



Universiteit
Leiden
The Netherlands

Searching for law at the Security Council: fact-making in the age of digital evidence

Lahmann, H.C.; Labuda, P.I.; Paddeu, F.

Citation

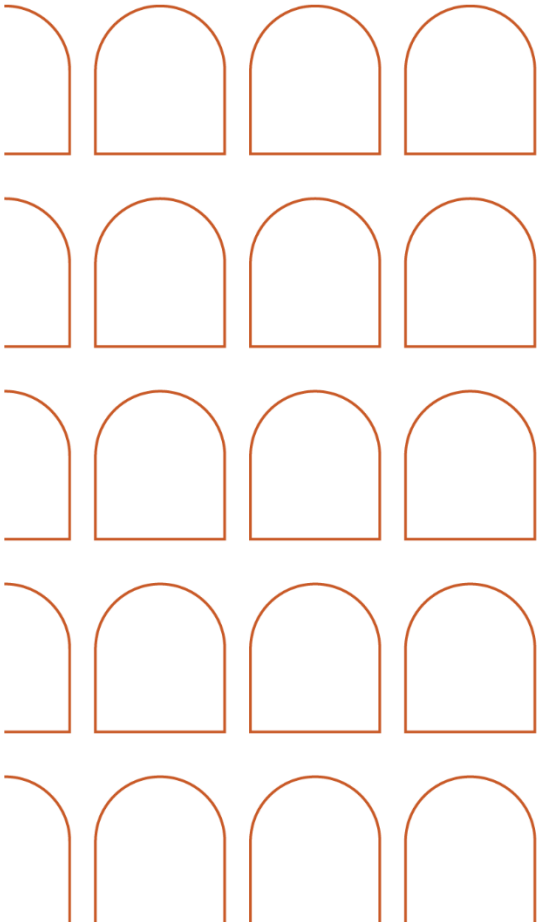
Lahmann, H. C. (2025). Searching for law at the Security Council: fact-making in the age of digital evidence. *Academy Of European Law (Ael) Working Papers*, 71-77. Retrieved from <https://hdl.handle.net/1887/4294403>

Version: Publisher's Version

License: [Creative Commons CC BY 4.0 license](https://creativecommons.org/licenses/by/4.0/)

Downloaded from: <https://hdl.handle.net/1887/4294403>

Note: To cite this publication please use the final published version (if applicable).



AEL 2025/04
Academy of European Law
European Society of International Law
Proceedings

WORKING PAPER

**Technological change and international law:
ESIL annual conference, Vilnius,
5-6 September 2024**

Nathan Ehrenfreund, Eirini-Erasmia Fasia, Katia Fach Gómez, Jonathan Hafetz, Nora Hertz, Henning Lahmann, Andrea Leiter, Agnè Limantè, Tiina Pajuste, Yuval Shany, Ellie Smith, Adam Strobeyko, Erik Tuchtfield, Anna Ventouratou, Pierre Walckiers, Kebene Wodajo, Gention Zyberi

European University Institute

Academy of European Law

European Society of International Law

ESIL Annual Conference, Vilnius, September 2024

Technological Change and International Law

Nathan Ehrenfreund, Eirini-Erasmia Fasia, Katia Fach Gómez,
Jonathan Hafetz, Nora Hertz, Henning Lahmann, Andrea Leiter,
Agne Limante, Tiina Pajuste, Yuval Shany, Ellie Smith, Adam
Strobeyko, Erik Tuchtfield, Anna Ventouratou, Pierre Walckiers,
Kebene Wodajo, Gentian Zyberi

ESIL Proceedings editors:

Patryk I. Labuda (Central European University)

Federica Paddeu (Queens' College, Cambridge)

Assistant editor: Paulina Rundel (University of Vienna)

ISSN 1831-4066

© Nathan Ehrenfreund, Eirini-Erasmia Fasias, Katia Fach Gómez, Jonathan Hafetz, Nora Hertz, Henning Lahmann, Andrea Leiter, Agne Limante, Tiina Pajuste, Yuval Shany, Ellie Smith, Adam Strobeyko, Erik Tuchtfield, Anna Ventouratou, Pierre Walckiers, Kebene Wodajo, Gentian Zyberi/Patryk I. Labuda, Federica Paddeu, Paulina Rundel, 2025

This work is licensed under a [Creative Commons Attribution 4.0 \(CC-BY 4.0\)](#) International license.

