. In contrast, moral arguments are perceived as intuitive and inclusive, and encourage wider participation by society members. As Martha Minow suggests, maybe words by lawyers differ from words by journalists and artists, and maybe “the more intimate and yet more widely accessible languages of literature and popular music lyrics may change minds and prompt actions.”¹⁶⁰ This study is only the beginning of an exploration of the unique effects of the legalization of truth on individuals' beliefs and attitudes. In future studies I will continue to explore alternatives to legal discourse, and will measure their impact on attitudes and beliefs, including

¹⁶⁰ Minow, *supra* note 130, at 1673, 1685.

empathy for out-group members. In the following section I suggest several alternatives to existing structures that stem from these findings, as well as concrete recommendations for future fact-finding efforts regarding the Kunduz hospital bombing case.

F. RECOMMENDATIONS: REDESIGNING INTERNATIONAL FACT-FINDING

The findings of the two experiments discussed in this article, together with the interdisciplinary literature presented above, suggest that the decision to center international fact-finding efforts around legal discourse – including legal judgment, terminology, and frame – may be counter-productive. My research indicates that the legal *judgment* of the fact-finding report is likely to trigger ideological-based belief polarization; that ‘hot’ legal *terminology* tends to reduce the perceived fairness of the report; and that the legal *frame* appears to be less effective than moral frame in influencing attitudes. Based on these findings, international organizations, including the U.N., should rethink the use and design of legal fact-finding missions. First, it is important to acknowledge the limitations of legal fact-finding and to recognize its questionable efficacy in promoting its main objectives, mainly, to produce and disseminate facts, and to mobilize domestic support for accountability measures. Second, responding to these challenges requires both reforming the goals, structures, and processes of international fact-finding, and a systematic consideration of alternatives to this method, including formal tribunals or collaborative measures. While this article is mainly focused on the unintended consequences of legal fact-finding and not on the potential spectrum of alternative institutional choices, the following section offers several observations from an institutional design perspective, and proposes recommendations to improve the design and outcomes of fact-finding bodies. More work is needed to further explore the full range of alternatives to legal fact-finding, to measure the social impact of these alternatives on attitudes and beliefs, and to compare the relative pros and cons of each method, in comparison to legal fact-finding.¹⁶¹

¹⁶¹ In another paper I offer a taxonomy of fact-finding goals, structures, and processes, and provide a systematic method, based on dispute system design and organizations literature, to match goals with the processes and structures that are most likely to achieve them.

1. International Fact-Finding Goals and Purposes

In developing a research agenda for studying the effectiveness of international courts, Yuval Shany proposed a goal-based approach to evaluate international tribunals.¹⁶² Drawing on the work of the influential sociologist Charles Perrow, Shany offered an analytical framework to organize and prioritize institutional goals, 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).¹⁶³ Building on Shany's work, this article suggests employing the goal-based analytical framework not only for evaluating the effectiveness of international institutions (including fact-finding bodies), but also – and more importantly – for selecting institutional designs. That is to say, when designing an international fact-finding mission, the mandating organization should define, clarify, and prioritize the goals and purposes of this mission. Based on the mission's main 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.

As mentioned earlier, U.N. fact-finding missions have been established to fulfill an array of goals and purposes, including creating a historical record, encouraging domestic accountability, fostering reconciliation, and preventing future abuses. The structure and processes of fact-finding in most of these cases were similar: the missions adopted legal discourse and made nonbinding recommendations. The experimental findings presented above suggest that legal discourse may not be a suitable method to achieve some of these goals, including creating and disseminating a unified historical record and promoting domestic accountability: the legal judgment and legal terminology triggers cognitive and emotional biases that prevent the creation of a collective historical narrative; and the legal frame is less effective than a moral frame for mobilizing domestic support for accountability measures (including penalizing offenders and reparations for the victims). These findings suggest that the goals and processes of international fact-finding should

¹⁶² Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 270 (2012).

¹⁶³ *Id.* at 232.

be better studied and understood, and support the creation of a systematic framework to design fact-finding missions in order to increase their positive social impact.

There are several reasons to support a goal-based approach for the design of international fact-finding. International fact-finding missions do not enjoy the formal documentation and organizational sophistication inherent to other international institutions. They do not have charters, statutes, or rules of procedure and evidence to turn to for guidance. Their mandates are often crafted hastily, while atrocities are ongoing, without identifying and prioritizing concrete goals.¹⁶⁴ Without clarifying the goals and purposes of fact-finding efforts, it is difficult to systematically consider alternative processes and structures, and to choose, from a variety of options, those most suitable to promote the mission's goals. Moreover, lack of clarity concerning the mission's goals encourages the adoption of existing or familiar structures, without proper consideration of the appropriateness of these structures to the current situation or the existence of alternative structures.

For example, the decision of the Human Rights Council to dispatch a fact-finding mission to the Central African Republic [CAR] was short and laconic, stating only that the Council requests the High Commissioner "to submit to the Human Rights Council, at its twenty-fourth session, an interim report on the human rights situation in the Central African Republic."¹⁶⁵ In response, the U.N. High Commissioner for Human Rights deployed, from June 20 to July 11, 2013, a fact-finding mission to the CAR to collect information on human rights violations committed in Bangui and other localities between December 2012 and July 2013. The mission interpreted the vague mandate to 'submit a report on the human rights situation' as directed at legal discourse and accountability, and, accordingly, submitted a legal report analyzing the applicable law and finding both parties responsible for gross human rights violations and, possibly, war crimes.¹⁶⁶ Neither of these documents – the mandating resolution or the final report – mentioned the goals of this process or reasons to adopt a legal analysis, given the mission's lack of any enforcement capabilities. From the materials available, it seems that this structure was adopted as a default solution, without

¹⁶⁴ See, for example, the UNHRC resolution concerning Burundi. UNHRC Res. S-24/1, *supra* note 35, <http://www.ohchr.org/EN/HRBodies/HRC/UNIIB/Pages/UNIIB.aspx>

¹⁶⁵ U.N. HUMAN RIGHTS COUNCIL RES. A/HRC/RES/23/18, Technical Assistance to the Central African Republic in the Field of Human Rights (June 27, 2013), http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/RES/23/18

¹⁶⁶ Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in the Central African Republic*, A/HRC/24/59 (Sept. 12, 2013), http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/24/59.

discussing the purposes of dispatching this mission and without considering alternative structures and processes. This goal ambiguity harms fact-finding efforts, as it encourages practices that are not necessarily productive or fruitful; it impedes attempts to clarify the policy direction *ex ante*, and to assess the mechanism's effectiveness *ex post*.

