

# From Isolation to Interoperability: The Interaction of Monitoring, Reporting, and Fact-finding Missions and International Criminal Courts and Tribunals

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Rob Grace and Jill Coster Van Voorhout

## Abstract

This working paper discusses opportunities and challenges for achieving a greater degree of interoperability between international judicial and non-judicial accountability efforts. Over the past few decades, governments have established various international criminal courts and tribunals (ICCTs), including several *ad hoc* entities — such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) — as well as a permanent body in the form of the International Criminal Court (ICC). Additionally, international actors have also established a wide array of non-judicial monitoring, reporting, and fact-finding (MRF) missions, such as commissions of inquiry, monitoring components of peace operations, and special rapporteurs. How can and should these two types of entities interact with one another? While disagreements exist about the desirability of blurring the lines between the domains of MRF and international criminal justice, many practitioners and scholars have emphasized the importance of bolstering linkages between organizations laboring in these separate, though overlapping, fields. This working paper addresses this issue. Part I focuses on the mandates of MRF missions and the statutes of ICCTs to present an overview of the ways that interoperability has been foreseen — or not foreseen — by the founding documents of these bodies. Part II focuses on specific points of potential interaction between MRF missions and ICCTs. This section addresses the triggering of investigations, information sharing, capacity sharing, and the influence of the legal analysis of MRF missions on ICCTs. Part III examines several factors that complicate efforts to promote interoperability. In particular, these issues are reputational considerations, standards of proof, victim/witness protection in the context of a fair trial, and differences in information gathering methodologies. Weighing these factors, Part IV concludes that the identified challenges can only be overcome through extensive engagement on both the institutional and the professional levels with practitioners involved in ICCT and MRF work.

This working paper is the first in a series on the topic of fact-finding.

### Keywords

Fact-finding, international criminal courts and tribunals (ICCTs), International Criminal Court (ICC), International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), criminology



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### The Hague Institute for Global Justice

Sophialaan 10  
2514 JR The Hague  
The Netherlands

t +31 (0)70 30 28 130  
e [info@TheHagueInstitute.org](mailto:info@TheHagueInstitute.org)  
w [TheHagueInstitute.org](http://TheHagueInstitute.org)  
t @HagueInstitute

### Program on Humanitarian Policy and Conflict Research

14 Story Street  
Cambridge, MA 02138  
United States

t (617) 384-5904  
w [hpcrresearch.org](http://hpcrresearch.org)  
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## Introduction

Over the past few decades, accountability efforts undertaken by international actors have assumed both judicial and non-judicial forms. On the one hand, governments have established various international criminal courts and tribunals (ICCTs), including several *ad hoc* entities — such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) — as well as a permanent body in the form of the International Criminal Court (ICC). On the other hand, international actors have also established a wide array of non-judicial investigative procedures. These monitoring, reporting, and fact-finding (MRF) missions include commissions of inquiry, monitoring components of peace operations, special rapporteurs, and on-going thematic processes such as the Monitoring and Reporting Mechanism geared toward gathering information about children in armed conflict.<sup>1</sup>

How should these two types of entities interact with one another? The experience of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (DPRK) is a telling and recent example of the tensions that surround this question. Judge Michael Kirby, who served as Chair of the Commission, has become a staunch advocate for incorporating the findings of the Commission into future accountability efforts.<sup>2</sup> Indeed, the connection between the Commission’s work and the pursuit of accountability is inherent in the Commission’s mandate. The core task of the Commission, as defined by United Nations Human Rights Council (UNHRC) resolution 22/13, is to investigate allegations of “systematic, widespread and grave violations of human rights” committed in the DPRK “with a view to ensuring full accountability, in particular where these violations may amount to crimes against humanity.”<sup>3</sup> Yet, not everyone found this link between the Commission’s activities and accountability to be desirable. As Judge Kirby explained recently at an event convened at The Hague Institute for Global Justice:

“We’ve had some people, including some very considerable, important scholars who’ve suggested, “Well maybe you could have been a bit more subtle. (...) You’re not going to get North Korea on board if you’re talking about accountability.” We had no option. We were asked to answer a question. (...) Are there these crimes, and if so, how can we render them accountable?”<sup>4</sup>

As these comments suggest, disagreements exist concerning the desirability of blurring the lines between the domain of MRF and international criminal justice. Indeed, some practitioners have advocated that MRF practitioners and ICCT professionals should embrace the differences between these two types of entities. As one practitioner has stated

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1 For an overview of strategic and operational dilemmas faced by monitoring, reporting, and fact-finding missions, see generally Rob Grace and Claude Bruderlein, “Building Effective Monitoring, Reporting, and Fact-finding Mechanisms,” Working Paper, Program on Humanitarian Policy and Conflict Research at Harvard University, 2012, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2038854](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038854).

2 For example, see “Global Leaders: Michael Kirby,” International Bar Association, available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=cf850d9d-9879-412a-9389-3a3940c5233d>.

3 United Nations Human Rights Council resolution 22/13, para. 5.

4 “Launch of UN Human Rights Report on North Korea with Judge Michael Kirby,” The Hague Institute for Global Justice, 20 March 2014, available at <http://thehagueinstituteforglobaljustice.org/index.php?pid=123&id=153>.

regarding the Truth and Reconciliation Commission of Sierra Leone and the Special Court for Sierra Leone, which both operated alongside one another simultaneously:

“Although there is much common ground, this does not mean that the two institutions necessarily have much to share in terms of their methodologies and their resources. Perhaps the appropriate metaphor is that of building a house. The Truth and Reconciliation Commission is the plumber, and the Special Court is the electrician. The two trades work in different parts of the house, on different days, at different stages of the construction, and using different tools and materials. Nobody would want to live in a finished house that lacked either electricity or plumbing. The best way to ensure that both succeed and that the house gets completed on schedule is that they be left alone and undisturbed, so that they can get on with their valuable work.”<sup>5</sup>

However, many practitioners and scholars have advocated for a greater degree of interoperability between MRF missions and ICCTs. From the perspective of ICCTs, one author forcefully writes, “Wholesale rejection of information coming from UN [United Nations] human rights sources for international prosecution purposes represents nothing short of unprofessional arrogance that ultimately ignores valuable information often coming from victims and NGOs [non-governmental organizations] who normally remain closer to the situation than could the ICC.”<sup>6</sup> Similarly, MRF missions have been called on to do more to maximize the potential for interoperability.<sup>7</sup>

This working paper examines how a greater degree of interoperability can be achieved between different organizations laboring in these separate — albeit overlapping — domains. For the purpose of this working paper, the definition of interoperability includes not only information exchange between different investigative mechanisms but also collaboration in relation to the legal, social, political, and organizational factors that impact the implementation of coherent operations seeking to further international legal accountability.

How can practitioners navigate these competing pressures: one pulling towards interoperability, the other towards isolation? What are the challenges that hinder effective interoperability? How can the communities of ICCT professionals and MRF practitioners surmount these challenges? This working paper will examine these questions. Part I focuses on the mandates of MRF missions and the statutes of ICCTs and presents an overview of the ways that interoperability has been foreseen — or not foreseen — by the founding documents of these bodies. Part II focuses on specific points of potential interaction between MRF missions and ICCTs. Part III examines several factors that complicate efforts to promote interoperability. Part IV offers a number of concluding remarks.

## I. The Formal Basis for Interoperability

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<sup>5</sup> William A. Schabas, “The Relationship between Truth Commissions and International Courts: The Case of Sierra Leone,” 25 *Human Rights Quarterly* No. 4 (2003), at 1065.

<sup>6</sup> Lyal S. Sunga, “How can UN human rights special procedures sharpen ICC fact-finding?” 15 *The International Journal of Human Rights* No. 2 (2011), at 201.

<sup>7</sup> *Ibid.*, at 188.