If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the series and number, the year and the publisher.

Published in September 2025 by the European University Institute.
Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu

Views expressed in this publication reflect the opinion of individual author(s) and not those of the European University Institute.

This publication is available in Open Access in [Cadmus](#), the EUI Research Repository:



With the support of the
Erasmus+ Programme
of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Searching for Law at the Security Council: Fact-Making in the Age of Digital Evidence

Henning Lahmann

Abstract

The emergence of new tools for the media and other civil society actors to harness digital information found in the public domain offers the potential for unprecedented access to detailed and evidence of state wrongdoing that was previously available only to states with powerful intelligence agencies. Yet instead of engendering a new era of transparency and meaningfully restructuring international legal discourse beyond judicial proceedings, a sober look at the new realities of fact-making in the digital age reveals continuity rather than disruption. Using the example of deliberations at the UN Security Council after the incident at al-Ahli Arab Hospital in Gaza City in October 2023 in comparison with the factual disputes surrounding the so-called Markale Massacre that occurred during the siege of Sarajevo in 1994, this intervention argues that while digital technologies used to record atrocities and novel techniques of narration can help overcome some long-standing structural and cognitive constraints of fact-making, they ultimately fail to loosen the grip powerful state actors continue to exert over the construction of a shared perception of reality for the purpose of international legal discourse. This brief intervention looks at the process of fact-making at the UN Security Council and the impact of digital technologies, in particular the emergence of open-source information as provided by the media and other civil society actors.

Keywords

UN Security Council, Evidence, Facts, Open-source investigations, Media, Civil Society Actors, Gaza, Israel

Author's information

Universiteit Leiden.

e-mail: h.c.lahmann@law.leidenuniv.nl

1. Fact-making at the Security Council

The Security Council is not a court but “a political organ that acts for political reasons”, in Judge Schwebel’s famous words.¹ However, factual claims and disputes about facts play a significant role whenever the Security Council deals with its core responsibilities under the Charter. In particular, when a state makes legal claims to justify the resort to violence, it needs to relate the invoked rule to some set of facts, and it is such *factual claim* that is then assessed just as much as whatever doctrinal theory of the law the state advances. And we know that frequently these factual claims do not hold up to scrutiny, as the case of the 2003 Iraq invasion amply demonstrated.

There are other situations in which a lot, if not everything, turns on the facts; when the Security Council makes a determination under Article 39 of the Charter, there must be some evaluation of the facts on the ground. The same goes for alleged violations of international law or the contemplation of binding measures such as the imposition of a ceasefire. Of course, none of these sets of circumstances mean that the eventual decision will be based on a clear application of the law to the determined facts. But it does mean that the establishment of some shared perception of reality among the Council members is required.

Therefore, the question is: What factual claim gets accepted as a *fact* within the deliberative processes at the Security Council, and who gets to decide? And what is the role of new technologies in this context?

While facts play an important role at the Security Council, the way disputes over facts unfold differs in virtually every respect from a judicial proceeding.² Because facts are not made through a formal process of introducing and evaluating evidence, many different sources and actors directly and indirectly contribute to the process. The Council can initiate its own fact-finding inquiries, but this tool is rarely made use of.³ And while the Secretary-General and other UN organs and agencies frequently provide factual input, in practice much more important than these institutional mechanisms are the factual assumptions the members bring with them or develop through processes mostly located outside the confines of the Council, be it through their own or other states’ intelligence services, reports from their diplomatic missions, or through reporting in the media, from NGOs, or other public sources.⁴

2. Constraints of Security Council Fact-Making

This heterogenous and decentralised picture reveals some inherent constraints that we can interrogate through two different analytical lenses.