Another reason to support a goal-based approach to the design of international fact-finding missions is that even when goals are mentioned in the mandating process they are often mixed, sometimes conflicting. The documents concerning the United Nations Independent Investigation on Burundi [UNIIB], for example, mention several goals and purposes for the investigation, including '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.¹⁶⁷ 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 sometime be achieved only by promising powerful leaders full or partial amnesty.¹⁶⁸ Some transitional justice measures indeed promote truth and reconciliation processes, in which participants are promised immunity from prosecution in return for their detailed account of what happened.

In his oral remarks from March 22, 2016, Christof Heyns, U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions and member of the UNIIB, mentioned another goal, stating that "it is crucial to ascertain the disputed facts in an *indisputable* manner."¹⁶⁹ As the

¹⁶⁷ See UNHRC Res. S-24/1, *supra* note 35.

¹⁶⁸ Andrea Kupfer Schneider, *The Intersection of Dispute Systems Design and Transitional Justice*, 14 HARV. NEGOT. L. REV. 289, 292 (2009); see also Jane E. Stromseth et al., CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 253 (2006).

¹⁶⁹ 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://libraryresources.unog.ch/c.php?g=462695&p=3162785#21493049>

theoretical framework and the experimental findings described above demonstrate, determining facts in an indisputable manner is probably not a productive way to think about the process of truth-telling and truth-seeking concerning intense social controversies. Moreover, the desire to present facts as indisputable may conflict with conflict resolution and reconciliation efforts, which are often based on a narrative or restorative approaches to truth – rather than on binary legal discourse – embracing the coexistence of conflicting narratives and different descriptions or experiences of the same events. Additionally, thinking of determining facts in an indisputable way raises another challenge, as it relates to two separate goals: *determining* the facts, and *disseminating* these facts successfully to a variety of heterogeneous sub-groups. To achieve this dual goal, documenting abuses is not enough; it is just as important to contribute to the creation of a shared narrative. As this article demonstrates, the processes and structures adopted to find the truth inevitably influence the persuasive power of these facts and determine the success or failure of their dissemination. Since different aspects of the legal discourse (including judgment and terminology) trigger cognitive and emotional biases and selective information processing, successful dissemination of facts could potentially benefit from a different approach to fact-finding and truth. The following section will suggest some alternative approaches.

2. Alternatives to Legal Discourse

The popularity of legal discourse in the context of fact-finding should not be mistaken as a force of nature. Instead, it should be understood as what it is: a choice; a social structure that constructs a specific interpretation of reality. As Jack Balkin points out, “law’s truth is not the only truth, and law’s vision of reality is not the only reality. Law’s power to enforce its vision of the world can clash with other practices of knowledge, and with other forms of truth.”¹⁷⁰ There are many other forms of knowledge acquisition in the world, and many other conventions through which people try to determine what is true or false, try to gather and assess knowledge.¹⁷¹ In his canonic book, *What is History*, Edward Carr explains that history is a “continuous process of interaction between the historian and his facts, an unending dialogue between the present and the past.”¹⁷² Unlike history-making, the traditional criminal legal process is final and binary. The

¹⁷⁰ Jack M. Balkin, *The Proliferation of Legal Truth*, 26 HARV. J. L. & PUB. POL’Y 5, 7 (2003).

¹⁷¹ *Id.* at 11.

¹⁷² EDWARD H. CARR, *WHAT IS HISTORY?* 35 (1961).

judgment can be either incriminating or absolving, not both. Conflicting narratives cannot co-exist. This unavoidable affirmation of one narrative and rejection of others triggers, as explained earlier, cognitive bias and rejection or distortion of information.

To overcome some of these unintended consequences of legal discourse and to provide a more inclusive and nuanced account of what happened, other types of discourse can be adopted, promoting different interpretations of ‘truth.’ While exploring the broad range of potential discourses and the types of realities or ‘truths’ that they produce is beyond the scope of this article, I will mention just a few alternatives, adopted by other transitional justice mechanisms in the past. The South African Truth and Reconciliation Commission, for example, included four different types of ‘truth’ in its fact-finding processes: a *forensic truth*, focused on the objective, physical, information; a *narrative truth*, focused on the personal stories and experiences of individuals – both victims and perpetrators – and on creation of 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.¹⁷³ The medical and psychological literature has also revealed the potential contribution of this broader understanding of truth for therapy;¹⁷⁴ and socio-psychological research has demonstrated that third parties can potentially play a valuable role in the process of reevaluating social narratives and beliefs.¹⁷⁵

While courts of law must rely on legal discourse and cannot escape making final and binary determinations based on legal judgment, terminology, and frame, international fact-finding efforts may, in some circumstances, benefit from considering other types of discourse, depending on the primary goals of the mission.¹⁷⁶ A broader, non-legalistic interpretation of truth, such as a

¹⁷³ Alex Boraine, *Truth and Reconciliation in South Africa: The Third Way*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 141-157, 151-153 (Robert I. Rotberg & Dennis Thompson eds., 2000).

¹⁷⁴ 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).

¹⁷⁵ Bar-Tal, *supra* note 27, at 22. Others found that third-party activities to open or maintain lines of communication are the most consistently effective conflict management techniques for preventing escalation. William J. Dixon, *Third-Party Techniques for Preventing Conflict Escalation and Promoting Peaceful Settlement*, 50 INT’L ORG. 653, 671 (1996).

¹⁷⁶ Marco Sassoli, for example, advised the international community to avoid using international criminal law as an alibi for failing to engage 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).

narrative, social, or restorative truth,¹⁷⁷ may be better suited to contribute to a collective narrative of contested events, create a ‘shared history,’ and disseminate otherwise threatening facts.

Additionally, legal discourse, especially in the context of criminal law and accountability, is focused on individualized blame.¹⁷⁸ While individualizing guilt serves several purposes, it has its own problems and dangers. As Barbara Fried points out, “we have gotten nothing from our 40-year blame fest except the guilty pleasure of reproaching others for acts that, but for the grace of God, or luck, or social or biological forces, we might well have committed ourselves.”¹⁷⁹ Discussing the South African Truth and Reconciliation Commission, Gibson argued that promoting an alternative of “shared blame” was the single most important characteristic of the South African truth and reconciliation process.¹⁸⁰ As he explains, “sharing responsibility, blame, and victimhood creates a common identity, which can provide a basis for dialogue. If people are no longer dogmatically attached to a “good versus evil” view of the struggle, then perhaps a space for reconciliation is opened.”¹⁸¹ Replacing the criminal legal discourse of individualized guilt with a social discourse of “shared blame,” could potentially alleviate the binary legal discourse of guilt/innocence into a constructive social discourse supporting reconciliation.