Before delving into an assessment of possible avenues for and obstacles to interoperability — which the rest of this paper will explore — this section first examines the ways that the possibility of interoperability is built into, or in some cases ignored by, the legal documents that determine how MRF missions and ICCTs operate. The section examines ICCT statutes (Section A), MRF mandates (Section B), and efforts that have been pursued to formalize coordination on an *ad hoc* basis between different investigative entities (Section C). As this section demonstrates, though certain MRF mandates and ICCT statutes make specific reference to interactions between MRF missions and ICCTs, there is inconsistency across different instruments, and overall, a certain degree of ambiguity about the extent to which these legal instruments leave room for interoperability.

### A. Statutes of International Criminal Courts and Tribunals

ICCT statutes have been consistently explicit about the importance of MRF investigations to ICCT processes. The statute for the Special Tribunal for Lebanon, mandated by the United Nations Security Council (UNSC) after the creation of the United Nations International Independent Investigation Commission (UNIIC), specifically mentions that the Tribunal will receive information from the UNIIC. According to Article 19:

“Evidence collected with regard to cases subject to the consideration of the Special Tribunal, prior to the establishment of the Tribunal, by the national authorities of Lebanon or by the International Independent Investigation Commission in accordance with its mandate as set out in Security Council resolution 1595 (2005) and subsequent resolutions, shall be received by the Tribunal. Its admissibility shall be decided by the Chambers pursuant to international standards on collection of evidence. The weight to be given to any such evidence shall be determined by the Chambers.”<sup>8</sup>

Also, the statutes for the ICTY and the ICTR contain provisions — almost identical to one another — that reference the value of information gathered by MRF bodies to the Prosecutor’s process of initiating investigations. For example, Article 18(1) of the ICTY Statute states:

“The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Government, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.”<sup>9</sup>

The Rome Statute, which established the ICC, contains a similar provision in Article 15(2), which states that one objective of the Prosecutor’s preliminary investigation is to:

“(…) analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations,

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<sup>8</sup> Statute of the Special Tribunal for Lebanon, Article 19, available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Lebanon%20SRES1757.pdf>.

<sup>9</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, Article 18(1). See also Statute of the International Criminal Tribunal for Rwanda, Article 17.

intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.”<sup>10</sup>

What is less clear from these statutes is the role that information drawn from MRF bodies — such as MRF reports, physical evidence gathered by MRF missions, forensic investigations conducted under MRF auspices, as well as testimony from MRF practitioners — can and should play in subsequent phases of the prosecutorial process. Examples are Pre-Trial Chamber decisions regarding whether or not there is a reasonable basis to proceed with an investigation, the issuance of arrest warrants and summonses to appear before the court, the confirmation of charges before a trial, and during the trial itself. Nevertheless, the statute of the ICC is rife with additional provisions that suggest the necessity of coordination and cooperation with outside entities. Article 93 states that States Parties to the Rome Statute must “comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions.”<sup>11</sup> Elements of this article potentially relevant to MRF bodies include “[t]he taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;” “[t]he provision of records and documents, including official records and documents;” and “[a]ny other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.”<sup>12</sup> The ICC statute also states, “The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.”<sup>13</sup> The subsequent relationship agreement struck by the ICC and the UN will be examined later in this section.

## B. Mandates of Monitoring, Reporting, and Fact-finding Missions

Unlike ICCT statutes, few MRF mandates explicitly mention interoperability. One recent exception is UNHRC resolution S-19/1, which in June 2012 requested that the Independent International Commission of Inquiry on the Syrian Arab Republic (hereafter the Syria Commission) — originally mandated by the UNHRC in August 2011<sup>14</sup> — gather information about the May 2012 incident in El Houleh, where summary executions were alleged to have occurred.<sup>15</sup> The mandate specifically authorized the mission to “preserve the evidence of crimes for possible future criminal prosecutions or a future justice process.”<sup>16</sup> Another mandate for which interoperability was a core component is that of the UNIIC, which was authorized by the UNSC “to assist the Lebanese authorities in their investigation of all aspects of this terrorist act [the 2005 bombing in Beirut that killed Lebanese Prime Minister Rafiq Hariri, as well as twenty-one others], including to help identify its perpetrators, sponsors, organizers and accomplices (...).”<sup>17</sup> Similar to the Syria Commission’s El Houleh mandate, the UNIIC mandate explicitly links the UNIIC to another investigative process.

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<sup>10</sup> Rome Statute of the International Criminal Court, Article 15(2).

<sup>11</sup> Rome Statute of the International Criminal Court, Article 93.

<sup>12</sup> *Ibid.*

<sup>13</sup> Rome Statute of the International Criminal Court, Article 2.

<sup>14</sup> For the original mandate of the Independent International Commission of Inquiry on the Syrian Arab Republic, see United Nations Human Rights Council resolution S-17/1, para. 13.

<sup>15</sup> United Nations Human Rights Council resolution S-19/1, para. 8.

<sup>16</sup> *Ibid.*

<sup>17</sup> United Nations Security Council resolution 1595 (2007), para. 1.

More commonly, though, MRF mandates either merely suggest the necessity of interoperability or make no mention of the issue at all. One way that many mandates link a mission to subsequent accountability efforts is by authorizing the mission to compile a list of alleged perpetrators for use during future investigations and/or prosecutions. Returning to the Syria Commission example, the mission's initial mandate tasks the Commission:

“(...) to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable (...).”<sup>18</sup>

To fulfill the UNHRC's request for the Commission to identify alleged perpetrators, the mission compiled confidential lists that the mission handed over to the Office of the High Commissioner for Human Rights (OHCHR).<sup>19</sup> A representative of OHCHR stated, “Should the [ICC] be engaged and request the office's assistance at any stage of its investigation into violations in Syria, the office will be ready to provide them with the information, including the confidential list of names as appropriate.”<sup>20</sup>

Mandates authorizing the mission to identify names present a conundrum for MRF practitioners. Indeed, in such contexts, practitioners find themselves caught between the demands of their mandate and considerations for the individual trial rights of the accused. Some missions — for example, the International Commission of Inquiry for Guinea and the Independent Special Commission of Inquiry for Timor-Leste — have published lists of alleged perpetrators.<sup>21</sup> Although, the more common approach is that of the Syria Commission — compiling a confidential list — an option that allows the mission to fulfill the mandate while still addressing concerns of due process for the accused, as well as other factors, such as the possibility of prejudicing future trials and the risk that the publication of names could lead to reprisals against interviewees who provided information to the mission.<sup>22</sup> In other instances, missions have declined to identify names, either publicly or privately, even if called for by the mandate, due to various concerns regarding the capacities of the mission. For example, the final report of the Kyrgyzstan Inquiry Commission (KIC) states:

“The KIC was not mandated to conduct a criminal investigation, which remains the responsibility of the authorities of Kyrgyzstan. Neither is it a prosecuting authority or tribunal. The KIC is not in a position to identify named individuals as being

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18 United Nations Human Rights Council resolution S-17/1, para. 13.

19 For example, see “Report of the independent international commission of inquiry on the Syrian Arab Republic,” A/HRC/21/50, 2012, para. 131.

20 Stephanie Nebehay, “Death toll in Syria protests rises to 2,700: U.N. rights office,” Reuters, September 19, 2011 (<http://www.reuters.com/article/2011/09/19/us-syria-un-rights-idUSTRE78I3D420110919>).

21 See “Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste,” October 2006, at paras 109-134; and “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, 2009, paras 212-252.

22 For example, see “Report of the International Commission of Inquiry on Libya,” A/HRC/19/68, 2012, para. 14, available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A.HRC.19.68.pdf>; and “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General,” 2005, paras 15-17.

responsible for the crimes that have been documented. This results in part from the limitation of its mandate, but other factors are also relevant, including: the short timeframe for its work; the limited investigative capacities available to it; and its inability to require individuals to testify.”<sup>23</sup>

Such considerations point to the differences — in terms of methodologies and capacities — between MRF missions and ICCTs that hinder interoperability, as this paper will examine in a greater detail in a later section.<sup>24</sup> In addition to these crucial distinctions, the general silence of MRF mandates about the extent to which missions should pursue interoperability has led to an environment in which many MRF practitioners do not perceive interoperability to fall squarely within the typical MRF mission’s mandate.