First, there is the structural lens. It builds on the observation that what factual claims get to be made and accepted as fact is dependent on questions of power relations within and outside the Security Council. At least where the Council assumes a “quasi-judicial” function by making

¹Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA) (Merits)[1986] ICJ Rep 14, Dissenting Opinion of Judge Schwebel 259,290.

²Marie Jacobsson, ‘Evidence as an Issue in International Legal Practice’ (2006) 100 Proceedings of the American Society of International Law 40.

³Agnieszka Jachec-Neale, ‘Fact-Finding’, *Max Planck Encyclopedia of Public International Law* (2021) para. 19.

⁴Henning Lahmann, ‘Ukraine, Open-Source Investigations, and the Future of International Legal Discourse’ (2022) 116 AJIL 810, 813.

determinations of fact that form the basis of binding decisions,⁵ the process is contingent on the assent of the Permanent 5 (the United States, the Russian Federation, China, United Kingdom, and France).

Other structural factors concern the situations under scrutiny. States have vastly differing intelligence capacities, and those that do have powerful services are often reluctant to share what they know or how they know it, which makes it impossible for other actors to meaningfully verify factual claims.⁶ Moreover, states affected by the situation can have a great impact on the modalities of fact-making, for example by restricting access to the conflict zone, by damaging infrastructure necessary to produce or distribute evidence, by acts of manipulation, or even by killing reporters and other providers of fact on the ground. Finally, the media and other civil society actors have traditionally depended on government sources and leaks, which has made reporting susceptible to government framing and filtering.⁷

The second way to look at fact-making at the Security Council is through a cognitive lens. We can observe that even where the facts about a situation are known or could easily be known, assessments by state representatives are influenced by biases as well as politically and ideologically motivated reasoning. Research has shown that such cognitive limitations are not reduced due to the fact that the diplomats are *experts* or because factual assessments are embedded in institutional processes.⁸

These constraints taken together mean that powerful actors can often impose their own factual claims on the Security Council as a whole, which also implies that they can get away with lies and factual manipulations to the benefit of themselves or their allies.

3. The Promise of Digital Open-Source Information: Shifts in Fact-Making?

New means to record and distribute information about conflicts brought about by the digital transformation, and the so-called democratisation of fact-making they engendered,⁹ hold the promise to alleviate the constraints just described. Utilising information found on social media, through commercial satellite observation services, or other public sources, the media and other civil society actors now produce factual claims at an unprecedented level of granularity and at an unprecedented temporal proximity to any situation – and they do so with a level of technical sophistication that just a few years ago was available only to the most advanced intelligence agencies. Moreover, the principle of *open verification* that many of these actors adhere to promises a public peer-review process that ensures a new level of transparency in fact-making.¹⁰

In light of these developments, one would expect not only a greater future role for the media and civil society actors in the deliberative process; more importantly, one should assume that

⁵Elihu Lauterpacht, *Aspects of the Administration of International Justice* (Grotius Publications 1991), 43.

⁶See Lahmann (n 4).

⁷Alexandra H Perina, 'Black Holes and Open Secrets: The Impact of Covert Action on International Law' (2015) 53 *Columbia Journal of Transnational Law* 507, 549.

⁸See Joshua D Kertzer, 'Re-Assessing Elite-Public Gaps in Political Behavior' (2022) 66 *American Journal of Political Science* 539; Joshua D Kertzer and others, 'Hawkish Biases and Group Decision Making' (2022) 76 *International Organization* 513.

⁹Molly K Land, 'Democratizing Human Rights Fact-Finding', in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (OUP 2016) 399.