Alternatively, the scientific and medical literature has challenged the criminalization of human errors and the culture of blame altogether.¹⁸² In his book, *Just Culture: Balancing Safety and Accountability*, Sidney Dekker concludes that the threat of judicial involvement is enough to prevent people from coming forward with information about an incident that they were involved in.¹⁸³ Judicial involvement, he argues, can engender a climate of fear and silence, in which it can

¹⁷⁷ Boraine, *supra* note 173, at 151-153.

¹⁷⁸ MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* (2010); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7 (2001).

¹⁷⁹ Barbara H. Fried, *Beyond Blame: Would We Be Better Off in a World Without Blame?*, BOSTON REV., June 28, 2013.

¹⁸⁰ James L. Gibson, *The Contributions of Truth to Reconciliation Lessons from South Africa*, 50 J. CONFLICT RESOL. 409, 417 (2006).

¹⁸¹ *Id.*

¹⁸² Geoffrey Thomas, *A crime against safety*, 44(1) AIR TRANSPORT WORLD 57 (2007) (calling to change the healthcare culture of blame, as it only hinders investigations into why an error occurred and how to prevent future ones); Lucian L. Leape et al, *Promoting Patient Safety by Preventing Medical Error*, 280(16) JAMA 1444 (1998) (arguing that escalating punishments for errors has been less than successful, resulting in suppression, stonewalling, and cover-up by clinicians and healthcare organizations).

¹⁸³ SIDNEY DEKKER, *JUST CULTURE: BALANCING SAFETY AND ACCOUNTABILITY* 103-105 (2012).

be difficult, if not impossible, to get access to information that may be critical to finding out what happened and to prevent similar errors in the future.¹⁸⁴ Others found, similarly, that cultures of blame – intensified by lawyers and the media – can lead individuals and organizations to blame others rather than take responsibility for the error and thereby explore and create solutions to address the error or problem.¹⁸⁵

Therefore, official policy-making bodies and experts in medical and human error have called for a shift in perspective to a blame-free culture within medicine, predicated on the basis that errors are largely attributable to systems rather than individuals.¹⁸⁶ While, arguably, healthcare and aviation errors are different than military ones, at least to some extent, an important similarity relates to the psychological processes leading individuals to share information, to take responsibility, and to find solutions and prevent repetition of the same errors time and again.¹⁸⁷ If criminalization and blame have indeed a detrimental effect on willingness to report and disclose information, then we should be motivated to explore blame-free alternatives to fact-finding, which could, potentially, motivate individuals to share information and experiences openly.

3. The Kunduz Hospital Bombing: Finding the Facts, Preventing Future Attacks

Let us now return to the attack on the MSF hospital in Kunduz. At the time of this writing, both MSF and UNAMA, as well as several other human rights organizations, continue to demand the establishment of a legalized fact-finding mission to investigate the attack (or to task the existing IHFFC with this responsibility).¹⁸⁸ It seems that the international community has been trapped in

¹⁸⁴ SIDNEY DEKKER, JUST CULTURE: BALANCING SAFETY AND ACCOUNTABILITY 103-105 (2012). And see, also, Sidney Dekker, *The criminalization of human error in aviation and healthcare: A review*, 49(2) SAFETY SCIENCE 121 (2011) (exploring the social causes and psychological and organizational consequences of the criminalization of human error in aviation and healthcare and concluding that criminal prosecution may threaten safety, as it has a detrimental effect on willingness to report and disclose safety-related information).

¹⁸⁵ Jamie Dickey, Ralph J. Damiano, and Ross Ungerleider, *Our Surgical Culture of Blame: a Time for Change*, 126(5) THE J. OF THORACIC AND CARDIOVASCULAR SUR. 1259 (2003).

¹⁸⁶ Molly E. Collins et al, *On the Prospects for a Blame-Free Medical Culture*, 69(9) SOCIAL SCIENCE & MEDICINE 1287 (2009). See, also, Richard T. Penson et al, *Medical Mistakes: a Workshop on Personal Perspectives*, 6(1) THE ONCOLOGIST 92 (2001) (finding that openly sharing experiences in a confidential setting helps defuse feelings of guilt and challenges the culture of shame and isolation that often surrounds medical errors).

¹⁸⁷ For a brief typology of human errors and failures, see: Amy C. Edmondson, *Strategies for learning from failure*, 89(4) HARVARD BUSINESS REVIEW 48 (2011).

¹⁸⁸ See, for example, the online petition issued by MSF: *Tell U.S. President Obama to Consent to Independent Investigation of Kunduz Hospital Bombing*, which recruited by July 28, 2016 over 559,000 signatures, <https://www.change.org/p/barack-obama-kunduz-investigation>. The petition calls for “an independent international

the misconception that legal fact-finding is the only method to resolve factual controversies and mobilize for action. However, as this article demonstrates, legal discourse is ineffective in realizing both. Applying the previous discussion to the case of the Kunduz hospital airstrike, I make the following suggestions and observations:

First, *prioritizing goals and purposes*: what is more important – finding what happened, or determining who is responsible? Prosecuting those involved, or implementing long-term institutional changes? Of course, it is possible to envisage a combination of goals to be pursued in a single case. However, clarifying and prioritizing these goals would be helpful in deciding which structures and processes would best fit the particular situation. Based on MSF’s communications, reports, and demands, it seems that the organization’s main goal is not individualized prosecutions and adjudication, but rather finding out what really happened – what caused the U.S. military to mistakenly identify a hospital as a military target, and accordingly to attack it. They seek a way to determine and disseminate facts successfully, reconciling conflicting accounts concerning what happened.¹⁸⁹

Second, *identifying alternatives to legal discourse*: if, indeed, the main goals of the fact-finding efforts are determining and disseminating facts and producing an agreed-upon record of events, as well as preventing future breaches of the protections accorded to medical objects, the adoption of legal discourse might be counter-productive. The binary legal judgment – assigning blame and incriminating or absolving specific individuals – might stand in the way of encouraging information sharing and creating a shared understanding of what happened. Legal discourse creates an adversarial approach to truth, in which conflicting narratives clash and only one prevails. If, at the end of an international fact-finding process, the MSF narrative prevails, it is conceivable that the U.S. military would continue to reject this narrative, especially considering the nonbinding nature and lack of enforcement capacities of fact-finding reports. If the narrative of the U.S.