### C. *Ad Hoc* Agreements and Memoranda of Understanding

One overarching impediment to interoperability is the enduring *ad hoc* nature of the MRF domain-of-MRF. For ICCTs, the days of the *ad hoc* courts and tribunals — such as the ICTY, ICTR, and the Special Court for Sierra Leone — have given rise to the emergence of a permanent body, the ICC, though some scholars or other actors still entertain the possibility of creating *ad hoc* tribunals to address certain contexts, such as Syria.<sup>25</sup> However, for MRF missions, no effective permanent mechanism has arisen. While the International Humanitarian Fact-finding Commission (IHFFC) has existed since 1977 and has been activated since the 1990s, this instrument has never been used, despite persistent attempts of various international actors to persuade governments to consent to IHFFC investigations.<sup>26</sup> Instead, MRF missions arise in multiple forms from a wide array of different international, regional, and national mandating bodies.

Given the fragmented nature of the MRF domain, several initiatives have emerged to promote a certain degree of coordination between different MRF processes. The International Coordinating Committee for National Human Rights Institutions (NHRIs), created in 1993, “[e]ncourages cooperation and information sharing among NHRIs,” “[p]romotes the role of NHRIs within the United Nations and with States and other

23 “Report of the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010,” para. 7.

24 Additionally, a follow-up to this working paper will also examine these methodological issues in greater depth.

25 For example, the possibility has been discussed of creating an *ad hoc* tribunal to address incidents that have occurred in the context of the Syrian Civil War. See Aryeh Neier, “An Arab War-Crimes Court for Syria,” *The New York Times*, April 4, 2012 ([http://www.nytimes.com/2012/04/05/opinion/an-arab-war-crimes-court-for-syria.html?\\_r=0](http://www.nytimes.com/2012/04/05/opinion/an-arab-war-crimes-court-for-syria.html?_r=0)); and Chris Smith, “Representative Chris Smith: Establish a Syrian war crimes tribunal,” *The Washington Post*, September 13, 2013 ([http://www.washingtonpost.com/opinions/rep-chris-smith-establish-a-syrian-war-crimes-tribunal/2013/09/09/be88e10c-197c-11e3-82ef-a059e54c49d0\\_story.html](http://www.washingtonpost.com/opinions/rep-chris-smith-establish-a-syrian-war-crimes-tribunal/2013/09/09/be88e10c-197c-11e3-82ef-a059e54c49d0_story.html)).

26 As noted on the website of the IHFFC, “Although already 76 States from all the Continents have recognised it [the IHFFC], the Commission has not yet been called upon.” See “The IHFFC in a few words,” International Humanitarian Fact-finding Commission, available at [http://www.ihffc.org/index.asp?page=aboutus\\_general](http://www.ihffc.org/index.asp?page=aboutus_general). Also, see generally 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), 835-842. However, at the 31st Conference of the Red Cross and Red Crescent, held in November 2011, the Government of Switzerland, along with several other countries, adopted Pledge 1097, by which Switzerland “commits itself to promote reflections on measures that would render the IHFFC more operational and to continue its efforts to encourage the resort to the IHFFC in situations of armed conflicts.” The full text of Pledge 1097 and the full list of countries that joined the pledge are available at [http://www.icrc.org/pledges/pledgeList1.xsp?xsp=Statesdoc&option=States&section=Switzerland&outline=3&iew=V\\_xspPledgesByPAUnikey](http://www.icrc.org/pledges/pledgeList1.xsp?xsp=Statesdoc&option=States&section=Switzerland&outline=3&iew=V_xspPledgesByPAUnikey).

international agencies,” and “[o]ffers capacity building in collaboration with the Office of the High Commissioner for Human Rights (OHCHR).”<sup>27</sup> Additionally, the Coordination Committee of Special Procedures, created in 2005, is responsible for coordinating UNHRC Special Procedures mandate holders, and specifically, for “proactively identifying issues of concern to groups of mandates and facilitating joint action on cross-cutting issues or issues of shared concern” and “structuring the exchange of information and in particular keeping mandate-holders informed of the activities carried out by colleagues.”<sup>28</sup> Furthermore, in January 2012, the Special Procedures of the UNHRC and the Special Mechanisms of the African Commission on Human and Peoples’ Rights convened a two-day meeting focused on strengthening coordination between the two bodies.<sup>29</sup>

However, the domain of MRF lacks an over-arching entity responsible for coordinating the different investigative endeavors mandated by the international community, and as one scholar wrote recently — expressing a widely shared sentiment — there is an “urgent necessity to organize a division of labor among the various bodies undertaking fact-finding activities, clarifying the goals that each is better suited to pursue.”<sup>30</sup> This *ad hoc* state of affairs presents challenges for creating effective institutional and methodological linkages between MRF missions and ICCTs, even in situations in which MRF mandates specifically call for interoperability.

Despite these obstacles, the drive to maximize opportunities for interoperability has led to instances in which specific MRF missions and ICCTs have developed agreements with one another in order to coordinate their respective activities. For example, the Human Rights Field Operation in Rwanda (HRFOR), the Special Rapporteur for Rwanda, and the Prosecutor of the ICTR worked together to allocate responsibilities for different types of investigations. Specifically, the Special Rapporteur for Rwanda agreed with the ICTR Prosecutor that the Special Rapporteur would undertake several individual investigative projects, would keep the ICTR informed of each project, and would discontinue any projects that conflicted with the ICTR’s work.<sup>31</sup> Nonetheless, the resulting coordination was not entirely successful, as Section III of this working paper will examine in greater detail, and as Seutcheu notes when he writes:

“[W]hen a myriad of organizations and groups are conducting multiple investigations, using different procedures, however well intentioned, they harm the prosecution effort. This can lead to disruption of the crime scene, loss of evidence,

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27 “A brief history of the ICC,” International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), available at <http://nhri.ohchr.org/EN/AboutUs/Pages/History.aspx>.

28 “Manual of Operations of the Special Procedures of the Human Rights Council,” June 2008, p. 26, available at [http://www2.ohchr.org/english/bodies/chr/special/annual\\_meetings/docs/ManualSpecialProceduresDraft0608.pdf](http://www2.ohchr.org/english/bodies/chr/special/annual_meetings/docs/ManualSpecialProceduresDraft0608.pdf).

29 “UN and African Union Special Mechanisms on Human Rights Adopt a Roadmap for Greater Cooperation,” United Nations Office at Geneva, January 18, 2012, available at [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear\\_en\)/FF93E06B8FF17E3BC1257989006540AF?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/FF93E06B8FF17E3BC1257989006540AF?OpenDocument).

30 Micaela Frulli, “Fact-Finding or Paving the Road to Criminal Justice? Some Reflections on United Nations Commissions of Inquiry,” 10 *Journal of International Criminal Justice* (2012), at 1338.

31 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, pp. 5-8 (in HPCR’s possession).

security concerns for witnesses and general confusion and misunderstandings about who is suppose[d] to do what.”<sup>32</sup>

Additionally, in 2004, pursuant to the aforementioned ICC statute article calling for a formal relationship between the ICC and the UN, the “Negotiated Relationship Agreement between the International Criminal Court and the United Nations” was adopted. This agreement serves as the framework for the ICC’s engagement with UN bodies, including MRF missions mandated by UN organs.<sup>33</sup> To date, only one Memorandum of Understanding (MOU) has been reached under the ICC-UN negotiated agreement.<sup>34</sup> This MOU was agreed upon in 2005 between the ICC and the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC).<sup>35</sup> The MOU, in addition to articulating terms for administrative and logical cooperation, laid out terms for the sharing of information, comprising “audiotapes, including audiotapes of radio intercepts, video recordings, including video recordings of crime scenes and of statements by victims and potential witnesses, and photographs.”<sup>36</sup> Furthermore, according to the terms of the MOU, “[t]he United Nations undertakes to alert the Prosecutor to developments in the situation in the Democratic Republic of the Congo which it may consider to be of relevance to the conduct of his or her investigations.”<sup>37</sup>

Another development in the realm of interoperability is that OHCHR and the ICC have begun a dialogue about evidentiary collaboration that might ultimately entail joint training of ICC and OHCHR investigators.<sup>38</sup> However, the process is currently in a nascent stage, which — in addition to the fact that only one MOU has been reached since the ICC-UN negotiated agreement was created a decade ago — suggests the many challenges that exist for interoperability, as a later section of this paper will examine.

