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Building Effective Monitoring, Reporting, and
Fact-finding Mechanisms

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HPCR AND PROJECT BACKGROUND

The Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR) is a research and policy program based at the Harvard School of Public Health in Cambridge, Massachusetts. The Program is engaged in research and advisory services on humanitarian operations and the protection of civilians in conflict areas. The Program advises organizations such as the United Nations, governments, and non-governmental actors, and focuses on the protection of vulnerable groups, conflict prevention, strategic planning for human security, and the role of information technology in emergency response. The Program was established in August 2000 in close cooperation with the Government of Switzerland and the United Nations.

This Working Paper presents HPCR's research to date on dilemmas faced by international actors engaged in the creation and implementation of monitoring, reporting, and fact-finding (MRF) mechanisms. This Working Paper aims to provide HPCR's analysis of the current state of MRF missions and to suggest key areas for future research and policy engagement.

The "Monitoring, Reporting, and Fact-finding" Project is a multi-year initiative geared toward, at the outset, conducting scientific research on past and current MRF mechanisms. Ultimately, HPCR aims to assemble a Group of Professionals, composed of expert MRF practitioners, to participate in the creation of the Draft Guidelines on Crafting MRF Mandates and the Recommendations for Implementation. This manual will offer guidance on all aspects of creating and implementing MRF mechanisms. Through the creation of this manual, HPCR aims to aid the international community's endeavor to protect vulnerable citizens in armed conflicts and hold violators of international law accountable.

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I. INTRODUCTION

Since the end of the Cold War, the international community's drive to bolster accountability to international law and protect civilians during situations of armed conflict and internal violence has flourished. As Cold War tensions cooled in the early 1990s, there was "a veritable explosion of interest in international human rights,"¹ as one writer asserts, United Nations (UN) peace operations proliferated,² and international actors created numerous international judicial mechanisms.³ Additionally, the international community has increasingly recognized human security as a pillar of international stability. The United Nations Development Programme (UNDP) popularized this notion in a 1994 report that asserted, "[W]hen human security is under threat anywhere, it can affect people everywhere."⁴ In 1999, the United Nations Security Council (UNSC) began regularly engaging in open debate on protecting civilians in armed conflict.⁵ And at the 2005 World Summit, UN Member States acknowledged the principle of the Responsibility to Protect.⁶ A new sense of responsibility for civilian welfare has arisen.

To activate this sense of responsibility, the international community has mandated and implemented a multitude of monitoring, reporting, and fact-finding (MRF) mechanisms. These mechanisms are the eyes and ears of the international community, allowing international actors to collect information on the vulnerabilities of civilian populations and investigate potential violations of international law. But despite the increasingly important role that MRF plays in the international community's endeavor to enhance accountability and civilian protection, various MRF practitioners — including mandate drafters, commissioners, investigators, and interpreters — note that

¹ Mary Ann Glendon, "The Rule of Law in the Universal Declaration of Human Rights," 2 *Northwestern Journal of International Human Rights* No. 5, 15 (2004).

² Between 1988 and 1992, the United Nations initiated thirteen peace operations, the same number that the United Nations created between 1947 and 1985. See William J. Durch, "Introduction," in The Evolution of UN Peacekeeping, ed. William J. Durch (New York: St. Martin's Press, Inc., 1993), 7-9.

³ These include the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, and the International Criminal Court.

⁴ United Nations Development Programme, "Human Development Report," 1994, p. 34.

⁵ For summaries of UNSC open debates on protecting civilians in armed conflict, see International Coalition for the Responsibility to Protect, "Security Council Open Debates on the Protection of Civilians – Reports and Excerpts from the Twelve Open Debates," available at http://www.responsibilityto-protect.org/index.php?option=com_content&view=article&id=2449

⁶ A/RES/60/1, paras 138 and 139.

a paucity of guidance and a lack of standardization continues to hinder implementation. As one practitioner states, MRF mechanisms “are now routine and expected. This is a positive. But what we could get from them could be much more profound.”⁷

HPCR’s research — including extensive consultations with expert MRF interlocutors, as well as analysis of MRF mandates, MRF reports, and relevant secondary literature — indicates two key areas in need of further research and policy attention. First, despite the breadth of literature on various areas of MRF, academics and policymakers have yet to examine the MRF world as a whole. HPCR’s research indicates a need for a more holistic examination of the world of MRF that draws connections and makes distinctions between different types of MRF mechanisms. Second, little literature exists that examines the process of creating MRF mechanisms. Ad hoc MRF mechanisms — such as fact-finding missions and commissions of inquiry — suffer particularly from this literature gap, and ad hoc MRF mandate drafters and mandatees frequently express a desire for more extensive methodological guidance. This paper aims to fill these research gaps, endeavoring ultimately to present a road map for increasing MRF’s capacity to protect civilians in armed conflict and hold violators of international law accountable.

Section II provides an overview of the world of MRF and surveys existing MRF academic and policy literature. Section III presents a conceptual framework that examines key distinctions between different MRF activities and presents guiding principles applicable to all MRF mechanism types. Examining past MRF practice through the lens of this conceptual framework, Section IV explores the process of creating MRF mechanisms, focusing primarily on ad hoc MRF missions. Section V offers concluding observations and suggests next steps for the MRF community.

II. THE WORLD OF MRF

This section offers an overview of the emergence of MRF over the course of the past century. As this section demonstrates, the trajectory of MRF history has not been linear. Indeed, MRF developments have occurred sporadically and irregularly, and in the post-Cold War era particularly, have arisen with a rapidity with which academics and policy analysts have struggled to keep pace.

⁷ HPCR interview on 9/22/11 with Karen Kenny, Director of the International Human Rights Network, www.ihrnetwork.org.

The history of MRF dates back at least to the first half of the 20th century. In 1913, the Carnegie Endowment for International Peace initiated a commission of inquiry to examine the Balkan Wars of 1912 and 1913, concluding that “there is no clause in international law applicable to land war and to the treatment of the wounded, which was not violated, to a greater or less extent, by all the belligerents.”⁸ In 1931, the League of Nations mandated the Lytton Commission “to study on the spot and to report to the Council on any circumstances which, affecting international relations, threaten to disturb the peace between China and Japan, or the good understanding between them upon which peace depends.”⁹ And during World War II, the Allies created the United Nations War Crimes Commission and the Far East Commission to investigate war crimes committed by Germany and Japan, respectively.¹⁰

Under the UN system, MRF missions continued to arise from a variety of different mandating bodies. The UNSC mandated investigative commissions in Greece (in 1946 and 1947),¹¹ Palestine (in 1948),¹² India and Pakistan (in 1949),¹³ and Indonesia (in 1949).¹⁴ The Organization of American States (OAS) initiated fact-finding missions to investigate Nicaraguan involvement in the 1948 Costa Rican Civil War and tensions between Haiti and the Dominican Republic in 1963.¹⁵ In 1974, Idi Amin attempted to assuage public discontent over his regime’s repression by authorizing a domestic investigation into disappearances.¹⁶ MRF, lacking a centralized mandating body, developed in an ad hoc manner, emerging from different institutional sources.

⁸ Carnegie Endowment for International Peace, “Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars,” 1914, p. 208, available at <http://www.archive.org/stream/reportofinternat00inteuoft#page/208/mode/2up/search/%22the+war+and+international+law%22>

⁹ See Arthur K. Kuhn, “The Lytton Report on the Manchurian Crisis,” 27 *The American Journal of International Law* No. 1, 96 (1933).

¹⁰ See Michael P. Scharf, “The Case for a Permanent International Truth Commission,” 7 *Duke Journal of Comparative & International Law* No. 2, 375 (1997).

¹¹ UNSC Res. 15 (1946) mandated the Commission of Investigation Concerning Greek Frontier Incidents, and UNSC Res. 23 (1947) mandated the Subsidiary Group of the Commission of Investigation Concerning Greek Frontier Incidents.

¹² UNSC Res. 48 (1948) mandated the Truce Commission for Palestine.

¹³ UNSC Res. 39 (1948) mandated the United Nations Commission for India and Pakistan.

¹⁴ UNSC Res. 67 (1949) mandated the United Nations Commission for Indonesia.

¹⁵ Hilde Hey, *Gross Human Rights Violations: A Search For Causes* (Boston: Martinus Nijhoff Publishers, 1995), p. 45; and G. Pope Atkins and Larman C. Wilson, *The Dominican Republic and the United States: From Imperialism to Transnationalism* (Athens, Georgia: University of Georgia Press, 1998), p. 129.

¹⁶ The Commission of Inquiry into the Disappearances of People in Uganda since 25 January was mandated by Legal Notice No. 2 (1974), available at http://www.usip.org/files/resources/collections/truth_commissions/Uganda74-Report/Uganda74-Charter.pdf

This was supposed to change with the creation of the International Humanitarian Fact-finding Commission (IHFFC), established by Additional Protocol I to the Geneva Conventions (AP I) in 1977. The purpose of IHFFC, as the text of AP I states, is to “inquire into any facts alleged to be a grave breach as defined in the [Geneva] Conventions and this Protocol or other serious violation of the Conventions or of this Protocol.”¹⁷ The international community had attempted to establish inquiry mechanisms in the Geneva Conventions of 1929 and 1949. But these procedures could only be activated “[a]t the request of a Party to the conflict” and “in a manner to be decided between the interested Parties.”¹⁸ The relegation of investigation decisions to the whims of belligerents ensured that these procedures, if used, would remain political in nature. And more importantly, the procedures require agreement between warring parties, a condition that has doomed the mechanisms to irrelevance due to “the difficulty in time of war of reaching agreement between belligerent States,” as the International Committee of the Red Cross (ICRC) Commentary states.¹⁹ As a result, these procedures endure unused.²⁰

The IHFFC could have solved these problems. Many proponents hoped to design a commission that would have compulsory jurisdiction and the right to initiate inquiries.²¹ But the attendees of the 1977 Plenary Meeting of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts — which created the IHFFC — bifurcated into two groups, one that supported a strong commission and another that feared, according to the ICRC Commentary, “an intolerable encroachment on the sovereignty of States.”²² The result, according to one writer, was a commission plagued by “several unattractive birth marks reflecting the struggle that had accompanied its creation.”²³ The IHFFC was not granted the right to initiate inquiries,²⁴ and though States Parties to the treaty can opt to recognize the compulsory competence of the IHFFC in advance,²⁵ inquiries otherwise

¹⁷ Additional Protocol I (1977), Art. 90.

¹⁸ See Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (1929), Art. 30; Geneva Convention I (1949), Art. 52; Geneva Convention II (1949), Art. 53; Geneva Convention III (1949), Art. 132; and Geneva Convention IV (1949), Art. 149.

¹⁹ Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, eds., Commentary on the Additional Protocols, (Geneva: International Committee of the Red Cross, 1987), 632 (internal footnotes omitted).

²⁰ *Ibid.*, p. 1039.

²¹ Frits Kalshoven, “The International Humanitarian Fact-Finding Commission: A Sleeping Beauty?” in Reflections on the Law of War: Collected Essays (Boston: Martinus Nijhoff Publishers, 2007), 214.

²² Sandoz et al., *supra* note 19, at 1044.

²³ Kalshoven, *supra* note 21, at 213.

²⁴ Sandoz et al., *supra* note 19, at 1044.

²⁵ Additional Protocol I (1977), Art. 90(2)(a).

require the consent of all parties concerned.²⁶ In other words, the IHFFC did relatively little to improve upon the inquiry procedures outlined in the Geneva Conventions of 1929 and 1949.

This unfortunate fact became clear in the early 1990s. Twenty States Parties had accepted the competence of the commission, and hence, pursuant to Article 90(1)(b) of AP I, the IHFFC could finally be activated.²⁷ The international community's burgeoning post-Cold War interest in civilian protection and international legal accountability had already manifested with the UN's engagement to end El Salvador's twelve-year civil war. The UNSC had established the United Nations Observer Mission in El Salvador (ONUSAL), the first UN peace operation to include an expressly mandated human rights monitoring component,²⁸ and the UN-brokered Chapultepec Peace Accords established the Commission on Truth for El Salvador (hereafter the El Salvador Commission), the first such commission funded and staffed by the UN.²⁹ The IHFFC's activation coincided seemingly auspiciously with this emerging international trend. But in 1992, when the UNSC decided to address potential international humanitarian law (IHL) violations committed in the former Yugoslavia, the UNSC ignored the IHFFC and established its own ad hoc MRF mission, the Commission of Experts on the Former Yugoslavia (hereafter the Former Yugoslavia Commission).³⁰ As if to accentuate the IHFFC's irrelevance, the United Nations Secretary-General (UNSG) appointed two IHFFC members — Fritz Kalshoven and Torkel Opsahl — to the UNSC's commission.³¹ As the international community continued to engage more deeply in the welfare of civilians in armed conflict, the IHFFC suffered the fate of its Geneva Convention inquiry procedure predecessors. The IHFFC marked not the end of MRF history, but yet another phase, as a diverse world of MRF mechanism types emerged in the wake of the IHFFC's failure.

International institutional and regional developments fueled this increase in MRF efforts. The UN established the Office of the High Commissioner for Human Rights

²⁶ Additional Protocol I (1977), Art. 90(2)(d).

²⁷ Kalshoven, *supra* note 21, at 214.

²⁸ S/RES/693 (1991), para. 2 mandated ONUSAL "to verify the compliance by the parties [the Government of El Salvador and Farabundo Marti Liberation Front (FMLN)] with the Agreement on Human Rights signed at San Jose on 26 July 1990." Previous UN-mandated peace operations had included human rights-related activities, though without explicit human rights mandate language. See generally Katarina Mansson, "The Forgotten Agenda: Human Rights Protection and Promotion in Cold War Peacekeeping," 10 *Journal of Conflict & Security Law* No. 3, 379-403 (2005).