investigation into the events of October 3 by the International Humanitarian Fact-Finding Commission (IHFFC)”, which will reaffirm the commitment to international humanitarian law and the right to provide medical care in conflict zones. See, also, *Afghanistan: US Should Conduct Criminal Inquiry in MSF Attack*, HUMAN RIGHTS WATCH (Dec. 21, 2015), <https://www.hrw.org/news/2015/12/21/afghanistan-us-should-conduct-criminal-inquiry-msf-attack>.¹⁸⁹ See, e.g., Doctors Without Borders, *supra* note 9 Doctors Without Borders, *Kunduz: Some of MSF’s Questions in Response to the U.S. Military Investigation into Their Attack on the Hospital* (Apr. 29, 2016), <http://www.msf.org/en/article/kunduz-some-msf%E2%80%99s-questions-response-us-military-investigation-their-attack-hospital>.

military prevails, concluding that the named individuals did not commit war crimes, these individualized findings might mask broader systemic failures.

To find the truth and reconcile conflicting narratives, MSF should consider forsaking its commitment to legal judgment and blame, which has detrimental effects on willingness to report and disclose sensitive information concerning erroneous risk assessments and organizational failures. Alternatively, an organizational discourse, promoting a “learning from failure” approach, should be considered, offering collaborative, blameless, fact-finding structures to motivate information sharing and disclosure, as well as organizational reform.¹⁹⁰ Additionally, an organizational discourse would shift the focus of attention from issues relating to individual criminal responsibility to broader social processes, including organizational culture, decision-making processes, and structural biases leading to erroneous risk assessments, which may better account for some of the failures leading to the attack on the MSF hospital. While analyzing the effects of various alternatives to legal discourse, including an organizational discourse, is outside the scope of this article, the literature surveyed here testifies to the potential of such alternative discourses in instigating better practices of information sharing and organizational change.

G. CAVEATS AND FUTURE RESEARCH

Experimental methods have unique value for studying the efficacy of legal institutions. By randomly assigning treatments, the researcher is able to control the data-generation process and to estimate the influence of a specific intervention on an outcome.¹⁹¹ Nonetheless, this method is not without flaws.

First, this article demonstrates that individuals respond in different ways to new information, depending on their national, social, cultural, and political affiliations. Therefore, the findings of the experiments described in this article are limited to the social groups that were included in the experiments, mainly American Nationals. It is possible that different social groups hold different beliefs and respond differently to international law and international institutions. To support a more inclusive and generalizable argument concerning the impact of international law

¹⁹⁰ Amy C. Edmondson, *Strategies for Learning from Failure*, 89 HARV. BUS. REV. 48 (2011).

¹⁹¹ Chilton & Tingley, *supra* note 19, at 6.

on domestic attitudes, these hypotheses must be tested using representative samples of other nations. In future articles I will report the results of similar experiments fielded in Israel and Canada. These comparative experiments will enable a comparison of the impact of international fact-finding reports on public beliefs and attitudes in different societies.

Second, the findings of the experiments described in this paper are also limited to the specific situation which was chosen for the vignette: a small-scale war crime, which could lead to different legal and moral conclusions. While this scenario was carefully chosen to represent a real-life, believable situation, allowing subjects to reach their own judgments and to reduce social desirability bias, other situations could result in different outcomes. Future research should test the impact of international law on domestic attitudes when in-group offenders are blamed for genocide or other large-scale grave violations of international law.

Third, Experiment I specifically measured the impact of ‘war crimes’ terminology on the perceived credibility of fact-finding reports. This wording was chosen to represent realistic use of this legal term, as it frequently appears in international fact-finding reports. The term represents ‘hot’ legal terminology with negative moral value. While the experiment successfully demonstrates the negative impact this specific term has on the perceived fairness of fact-finding reports, the results may also be motivated by remedial deterrence (or solution aversion). That is to say, the severe legal and moral implications stemming from war crimes accusations may motivate subjects to discredit the information altogether or refuse to sanction the offenders. Additionally, the discrepancy between the legal and political meanings of the term ‘war crimes’ could have influenced some participants to respond negatively to the treatment simply because they thought the described events are not grave enough to be considered ‘war crimes.’ To test the exact mechanism or reason for the negative effect found in this experiment – whether it resulted from an identity-based bias, solution aversion, or discrepancy between the legal and political meaning of war crimes – more research should be conducted, varying the gravity of the crimes, as well as the anticipated sanction.

Fourth, individuals typically receive this type of information from the media. A more realistic scenario would have presented the information to the research subjects as a news article. However, research shows that the specific media outlet conveying the information influences perceived credibility and assessments of new information. Even without mentioning the specific

outlet, subjects' authentic reactions to the report might be contaminated with their views of the 'media.' Therefore, I decided to use a direct 'quote' of the executive summary of the report rather than a news article reporting its main finding. This design choice allowed me to isolate subjects' reactions to the report rather than mix it with media bias.

Finally, public opinion or domestic attitudes are not necessarily a proxy for policy or behavioral changes. This is particularly true in non-democratic states, but is also relevant for democracies. Having said that, this article specifically tests domestic attitudes because I believe these are particularly important for international fact-finding efforts. Increasingly, with the development of social media and alternative information channels, social sub-groups hold conflicting beliefs concerning physical events. How many people were killed? What was the cause of death? Were the victims militants or civilians? And based on different assessments of what actually happened, individuals form opinions on specific responses to the relevant events, but also on the conflict, its roots, the enemy, and possible solutions. Regardless of potential policy or behavioral outcomes, I argue that domestic attitudes on war crimes matter because they serve as societal foundations which preserve and even intensify conflicts. And it is our duty to design institutions that can potentially mitigate, rather than intensify, this problem.