## II. Potential Points of Interaction

There are four overarching ways that the work of MRF missions can feed into ICCT processes. Firstly, an MRF report might trigger an investigation by an ICCT prosecutor or might influence the decision of political actors to create an ICCT body. Secondly, information collected by an MRF mission could be directly incorporated into different phases of the prosecutorial process, though as noted in the previous section, the question of the expansiveness and limits of the possibility has been controversial. Thirdly, concurrent MRF and ICCT investigations can engage in capacity sharing and coordinate their activities with one another on a logistical level. Finally, the legal analysis that appears in MRF reports could

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<sup>32</sup> *Ibid.*, at 30.

<sup>33</sup> For the full text of the agreement, see “Negotiated Relationship Agreement between the International Criminal Court and the United Nations,” available at [http://www.icc-cpi.int/nr/rdonlyres/916fc6a2-7846-4177-a5ea-5aa9b6d1e96c/0/iccasp3res1\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/916fc6a2-7846-4177-a5ea-5aa9b6d1e96c/0/iccasp3res1_english.pdf).

<sup>34</sup> Margherita Melillo, “Cooperation between the UN Peacekeeping Operation and the ICC in the Democratic Republic of the Congo,” 11 *Journal of International Criminal Justice* (2013), at 767.

<sup>35</sup> For the full text of the agreement, see “Memorandum of Understanding Between the United Nations and the International Criminal Court Concerning Cooperation between the United Nations Organizations Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court,” available at <http://www.icc-cpi.int/iccdocs/doc/doc469628.pdf>. Additionally, it should be noted that in 2011, the name of MONUC was changed to the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). See United Nations Security Council resolution 1925 (2011), para. 1.

<sup>36</sup> “Memorandum of Understanding,” *Ibid.*, at Article 10(14).

<sup>37</sup> *Ibid.*, at Article 10(16).

<sup>38</sup> Grace and Bruderlein, *supra* note 1, at 4.

influence ICCT judges' rulings. This section will provide an overview of these four potential points of interaction.

### A. Triggering Investigations

The importance of MRF missions to drawing attention to alleged violations is widely acknowledged. As one MRF practitioner states, MRF missions 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."<sup>39</sup> Indeed, MRF reports have brought prosecutors' attention to incidents of concern. As mentioned in the previous section, this element of interaction was foreseen by the Statutes of the ICTY (Article 18), the ICTR (Article 17), and the ICC (Article 15), all of which refer to the importance of MRF reports to the preliminary examinations by prosecutors.

In terms of MRF reports leading governments to take action on accountability, the ICTY was preceded by the UNSC-mandated Commission of Experts on the former Yugoslavia (hereafter the Former Yugoslavia Commission), which in the Commission's first interim report mentioned the possibility of an *ad hoc* tribunal and stated that though "it would be for the Security Council or another competent organ of the United Nations to establish such a tribunal," the Commission "observes that such a decision would be consistent with the direction of its work."<sup>40</sup> Various reports published by the United Nations Special Rapporteur on the former Yugoslavia also played a role in generating the political will to create the ICTY.<sup>41</sup> Similarly, the creation of the ICTR by the UNSC was preceded by the UNSC-mandated Commission of Experts on Rwanda (hereafter the Rwanda Commission). The UNSC's referral of the Darfur situation to the ICC followed the publication of the report of the International Commission of Inquiry on Darfur, which the UNSC had mandated in 2004 and which had recommended an ICC referral.<sup>42</sup> As one practitioner writes, MRF missions can play a crucial role in the process of creating ICCTs:

"From the perspective of the ICC, the Darfur process should also be seen as a major contribution to the evolution of a practice, which has the potential to maximize the value of the Court. Given the still limited number of States Parties to the Rome Statute and the assumption that voluntary referrals are unlikely to bring many of the worst situations before the Court, the process of establishing a Commission of Inquiry to evaluate whether or not a situation warrants a referral by the Security Council provides an appropriate filtering mechanism before the Council takes a decision. It ensures a thorough and systematic preliminary review of the facts, it provides a fully reasoned legal analysis, and it gives Council members the opportunity to consider alternative approaches which might be better suited to ensure a just outcome. The fact that a Commission will not always lead to a referral makes the process all the more legitimate and important."<sup>43</sup>

39 Martin Seutcheu, Human Rights Officer for the Office of the High Commissioner for Human Rights, quoted in Grace and Bruderlein, *supra* note 1, at 32.

40 "Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)," 10 February 1993, para. 74, available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/25274](http://www.un.org/ga/search/view_doc.asp?symbol=S/25274).

41 Sunga, *supra* note 6, at 190-191.

42 See Darfur Commission report, *supra* note 22, at paras 571-582.

43 Philip Alston, "The Darfur Commission as a Model for Future Responses to Crisis Situations," 3 *Journal of International Criminal Justice* (2005), at 607.

However, it is important to note the political factors that play a role in the triggering mechanism process. One practitioner writes about the UNSC's creation of the Rwanda Commission before mandating the ICTR:

“The Security Council may establish a Commission because it sees the need, at that time, for that issue to go through a particular process. The Rwanda Commission was one such case, whose mandate and duration were limited. It lasted three months and made a single one-week visit to Rwanda. Its function was essentially window dressing. At the time, the Security Council wanted to follow its precedent of the Yugoslavia Commission that preceded the International Criminal Tribunal for the Former Yugoslavia (ICTY) and that called for its establishment as stated in Resolution 808. Thus, it seemed to the Security Council more suitable, before establishing the International Criminal Tribunal for Rwanda (ICTR), to have a commission that would call for it. But there was another reason: It was necessary to gain time before the Security Council established the ICTR in order to work out the logistics of the prospective tribunal.”<sup>44</sup>

Indeed, if political actors are eager to activate a formal investigation, an MRF mission as a preliminary step has not always been necessary. The UNSC's reaction to the Libyan government's crackdown to the 2011 uprising in the country exemplifies this point. Unlike the referral of the Darfur situation to the ICC, in the instance of Libya the UNSC did not first mandate a commission of inquiry before referring the situation to the ICC.

Conversely, in other instances, though an MRF report presents information suggesting that violations have occurred and recommends international engagement regarding accountability, political actors and/or ICCT actors might still refrain from initiating an ICCT investigation. The International Commission of Inquiry for Burundi is an instructive example. Though this commission, mandated by the UNSC in 1995, concluded that acts of genocide had been committed against Tutsis and recommended that international jurisdiction be asserted to investigate and prosecute these crimes,<sup>45</sup> the UNSC, in contrast to the UNSC's response to the situations in the former Yugoslavia and Rwanda, did not mandate the creation of a tribunal to address this context. This example suggests that the political will of governments to act on the recommendations of MRF bodies depends not only on an objective assessment of the likelihood that violations of international law have occurred but also on *realpolitik* considerations. At the political level, MRF missions can play a role in the process of building consensus to pursue accountability, though these possibilities are unlikely to be realized in all instances.

## B. Information Sharing

The history of the rebirth of international criminal justice that has occurred over the past few decades is rife with instances in which prosecutors have relied on information gathered by MRF bodies. The database created by the Former Yugoslavia Commission was turned

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44 M. Cherif Bassiouni, “Appraising UN Justice-Related Fact-Finding Missions,” 5 *Journal of Law & Policy* No. 35 (2001), at 43.

