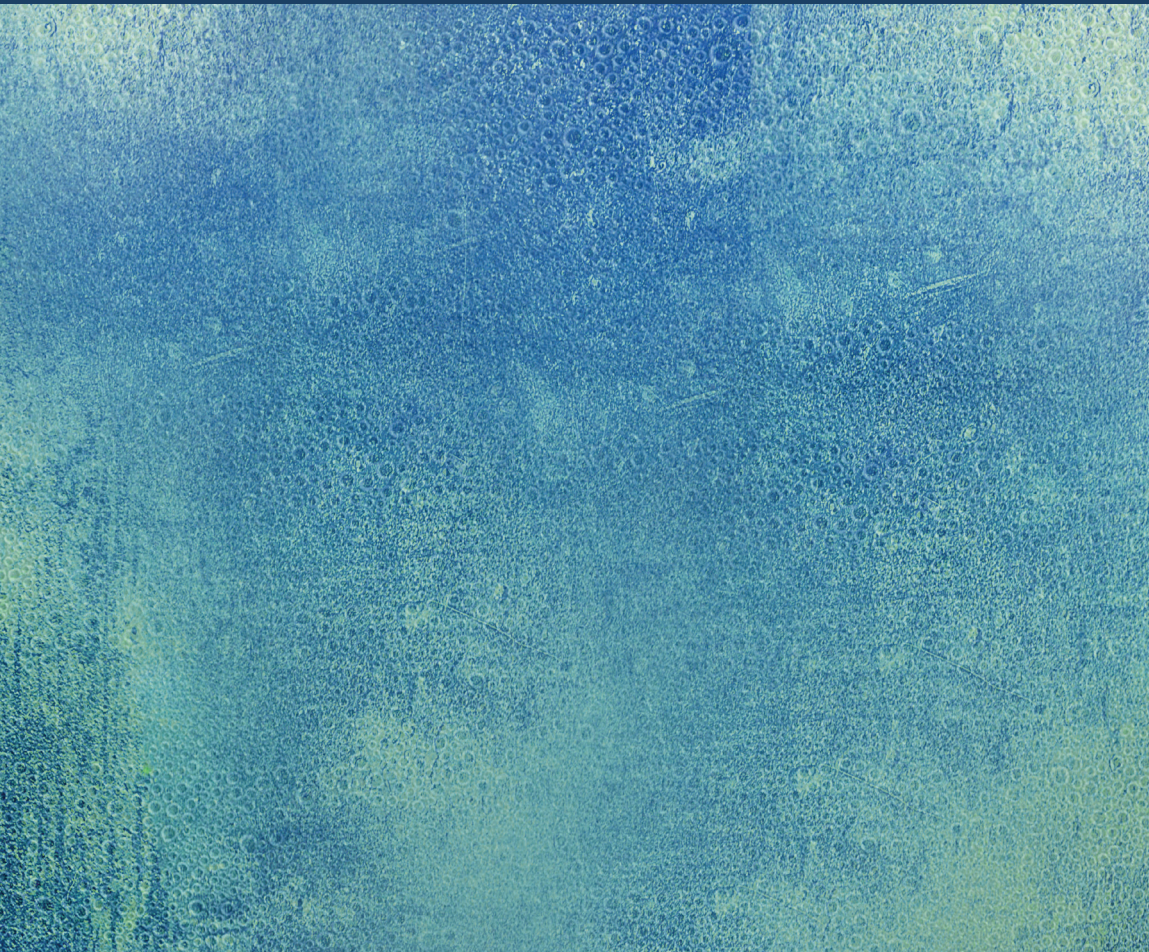


HPCR ADVANCED PRACTITIONER'S **HANDBOOK**  
ON **COMMISSIONS**  
OF **INQUIRY**

MONITORING, REPORTING, AND FACT-FINDING



HARVARD  
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Program on Humanitarian Policy and Conflict Research



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• MARCH 2015 •

Program on Humanitarian Policy and Conflict Research  
Harvard Humanitarian Initiative  
Harvard T. H. Chan School of Public Health

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The design and layout of the Handbook was undertaken by Brigitte Ayotte of Ayograph.

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# ACRONYMS

HPCR	Program on Humanitarian Policy and Conflict Research at Harvard University
ICC	International Criminal Court
ICL	International criminal law
IHL	International humanitarian law
IHRL	International human rights law
MRF	Monitoring, reporting, and fact-finding
OHCHR	Office of the High Commissioner for Human Rights
SGBV	Sexual and gender-based violence
UN	United Nations
UNHRC	United Nations Human Rights Council
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General

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# INTRODUCTION

Over the past few decades, commissions of inquiry have become an increasingly prominent component of international, regional, and national responses to allegations of violations of international human rights law (IHRL) and international humanitarian law (IHL) in the context of armed conflicts and internal disturbances. This development has occurred amidst a broader proliferation of monitoring, reporting, and fact-finding (MRF) mechanisms established in different forms by various mandating bodies. Indeed, entities such as the United Nations Security Council (UNSC), the United Nations Human Rights Council (UNHRC), the Office of the United Nations Secretary-General (UNSG), regional organizations such as the European Union, and governments at the domestic level have mandated not only commissions of inquiry and fact-finding missions but also panels of experts, mapping exercises, monitoring components of peace operations, and special rapporteurs.

This proliferation has led to efforts to review best practices used by MRF practitioners, including key methodological principles and modalities of application. Commissions of inquiry have constituted a particular area of focus for practitioners and policymakers. The growing body of policy literature that has been generated includes various documents, such as the 2013 *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies*, which articulates rules and principles applicable to different types of fact-finding endeavors.<sup>1</sup> The recently published document, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*—produced by the Office of the High Commissioner for Human Rights (OHCHR)—provides information about standard operating procedures and guidelines relevant to each stage of

<sup>1</sup> M. Cherif Bassiouni and Christina Abraham, eds., *Siracusa Guidelines for International, Regional and National Fact-finding Bodies*, (Cambridge: Intersentia, 2013).

United Nations (UN) commissions of inquiry and fact-finding missions.<sup>2</sup> Regarding fact-finding on a particular type of violation, the United Kingdom's Foreign and Commonwealth Office led a drafting process that resulted in the *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*.<sup>3</sup>

Some experts and practitioners have noted the differences in terms of context, mandates, and modalities among various MRF bodies and have cautioned against articulating generalized procedures that might not adequately account for these distinctions.<sup>4</sup> However, ongoing policy development efforts have helped to achieve a better understanding of the field of MRF and to improve the quality and credibility of MRF work.

This Handbook aims to complement existing policy literature by reviewing the practice of MRF from a different angle. It focuses on key issues faced by MRF practitioners working in the context of commissions of inquiry and addresses the more challenging methodological dilemmas facing them. In this regard, the Handbook does not intend to address exhaustively the full process of conducting MRF missions. The Handbook rather proposes a methodological approach based on the experiences of past MRF missions and established professional standards, in order to equip practitioners with the ability to draw on best professional practices. The Handbook is also informed by the participation in its preparation of the HPCR Group of Professionals on Monitoring, Reporting, and Fact-finding, a team of high-level experts set up by the Program on Humanitarian Policy and Conflict Research (HPCR) at Harvard University.

In terms of the intended audience, the practical steps detailed throughout the Handbook are primarily relevant for practitioners working on commissions of inquiry. However, the methodological considerations that the Handbook presents draw on lessons from other types of MRF bodies, such as panels of experts and mapping exercises. Therefore, MRF practitioners working in other contexts will find certain aspects of the Handbook useful in their work. Indeed, the issues that the

<sup>2</sup> "Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice," Office of the High Commissioner for Human Rights, New York and Geneva, 2015.

<sup>3</sup> "International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law," UK Foreign and Commonwealth Office, First Edition, June 2014, available at [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/319054/PSVI\\_protocol\\_web.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf)

<sup>4</sup> For example, see Richard J. Goldstone, "Quality Control in International Fact-Finding Outside Criminal Justice for Core International Crimes," in *Quality Control in Fact-Finding*, ed. M. Bergsmo (Torkel Opsahl Academic EPublisher, 2013), 52.

Handbook addresses about fact-finding and legal analysis are relevant to a wide array of different MRF mechanism types, including long-term monitoring missions and the work of special rapporteurs operating in the context of the UN or at the regional level.

## HANDBOOK OVERVIEW

This Handbook addresses five particular areas that sequentially follow the planning and implementation of a mission.

**CHAPTER ONE** focuses on mandate interpretation. It presents the elements included in MRF mandates and details available modes of interpretation to determine the scope of the mission's activities. The chapter also addresses the extent and limits of the interpretive power of the practitioners leading the mission and the importance of transparency in mandate interpretation.

**CHAPTER TWO** presents methodological considerations for approaching the inter-related processes of establishing facts, drawing legal conclusions, and employing a standard of proof. This chapter addresses the array of legal frameworks employed by MRF missions in order to make determinations on allegations of violations of IHRL, IHL, international criminal law (ICL), and domestic law.

**CHAPTER THREE** addresses the mission's responsibilities for mitigating risks to witnesses and victims that result from their exposure to the mission. It explains how practitioners can responsibly strike a balance between professional perspectives regarding an MRF mission's protective responsibilities, rooted in the notion that practitioners should *do no harm* to witnesses and victims, and the complex realities of on-the-ground implementation. To this end, the chapter presents the most favored practices articulated by practitioners, the challenges of implementing those practices, and practical solutions for grappling with these challenges.

**CHAPTER FOUR** focuses on the level of information that should or can be publicly communicated during the mission. This chapter presents a framework for a strategic approach to public communication while mitigating unintended negative repercussions on security and/or the way the mission is perceived.

**CHAPTER FIVE** focuses on report drafting. It offers considerations for report drafters regarding the presentation of information about the origins and operations of the mission, the mission's factual and legal findings, and the mission's recommendations. For each of these topics, the chapter seeks to assist in identifying the outputs to be included in the report, presenting the content, and planning the drafting process.

Each chapter is designed to offer answers to particular questions that practitioners have faced regarding these five issues. The reader may wish to focus on the chapters that are especially relevant to the context of a particular mission and the practitioner's expertise and role within the mission. Each chapter consists of four sections:

**I. BACKGROUND:**

Provides information about the context within which the issue of the chapter emerges.

**II. PRACTICAL STEPS:**

Presents a method for approaching the issue at hand.

**III. EXPLANATION:**

Offers detailed information, examples from past practice, and additional commentary regarding the practical steps to be taken.

**IV. FINAL OBSERVATIONS:**

Summarizes the key methodological considerations detailed in the chapter and highlights particularly challenging issues.

## **PREPARATION OF THE HANDBOOK**

The Handbook is the product of a multi-annual research project conducted by HPCR with the support of the Swiss Federal Department of Foreign Affairs. At the core of the project, HPCR engineered a Group of Professionals comprised of high-level practitioners in the domain of MRF and, in collaboration with the Group, undertook extensive research and professional reflection about current and past MRF practices. During the preparation process, HPCR worked with the Group of Professionals, as well as outside experts, to conduct a comprehensive review of past MRF professional practice. In the initial phase of the research, HPCR constructed an on-line database that aggregated mandates and reports for over fifty MRF missions implemented since the end of World War II.<sup>5</sup> HPCR worked with the Group of Professionals to

<sup>5</sup> The HPCR database can be accessed at the following web address:  
[www.hpcrresearch.org/mrf-database/](http://www.hpcrresearch.org/mrf-database/)

select fifteen missions among those included in the database, which reflected the diversity of recent MRF practice in terms of the mandating body that created the mission, the context, and the information gathering methodology.<sup>6</sup>

On the basis of these fifteen missions, HPCR collaborated with the Group to implement a research agenda that proceeded in four steps. First, a desk analysis was undertaken of each of these missions' mandates and reports, as well as relevant secondary literature. Second, HPCR conducted extensive interviews with high-level practitioners who served on these missions in various capacities. Third, based on the desk analysis and the interviews, a series of six working papers analyzed trends in professional decision-making and the implications of different methodological choices.<sup>7</sup> Fourth, HPCR worked with the Group to adapt the working papers into a format suitable for the Handbook. This process entailed five on-site meetings of the Group of Professionals that HPCR convened between 2012 and 2014.

Throughout the Handbook preparation process, Professor Claude Bruderlein of HPCR served as the Chair of the Group of Professionals. Rob Grace, also of HPCR, served as the lead researcher on the project and the lead drafter of the Handbook. Anaide Nahikian, also of HPCR, provided valuable support in terms of project coordination throughout the duration of the initiative.

<sup>6</sup> Information about the selected missions, as well a detailed explanation of the criteria used for selecting these missions, can be found in the Annex.

<sup>7</sup> These working papers can be accessed on the HPCR website here: [www.hpcrresearch.org/research/monitoring-reporting-and-fact-finding](http://www.hpcrresearch.org/research/monitoring-reporting-and-fact-finding)





# CHAPTER ONE

## Mandate Interpretation

### I. BACKGROUND

The creation of an MRF mission occurs over the course of two phases (see Table 1). The key actors involved in this process are the mandating body (which could be an inter-governmental body, a national government, or an entity such as the UNSG) and the mandate holder (which is the MRF body itself, led, in the context of an *ad hoc* mission, by individuals under the title of ‘commissioner’ or a similar denomination).

**IN PHASE 1**, a mandating body decides to establish an MRF mechanism for the purpose of gathering information on alleged serious violations of IHL or IHRL and grants a mandate that articulates the mission’s broad contours. The mandate holder nominates respected individuals to fulfill the mandate.

**IN PHASE 2**, commissioners collectively interpret the mission’s mandate to derive from the text the necessary instructions and guidance for the mandate’s implementation.

**TABLE 1: THE TWO PHASES OF CREATING AN MRF MISSION**

	Who	Doing What	Weighing Which Considerations
<b>PHASE 1: Mandate Adoption</b>	The mandating authority	Adopting a mandate after consultations or negotiations	The explicit aims of the mandate, as well as other interests, including geopolitical and security concerns
<b>PHASE 2: Mandate Interpretation</b>	Commissioners, in some cases in consultation with other practitioners serving on the mission, such as investigative and legal experts	Adopting an interpretation of the mandate	The text of the mandate; the object and purpose of the mission; widely accepted principles of professional practice, such as impartiality; and considerations of the mission’s capacities (in terms of timeframe and resources)

Commissioners typically play no role in drafting the mandate during Phase 1, which is commonly a process of generating political consensus undertaken by the mandating body. Additionally, the mandating body rarely influences the interpretation of the mandate by the mandate holder that occurs during Phase 2, which is typically seen as a professional or technical process based on the prerogatives of the commissioners.

The independence of the mandate holder from the mandating body is essential. However, the fact that the mandate drafting process in Phase 1 is led by political actors—rather than MRF professionals—frequently leads to numerous challenges during mandate interpretation in Phase 2. For example, though the MRF mandate constitutes a closed text that the mandating body is unlikely to renegotiate, one or more elements of the mission’s scope often remain ambiguous. Additionally, a mandate might authorize a broad investigation that is logistically unrealistic given the time and resource constraints of the mission, or a one-sided investigation that risks undermining the mission’s credibility.

The overarching aim of mandate interpretation is to ensure that the mission can function properly and with integrity, both in terms of technical feasibility and in terms of insulating the implementation of the mandate from politicization, even when operating in a highly charged political climate.

## II. PRACTICAL STEPS

The overarching aim of this section is to present a framework for how practitioners can identify the key elements of the mission’s mandate. This framework draws not only on past and current professional MRF practices but also on the principles inherent in the common practice of treaty interpretation, by which, as articulated in the Vienna Convention on the Law of Treaties, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>8</sup>

The framework focuses on identifying the elements of a mission’s mandate by asking two key questions.

**THE FIRST QUESTION IS:** What is the context to be examined? Answering this question entails discerning the following elements of the mandate:

- Territorial scope** ▶ Territorial limits of the investigation
- Temporal scope** ▶ Period of time under investigation
- Nature and scope of incidents** ▶ Nature, gravity, and scale of incidents

<sup>8</sup> Vienna Convention on the Law of Treaties, Article 31(1) (1969).

Most mandates make no mention of which parties are allegedly involved in the incidents relevant to the investigation's scope. Therefore, the typical MRF mission faces no issue in following the well-established professional practice that MRF practitioners should undertake comprehensive, impartial investigations. Mandates that do articulate or suggest a restriction on parties to be investigated lead to complications, as will be discussed in Step 4 of the Practical Steps elaborated on the following page.