²⁹ Priscilla Hayner, "Fifteen Truth Commissions—1974 to 1994: A Comparative Analysis," 16 *Human Rights Quarterly* No. 5, 599 (1994).

³⁰ Kalshoven, *supra* note 21, at 215.

³¹ *Ibid.*

(OHCHR);³² initiated a process of integrating OHCHR human rights and IHL monitoring missions with peace operations led by the Department of Peacekeeping Operations (DPKO);³³ and established the United Nations Human Rights Council (UNHRC), which expanded the Special Procedures of the UNHRC's predecessor, the United Nations Commission on Human Rights (UNCHR), initiated the Universal Periodic Review (UPR), and has mandated numerous OHCHR-led commissions of inquiry.³⁴ Additionally, in 2005, the UNSC created the 1612 MRM to monitor violations against children in armed conflict,³⁵ in 2009 and 2011 expanded the mechanism,³⁶ and in 2010, encouraged the UNSG to initiate a listing mechanism for "parties that are credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence in situations of armed conflict on the Security Council agenda."³⁷

At the regional level, the African Union (AU) and the OAS, under the respective auspices of the African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights, mandated various human rights Special Rapporteurs. The Arab League began conducting ad hoc MRF missions, namely, to Darfur in 2004 and the Occupied Palestinian Territories in 2009. And the European Union (EU) began conditioning its Generalised System of Preferences (GSP), which

³² A/RES/48/141, passed by the United Nations General Assembly (UNGA) in December 1993, established OHCHR.

³³ The 2000 Report of the Panel on United Nations Peace Operations, commonly known as the Brahimi Report, states, "If United Nations operations are to have effective human rights components, OHCHR should be able to coordinate and institutionalize human rights field work in peace operations; second personnel to Integrated Mission Task Forces in New York; recruit human rights field personnel; organize human rights training for all personnel in peace operations, including the law and order components; and create model databases for human rights field work." See A/55/305-S/2000/809, para. 244.

³⁴ See A/59/565, para. 283, in which, in 2004, the High-Level Panel on Threats, Challenges and Change asserted of the UNCHR that its "capacity to perform these tasks [promoting human rights, responding to violations in specific countries and assisting countries in building their human rights capacity] has been undermined by eroding credibility and professionalism." The UNGA created the UNHRC with A/RES/60/251 in 2006.

³⁵ S/RES/1612 (2005) established the MRM to monitor and report on the following six violations against children in armed conflict: killing or maiming of children, recruitment or use of child soldiers, rape and other forms of sexual violence against children, abduction of children, attacks against schools or hospitals, and denial of humanitarian access to children.

³⁶ Originally, the 1612 MRM monitored all six violations but only in countries in which "recruitment and use of child soldiers" had occurred, thus allowing this violation to function as a 'trigger.' S/RES/1882 (2009) added both "killing and maiming of children" and "rape and other sexual violence against children" to the list of triggers. S/RES/1998 (2011) added "attacks on schools and/or hospitals" to the list of triggers.

³⁷ S/RES/1960 (2010), para. 3.

offers developing countries low tariffs or completely duty-free imports,³⁸ on respect for human rights. In 1996, the EU suspended GSP privileges for Myanmar after investigating forced labor practices in the country, and in 2009, the EU suspended these privileges for Sri Lanka after investigating human rights abuses committed by the government during the Sri Lankan Civil War.³⁹

Since MRF continually emerges from various sources and assumes multiple forms, academic and policy literature on MRF exists in a fractured state. Some areas of MRF — including UN peace operations,⁴⁰ the UNHRC Special Procedures,⁴¹ truth commissions,⁴² and the 1612 MRM⁴³ — have been the subject of relatively intensive academic and policy analysis. In contrast, existent policy literature on ad hoc MRF missions is minimal. Though some MRF practitioners have written about their experiences and impressions of particular ad hoc MRF missions,⁴⁴ little comparative

³⁸ See generally European Commission, “The European Union’s Generalised System of Preferences,” 2004, available at http://trade.ec.europa.eu/doclib/docs/2004/march/tradoc_116448.pdf

³⁹ For Myanmar, see “Council Regulation (EC) No. 552/97 of 24 March 1997,” available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R0552:20080826:EN:PDF>; for Sri Lanka, see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=515>

⁴⁰ See United Nations Department of Peacekeeping Operations and Department of Field Support, “United Nations Peace Operations: Principles and Guidelines,” 2008; United Nations Department of Peacekeeping Operations and Department of Field Support, “A New Partnership Agenda: Charting a New Horizon for UN Peacekeeping,” 2009; Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs of the United Nations, “Protecting Civilians in the Context of UN Peacekeeping Operations,” 2009; and “Civilian Capacity in the Aftermath of Conflict,” A/65/747-S/2011/85.

⁴¹ See in particular *The International Journal of Human Rights*, Vol. 15, Issue 2, 2011, a special issue devoted entirely to UNHRC Special Procedures.

⁴² Hayner, *supra* note 29; and Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001).

⁴³ See, in particular, Foreign Affairs and International Trade Canada, “Ending Abuses Against Children in War: Implementing United Nations Security Council Resolution 1612,” 2006; Humanitarian Practice Network, “Full of Promise: How the UN’s Monitoring and Reporting Mechanism can Better Protect Children,” Network Paper Number 62, September 2008; Watchlist on Children and Armed Conflict, “UN Security Council Resolution 1612 and Beyond: Strengthening Protection for Children in Armed Conflict,” May 2009.

⁴⁴ For examples, see generally Philip Alston, “The Darfur Commission as a Model for Future Responses to Crisis Situations,” 3 *Journal of International Criminal Justice* No. 3 (2005); Arthur Lenk, “Fact-Finding as a Peace Negotiation Tool – The Mitchell Report and the Israeli-Palestinian Peace Process,” 24 *Loyola Los Angeles International & Comparative Law Review* Rev. 289 (2002); and Christine Chinkin, “U.N. Human Rights Council Fact-Finding Mission: Lessons From Gaza,” in *Looking to the Future: Essays on International law in honor of W. Michael Reisman*, eds. Mahnoush H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane, and Siegfried Wiessner (Leiden: Martinus Nijhoff Publishers, 2011), 475-498.

analysis of ad hoc MRF missions exists.⁴⁵ The OHCHR has developed an internal manual on implementing commissions of inquiry but has not made it publicly available. Hence, non-OHCHR ad hoc missions are frequently bereft of even minimal guidance. Additionally, though the UN has produced various manuals on monitoring and fact-finding methodology,⁴⁶ as have numerous non-governmental organizations (NGOs),⁴⁷ the MRF community has not accepted any methodological standards as authoritative. And furthermore, no policy literature to date has examined multiple mechanisms together, and thus, the MRF community has missed an opportunity to learn lessons across various types of MRF mechanisms.

A 2001 statement from Professor M. Cherif Bassiouni, who has led ad hoc MRF missions in the Former Yugoslavia, Libya, and Bahrain, encapsulates this state of affairs:

After fifty years, there is no standard operating procedure for fact-finding missions. Admittedly, any standard operating procedure needs to be tailored to the situation. But no manual exists to describe how an investigation should be conducted and there is no standard, though adaptable, computer program to input collected data. Worst of all, there is no continuity. In short, there is nothing to guide, instruct, or assist the heads and appointees to these missions of how to better carry out their mandates. It strains one's belief that in fifty years the most elementary aspects of standardized organization, planning, documentation, and reporting have not been developed.⁴⁸

⁴⁵ For an example of comparative analysis of ad hoc MRF, see generally Theo Boutruche, "Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice," 16 *Journal of Conflict and Security Law* No. 1 (2011).

⁴⁶ See, in particular, Office of the United Nations High Commissioner for Human Rights, "Training Manual on Human Rights Monitoring," Professional Training Series No. 7, United Nations, 2001; UN World Health Organization, "WHO Ethical and Safety Recommendations for Researching, Documenting and Monitoring Sexual Violence in Emergencies," July 2007; UN Human Rights Council, "Manual of Operations of the Special Procedures of the Human Rights Council," 2008; Office of the High Commissioner for Human Rights, "Evaluating Human Rights Training Activities: A Handbook for Human Rights Educators," Professional Training Series No. 18, United Nations, 2011.

⁴⁷ See, in particular, Amnesty International and CODESRIA, "Monitoring and Investigating Human Rights Abuses in Armed Conflict," 2001; Norwegian Centre for Human Rights, "Manual on Human Rights Monitoring - An Introduction for Human Rights Field Officers," 2008; William G. O'Neill, "Guiding Principles for Human Rights Field Officers Working in Conflict and Post-conflict Environments," Human Rights Law Centre, University of Nottingham, 2009.

⁴⁸ M. Cherif Bassiouni, "Appraising UN Justice-Related Fact-Finding Missions," 5 *Washington University Journal of Law & Policy* No. 35, 40 (2001).

Despite the wealth of MRF literature referenced above, a recent statement by Philip Alston, who has served as an MRF practitioner in a wide array of capacities, including as UN Special Rapporteur on extrajudicial, summary or arbitrary executions, indicates that some of the problems Bassiouni articulated persist:

My sense is that many [fact-finders] don't give enough thought to the different roles they are going to play and how they are going to play them. There is an assumption that there is a sort of standard template and that they are applying that template in their own way. In fact there isn't a template, despite the efforts of various non-governmental groups over the years to come up with guidelines for human rights fact-finding. Different fact-finders will attach different weights to the importance of, for example, first-hand witness interviews, visits on location, forensic and other technical examinations, and the involvement of particular types of expertise ranging from a familiarity with armaments, through scientific and technological expertise, to anthropological or sociological knowledge of how to frame interviews and interpret results. It is telling that a great many fact-finding reports do not contain any section dealing in any detail with the methodology of gathering the information and preparing it for use in the report.⁴⁹

HPCR's research indicates that this lack of standardized methodology and the lack of strategic thinking to which Alston alludes stem from the rapidly evolving nature of the world of MRF. The MRF community, always operating under scarce time and monetary resources,⁵⁰ has been unable to sufficiently scrutinize how MRF mechanisms operate. But as the number, type, and importance of MRF mechanisms grow, filling MRF's research gaps and devising systems for learning lessons from past experiences become increasingly crucial.

III. UNDERSTANDING HOW MRF MECHANISMS FUNCTION

This section addresses the research gap noted above by examining the world of MRF from a bird's-eye view, articulating differences and similarities between distinct MRF

⁴⁹ "The Challenges of Responding to Extrajudicial Executions: Interview with Philip Alston," 2 *Journal of Human Rights Practice* No. 3, 357 (2010) (internal citation omitted).

⁵⁰ "High Commissioner calls 3% UN budget for human rights 'scandalous', in Third Committee Dialogue," *International Service for Human Rights*, October 31, 2011, available at http://www.ishr.ch/general-assembly/1192-high-commissioner-calls-3-un-budget-for-human-rights-scandalous-in-third-committee-dialogue?utm_source=ISHR+Publications+and+News&utm_campaign=0d24a9094e-RSS_Email_Campaign_General_Assembly&utm_medium=email

functions. The section first offers a conceptual framework for distinguishing between MRF’s key strategic objectives. Then, the section examines the costs that arise when MRF actors are uncertain about which strategic objective their mission was designed to pursue. And finally, building on this analysis, the section identifies guiding principles to which MRF actors can adhere to facilitate more effective implementation.

A. The Strategic Objectives of MRF

MRF actors often acknowledge differences between various types of MRF mechanisms. As one MRF actor states, “an ad hoc mission is very different from a peace operation. The commonalities are the exception.”⁵¹ But the MRF community has not devised a systematic framework for understanding these differences. As a result, MRF actors sometimes blur the lines between different MRF activities and misunderstand the mission’s strategic goals, the standard of evidence required, and the nature of their mission’s relationship with its investigative targets. The conceptual framework below divides MRF activities into three distinct categories: monitoring, reporting, and fact-finding.

| Activity | Strategy | Relationship With Alleged Perpetrator | Facts Examined |
|-----------------|-----------------|----------------------------------------------|--------------------------------------------------|
| Monitoring | Prevent | Supportive Dialogue | Contextual Information and Patterns |
| Reporting | Mitigate | Advisory | Specific Incidents |
| Fact-finding | Correct | Investigative | Evidence of Responsibility In Specific Incidents |

All three of these MRF activities share a common core property. Each represents a different method for a mandator — which could be an intergovernmental entity (such as the UNSC or the UNHRC), a regional organization, or a national government — to gather information about potential violations of international law. Hence, each activity represents a different mode through which MRF serves as the mandator’s eyes and ears.

⁵¹ HPCR interview on 11/9/11 with Peggy Hicks, Global Advocacy Director at Human Rights Watch.

However, as the above chart indicates, these three activities have crucial strategic differences. The rest of this section examines these three activities, as well as other mechanism types that fall outside the scope of traditional MRF.

1. Monitoring to Prevent

Monitoring entails examining contextual information in search of patterns that indicate the potential perpetration of international law violations. For example, a drop in the usual number of women who travel daily to a well for water may indicate that women believe themselves to be in danger of gender-based violence.⁵² Similarly, changes in market times and locations may indicate that vendors fear a coming attack.⁵³ Monitoring is preventive, as monitors seek information before violations have occurred and aim to alert the mandator of areas in need of preventive action.