¹⁰Eyal Weizman, 'Open Verification' (*e-flux*, 2018) <<https://www.e-flux.com/architecture/becoming-digital/248062/open-verification/>> accessed 20 October 2024.

this practice can help overcome some of the constraining factors, especially powerful states' privileged access to intelligence, source-dependency, as well as access restrictions. By providing factual narratives with much greater clarity and transparency, the practice also promises to alleviate some cognitive limitations in the assessment of facts. Therefore, by making high-quality information available to more actors, the practice should restructure the process of fact-making at the Security Council, especially when it comes to allegations of state wrongdoing. As Stanley Cohen noted already in 2001, "greater international visibility and transparency have made the more literal forms of denial difficult to sustain. (...) In this latest round of 'telling truth to power', technology is surely on our side."¹¹ Contrary to Cohen, in this article, I ask whether that is actually the case.

4. A Sober Look at the New Realities of Digital Fact-Making

To answer this question, I want to consider one controversial incident that occurred over the course of Israel's military operations in Gaza, namely the large explosion that occurred at al-Ahli Arab Hospital in Gaza City on 17 October 2023, which killed somewhere between a hundred and five hundred Palestinian civilians. It is important to emphasise that responsibility for the incident is undetermined and what actually happened remains disputed. While Israel claims that an errant rocket fired by Islamic Jihad militants is to blame, other sources consider either an Israeli airstrike, an artillery missile, or a misguided Iron Dome projectile the more likely cause of the incident. From our perspective, what is important about this case is how factual claims were made and presented, and how the different state actors responded to them in the Security Council context.

To get a better impression of the changes that have taken hold with the emergence of digital technologies, a comparison can be made with a similarly violent episode that occurred in Sarajevo on 5 February 1994 during the siege of the city by Bosnian Serb forces. What became known as the Markale massacre was the shelling of an open-air market that killed 68 civilians. Then, just as after the al-Ahli incident in Gaza, claims and counterclaims dominated discourse at the United Nations for weeks.¹² With the benefit of hindsight, today it seems obvious that the party responsible for the shelling were the Bosnian Serbs, as ultimately determined by the ICTY in 2006.¹³ However, this is not how the incident was assessed in its immediate aftermath. Because in the absence of any video or other documentary evidence that captured the shelling, all fact-finding efforts, including by UN experts, revolved almost exclusively around the size, shape, and depth of the crater left by the projectile and resulted in widely diverging conclusions. Intelligence services from seven Western states even established independently of each other that the shelling had been carried out by Bosnian Muslims to blame the Serbs and to prompt NATO to intervene on their behalf.¹⁴ The assessments had a discernible impact on subsequent deliberations at the Security Council, where almost only Muslim-majority states expressed conviction that the Serbian forces were to blame, while Western representatives mainly cited the indeterminacy of available evidence.

In comparison, the atrocity at al-Ahli should have been an object lesson for the power of digital open-source information. Within hours of the incident, various media organisations engaged in inquiries into its cause by utilising audio-visual material obtained from public sources. In

¹¹Stanley Cohen, *States of Denial* (Polity Press 2001) 105, 185 f.

¹²Mark Danner, 'Bosnia: The Turning Point' (1998) 45 *The New York Review of Books* <<https://www.nybooks.com/articles/1998/02/05/bosnia-the-turning-point/>> accessed 26 February 2024.

¹³*Galić Case* (Appeals Judgment) ICTY-98-29-A (30 November 2006).