**THE SECOND QUESTION IS:** What activities and outputs are expected from the MRF mission? Answering this question entails determining the specific activities that the mission should undertake during implementation and the outputs that the mission should produce.

The practical steps presented below offer practitioners a method for answering these questions.

**STEP 1: ASSESS THE TEXT OF THE MANDATE**

Using only the text of the mandate as a literal source of instruction, identify the scope of the investigation, as well as the activities and outputs of the mission.

**STEP 2: CONSIDER THE OBJECT AND PURPOSE OF THE MISSION**

Consider how the object and purpose of the mission should inform the mandate holder's interpretation of the key elements of the mandate.

**STEP 3: IDENTIFY AND CLARIFY ANY AMBIGUITIES  
OR GAPS IN THE MANDATE**

Review each element of the mandate and determine whether the mandate is silent on any of those or whether the mandate uses ambiguous terminology. If necessary, clarify ambiguous terms in the text of the mandate and fill in gaps through logical interpretation, taking into consideration the object and purpose of the mission.

**STEP 4: VERIFY THAT THE MANDATE IS TECHNICALLY FEASIBLE  
AND IMPARTIAL**

Ensure that each key element of the mandate allows the mission to undertake the investigation in an impartial manner and that the scope of the mandate is logistically feasible. If the interpretation results in a mission that is not impartial in nature and/or is unfeasible, adjust the mission's mandate interpretation accordingly.

### III. EXPLANATION

#### STEP 1: INTERPRET THE TEXT OF THE MANDATE

This step involves using only the text of the mandate as a literal source of instruction to identify the elements of the mandate, which are the context to be examined (including the territorial and temporal scope, and the nature and scope of the relevant incidents), as well as the activities and outputs of the mission.

The operative paragraph of the mandate for the **Côte d'Ivoire Commission**, adopted by the United Nations Human Rights Council in 2011, states that the Council:

*Decides to dispatch an independent, international commission of inquiry, to be appointed by the President of the Human Rights Council, taking into consideration the importance of ensuring the equal participation and full involvement of women, to investigate the facts and circumstances surrounding the allegations of serious abuses and violations of human rights committed in Côte d'Ivoire following the presidential election of 28 November 2010, in order to identify those responsible for such acts and to bring them to justice, and to present its findings to the Council at its seventeenth session, and calls upon all Ivorian parties to cooperate fully with the commission of inquiry (...).<sup>9</sup>*

Assessing the mandate elements based on the information contained in the operative paragraph yields the following result:

- Territorial scope** ▶ “in Côte d'Ivoire”
- Temporal scope** ▶ “following the presidential election of 28 November 2010”
- Nature and scope of incident** ▶ “serious abuses and violations of human rights”
- Activities**
  - ▶ ➤ “investigate the facts and circumstances”
  - ▶ ➤ “identify those responsible for such acts [i.e., serious abuses and violations of human rights]”
  - ▶ ➤ “present its findings to the Council at its seventeenth session”

<sup>9</sup> United Nations Human Rights Council Resolution 16/25, para. 10.

## STEP 2: CONSIDER THE OBJECT AND PURPOSE OF THE MISSION

Commissioners' perceptions of the object and purpose of the mission can be shaped by two factors: 1) the text of the mandate, and 2) the intent of the mandating body, as discerned from other sources, including the overall context in which the mission was created.

Regarding *the text of the mandate*, the document that authorizes the mission sometimes includes language that references the aims of the mission. In such instances, these references can inform commissioners' decisions regarding the scope of the investigation.

The mandate for the [Côte d'Ivoire Commission](#) explicitly mentions only human rights law but also states that a goal of the mission is "to identify those responsible for such acts and to bring them to justice."<sup>10</sup> The reference to "justice" implies the framework of international criminal law, which the commissioners employed in the mission's final report.<sup>11</sup>

Regarding *the intent of the mandating body*, commissioners can consider public statements made by members of the mandating body, records of the internal deliberations of the mandating body, and the overall context that led to the creation of the MRF mission. The scope of the mission can be informed by both the intent of the mandating authority at the moment of the mandate's adoption and the implied intent in response to shifting on-the-ground conditions.

During the [Libya Commission](#), when determining the scope of the mission, the commissioners considered not only the intent of the mandating body at the moment of the mandate's adoption but also how the mandating body would wish the mission to respond to developments that had occurred after the adoption of the mandate.

Regarding the mandating body's intent *at the moment of the mandate's adoption*, the mission's mandate articulated no temporal scope. However, the commissioners decided to focus on events related to the uprising that began in February 2011, one reason being that the commissioners perceived these incidents to constitute the mandate's implicit focus.

<sup>10</sup> *Ibid.*

<sup>11</sup> See "Rapport de la Commission d'enquête internationale indépendante sur la Côte d'Ivoire," A/HRC/17/48, 14 June 2011.

Regarding the mission's *response to shifting on-the-ground conditions*, the mission had to decide how the scope of the mission would be affected by the armed conflict that developed in Libya after the UNHRC adopted the mission's mandate. Specifically, the mandate specifies only "international human rights law" and does not mention IHL.

However, the commissioners concluded that examining IHL violations was consistent with the mandate and believed that if the Council could have foreseen that an armed conflict would emerge, the Council would have wanted the commissioners to gather information about IHL violations committed by all relevant parties. During subsequent Council debates about the mission's report, no states raised objections to the use of IHL, and the June 2011 resolution that extended the mission's mandate also did not object, confirming for the commissioners that the mission had correctly gauged the Council's expectations of how the mission should respond to the evolving situation.<sup>12</sup>

### **STEP 3: IDENTIFY AND CLARIFY ANY GAPS OR AMBIGUITIES IN THE MANDATE**

This step first entails reviewing each element relevant to the scope of the mission and asking: Is the mandate silent about this element? Or does the mandate use ambiguous terminology that requires greater definitional specificity?

Once the mission has identified a gap or ambiguity in the mandate, it must fill in this gap or clarify the ambiguity through logical interpretation. Table 2 (on the following page) offers examples from past practice of missions that operated under mandates that either: 1) were silent about a certain scope element, or 2) mentioned a certain scope element in a manner that was interpreted to be ambiguous.

<sup>12</sup>For information on the commissioners' interpretation of the mandate for the Libya Commission, see Rob Grace, "The Designing and Planning of Monitoring, Reporting, and Fact-finding Missions," HPCR Working Paper, Program on Humanitarian Policy and Conflict Research at Harvard University, December 2013, pp. 12-15.

**TABLE 2: CLARIFYING AMBIGUOUS MANDATES**

Scenario	Example
Mandate is silent about a certain element: temporal scope	<p>The mandate for the <b>Darfur Commission</b> authorized the mission “to investigate reports of violations of international humanitarian law and human rights law” but articulated no temporal scope.<sup>13</sup> However, the mission gleaned temporal cues from the mandate’s authorization to investigate “reports of violations.” The members considered when the “reports of violations” began to emerge and used this date—February 2003—as the beginning of mission’s temporal focus.<sup>14</sup></p>
Mandate mentions temporal scope but remains ambiguous	<p>The mandate for the <b>Sri Lanka Panel</b> states that the mission should focus on “the final stages of the war.”<sup>15</sup> With this provision, the mandate articulates a temporal limitation but relegates to the Panel the process of logically deducing which specific dates constitute “the final stages of the war.” As the Panel’s report states:</p> <p style="padding-left: 40px;">The Panel focused on the period from September 2008 through May 2009, which encompasses the most intense and violent phase of the war during which many of the most serious violations of international law are alleged to have taken place. September 2008 corresponds to the beginning of the Government’s final military offensive on the LTTE [Liberation Tigers of Tamil Eelam] <i>de facto</i> capital of Kilinochchi. It also coincides with the end of international observation of the war due to the Government’s declaration that it could no longer ensure the security of international staff working for international organizations in the Vanni. May 2009 corresponds to the end of the fighting and the military defeat of the LTTE.<sup>16</sup></p>

<sup>13</sup> United Nations Security Council Resolution 1564 (2004), para. 12.

<sup>14</sup> Grace, *supra* note 12, at p. 21.

<sup>15</sup> “Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka,” 31 March 2011, at para. 5.1.

<sup>16</sup> *Ibid.*, at para. 12.

#### **STEP 4: VERIFY THAT THE MANDATE IS TECHNICALLY FEASIBLE AND IMPARTIAL**

This final step entails reviewing the key elements of the mandate to ensure: 1) that the scope of the mission is logistically feasible, and 2) that the investigation can be undertaken with impartiality.

In terms of *logistical feasibility*, mandates sometimes can be interpreted as requesting that the mission achieve results or conduct activities that are technically impractical. Specifically, overly broad mandates cannot be fully implemented due to resource and time constraints faced by the mission. In such cases, commissioners must—keeping in mind the mission’s object and purpose, as well as the limitations and obstacles facing the mission—calibrate the scope of the mission’s activities with the resources available to the MRF body.

The mandate for the **Darfur Commission** authorized the mission “to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, 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 (...).”<sup>17</sup>

However, the commissioners did not perceive that the commission had the capacity to gather information about all of the incidents within the mandate’s scope. Instead, the report states:

It was not possible for the Commission to investigate all of the many hundreds of individually documented incidents reported by other sources. The Commission, therefore, selected incidents and areas that were most representative of acts, trends and patterns relevant to the determination of violations of international human rights and humanitarian law and with greater possibilities of effective fact-finding. In making this selection, access to the sites of incidents, protection of witnesses and the potential for gathering the necessary evidence were, amongst others, of major consideration.<sup>18</sup>

<sup>17</sup> United Nations Security Council Resolution 1564 (2004), para. 12.

<sup>18</sup> “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General,” 25 January 2005, para. 223.



Regarding the genocide issue, the mission similarly deemed this question to fall beyond the mission's capacities. The mission concluded that Sudanese governmental policy lacked genocidal intent, and the mission's report did not "rule out the possibility that in some instances *single* individuals, including Government officials, may entertain a genocidal intent."<sup>19</sup> However, the mission declined to identify perpetrators, noting that "it would be for a competent court to make such a determination on a case by case basis."<sup>20</sup>

In terms of *impartiality*, the consensus building process by which a mandating body adopts a mandate is political in nature (see the Background section of this Chapter). While most resulting mandates allow for credible, impartial investigations, some may become politicized during the mandate design process.

One manifestation of this politicization is the adoption of one-sided mandates, which articulate or suggest restrictions on which entities the mission may investigate. However, other aspects of the mandate might also raise questions about a mission's impartiality. For example, a restrictive temporal scope that includes violations committed only by one side—whereas a more expansive temporal scope would include violations committed by all sides to a conflict—could lead to a perception that the investigation is one-sided.

The United Nations Secretary-General's Investigative Team in the Democratic Republic of the Congo (DRC) was originally mandated to gather information about incidents that had occurred since 1996. However, as the mission's final report states, 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 Forces Armées Zaïroises (FAZ), against Zairians of both Hutu and Tutsi origin, as well as subsequent developments, such as the influx of Hutu refugees from Rwanda in July 1994, following the genocide in that country; the insecurity generated, both in Zaire and in Rwanda, by armed members of the ex Forces Armées Rwandaises (ex-FAR) and Interahamwe militia who maintained strict control over the refugees and launched raids into Rwanda;

<sup>19</sup> *Ibid.*, at para. 520.

<sup>20</sup> *Ibid.*

and the increasing violence to which Zairian Tutsis were subjected until the October 1996 uprising.<sup>21</sup>

In response to the government's concerns that the original temporal scope would not allow for a thorough investigation, the UNSG extended the scope to encompass incidents that had occurred since 1993.

If any of the elements of the mandate might hinder the impartiality—real or perceived—of the investigation, the commissioners should adopt a mode of interpretation that allows the mission to correct any of the mandate's implicit or explicit biases.

Avenues available to practitioners operating under potentially one-sided mandates include: 1) seeking authorization from the mandating body to surpass restrictions on whom the mission may investigate, 2) justifying the examination of the actions of all parties by noting the necessity of doing so in order to make a proper determination about whether violations of IHL or IHRL have been committed, and 3) citing a mandate provision that supports a balanced interpretation. See Table 3 (on the following page) for examples of responses to UNHRC mandates that focused on the conduct of Israel.

<sup>21</sup> "Report of the Secretary-General's Investigative Team charged with investigating serious violations of human rights and international humanitarian law in the Democratic Republic of the Congo," S/1998/581, 29 June 1998, p. 1.

**TABLE 3: ADDRESSING ONE-SIDED MANDATES**

Mode of Interpretation	Example
Seek authorization from the mandating body	The original mandate adopted by the UNHRC for the <b>Gaza Fact-finding Mission</b> focused investigative attention only on Israel. However, Justice Richard Goldstone, when approached to lead the mission, struck an agreement with the President of the Council on a revised mandate that authorized the mission “to investigate all violations of international human rights law and international humanitarian law that might have been committed” relevant to the conflict. <sup>22</sup>
Refer to the necessity of examining all parties to make determinations about IHL or IHRL violations	The <b>Lebanon Commission</b> was mandated, among other measures, “[t]o investigate the systematic targeting and killings of civilians by Israel in Lebanon.” <sup>23</sup> The mission accepted that the mandate only authorized an investigation of the legality of Israel’s—and not Hezbollah’s—actions. However, the mission did gather the information about Hezbollah necessary to draw conclusions about potential Israeli IHL violations. <sup>24</sup> Indeed, the mission’s report discusses factual findings about Hezbollah’s conduct during the armed conflict. <sup>25</sup>
Cite a mandate provision that justifies a balanced interpretation	The mandate of the <b>Beit Hanoun Fact-finding Mission</b> focused solely on investigating the effects of incidents perpetrated by Israel. <sup>26</sup> However, the UNHRC resolution that includes the mission’s mandate also “[u]rges all concerned parties to respect the rules of international humanitarian law, to refrain from violence against the civilian population and to treat under all circumstances all detained combatants and civilians in accordance with the Geneva Conventions of 12 August 1949 (...).” <sup>27</sup> Using the reference in this provision to “all parties” as a justification, the mission’s report draws legal conclusions about the conduct not only of Israel but also of Hamas. <sup>28</sup>

<sup>22</sup> “Report of the United Nations Fact Finding Mission on the Gaza Conflict,” A/HRC/12/48, 25 September 2009, para. 1.

<sup>23</sup> United Nations Human Rights Council Resolution S-2/1, para 7.

<sup>24</sup> The report states, “A fundamental point in relation to the conflict and the Commission’s mandate as defined by the Council is the conduct of Hezbollah. The Commission considers that 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. Thus an inquiry into the conformity with international humanitarian law of the specific acts of the Israel Defense Forces (IDF) in Lebanon requires that account also be taken of the conduct of the opponent.” See “Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1,” A/HRC/3/2, 23 November 2006, para. 6.

<sup>25</sup> For example, the report discusses whether Hezbollah used “human shields.” See *ibid.*, at para. 26.

<sup>26</sup> United Nations Human Rights Council Resolution S-3/1, para. 7.

<sup>27</sup> *Ibid.*, at para. 6.

<sup>28</sup> See “Report of the high-level fact-finding mission to Beit Hanoun established under Council Resolution S-3/1,” A/HRC/9/26, 1 September 2008, para. 14.

## IV. FINAL OBSERVATIONS

The practical steps presented in this chapter offer MRF practitioners a framework for approaching the mandate interpretation process in a systematic manner. These steps aim to orient practitioners toward delineating, in technically feasible terms, and in a manner that is impartial in nature, the scope of an MRF mission's investigation and activities.

Certain mandates may prove particularly challenging to navigate, in terms of designing a credible, comprehensive investigation. In particular, for mandates that, in terms of the literal text, are one-sided or otherwise biased, the mission is unlikely to avoid criticisms. Adhering to the mandate's literal interpretation will evoke criticisms that the mission is not evenhanded. Surpassing the mandate's limitations in an effort to obtain impartiality might not only fail to assuage these critics but also might bring forth criticisms that the mission has overstepped the boundaries of the mission's mandated authority.