MRF actors undertaking monitoring engage in supportive dialogue with their investigative targets. “It’s important to actively cultivate relationships with local authorities,” states one MRF actor engaged in human rights monitoring.⁵⁴ As another MRF actor notes, “With a good relationship, you can call directly— ‘What’s up with this case?’. Without a good relationship, you can’t.”⁵⁵ Sometimes, the mere presence of monitors can have a preventive effect, and in other cases, building durable supportive relationships with local authorities allows MRF actors to more successfully address IHL and international human rights law (IHRL) issues when they arise.⁵⁶

The MRF mechanism type most commonly associated with monitoring is a peace operation. As noted earlier, in the post-Cold War era, the UN has increasingly integrated human rights and IHL monitoring components into peace operations. This process began upon the recommendation of the Brahimi Report, which in 2000 expressed the notion that “gross violations of human rights” rank among “variables that affect the difficulty of peace implementation.”⁵⁷ Subsequent UN policy analyses — such as the Capstone Document produced in 2008 — also base recommendations on

⁵² HPCR interview on 9/21/11 with Selma Scheewe, Gender Training and Research Officer for MONUC.

⁵³ “Gender and Peacekeeping,” a training document produced by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) (on file with HPCR).

⁵⁴ HPCR interview on 10/4/11 with an anonymous high-level MRF practitioner, name of interviewee on file.

⁵⁵ Head of sub-office, OHCHR, Colombia, as quoted in Liam Mahoney, “Proactive Presence: Field Strategies for Civilian Protection,” Centre for Humanitarian Dialogue, 2006, p. 52.

⁵⁶ *Ibid.*, pp. 49-55.

⁵⁷ “Report of the Panel on United Nations Peace Operations,” 2000, A/55/305-S/2000/809, para. 24.

this assumption,⁵⁸ and recent mandates for UN peace operations further reflect the prevalence of this view. For example, the mandate for the United Nations Mission in the Republic of South Sudan (UNMISS) “[stresses] the need for a comprehensive and integrated approach to peace consolidation that strengthens coherence between political, security, development, human rights, and rule of law activities (...).”⁵⁹ This language suggests that the goal of monitoring is not to gather information for use in accountability measures. Instead, the purported goal is to protect civilians in conflict or post-conflict situations and to help pave the way for political reconciliation processes.

2. Reporting to Mitigate

Reporting entails addressing specific ongoing incidents of international law violations. MRF actors engaging in reporting work in an advisory capacity to endeavor to convince alleged perpetrators to alter their behavior. MRF actors advocate for specific steps that can be taken by their MRF mission, by members of the local and international communities, and by the investigative targets themselves to address ongoing incidents and mitigate the likelihood of future incidents.

MRF mechanisms engaged in reporting assume many forms. The quintessential MRF mechanism type designed to undertake reporting is the UN Special Procedures system. UN Special Procedure mandate holders are mandated, among other responsibilities, to “respond quickly to allegations of human rights violations against individuals or groups” and “advise on the measures which should be taken by the Government(s) concerned and other relevant actors.”⁶⁰ The 1612 MRM also serves a reporting function, for 1612 reports include, among other items, suggestions for providing health and social services to victims, developing community-wide programs to address future incidents,

⁵⁸ The Capstone Document states: “The abuse and violation of human rights is at the heart of most modern conflicts and is also a consequence of them. Many of the worst human rights abuses occur during armed conflict and the protection of human rights must be at the core of action taken to address it. All United Nations entities have a responsibility to ensure that human rights are promoted and protected by and within their field operations. Most United Nations multi-dimensional peacekeeping operations are therefore mandated to promote and protect human rights by monitoring and helping to investigate human rights violations and/or developing the capacity of national actors and institutions to do so on their own. The integration of human rights and the sustainability of human rights programmes should always be a key factor in the planning of multi-dimensional United Nations peacekeeping operations.” See United Nations Department of Peacekeeping Operations and Department of Field Support, “United Nations Peace Operations: Principles and Guidelines,” p. 27, 2008.

⁵⁹ S/RES/1996 (2011), preamble.

⁶⁰ “Manual of the Operations of the Special Procedures of the Human Rights Council,” August 2008.

and persuading violators to alter their behavior.⁶¹ The EU's process for suspending GSP privileges for human rights violators represents another form of reporting. As one writer notes, this procedure is a “[c]arrot” and “[s]tick” approach,⁶² in which the EU aims to work in an advisory capacity with human rights violators to persuade them to bring their behavior into line with IHRL. Additionally, peace operations frequently undertake reporting. Often this process is closely linked with a mission's monitoring activities, for a discovery, while monitoring, of ongoing violations will initiate a process of creating a report that includes recommendations directed toward local security forces, the national government, and the international community.⁶³ Successful monitoring tends to lead to successful reporting, because if, while monitoring, MRF actors build supportive relationships with investigative targets, then, when reporting, MRF actors will be better positioned to successfully advise violators on how to address the incidents that have occurred.

3. Fact-finding to Correct

When fact-finding, MRF actors perform an in-depth examination of specific incidents in order to establish evidence of responsibility. The goal of fact-finding is to present this information to the mandator and recommend measures to be taken by the mandator, governments, non-state-actors, and judicial mechanisms to ensure accountability for the investigated incidents. Thus, fact-finding requires a more comprehensive examination of facts than either reporting or monitoring. Typically, fact-finding occurs in the context of an ad hoc MRF mechanism mandated by the UN, a regional organization, or a national government, often in situations in which other MRF mechanisms have previously engaged in monitoring and reporting.

Fact-finding involves a corrective strategy. MRF actors believe a crime may have been committed and gather data related to the alleged perpetrators. But fact-finding is distinct from evidence-gathering that occurs in the context of a formal judicial process. The primary goal of fact-finding is not necessarily to gather evidence for presentation during a trial but to determine the most effective route for ensuring accountability, a process that sometimes entails determining which judicial forum is best suited to address the relevant incidents. For example, the Darfur Commission found the

⁶¹ “MRM Field Manual: Monitoring and Reporting Mechanism (MRM) on Grave Violations Against Children in Situations of Armed Conflict,” pp. 46-49, April 2010.

⁶² Barbara Brandtner and Allan Rosas, “Trade Preferences and Human Rights,” in The EU and Human Rights, ed. Philip Alston (New York: Oxford University Press, 1999), 717.

⁶³ For example, see “UNMIS Report on the Human Rights Situation During the Violence in Southern Kordofan Sudan,” United Nations Mission in Sudan (UNMIS), 2011, paras 75–75.5.

Sudanese justice system unfit to address incidents examined by the mission, and therefore recommended that the UNSC refer the matter to the International Criminal Court (ICC).⁶⁴ Fact-finders help the mandator determine the most appropriate method of corrective action.

4. Other Mechanism Types

A domain of non-traditional MRF mechanisms falls outside the scope of the classical MRF types examined above. These mechanism types — such as Truth and Reconciliation Commissions and missions geared toward facilitating political dialogues, such as the Sharm el-Sheikh Fact-Finding Committee (hereafter the Mitchell Committee) formed by the United States in 2000 during the Al-Aqsa Intifada — may use some MRF methodologies but have primarily political goals. For example, a Commissioner for the El Salvador Commission described his perception of “[t]he real contribution of the Truth Commission”:

The release of the Report had a very significant psychological impact on the people of El Salvador. While the Peace Accords ended the armed conflict, the Report put the country on the road to healing the emotional wounds that had continued to divide it. The Report told the truth in a country that was not accustomed to hearing it. To be restored to normalcy, El Salvador needed to hear the truth from a source that had legitimacy and credibility.⁶⁵

Similarly, a participant in the Mitchell Committee wrote, “The Committee’s original goals were an introspective attempt to analyze the recent violence and to find a solution to prevent its recurrence,” and “[w]hen it became readily apparent that the violence would continue, the Committee and the parties involved realized that an immediate end to the violence was now their paramount objective.” The Sierra Leone Truth and Reconciliation Commission (hereafter the Sierra Leone TRC) particularly demonstrates the distinction between non-traditional and classical MRF. The Lomé Peace Agreement, which mandated the Commission, also granted amnesty to “all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the signing of the present Agreement.”⁶⁶ The Sierra Leone TRC was not geared toward

⁶⁴ HPCR interview on 9/21/11 with Fannie Lafontaine, Human Rights Officer/Special Assistant to the President on the International Commission of Inquiry on Darfur.

⁶⁵ Thomas Buergenthal, “The United Nations Commission for El Salvador,” 27 *Vanderbilt Journal of Transnational Law* No. 497, 539 (1994).

⁶⁶ Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Article XXVI mandated the commission, Article IX granted the amnesty, available at http://www.usip.org/files/file/resources/collections/peace_agreements/sierra_leone_07071999.pdf

accountability, and in fact, the Commission's reluctance to turn over evidence to the Special Court for Sierra Leone actually hindered accountability efforts.⁶⁷

The classical MRF types examined earlier usually also have conflict-resolution components. The UNSC's 1612 MRM mandate explicitly links the mechanism's goals to conflict resolution, stating "that the protection of children in armed conflict should be regarded as an important aspect of any comprehensive strategy to resolve conflict(...)." ⁶⁸ Similarly, the mandate for the International Commission of Inquiry on Libya (hereafter the Libya Commission), authorized by the UNHRC after the 2011 uprising, "urges the Libyan authorities (...) to promote a peaceful solution ensuring safety for all civilians and stability for the country (...)." ⁶⁹ However, in non-traditional MRF mechanisms, the political process is just as important, if not more important, than the information collected. The function of non-traditional MRF mechanisms is not to be the eyes and ears of the mandator, as with classical MRF mechanisms, but to open a space where facts can be established for dialogue. In classical MRF, the purpose is to provide information to the mandator, and in non-traditional MRF, the purpose is to contribute to a political process.

B. The Costs of Confusion

Two key problems can arise if MRF actors are unclear about their strategic objectives, uncertain about whether they are undertaking monitoring, reporting, or fact-finding, or unsure whether their mission is a classical or non-traditional MRF mechanism. First, MRF actors may incorrectly assess the standard of evidence required to achieve their specific goals. Such an error can be particularly detrimental to an MRF mission if the type of data collected conflicts with other strategic aspects of an MRF mission's activities. For example, as noted above, an MRF actor undertaking monitoring must engage in a supportive dialogue with the mission's investigative targets. An MRF actor who confuses the standard of evidence required and, while monitoring, begins to search for data that indicates evidence of responsibility — which is required in fact-finding but not monitoring — risks damaging the supportive relationship necessary to successfully pursue the preventive strategy of monitoring. Hence, pursuing a standard of evidence that does not correlate to a mission's strategic objectives could jeopardize the mission's work.

⁶⁷ See generally William A. Schabas, "The Relationship between Truth Commissions and International Courts: The Case of Sierra Leone," *25 Human Rights Quarterly* No. 4 (2003).

⁶⁸ S/RES/1612 (2005), preamble.

⁶⁹ A/HRC/RES/S-15/1, para. 6.

The experience of investigators in the Mapping Exercise in the Democratic Republic of the Congo (hereafter the DRC Mapping Exercise) – mandated to examine human rights and IHL violations committed in the DRC between March 1993 and June 2003 – demonstrates such confusion. The DRC Mapping Exercise resembled fact-finding, for the mission was designed to examine international law violations that had already occurred. However, careful scrutiny of the mission’s aims reveals that the exercise was actually designed to engage in reporting. As the mission’s Terms of Reference (TOR) states, “the Mapping Team shall formulate a series of options aimed at assisting the government of the DRC in identifying appropriate transitional justice mechanisms to deal with the legacy of these violations, in terms of truth, justice, reparation, and reform,” indicating the mission’s advisory relationship with its investigative target,⁷⁰ and as the final report states, the mission “neither aims to establish individual responsibility, nor lay blame.”⁷¹ As a result, the mission’s leadership, following the methodology adopted, decided that each fact admitted into the final report had to be confirmed by just two independent, credible sources.⁷² Some investigators, confusing the mission with fact-finding, sought more than two sources, but the mission’s leadership discouraged this practice as unnecessary under the standard of evidence adopted and a waste of time and resources.⁷³

Second, MRF actors may misunderstand the nature of their relationship with their investigative targets. Such confusion can be especially problematic when MRF actors confuse the investigative relationship necessary for fact-finding with the supportive relationship necessary for monitoring (or the advisory relationship necessary for reporting). In 1995, the UNSC mandated the International Commission of Inquiry on Burundi (hereafter the Burundi Commission) “[t]o establish the facts relating to the assassination of the President of Burundi on 21 October 1993, the massacres and other related serious acts of violence which followed (...).”⁷⁴ But as the Commission’s mandate drafter notes, after the mission found both Tutsis and Hutus guilty of genocide, Burundi’s Tutsi-led government opposed the release of the Commission’s

⁷⁰ Terms of Reference for the DRC Mapping Exercise, para. 1.3, available at <http://www.ambarwanda.be/pdf/tor%20drc%20mapping%20exercise.pdf>

⁷¹ OHCHR, “Report of the mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003,” 2010, p. 1, available at http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf

⁷² HPCR interview on 10/4/11 with Luc Cote, Executive Director of the Independent Special Commission of Inquiry for Timor-Leste, Head of the DRC Mapping Exercise.

⁷³ HPCR Cote interview, *supra* note 72.

⁷⁴ S/RES/1012 (1995), para. 1(a).

final report.⁷⁵ In response, the commission “made a political decision that the government of Burundi had to approve the report” and omitted “any mention of Tutsis killing Hutus.”⁷⁶ In other words, though the mission was by design investigative, the Commission opted to strive for a supportive relationship with the Burundi government. As a result, the Commission failed to fulfill its mandate to “establish the facts.”⁷⁷ Conversely, clarity about MRF actors’ mandated activities, their strategic objectives, and their relationships with potential perpetrators facilitates more informed decision-making that better allows MRF actors to effectively fulfill their mandated functions.