H. CONCLUSION

War crimes investigations are intended, among other things, to assert and disseminate the truth and to prevent future atrocities. Unfortunately, modern international fact-finding missions adopt legal discourse to construct and interpret facts, and this discourse tends to trigger cognitive and emotional biases which may frustrate attempts to achieve these exact goals. An adversarial, binary, legal-judgment-approach to truth might frustrate attempts at resolving factual controversies and disseminating threatening information. 'Hot' legal terminology, such as 'war crimes,' might trigger defensive reaction of rejection of information and decrease the perceived fairness of the report. A legal frame fails to influence domestic attitudes or to mobilize support for sanctioning and reparations. The choice to ascertain and disseminate truth using legal discourse is not without benefits – it provides legal rules, terminology, and conventions to structure and guide the production of facts and construction of meaning. However, at the same time, it triggers cognitive

and emotional biases that frustrate efforts to disseminate controversial information and to resolve factual disputes; and it lacks the emotional appeal, participatory value, and social cues that moral expressions or other types of social truth-telling entail.

The data reported here suggest that sometimes more information means less shared knowledge: while opposing social and political groups could potentially agree on factual findings such as numbers of victims or the timeframe of a military attack, the adoption of binary legal judgment and politicized legal terminology contributes to a bitter divide in public opinion concerning war crimes. Ironically, the tendency to turn to legal discourse to achieve factual accuracy and accountability triggers social dynamics that frustrate both objectives. In order to have a stronger, more robust, persuasive value, fact-finding missions should rethink their focus on legal discourse and consider replacing it with other, more socially oriented forms of truth-telling and communication. By widening the corpus of relevant facts, by restructuring the boundaries of what is true or false, and by accepting the potential co-existence of conflicting narratives, fact-finding mechanisms may be able to dismantle some of the biases and distortion, and to accomplish their goals.

I. APPENDICES

1. U.N. Fact-Finding Missions – Goal Dataset

Goals Legend/Coding (1=goal mentioned in the mission’s mandate, 0=goal not mentioned):

IL = Investigating International Law Violations

Fact = Establishing the Facts

Truth = Establishing the Truth

Prev = Preventing Future Atrocities

Rec = Promoting Reconciliation

Account = Promoting Accountability

Assist = Assisting Domestic Authorities

| Year | Investigated Country | Mandating Authority | Goals | | | | | | |
|------|----------------------|---------------------|-------|------|-------|------|-----|---------|--------|
| | | | IL | Fact | Truth | Prev | Rec | Account | Assist |
| 2015 | Burundi | HRC | 1 | 0 | 0 | 1 | 1 | 1 | 1 |
| 2015 | Syria | HRC | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 2015 | Libya | HRC | 1 | 1 | 0 | 0 | 0 | 1 | 0 |
| 2015 | South Sudan | HRC | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 2015 | Boko Haram | HRC | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2014 | Syria | HRC | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 2014 | Iraq | HRC | 1 | 1 | 0 | 0 | 0 | 1 | 0 |
| 2014 | Sri-Lanka | HRC | 1 | 1 | 0 | 0 | 0 | 1 | 0 |
| 2014 | Israel/Palestine | HRC | 1 | 1 | 0 | 1 | 0 | 1 | 0 |
| 2014 | Eritrea | HRC | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 2013 | DPRK | HRC | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 2013 | Syria | HRC | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 2013 | Syria | HRC | 0 | 1 | 0 | 0 | 0 | 0 | 0 |
| 2013 | CAR | UNSC | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 2013 | Mali | HRC | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2013 | CAR | HRC | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2012 | Syria | HRC | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 2012 | Syria | HRC | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 2011 | Syria | HRC | 1 | 1 | 0 | 0 | 0 | 1 | 0 |
| 2011 | Syria | HRC | 1 | 1 | 0 | 0 | 0 | 1 | 0 |
| 2012 | Israel/Palestine | HRC | 1 | 1 | 0 | 0 | 0 | 0 | 0 |
| 2011 | Côte d’Ivoire | HRC | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 2011 | Libya | HRC | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 2010 | Israel/Turkey | HRC | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 2010 | Sri-Lanka | SG | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 2010 | Israel/Palestine | HRC | 1 | 1 | 0 | 0 | 0 | 1 | 0 |
| 2009 | Israel/Palestine | HRC | 1 | 0 | 0 | 0 | 0 | 0 | 0 |

| Year | Investigated Country | Mandating Authority | Goals | | | | | | |
|---------------|----------------------|---------------------|-----------|-----------|----------|----------|----------|-----------|----------|
| | | | IL | Fact | Truth | Prev | Rec | Account | Assist |
| 2009 | Honduras | HRC | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2009 | Nepal | HCHR | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2009 | Guinea | SG | 1 | 1 | 0 | 0 | 0 | 1 | 0 |
| 2008 | Congo | SG | 1 | 0 | 0 | 0 | 0 | 0 | 1 |
| 2008 | Kenya | HCHR | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2006 | Israel/Palestine | HRC | 0 | 0 | 0 | 1 | 0 | 1 | 0 |
| 2006 | Timor | SG | 1 | 1 | 0 | 0 | 0 | 1 | 0 |
| 2006 | W. Sahara | HCHR | 1 | 0 | 0 | 1 | 0 | 0 | 0 |
| 2006 | Israel/Lebanon | HRC | 1 | 1 | 0 | 0 | 0 | 0 | 0 |
| 2006 | Afghanistan | HCHR | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2006 | Darfur | HRC | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2005 | Uzbekistan | HCHR | 1 | 1 | 0 | 0 | 0 | 0 | 0 |
| 2005 | Togo | HCHR | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2004 | Darfur | HCHR | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2004 | Côte d'Ivoire | UNSC | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 2004 | Abidjan | SG | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 2004 | Darfur | UNSC | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 2002 | Columbia | HCHR | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2002 | Côte d'Ivoire | SG | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2000 | Togo | GA | 1 | 0 | 1 | 0 | 0 | 0 | 0 |
| 2000 | Côte d'Ivoire | SG | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2000 | Israel/Palestine | CHR | 1 | 0 | 0 | 1 | 0 | 0 | 0 |
| 1999 | Afghanistan | GA | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1999 | Timor | CHR | 1 | 1 | 0 | 0 | 0 | 0 | 0 |
| 1999 | Cambodia | GA | 1 | 0 | 0 | 0 | 1 | 1 | 1 |
| 1998 | Afghanistan | HCHR | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1997 | Congo | CHR | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 1997 | Congo | SG | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 1995 | Burundi | UNSC | 1 | 1 | 0 | 0 | 1 | 1 | 0 |
| 1994 | Rwanda | UNSC | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1993 | Georgia | SG | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1993 | Burundi | SG | 1 | 1 | 0 | 0 | 0 | 0 | 0 |
| 1993 | Liberia | UNSC | 1 | 0 | 0 | 1 | 0 | 1 | 0 |
| 1992 | Yugoslavia | UNSC | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1988 | Cuba | CHR | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1979 | Israel/Palestine | UNSC | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| 1975 | Chile | CHR | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1973 | Mozambique | GA | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1963 | Vietnam | GA | 0 | 1 | 0 | 0 | 0 | 0 | 0 |
| Total: | 66 | | 63 | 17 | 1 | 6 | 3 | 33 | 3 |

2. Experiments' Sampling and Demographics

(a) *Matching and Weighting for experiment I:*

YouGov interviewed 2251 respondents who were then matched down to a sample of 2000 to produce the final dataset. The respondents were matched to a sampling frame on gender, age, race, education, party identification, ideology, and political interest. The frame was constructed by stratified sampling from the full 2010 American Community Survey (ACS) sample with selection within strata by weighted sampling with replacements (using the person weights on the public use file). Data on voter registration status and turnout were matched to this frame using the November 2010 Current Population Survey.