Articulating in precise terms—in particular, in the mission's final report—the considerations that underpin the mission's mandate interpretation will assist efforts to present the mission as a credible exercise. By elaborating how the mission assessed the literal text of the mandate, defined the object and purpose of the mission, clarified ambiguities or gaps in the mandate, and ensured the technical feasibility and impartiality of the mission, commissioners can address uncertainties about how the mission derived its authority from the text received from the mandating body.

# CHAPTER TWO

## Establishing Facts and Applying the Law

### I. BACKGROUND

The core task of MRF missions is to gather information to determine whether violations of international law have occurred. Before the initiation of fieldwork, a preliminary desk analysis of information already available is an important tool to help the mission prepare for its own data gathering effort. This review entails collating and reviewing existing reports of events potentially relevant to the mission's mandate, in order to identify the main incidents, actors, and locations and to establish a chronology of events. This informs the process of setting priorities and preparing an investigation plan.<sup>29</sup>

After this initial analysis, MRF practitioners implement a plan to gather firsthand information. There are commonly three main categories of evidence: testimonial, documentary, and physical. Specific types of sources that investigators can consider include witness testimony, physical evidence, documents, video material, photographs, personal observation of locations where incidents occurred, and satellite images. MRF practitioners tend to rely heavily on witness testimonies to establish facts. In practice, this task of collecting information has included conducting field visits to the territory in which the armed conflict or internal disturbance occurred or to another location where interviewees reside or can be invited for an interview, as well as remote engagement with interviewees (e.g., via Skype).<sup>30</sup> The mission reviews and analyzes the information gathered on an ongoing basis. This analysis informs the data gathering effort.

<sup>29</sup> For additional information about planning an MRF investigation, see "Guidance and Practice," OHCHR, *supra* note 2, at pp. 40-59.

<sup>30</sup> Additionally, when engaging with witnesses and victims, MRF practitioners grapple with issues of protection. For information about this issue, see Chapter 3.

The processes of gathering information and drawing legal conclusions are inter-related. The mission's decisions about planning the investigation, selecting legal frameworks, and adopting a standard of proof all inform one another and cannot be conducted in isolation. While the credibility of an MRF mission is commonly assessed with regard to the methodology used to establish facts, the legal interpretation and classification of the mission's factual findings is equally important and similarly requires a rigorous and sound approach.

The interplay between the facts and the relevant legal norms allegedly violated is essential. The mission's analysis of the information gathered elucidates what additional pieces of information will be necessary to demonstrate that a violation of international law has occurred. Also, the data gathering process is shaped by the relevant legal frameworks and the mission's standard of proof. For example, establishing whether an attacker adhered to IHL precautionary obligations requires collecting factual information related to the military or humanitarian factors that help determine what measures were practically possible at the time prior to the attack. In this sense, the norms themselves determine the type of factual information needed.

The soundness of the mission's methodology and the transparency with which the mission communicates the methodology adopted is crucial for the credibility of the mission. Given the delicate political environment in which MRF missions typically operate, as well as the sensitive nature of levying allegations of violations of international law, MRF missions often face criticisms relating to the manner in which the mission draws conclusions about controversial or sensitive issues. Missteps or ambiguities about the mission's information gathering process or rationales underlying the report's interpretation of the law and legal conclusions feed such criticisms.

To inform how practitioners can approach this aspect of an MRF mission's methodology, this chapter focuses on the interplay between the facts, the law, and the standard of proof adopted by the mission.

## **II. PRACTICAL STEPS**

The purpose of this section is to help practitioners proceed with establishing a clear methodology in terms of applying legal frameworks to the facts found by the mission. To this end, this section offers the following practical steps for the mission to consider when approaching this issue.

### **STEP 1: SELECT RELEVANT LEGAL FRAMEWORKS**

To select which legal frameworks are relevant to the mission, answer the following two questions: What legal frameworks does the mandate specifically articulate or imply? What legal frameworks are relevant, based on the facts established by the mission?

### **STEP 2: ADOPT A STANDARD OF PROOF**

Decide the level of certainty that the mission will require in order to draw conclusions about its findings, bearing in mind that it lacks the mandate and resources to achieve the “beyond a reasonable doubt” or “intimate conviction” standard used by many criminal courts and tribunals.

### **STEP 3: LEGAL CLASSIFICATION OF FACTS**

Apply legal frameworks to facts, considering the mission’s standard of proof and the need to ensure the clarity of the mission’s application of the law.

## **III. EXPLANATION**

### **STEP 1: SELECT RELEVANT LEGAL FRAMEWORKS**

An MRF mission must adopt a sound and rigorous approach to determining which legal frameworks are applicable in the context at hand. Indeed, disagreements, often politically charged in nature, sometimes arise on this issue.

The report of the [UNSG Flotilla Panel](#) mentions that, for the Gaza flotilla incident, which was the context of the Panel’s mandate, the determination of applicable legal frameworks was as controversial as conclusions about factual findings. When discussing the assertions of national investigative commissions mandated in Israel and Turkey, the Panel’s report states that the reports of these two national commissions “differ as widely on the applicable law as they do on what actually happened.”<sup>31</sup>

<sup>31</sup> “Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident,” September 2011, para. 13.

MRF reports commonly rely on the following bodies of law:

- a) IHL (including treaty law, such as the Geneva Conventions of 1949 and the Additional Protocols of 1977, and customary international humanitarian law) in contexts that reach the level of armed conflict, whether international or non-international in character;
- b) IHRL (e.g., international human rights treaties; regional human rights instruments; customary law; and soft law instruments that clarify the content of human rights law, such as United Nations General Assembly resolutions);
- c) ICL (e.g., the Statute of the International Criminal Court (ICC), interpreted and applied in jurisprudence of international criminal courts and tribunals, as well as customary international law); and
- d) Domestic law (in particular, domestic statutes relevant to the actors involved in the incidents examined by the mission).

Additionally, some MRF reports have also incorporated other relevant branches of public international law, such as *jus ad bellum* law and maritime law, as part of the mission's mandate to address specific allegations. MRF practitioners have also relied on other bodies of law—such as the law on state responsibility for wrongful acts and the law of treaties, notably the principles of treaty interpretation—in order to reach legal conclusions.

This section first presents the particularities and challenges inherent in the four legal frameworks listed above, in order to frame the method of undertaking Step 1, which will subsequently be elaborated.

## **A. DESCRIPTION OF LEGAL FRAMEWORKS**

### **1) IHL**

IHL is applicable in times of armed conflict—both international, including situations of occupation, and non-international—between states, between governmental armed forces and organized armed groups, or among different armed groups within a state or across international borders.

Determining the existence of an armed conflict and classifying a conflict as international, non-international, or a situation of occupation can itself be challenging. Such determinations should be based on facts and the established legal definition of an armed conflict or of occupation. However, there can be overlapping armed conflicts. Additionally, the threshold of a non-international armed conflict, as opposed to an internal disturbance, is often difficult to discern definitively.



The report of the [DRC Mapping Exercise](#) discusses the challenges inherent in legally classifying complex and evolving situations of large-scale violence. The report states:

It is difficult to classify all of the various armed conflicts that affected the DRC all over its territory between 1993 and 2003. Depending on the time and place, the DRC experienced internal and international armed conflicts and internal conflicts that subsequently became international.<sup>32</sup>

## 2) IHRL

IHRL regulates the behavior of states vis-à-vis the people under their jurisdiction. A trend is also emerging regarding the recognition of human rights obligations for non-state armed groups under certain conditions, an issue that this chapter examines in greater detail in the context of Step 3.

A consensus exists that IHRL continues to apply during armed conflicts, except in cases of derogation under specific conditions as provided in the law. However, the interaction between IHL and IHRL has given rise to much debate. One widely accepted viewpoint conceives IHL as the *lex specialis* compared to IHRL during an armed conflict in cases of a conflict of norms between the two. In such instances, IHL—the more specialized, or specific, body of law in the context of an armed conflict—overrides IHRL. Or, IHRL may constitute the *lex specialis* compared to IHL on particular issues for which it is more specific than IHL. For example, regarding the grounds to detain someone in a non-international armed conflict, IHL is more general compared to IHRL. In other cases, no reconciliation is required because IHL and IHRL are compatible.

Different MRF reports have articulated the nature of the co-applicability between these two bodies of law in various ways.

<sup>32</sup> “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. 474.

The following passages from MRF reports exhibit various ways of articulating the relationship between IHL and IHRL during armed conflict:

- “With an armed conflict having developed in late February in Libya and continuing during the Commission’s operations, the Commission looked into both violations of international human rights law and relevant provisions of international humanitarian law, the *lex specialis* which applies during armed conflict.” (Libya Commission, first report)<sup>33</sup>
- “It is now widely accepted that human rights treaties continue to apply in situations of armed conflict. (...) It is today commonly understood that human rights law would continue to apply as long as it is not modified or set aside by IHL. In any case, the general rule of human rights law does not lose its effectiveness and will remain in the background to inform the application and interpretation of the relevant humanitarian law rule.” (Gaza Fact-finding Mission)<sup>34</sup>
- “While the conduct of armed conflict and military occupation is governed by international humanitarian law, human rights law is applicable at all times, including during states of emergency or armed conflict. The two bodies of law complement and reinforce one another.” (Lebanon Commission)<sup>35</sup>

### 3) ICL

ICL provides substantive definitions of the acts or omissions that can be qualified as international crimes—such as war crimes, crimes against humanity, and genocide—and also deals with individual criminal responsibility.

In some instances, an MRF mandate, or commissioners on a particular mission, opt to reference international criminal law, especially the material elements of international crimes contained in international treaties, such as the Rome Statute, or the jurisprudence of international tribunals. However, it is important to note that an MRF mission lacks the mandate and resources of a court of law. It should be cautious about the types of conclusions and determinations that can be drawn in

<sup>33</sup> “Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya,” A/HRC/17/44, 1 June 2011, para. 4.

<sup>34</sup> Gaza Fact-finding Mission report, *supra* note 22, at paras 295-296.

<sup>35</sup> Lebanon Commission report, *supra* note 24, at para. 64 (internal footnote omitted).

its report. Most MRF reports highlight the fact that the mission does not act as a judicial body and that, therefore, a competent court would have to make its own determination based on the specific level of evidence required under criminal law.

#### **4) Domestic Law**

The choice to rely on relevant domestic legal frameworks in MRF reports has been driven by the principle that domestic courts bear the primary responsibility for accountability for international crimes.

However, when deciding whether to incorporate domestic law, MRF practitioners should consider whether international law has been sufficiently incorporated into domestic law and whether the domestic court system—both in terms of resources and political will—is capable of implementing international legal principles effectively.

The Timor-Leste Commission was authorized:

To recommend measures to ensure accountability for crimes and serious violations of human rights allegedly committed during the above-mentioned period, taking into account that the Government of Timor-Leste considers that the domestic justice system, which has the participation of international judges, prosecutors and defence lawyers, should be the primary avenue of accountability for these alleged crimes and violations (...).<sup>36</sup>

The commission concluded that “measures are needed to strengthen the ability of the domestic system to handle high-profile cases involving political actors in a manner that will be considered credible by the population,” but that “the crimes under consideration contravene domestic law” so “should be handled within the domestic judicial sector.”<sup>37</sup>

### **B. METHOD FOR DETERMINING WHICH LEGAL FRAMEWORKS ARE APPLICABLE**

The task of MRF practitioners when determining which legal frameworks are relevant is to examine the applicability of international norms to the situation under consideration based on facts and previous interpretations of those norms.

<sup>36</sup> “Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste,” 2 October 2006, at para. 4.

<sup>37</sup> *Ibid.*, at para. 179.

In this process, the mission should weigh two considerations: 1) the mandate, and 2) the facts.

In terms of *the mandate*, the mission should answer two questions.

**THE FIRST QUESTION IS:** Which legal frameworks does the mandate specifically mention? Answering this question is the most straightforward portion of determining the legal frameworks applicable to the mission. Most mandates make explicit reference to certain bodies of law.

The mandate for the **DRC Mapping Exercise** tasks the mission to examine “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.”<sup>38</sup> Per this mandate, the mission had clear authorization to examine violations of IHRL and IHL.

**THE SECOND QUESTION IS:** Which legal frameworks does the mandate imply? Elements of the mandate’s scope may imply a particular legal framework that was not intended by the drafters of the mandate but is necessary to address alleged violations or disputed facts.<sup>39</sup>

The mandate for the **Georgia Fact-finding Mission** authorizes the mission “to investigate the origins and the course of the conflict in Georgia, including with regard to international law, humanitarian law and human rights, and the accusations made in that context.”<sup>39</sup> While the mandate explicitly mentions IHRL and IHL, the mission interpreted the mandate’s reference to the “origins” of the conflict to imply also the application of jus ad bellum law, including the United Nations Charter and other laws regulating the resort to armed action by states.

In many situations, *the facts* inform commissioners’ decisions about the relevancy of different legal frameworks. Therefore, the facts play a key role in selecting applicable legal frameworks, as well as specific norms within those frameworks.

<sup>38</sup> DRC Mapping Exercise report, *supra* note 32, at p. 542.

<sup>39</sup> “Council Decision 2008/901/CFSP of 2 December 2008 concerning an independent international fact-finding mission on the conflict in Georgia,” Council of the European Union, Article 1, para. 2 (internal footnotes omitted).

The mandate for the Kyrgyzstan Inquiry Commission makes no reference to specific legal frameworks but rather calls on the mission to determine which bodies of law are relevant, based on the facts found. Specifically, the mandate states that the mission should “[i]nvestigate the facts and circumstances” and “[q]ualify the violations and the crimes under international law.”<sup>40</sup>

## STEP 2: ADOPT A STANDARD OF PROOF

It is important for MRF missions to analyze information systematically. A key component of this analysis is the adoption of a standard of proof. Clarifying the level of certainty of the mission’s findings in this regard is essential to the credibility of a mission’s final report. Also, articulating the mission’s standard of proof distinguishes the report’s conclusions from those of a formal judicial process.

The standards commonly referred to by MRF missions are reasonable suspicion, reasonable grounds to believe, and balance of probabilities. In actual MRF practice, however, practitioners tend to use different standards of proof interchangeably. For example, though one mission uses “reasonable grounds to believe” while another mission uses “balance of probabilities,” the two standards of proof may actually be indistinguishable, even though each standard of proof has its own specific, theoretical definition. “Reasonable suspicion” has been defined as “necessitating a reliable body of material consistent with other verified circumstances tending to show that an incident or event did happen.”<sup>41</sup> “Reasonable grounds to believe” has been defined to mean that the information gathered “would justify a reasonable or ordinarily prudent man to believe that a suspect has committed a crime” and “raise a clear suspicion of the suspect being guilty of a crime.”<sup>42</sup> This standard does not require that one “has double checked every possible piece of evidence, or investigated the crime personally, or instituted an enquiry into any special matter” and the evidence “need not be overly convincing or conclusive; it should be adequate or satisfactory to warrant the belief that the suspect has committed the crime.”<sup>43</sup> “Balance of probabilities” refers to an assessment that a fact is more likely than not to be true.<sup>44</sup>

<sup>40</sup> “Report of the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010,” para. 2.

<sup>41</sup> DRC Mapping Exercise report, *supra* note 32, at pp. 4-5 (internal footnote omitted).

<sup>42</sup> Judge R. Sidhwa of the International Criminal Tribunal for the former Yugoslavia, quoted in Darfur Commission report, *supra* note 18, at p. 12.

<sup>43</sup> *Ibid.*

<sup>44</sup> Stephen Wilkinson, “Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions,” Geneva Academy of International Law and Human Rights, 2012, p. 49, available at [www.geneva-academy.ch/docs/reports/Standards%20of%20proof.pdf](http://www.geneva-academy.ch/docs/reports/Standards%20of%20proof.pdf)

When approaching the issue of ascribing individual criminal responsibility, the standard practice of MRF missions is to employ particular caution. MRF practitioners do not publicly identify alleged perpetrators out of concerns for due process for the accused (see also Chapter 5). Table 4 (below) indicates different ways that MRF reports have approached articulating the mission’s standard of proof.