45 “International Commission of Inquiry for Burundi: Final Report,” United States Institute of Peace, paras 496-499, available at <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Burundi-Report.pdf>.

over to ICTY, and subsequently, Justice Richard Goldstone, the ICTY Prosecutor from 1994-1996, stated, “The only thing that we had was the work of Bassiouni’s Commission of Inquiry, which permitted us to construct the Tadic case.”<sup>46</sup> Another example is the Humanitarian Law Documentation Project in Kosovo, an initiative that was conducted by the International Crisis Group, which gathered over four thousand records and handed this information over to the ICTY.<sup>47</sup> More recently, scholars have written that MONUC “was one of the main providers of evidentiary material” for the *Lubanga* case,<sup>48</sup> and regarding the interaction between MONUC and national prosecutions occurring in the DRC, the mission “has been intimately involved in the investigation and prosecution of international crimes in the DRC, including, among others, the Ngoy case.”<sup>49</sup>

One reason that information gathered by MRF missions can be helpful to the work of ICCTs is that MRF missions often gain territorial access to sites where violations occurred long before ICCTs arrive on the scene. As one author writes:

“First on the scene may be international agencies such as the U.N. and humanitarian agencies. While their primary mandate may be to restore or maintain stability or to provide humanitarian relief, they will often be in possession of information that later proves crucial to a criminal case, and in some contexts such agencies have themselves been charged with investigating violations (...). Local NGOs may also be on the scene first, for instance providing assistance to arriving refugees. In the course of providing such assistance, both U.N. agencies and NGOs may be told a lot of information by victims and witnesses.”<sup>50</sup>

Local NGOs can be particularly valuable to ICCT prosecutors because these organizations have often already established relationships with — and have already gained the trust of — the local population.<sup>51</sup> Furthermore, access to witnesses and victims, as well as to physical evidence, is a particular challenge in the context of ongoing armed-conflicts, which constitute many of the ICCs areas of focus. By gaining access to areas where armed conflicts are ongoing, MRF missions can play a useful role obtaining information that would otherwise be unavailable to prosecutors.

The possibility also exists that MRF missions and ICCTs could coordinate on forensic analysis. Such cooperation occurred in 1996, when the ICTY outsourced a mass grave excavation to Physicians for Human Rights.<sup>52</sup> Additionally, the UNIIIC gathered physical evidence, conducted extensive forensic investigations of the crime scene, and conducted analysis of

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46 Pierre Hazan, *Justice in a Time of War*, trans. James Thomas Snyder (United States: Pierre Hazan, 2004), 60.

47 “The Role of Human Rights NGOs in Relation to ICC Investigations,” Discussion Paper, Human Rights First, The Hague, September 2004, p. 7, available at [http://www.iccnw.org/documents/HRF-NGO\\_RoleInvestigations\\_0904.pdf](http://www.iccnw.org/documents/HRF-NGO_RoleInvestigations_0904.pdf).

48 Heikelina Verrijn Stuart, “The ICC in Trouble,” 6 *Journal of International Criminal Justice* (2008), at 412.

49 Elena Baylis, “Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks,” March 2008, p. 44, available at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2404&context=bclr>.

50 Human Rights First, *supra* note 47, at 3.

51 *Ibid.*, at 4.

52 Melanie Klinkmer, “Improving International Criminal Investigations into Mass Graves: Synthesizing Experiences from the Former Yugoslavia,” 4 *Journal of Human Rights Practice* No. 3 (2012), at 338.

telephone calls of individuals suspected to be responsible for the attack,<sup>53</sup> and this information was subsequently transferred to the Special Tribunal for Lebanon.<sup>54</sup>

Another manner by which MRF missions can feed information into ICCT processes is through the testimony of MRF practitioners during trials. As one writer has noted with reference to the *Lubanga* case, “the most important witness to appear before the ICC in this case was an official from the MONUSCO human rights division.”<sup>55</sup> The testimony of this witness, who monitored the situation of child soldiers in the DRC, was deemed by the Trial Chamber to be “detailed, credible and reliable, particularly when it was based on her personal experience of working with demobilised children in the region.”<sup>56</sup>

Additionally, in various cases brought before the ICTY, the prosecutor noted the mere existence and dissemination of MRF reports to establish that the defendants and other actors were aware that the alleged crimes were occurring. In the *Perišić* case, the Trial Chamber referred to the dissemination of the reports of the United Nations Special Rapporteur on the former Yugoslavia to demonstrate that the leadership of the Federal Republic of Yugoslavia had an awareness of alleged crimes that were being committed.<sup>57</sup> In the *Krstić* case, the existence of a report of the United Nations Secretary-General was used to demonstrate widespread knowledge of crimes committed at Srebrenica,<sup>58</sup> while in the *Dorđević* case, the dissemination of Human Rights Watch reports was used as part of the effort to establish command responsibility by demonstrating that the defendant, Vlastimir Dorđević, had knowledge of the actions of his subordinates.<sup>59</sup>

### C. Capacity Sharing

ICCTs suffer from a perpetual struggle to garner sufficient financial, logistical, and personnel capacity. As a recently released strategic plan drafted by the Office of the Prosecutor of the ICC states, “the lack of resources is the most critical factor, affecting the ability to successfully face the new challenges and demands on the Office.”<sup>60</sup> For this reason, capacity

53 See “Fourth report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005), 1636 (2005) and 1644 (2005),” 10 June 2006, para. 5, available at <http://www.stl-tsl.org/en/documents/un-documents/reports-of-the-uniic/4th-report-of-the-International-Independent-Investigation-Commission-established-pursuant-to-Security-Council-resolutions>; “Eighth report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006) and 1748 (2007),” July 2007, paras 29 and 41-46, available at <http://www.stl-tsl.org/en/documents/un-documents/reports-of-the-uniic/8th-report-of-the-International-Independent-Investigation-Commission-established-pursuant-to-Security-Council-resolutions>; and “Ninth report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006) and 1748 (2007),” November 2007, paras 27-28, 40-41, and 91-93, available at <http://www.stl-tsl.org/en/documents/un-documents/reports-of-the-uniic/9th-report-of-the-International-Independent-Investigation-Commission>.

54 Amal Alamuddin and Anna Bonini, “The UN Investigation of the Hariri Assassination,” in *The Special Tribunal for Lebanon: Law and Practice*, eds. Amal Alamuddin, Nidal Nabil Jurdi, and David Tolbert (Oxford: Oxford University Press, 2014), 57.

55 Melillo, *supra* note 34, at 774.

56 “Judgment pursuant to Article 74 of the Statute,” SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO, ICC-01/04-01/06, 14 March 2012, para. 645.

57 David Re, “Fact-Finding in the Former Yugoslavia: What the Courts Did,” in *Quality Control in Fact-Finding*, ed. Morten Bergsmo (Florence: Torkel Opsahl Academic EPublisher, 2013), 301.

58 *Ibid.*, at 309.

59 *Ibid.*, at 316-317.

60 “Strategic plan: June 2012-2015,” International Criminal Court, Office of the Prosecutor, 11 October 2013, p. 8, available at <http://www.icc->

sharing between ICCTs and MRF missions constitutes another area of potentially beneficial interoperability. The coordination that occurred between the ICC and MONUC, for example, has included sharing offices, information technology, and other resources necessary for on-the-ground investigations.<sup>61</sup> Furthermore, MONUC's efforts to support prosecutions occurring on the national level in the DRC particularly demonstrate the lengths that can be achieved through coordination. As one scholar writes of prosecutions of crimes committed in the town of Mambasa in the DRC:

“As the Mambasa cases progressed, other needs developed and additional partnerships were created to meet them. For example, both the defendants and the victims needed lawyers, and so the NGO *Advocats sans Frontieres* found, coordinated, and paid local attorneys to represent both sides. Another UN agency began providing witness protection. As the cases moved toward trial, everything had to be rebuilt from the ground up. The EU repaired the courtroom, while an NGO repaired the prisons. The judges were paid by the EU but lived inside the MONUC military camp for their protection. All this time, MONUC and others were pressing for arrests and then for prosecutions.”<sup>62</sup>

#### D. Legal Analysis

The legal analysis conducted by MRF bodies can also influence the direction and outcome of ICCT processes. For example, judges of the ICTY cited the legal conclusions of the Former Yugoslavia Commission regarding the application of customary international law to non-international armed conflicts, the legal components of command responsibility, and the definition of ‘protected persons’ under crimes against humanity.<sup>63</sup> More recently, one scholar has suggested that the Syria Commission has contributed to the progressive development of international human rights law by adopting progressive interpretations of the human rights obligations of armed groups.<sup>64</sup> However, MRF practitioners appear to be largely opposed to the notion that MRF reports should aim to contribute to the development of unsettled areas of international law, and instead, MRF practitioners perceive that MRF reports should aim to apply only existing law.<sup>65</sup> But given the nature of MRF work, MRF practitioners frequently do have to draw conclusions about areas of international law that remain unsettled, so the possibility remains that MRF practitioners, through their legal analyses, could influence judges’ rulings, either because judges explicitly refer to MRF reports to justify their conclusions, as occurred in the ICTY, or because MRF reports are — despite the protestations of practitioners — contributing in some way to the overall process of settling unresolved international legal questions.