Data on interest in politics and party identification were then matched to this frame from the 2007 Pew Religious Life Survey. The matched cases were weighted to the sampling frame using propensity scores. The matched cases and the frame were combined and a logistic regression was estimated for inclusion in the frame. The propensity score function included age, gender, race/ethnicity, years of education, and ideology. The propensity scores were grouped into deciles of the estimated propensity score in the frame and post-stratified according to these deciles.

Table 1. Sample Descriptive Statistics (experiment I)

| | Proportion/mean |
|--------------------------------|-------------------------------------|
| <i>Experimental treatments</i> | |
| <i>Judgment</i> | |
| Incriminating legal judgment | 0.322 |
| War crimes judgment | 0.341 |
| Absolving legal judgment | 0.338 |
| <i>Institution</i> | |
| United Nations | 0.335 |
| U.S. Military Court | 0.332 |
| U.S. Federal Court | 0.334 |
| <i>Covariates</i> | |
| <i>Ideology</i> | |
| Conservative | 0.366 |
| Moderate | 0.325 |
| Liberal | 0.256 |
| Gender (female) | 0.526 |
| Age | 49 (s.d.=16.369, min=19, max=93) |
| <i>Race</i> | |
| White | 0.717 |

| | |
|---------------------------------|-------|
| Black | 0.108 |
| Hispanic | 0.123 |
| Other | 0.055 |
| Education | |
| No high school education | 0.037 |
| High school education | 0.345 |
| College education (or partial) | 0.511 |
| Graduate education | 0.108 |
| Valid voter registration status | 0.876 |

(b) Matching and Weighting for experiment II:

YouGov interviewed 1152 respondents who were then matched down to a sample of 1000 to produce the final dataset. The respondents were matched on gender, age, race, education, party identification, ideology, and political interest.

YouGov then weighted the matched set of survey respondents to known characteristics of the general population of the United States from the 2010 American Community Survey and 2012 Current Population Survey.

Table 2. Sample Descriptive Statistics (experiment II)

| | Proportion/mean |
|--------------------------------|-------------------------------------|
| <i>Experimental treatments</i> | |
| <i>Judgment/framing</i> | |
| Incriminating legal judgment | 0.199 |
| Absolving legal judgment | 0.206 |
| Incriminating moral judgment | 0.213 |
| Absolving moral judgment | 0.197 |
| Control | 0.185 |
| <i>Covariates</i> | |
| <i>Ideology</i> | |
| Conservative | 0.348 |
| Moderate | 0.3 |
| Liberal | 0.265 |
| Gender (female) | 0.52 |
| Age | 47 (s.d.=16.998, min=18, max=93) |
| <i>Race</i> | |
| White | 0.721 |
| Black | 0.111 |
| Hispanic | 0.111 |
| Other | 0.057 |

Education

| | |
|---------------------------------|-------|
| No high school education | 0.055 |
| High school education | 0.377 |
| College education (or partial) | 0.482 |
| Graduate education | 0.085 |
| Valid voter registration status | 0.865 |

3. Vignettes and Questionnaires

(a) *Experiment I:*

Each respondent was randomly assigned into one of 9 treatment groups, based on 2 randomized variables:

1. **Institution_rand:** the United Nations, a U.S. Military Court or a U.S. Federal Court
2. **Judgment_rand:** The U.S. Marines did not violate international law, the U.S. Marines violated international law or the U.S. Marines committed war crimes.

First, respondents read the following paragraph:

The following questions are about a military operation in Afghanistan that happened a few months ago. Initially, it was unclear how many people died, and whether they were Al-Qaeda members or innocent civilians.

Therefore, the **institution_rand** appointed a team of experts to investigate.

The summary of their report includes 2 parts (which are reprinted on the next 2 screens): in the *first* part the investigators give their account of what happened (the facts of the case). In the *second* part the investigators give their legal judgment of these facts, concluding that the United States **judgment_rand**.

Please read both parts carefully. Afterwards, we will ask for your opinions about each part of the report.

Second, the respondents read the two parts of the fact-finding report:

[Insert UN1/MC1/CC1 here]

New Screen

[Insert UN2/UN3/UN4/MC2/MC3/MC4/CC2/CC3/CC4 here]

Third, the respondents were asked to answer the following questions:

“The investigation was conducted because **the facts of this case were highly contested** (especially how many people were killed, and whether they were Al-Qaeda members or innocent civilians).

Therefore, we want to know your opinion on the **credibility of the facts** determined by the investigators (the description of what happened, including the finding that 4 unarmed Afghan civilians were killed by the Marines):

Do you think that the **facts** summarized by the investigators are –

- 1 Completely inaccurate
- 2 Mostly inaccurate
- 3 Somewhat inaccurate
- 4 Somewhat accurate
- 5 Mostly accurate
- 6 Completely accurate

In your opinion, were the **facts** presented by the investigators –

- 1 Completely biased
- 2 Mostly biased
- 3 Somewhat biased
- 4 Somewhat objective
- 5 Mostly objective
- 6 Completely objective

New Screen

Now we want your opinion on the investigators' legal judgment of the events (determining that the United States **did not violate international law/violated international law/committed war crimes**).

In your opinion, was the investigators' **judgment** –

- 1 Completely biased
- 2 Mostly biased
- 3 Somewhat biased
- 4 Somewhat objective
- 5 Mostly objective
- 6 Completely objective

New screen

Based on the summary of the report, we now want to know your opinion on the **full report**.