	<b>Implications</b>	<b>Example</b>
Articulate a specific overarching standard of proof	Presents a clear perspective on the level of certainty of the mission’s findings.	The <b>Timor-Leste Commission</b> report states that “the Commission concluded that the most appropriate standard was that of reasonable suspicion. This would necessitate a reliable body of material consistent with other verified circumstances tending to show that a person may reasonably be suspected of involvement in the commission of a crime. Obviously the Commission would not make final judgements as to criminal guilt. It would make an assessment of possible suspects in preparation for future investigations and possible indictments by a prosecutor.” <sup>45</sup>
Refer to an <i>ad hoc</i> standard that does not correlate to a formalized notion of standards of proof	Conveys the <i>ad hoc</i> , mission-specific method by which some practitioners handle standards of proof but leaves the level of certainty of the mission’s findings unclear.	The <b>UNHRC Flotilla Fact-finding</b> report articulates no explicit standard of proof but states, “The Mission found the facts set out below to have been established to its satisfaction.” <sup>46</sup>
Specify that the report’s findings do not constitute a substitution for a formal judicial proceeding but make no reference to the mission’s standard of proof	Risks leaving the impression that the mission did not consider issues of standards of proof and did not apply a systematic methodology for assessing the information gathered by the mission.	The <b>Georgia Fact-finding Mission</b> report makes no mention of the overarching level of certainty of the findings articulated in the report. However, the report states, “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.” <sup>47</sup>

<sup>45</sup> Timor-Leste Commission report, *supra* note 36, at para. 12.

<sup>46</sup> “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, 27 September 2010, para. 75.

<sup>47</sup> “Independent International Fact-Finding Mission on the Conflict in Georgia Report,” Volume I, September 2009, p. 8.

***If the Findings Fall Short of the Standard of Proof.*** For certain incidents under investigation, an MRF mission might be unable to corroborate adequately the information gathered. In such instances, the report should indicate that, since the mission was unable to obtain the necessary pieces of evidence, the mission was not able to draw a factual conclusion.

Various MRF reports have indicated that the mission was not able to reach the standard of proof adopted in order to draw conclusions about certain incidents, as indicated by the below passages:

- “However, *the available evidence is not sufficient to conclude* that the death resulted from an excessive use of force.” (Bahrain Commission, para. 954)
- “It considers that there have been attacks on humanitarian units, though it is *not able to establish* whether intentional or not without further information.” (Libya Commission, first report, para. 180)
- “While the KIC [Kyrgyzstan Inquiry Commission] *is not in a position to make any conclusion* about the exact nature of that device nor its source, *its limited analysis supports the view* that at least some of the burning was at a high intensity and unlikely to have been caused by a Molotov cocktail.” (Kyrgyzstan Inquiry Commission, para. 260)
- “The Commission is not *in a position at this stage to assess* the veracity of the information received.” (Libya Commission, first report, para. 235)
- “But we are *unable to conclude* whether this included live fire during the initial stages of the boarding attempt.” (UNSG Flotilla Panel, para. 121)
- “The Commission is *unable to conclude, barring additional explanation*, whether these strikes are consistent with NATO’s [North Atlantic Treaty Organization] objective to avoid civilian casualties entirely, or whether NATO took all necessary precautions to that effect.” (Libya Commission, second report, para. 89)
- “The key questions on the existence within these militias of a clear command structure and their capacity to carry out real military operations *would need to be examined in more detail.*” (DRC Mapping Exercise, para. 476)
- “The Commission received information about other cases of forced disappearance *which could not be verified.*” (Guinea Commission, para. 86)

One area that is emblematic of the challenges of gathering information about certain violations is sexual and gender-based violence (SGBV).<sup>48</sup> The following factors contribute to this difficulty:

- Families, if they are aware that a family member has suffered from SGBV, sometimes 'hide' these victims; and
- Victims are frequently reluctant to provide information to MRF investigators, or do not agree to engage with an MRF mission, due to the stigma surrounding this type of violence, as well as the pressure that sometimes exists—from family members, for example—for the victim to seek financial compensation from, or even to marry, the perpetrator.

These challenges should not discourage MRF practitioners from investigating such violations. In some instances, practitioners are convinced that certain incidents have happened, based on a small number of interviews and on information otherwise available (such as previously produced human rights reports), but fall short of reaching the standard of proof adopted by the mission. In such instances, MRF missions have chosen to report the violations and to explain why the mission was unable to reach the standard of proof adopted for the report. By doing so, MRF missions bear in mind and draw attention to the cultural and psychological obstacles that often hinder information gathering about whether or not acts of SGBV have occurred.

The Libya Commission received unverified allegations of SGBV. However, when assessing the credibility of these allegations, the mission considered the many difficulties that arise when gathering information about such incidents. The report states:

The number of cases reported was small. However, the Commission recognizes the difficulties in collecting evidence in cases of sexual violence, including a victim's reluctance to disclose information due to the trauma, shame and stigma linked to reports of sexual assault. In Libya, the fact that Libyan criminal law punishes by flogging sexual relations outside a lawful marriage also increases the reluctance of victims to report sexual violence. These factors thus need to be taken into account in evaluating the information received.<sup>49</sup>

<sup>48</sup> For a recent articulation of standards and best practices in this area, see generally "International Protocol on the Documentation and Investigation of Sexual Violence in Conflict," *supra* note 3.

<sup>49</sup> First Libya Commission report, *supra* note 33, at para. 212 (internal footnotes omitted).



**If the Findings Exceed the Standard of Proof.** When practitioners have corroborated information to an extent that exceeds the mission’s standard of proof, practitioners have calibrated the report’s vocabulary to reflect the mission’s high level of certainty.

Examples of passages from MRF reports that use vocabulary to express a high level of certainty appear below:

- The attacks on the Kasaian civilian population *were quite clearly* widespread and systematic.” (DRC Mapping Exercise, para. 494)
- “This *could not have happened without* the knowledge of higher echelons of the command structure of the Mol [Ministry of Interior] and NSA [National Security Agency].” (Bahrain Commission, para. 1179)
- “These accounts were *so consistent and vivid as to be beyond question.*” (UNHRC Flotilla Fact-finding Mission, para. 202)
- “The events of 28 September 2009 *strongly suggest* coordinated action by the red berets, the Thégboro gendarmes, the militia and, to some extent, the gendarmerie and the police.” (Guinea Commission, para. 192)

### **STEP 3: LEGAL CLASSIFICATION OF FACTS**

This step entails the classification of facts, bearing in mind the legal framework(s) identified in Step 1 and the standard of proof selected in Step 2. Regarding the application of legal frameworks to facts, certain key areas are emblematic of the challenges recurrently faced by practitioners in the domain of MRF. Some relate to difficulties in applying certain legal concepts and rules to facts. Others, due to the contested nature or content of certain norms in unsettled areas of international law, exacerbate the complexity of classifying facts. Five of these issues—all of which have challenged practitioners on recent missions and which are critical in terms of an MRF mission’s credibility—are discussed below.

#### **a) Co-applicability of IHL and IHRL**

Although, as mentioned in Step 1, MRF missions have consistently embraced the notion of IHRL-IHL co-applicability, some have either devoted insufficient attention to the actual implications of this dual applicability or have articulated confused rationales when classifying violations.

While MRF practitioners cannot be expected to clarify all unsettled aspects of the complex interaction between IHRL and IHL, they should be mindful of the implications of co-applicability for the sake of their own legal determinations. A rigorous and nuanced approach is needed to avoid legal confusion.

One example is the prohibition of arbitrary deprivation of liberty (detention) in the context of a non-international armed conflict. Because relevant IHL norms do not articulate the grounds for detention and related procedures, IHRL could be applicable as the *lex specialis*. (See Step 1, Section A.2 of this chapter for more information about *lex specialis*.) Given the detailed and strict conditions under IHRL related to detention in this context, an MRF mission could conclude that a violation was committed under IHRL but would have to properly justify the IHRL basis for the conclusion.

Table 5 (on the following page) presents common issues, examples of passages from past reports that exemplify these issues, descriptions of how these passages fall short of accurately articulating the ways in which these two bodies of law interact, and possible solutions.

**TABLE 5: ARTICULATING ISSUES OF IHL AND IHRL CO-APPLICABILITY**

	Examples of Passages From MRF Reports	Description of Problem	Solution
Generally presenting the manner in which IHL and IHRL interact with one another	“[I]nternational human rights law obligations remain in effect and operate to limit the circumstances when a state actor—even a soldier during internal armed conflict—can employ lethal force.” <sup>50</sup>	Adopts a progressive interpretation of co-applicability—in which IHRL provides additional constraints compared to IHL—but does not justify this interpretation or mention that the interpretation could be disputed.	Articulate with caution the way that IHL and IHRL interact with one another and provide legal citations to justify the approach adopted.
Mixing IHL and IHRL vocabulary	“Parties to the conflict and their auxiliary forces have violated provisions of statutory and customary international humanitarian law, including the right to life and physical integrity of protected persons (...).” <sup>51</sup>	Uses IHL and IHRL language interchangeably, such as the concepts of rights (from IHRL) and protected persons (from IHL), which may undermine the accuracy and credibility of legal determinations.	Ensure that the report respects the distinctions between IHL and IHRL and does not blend together terminology and concepts from these two bodies of law.
	“The deliberate and indiscriminate targeting of civilian houses constitutes a violation of international humanitarian law and of international human rights obligations.” <sup>52</sup>	Uses IHL terminology (“deliberate and indiscriminate targeting”) but claims that these incidents also constitute violations of IHRL.	

<sup>50</sup> “Report of the International Commission of Inquiry on Libya,” A/HRC/19/68, 2 March 2012, para. 145.

<sup>51</sup> Côte d’Ivoire Commission report, *supra* note 11, at para. 90 (translated from French to English by HPCR).

<sup>52</sup> Lebanon Commission report, *supra* note 24, at para. 319.

## **b) References to Customary International Law**

While some rules of customary international law are firmly established, a lack of consensus exists regarding the customary status of other norms or their content. For this reason, a too progressive approach when referring to customary international law can open the mission's interpretation of the law to criticism from certain governments or other entities. This should not discourage MRF practitioners from citing customary international law in their reports, but they should seek to mitigate potential controversy by specifically and extensively articulating the report's legal reasoning.<sup>53</sup>

Practical considerations can complicate this approach. The mission may be unable to include in the report adequate documentation and references supporting and explaining the mission's legal reasoning, due, for example, to a lack of time and/or personnel. Some practitioners are also concerned that an extensive description of the legal rationales underlying the report may divert attention from the mission's factual conclusions. Such considerations are especially relevant for missions that face limitations on the length of the report.

## **c) Assessing the Conduct of Hostilities Under IHL**

Some rules of IHL prove challenging due to the difficulty of establishing certain facts required for their application, and therefore, for the determination of whether violations have been committed. Most of the rules on the conduct of hostilities contain elements that are defined *ex-ante* (before an attack is launched), whereas the assessment is carried out *ex post facto* (after the attack has occurred), making it difficult to gather relevant information. In addition, these norms relate to factual aspects that pertain to different perspectives, such as that of the attacker and that of the defender, as well as the use of weapons and the nature of the target. All components of these norms need to be established in order to be able to reach a legal conclusion.

It is commonly considered that the law on targeting under IHL requires three sets of obligations before carrying out an attack. In a brief overview, they include the following steps: *First*, an attacker must respect the principle of distinction and direct his/her attack only against military objectives and combatants, based on the legal definition of a military objective. *Second*, even if the attack targets a military objective, the principle of proportionality prohibits excessive incidental effects on civilians and civilian objects compared to the military advantage anticipated from the attack. *Finally*, even if the first two conditions are met, all feasible precautionary measures must be taken to minimize the effect of the attack on civilians and civilian objects.

<sup>53</sup> A valuable resource in this regard for customary international law is Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volumes I-III, (Cambridge: International Committee of the Red Cross and Cambridge University Press, 2005).

The law on targeting under IHL offers various examples of factual and legal challenges. As an illustration, under IHL, a civilian object, such as a school, can become a legitimate target if the attacker deems that the object makes an effective contribution to military action and that its total or partial destruction would offer a definite military advantage to the attacker. But, for example, investigating whether fighters were present on the roof of a school, which could justify targeting the building, is a particularly complex task, especially since MRF missions often do not arrive on the scene until long after an attack has occurred.

The dilemmas inherent in proportionality assessments also demonstrate these factual and legal difficulties. Gauging whether attacks were proportional entails comparing the concrete and direct military advantage anticipated by the attacker to the incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof. Specifically, a proportionality assessment involves determining whether the latter is excessive compared to the former.

Finally, to assess whether the attacker fulfilled his/her obligations to undertake all feasible precautionary measures, MRF practitioners would need to take into account how “feasible” has been defined in IHL and to gather relevant information accordingly. The extent of the information that must be gathered is conveyed in the commonly agreed upon definition of “feasible,” which is: “that which is practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations.”<sup>54</sup>

MRF reports need to address all of these issues (i.e., that an attacker respected the principles of distinction and proportionality and undertook all feasible precautionary measures) in order to draw legal conclusions about the conduct of hostilities. While direct evidence related to these obligations is often difficult for MRF investigators to obtain, legal conclusions can be based on inferences from the available evidence as a whole, or on circumstantial evidence.

Examples from past practice on the following pages demonstrate how different MRF reports have assessed the conduct of hostilities under IHL.

<sup>54</sup> *HPCR Manual on International Law Applicable to Air and Missile Warfare*, 2009, Section A: Definitions, para. 1(q), available at [ihlresearch.org/amw/HPCR%20Manual.pdf](http://ihlresearch.org/amw/HPCR%20Manual.pdf)

1) ATTACK AGAINST CIVILIAN OBJECTS	
<b>MRF mission</b>	Lebanon Commission
<b>Incident investigated</b>	Bombing by the Israeli Air Force of a three-story building in the town of Qana, resulting in the death of 29 civilians.
<b>Sources of information</b>	List of victims provided to the Commission by the Mayor of Qana; UNSG report outlining perspectives of the Government of Israel and the Government of Lebanon on the attack; press conference held by Chief of Staff of the Israeli Air Force after the attack; report of an official inquiry published by Israeli authorities; the Commission's on-site visit to Qana; and interviews conducted by the Commission with witnesses, Lebanese Red Cross staff, and rescuers from the United Nations Interim Force in Lebanon.
<b>Factual assessment</b>	"The Commission did not receive any information to suggest that the building in question was being used as a Hezbollah missile launch site, either prior to or at the time of the attack, and that it therefore may have been a legitimate military target." <sup>55</sup>
<b>Conclusion</b>	"It is the view of the Commission that the reasons advanced for its targeting are not tenable." <sup>56</sup>

2) ADHERING TO THE PRINCIPLE OF PROPORTIONALITY	
<b>MRF mission</b>	Darfur Commission
<b>Incident investigated</b>	Attacks by Sudanese government forces and the Janjaweed on villages in Darfur.
<b>Sources of information</b>	Justifications provided for the attacks by the Government of the Sudan, reliable eyewitnesses interviewed by the Commission during fieldwork, and unnamed secondary sources used for corroboration.
<b>Factual assessment</b>	"The issue of proportionality did obviously not arise when no armed groups were present in the village, as the attack exclusively targeted civilians. However, whenever there might have been any armed elements present, the attack on a village would not be proportionate, as in most cases the whole village was destroyed or burned down and civilians, if not killed or wounded, would all be compelled to flee the village to avoid further harm. The civilian losses resulting from the military action would therefore be patently excessive in relation to the expected military advantage of killing rebels or putting them <i>hors de combat</i> ." <sup>57</sup>
<b>Conclusion</b>	"It is apparent from the Commission's factual findings that in many instances Government forces and militias under their control attacked civilians and destroyed and burned down villages in Darfur contrary to the relevant principles and rules of international humanitarian law." <sup>58</sup>

<sup>55</sup> Lebanon Commission report, *supra* note 24, at para. 102 (internal footnote omitted).

<sup>56</sup> *Ibid.* (internal footnote omitted).

<sup>57</sup> Darfur Commission report, *supra* note 18, at para. 266.

<sup>58</sup> *Ibid.*, at para. 267.