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[cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf](http://www.cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf).

61 Melillo, *supra* note 34, at 769.

62 Baylis, *supra* note 49, at 46.

63 Re, *supra* note 57, at 287.

64 Tilman Rodenhäuser, “Progressive Development of International Human Rights Law: The Reports of the Independent International Commission of Inquiry on the Syrian Arab Republic,” *EJIL: Talk!* April 13, 2013, available at <http://www.ejiltalk.org/progressive-development-of-international-human-rights-law-the-reports-of-the-independent-international-commission-of-inquiry-on-the-syrian-arab-republic/>.

65 Théo Boutruche, “Selecting and Applying Legal Lenses in Monitoring, Reporting, and Fact-finding Missions,” Working Paper, Program on Humanitarian Policy and Conflict Research at Harvard University, October 2013, p. 21, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2337437](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337437).

### III. Operational and Methodological Challenges

This section examines four factors that complicate efforts to build links of interoperability between MRF missions and ICCTs. Firstly, reputational considerations sometimes hinder interoperability. Secondly, MRF missions and ICCTs have different requirements regarding standards of proof.<sup>66</sup> Thirdly, differences exist between how these two types of entities balance the responsibility to protect witnesses and victims with due process concerns for the accused. Fourthly, a risk exists that an MRF mission, by handling physical evidence, might harm a future ICCT investigation by tarnishing evidence, such as a suspected mass grave.

#### A. Reputations

When MRF missions and ICCTs interact, the possibility is always present that their respective reputations could complicate efforts to facilitate interoperability. Despite the investigative coordination that occurred in Rwanda, as mentioned earlier in this paper, the cooperation between the Office of the Prosecutor of the ICTR and HRFOR is one pertinent example of the complexities that arise from reputational considerations. While the ICTR Prosecutor wished to distinguish itself from human rights agencies, HRFOR was careful to maintain its identity as an independent human rights body. In particular, HRFOR was concerned that assistance to the ICTR could affect perceptions of the mission's neutrality, which could affect access to political and military leaders. At the same time, the Office of the Prosecutor was concerned that HRFOR's monitoring role might jeopardize cooperation between the ICTR and the Rwandan Government.<sup>67</sup>

Similar considerations have influenced more recent MRF missions. In particular, according to Whiting, a danger exists that an MRF mission's cooperation with the ICC could hamper the mission's ability to gather information from witnesses and victims.<sup>68</sup> Whiting writes, "states and organizations will be particularly cautious about providing information to the ICC *because* it is a permanent institution. (...) In this way, the institutionalization of international criminal justice paradoxically creates additional impediments to its success."<sup>69</sup> Indeed, UN Member States' opposition to the ICC, particularly from the United States, has presented an obstacle to the authorization of coordinative linkages. During negotiations for the original mandate of MONUC, an early draft of the UNSC resolution included an explicit reference to the fact that the mission would function in cooperation with the ICC.<sup>70</sup> However, this reference was dropped due to American opposition.<sup>71</sup> Though the exclusion of this language from the resolution did not preclude the eventual adoption of an MOU between MONUC and the ICC, this example is indicative of the forces of resistance that sometimes stand in the way of interoperability.

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<sup>66</sup> The issue of standards of proof is not only touched on in this section, but will also be examined in-depth in a subsequent working paper.

<sup>67</sup> Seutcheu, *supra* note 34, at 6.

<sup>68</sup> Alex Whiting, "Lead Evidence and Discovery Before the International Criminal Court: The Lubanga Case," 14 *UCLA Journal of International Law and Foreign Affairs* No. 1 (2009), at 227.

<sup>69</sup> *Ibid.*

<sup>70</sup> Melillo, *supra* note 34, at 767.

<sup>71</sup> *Ibid.*

## B. Standards of Proof

MRF missions and ICCTs adopt contrasting approaches to standards of proof. Standards of proof in an ICCT context are highly systematized. For example, during an ICC case, the standard of proof required for the issuance of an arrest warrant or a summons to appear before the Court is “reasonable grounds to believe,”<sup>72</sup> for the Pre-Trial Chamber to confirm charges is “substantial grounds to believe,”<sup>73</sup> and for the Trial Chamber to convict the accused is “beyond a reasonable doubt.”<sup>74</sup> In contrast, MRF missions not only tend to approach standards of proof in a somewhat fluid manner but also typically require a lower evidentiary threshold, such as “reasonable suspicion,”<sup>75</sup> “preponderance of evidence,”<sup>76</sup> or “balance of probabilities,”<sup>77</sup> while some MRF reports articulate no standard of proof at all.<sup>78</sup> However, to elucidate the distinction between MRF missions and ICCTs, MRF practitioners fairly consistently emphasize that the findings included in MRF reports fall short of the evidentiary standard necessary for criminal prosecution. The passages below from MRF reports demonstrate this trend:

- “One of the major premises is that mapping remains a preliminary exercise that does not seek to gather evidence that would be admissible in court, but rather to ‘provide the basis for the formulation of initial hypotheses of investigation by giving a sense of the scale of violations, detecting patterns and identifying potential leads or sources of evidence.’” (Mapping Exercise in the Democratic Republic of the Congo)<sup>79</sup>
- “In summary, it should be noted that the factual basis thus established may be considered as adequate for the purpose of fact-finding, but not for any other purpose. This includes judicial proceedings such as the cases already pending before International Courts as well as any others.” (Independent International Fact-Finding Mission on the Conflict in Georgia)<sup>80</sup>

72 Rome Statute of the International Criminal Court, Article 58(1)(a).

73 Rome Statute of the International Criminal Court, Article 61(5).

74 Rome Statute of the International Criminal Court, Article 66(3).

75 See, e.g., “Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste,” 2006, paras 12 and 110, available at <http://www.ohchr.org/Documents/Countries/COITimorLeste.pdf>.

76 See, e.g., “Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance,” 2010, para. 24, available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.21\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.21_en.pdf).

77 See, e.g., “Report of the International Commission of Inquiry on Libya,” [A/HRC/19/68, 2012, March 2012](#), para. 7, available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A.HRC.19.68.pdf>.

78 For example, the report of the Bahrain Commission of Inquiry makes no mention of the commission’s standard of proof. Additionally, the report of the fact-finding mission mandated by the United Nations Human Rights Council to gather information about the Israeli Flotilla raid of 2010 simply states, “The Mission found the facts set out below to have been established to its satisfaction.” See “Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance,” A/HRC/15/21, 2010, para. 183.

79 “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,” August 2010, para. 95.

80 “Independent International Fact-Finding Mission on the Conflict in Georgia Report,” Volume I, September 2009, p. 8.