C. Guiding Principles

The above conceptual framework suggests a fundamental aspect of MRF mechanisms that is often underemphasized or entirely overlooked in analyses of MRF. All three classical MRF activities — monitoring, reporting, and fact-finding — involve a relationship with an investigative target geared toward shaping that entity’s behavior through a technical data-gathering effort. In other words, MRF mechanisms are fundamentally both political and technical. These two aspects of MRF can complement one another. As one MRF actor states, “the goal is to put pressure on the state to improve the situation,”⁷⁸ and as another asserts, MRF practitioners can “use the technical to move it forward politically.”⁷⁹ Alternatively, these two aspects can conflict with one another. This section examines three guiding principles that can help MRF actors ensure that an MRF mechanism’s technical and political aspects operate in congruence with one another to further accountability, civilian protection, and — in the case of non-traditional MRF types — conflict resolution.

One guiding principle is neutrality. Neutrality entails treating all relevant parties equally when initiating an MRF mechanism, and in particular, at two key points during the MRF-mechanism-creation process. First, neutrality can shape decisions about which situations to examine. Failure to remain neutral at this stage can expose the mandator to critiques of bias and selectivity, thus potentially harming the mandating body’s legitimacy. A 2011 discussion on fact-finding, co-organized by the Permanent Mission of Portugal to the UN and the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), identified “selectivity in terms of what contexts are

⁷⁵ HPCR interview on 9/14/11 with Gregory Stanton, Mandate Drafter for the International Commission of Inquiry on Burundi.

⁷⁶ Ibid.

⁷⁷ Supra note 74.

⁷⁸ HPCR interview on 9/29/11 with Oscar Solera, Human Rights Officer for the United Nations Human Rights Council Commission of Inquiry on Lebanon.

⁷⁹ HPCR Kenny interview, supra note 7.

considered” as a key challenge of UNSC-mandated fact-finding activities.⁸⁰ The EU has also faced critiques for inconsistently applying its GSP trade privilege suspension process. As noted earlier, the European Commission suspended GSP privileges to Myanmar over forced labor practices, but the Commission decided not to take action against Pakistan, despite Pakistan’s record of forced child labor.⁸¹ One writer, citing “the precedent-setting case of the EU’s investigation into forced labour in Burma,” argued that “the Commission must formally announce the initiation of an investigation into forced labour in Pakistan, just as it did in the case of Burma.”⁸² For such writers, the European Commission’s inconsistent application of the process risks undermining the procedure’s overall legitimacy.

Second, after mandators have decided to launch an MRF mission, neutrality can inform the mandate-drafting process. As will be examined in greater detail in the next section, the manner in which mandators frame their mission’s scope — in terms of timeframe and geography, for example — can drastically affect the impact the mission has on relevant parties. A perception that a mission disproportionately focuses on one side at the expense of another can harm the mission’s legitimacy, making it difficult for MRF actors to ensure the relevant parties’ cooperation. Since MRF missions ultimately aim to influence behavior, cooperation is necessary for MRF missions to achieve their aims. Hence, as one writer asserts, “[i]f the mandate is effectively partial with respect to its impact on the parties, the game is up before it has even begun (...).”⁸³

A second guiding principle — perhaps universally acknowledged by the MRF community — is impartiality.⁸⁴ While neutrality affects MRF creation, impartiality affects MRF implementation. Conducting an impartial investigation entails establishing a data-gathering methodology that allows the mission to discover facts about all relevant parties, excepting information only if deemed poor in quality or reliability. Impartiality considerations are crucial in decisions about collaboration with local NGOs. MRF actors emphasize the importance of local NGOs for accessing witnesses

⁸⁰ Permanent Mission of Portugal to the United Nations and OCHA, “Highlights from the Workshop on Accountability and Fact-finding Mechanisms for Violations of International Humanitarian Law and Human Rights Law: The Role of the Security Council — Past and Future,” 2011, available at <http://www.missionofportugal.org/mop/images/documentos/nov0111.pdf>

⁸¹ Brandtner and Rosas, *supra* note 62, at 716.

⁸² International Confederation of Free Trade Unions, “Ending the Menace of Bonded Labour in Pakistan,” 1998, available at <http://www.icftu.org/www/english/els/escl98pakistan.html>

⁸³ Jane Boulden, “Mandates Matter: An Exploration of Impartiality in United Nations Operations,” 11 *Global Governance* No. 2, 155 (2005).

⁸⁴ HPCR interview on 9/29/11 with Kim Carter, Canadian Forces War Crimes Investigation Team Leader providing support for the Former Yugoslavia Commission; HPCR Kenny interview, *supra* note 7.

and victims, because local NGOs are often the first actors on the scene and, by the time MRF actors arrive, “NGOs have already gained trust with victims and witnesses,” as one MRF actor notes.⁸⁵ But other MRF actors warn that local NGOs “try to use you sometimes,”⁸⁶ and hence, MRF actors “must assess whether the objectives of the local groups are in line with” the MRF mission’s goals,⁸⁷ and must “double-check that the NGO is not biased,” for “this could affect the process of identifying victims and witnesses to be interviewed.”⁸⁸

The importance of impartiality permeates UN MRF policy literature. The “Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security” passed by the United Nations General Assembly (UNGA) in 1991 stated that “[f]act-finding missions have an obligation” to “perform their task in an impartial way.”⁸⁹ The Capstone Document asserts that “United Nations peacekeeping operations must implement their mandate without favour or prejudice to any party.” And the “Manual of Operations of the Special Procedures of the Human Rights Council” asserts that “[b]ecause of the sensitivity of many of the issues that arise mandate-holders should be guided in their information-gathering activities by,” among other principles, “impartiality” and “even-handedness.”⁹⁰

However, an often-neglected aspect of impartiality is that its importance arises from the political nature of MRF mechanisms and the thin reed of legitimacy on which MRF mechanisms typically rest. MRF actors note that “no state likes to have a finger pointed at it”⁹¹ and that “a fact-finding mission is an intrusive act and may be resented as unwarranted interference into events deemed to be within the target states’ jurisdiction.”⁹² Thus, states under investigation frequently attempt to delegitimize the MRF mechanisms for which they are investigative targets by launching accusations of bias. Failure to build impartial missions gives investigative target countries “room to

⁸⁵ HPCR interview on 9/12/11 with Janja Pavetic-Dickey, Interpreter for the Former Yugoslavia Commission.

⁸⁶ HPCR interview on 11/2/11 with Christine Cleiren, Commissioner on the Former Yugoslavia Commission.

⁸⁷ HPCR Carter interview, *supra* note 84.

⁸⁸ HPCR interview on 10/17/11 with Theo Boutruche, Legal Expert for the Independent International Fact-finding Mission on the Conflict in Georgia.

⁸⁹ A/RES/46/59, para. 25.

⁹⁰ “Manual of Operations of the Special Procedures of the Human Rights Council,” *supra* note 60, at para. 24. Additionally, A/RES/60/251, which mandated the UNHRC, articulates impartiality as a guiding principle of the UNHRC, see para. 4.

⁹¹ HPCR Solera interview, *supra* note 78.

⁹² Chinkin, *supra* note 44, at 487-488.

maneuver, to criticize,”⁹³ as one MRF notes, and “[i]mpartiality is crucial to maintaining the consent and cooperation of the main parties,” as the Capstone Document asserts.⁹⁴ Impartiality, like neutrality, can help MRF missions to retain the perception of legitimacy on which successful missions depend.

A third guiding principle is independence. Maintaining independence means that the mission’s investigative targets, donors, and mandators cannot affect the course of the investigation. Instead, the mission rests in the hands of mandatees free from outside influence. The political circumstances under which MRF missions operate often tempt MRF actors to sacrifice independence to maintain a perception of impartiality. However, much MRF policy literature warns against this practice. For example, the Capstone Document states:

Notwithstanding the need to establish and maintain good relations with the parties, a peacekeeping operation must scrupulously avoid activities that might compromise its image of impartiality. A mission should not shy away from a rigorous application of the principle of impartiality for fear of misinterpretation or retaliation, but before acting it is always prudent to ensure that the grounds for acting are well-established and can be clearly communicated to all.⁹⁵

The Burundi Commission’s decision to allow the Burundi government’s concerns to shape decisions about the final report’s contents is a particularly salient example of sacrificing independence to maintain amicable political relations with an investigative target. But, as the Capstone Document’s prescriptions indicate, MRF actors who allow political considerations to affect the quality of their data-gathering efforts risk stymying the mission’s potential to achieve its strategic objectives.

Independence is especially challenging for MRF actors engaged in monitoring. Due to the inherently supportive relationship between monitors and their investigative targets, MRF history is replete with examples of monitoring missions that have grown too close to their host state governments. As one writer notes, the “proximity to the government of Chad in 2009” of the United Nations Mission in the Central African Republic and Chad (MINURCAT) “hamstrung its ability to resist government obstructionism.”⁹⁶ Similarly, the joint operations of the United Nations Organization Mission in the

⁹³ HPCR interview on 11/3/11 with Ghanim Al-Najjar, Former UN Independent Expert for Somalia.

⁹⁴ DPKO, *supra* note 58, at 33.

⁹⁵ DPKO, *supra* note 58, at 33.

⁹⁶ Ian Johnstone, “Managing Consent in Contemporary Peacekeeping Operations,” 18 *International Peacekeeping* No. 2, 176 (2011).

Democratic Republic in the Congo (MONUC) “with the armed forces of the DRC, some of the greatest human rights abusers in the country, has undermined the legitimacy of the mission.”⁹⁷ These examples suggest that MRF actors engaged in monitoring should be particularly cautious to strike a balance between maintaining independence and developing the supportive relationships necessary to their work.

The fact that these guiding principles apply to all three MRF activities — monitoring, reporting, and fact-finding — as well as non-traditional MRF mission types indicates fundamental attributes that all MRF mechanisms share. Though different MRF mechanisms employ distinct combinations of monitoring, reporting, and fact-finding activities, all MRF mechanisms are both political and technical and can balance these two aspects by maintaining neutrality, impartiality, and independence.

SECTION IV. THE TWO-PHASE PROCESS OF CREATING MRF MECHANISMS

HPCR’s research indicates that MRF mechanism’s two fundamental attributes — political and technical — are particularly important to consider when creating MRF mechanisms. Regardless of mechanism type, MRF missions are created over the course of two phases — a political Mandate Drafting phase and a technical Design and Planning phase — that represent MRF mechanism’s two fundamental aspects. In the initial Mandate Drafting phase, a mandating body decides to create an MRF mechanism and reaches a consensus on a mandate that articulates the mission’s broad contours. In the second Design and Planning phase, a secretariat staffs the mission and crafts a TOR that more specifically details the mission’s form, and the mission’s leaders legally interpret the mandate and collaborate with the secretariat on making strategic decisions regarding the mission’s implementation. However, the MRF community often overlooks the distinction between these two phases. As with the often-blurred distinction between monitoring, reporting, and fact-finding, the failure to parse out political from technical considerations can lead to ineffective decision-making.

Bearing in mind the strategic objectives and guiding principles articulated in the previous section, this section examines the two-stage process of creating MRF mechanisms. The two stages are: A) Mandate Drafting, and B) Design and Planning. Since, as noted earlier, ad hoc MRF mechanisms in particular suffer from a lack of research attention, this section focuses primarily on ad hoc MRF missions, and incorporates lessons from other MRF mechanism types when applicable.

⁹⁷ Ibid.

A. Mandate Drafting

A mandate is a crucial component of an MRF mechanism, as it forms the legal basis for the entire mission.⁹⁸ For this reason, mission leaders frequently refer to their mandates at every phase throughout their work.⁹⁹ MRF actors note that successful mandates should be both “clear and flexible,”¹⁰⁰ articulating intelligible and manageable directives while also allowing commissioners sufficient interpretive leeway to shape their missions based on logistical, technical, and political considerations that emerge throughout the implementation process. As one MRF actor asserts, “If a mandate is clear, then the work is clear. If the mandate is murky, then it may be difficult to reconcile different positions among the commissioners.”¹⁰¹ But as another states, “since decisions to create commissions of inquiry are political, this can lead to grey areas in the mandates that reflect political compromise rather than an effort to create a mandate that corresponds with complete precision to the situation under investigation.”¹⁰² Because of the political compromises usually necessary to reach consensus within a mandating body, and due to the relative lack of technical expertise among mandators (compared with commissioners, investigators, and monitors), specific details about a mission’s implementation are generally best left to the Design and Planning phase. But HPCR’s survey of MRF mandates indicates four key areas that successful mandates address: the targeted situation, the targeted parties, the targeted actions, and the intended audience. Each of these areas presents mandators with an opportunity to strike a balance between focusing the attention of mandatees on the mandators’ primary areas of concern and leaving mandatees the flexibility to make specific technical decisions.

⁹⁸ The “Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security” asserts that “[f]act-finding missions have an obligation to act in strict conformity with their mandate (...).” See A/RES/46/59, para. 25.

⁹⁹ HPCR Interview on 11/22/11 with an anonymous high-level MRF practitioner, name of interviewee on file.

¹⁰⁰ HPCR Carter interview, *supra* note 84.

¹⁰¹ HPCR Interview on 9/29/11 with Roberto Ricci, Chief of Peace Mission Support and Rapid Response Unit for OHCHR; The “Declaration on Fact-Finding by The United Nations in the Field of the Maintenance of International Peace and Security” asserts that “[t]he decision by the competent United Nations organ to undertake fact-finding should always contain a clear mandate for the fact-finding mission and precise requirements to be met by its report.” See A/RES/46/59, para. 17.

¹⁰² HPCR Interview on 10/6/11 with Ben Majekodunmi, Chief of Human Rights Section for MINUSTAH.