In your opinion, was the investigators' **report** –

- 1 Completely unfair
- 2 Mostly unfair
- 3 Somewhat unfair
- 4 Somewhat fair
- 5 Mostly fair
- 6 Completely fair

New screen

Now we want to know your **personal opinion on the events**.

How much do you agree or disagree with each of the following statements?

“The US Marines did the best they could under the circumstances.”

- 1 Disagree strongly
- 2 Disagree somewhat
- 3 Disagree slightly
- 4 Agree slightly
- 5 Agree somewhat
- 6 Agree strongly

New screen

“The US Marines should be prosecuted.”

- 1 Disagree strongly
- 2 Disagree somewhat
- 3 Disagree slightly
- 4 Agree slightly
- 5 Agree somewhat
- 6 Agree strongly

Fourth, after completing the survey, the respondents were given various tasks related to other issues (such as education reforms). After about 10 minutes of unrelated assignments, respondents were asked the following two attitudinal questions:

What is your opinion of the **institution_rand**?

- 1 Very favorable
- 2 Somewhat favorable
- 3 Somewhat unfavorable
- 4 Very unfavorable
- 5 Don't know / Never heard of it

New Screen

How much do you agree or disagree with the following statement?

"Patriots should support America even if it is in the wrong"

- 1 Disagree strongly
- 2 Disagree somewhat
- 3 Agree somewhat
- 4 Agree strongly

UN1 (similar to MC1 and CC1, the only difference being the institution's name and symbol):

United Nations



Investigation Report

Distr.
GENERAL
A/SG/11/65

23 December 2013

Report of the UN Investigation on the Nangar Khel incident **Summary of the Facts**

On August 4, 2013, a member of Al-Qaeda exploded a bomb near a US Marine base in the Nangar Khel region in Afghanistan, killing a US Marine.

Three Marines, who witnessed the explosion, chased the attacker into a nearby marketplace. They shot their guns repeatedly until they killed the attacker.

Four Afghans who were near the shooting were also killed from the gunshots, and nine others were wounded. The Marines said they saw weapons and thought these people were Al-Qaeda members. After examining the evidence, the investigators concluded that these people were unarmed civilians.

UN2 (similar to MC2 and CC2, the only difference being the institution's name and symbol):

United Nations



Investigation Report

Distr.
GENERAL
A/SG/11/65

23 December 2013

Report of the UN Investigation (continued): Summary of the Legal Conclusions

According to **international law** (including the *Geneva Conventions*), soldiers are obligated to exercise reasonable care to protect civilians during armed conflict.

Having investigated the facts of the case, the investigators concluded that the US Marines violated this **legal standard** and that the United States is, therefore, **legally responsible** for the death and injury of these civilians.

UN3 (similar to MC3 and CC3, the only difference being the institution's name and symbol):

United Nations



Investigation Report

Distr.
GENERAL
A/SG/11/65

23 December 2013

Report of the UN Investigation (continued): Summary of the Legal Conclusions

According to **international law** (including the *Geneva Conventions*), soldiers are obligated to exercise reasonable care to protect civilians during armed conflict.

Having investigated the facts of the case, the investigators concluded that the US Marines did not violate this **legal standard** and that the United States is, therefore, **not legally responsible** for the death and injury of these civilians.

UN4 (similar to MC4 and CC4, the only difference being the institution's name and symbol):

United Nations



Investigation Report

Distr.
GENERAL
A/SG/11/65

23 December 2013

Report of the UN Investigation (continued): Summary of the Legal Conclusions

According to **international law** (including the *Geneva Conventions*), soldiers are obligated to exercise reasonable care to protect civilians during armed conflict.

Having investigated the facts of the case, the investigators concluded that the US Marines committed **war crimes** and that the United States is, therefore, **legally responsible** for the death and injury of these civilians.

(b) Experiment II:

Each respondent was randomly assigned into one of 4 treatment groups or a control group, based on 2 randomized variables:

1. **Framing_rand:** international law standards or universal moral standards.
2. **Judgment_rand:** The U.S. Marines did not violate or violated the **framing_rand**.
3. **Control group subjects** read the same facts as everybody else, but did not receive any judgment (condemning or absolving, legal or moral).

First, respondents read the following paragraph:

The following questions are about a military operation in Afghanistan which happened a few months ago. Initially, it was unclear how many people died, and whether they were Al-Qaeda members or innocent civilians.

Therefore, a team of international experts was asked to investigate.

The summary of their report is reprinted on the next screen. In their summary, the investigators give their account of what happened (the facts of the case).

The summary of their report includes 2 parts (which are reprinted on the next 2 screens): in the *first* part the investigators give their account of what happened (the facts of the case). In the *second* part the investigators give their legal judgment of these facts, concluding that **judgment_rand** [control group subjects read a similar paragraph that only mentioned the first part of the report].

Please read the report's summary carefully. Afterwards, we will ask for your opinion about it.

Nangar Khel (Afghanistan) Report:

Summary of the Facts

On August 4, 2013, a member of Al-Qaeda exploded a bomb near a US Marine base in the Nangar Kahel region in Afghanistan, killing a US Marine.

Three Marines, who witnessed the explosion, chased the attacker into a nearby marketplace. They shot their guns repeatedly until they killed the attacker.

Four Afghans who were near the shooting were also killed from the gunshots, and nine others were wounded. The Marines said they saw weapons and thought these people were Al-Qaeda members. After examining the evidence, the investigators concluded that these people were unarmed civilians.

New screen

Second, respondents in the treatment groups read one of the following 4 treatments [2X2 design]:

Nangar Khel (Afghanistan) Report (continued):

Summary of the Legal Conclusions

According to **international law** (including the *Geneva Conventions*), soldiers are obligated to exercise reasonable care to protect civilians during armed conflict.

(1) Incriminating judgment, legal framing:

Having investigated the facts of the case, the investigators concluded that the US Marines violated this **legal standard** and that the United States is, therefore, **legally responsible** for the death and injury of these civilians.

(2) Absolving judgment, legal framing:

Having investigated the facts of the case, the investigators concluded that the US Marines did not violate this **legal standard** and that the United States is, therefore, **not legally responsible** for the death and injury of these civilians.

(3) Incriminating judgment, moral framing:

Having investigated the facts of the case, the investigators concluded that the US Marines violated this **moral standard** and that the United States is, therefore, **morally responsible** for the death and injury of these civilians.