- “With some exceptions, the information and allegations contained therein have not been verified. However, the cumulative nature of the information, as well as its corroboration from multiple sources evidences a degree of reliability, in the aggregate and in many individual cases. The recurrence of certain factual information from multiple or unrelated sources provides a basis for an inference of reliability and credibility. Viewed in its entirety, the combination of this information warrants the Commission’s findings as to the general patterns and policies described in the Final Report and in the Annexes.” (Former Yugoslavia Commission)<sup>81</sup>

In some instances, MRF reports have articulated the standard of proof — “reasonable grounds to believe” — required, as mentioned above, by the Rome Statute for the Pre-Trial Chamber to issue an arrest warrant or a summons to appear before the Court.<sup>82</sup> However, even in these situations, the standard as understood and employed by the MRF mission might not necessarily be congruent with the standard required by the ICC. As one practitioner stated of MRF work, “It is inevitable to have a discussion of standards of proof. But when you’re involved, you apply standards of proof in practical terms, not in theoretical terms. (...) You follow more generally what you believe is a sensible approach.”<sup>83</sup> Indeed, as Jacobs and Harwood argue, divorcing the concept of standards of proof from the prosecutorial process risks rendering the very notion of standards of proof senseless:

“[S]tandards of proof in the judicial context have a specific function in the achievement of a particular procedural goal, most notably the determination of the innocence or guilt of a particular individual, with the very concrete effect of incarceration. In other words, in criminal law, standards of proof are intrinsically linked to the protection of the rights of the accused, more particularly in respect of the presumption of innocence. The two cannot be separated and, given the nature of commissions, which do not have a judicial function, nor specific legal powers over individuals, the adoption of evidentiary thresholds might not be conceptually sound.”<sup>84</sup>

The 2013 decision of the Pre-Trial Chamber of the ICC to adjourn the hearing for confirming the charges against Laurent Gbagbo saliently elucidates the complexities of building a case in part on information gathered by outside entities. The Pre-Trial Chamber asserted that the Prosecutor’s allegations “are proven solely with anonymous hearsay from NGO Reports, United Nations reports and press articles,” and that “the Chamber is unable to attribute much probative value to these materials.”<sup>85</sup> On the question of how the standard of proof of

<sup>81</sup> Report of the Commission of Experts on the former Yugoslavia, quoted in *Re, supra* note 57, at 299.

<sup>82</sup> See Rome Statute of the International Criminal Court, Article 58(1)(a). For MRF reports that have used the “reasonable grounds to believe” standard, see “Rapport de la Commission d’enquête internationale indépendante sur la Côte d’Ivoire,” A/HRC/17/48, 2011, para. 118; and “Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka,” 31 March 2011, para. 51.

<sup>83</sup> Philippe Kirsch, quoted in Stephen Wilkinson, “Finding the Facts: Standards of Proof and Information Handling in Monitoring, Reporting, and Fact-finding Missions,” Program on Humanitarian Policy and Conflict Research, February 2014, p. 14, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2400927](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400927).

<sup>84</sup> Dov Jacobs and Catherine Harwood, “International Criminal Law Outside the Courtroom: The Impact of Focusing on International Crimes for the Quality of Fact-Finding,” in *Quality Control in Fact-Finding*, ed. Morten Bergsmo (Florence: Torkel Opsahl Academic EPublisher, 2013), 354.

<sup>85</sup> “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute,” Pre-Trial Chamber I, International Criminal Court, p. 17, available at <http://www.icc-cpi.int/iccdocs/doc/doc1599831.pdf>.

MRF reports affects the admissibility of this information as evidence, the Pre-Trial Chamber stated:

“[T]he Chamber notes with serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity. Such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(l)(a) of the Statute. Even though NGO reports and press articles may be a useful introduction to the historical context of a conflict situation, they do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of charges.”<sup>86</sup>

In contrast to the ICC Pre-Trial Chamber, the International Court of Justice (ICJ) has been more liberal in its acceptance of MRF findings as evidence, though many scholars have critiqued the ICJ for this practice.<sup>87</sup> According to one writer who examined the ICJ’s ruling on the *Democratic Republic of the Congo v. Uganda* case, “the Court accepts evidence derived from UN reports as virtually conclusive,” “demonstrates an uncritical approach (...) towards UN documents,” and “substitute[s] findings by the UN for its own assessment of the facts.”<sup>88</sup> As these comments suggest, contrasting views exist about the credibility of MRF reports, raising questions about the extent to which interoperability should be fostered.

### C. Victim/Witness Protection in the Context of a Fair Trial

One core factor that distinguishes MRF missions from ICCTs is the differing ways that these types of bodies deal with concerns about the protection of victims and witnesses and fair trial guarantees. MRF missions are usually based primarily on information obtained from confidential sources. MRF practitioners, to protect interviewees from the risk of reprisals, aim to retain the confidentiality of these interviewees by removing interviewees’ names, as well as additional potentially identifying information, from internal and external reports.<sup>89</sup> As noted earlier in this paper, MRF practitioners weigh due process guarantees when deciding whether or not to publicly identify alleged perpetrators, but MRF reports otherwise do not address individual criminal responsibility, thus rendering considerations of due process for individual alleged perpetrators irrelevant.

In contrast, in the context of an ICCT, fair trial guarantees play a prominent role. While MRF reports are based primarily on confidential sources, the ICC statute, for example, states in Article 67(2) that the Prosecutor “shall, as soon as practicable, disclose to the defense evidence in the Prosecutor’s possession or control which he or she believes shows or tends

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<sup>86</sup> *Ibid.*, at 16.

<sup>87</sup> For a critique of the ICJ’s use of UN reports in the Kosovo advisory opinion, see generally Katherine Del Mar, “Weight of Evidence Generated through Intra-Institutional Fact-finding before the International Court of Justice,” 2 *Journal of International Dispute Settlement* No. 2 (2011), at 393-415.

<sup>88</sup> Simone Halink, “All Things Considered: How the International Court of Justice Delegated Its Fact-Assessment to the United Nations in the Armed Activities Case,” *Institute for International Law and Justice Emerging Scholars Paper* 4, 2007, pp. 8 and 10, available at <http://www.ijl.org/publications/documents/HalinkWP.print-web.pdf>.

<sup>89</sup> See generally Cynthia Petrich, “Protection of Witnesses, Victims, and Staff in Monitoring, Reporting, and Fact-finding Mechanisms,” Working Paper, Program on Humanitarian Policy and Conflict Research at Harvard University, February 2014, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2392493](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2392493).

to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.”<sup>90</sup> Nonetheless, Article 18(5) of the statute articulates the following exception for reasons of protection:

“Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”<sup>91</sup>

The ICC statute also states in Article 54(3)(e) that the Prosecutor may “[a]gree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents (...).”<sup>92</sup>

Yet, how does the ICC statute balance the Prosecutor’s obligation to disclose exculpatory material to the defense counsel with the exceptions mentioned in Articles 18(5) and 54(3)(e)? In the *Lubanga* case, the lack of clarity concerning the answer to this question almost caused the case to fail. Indeed, the Trial Chamber, in its June 13, 2008 decision to halt proceedings, asserted that the Prosecutor had “incorrectly used Article 54(3)(e)” and that, as a result, “the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial.”<sup>93</sup> According to Whiting, “The conflict between Articles 54(3)(e) and 67(2) in the *Lubanga* case will likely repeat itself in future cases.”<sup>94</sup> Whiting concludes that the ambiguity of the ICC statute on this issue presents a potentially massive hindrance for the future of interoperability:

“[C]onfidential lead evidence will be critical to the ultimate success of the ICC. Moreover, it will be essential that providers feel confident that the information they provide to the ICC will be kept confidential, and that they will be pressured to disclose only as a last resort. If they lack this confidence, there is a real risk that providers will simply stop cooperating with the ICC.”<sup>95</sup>

From the perspective of MRF practitioners, interoperability depends on the informed consent on the interviewee, meaning that interviewees providing information to MRF missions must provide consent to how the information will be used. However, ambiguities persist regarding informed consent. Firstly, in many instances, interviewees do not appear to actually understand the implications of the consent being granted.<sup>96</sup> In such situations, MRF practitioners must decide how to use this information in a responsible manner. Secondly,

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90 Rome Statute of the International Criminal Court, Article 67(2).

91 Rome Statute of the International Criminal Court, Article 18(5).

92 Rome Statute of the International Criminal Court, Article 54(3)(e).

93 “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008,” SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO, 13 June 2008, paras 92-93, available at <http://www.icc-cpi.int/iccdocs/doc/doc511249.PDF>.