1. Targeted Situation

By articulating the targeted situation, mandators focus mandatees on the specific context that the mandating body wishes to address. The key challenge in framing the targeted situation is to include sufficient specificity while also granting mandatees a certain degree of investigative leeway. For example, the International Independent Investigation Commission (IIIC), established by the UNSC after the assassination of Rafiq Hariri, was mandated to cover “all aspects of this terrorist attack.”¹⁰³ Similarly, the International Commission of Inquiry on Guinea (hereafter the Guinea Commission), mandated by the UNSG to investigate the Government of Guinea’s crackdown on protesters in Conkary in 2009, also mandated inquiry into “related events in their immediate aftermath.”¹⁰⁴ This language granted mandatees the ability to select incidents they deemed contextually appropriate. Conversely, a too narrow scope could lead a commission to suffer the fate of the 1985 Uruguayan Investigative Commission on the Situation of ‘Disappeared’ People and its Causes, which has been criticized for ignoring widespread incidents of torture.¹⁰⁵

Additionally, HPCR’s research indicates that establishing the targeted situation entails two key aspects — temporal scope and geographic scope — both of which are examined below. The temporal scope delineates the time span of the situation that the mission will examine. MRF practice demonstrates the importance of crafting a temporal scope that allows implementers to examine all contextually relevant incidents. The Independent International Fact-finding Mission on the Conflict in Georgia (IIFMCG) mandate specifies an inclusive temporal scope by asserting that the “time span of the investigation will be sufficiently broad to determine all the possible causes of the conflict.”¹⁰⁶ But other MRF actors have encountered problems related to temporal scope. The United Nations Independent Expert on Somalia repeatedly called for a UNSC-authorized ad hoc MRF mission to Somalia and insisted that the temporal scope stretch back to 1991 to include massacres that followed the collapse of the government of Siad Barre.¹⁰⁷ Otherwise, he believed the mission “would be looked at as biased.”¹⁰⁸ Opposition to this broad temporal scope played a role in the international community’s resistance to the commission, and the proposal was never adopted.¹⁰⁹ Ad hoc MRF

¹⁰³ S/RES/1595 (2005), para. 1.

¹⁰⁴ S/2009/556, para. 2.

¹⁰⁵ Hayner, *supra* note 29, at 616.

¹⁰⁶ “Report of the Independent International Fact-Finding Mission on the Conflict in Georgia,” Vol. I, p. 3, 2008.

¹⁰⁷ HPCR Al-Najjar interview, *supra* note 93.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

investigators in the Democratic Republic of the Congo (DRC) have repeatedly encountered host government resistance based in part on government concerns about temporal scope, and in 1998, the UNSG broadened his Investigative Team's temporal scope in an effort to gain the cooperation of the DRC government.¹¹⁰

Some mandates avoid these issues by providing no temporal scope. For example, the mandate for the Libya Commission authorizes the mission "to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya" without specifying a time span.¹¹¹ Similarly, the Darfur Commission mandate authorizes the mission "to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties" and indicates no temporal scope.¹¹² However, both of these mandates provide contextual suggestions of a temporal scope. The Libya Commission mandate focuses clearly on the 2011 uprising by, among other statements, expressing "deep concern at the deaths of hundreds of civilians and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan Government (...)."¹¹³ The Darfur Commission mandate clearly focuses on reconciliation efforts between the Sudanese government and armed opposition groups.¹¹⁴ Though these contextual indicators do not offer precise temporal limitations, they offer guidance to mandatees in making this determination. Without this guidance, mandatees might not know, or might misunderstand, their mandators' primary area of concern.

The geographic scope alerts implementers to the territorial limitations of the situation being examined. As with temporal scope, mandators must be careful to craft a

¹¹⁰ According to the Secretary-General's Report, the Government of the DRC "urged that the mandate be extended back to 1 March 1993, in order to include: the ethnic violence which, from that time, pitted self-styled 'indigenous' Zairians, originally supported by the Forced Armées Zaïroises (FAZ), against Zairians of both Hutu and Tutsi origin, as well as subsequent developments (...). In response to the Government, [the Secretary-General] extended the period under investigation back to 1 March 1993." See "Letter Dated 29 June 1998 from the Secretary-General Addressed to the President of the Security Council," S/1998/581.

¹¹¹ A/HRC/RES/S-15/1, para. 11.

¹¹² S/RES/1564 (2004), para. 12.

¹¹³ A/HRC/RES/S-15/1, preamble.

¹¹⁴ In the Darfur Commission mandate, the UNSC "[d]eclares its grave concern that the Government of Sudan has not fully met its obligations noted in resolution 1556 (2004) and the 3 July Joint Communiqué with the Secretary-General to improve, as expected by the Council, the security of the civilian population of Darfur in the face of continued depredations, and deplores the recent ceasefire violations by all parties, in particular the reports by the Cease Fire Commission of Government of Sudan helicopter assaults and Janjaweed attacks on Yassin, Hashaba and Gallab villages on 26 August 2004 (...)." S/RES/1564 (2004), para. 1.

geographic scope that allows implementers to examine all significant incidents relevant to the conflict in question. A poorly crafted geographic scope, like a poorly crafted temporal scope, can cause an investigation to have actual and perceived impartiality problems.

Mandators frequently confine the geographic scope to the territory of a single country. For example, the Former Yugoslavia Commission mandate confines its scope to “the territory of the former Yugoslavia,”¹¹⁵ the Rwanda Commission mandate to violations “committed in Rwanda,”¹¹⁶ and the Libya Commission mandate to incidents “in the Libyan Arab Jamahiriya.”¹¹⁷ However, in some circumstances, a broader geographic scope is necessary for a comprehensive investigation. The IIFMCG mandate states that “[t]he geographical scope (...) of the investigation will be sufficiently broad to determine all the possible causes of the conflict.”¹¹⁸ And, as with temporal scope, some mandates articulate no geographic scope. For example, the Sierra Leone TRC mandate states that the Commission’s task “is to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lome Peace Agreement,” but expresses no territorial restriction.¹¹⁹ However, the mandate does include a specific temporal scope (beginning in 1991) and a strong contextual indicator (the Sierra Leonean conflict) to guide scope determination. Thus, the mandate authorized implementers to examine incidents not just within Sierra Leone but also in neighboring countries, as long as the incidents fell within the mandated timeframe. The key, as with temporal scope, is to focus mandatees’ investigative efforts while allowing them a certain degree of freedom to select incidents that arise as significant during their data gathering effort.

2. Targeted Parties

By articulating the parties about whom the mandatees will collect data, the mandators determine whose violations (or potential violations) the MRF mechanism will examine. The clear articulation of this element is crucial to a mission’s success, for a well-defined scope can lead to a thorough, impartial data gathering effort, but a poorly crafted scope can lead to political and technical obstacles.

¹¹⁵ S/RES/780 (1992), para. 2.

¹¹⁶ S/RES/935 (1994), para. 2.

¹¹⁷ A/HRC/RES/S-15/1, para. 11.

¹¹⁸ Georgia Commission Report, *supra* note 106.

¹¹⁹ “The Truth and Reconciliation Commission Act,” Part III, para. 6(a), 2000, available at <http://www.sierra-leone.org/Laws/2000-4.pdf>

Most MRF mandates focus mandatees' investigative efforts on all relevant governments and armed groups involved in the conflict in question. For example, the Darfur Commission mandate authorizes the mission "to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties (...)." ¹²⁰ However, MRF actors encounter difficulties when working with one-sided mandates, for a mandate that excludes certain relevant parties from an investigation can affect the mission's impartiality. As the commissioners of the Commission of Inquiry on Lebanon (hereafter the Lebanon Commission) — mandated by the UNHRC after the 2006 Lebanon War to investigate Israel but not Hezbollah — stated in their final report, "any independent, impartial and objective investigation into a particular conduct during the course of hostilities must of necessity be with reference to all the belligerents involved." ¹²¹ However, the report continues, "the Commission is not entitled, even if it had wished, to construe it as equally authorizing the investigation of the actions by Hezbollah in Israel," and "[t]o do so would exceed the Commission's interpretative function and would be to usurp the Council's powers." ¹²² As this report indicates, the mandate, as the primary authority for an MRF mechanism, can restrain implementers from undertaking their investigation in an impartial manner.

The perceived legitimacy issues that arise from a one-sided mandate can affect every phase of the implementation process. The Government of Israel identified the one-sided nature of the original mandate of the United Nations Fact Finding Mission on the Gaza Conflict (hereafter the Goldstone Commission), which authorized an investigation of Israel but not Hamas after Operation Cast Lead in 2009, as a reason for Israel's decision not to cooperate with the mission's work. ¹²³ Even though the Goldstone Commission ultimately did investigate violations committed by both sides during Operation Cast Lead, ¹²⁴ critics of the Goldstone Commission still point to the original mandate to argue that the mission was biased. ¹²⁵

¹²⁰ S/RES/1564 (2004), para. 12.

¹²¹ "Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1," A/HRC/3/2, para. 6.

¹²² *Ibid.*

¹²³ The original mandate for the Goldstone Commission authorized the mission "to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression (...)." See A/HRC/RES/S-9/1, para. 14. For Israel's response to the Goldstone Commission, see "Letter from Israel Ambassador Leshno-Yaar to Goldstone," July 2, 2009, available at http://www.mfa.gov.il/MFA/Foreign+Relations/Israel+and+the+UN/Issues/Letter_from_Israel_Ambassador_Leshno-Yaar_to_Goldstone_2-Jul-2009.htm

¹²⁴ In announcing the mission, Ambassador Martin Ihoeghian Uhomobhi, president of the UNHRC, stated that the Goldstone Commission would "[deal] with all violations in an impartial and objective manner." See the transcript of the press briefing held on April 3, 2009, available at

A one-sided mandate can also hinder on-the-ground data gathering efforts. On-the-ground fact-finders must navigate sensitive political terrain, perpetually endeavoring to keep diplomatic peace with local authorities and armed groups to ensure continued access to territory. For example, the Former Yugoslavia Commission repeatedly found its work interrupted by ad hoc restrictions imposed by local authorities and armed groups. In an effort to gain access to a Serb-perpetrated massacre site at Ovčara, the Commission decided, as its report states, “as a matter of balance, the Commission would attempt to excavate a second mass grave site in Sector West that was believed to contain Serb victims at essentially the same time as it conducted the Ovčara excavation.”¹²⁶ Thus, in an effort to secure access to territory, the Commission sought to ensure investigative balance in terms of the mission’s targeted parties. A one-sided mandate would have deprived investigators of this option and made negotiations for territorial access more challenging.

Additionally, since accurate assessments of violations of IHL require examination of the behavior of all relevant parties, a one-sided mandate can deprive commissioners of the ability to make accurate legal assessments. As one writer noted of the Lebanon Commission:

In some instances the failure to consider Hezbollah's actions even undermined the Commission’s consideration of Israeli conduct of hostilities, since an intricate understanding of Hezbollah’s command structure, strategic objectives and military operations was essential in determining whether targets destroyed by Israel were military targets and whether the incidental impact on civilians that

<http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm>. Additionally, the Goldstone Report stated that the mission’s mandate was “to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza (...).” See “Report of the United Nations Fact-Finding Mission on the Gaza Conflict,” available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>. Also, Richard Goldstone stated that he had “specifically and explicitly rejected” the original mandate and had “demanded and received a balanced mandate to enable me to investigate allegations of war crimes by all sides.” See Tomer Zarchin, “Goldstone to Haaretz: U.S. does not have to protect Israel blindly,” *Haaretz*, November 13, 2009, available at <http://www.haaretz.com/print-edition/news/goldstone-to-haaretz-u-s-does-not-have-to-protect-israel-blindly-1.4211>

¹²⁵ For example, Israeli Deputy Minister of Foreign Affairs, Danny Ayalon, identified the original one-sided mandate as a justification for Israel’s refusal to cooperate with the Goldstone Commission. See “MFA briefing to the foreign press on the Goldstone Report,” October 1, 2009, available at http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2009/MFA_briefing_foreign_press_Goldstone_Report_1-Oct-2009.htm

¹²⁶ “Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992),” S/1994/674, para. 268.

resulted from the attacks was excessive in relation to the military advantage gained.¹²⁷

Conversely, a mandate that authorizes data-gathering relating to all relevant sides of a conflict provides mandatees with the political and technical tools necessary to thoroughly and accurately undertake their work.

3. Targeted Actions or Behaviors

In addition to articulating the targeted situation and the targeted parties, mandators must also articulate the targeted actions or behaviors (e.g., specific IHL and/or IHRL law violations such as torture, forced disappearances, and indiscriminate attacks on civilians) of the investigation. The most critical aspect of this element is the applicable legal framework, largely because the legal framework guides the manner in which mandatees select incidents for investigation (e.g., an IHL mandate will focus implementers on IHL violations while an IHRL mandate will focus implementers on human rights violations).

Most MRF mandates provide a broad legal scope, such as “grave violations of international humanitarian law,”¹²⁸ as called for in the mandate for the Commission of Experts on Rwanda (hereafter the Rwanda Commission), or “serious abuses and violations of human rights,” as called for in the mandate for the 2011 Independent, International Commission of Inquiry on Côte d’Ivoire (hereafter the 2011 Côte d’Ivoire Commission).¹²⁹ Various MRF experiences indicate that a broad legal scope is desirable and decisions about investigative specifics are best relegated to the technical implementation phase. After the Government of El Salvador and the FMLN failed to agree on a list of incidents to investigate when negotiating the mandate for the El Salvador Commission, the mission’s commissioners concluded that in fact such decisions “could not be made without a careful analysis of the relevant events, the allegations of the Parties, and the information provided to the Commission by victims, their next of kin, and other sources.”¹³⁰ Numerous other MRF actors note that a thorough desk analysis of available data — typically the first step in the implementation phase — is crucial to selecting incidents for investigation.¹³¹ Since mandators usually

¹²⁷ James Stewart, “The UN Commission of Inquiry on Lebanon: A Legal Appraisal,” 5 *Journal of International Criminal Justice* No. 5, 1041 (2007).