(4) Absolving judgment, moral framing:

Having investigated the facts of the case, the investigators concluded that the US Marines did not violate this **moral standard** and that the United States is, therefore, **not morally responsible** for the death and injury of these civilians.

Third, the respondents were asked to answer the following questions:

The investigation was conducted because the facts of this case were highly contested (especially how many people were killed, and whether they were Al-Qaeda members or innocent civilians).

Therefore, we want to know your opinion on the **credibility of the facts** determined by the investigators (the description of what happened):

Do you think that the **facts** summarized by the investigators are –

- 1 Completely inaccurate
- 2 Mostly inaccurate
- 3 Somewhat inaccurate
- 4 Somewhat accurate
- 5 Mostly accurate
- 6 Completely accurate

In your opinion, were the **facts** presented by the investigators –

- 1 Completely biased
- 2 Mostly biased
- 3 Somewhat biased
- 4 Somewhat objective
- 5 Mostly objective
- 6 Completely objective

New screen

Now we want your opinion on the investigators' **legal/moral judgment** of the events (determining that **judgment_rand**).

In your opinion, was the investigators' **judgment** –

- 1 Completely biased
- 2 Mostly biased
- 3 Somewhat biased
- 4 Somewhat objective
- 5 Mostly objective
- 6 Completely objective

New screen

Based on the summary of the report, we now want to know your opinion on the **full report**.

In your opinion, was the investigators' **report** –

- 1 Completely unfair
- 2 Mostly unfair
- 3 Somewhat unfair
- 4 Somewhat fair
- 5 Mostly fair
- 6 Completely fair

New screen

Now we want to know your **personal opinion on the events**.

Please tell us how much you agree or disagree with each of the following statements:

“The US Marines did the best they could under the circumstances.”

- 1 Disagree strongly
- 2 Disagree somewhat
- 3 Disagree slightly
- 4 Agree slightly
- 5 Agree somewhat
- 6 Agree strongly

“The US Marines should be prosecuted.”

- 1 Disagree strongly
- 2 Disagree somewhat
- 3 Disagree slightly
- 4 Agree slightly
- 5 Agree somewhat
- 6 Agree strongly

“The US Government should compensate the Afghan victims.”

- 1 Disagree strongly
- 2 Disagree somewhat
- 3 Disagree slightly
- 4 Agree slightly
- 5 Agree somewhat
- 6 Agree strongly

4. Summary of Treatment Effects

(a) *Experiment I:*

Table 3. Summary of Treatment Effects: Mean Report Fairness, by Treatment Groups and Ideology

| Judgment | Institution | All Respondents | Ideology | | |
|----------------------------|----------------|-------------------------|-------------------------|-------------------------|-------------------------|
| | | | Liberals | Moderates | Conservatives |
| Absolving | United Nations | 61.51 (57.93, 65.09) | 45.09 (37.31, 52.87) | 63.07 (57.98, 68.16) | 70.25 (63.97, 76.53) |
| | Military Court | 60.5 (57.18, 63.82) | 52.3 (44.42, 60.19) | 60.41 (55.78, 65.04) | 66.75 (61, 72.51) |
| | Federal Court | 58.02 (54.59, 61.46) | 46.66 (40.39, 52.94) | 59.67 (53.97, 65.38) | 63.66 (57.44, 69.87) |
| | Total (AJ) | 60.05 (58.07, 62.04) | 48.02 (43.86, 52.18) | 61.1 (58.2, 64) | 66.99 (63.51, 70.47) |
| Incriminating (violation) | United Nations | 57.1 (53.48, 60.72) | 70.6 (64.74, 76.46) | 57.03 (50.13, 63.94) | 44.86 (39.23, 50.49) |
| | Military Court | 59.4 (55.58, 63.21) | 68.14 (61.66, 74.64) | 58.78 (52.17, 65.4) | 50.31 (42.91, 57.7) |
| | Federal Court | 59.2 (55.82, 62.57) | 73.75 (67.62, 79.87) | 63.37 (60.37, 70.36) | 47.5 (41.88, 53.11) |
| | Total (IJ) | 58.56 (56.49, 60.62) | 70.71 (67.2, 74.22) | 60.64 (57.11, 64.16) | 47.43 (43.93, 50.93) |
| Incriminating (war crimes) | United Nations | 52.05 (48.5, 55.59) | 65.53 (59.31, 71.76) | 54.54 (48.66, 60.42) | 38 (32.04, 43.95) |
| | Military Court | 53.66 (49.9, 57.4) | 64.82 (58.42, 71.23) | 53.51 (47, 60.02) | 44.41 (37.68, 51.14) |
| | Federal Court | 57.71 (54.35, 61.08) | 70.79 (65.22, 76.35) | 59.05 (53.99, 64.12) | 41.96 (35.44, 48.49) |
| | Total (WC) | 54.47 (52.42, 56.52) | 67.09 (63.63, 70.55) | 55.91 (52.59, 59.22) | 41.37 (37.7, 45.04) |

Table reports the means of the Report Fairness, by Institution, Judgment and Ideology, with 95% confidence intervals in parentheses, N= 1,995.

*(b) Experiment II:***Table 4.** *Summary of Treatment Effects: Mean Willingness to Prosecute the Soldiers, by Treatment Groups and Ideology*

| Treatment | All Respondents | Ideology | | |
|--------------------|-------------------------|-------------------------|-------------------------|-------------------------|
| | | Liberals | Moderates | Conservatives |
| <i>Legal Frame</i> | | | | |
| Incriminating | 30.25 (25.94, 34.55) | 42.4 (32.81, 51.98) | 26.66 (17.97, 35.35) | 19.73 (14.12, 25.34) |
| Absolving | 31.26 (26.81, 35.7) | 36.27 (28.08, 44.45) | 36.87 (29.1, 44.64) | 18.73 (10.69, 26.76) |
| <i>Moral Frame</i> | | | | |
| Incriminating | 39.43 (35.2, 43.66) | 51.63 (42.76, 60.5) | 40.88 (33.53, 48.24) | 26.66 (20.5, 32.82) |
| Absolving | 32.65 (28.01, 37.28) | 50 (41.27, 58.72) | 36.27 (28.32, 44.22) | 15.27 (9.09, 21.46) |
| <i>Control</i> | 30.54 (26.11, 34.97) | 44.09 (34.76, 53.41) | 32.75 (25.02, 40.49) | 17.7 (10.63, 24.77) |

Table reports the means of Willingness to Prosecute, by Treatment and Ideology, with 95% confidence intervals in parentheses, N= 998.