¹⁴Nederlands Instituut voor Oorlogsdocumentatie, 'Srebrenica: A "Safe" Area. Appendix II: Intelligence and the War in Bosnia 1992–1995: The Role of the Intelligence and Security Services' (2002) 61.

response, the IDF maintained that both the absence of a visible crater large enough to have been produced by one of Israel's weapons and the videos capturing a rocket proved beyond doubt that Palestinian militants were responsible. The IDF additionally released the allegedly intercepted recording of a phone conversation between Hamas operatives that seemed to confirm that the Palestinians themselves were aware of a malfunctioning rocket as the cause of the explosion.¹⁵

Yet in the days and weeks that followed, many of these factual claims were disproven by the media and civil society groups. For example, a report by the New York Times challenged the claim that the rocket visible in the video footage could have caused the explosion, a conclusion that was later backed up by a detailed investigation by Forensic Architecture.¹⁶ Audio analysis conducted by Forensic Architecture and UK Channel 4 within days disproved the alleged authenticity of the released audio recording.¹⁷ At the same time, Hamas not only never delivered on its announcement to publicly display fragments of the projectile but also soon started claiming that the missile had "dissolved like salt in the water".¹⁸ Again, responsibility for the incident remains undetermined, and the hypothesis of a failing Islamic Jihad rocket remains plausible. However, what we can say is that the various contested claims and counterclaims, and the response to them at the diplomatic level, suggest that we have not at all entered a new era of transparency and clarity in fact-making.

5. The Perils of Digital Aestheticism

I will offer three observations to explain why this new era has not materialised. First, the incident at al-Ahli has exposed the limits of the principle of "open verification". The investigative techniques on display have quickly become so complex that they are increasingly difficult to comprehend by anyone but forensic experts – just consider the pristine architectural renderings created by Forensic Architecture to show the likely point of origin and trajectory of the rockets in the video material.¹⁹ Such complexities mean that the audience is left in a position to either believe or doubt what they are being presented with, without any real means to verify claims themselves.

Second, states have quickly adapted to the new reality by emulating the aesthetic language of open-source investigations. In doing so, they flood social media platforms and traditional media outlets with a constant stream of audio-visual material that is now routinely equipped with coloured squares and other aesthetic markers of open-source investigative work. This forces investigators to get bogged down in a strenuous effort to evaluate and disprove claim after claim, for example the obviously faked phone call, while the communicative strategy casts

¹⁵'Israel-Hamas War: IDF Releases Audio Claiming to Be Conversation between Hamas Militants about Hospital Explosion' (*Sky News*, 18 October 2023) <<https://news.sky.com/video/israel-hamas-war-idf-releases-audio-claiming-to-be-conversation-between-hamas-militants-about-hospital-explosion-12986860>> accessed 20 October 2024.

¹⁶Aric Toler and others, 'A Close Look at Some Key Evidence in the Gaza Hospital Blast' (*The New York Times*, 25 October 2023) <<https://www.nytimes.com/2023/10/24/world/middleeast/gaza-hospital-israel-hamas-video.html>> accessed 2 July 2024.

¹⁷'Hamas Says It Has Released Two American Hostages Being Held in Gaza' (*Channel 4 News*, 20 October 2023) 5:33 <<https://www.youtube.com/watch?v=qeP9vFrTEzI>> accessed 20 October 2024

¹⁸Patrick Kingsley and Aaron Boxerman, 'Hamas Fails to Make Case That Israel Struck Hospital' (*The New York Times*, 23 October 2023) <<https://www.nytimes.com/2023/10/22/world/middleeast/israel-gaza-hospital-evidence.html>> accessed 19 October 2024.

¹⁹Forensic Architecture, 'Israeli Disinformation: Al-Ahli Hospital' (*Forensic Architecture*, February 2024) <<https://forensic-architecture.org/investigation/israeli-disinformation-al-ahli-hospital>> accessed 22 February 2024.

doubt on any emerging narrative of the incident because, as Linda Kinstler has noted, “the very labor of responding to the lie can legitimate its premise”.²⁰