¹²⁸ S/RES/935 (1994), para. 1.

¹²⁹ A/HRC/16/L.33, para. 10.

¹³⁰ Buergenthal, *supra* note 65, at 505.

¹³¹ HPCR Cote interview, *supra* note 72; HPCR Chinkin interview, *supra* note 99.

lack the resources and ability to conduct a desk analysis and to thoroughly assess the investigative restraints that arise from logistics, access to territory, and security, mandatees are better positioned to select specific incidents for investigation.

Mandators can also specify particular categories of incidents on which they wish the mission to focus. Peace operations mandates with human rights and IHL monitoring components now include provisions for sexual and gender-based violence as well as violence against children. For example, the mandate for the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) states that the mission is to “[s]upport the efforts of the Government of the Democratic Republic of the Congo to ensure the protection of civilians from violations of international humanitarian law and human rights abuses, including all forms of sexual and gender-based violence” and to “[w]ork closely with the Government to ensure the implementation of its commitments to address serious violations against children (...).”¹³² Such provisions can ensure that those areas receive adequate attention and resources throughout the mission.

Additionally, the interplay between IHRL and IHL presents the world of MRF with dilemmas that are often unaddressed by MRF actors. Several ad hoc MRF missions have accepted the co-applicability of IHL and IHRL,¹³³ and some commissions, even when their mandates have specified only IHRL and not IHL, analyzed facts through the lens of IHL, citing IHL as the *lex specialis* of IHRL during armed conflict.¹³⁴ Certain MRF actors express concern that the MRF community has not sufficiently grappled with the complexities of IHL-IHRL co-applicability. One MRF actor asserts that IHRL experts have been “dragged into addressing allegations of violations in the context of an armed conflict” and “sometimes stretch IHL rules so that it’s a human rights interpretation of IHL.”¹³⁵ Another writer expresses the opposite concern, asking, “Will the moral core of human rights lawyering, and its insistence on the promise of aspirational goals, be lost as these lawyers and scholars immerse themselves in the technicalities of warfighting?”¹³⁶ These dilemmas suggest that IHL and IHRL often establish two fundamentally different relationships between an MRF mission and its investigative

¹³² S/RES/1925 (2010), paras 12(c) and 12(e).

¹³³ Boutruche, *supra* note 45, at 19.

¹³⁴ “Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya,” 2011, A/HRC/17/44, p. 14.

¹³⁵ HPCR interview on 11/16/11 with Theo Boutruche, Legal Expert for the Independent International Fact-finding Mission on the Conflict in Georgia.

¹³⁶ Naz Modirzadeh, “The Dark Side of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict,” 86 *U.S. Naval War College International Law Studies (Blue Book) Series*, 382 (2010).

targets. IHL, as noted earlier, requires examination of the behavior of all relevant parties, and additionally, creates binding obligations on state and non-state actors alike.¹³⁷ IHRL, on the other hand, focuses investigative efforts on the state, since IHRL creates no binding legal obligations on non-state actors.¹³⁸ In this respect, the lens of IHL may actually be more conducive to maintaining a perception of impartiality. And the political nature of these factors suggests that mandators may benefit from engaging more deeply in the issue of IHL-IHRL co-applicability, rather than persisting with the current trend, in which mandators relegate such decisions to the second Design and Planning phase.

Mandates also often request specific legal conclusions, a practice that determines the kind of data that is necessary to gather. For example, the mandate for the Former Yugoslavia Commission requested that the mission present “conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia (...).”¹³⁹ HPCR’s research indicates that, when framing legal questions, mandate drafters should consider what an MRF mechanism can feasibly accomplish in terms of its legal authority. The Darfur Commission mandate asked the Commission “to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable (...).”¹⁴⁰ However, the Commission concluded that it was unable to accomplish this task. Though the Commission did not “rule out the possibility that in some instances *single individuals*, including Government officials, may entertain a genocidal intent,” the Commission declined to identify perpetrators, noting that “it would be for a competent court to make such a determination on a case by case basis.”¹⁴¹ Most commissions have declined to publicly name names, sometimes citing limitations related to the mission’s standard of evidence.¹⁴² In a rare example, the El Salvador Commission decided to

¹³⁷ ICRC, “International Humanitarian Law and the challenges of contemporary armed conflicts,” 2011, p. 14, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>

¹³⁸ Ibid.

¹³⁹ S/RES/780 (1992), para. 2.

¹⁴⁰ S/RES/1564 (2005), para. 12.

¹⁴¹ “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General,” p. 132, available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf

¹⁴² For example, the report of the Libya Commission states, “The commission was able to accomplish its mandate in a relatively short period of time, particularly for a period of ongoing conflict. It considers that further work has to be done in order to investigate fully the numerous allegations it continues to receive at a time when the conflict is still ongoing. Future work would also permit an assessment of the veracity of the allegations received, particularly with regard to the use of mercenaries, the use of child soldiers, sexual violence and violations against migrant workers. Finally, the commission feels that, at this stage, it

identify perpetrators, deeming it necessary to fulfill its mandate to make known “the complete truth.”¹⁴³ However, many MRF actors express concern that naming names deprives alleged perpetrators of due process,¹⁴⁴ which suggests that mandates should refrain from authorizing the public identification of perpetrators.

The issue of naming names highlights the complexities that arise from MRF mechanisms’ quasi-judicial nature. Though missions are often mandated to formulate legal conclusions, MRF missions are, as noted earlier, distinct from formal prosecutorial bodies. Thus, MRF actors must be careful about how they frame their conclusions. As one MRF actor states, “We should never write in a report that there were, for example, crimes against humanity. We should phrase it that there could be, if the facts alleged in the report are proven in a court of law.”¹⁴⁵ The purpose of MRF is not to make definitive legal determinations but rather, as noted earlier, to serve as the eyes and ears of the mandator, providing information that allows the mandating body to determine the most appropriate preventive, mitigative, or corrective actions to address the situation at hand.

4. Intended Audience

Mandates also typically indicate how and to whom the mission should present its findings. The IIFMCG mandate specifies that “[t]he results of the investigation will be presented to the parties to the conflict, and to the Council, the Organization for Security and Cooperation in Europe (OSCE) and the United Nations (UN), in the form of a report.”¹⁴⁶ The 1612 MRM mandate states that the “information compiled by this mechanism” is “for reporting by the Secretary-General to the General Assembly and the Security Council (...).”¹⁴⁷ Recent peace operations mandates establish a tiered system of reporting that authorizes, as demonstrated by the mandate for the United Nations Mission in the Republic of South Sudan (UNMISS), “reporting regularly on human rights and potential threats against the civilian population as well as actual and

is not in a position to identify those responsible, as requested by the Human Rights Council in the resolution establishing its mandate.” “Libya Commission Report,” supra note 134, at 8.

¹⁴³ Buergenthal supra note 65, at 519.

¹⁴⁴ For example, Jose Zalaquett, who served on the Chilean National Truth and Reconciliation Commission, asserted that “[t]o name culprits who had not defended themselves and were not obliged to do so would have been the moral equivalent to convicting someone without due process. This would have been in contradiction with the spirit, if not the letter, of the rule of law and human rights principles.” As quoted in Scharf, supra note 10, at 385.

¹⁴⁵ HPCR Cote interview, supra note 72.

¹⁴⁶ Georgia Commission Report, supra note 106.

¹⁴⁷ S/RES/1612 (2005), para. 6.

potential violations of international humanitarian and human rights law” in addition to “immediately reporting gross violations of human rights to the UN Security Council.”¹⁴⁸

But the majority of mandates remain silent on a key matter: whether the mission’s reports should be made public or kept private.¹⁴⁹ This factor can be crucial to an MRF mission’s success. As various MRF actors assert, ad hoc mechanisms engaging in fact-finding are designed “to bring out the facts and trigger a political intervention to stop human rights abuses [as well as other crimes], to build momentum toward accountability,”¹⁵⁰ and their reports are “used, notably, as advocacy tools”¹⁵¹ — ends that obviously cannot be achieved if reports are kept from the public. For this reason, many MRF actors criticize ad hoc MRF missions that fail to publish their final reports. For example, the 2004 Côte d’Ivoire Commission of Inquiry (hereafter the 2004 Côte d’Ivoire Commission) report has not been released publicly, and various NGOs and other UN entities — including the United Nations Operation in Côte d’Ivoire (UNOCI) and the 2011 Côte d’Ivoire Commission — have argued that this decision contributes to an environment of impunity.¹⁵² MRF actors also debate about how the 1612 MRM can most effectively function. Some MRF actors believe public advocacy (and hence public reports) is more effective while others believe closed-door diplomatic negotiations (and hence private reports) are more effective.¹⁵³

The public-private dilemma illustrates complexities that arise when MRF actors are unclear about their mechanism’s strategic objectives. Though the mandating body is always the mission’s primary audience, in some cases report publication may be a core

¹⁴⁸ S/RES/1996 (2011), para. 3(b)(iii).

¹⁴⁹ One exception is the mandate for the Bahrain Independent Commission of Inquiry (BICI), created by Bahraini royal decree in 2011 to investigate the government’s crackdown on protesters. The mandate specifies that the commission’s final report “shall be made public in its entirety.” See Royal Order No. 28 of 2011, Article Nine, available at <http://www.bici.org.bh/wp-content/uploads/2011/08/RoyalOrder28of2011.pdf>

¹⁵⁰ HPCR interview on 9/23/11 with Martin Seutcheu, Human Rights Officer for OHCHR.

¹⁵¹ HPCR Cote interview, *supra* note 72.

¹⁵² See “Council Hears Reports on Côte d’Ivoire and Syria, Holds General Debate on Human Rights Situations that Require its Attention,” *UN News & Media*, June 15, 2011, available at [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/2E1EEE547145086DC12578B0004B7C2A?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/2E1EEE547145086DC12578B0004B7C2A?OpenDocument); as well as a 2006 report by the United Nations Operation in Côte d’Ivoire (UNOCI), which states, “The failure to consider and make public the 2004 report of the international commission of inquiry on serious violations of human rights has led to questions being raised on the ground, especially by members of civil society, about the value of UN investigations and UN’s commitment to transparency,” available at http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.1313229/k.C896/January_2006brCte_dIvoire_UNOCI.htm

¹⁵³ Watchlist on Children and Armed Conflict, “Getting it Done and Doing it Right: Implementing the Monitoring and Reporting Mechanism on Children and Armed Conflict in Sri Lanka,” 2008, p. 15.

component of an MRF mission's strategy. The 2004 Côte d'Ivoire Commission — like the Burundi Commission examined earlier — is an example of MRF actors lacking certainty about the nature of their relationship with their investigative target. Though the mission engaged in fact-finding (thus entailing an investigative relationship with its host state), MRF actors treated the mission as if it was engaging in reporting (thus entailing an advisory relationship with its host state). Consideration of the conceptual framework presented in the previous section could help guide mandators to more successfully link their technical data-gathering endeavors with their overarching strategic aims.

B. Design and Planning of the MRF Mission

Once the mandating body has authorized a mandate that shapes the mission's broad contours, the Design and Planning phase begins. In this phase, decision-making responsibilities shift from the mandators to the mandatees. The mandators have determined the mission's framework and the implementers now make decisions that, as one MRF actor states, "can put meat on the bones."¹⁵⁴ The nature of the decision-making process shifts from strategic to tactical.

Much of the mechanism's form is determined in the Design and Planning phase, so adept decision-making at this phase is crucial. Furthermore, MRF actors typically execute the Design and Planning phase under severe time restraints. As one MRF practitioner explains, "In an actual mission, there are so many practical considerations that they don't always have time to address conceptual issues."¹⁵⁵ Thus, MRF actors need to properly understand the mechanisms they are creating, so they can make effective decisions quickly. HPCR's research indicates four crucial Design and Planning areas: drafting the TOR, interpreting the mandate, staffing the mission, and determining the mission's investigation methodology. This section will examine each of these areas, highlighting the challenges MRF actors face and examining possible improvements that could enhance MRF effectiveness.

1. Drafting the Terms of Reference

The first crucial step in the Design and Planning phase is drafting the TOR. The function of the TOR, as one MRF actor notes, is "to operationalize the mandate, spell it out, and go into details about the function of the mission, where it will be deployed,

¹⁵⁴ HPCR Cote interview, *supra* note 72.

¹⁵⁵ HPCR Boutruche interview, *supra* note 88.

internal organization, and the decision-making process.”¹⁵⁶ Relegating decisions about the specific form of the mission to the TOR stage carries several benefits, which are examined below.

One benefit of the TOR is that the secretariat — which drafts the TOR and provides the mission with logistical, technical, and personnel support — typically has more on-the-ground experience and expertise than members of the mandating body. The OHCHR has provided secretariat functions for numerous UNHRC commissions of inquiry — in 2011 alone, for missions in Côte d’Ivoire, Libya, and Syria — and has a methodology unit that periodically assesses lessons learned from past experience.¹⁵⁷ The OHCHR can thus build on its experience by “taking a TOR from a previous commission, adapting it, keeping the core function, and using things that were efficient in the previous mission.”¹⁵⁸ Thus, compared to the mandating body, the secretariat, based on its experience, can make more informed decisions on investigative specifics.