3) VIOLATION OF THE OBLIGATION TO GIVE EFFECTIVE ADVANCE WARNING (“UNLESS CIRCUMSTANCES DO NOT PERMIT”)	
<b>MRF mission</b>	Gaza Fact-finding Mission
<b>Incident investigated</b>	Israeli attacks undertaken in the context of Operation Cast Lead.
<b>Sources of information</b>	Meetings with people in Gaza, press reports, Israeli military sources, review of the types and content of warnings provided by Israeli forces.
<b>Factual assessment</b>	<ul style="list-style-type: none"> <li>• “Whether a warning is deemed to be effective is a complex matter depending on the facts and circumstances prevailing at the time, the availability of the means for providing the warning and the evaluation of the costs to the purported military advantage.”<sup>59</sup></li> <li>• “The effectiveness will depend on three considerations: the clarity of the message, the credibility of the threat and the possibility of those receiving the warning taking action to escape the threat.”<sup>60</sup></li> </ul>
<b>Conclusion</b>	<ul style="list-style-type: none"> <li>• “The Mission does not have sufficient information to assess the accuracy of the Israeli Government’s claim that the warning shot method was used only when previous warnings (leaflets, broadcasts or telephone calls) had not been acted upon. However, in many circumstances it is not clear why another call could not be made if it had already been possible to call the inhabitants of a house.”<sup>61</sup></li> <li>• “The Mission considers that some of the leaflets with specific warnings, such as those that Israel indicates were issued in Rafah and al-Shujaeyahmay, may be regarded as effective. However, the Mission does not consider that general messages telling people to leave wherever they were and go to city centres, in the particular circumstances of this military campaign, meet the threshold of effectiveness.”<sup>62</sup></li> <li>• “The Mission regards some specific telephone calls to have provided effective warnings but treats with caution the figure of 165,000 calls made. Without sufficient information to know how many of these were specific, it cannot say to what extent such efforts might be regarded as effective.”<sup>63</sup></li> <li>• “The Mission does not consider the technique of firing missiles into or on top of buildings as capable of being described as a warning, much less an effective warning. It is a dangerous practice and in essence constitutes a form of attack rather than a warning.”<sup>64</sup></li> </ul>

<sup>59</sup> Gaza Fact-finding Mission report, *supra* note 22, at para. 510.

<sup>60</sup> *Ibid.*, at para. 513.

<sup>61</sup> *Ibid.*, at para. 534.

<sup>62</sup> *Ibid.*, at para. 539.

<sup>63</sup> *Ibid.*, at para. 540.

<sup>64</sup> *Ibid.*, at para. 541.

#### **d) References to International Criminal Law**

In order to demonstrate that a violation of international criminal law has occurred, an MRF mission needs to establish the existence of all the necessary elements of the crime. Table 6 (on the following page) presents the elements required about the status of the victim, the context in which the incident occurred, and the nature of the incident in order to legally classify certain incidents as international crimes.

While Table 6 does not detail all the nuances and complexities of establishing these crimes and also presents only a few international crimes as examples, it offers a starting point for MRF practitioners to map out the factual conclusions that the mission will need to draw in order to derive a legal conclusion about whether an international crime might have been committed.

#### **e) Addressing Unsettled Areas of International Law: The Case of Non-state Armed Groups Under IHRL**

MRF practitioners have emphasized that missions should apply only existing law and should not aim to contribute to the development of new substantive norms of international law.<sup>65</sup> However, they have acknowledged that due to the way that international law operates, MRF reports may inadvertently serve jurisprudential purposes, as lawyers and lawmakers, searching for answers to unsettled international legal issues, are likely to turn to conclusions reached by MRF bodies. MRF missions frequently do—and, in many cases, to fulfill MRF mandates, must—make determinations about unsettled rules, unclear areas of international law, or controversial legal questions.

One example is the extent to which armed groups have obligations under IHRL, a question that has been addressed in slightly different ways from mission to mission. Although different MRF reports have reached the same conclusion about this issue, these reports mention the “contested” nature of the question and the “rapidly evolving” nature of the law relevant to this area (see the examples indicated on page 40).

<sup>65</sup> Theo Boutruche, “Selecting and Applying of Legal Lenses in Monitoring, Reporting, and Fact-finding Missions,” HPCR Working Paper, Program on Humanitarian Policy and Conflict Research at Harvard University, October 2014, p. 21.



**TABLE 6: DEMONSTRATING THE EXISTENCE OF A CRIME UNDER THE ROME STATUTE<sup>66</sup>**

	Status of the Victim	Context	Nature of the Incident(s)
Genocide	Belonged to a particular national, ethnical, racial or religious group	A manifest pattern of similar conduct directed against a national, ethnical, racial or religious group, or conduct that could itself effect such destruction	Any acts referred to in relevant articles of the Rome Statute (i.e., killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction, imposing measures intended to prevent births, and forcibly transferring children) undertaken with the intent to destroy, in whole or in part, that national, ethnical, racial, or religious group
Murder as a crime against humanity	Person	Part of a widespread or systematic attack directed against a civilian population	Murder committed by a perpetrator who had knowledge of the attack <sup>67</sup>
Willful killing as a war crime (grave breach of the 1949 Geneva Conventions)	Protected person(s) under the relevant 1949 Geneva Conventions	International armed conflict	An incident in which a perpetrator killed one or more persons and was aware of the protected status of the victim(s)
Murder as a war crime (serious violation of Article 3 common to the four 1949 Geneva Conventions)	Persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause	Non-international armed conflict (of the type envisaged in Article 3 common to the four 1949 Geneva Conventions)	Murder of all kinds

<sup>66</sup> The information presented in this table draws from "Elements of Crimes," International Criminal Court, 2011, available at [www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf](http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf)

<sup>67</sup> For a full description of acts that could constitute crimes against humanity, see *Ibid.*, at Article 7.

Regarding the unsettled issue of the obligations of armed groups under IHRL, different missions have addressed this issue. The report of the Libya Commission states:

Although the extent to which international human rights law binds non-state actors remains contested as a matter of international law, it is increasingly accepted that where non-state groups exercise de facto control over territory, they must respect fundamental human rights of persons in that territory. The Commission has taken the approach that since the NTC [National Transition Council] has been exercising de facto control over territory akin to that of a Governmental authority, it will examine also allegations of human rights violations committed by its forces.<sup>68</sup>

Meanwhile, the report of the Gaza Fact-finding Mission states:

The relationship between IHL and IHRL is rapidly evolving, in particular in relation to non-State actors' obligations, with the ultimate goal of enhancing the protection of people and to enable them to enjoy their human rights in all circumstances. In the context of the matter within the Mission's mandate, it is clear that non-State actors that exercise government-like functions over a territory have a duty to respect human rights.<sup>69</sup>

Many practitioners have indicated that MRF reports, when addressing an unsettled area of law, should indicate that the area is unsettled, take a stand on the issue, and provide adequate references to justify the choice adopted. However, this option, though adopted by some missions, has not yet emerged as a standard practice, indicating that a gap exists between notions of 'best practice' held by professionals and actual practice.

This Handbook advises that MRF reports should be as explicit as possible when addressing an unsettled area of law, should clearly articulate the rationale underlying the report's legal conclusion, should provide references for such interpretations, and should indicate whether dissenting views exist about a particular legal issue.

<sup>68</sup> First Libya Commission report, *supra* note 33, at para. 72 (internal footnotes omitted).

<sup>69</sup> Gaza Fact-finding Mission report, *supra* note 22, at para. 305.

## IV. FINAL OBSERVATIONS

This chapter has proposed an approach for drawing both factual and legal conclusions in the context of an MRF mission. By breaking down this process into three distinct, though inter-related, steps, it has sought to provide practitioners with a roadmap for navigating the complexities inherent in this aspect of MRF work.

Each step discussed in this chapter presents unique challenges. When determining which legal frameworks apply to the mission, practitioners have found difficulty in qualifying complex contexts in which overlapping armed conflicts exist, precisely articulating the ways that IHL and IHRL interact with one another, and drawing conclusions about ICL violations while lacking the mandate and resources of a court or tribunal. In relation to standards of proof, practitioners employ evidentiary standards and strive to calibrate carefully the vocabulary in MRF reports to indicate whether, for each allegation, the standard was or was not reached, or was exceeded. And finally, the application of the law to facts is complicated by both the difficulty of applying certain legal norms and the lack of consensus that exists about certain areas of international law.

The overarching consideration is the importance that practitioners should place on a clear articulation of the reasoning underlying an MRF mission's approach to these issues. Similar to mandate interpretation, as discussed in Chapter 1, the methodology employed by the mission to establish facts and apply the law, and the resulting conclusions reached, are likely to be the subject of controversy, given the nature of MRF bodies as entities that levy allegations about violations of international law. However, by clearly communicating that the mission employed a sound methodology in terms of conducting legal analysis, the mission can seek to mitigate potential criticism and enhance its credibility.



# CHAPTER THREE

## Protection of Witnesses and Victims

### I. BACKGROUND

While MRF operations are undertaken in order to draw attention to violations of international law, the implementation of an MRF mission can also put witnesses and victims at risk of further violations.

MRF practitioners are guided by the *do no harm* principle in that MRF missions should *do no harm* to victims and witnesses. This fundamental principle is a well-established professional standard within MRF missions, as well as within the development and humanitarian community. It should inform all decisions taken by MRF practitioners. It refers to the mission's responsibilities not only toward individuals who come into direct contact with the mission but also toward other witnesses and victims in the same context. It means that practitioners should avoid increasing risks that witnesses and victims face, and to the extent possible, mitigate any risks that arise from the conduct of the mission. Given that the realities of on-the-ground implementation require activities that could create dangers for witnesses and victims, *do no harm*, in actuality, entails assessing what constitutes an acceptable level of risk.

For individuals with whom the mission comes directly into contact for information gathering, the risks are especially acute. For this reason, it is important for the mission to consider what protective measures in this regard can be taken by the mission to minimize those risks. The two core risks that these individuals face are described below.

**1) Retaliation.** Interviewees who provide information to MRF investigators often face the threat of retaliatory action as a result of their cooperation with the mission. In several instances, practitioners have reported that these threats have actually materialized. This danger arises because MRF missions are sometimes controversial in the countries in which they operate, leading certain actors to try to dissuade the local population from collaborating with the mission.

Though governments carry the primary responsibility for protection, in many cases, governments themselves are among the entities accused of committing violations. A widely held perspective is that, in such environments, MRF practitioners should do their best to fill the void of responsibility in relation to the protection of individuals who cooperate with the mission to avoid the risk of retaliation, to the extent possible.

**2) Re-traumatization.** The danger also exists that victims of violent incidents, who have been traumatized by these experiences, could suffer from re-traumatization while re-telling those stories to MRF investigators. While the risk of retaliation involves the physical security of interviewees, the risk of re-traumatization involves interviewees’ psychological health. A professional standard—consistent with the *do no harm* principle mentioned above—has developed that a responsible MRF process involves gathering information from interviewees in a manner that does not further exacerbate the trauma that interviewees have experienced.

On the issue of mitigating these risks, a divide exists between the most favorable practices that have been recommended by practitioners and policy actors and the realities of on-the-ground implementation, especially given the limited timespan and resources of the mission (see Table 7 below).

**TABLE 7: THE CONTRASTING NATURE OF PROTECTION NEEDS AND MRF MISSIONS**

Nature of protection needs of witnesses and victims who cooperate with an MRF mission	Nature of MRF missions
The mitigation of threats requires significant resources.	Budgetary, personnel, and overall resource restrictions limit the mission’s operational capacity.
Witnesses and victims face recurring threats over an extended period of time.	The temporary nature of MRF missions does not allow the mission to pursue protective measures after the mission disbands.
Skills and training are needed for staff to handle correctly and in a sensitive manner the mission’s protective responsibilities.	The <i>ad hoc</i> nature of the domain of MRF has sometimes led missions to be staffed with investigators who lacked sufficient experience in protective measures.

Because of this disparity, a methodological dilemma arises. While MRF practitioners have firm notions of most favorable practices, practitioners have widely acknowledged that the domain of MRF cannot always live up to these expectations in the field. MRF practitioners and policymakers are then caught between a desire to promote activities that fully live up to a mission’s protective responsibilities, and a reluctance to prescribe best practices that are unlikely to be actually followed, due to limitations in terms of budget, personnel, and logistical resources.

MRF practitioners must determine how far one can stray from the most favorable practices while still maintaining responsible, professional conduct. MRF mandates rarely provide specific guidance in this regard. Though some mandates refer in broad terms to protective responsibilities, few mandates mention specific protection measures.

One example of a mandate that specifies certain protective measures to be undertaken by the mission is the mandate for the **DRC Mapping Exercise**, which states:

Sensitive information gathered during the mapping exercise should be stored and utilized according to the strictest standards of confidentiality. The team should develop a database for the purposes of the mapping exercise, access to which should be determined by the High Commissioner for Human Rights. (...)

The Mapping Team should devise a strategy concerning the tracing of witnesses. Consent of witnesses to the sharing with MONUC [United Nations Organization Mission in the Democratic Republic of the Congo] and transitional justice bodies of information provided by them must be sought.<sup>70</sup>

Instead, the protection procedures adopted depend more on the individual practitioners serving on the mission and the mission's resource capacities. Typically, UN missions have had a greater capacity than others for protection, given the possibilities for coordinating protection activities with relevant UN agencies. However, in all cases, a certain degree of risk remains for victims and witnesses, and practitioners are left to grapple with mitigating these risks.

## II. PRACTICAL STEPS

The purpose of this section is to help practitioners design a protective framework for the witnesses and victims that the mission encounters. This method focuses on eight specific areas:

- 1) Training and development of methodology,
- 2) Engaging with governmental actors,
- 3) Ensuring confidentiality and obtaining informed consent,

<sup>70</sup> DRC Mapping Exercise report, *supra* note 32, at p. 544.

- 4) Exhibiting sensitivity during the interview process,
- 5) Using discretion during the interview process,
- 6) Data protection,
- 7) Report drafting, and
- 8) Follow-up measures.

For each of these eight areas, the mission should pursue the following steps:

#### **STEP 1: IDENTIFY THE MOST FAVORABLE PRACTICES**

Identify the practices that practitioners have noted as ideal manifestations of the professional responsibility to *do no harm* during a mission's implementation. This task could include reviewing existing guidelines, best practice documents, statements of principles, or relevant passages in past MRF reports.

#### **STEP 2: ANTICIPATE COMPLICATING FACTORS**

Assess the factors that could arise during implementation that might present obstacles for implementing the practices identified in Step 1.

#### **STEP 3: DEVELOP PRACTICAL SOLUTIONS**

Devise measures for surmounting the potential obstacles identified in Step 2.

### **III. EXPLANATION**

To assist practitioners in implementing the practical approach described on the previous page, this section details certain most favored practices, complicating factors, and practical measures that can be adopted to address each of the eight areas mentioned in the previous section.

When reviewing the comments offered throughout this section, MRF practitioners should bear in mind that there is no 'one-size-fits-all' solution to handling protection in a sensible and successful manner. Missions differ from one another in terms of context, capacities, and mandates. In each instance, the mission will have to determine individually how to best fulfill its protective responsibilities.

Nevertheless, the points detailed in this section offer a framework of considerations for how practitioners can develop protective measures that are both appropriate and practical in the particular circumstances of the mission.