Third, although open-source investigations can help overcome some of the discursive constraints, such as source-dependency and privileged access to information, we can observe, perhaps not so surprisingly, that both cognitive and structural limitations persist. A look at how deliberations at the Security Council played out after the incident shows that in situations where conflicting factual accounts, all seemingly backed up by digital evidence, support opposing positions, the efforts by investigators merely managed to bolster a further entrenchment of pre-existing political and ideological positions.²¹ The ambiguity of digitally mediated “facts” allowed each participant to see exactly what they needed to see to arrive at predetermined conclusions. The most conspicuous actor turned out to be the United States, which reverted to claiming privileged access to determinative knowledge gained from its intelligence services “based on analysis of overhead imagery, intercepts and open-source information”,²² none of which it disclosed to the forum. A week after the incident, the U.S. furthermore pointed to the existence of a *different* audio recording it had obtained from Israel, which it claimed was verifiably authentic and proving the Islamic Jihad’s culpability beyond doubt but that unfortunately and unlike the first fake one could not be shared with the public.²³ At the same time, the U.S. frustrated all calls made by other states, including China, Russia, and France, to initiate an independent international fact-finding inquiry into the incident as not “appropriate at this time”.²⁴

6. Conclusion

In conclusion, despite the ubiquity of open-source information and the impressive investigative work done by civil society organisations, whose emancipatory potential is not in dispute, when it comes to fact-making among states outside of judicial settings, and in the context of the Security Council in particular, we see continuity rather than disruption. What is most concerning about this development is that we see in this work an increasing fetishisation of digital aestheticism that breaks conflicts down into a string of individual instances of outrage that ultimately risks detracting from the larger picture. The described case shows that instead of acting as catalysing events for change, this shift in focus enables states – either because they are themselves powerful enough or because they have a powerful ally at the Security Council – to dismiss every single one of them by pointing to the inconclusiveness of evidence available in the public domain, both evading accountability and stifling any reasonably informed collective decision-making at the Council.

²⁰Linda Kinstler, ‘Weaponization and Denial’ (*Jewish Currents* 2024) <<https://jewishcurrents.org/weaponization-and-denial>> accessed 22 February 2024.

²¹During deliberations at the Security Council in the aftermath of the incident, only the United States and Israel explicitly blamed the Islamic Jihad. Jordan, Egypt, Oman, Libya, Tunisia, Algeria, Pakistan, South Africa, Syria, Iraq, Iran, Lebanon, Bolivia, Bangladesh, and the Maldives blamed Israel. While Russia, Ghana, Switzerland, France, United Arab Emirates, Pakistan, South Africa, Albania, Malta, China, Slovenia, Mexico, and Sierra Leone called for an independent international inquiry, the United States, Israel, and the United Kingdom claimed they were each carrying out their own investigations; see UN Doc. S/PV.9443 (18 October 2023), UN Doc. S/PV.9451 (24 October 2023).

²²UNSC Verbatim Record (18 October 2023) UN Doc S/PV.9443, 14.

²³Jeff Seldin, ‘US Sharing Intelligence Exonerating Israel in Hospital Blast’ (*Voice of America*, 24 October 2023) <<https://www.voanews.com/a/us-sharing-intelligence-exonerating-israel-in-hospital-blast/7325420.html>> accessed 14 February 2024.

²⁴‘State Department Daily Briefing’ (*C-SPAN*, 19 October 2023) <<https://www.c-span.org/video/?531253-1/state-department-daily-briefing>> accessed 20 March 2024.

To emphasise this danger that is inherent in this new practice of open-source investigations, I will end with a quote from the Dutch representative at the Security Council. In 1994, he said the following about the Markale massacre:

“Whatever the outcome of the ongoing inquiry into the carnage of 5 February – and I am afraid it is bound to be inconclusive – we have to keep in mind that during the past 22 months thousands upon thousands of innocent people have been killed, maimed or wounded in exactly the same way, and we know exactly who is responsible for the vast majority of these cases: nobody but the Bosnian Serbs. Who did it on 5 February is in relation to the immense suffering caused so far, almost irrelevant.”²⁵

²⁵UNSC Verbatim Record (14 February 1994) UN Doc S/PV.3336 (Res. 1), 134.