A second benefit is that the decision-making process of the secretariat is technical while the decision-making process of the mandating body is political. Members of mandating bodies frequently make political compromises with one another in order to reach consensuses. For example, as the mandate drafter for the Former Yugoslavia Commission writes, in UNSC negotiations leading up to the creation of the commission, the United Kingdom and France wanted the commission to be “a passive group that would analyze and collate information that was passed to them” and “reluctantly agreed to the Commission’s investigative authority only after high level interventions by United States Government officials” but “managed to undermine this authority by insisting that the Commission be funded from existing UN resources rather than include in the resolution a specific budget for the Commission.”¹⁵⁹ Such political maneuvering, if applied to technical considerations such as determining methods of ensuring the protection of interviewees or the ways in which the mission will divide responsibilities among its implementers, could lead to directives that make little technical sense.

A third benefit is that the TOR can be easily adapted if the situation on the ground changes.¹⁶⁰ In contrast, the mandating body, hampered by the often complicated and slow process of reaching political consensus, can less easily respond to rapid on-the-

¹⁵⁶ HPCR interview on 10/14/11 with Martin Seutcheu, Human Rights Officer with OHCHR.

¹⁵⁷ HPCR Ricci interview, *supra* note 101.

¹⁵⁸ HPCR Seutcheu interview, *supra* note 156.

¹⁵⁹ Michael P. Scharf, “Cherif Bassiouni and the 780 Commission: The Gateway to the Era of Accountability,” *An Occasional Paper of the Frederick K. Cox International Law Center*, 6, 2006.

¹⁶⁰ HPCR Seutcheu interview, *supra* note 156.

ground developments. For long-term MRF processes such as monitoring components of peace operations, the slowness with which the mandating body operates can be less problematic. The UNSC successfully revised the mandate for the United Nations Mission in Bosnia and Herzegovina (UNMIBH) in response to on-the-ground needs,¹⁶¹ and after discussions between MONUC and the Government of the DRC, the UNSC revised MONUC's mandate, articulating a plan for eventual withdrawal and changing the peace operation's name to MONUSCO to signify that the operation had entered a new phase.¹⁶² However, ad hoc MRF missions typically operate under tight deadlines and are better served by a freedom of adaptability that does not require authorization from the mandating body.

2. Interpreting the Mandate

Another step in the Design and Planning phase that is crucial to determining the mission's form is the interpretation of the mandate. In practice, this role typically falls to the commissioners. Though mandates do not specify this step in the process, MRF actors widely recognize its significance. As one MRF actor states, interpreting the mandate is "the most important job of the commissioner,"¹⁶³ for mandate interpretation complements the TOR in filling in the gaps left by the mandate's ambiguities.

Some MRF actors have enjoyed unproblematic mandate interpretation processes. An MRF practitioner who worked on the Darfur Commission states, "From a legal standpoint the mandate was not ambiguous. We knew from the mandate that we had to look at IHL, human rights, and genocide. There were no disagreements at this phase."¹⁶⁴ Other MRF actors have had more complex deliberative experiences. Consultants working on the Sierra Leone TRC urged commissioners to interpret their mandate narrowly to replicate the experience of the South African Truth and Reconciliation Commission,¹⁶⁵ but commissioners agreed on a broader scope that, as one

¹⁶¹ The original mandate for UNMIBH, S/RES/1035 (1995), established the UN International Police Task Force (IPTF), whose responsibilities included monitoring of law enforcement activities. S/RES/1103 (1997) and S/RES/1107 (1997) increased the mission's police personnel based on recommendations by the Secretary-General. S/RES/1184 (1998) approved a program to monitor and assess the court system in Bosnia and Herzegovina.

¹⁶² See the mandate of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO): S/RES/1925 (2011).

¹⁶³ HPCR Cote interview, *supra* note 72.

¹⁶⁴ HPCR Lafontaine interview, *supra* note 64.

¹⁶⁵ The report for the Sierra Leone Truth and Reconciliation Commission states, "The mandate of the South African TRC — a model familiar to the Parliament of Sierra Leone when it created the Commission — spoke only of 'gross violations'. This is clearly a much narrower concept than 'violations and abuses'. According to Priscilla Hayner, the South African TRC was criticized for this narrow perspective, in that

commissioner asserts, “led to some good discoveries of grievances relating to economic, social, and cultural rights.”¹⁶⁶ A member of the Former Yugoslavia Commission states, “We spent too much time talking from the start” and as a result, “were criticized as a do-nothing entity. It’s important to take early action to keep support and mobilize additional support.”¹⁶⁷ Thus, the clarity of the mandate, and the speed with which commissioners reach consensus on the mandate’s interpretation, can significantly affect international perceptions of the commission’s efficacy, and as a result, affect the commission’s political significance.

But an unspecific mandate can also be beneficial, as it can offer implementers the opportunity to interpret creatively. The IIFMCG is a salient example of creative mandate interpretation. The IIFMCG’s mandate specified that the goal of the mission was “to investigate the origins and the course of the conflict in Georgia.”¹⁶⁸ The Head of the Mission interpreted this language as encompassing, for example, in-depth legal analyses of both parties’ adherence to *jus ad bellum* law leading to the conflict, as well as Russia’s passportization policy, which entailed Russia issuing passports to numerous residents of South Ossetia and Abkhazia after granting them Russian citizenship.¹⁶⁹ Though the mandate explicitly mentioned neither of these issues, both areas became significant components of the IIFMCG’s report.

The commissioners’ legal analysis is particularly important because it partly determines the nature of the mission’s ultimate recommendations. A statement from the report of the Kyrgyzstan Inquiry Commission (KIC) expresses the interrelationship between the legal frameworks employed, the facts examined, and the accountability measures recommended. As the report states:

Although the KIC was in express terms not to conduct a criminal investigation, which is the “responsibility of the authorities of the Kyrgyz Republic”, it nevertheless considers that its mandate required it to also qualify generally the

this presented a ‘compromised truth’ that excluded a large number of victims from the Commission’s scope.” (internal citations omitted) “Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission,” Vol. I, Chapter One, “The Mandate of the Truth and Reconciliation Commission,” p. 34.

¹⁶⁶ HPCR interview on 9/28/11 with William Schabas, Commissioner on the Sierra Leone Truth and Reconciliation Commission.

¹⁶⁷ HPCR interview on 9/16/11 with William Fenrick, Commissioner on the Former Yugoslavia Commission.

¹⁶⁸ Georgia Commission Report, *supra* note 106.

¹⁶⁹ Georgia Commission Report, *supra* note 106, Vol. II, at 147-183 and 229-294.

crimes committed under Kyrgyz law in order to make appropriate recommendations “on accountability measures.”¹⁷⁰

As the KIC report suggests, a mission’s recommendations flow directly from the applicable legal frameworks. One violation that particularly illustrates this interrelationship is starvation of civilians as a method of warfare. Under the Rome Statute, starvation of civilians is a crime in an international armed conflict (IAC) but not in a non-international armed conflict (NIAC).¹⁷¹ A commission decision to recommend referring an allegation of starvation of civilians to the ICC would thus hinge on the commissioners’ analysis of the classification of the conflict, a sometimes complex assessment.¹⁷²

Another topic that illustrates this interrelationship is the notion of “direct participation in hostilities.” The exact legal parameters of this notion’s definition endure unsettled in certain respects and often divide IHL experts in contentious debates.¹⁷³ To make IHL assessments, though, commissioners may have to make a choice about the definition of “direct participation in hostilities,” thus placing themselves on one side of an unresolved dispute. But to make useful recommendations, commissioners must consider what decisions are likely to be made by relevant courts and tribunals. Thus, commissioners could find themselves in murky terrain in which, because of the unsettled nature of certain areas of the law, they are not only uncertain about how to legally analyze their data but also uncertain about what measures to recommend.

Commissioners may also have to make politically controversial interpretive decisions, some of which may be best made at the mandating phase due to the political sensitivities involved. For example, investigative targets may take issue with an assessment that a situation of internal violence has reached the threshold of a NIAC, for states frequently deny the existence of NIACs, and thus the applicability of IHL, out of a fear of legitimizing armed opposition groups.¹⁷⁴ Some commissioners have grappled with NIAC determinations in relatively unambiguous situations, such as in Guinea in 2009 and Kyrgyzstan in 2010, two cases in which commissioners decided that IHL did

¹⁷⁰ “Report of the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010,” para. 8, 2011.

¹⁷¹ Rome Statute of the International Criminal Court (1998), Art. 8(2)(b)(xxv) and Art. 8(2)(c).

¹⁷² See, for example, Libya Commission Report, *supra* note 134, at 4.

¹⁷³ See generally Michael N. Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis,” 1 *Harvard National Security Journal* 5-45 (2010).

¹⁷⁴ International Committee of the Red Cross, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts,” p. 23, 2007, available at <http://www.icrc.org/eng/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf>

not apply.¹⁷⁵ However, in a non-international context in which the applicability of IHL is ambiguous, the determination could be more politically charged. For this reason, it might be desirable for mandators to clearly articulate in the mandate whether commissioners should apply the lens of IHL. Otherwise, the commissioners, as technical mandatees, may find themselves forced to make politically charged legal interpretations.

3. Staffing the Mission

The Design and Planning phase also entails staffing the mission, a particularly challenging process given the time restraints under which Design and Planning usually occurs. As one MRF actor said of a mission on which he served, “It takes a while to put together a team. Time was lost trying to find the right people.”¹⁷⁶ And another MRF actor states, “You must be able to put trained boots quickly on the ground or you will miss the boat. Professionals trained in investigating international crimes must be the first on the ground in order to maximize the identification, collection, and preservation of the most important information and to minimize the danger to victims and witnesses.”¹⁷⁷ The nature of MRF mechanisms makes finding the right people critical. Since, as examined earlier, strong mandates leave a significant amount of interpretive leeway to mandatees, the mission must be staffed with implementers — including commissioners, investigators, interpreters, and logistical coordinators — who have the expertise and experience necessary to make sound technical decisions. Additionally, MRF mechanisms must balance this technical need with the mission’s continued political needs, for staffing decisions can also affect perceptions of a mission’s impartiality and its overall legitimacy.

The commissioner selection process particularly demonstrates the importance of balancing these political and technical considerations. In commissioner selection, many MRF actors emphasize the importance of legitimacy, and often, commissioners are legal experts whose academic credentials lend legitimacy to the mission. The mandate for the Bahrain Independent Commission of Inquiry (BICI), created by Bahraini royal decree in 2011 to investigate the government’s crackdown on protesters, specifies that “[t]he Commission consists of five eminent and internationally-renowned members,

¹⁷⁵ “Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea,” S/2009/693, p. 10; and Kyrgyzstan Inquiry Commission Report, *supra* note 170, at paras 241-245.

¹⁷⁶ HPCR interview on 9/30/11 with an anonymous high-level MRF practitioner, name of interviewee on file.

¹⁷⁷ HPCR interview on 10/26/11 with Andras Vamos-Goldman, Coordinator for Justice Rapid Response.

whose experience and reputation worldwide is well established.”¹⁷⁸ But legal expertise, in addition to enhancing a mission’s perceived legitimacy, is also necessary for successful fact-finding. As one writer asserts, it is “virtually impossible to conduct fact-finding without knowledge of the law because it is only through legal expertise that one can select the relevant facts from the huge quantity of information around a given incident.”¹⁷⁹ In this sense, the mission’s technical and political needs coincide.

However, at times, MRF actors have critiqued the underemphasis of leadership and managerial skills in commissioner selection. As one MRF actor states, “Leadership is important. Commissioners should know the law but should also be skilled at drafting, organizing, and managing. You want them to be involved, fighting, working until 3AM.”¹⁸⁰ In this vein, officials in the United States State Department critiqued the composition of the Former Yugoslavia Commission for placing “too much emphasis on academic qualifications and too little on investigative or managerial skills,” as the commission’s mandate drafter writes.¹⁸¹ In this sense, the mission’s political and technical needs may conflict with one another. Poor leadership skills, or a lack of managerial experience, could offset the benefits of the legitimacy a commissioner’s academic credentials lend to the mission.

Another challenge in balancing political and technical staffing considerations is selecting commissioners and investigators who have in-depth prior knowledge of the context but who will not compromise the mission’s actual or perceived impartiality. On the one hand, MRF actors emphasize the importance of prior experience. “You can’t really know what can be accomplished unless you’ve been to a country,” asserts one MRF actor.¹⁸² But on the other hand, as another states, “You can’t recruit someone with a past that might be offensive to the country. So you wind up recruiting people who haven’t worked on the country before and who, by definition, are not experts on the country or the situation to be investigated.”¹⁸³

One disadvantage of this solution, though, especially in ad hoc missions, is that ad hoc MRF actors “don’t have much time and have to hit the ground running.”¹⁸⁴ Hence, ad hoc MRF actors have little time to master the background of the situation they will be

¹⁷⁸ BICI mandate, *supra* note 149, at Article Two.

¹⁷⁹ Boutruche, *supra* note 45, at 7.

¹⁸⁰ HPCR Lafontaine interview, *supra* note 64.

¹⁸¹ Scharf, *supra* note 159, at 7.

¹⁸² HPCR interview on 9/8/11 with Patrick Gaffney, Investigator for the International Commission of Inquiry for Burundi.

¹⁸³ HPCR Majekodunmi interview, *supra* note 102.

¹⁸⁴ HPCR Seutcheu interview, *supra* note 150.

investigating. Another disadvantage is that selecting individuals with no prior experience in the country can have the opposite of the intended effect and actually bring the mission's legitimacy into question. As Paulo Sergio Pinheiro, who held country-specific UNHRC mandates for Burundi and Myanmar, and had no prior experience with either country, wrote:

I remember that at my first meeting after been appointed special rapporteur with the ambassador of Myanmar in Geneva, he told me that he was surprised that a Latin American had been appointed instead of someone from Asia and asked me what could be the explanation. I delicately told him that I had not the slightest idea but that I was afraid he needed to become accustomed to me.¹⁸⁵

Such statements suggest that the ideal solution is that commissioners and investigators have some prior knowledge of the context, though none that would lead to actual or perceived impartiality problems.