## 1) TRAINING AND DEVELOPMENT OF METHODOLOGY

<b>Most favored practices</b>	<ul style="list-style-type: none"> <li>• Develop a mission-wide methodology for mitigating risks for the witnesses and victims that the mission encounters while gathering information.</li> <li>• Design and conduct training for all commissioners and staff who will interact with interviewees.</li> </ul>
<b>Complicating factors</b>	<ul style="list-style-type: none"> <li>• The mandating body often does not provide specific guidance in the mandate in this regard.</li> <li>• The mission may lack sufficient resources and capacity to allow the mission to fulfill its protective responsibilities.</li> <li>• The lack of a community of practice limits the extent to which, when developing training and methodologies, MRF practitioners can learn from the experiences of past missions.</li> <li>• The pool of experienced and available staff is sometimes insufficient for the demands of the domain of MRF. Mission-specific trainings, though useful, cannot fully make up for lack of staff experience.</li> <li>• Training all staff members simultaneously is complicated by logistical factors, especially when different staff members join the mission at different times.</li> </ul>
<b>Practical solutions</b>	<p>Seek methodological and training guidance from practitioners who have served on past missions, and especially recent MRF operations, since the domain of MRF is rapidly evolving in response to the wide array of ongoing MRF activities.</p>

## 2) ENGAGING WITH LOCAL AUTHORITIES

<b>Most favored practices</b>	<ul style="list-style-type: none"> <li>• At the beginning of the mission, request that local authorities protect individuals who cooperate with the mission and stress that the primary responsibility for protection rests with governments.</li> <li>• During the mission, engage in communications to pressure governmental leaders, or other individuals, who appear to be responsible for, or threatening, retaliatory measures.</li> <li>• Recommend in the mission's report that local authorities and other relevant actors seek to protect the individuals who cooperated with the mission.</li> </ul>
<b>Complicating factors</b>	<p>Local authorities may be unable or unwilling to provide sufficient protective measures for witnesses and victims during and after the mission, in some instances because these authorities are themselves the perpetrators of violations.</p>
<b>Practical solutions</b>	<p>Make clear that governments bear the primary responsibility for protecting witnesses and victims but prepare to fill the void in terms of protection by pursuing the practical solutions addressed throughout this chapter.</p>

### 3) ENSURING CONFIDENTIALITY AND OBTAINING INFORMED CONSENT

<b>Most favored practices</b>	<ul style="list-style-type: none"><li>• Ensure the confidentiality of the information gathered.</li><li>• Obtain informed consent from interviewees to ensure that interviewees understand how and for what purpose the mission will use the information obtained.</li><li>• In general, refrain from revealing to external entities not only the identity of witnesses but also any additional information that could allow witnesses to be identified.</li><li>• When sharing information with outside entities is consistent with the mission’s mandate—for example, transmitting information to the ICC when the mandate is aimed at accountability—ensure that interviewees give an informed consent and understand the potential ramifications, such as the disclosure of the information to the accused in an ICC case. In particular, the mission should approach the transmission of names or other potentially identifying information with utmost caution.</li></ul>
<b>Complicating factors</b>	<ul style="list-style-type: none"><li>• Sometimes interviewees do not understand the risks inherent in granting their consent.</li><li>• Even if an interviewee grants consent, the mission may determine that sharing the information provided could put the interviewee in danger.</li><li>• In instances in which an MRF mission intends to share information with an outside entity, informed consent has sometimes lacked sufficient precision regarding potential addressees (e.g., the mission will need to clarify whether consent to share information with the ICC includes defense counsel).</li><li>• Handing witness accounts over to the ICC risks undermining a criminal prosecution by giving the defense counsel the opportunity to highlight any discrepancies between statements offered by the same witness to an MRF mission and in the context of an ICC case.</li></ul>
<b>Practical solutions</b>	<ul style="list-style-type: none"><li>• Develop a rigorous system for evaluating whether or not the interviewee understands the consent granted.</li><li>• Given that MRF practitioners are, on an ongoing basis, further refining informed consent procedures, seek to learn from the experiences of recent missions.</li><li>• Engage in discussion within the mission about existing risks that may preclude sharing information even if consent has been granted.</li></ul>

#### 4) EXHIBITING SENSITIVITY DURING THE INTERVIEW PROCESS

<b>Most favored practices</b>	<ul style="list-style-type: none"><li>• To avoid exposing interviewees to the risk of re-traumatization, when selecting interviewees, if possible, refrain from interviewing particularly psychologically vulnerable individuals.</li><li>• Exhibit sensitivity during interviews and stop the interview if, during the interview, information relayed or behavior exhibited by the interviewee leads the interviewer to reassess the vulnerability of the witness.</li></ul>
<b>Complicating factors</b>	Sometimes MRF investigators lack sufficient skills and do not know how to appropriately deal with victims of trauma.
<b>Practical solutions</b>	Ensure that an experienced interviewer with a background in engaging with trauma victims is always present during interviews.

#### 5) USING DISCRETION DURING THE INTERVIEW PROCESS

<b>Most favored practices</b>	<p>To avoid exposing interviewees to the risk of retaliation:</p> <ul style="list-style-type: none"><li>• Use discretion when approaching interviewees.</li><li>• Conduct interviews in private.</li><li>• When selecting interviewees, consider the compounded risks—specifically, in terms of the danger of retaliation—that exist for individuals who have already been interviewed by other organizations.</li></ul>
<b>Complicating factors</b>	<ul style="list-style-type: none"><li>• MRF missions are frequently high profile, complicating efforts to use discretion when approaching interviewees.</li><li>• For certain contexts, such as detention centers and refugee camps, it is sometimes difficult or impossible to conduct interviews in private.</li></ul>
<b>Practical solutions</b>	<ul style="list-style-type: none"><li>• Investigators can meet interviewees in a different location (this could include providing money to interviewees to take local transportation to a nearby town or to investigators to rent anonymous-looking cars).</li><li>• For victims of violations associated with a high level of stigma—for example, victims of SGBV—do not announce the types of victims for which you are looking.</li><li>• For detention centers, ensure that information provided by a detainee is never transmitted to the interviewee’s captors.</li><li>• When a private interview is impossible, proceed only if the interviewee agrees and if doing so is unlikely to increase the risk of retaliation facing the interviewee.</li></ul>

## 6) DATA PROTECTION

<b>Most favored practices</b>	<ul style="list-style-type: none"><li>• Retain anonymity of interviewees (e.g., by using codes instead of actual names) in internal notes and reports.</li><li>• Keep data secure that contains information that could allow interviewees to be identified.</li><li>• Destroy paper notes of interviews after converting to electronic format.</li><li>• Use encrypted computers and secure servers to upload information gathered through interviews.</li><li>• Ensure that data is kept secure after the mission's conclusion.</li></ul>
<b>Complicating factors</b>	<ul style="list-style-type: none"><li>• Some missions, particularly non-UN missions, lack comprehensive data protection capacities, such as encryption.</li><li>• After a mission ends, it is sometimes unclear who will have access to the data and for what length of time the records of the mission will be kept confidential.</li></ul>
<b>Practical solutions</b>	<p>The mission should adopt clear guidelines, consistent with the informed consent granted during the interviews, regarding who will and will not be granted access to the information gathered during and after the conclusion of the mission.</p>

## 7) REPORT DRAFTING

<b>Most favored practices</b>	<p>Do not include in the report:</p> <ul style="list-style-type: none"><li>• Names of interviewees, and</li><li>• Details that could allow interviewees to be identified.</li></ul>
<b>Complicating factors</b>	<ul style="list-style-type: none"><li>• It is not always clear what information should be omitted from the report in order to retain the anonymity of the interviewees.</li><li>• Sometimes omitting these details will lead to reports that read as ambiguous.</li></ul>
<b>Practical solutions</b>	<p>During report drafting, if ambiguities exist about which pieces of information would cause interviewees to be identifiable, practitioners should err on the side of caution in order to abide by the mission's responsibility to mitigate risks to witnesses and victims.</p>

## 8) FOLLOW-UP MEASURES

<b>Most favored practices</b>	<ul style="list-style-type: none"><li>• Provide referrals to connect interviewees with other organizations that might be able to see to the interviewees' humanitarian, medical, and psychosocial needs (based on a mapping of potentially useful services that the mission conducts prior to the start of fieldwork).</li><li>• Verify that referrals are effective.</li><li>• Coordinate follow-up measures—in terms of protection or for other humanitarian needs—for interviewees.</li><li>• Consider assisting interviewees interested in seeking asylum.</li></ul>
<b>Complicating factors</b>	<ul style="list-style-type: none"><li>• The temporary nature of MRF creates challenges for post-mission engagement with witnesses and victims.</li><li>• Regarding the coordination of follow-up measures, sometimes other organizations, including UN agencies, lack the capacity to engage in effective follow-up activities.</li><li>• Once the mission ends, the MRF team disbands and lacks the capacity, as a mission, to undertake follow-up measures.</li><li>• Sometimes practitioners feel compelled to engage in an activist capacity to attend to the humanitarian needs of witnesses and victims, with the risk of bringing the impartial character of the mission into question or creating confusion locally about the mission's aims and purposes.</li></ul>
<b>Practical solutions</b>	<p>When possible, an MRF mission should seek to build linkages with other entities able to assume a role in monitoring protection concerns related to the witnesses and victims with whom the mission engaged. This assists MRF investigators in attending to interviewees' long-term needs without compromising the impartiality of the mission.</p>

## IV. FINAL OBSERVATIONS

The goal of this chapter has been to assist practitioners in navigating, on the one hand, expectations regarding MRF practitioners' responsibilities to protect witnesses and victims, and on the other hand, the practical realities of undertaking an on-the-ground data gathering effort. The core dilemma is that, while *do not harm* is a firmly established guiding principle of MRF operations, its application differs depending on the mandate, resources, and context of the mission. For this reason, there is no single protection template applicable to the diversity of MRF missions.

Given this state of affairs, the considerations outlined in this chapter offer not a conclusive framework for approaching protection, but rather, a starting point for determining how an MRF mission can surmount common challenges that practitioners have faced in relation to this issue. MRF practitioners should also bear in mind that protection practices continue to evolve on an ongoing basis in response to lessons learned. Therefore, it is particularly important that practitioners seek to gain insight from a wide array of professionals experienced in these issues, in particular, from practitioners who have served on recent missions.

# CHAPTER FOUR

## Public Communication

### I. BACKGROUND

Public communication serves a number of purposes at different stages of an MRF mission. Upon its initiation, the aim of public engagement is to communicate in a transparent manner the aims, composition, and planned activities of the mission. During the investigation, public engagement can be used to respond to—and mitigate the effects of—criticisms regarding the mission’s credibility, as well as to cultivate a feeling among witnesses and victims and affected communities of being heard by the international community. Upon the release of the report, the aim of public engagement shifts toward raising the visibility of the mission’s findings.

Public engagement also carries risks, particularly as the mission is ongoing. If handled ineffectively, it can exacerbate an already volatile climate, fuel speculation about the credibility of the mission, or cause security risks for witnesses and victims, as well as for MRF practitioners themselves.

Public communication therefore requires careful management. It is important for MRF practitioners to adopt a strategic approach to public engagement, so that the mission is poised to take a proactive—rather than reactive—approach to events as they unfold during an MRF investigation.

### II. PRACTICAL STEPS

The purpose of this section is to provide practitioners with a strategic view of the objectives of public communication. This section focuses on public communication activities during three phases of an MRF mission’s implementation, which are:

- A. The initiation of the mission
- B. During the investigation
- C. After the release of the report

For each of these three phases, the mission should pursue the following steps:

**STEP 1: IDENTIFY THE OBJECTIVES**

Identify whom the mission wishes to impact and why this aim is important to the operations of the mission.

**STEP 2: STRATEGIC PLANNING**

Plan the mission's public communication activities, taking into consideration the potential benefits and risks of different courses of action.

### III. EXPLANATION

#### A. THE INITIATION OF THE MISSION

**STEP 1: IDENTIFY THE OBJECTIVES**

The aim of public communication during this phase is to ensure that all the relevant entities—governments, the affected population, and civil society—may have a basic understanding of the aims and operations of the mission. Measures taken toward this end can be particularly important for international missions, which have sometimes faced skepticism from local actors about their aims and intentions. When the mission operates simultaneously with other investigative mechanisms, a related objective is to make it clear that the mission is a distinct and independent exercise. For example, part of the public communications strategy of the Guinea Commission was to distinguish the mission from the national commission that had been mandated by the Government of Guinea.

**STEP 2: STRATEGIC PLANNING**

Specific public communication measures that have been adopted at the outset of an MRF mission include:

- Convening a press conference to announce the creation of the mission;
- Publishing a press release that provides information about the mission's mandate and the identities of the commissioners;
- Making public the mandate and modalities of the mission;
- Creating a mission-specific webpage; and
- Providing information about planned field visits, pending security considerations.

Security considerations are important in two respects.



First, offering detailed public information about the mission's planned field visits could create security risks for commissioners and staff, as well as for witnesses and victims, especially in complex security environments and where MRF missions are controversial. Regarding witnesses and victims, it is important that the mission use discretion when approaching interviewees, so as to not make them vulnerable to reprisals (See Chapter 3 for more details about protecting witnesses and victims). The mission should consider these factors when making decisions about the level of detail that the mission will publicly provide about the mission's field visits.

Second, though the mission may publicly communicate about the number of its staff members and their roles, identities should be kept confidential (see Chapter 5 for an explanation of how to address this issue in the final report). In typical MRF practice, commissioners serve as the public face of the mission. Staff members are not publicly identified by name, due to the security risks for these individuals that could arise for them not only during—but also after the conclusion of—the mission.

## **B. DURING THE INVESTIGATION**

### **STEP 1: IDENTIFY THE OBJECTIVES**

During the investigation, the mission should normally exercise restraint in public communications. However, public engagement is sometimes required, in order to defend the mission's credibility in response to criticisms, and to reach out to witnesses and victims.

In the first case, given the importance of perceptions of the mission's credibility, it can be important for the mission to counter criticisms that may arise about the mission's mandate or operations, to defend its integrity.

In the second case, one key component of an MRF operation is to forge connections between the mission and witnesses and victims relevant to the mission's mandate. To this end, certain MRF missions have devised different means for the affected population to present information to the mission. Such measures could not only raise the visibility of the mission in a manner that enhances its impact but could also provide witnesses and victims with the sense that there is an opportunity to tell their stories to the international community.

Although public outreach measures tend to be presented as a means of gathering information, the information obtained tends to be of limited evidentiary value (as described in Step 2 below). For this reason, such measures should only be undertaken after careful consideration of the costs in terms of money, personnel, and time, as well as the potential security risks (Step 2, below, also elaborates on the issue of security risks).

## STEP 2: STRATEGIC PLANNING

### **a) Defending the Mission's Credibility**

It is important for the mission to respond publicly if the mission's integrity has been brought into question. However, a public misstep can further exacerbate an already tense political atmosphere and also can increase security risks for commissioners and staff members. Specifically, during an interview or press conference, a commissioner may make a comment that suggests, due to imprecise wording, a misunderstanding on the part of the interviewer, or subsequent quotation of the statement out of context—that the mission has pre-judged the outcome of the investigation.

Given the unpredictability of in-person interviews and press conferences, in contexts where the mission's credibility is brought into question, the mission should opt, whenever possible, to respond to these criticisms only in writing. This medium will better allow commissioners to control the message that the mission wishes to publicly convey. Table 8 (on the following page) presents common criticisms, how practitioners can respond, and examples from past practice.

### **b) Public Outreach**

Public outreach endeavors that have been undertaken by past MRF missions include holding public hearings, opening public offices, and issuing a public call for submissions to the mission. However, when deciding whether to pursue any of these avenues, MRF practitioners should consider the potential drawbacks: 1) engaging with witnesses publicly could impair witness protection; 2) seeking information through public means is unlikely to yield information leading to factual conclusions.

In terms of *protection issues for witnesses and victims*, during field visits, MRF missions usually aim to retain the anonymity of interviewees in order to avoid exposing these witnesses and victims to the risk of being further victimized by retaliatory measures (see Chapter 3 for more details). MRF missions that pursue public engagement with witnesses and victims—for example, in the context of public hearings—will need to undertake extensive measures to mitigate this risk. Specifically, MRF missions should, throughout the implementation of the mission, monitor the situation of individuals who have publicly offered information, and if problems arise, pursue corrective measures. For example, if an individual, after providing information to an MRF mission, is detained by governmental authorities, commissioners can press for the release of the individual, either through written communication with the government or through public efforts that aim to apply pressure on these authorities.