94 Whiting, *supra* note 68, at 233.

95 *Ibid.*, at 230.

96 Petrich, *supra* note 89, at 38.

MRF practitioners sometimes encounter situations in which, even though an interviewee grants consent, the mission determines that exposing this information publicly or to outside entities could place the interviewee at risk.<sup>97</sup> In these scenarios, MRF practitioners conduct their own assessment of the interviewee's security risks. Thirdly, on some missions, practitioners have discovered that their processes of obtaining informed consent lacked sufficient specificity. One practitioner recounts:

"We had a simple, straightforward consent menu that proved to be insufficient when the ICC formally requested the materials. When we covered the consent options with our interviewees, one specific question we asked was whether they would permit us to share the information with the ICC. We didn't specify, either to the interviewee or in our record of the conversation, if that consent included the ability to give both to the prosecution and the defence. When the defence later requested the information we didn't know if we could give it. We had a sense that the interviewee was hoping it would be used for prosecution, to achieve 'justice'. We were concerned that we would be misusing their consent. We have since amended our consent options."<sup>98</sup>

#### D. Information Gathering Methodology

On some MRF missions, when practitioners have attempted to devise evidence-gathering procedures conducive to coordination, methodological errors have sometimes hindered interoperability. In addition to the aforementioned reputational concerns that arose in the context of Rwanda, evidence handling was also an issue. In particular, the Office of the Prosecutor found some evidence that had been collected by HRFOR to be inadmissible 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 the photographs were taken.<sup>99</sup> Similar problems hindered efforts to share witness testimony. As one writer notes of both the ICTR and the ICTY, "deponents who gave eyewitness accounts [to MRF mechanisms] were often not identified at all or with insufficient precision which hindered verification at a later stage and rendered its adduction as evidence in court impossible."<sup>100</sup>

The possibility also exists that MRF engagement to potential ICCT witnesses could harm a future prosecution. According to one writer:

"NGOs may also need guidance on how to avoid "contaminating" witnesses. For instance, if – before ICC investigators arrive – groups take detailed verbatim statements from an individual who turns out to be a key witness, this could create problems for a subsequent ICC investigation. Problems will also be caused if multiple NGOs and international organizations take statements from the same witness. In such situations, the ideal solution from the ICC's point of view could be that a human rights organization takes only a short note of the evidence a witness could give rather than a full, signed statement in the person's own words, obtaining the witness's consent if it intends to forward that note to the ICC."<sup>101</sup>

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97 *Ibid.*, at 39.

98 Vic Ullom, quoted in *Ibid.*, at 38.

99 Seutcheu, *supra* note 34, at 8.

100 Sunga, *supra* note 6, at 196.

101 Human Rights First, *supra* note 47, at 8.

As another writer notes, the level of skills and expertise of the mission's investigators plays a major role in determining whether this risk arises:

“Besides, there is a huge risk of the spoiling of evidence by unschooled interrogators and evidence collectors, however well-meaning they may be. Precisely because their mandate is different and their expertise not necessarily suitable for criminal investigations, the use of local knowledge and NGO and UN intermediaries should be open for scrutiny by the judges and by the defence.”<sup>102</sup>

The risk is particularly acute for physical evidence, including mass graves excavations, which numerous MRF bodies have conducted. For example, the Former Yugoslavia Commission exhumed mass graves at Ovčara and Pakračka Poljana;<sup>103</sup> Physicians for Human Rights conducted exhumations for the ICTY; and the United Nations Independent Expert on Somalia tasked Physicians for Human Rights to conduct investigations of over one hundred suspected mass grave sites in Somalia.<sup>104</sup> However, recent MRF missions have refrained from undertaking exhumations. The possibility arose for the International Commission of Inquiry for Guinea, and as the mission's final report states, “In order to preserve the evidence for any future criminal prosecution, the Commission did not visit the locations that witnesses had identified as mass graves, despite the various corroborating accounts it had received.”<sup>105</sup> Indeed, the efforts of many forensic scientists to conduct analyses of mass graves have been frustrated by contamination, resulting from previous poorly conducted investigative attempts.<sup>106</sup> Essentially, MRF practitioners who desire to facilitate interoperability are often caught between competing considerations. On the one hand, if MRF missions refrain from gathering and analyzing physical evidence, the evidence can be lost forever if not properly secured. On the other hand, practitioners may lack the skill set required to handle physical evidence appropriately and might unknowingly create complications for a future ICCT investigation. In such instances, even if the will to promote interoperability is present, the best course of action is not always obvious.

## IV. Conclusion

As this paper has demonstrated, during every phase throughout the ICCT prosecutorial process — from the decision to authorize an investigation to the judges' legal rulings — interoperability can play a crucial role. Indeed, interoperability already regularly occurs, and the many examples of successful interoperability mentioned throughout this paper suggest the desirability of facilitating more frequent methodological and operational linkages between MRF missions and ICCTs. Although, the challenges that this paper has examined and the numerous examples of ineffective efforts to promote interoperability suggests that

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<sup>102</sup> Stuart, *supra* note 43, at 414.

<sup>103</sup> “Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992),” S/1994/674, 27 May 1994, p. 61, available at [http://www.law.depaul.edu/centers\\_institutes/ihri/downloads/Secretary\\_General\\_letter.pdf](http://www.law.depaul.edu/centers_institutes/ihri/downloads/Secretary_General_letter.pdf).

<sup>104</sup> “Mass Graves: Unearthing Evidence of Barre-era War Crimes,” The Center for Justice & Accountability, available at <http://www.cja.org/section.php?id=483>.

<sup>105</sup> “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, 2009, para. 13.

<sup>106</sup> See “Uncovering the Truth with Forensic Archaeology,” Heritage Daily, February 26, 2013, available at <http://www.heritagedaily.com/2013/02/uncovering-the-truth-with-forensic-archaeology/78162>.

there are the obstacles that policy actors are likely to face while endeavoring to promote deeper and more sustained linkages between MRF missions and ICCTs.

In certain circumstances, these obstacles might prove to be insurmountable. For example, in contexts in which the ICC is controversial, reputational considerations are likely to lead the MRF practitioners to shun interoperability in order to preserve perceptions of the MRF mission's integrity. However, many of the other challenges that this paper has highlighted are methodological and operational issues that could be overcome through efforts to draw MRF practitioners and ICCT professionals together to exchange views about their practices and needs. Indeed, issues such as how to approach standards of proof; how to balance, on the one hand, the protection of witnesses and victims, and on the other hand, considerations of due process for the accused; and how to conduct MRF work in a manner that is simultaneously consistent with an MRF mission's mandate and useful to ICCTs are all issues ripe for coordinative improvement. A follow-up to this working paper will examine in detail issues related to the science of evidence and how peer-to-peer exchange on the more technical aspect of evidence-based fact-finding methodologies and techniques can further interoperability between practitioners working for MRF missions and ICCTs.

The overarching challenge in facilitating interoperability in these methodological and operational areas could very well be professional in nature. These two domains — MRF and ICCTs — are not professionally binary. Indeed, given the similarities in the professional skills required by these two types of entities, many professionals in this field have experience with both MRF and ICCT work. However, as this paper has addressed, various practitioners have articulated the perspective that MRF missions and ICCTs constitute distinct exercises that should not overlap. It will be the challenge of policy actors, then, not only to focus on the aforementioned methodological and operational issues but also to cultivate a professional consensus that the many potential benefits of interoperability outweigh the drawbacks that have been experienced in the past.

What might the route forward look like? Engagement on two levels will be necessary. Firstly, connections should continue to be fostered at the institutional level. While, as this paper has illustrated, various inter-institutional linkages have been pursued — between the ICC and the UN, and between international and regional rapporteurs, for example — these efforts have not yet consistently yielded successful methodological and operational cohesion. Secondly, efforts should be undertaken to bring together professionals to discuss the challenges, tensions, and potentialities addressed in this paper. Exploring engagement on both levels — institutional and professional — will be necessary in order to assess the extent to which the calls for more effective interoperability, as articulated by various actors throughout this paper, can be actualized.

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