The above challenges point to the importance of developing a substantial pool of available and experienced commissioners and investigators. Once an MRF mechanism is activated, commissioners and investigators do not have time to learn on the job. Thus, as one MRF practitioner asserts, "You need a stand-by pool, a core team of mobile investigators that can be pulled in. This would be an A-Team of investigators whose integrity and dependability had been scanned in advance."¹⁸⁶ Some MRF actors have taken steps to begin developing such a pool. The OHCHR now staffs its missions from a roster of outside consultants, composed mostly of human rights officers with diverse investigation backgrounds.¹⁸⁷ And the organization Justice Rapid Response has developed a roster of trained investigators who are active-duty professionals and have understandings with their employers that allow for the investigator's rapid release — sometimes in a matter of days — as long as the employer agrees 'in principle' with the deployment.¹⁸⁸ Additionally, the Institute for International Criminal Justice has been designed, according to its mission statement, "for the purpose of educating professional criminal investigators in the techniques and knowledge necessary to impartially investigate war crimes, crimes against humanity, and genocide, and for the purpose of quickly deploying multi-disciplinary teams to investigate such crimes."¹⁸⁹

¹⁸⁵ Paulo Sergio Pinheiro, "Being a special rapporteur: a delicate balancing act," 15 *The International Journal of Human Rights* No. 2, 165 (2011).

¹⁸⁶ HPCR Kenny interview, *supra* note 7.

¹⁸⁷ HPCR Seutcheu interview, *supra* note 150.

¹⁸⁸ HPCR Vamos-Goldman interview, *supra* note 177.

¹⁸⁹ See Institute for International Criminal Investigations, "Mission Statement," available at <http://www.iici.info/pages/mission.php#>

But as one MRF actor states, “There’s a very small roster of people. It would be good to expand it,”¹⁹⁰ suggesting that the development of a staffing pool has fallen behind the rapid rate at which the world of MRF has emerged. Staffing limitations can affect the fate of an entire mission, as untrained implementers may lack the skills to accurately gather and analyze data and may not possess sufficient acumen to address the sensitive political issues necessary for an MRF mechanism’s success. Only by ensuring an ample supply of skilled and experienced implementers can MRF actors adequately position their missions for success.

4. Determining Investigation Methodology

The final critical step in the Design and Planning phase is determining the mission’s investigation methodology. This step encompasses decisions about how interviews will be conducted; how implementers will report on their interviews, both internally and in reports produced for the mandating body; and how implementers will analyze the data gathered. This step is a counterpart to the scope determinations made during the Mandate Drafting phase. While mandators determine what data will be gathered, in this step implementers decide on how information will be gathered and analyzed.

Dilemmas of determining investigation methodology arise, in part, due to the quasi-judicial nature of MRF mechanisms. While criminal courts and tribunals use the evidentiary standard of “proof of facts beyond a reasonable doubt,” MRF missions use a less strict standard, such as the “balance of probabilities,” which entails, as one writer states, “comparing information that confirms a fact or violation with information that questions it.”¹⁹¹ But how can implementers systematize the process of comparing potentially conflicting information? MRF actors have yet to reach a consensus on this question.

In some cases, MRF actors have developed mission-specific strategies for investigation methodology. For example, as noted earlier, the leaders of the secretariat for the DRC Mapping Exercise decided that, following the adopted methodology, each fact admitted into the final report had to be confirmed by two independent, credible sources.¹⁹² Additionally, in 2007, the United Nations Assistance Mission in Afghanistan (UNAMA) worked with the OHCHR to develop criteria for verifying and documenting reports of

¹⁹⁰ HPCR Hicks interview, *supra* note 51.

¹⁹¹ Boutruche, *supra* note 45, at 9.

¹⁹² HPCR Cote interview, *supra* note 72.

civilian casualties caused by international forces in Afghanistan.¹⁹³ In terms of interview procedure, the Goldstone Commission developed a process in which at least two members of the commission were present for each initial interview — though in practice more frequently all Commission members were present — and, if necessary, a member of the secretariat would return to the interviewee for follow-up questions.¹⁹⁴ The Burundi Commission endeavored to ensure balanced and accurate data gathering by having two interpreters — one Hutu and one Tutsi — accompany each interviewer.¹⁹⁵

However, implementers note many cases of data-gathering processes in which they were involved in which the methodology was not systematized at all. One investigator stated that his MRF mechanism did not discuss the investigation methodology to be followed prior to the start of the field work.¹⁹⁶ Many members of the MRF community identify this lack of standardization as a significant problem. “There are shocking consequences of ad hoc-ery,” states one MRF practitioner, “The mechanisms should be accountable. There should be a minimum standard that they should be expected to adhere to. To send people in unprepared, making it up as they go along, is unacceptable.”¹⁹⁷

One impact of this lack of standardization relates to the quality of the information gathered. Many factors — such as cultural differences and a lack of education of witnesses and victims — can prevent interviewees from obtaining accurate information.¹⁹⁸ MRF missions with no systematization will find investigators employing disparate interview methodologies to deal with these factors and notating these issues differently, or not at all, in their reports. Such a scenario raises the possibility that an MRF mission might report inaccurate information, which can be particularly damaging to an MRF mission because, as one MRF actor notes, “If the first report says 200 bodies and then it turns out it was only 25, it undercuts the gravity of the crime. Killing 25 people is very bad. But if you first said that 200 people were killed, the focus will be on the inaccuracy of the first report rather than on punishing

¹⁹³ Jeannette Boehme, “Human Rights and Gender Components of UN and EU Peace Operations,” German Institute for Human Rights, p. 26, 2008, available at http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/study_human_rights_and_gender_components.pdf

¹⁹⁴ HPCR Chinkin interview, supra note 99.

¹⁹⁵ HPCR Gaffney interview, supra note 182.

¹⁹⁶ HPCR interview on 10/17/11 with an anonymous high-level MRF practitioner, name of interviewee on file.

¹⁹⁷ HPCR Kenny interview, supra note 7.

¹⁹⁸ Nancy Combs, *Fact-Finding Without Facts* (New York: Cambridge University Press, 2010), p. 125.

serious human rights violations.”¹⁹⁹ Thus, inaccurate information could lead an MRF mechanism to have the opposite of its intended effect.

A second impact is that interviewees may not receive sufficient protection. MRF actors largely agree that a bedrock principle of investigation methodology should be to “do no harm” to witnesses and victims and therefore caution that interviewers who lack sufficient guidance can risk retraumatizing their interviewees.²⁰⁰ Because of this danger, many MRF practitioners emphasize the importance of using mental health professionals to work with interviewees after emotionally challenging interviews.²⁰¹ Though most MRF missions do not use mental health professionals, and providing mental health services does not fall within the typical MRF mission’s mandate,²⁰² many MRF actors believe MRF missions should establish referral systems that can put interviewees in touch with mental health professionals if necessary.²⁰³ To adhere to the “do no harm” dictum, investigators should also be careful in how they select interviewees. As one MRF actor notes, interviewing a victim who has already been interviewed by another organization “increases the risk for retraumatization of the victim.”²⁰⁴ And additionally, MRF actors should be careful to omit names and details from reports to protect victims and witnesses because, as one MRF states, “just talking to an individual can identify them for reprisals.”²⁰⁵ If these measures are not systematized across an MRF mechanism, the mission may find itself unable to adequately protect its interviewees.

A third impact is that MRF mechanisms may not be equipped to collaborate effectively with other investigative mechanisms. One such example is the Human Rights Field Operation in Rwanda (HRFOR), which turned evidence it had gathered over to the International Criminal Tribunal for Rwanda (ICTR).²⁰⁶ However, the ICTR found some of this evidence unusable due to, in the case of photographs, ‘chain of custody’ issues that prevented the Office of the Prosecutor from adequately determining when and by whom photographs were taken.²⁰⁷ Such instances suggest that the world of MRF might

¹⁹⁹ HPCR interview on 9/19/11 with Penny Venetis, Legal Analyst for the Former Yugoslavia Commission.

²⁰⁰ HPCR Lafontaine interview, *supra* note 64; HPCR Cleiren interview, *supra* note 86.

²⁰¹ HPCR Pavetic-Dickey interview, *supra* note 85; HPCR interview on 9/19/11 with Debbie Bodkin, Investigator on the International Commission of Inquiry on Darfur.

²⁰² Boutruche, *supra* note 45, at 16.

²⁰³ *Ibid.*

²⁰⁴ HPCR Boutruche interview, *supra* note 88.

²⁰⁵ HPCR Vamos-Goldman interview, *supra* note 177.

²⁰⁶ Martin Seutcheu, “Working together to Prosecute Human Rights Criminals: an insider account of the relationship between human rights organizations and the International Criminal Tribunal for Rwanda,” written for the Visiting Fellows Program of the Human Rights Program at Harvard Law School, 2004, p. 8 (in HPCR’s possession).

²⁰⁷ *Ibid.*

benefit not just from systematizing evidentiary standards within individual MRF mechanisms but also from systematization across the entire field of MRF. This process has already begun, as the OHCHR and the ICC have begun a dialogue about evidentiary collaboration that might ultimately entail joint training of ICC and OHCHR investigators.²⁰⁸ However, the process is currently in a nascent stage, and still unanswered is the question of how these standards, if and when they are articulated, can be communicated to and adopted by non-OHCHR missions.

SECTION V. RECOMMENDATIONS FOR NEXT STEPS FOR THE MRF COMMUNITY

As this paper has demonstrated, the world of MRF has emerged rapidly and now exists in a somewhat fragmented state. MRF actors face a paucity of guidance, available staff, and time to grapple with conceptual MRF issues. In particular, as this paper has examined, the MRF community has yet been able to rise above the fractured state in which MRF exists and examine the world of MRF as a whole. Additionally, MRF actors tasked with creating MRF mechanisms — ad hoc MRF missions, in particular — frequently lack sufficient guidance.

As a contribution to addressing these dilemmas, this paper has offered a conceptual framework to further understanding of how MRF mechanisms function as well as an examination of the process of creating MRF mechanisms. However, this analysis, as well as HPCR's consultations with expert MRF practitioners, indicates that further steps are necessary to continue to address MRF's core issues. This section offers suggestions for how the MRF community can continue to build on this paper's analysis and address the problems raised.

A. Intensify MRF Research Efforts

Despite the efforts of the MRF community to generate MRF academic and policy literature, many areas remain underexplored, and as asserted earlier, the MRF community would benefit from a more rigorous effort to fill these literature gaps. One area to which researchers could devote more attention is the impact of ad hoc MRF mechanisms on the behavior of governments and armed groups. Though, as noted earlier, many MRF actors have written about challenges they have experienced on particular MRF missions, MRF actors have focused little scholarly attention on outcomes. One model for such an endeavor is a study conducted by the Brookings

²⁰⁸ HPCR Seutcheu interview, *supra* note 150.

Institution in 2011 on the impact of UNHRC Special Procedures. The study examined government responses to communications from nineteen thematic mandate holders from 2004 to 2008. A similar assessment of ad hoc MRF mechanisms would help inform the debate about how best to gauge MRF mechanisms' effectiveness.

MRF training would also benefit from scholarly attention. How do different MRF investigative training program curriculums compare with one another? Are distinct models of investigation methodology emerging? Are particular areas of consensus indicative of emerging standards? Are MRF trainers overlooking any significant areas? Given the importance of developing a pool of trained MRF investigators, the nature and effectiveness of MRF training will play a large role in determining future MRF success, and research in this area will help the MRF community to ensure that training curriculums are designed in a way that allows the field of MRF to reach its full potential.

B. Develop Authoritative Methodological Standards

As examined in detail in the previous section, the lack of standardized MRF investigation methodology, including the absence of a systematic approach to standard of evidence issues, leads to many complications for MRF mechanisms. An effort to reach consensus within the MRF community on methodology standardization could lead to more accurate and efficient MRF mechanisms while enhancing MRF missions' ability to collaborate with other investigative missions. Methodology standardization would also guide the way in which the MRF community develops a larger pool of available MRF investigators, for a definitive standard would shape MRF training curriculums and, if adopted across the MRF community, would lead to a more cohesive pool of available staff.

C. Build a Community of Practice

MRF actors lack a forum to share information and learn from one another's experiences. This partly results from the fact that MRF mechanisms originate from a diverse array of intergovernmental, regional, and domestic mandating bodies. While some individual entities have established processes for learning lessons from past practice — for example, the OHCHR's methodology unit — the world of MRF as a whole does not yet possess the capacity for developing an institutional memory. The ability to learn lessons from past practice is particularly important given that the world of MRF is in a perpetual state of change, with each mission teaching MRF actors new lessons.

An MRF community of practice could help MRF actors surmount these obstacles. This endeavor could take the form of an entity resembling the Inter-Agency Standing Committee (IASC), which coordinates decision-making and policy for UN and non-UN humanitarian assistance organizations. A similar entity geared toward MRF would allow the fractured world of MRF to begin to come together to coordinate their efforts and exchange views on practical issues (such as best practices for developing and sustaining rosters of MRF investigators) and conceptual issues (such as the intersection of IHL and IHRL).

This recommendation would build on the success of the previously articulated recommendations — intensifying research efforts and developing methodological standards. In-depth MRF research will guide the MRF community toward a better understanding of which MRF practices are most effective. Methodological standards will give the MRF community of practice a foundation around which to unite. Through these three interrelated steps, the MRF community can rise above its current fractured state and work collectively to better understand how MRF mechanisms function, what aims can feasibly be accomplished, and what strategic pathways MRF actors can traverse to reach success.