**TABLE 8: RESPONDING TO CRITICISMS OF THE MISSION'S CREDIBILITY**

Criticism	Mission's Response	Example
The mandating body is biased, and thus the mission is perceived as biased.	Clarify that the mission is a technical exercise operating independently of the mandating body.	After members of the Bahraini political opposition expressed concern that the <b>Bahrain Commission</b> was mandated by the Government of Bahrain, the very entity accused of committing violations, the Chair of the Commission made clear that the mission was independent and that the King of Bahrain was not in any way dictating or restricting the Commission's activities. <sup>71</sup>
The mandate is unnecessarily restrictive and/or biased.	Emphasize that the mission has corrected any potential biases that might exist in the mandate.	One of the criticisms of the <b>Gaza Fact-finding Mission</b> is that the original mandate focused solely on Israel. However, the Chair of the mission, in a press conference announcing the initiation of the investigation, emphasized that the mission would operate under terms agreed to by the President of the UNHRC that would correct the one-sided nature of the original mandate and would allow for an investigation that would examine all sides of the conflict. <sup>72</sup>
The commissioners and/or staff are perceived as biased, to have pre-judged the outcome of the investigation, or to have used selective approaches to gathering data.	Emphasize that the mission is gathering information from all sides and is evaluating the information in an impartial manner.	After the publication of the <b>Kyrgyzstan Inquiry Commission</b> report, the Kyrgyz Parliament decried the report as one-sided, declared the Chair of the commission "persona non grata," and discussed accusations that the Chair of the commission accepted bribes from Uzbek separatists. In response, the Chair offered public comments denying the accusations and asserting that the practitioners on the mission endeavored to conduct an impartial exercise. <sup>73</sup>

<sup>71</sup> "The Bahrain Independent Commission of Inquiry Statement," Bahrain Center for Human Rights, August 10, 2011, available at [www.bahrainrights.org/en/node/4499](http://www.bahrainrights.org/en/node/4499)

<sup>72</sup> "Near verbatim transcript of press conference by the President of the Human Rights Council, Martin Ihoeghian Uhomobhi (Nigeria) and Justice Richard J. Goldstone on the announcement of the Human Rights Council fact-finding mission on the conflict in the Gaza Strip," Geneva, 3 April 2009, available at [www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session9/Pages/FactFindingMission.aspx](http://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session9/Pages/FactFindingMission.aspx)

<sup>73</sup> "'Banned' Investigator Regrets Kyrgyz Probe Response," Institute for War & Peace Reporting, June 9, 2011, available at [iwpr.net/report-news/banned-investigator-regrets-kyrgyz-probe-response](http://iwpr.net/report-news/banned-investigator-regrets-kyrgyz-probe-response)

After the public hearings held by the [Gaza Fact-finding Mission](#), the mission perceived that the detention of one of the participants might have been linked to his participation in the hearings. The mission expressed concern, in writing, about this issue to a representative of the Israeli government. As the mission's report states:

Subsequent to the public hearings in Geneva, the Mission was informed that a Palestinian participant, Mr. Muhammad Srour, had been detained by Israeli security forces when returning to the West Bank and became concerned that his detention may have been a consequence of his appearance before the Mission. The Mission wrote to the Permanent Representative of Israel in Geneva expressing its concern. In response, the Permanent Representative informed the Mission that the detention of the person concerned was unrelated to his appearance at the public hearing. Mr. Srour was subsequently released on bail. The Mission is in contact with him and continues to monitor developments.<sup>74</sup>

In terms of the *limited evidentiary value of information gathered through public means*, MRF missions should be mindful that information received through public fora has very rarely served as a basis for the mission's findings. Information received through public hearings—at public offices established by the mission, or in response to public calls for written submissions—have not been as useful in terms gathering data as interviews conducted during MRF field work. Additionally, granting individuals and groups the ability to offer information to the mission in a public manner could lead to manipulation by outside interests who want to influence the conclusions reached by the mission.

The [Sri Lanka Panel](#) issued public call for submissions and received over 4,000 submissions from over 2,300 senders.<sup>75</sup> However, the Panel's final report states that, despite the large volume of submissions, the Panel could not independently verify the material, and as a result, did not use this information as a direct source for the Panel's report.<sup>76</sup> Indeed, the report states that "a portion of submissions" consisted of "[g]eneral information, including media reports, web links and historical

<sup>74</sup> Gaza Fact-finding Mission report, *supra* note 22, at para. 147.

<sup>75</sup> Sri Lanka Panel report, *supra* note 15, at para. 17.

<sup>76</sup> *Ibid.*, at para. 19.

accounts, forwarded to the Panel from publicly available sources (...).<sup>77</sup> The report also states of the submissions that “appeals urging the Panel to act or to make specific recommendations, but containing neither fact-based information nor analysis, accounted for a large number of submissions received.”<sup>78</sup>

Due to the witness protection risks, the low evidentiary value of the information obtained, and also in light of the costs (in terms of personnel, money, and time), public hearings should not be encouraged in MRF practice.

## **D. AFTER THE RELEASE OF THE REPORT**

### **STEP 1: IDENTIFY THE OBJECTIVES**

MRF policy literature, and practitioners themselves, emphasize the importance of making final MRF reports public. Often, commissioners engage in public efforts to promote the findings and recommendations of the mission after the release of the report. These activities can be important to the success of the mission but should be weighed against potential security risks. (see Chapter 5 for more details).

In some instances, though, mandates have been silent about whether reports should be made public, leaving the mandating body’s intent unclear. For missions mandated by the UNHRC, mandates commonly do not specify that the report will be made public, though the practice of the OHCHR, which plays a lead role in implementing such mandates, is publication upon the conclusion of the mission.<sup>79</sup> In other instances, the mandating body’s intention remains more ambiguous. Practitioners operating under such mandates can advocate, publicly or privately, that the mandating body publish the mission’s final report, a strategy that has been successful in the past.<sup>80</sup> It is also important that the report is circulated widely and, if applicable, translated into different languages so that the key actors relevant to the context can read the report. (See Chapter 5 for more information about report drafting.)

When planning the communication activities that aim to promote the final report, commissioners should consider the various audiences of MRF reports and their relevance to these audiences (see Table 9 on the following page for details).

<sup>77</sup> *Ibid.*, at para. 18.

<sup>78</sup> *Ibid.*

<sup>79</sup> Rob Grace, “Communication and Report Drafting in Monitoring, Reporting, and Fact-finding Missions,” HPCR Working Paper, Program on Humanitarian Policy and Conflict Research at Harvard University, July 2014, p. 21.

<sup>80</sup> *Ibid.*, at 21.

**TABLE 9: AUDIENCES OF MRF REPORTS**

Audience	Potential relevancy of the report to these entities
The mandating body	Assists in determining how to address allegations of violations of international law relevant to an ongoing or past armed conflict or internal disturbance.
Affected populations	Can cultivate a feeling among affected communities of being heard by the international community. In some contexts, the report might constitute the only form of justice available to victims. <sup>81</sup>
Civil society	Serves as an authoritative document that can be incorporated into advocacy efforts to address allegations relevant to the mission's mandate.
International or national prosecutors	Findings of the mission can be used as lead evidence, or as background or contextual evidence in future or ongoing investigations.

## STEP 2: STRATEGIC PLANNING

Efforts undertaken by commissioners with the aim of promoting the mission's report have included:

- Convening a press conference,
- Organizing a public event to launch the report,
- Providing media interviews, and
- Publishing op-eds in prominent newspapers.

After the release of the report, though the mission ends and the team dissolves, some ex-commissioners remain publicly engaged by offering public statements about the adoption (or lack thereof) of the report's recommendations, authoring academic articles about the mission, or becoming directly involved in related advocacy efforts or capacity building measures.<sup>82</sup>

<sup>81</sup> See the "Background" section of the "Report Drafting" chapter for details about this issue.

<sup>82</sup> On missions mandated by the UNHRC, commissioners are bound by a declaration requested by the Council that states, "I also undertake to respect during the tenure of my mandate and subsequently, the confidentiality of all information made available to me in my capacity as a member of the Commission of Inquiry/Fact-finding Mission." See "Guidance and Practice," OHCHR, *supra* note 2, at pp. 108-109. MRF practitioners bound by such a confidentiality pledge should ensure that any public communication activities do not compromise the declaration made.

Similar to statements made during the operation of an MRF mission, the release and promotion of the report also evokes security concerns for international staff who remain in the country. Normally, when MRF practitioners anticipate that the release of the report will lead to security issues, such as retaliatory measures undertaken by local actors, the mission will advise the UN and embassies in the country of the release date so that precautionary security measures can be taken. Or, for an interim report, a mission will ensure that the MRF team is out of the country on the day of the report's release.

Commissioners should also be aware that the delicate environment in which MRF missions operate does not end with their conclusion. Even long after the mission ended, commissioners have been generally reluctant to offer public comments that might bring the mission's credibility into question. Though a commissioner's formal authority ends with the conclusion of an MRF mandate, statements made in the wake of the publication of an MRF report can still influence people's perceptions of the legitimacy of the mission's findings.

Public comments made by the Chair of the [Gaza Fact-finding Mission](#) more than two years after the release of the final report reignited debates between the mission's supporters and detractors about the legitimacy of the report's findings. In particular, the Chair of the mission wrote an op-ed in 2011 that stated that, since the end of the mission, information had been made available that "indicate[d] that civilians were not intentionally targeted [by Israel] as a matter of policy,"<sup>83</sup> contrasting the conclusions offered in the mission's final report.<sup>84</sup>

The op-ed led to calls for the United Nations to retract the report. Additionally, the other three members of the mission disagreed with the Chair's conclusion and wrote their own op-ed that aimed "to dispel the impression that subsequent developments have rendered any part of the mission's report unsubstantiated, erroneous or inaccurate."<sup>85</sup>

<sup>83</sup> Richard Goldstone, "Reconsidering the Goldstone Report on Israel and war crimes," *The Washington Post*, April 1, 2011, [www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC\\_story.html](http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html)

<sup>84</sup> See Gaza Fact-finding Mission report, *supra* note 22, at paras 1883-1895.

<sup>85</sup> Hina Jilani, Christine Chinkin, and Desmond Travers, "Goldstone report: Statement issued by members of UN mission on Gaza war," *The Guardian*, April 14, 2011, [www.theguardian.com/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza](http://www.theguardian.com/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza)

## IV. FINAL OBSERVATIONS

As this chapter has elaborated, public communication is important for the implementation of an MRF mission. First, a widely accepted principle of MRF implementation dictates that, at the outset of an MRF operation—and during implementation—an MRF body should make publicly available basic information about the mandate, composition, and activities of the mission. Second, in some instances, criticisms levied at MRF missions have prompted commissioners to engage in a public defense of the credibility of the mission. Third, public outreach to the affected population can be an essential aspect of raising the visibility, and hence, perhaps the impact, of the mission. Fourth, after the conclusion of the mission, promoting the release of the final report allows commissioners to generate awareness of the mission’s findings and advocate for the implementation of the mission’s recommendations.

However, it is important that commissioners approach these activities in a strategic manner. The practical steps that this chapter presents aim to focus practitioners’ attention on defining the objectives of these activities and mitigating potential unintended consequences. Strategizing about the mission’s approach in this regard at the beginning of the implementation process—specifically, before the initiation of fieldwork—will position the mission to predict, and determine how to respond to, public relations issues and security concerns that emanate from negative perceptions of the mission.



# CHAPTER FIVE

## Report Drafting

### I. BACKGROUND

The drafting and publication of the final report is the culmination of the implementation of an MRF mission. Since the final report constitutes the concrete outcome of the MRF mission and the main basis on which the whole work of the mission will be judged, practitioners are of the view that reports should be drafted with the utmost care.

The importance of the report arises in part from the temporary nature of MRF missions. Upon the completion of the mandate, the MRF team typically disbands, leaving the task of reviewing and acting on the mission's findings to governmental and inter-governmental actors, politicians, and civil society. The control that practitioners can exercise over the mission's impact is then limited. The report constitutes the link between the mission's activities and the advocacy efforts and political decision-making processes that occur after the conclusion of the mission.

It is also paramount to stress that the publication of an MRF mission's final report often constitutes the only factual account and recognition of violations victims suffered, and as such, the only form of justice victims will obtain. In this regard, MRF reports contribute to realizing the right of victims of serious IHRL and IHL violations to access relevant information about violations, as a component of their rights to remedy and to full and public disclosure of the truth related to such violations as a form of compensation, within their right to reparation. These rights have been reaffirmed in various international legal documents.<sup>86</sup>

<sup>86</sup> For example, see the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," adopted by the United Nations General Assembly in 2005 in Resolution 60/147.

However, the report drafting process is challenging for several reasons. First, the need to produce a report in a relatively short timeframe complicates the collaboration among the different actors engaged in the drafting process. Second, bureaucratic constraints can also affect the process. In particular, for missions authorized by the UNHRC, the time needed for editing and translation could impose length limitations on the report (sometimes restricted to 25 pages) and require that the report be completed several weeks before its presentation to the Council.<sup>87</sup>

Because the report is so essential to the success of the mission, it is extremely important for practitioners to devise a report drafting strategy that clearly defines the objective, decision-making framework, and drafting process.

## II. PRACTICAL STEPS

The purpose of this section is to provide practitioners with strategic considerations to inform the process of drafting the mission's final report. This section focuses on three core aspects of an MRF report: providing information about the creation and operations of the mission, presenting the mission's findings, and offering recommendations. For each of these three areas, the mission must define the output, determine how to present the content, and plan the drafting process, as described in the practical steps presented below.

### A. PROVIDE INFORMATION ABOUT THE CREATION AND OPERATIONS OF THE MISSION

#### STEP 1: IDENTIFY THE OUTPUT

To promote transparency about the mission, provide information about the adoption of the mandate, the commissioners and staff, and the activities and investigative methodology of the mission.

#### STEP 2: DETERMINE HOW TO PRESENT THE CONTENT

The mission must decide on what level of detail the report will provide about each of the items mentioned in Step 1.

#### STEP 3: PLAN THE DRAFTING PROCESS

The mission should consider drafting this section of the report early on.

<sup>87</sup> Grace, *supra* note 79, at p. 36.

## ***B. PRESENT THE MISSION'S FINDINGS***

### **STEP 1: IDENTIFY THE OUTPUT**

Present the factual and legal findings of the mission and clarify the level of certainty of these findings, given the investigative methodology of the mission.

### **STEP 2: DETERMINE HOW TO PRESENT THE CONTENT**

In terms of structure, the mission must decide whether to organize the report by geographical region (dividing sections according to the location where incidents occurred, presented in chronological order) or by violation type (dividing sections based on the type of incident, regardless of where the incident occurred). The language should avoid emotive vocabulary, the tone should be consistent throughout the report, and legal vocabulary should be confined to sections on legal findings.

### **STEP 3: PLAN THE DRAFTING PROCESS**

The mission must decide how to divide drafting responsibilities between commissioners and staff, and if possible, should employ a lead drafter/editor to ensure consistency throughout the entire report.

## ***C. OFFER RECOMMENDATIONS***

### **STEP 1: IDENTIFY THE OUTPUT**

Decide what recommendations to offer and to whom the mission should direct its recommendations.

### **STEP 2: DETERMINE HOW TO PRESENT THE CONTENT**

Determine how the mission's mandate, the intended audience of the report, and desired impact of the mission should be reflected in the recommendations.

### **STEP 3: PLAN THE DRAFTING PROCESS**

The mission should draft recommendations that are precise and based on the mission's assessment of the situation on the ground.

## **III. EXPLANATION**

### ***A. PROVIDE INFORMATION ABOUT THE CREATION AND OPERATIONS OF THE MISSION***

#### **STEP 1: DEFINE THE OUTPUT**

Due to the sensitive nature of levying allegations of violations of international law, providing detailed information about the way that the mission implemented its mandate can be crucial for fostering public perceptions of the credibility of the investigation (see Chapter 4). For this reason, it is important that the report provides details about how the mission came into being and the way that the mission implemented its mandate (for additional details about the importance of transparency in this regard, see Chapters 1 and 2).

#### **STEP 2: DETERMINE HOW TO PRESENT THE CONTENT**

MRF reports have varied in terms of the level of detail that reports have provided about the origins and operations of the mission. Those differences come from such factors as report length limitations or the commissioners' perceptions of what aspects of the mandate and the implementation process are particularly important to emphasize.

This section offers models for how the report can present: 1) information about the adoption of the mandate, 2) background on commissioners and staff, and 3) a description of the activities and methodology of the mission. For each of these areas, this section describes two possibilities: offer a basic level of detail that constitutes a minimum level of transparency, or provide more extensive details.

Commissioners on each MRF mission will need to decide what level of detail is useful or necessary, given the mandate and context of the mission. The below framework, based on approaches that practitioners on past missions adopted, presents examples from past practice to guide practitioners' decision-making in this regard.

1) ADOPTION OF THE MANDATE		
	Description	Example
Include basic level of detail	Include only the operative portion of the mandate, the identity of the mandating body, and the date of the mandate's adoption.	The first report of the <b>Libya Commission</b> includes the name of the resolution adopted by the UNHRC, the date of adoption, and the operative portion of the mandate. <sup>88</sup>
Provide extensive details	Include the full text of mandate and additional information about the creation of the mission.	The <b>DRC Mapping Exercise</b> report includes a two-page description of the creation of the mission; the operative portion of the overarching mandate, which was the UNSC resolution that created the United Nations Organization Mission the Democratic Republic of the Congo; and in the annex, the full text of the mission's Terms of Reference, which were approved by the UNSG. <sup>89</sup>

2) BACKGROUND ON COMMISSIONERS AND STAFF		
	Description	Example
Include basic level of detail	Offer names and basic information about the commissioners.	The <b>Lebanon Commission</b> report provides only the names and nationalities of the commissioners and states, "The members were appointed on the basis of their expertise in international humanitarian law and human rights law." <sup>90</sup>
Provide extensive details	Provide extensive information about the commissioners' professional backgrounds, as well as general information about the role and responsibilities of the mission's staff.*	The <b>Bahrain Commission</b> report provides not only the names and nationalities of the commissioners but also, in an annex, one-page professional biographies for each commissioner, as well as a chart demonstrating the organizational link between the commissioners and the staff. <sup>91</sup>

\* Due to the security issues that could arise, staff members should not be identified by name in the mission's report. See Chapter 4 for details about this issue in terms of the mission's public communication activities.

<sup>88</sup> First Libya Commission report, *supra* note 33, at paras 1-3.

<sup>89</sup> DRC Mapping Exercise report, *supra* note 32, at pp. 33-34 and 542-544.

<sup>90</sup> Lebanon Commission report, *supra* note 24, at para. 4.

<sup>91</sup> "Report of the Bahrain Independent Commission of Inquiry," 2011, pp. 2, 495, and 499-503, available at [www.bici.org.bh/BIClreportEN.pdf](http://www.bici.org.bh/BIClreportEN.pdf)

### 3) ACTIVITIES AND METHODOLOGY OF THE MISSION

	Description	Example
Include basic level of detail	Concisely describe activities that the mission undertook, challenges faced, and methodological considerations that underpinned the investigation, including the sources of information on which the mission relied, how the mission gathered this information, and the standard of proof adopted by the mission.	The <b>Beit Hanoun Fact-finding Mission</b> report includes two paragraphs about challenges the mission faced due to lack of territorial access; four paragraphs about the mission’s field visits and data gathering methods; and in the Annex, the itinerary of the mission’s field visit to Gaza. <sup>92</sup>
Provide extensive details	Present an elaborate description of specific aspects of the mission’s activities and methodology, including the decision-making framework that guided all of the mission’s methodological choices.	The <b>Darfur Commission</b> report provides extensive information about the mission’s methodology, including 10 paragraphs about mandate interpretation, 6 paragraphs about working methods, 2 paragraphs about the restraints that affected the mission, 6 paragraphs about the mission’s field visits, and 14 paragraphs about cooperation received from the Sudanese authorities and rebel groups. <sup>93</sup>

### STEP 3: PLAN THE DRAFTING PROCESS

Due to the hectic nature of the report drafting process, it will benefit the mission to begin to draft the report as early on as possible during the implementation process. Since information about the creation and methodologies of the mission are available at the initial phase of the investigation, the mission can draft these sections at the beginning of the mission.

<sup>92</sup> Beit Hanoun Fact-finding Mission report, *supra* note 28, at pp. 3-4 and 24.

<sup>93</sup> Darfur Commission report, *supra* note 18, at pp. 9-17.

## **B. PRESENT THE MISSION'S FACTUAL AND LEGAL FINDINGS**

### **STEP 1: DEFINE THE OUTPUT**

Presenting the findings of the investigation is the ultimate purpose of an MRF exercise. For this reason, the findings should be drafted with care and precision and must be clear about their level of certainty (see Chapter 2). Additionally, the report should omit any content—such as names or other identifying information—that could jeopardize the protection of individuals who provided information to the mission (see Chapter 3) or that might raise *due process* concerns for allegations of criminal conduct by specific individuals.

In light of the importance of respecting *due process* and given the lower standard of evidence used by MRF bodies compared to courts, a mission required to identify alleged perpetrators should refrain from doing so publicly. Instead, the mission should compile a confidential list that can be made available in the future to any appropriate international or national prosecutors. The list should indicate the name of the individual and the specific allegation. Such documents should be lodged in a location where confidentiality can be assured. The common practice for missions mandated by the UNHRC is, at the end of the mission, to hand over confidential lists to the OHCHR.

### **STEP 2: DETERMINE HOW TO PRESENT THE CONTENT**

The two main considerations regarding the presentation of the mission's findings are: 1) the language that the mission uses to describe the incidents examine, and 2) the structure of the factual and legal conclusions.

The language used in the report is important for its credibility. *First*, practitioners widely agree that the tone for which MRF reports should strive is authoritative impartiality. Emotive vocabulary or superfluous adjectives that can bring the objectivity of the mission into question, should be avoided. *Second*, it is important that the mission confines legal vocabulary (e.g., describing incidents as violations) to the sections in the report that focus on legal analysis. Otherwise, the distinction between the report's factual and legal conclusions may be blurred. *Third*, the tone and vocabulary usage should be consistent throughout the entirety of the report. *Fourth*, report drafters should bear in mind the desirability of making the report readable to a wider audience. Presenting the information in a manner that is understandable and that tells a story could increase the outreach and impact of the report. *Fifth*, the report should always be written as if it is going to be made public, even if not clearly stipulated in the mandate.

Regarding structure, it is important that the report exhibits cohesion between the factual and legal findings of the investigation. If the report draws a legal conclusion that a violation has occurred, the report should also present all the requisite factual findings to indicate the presence of all the elements of the violation (see Chapter 2). Additionally, structuring the findings in chronological order will allow for better readability.

The overarching structural components of the report's factual and legal conclusions are described below:

- *Applicable law*—Describes what laws apply to the context. Could necessitate references to certain factual conclusions; for example, to demonstrate that a situation constitutes an armed conflict for the purpose of applying IHL and for the classification of an armed conflict as a non-international conflict, the report will have to establish certain facts, such as that an armed group that is a party to the conflict exhibits a certain degree of organization.
- *Factual findings*—Describes the facts found by the mission.
- *Legal analysis*—Articulates the mission's conclusions regarding which, if any, of the applicable laws have been violated, in light of the mission's factual findings.

Decisions about structure are complicated by the fact that MRF reports often cover many types of incidents committed by various perpetrators in a wide array of locations. When deciding how to organize this information, dividing chapters by perpetrator should normally be avoided, since this structural choice risks evoking controversy about the mission's conclusions.

Based on the mandate of the mission, as well as the aspects of the mission's findings that the commissioners wish to emphasize, the mission must decide whether to favor structuring the report's factual findings by geographical region or by violation type. While no professional consensus exists regarding the desirability of one structural choice versus the other, both options have certain benefits.

Structure *by geographic region* entails, within a single chapter, providing an overview, in chronological order, of different types of violations that occurred within the same geographical region. The benefit of this structural choice is that, by describing within a single section, factual findings related to different types of incidents that were part of the same attack, the report can more easily provide an overall narrative. Additionally, structuring a chapter in this manner can help the report demonstrate how different types of violations relate to one another.



The report of the Kyrgyzstan Commission presents the mission’s factual findings in a section titled, “Facts and Circumstances Relevant to Events of June 2010 in Osh and Surrounding Provinces,” which is divided into three sub-sections:

- A. *Narrative Chronology*—Presents a 15-page chronology that describes, in a narrative format, the factual conclusions of the mission, internally structured based on geographic area.
- B. *Some Particular Issues*—Highlights factual findings related to particular issues of concern to the mission, which are the seizure, distribution, and use of weapons; the burning of buildings; and SGBV.
- C. *Impact of the Events*—Addresses the impact of the violence by presenting statistics about injuries and fatalities, as well as discussing property damage and displacement.<sup>94</sup>

Structure *by violation type* breaks the report down by the type of violation being examined. Individual chapters can then be internally structured by geographic region, if necessary. This structural choice can help the report elucidate patterns of incidents that spanned multiple geographic regions, which can be particularly useful since some norms of international law—crimes against humanity, for example—require that the mission demonstrate the existence of a pattern of attacks.

The Lebanon Commission report is structured primarily based on incident types, including sections devoted specifically to:

- Attacks on civilian population and objects (internally structured by geographic region: Southern Lebanon, South Beirut, and the Bekaa Valley);
- Attacks on convoys of civilians;
- Attacks on infrastructure and other objects;
- Precautionary measures taken before attacks; and
- Attacks on medical facilities.<sup>95</sup>

In each section, the report presents the mission’s factual conclusions and legal analysis regarding the relevant violation type or thematic area.

<sup>94</sup> Kyrgyzstan Inquiry Commission report, *supra* note 40, at pp. 25-46.

<sup>95</sup> Lebanon Commission report, *supra* note 24.

These two structural options are not mutually exclusive. Indeed, as described above, a report primarily structured based on violation type might require sub-sections structured by geographic region. Each mission should decide how to best find the most appropriate equilibrium between these two structural avenues, given the commissioners' determination of how the mission can most clearly respond to the mission's mandate.

### **STEP 3: PLAN THE DRAFTING PROCESS**

The mission should decide early on in the implementation process how the mission plans to divide report drafting responsibilities between commissioners and staff. Typically, commissioners make decisions about the content of the report, and staff members prepare drafts based on the directives of the commissioners, to be carefully reviewed, edited, and adopted by the commissioners, who ultimately bear the sole responsibility for the content of the report.

Despite being the result of a collaborative drafting process, the report must have a consistent tone. The use of a lead drafter/editor has proved useful to that effect.

## **C. OFFER RECOMMENDATIONS**

### **STEP 2: DEFINE THE OUTPUT**

The recommendations included in the final report play an important role in the impact of the final report in the aftermath of the mission. The objective in crafting recommendations is to provide the mission's view of how various actors—including the mandating body, parties to the conflict, UN entities such as the UNSG and the UNSC, armed groups, civil society, as well as international or national prosecutors—should respond to the mission's findings.

### **STEP 2: DETERMINE HOW TO PRESENT THE CONTENT**

Commissioners must decide to whom recommendations should be directed and what specific measures the mission should recommend. Recommendations articulated in past MRF reports include the following:

- Countries engaged in ongoing violations should cease and desist;
- Accountability should be pursued by the countries involved in the context, on the international level, or in other countries through universal jurisdiction;
- Governments that have engaged in violations should pursue institutional reform (e.g., of the military or democratic institutions);

- Reparations should be granted to victims by national and/or international actors;
- Governments should ensure the protection of witnesses who provided information to the mission; and
- Follow-up measures should be implemented to monitor developments. Those could include the mandating of a special rapporteur, the creation of an *ad hoc* panel to monitor progress on accountability, monitoring undertaken by a UN peace operation or by the OHCHR, or an extension of the mandate of the mission).<sup>96</sup>

When deciding on recommendations—and to whom recommendations should be addressed—commissioners can be guided by two principal considerations. The first consideration is the *commissioners’ perspective of the object and purpose of the mission*, as derived from their interpretation of the mandate. Commissioners working under mandates with a legal focus have tended to offer recommendations that focus on accountability, while missions with a focus on reducing international tensions have yielded reports with more politically oriented recommendations.

The mandate for the **UNSG Flotilla Panel** states that the mission should “consider and recommend ways of avoiding similar incidents in the future” and makes no mention of accountability.<sup>97</sup>

In response to this mandate, the Panel produced a report that offered no recommendations about accountability but rather focused its recommendations on the non-repetition of incidents such as the Gaza flotilla raid, which was the focus of the Panel’s inquiry.<sup>98</sup>

The second consideration is *the desired result of the recommendations*. In this regard, when crafting recommendations, commissioners can be guided by the mission’s assessment of the impact of the report on the intended audience (see Table 9 in Chapter 4). One cautionary note in this regard is that offering too many recommendations could render this section of the report less readable adversely affecting its impact.

When deciding what, and to whom, to recommend, commissioners should consider both short-term and long-term recommendations. Some recommendations can be undertaken in the immediate aftermath of an MRF report. Other recommendations—

<sup>96</sup> This list draws from a list of recommendation types offered in “Guidance and Practice,” OHCHR, *supra* note 2, at pp. 94-99.

<sup>97</sup> UNSG Flotilla Panel report, *supra* note 31, at p. 11.

<sup>98</sup> *Ibid.*, at pp. 67-75.

for example, recommendations regarding accountability or institutional reform at the domestic level—necessarily require a longer period of time for implementation and may meet resistance from local authorities.

An MRF mission should not shy away from recommending important measures that may not be implemented in the short term. The mission should include such recommendations in the report in order to contribute to an environment of political pressure toward achieving these ends.

### **STEP 3: PLAN THE DRAFTING PROCESS**

The mission should aim to draft recommendations that are precise and based on the mission's assessment of the situation on the ground. In particular, the mission should avoid letting pre-conceived notions of the report's recommendations influence the data gathering effort. A scenario in which a mission makes decisions about recommendations before the data has been gathered and analyzed would bring the impartiality of the mission into question.

That being said, the process of crafting recommendations can benefit from preliminary steps taken toward the beginning of, and throughout, the implementation of the mission. For example, conducting a preliminary desk review of recommendations formulated by other organizations in previously produced MRF reports can inform the recommendation drafting process. Also, on some missions, members of the investigative team have proposed recommendations for commissioners' consideration throughout the investigation. As long as such measures are undertaken internally and kept confidential, they can accelerate the pace of the drafting process that occurs at the end of the mission without raising questions about its impartiality.

When feasible and deemed useful to the mission, during the preparation of the report, commissioners may opt to discuss recommendations with relevant parties, such as the addressees of recommendations, as long as doing so does not compromise the independence of the mission. In such discussions, commissioners can offer addressees of recommendations the opportunity to correct any issues of concern, thus potentially enhancing the impact of the mission.

## IV. FINAL OBSERVATIONS

As this chapter has highlighted, one overarching challenge frames the report drafting process. On the one hand, the report is the definitive document that communicates to relevant audiences the mission's findings and the means by which the mission arrived at its conclusions. On the other hand, the circumstances under which practitioners draft reports are far from ideal. MRF practitioners operate under resource scarce conditions, and often, particularly in the context of UN missions, bureaucratic obstacles also play a role in shaping the report drafting process.

The practical steps articulated in this chapter offer MRF practitioners considerations for grappling with this challenging environment and approaching report drafting in a strategic manner. For many of the decisions that commissioners need to make during this process, there is no template applicable to all MRF mission types. When broaching questions such as what level of detail to include in the report about the creation and operation of the mission, or how to structure the report's factual and legal findings (i.e., by geographic region or by incident type), commissioners will need to consider the mandate and context of the mission, as well as the intended audience of the report. The elements that this chapter presents offer considerations drawn from past professional practice to assist in these decision-making processes.

For other issues, widespread consensus exists among practitioners about the most favored approach. Specifically, the mission should not publish in the report names of individuals accused of responsibility for violations; should not use emotive vocabulary that could bring the mission's impartiality into question; and should not make any draft recommendations public until the conclusion of the data gathering exercise. The near uniformity of MRF practitioners' views in relation to these issues suggests the low degree of flexibility that an MRF mission should exercise when deciding how to approach these matters.

# ANNEX

The practical steps presented throughout this Handbook draw on the experiences of recent MRF missions. HPCR—in collaboration with the HPCR Group of Professionals on Monitoring, Reporting, and Fact-finding—undertook an extensive review of fifteen missions mandated and implemented over the past decade. When selecting these fifteen missions, HPCR chose missions that reflect the diversity that exists within the domain of MRF. First, HPCR focused on missions that would demonstrate the wide array of bodies that have created MRF mechanisms. In this regard, HPCR deemed it important to include missions mandated by various international entities—such as the UNHRC, UNSC, and the UNSG—as well as missions authorized at the regional and national levels. The significance of this diversity is that, depending on the mandating entity, the experiences of MRF missions have varied in institutional memory capturing lessons learned from past missions; operational, methodological, and personnel support provided to the mission; and opportunities for coordination with other entities involved on the ground in the same context.

Second, HPCR selected missions that reflect the distinct contexts in which MRF missions operate, from protracted armed conflicts to relatively brief internal disturbances. By drawing from these experiences, HPCR has sought to present information relevant to the diversity of environments on which future MRF missions are likely to focus.

Third, HPCR was interested in selecting missions that applied different methods for gathering and assessing information. Though all MRF mechanism types are tasked with gathering information and drawing conclusions about allegations of violations of international law, the methodologies of fact-finding commissions, mapping exercises, and inquiry panels mandated by the UNSG, differ. These differences, which bear on the types of sources on which the mission relies and the procedures it adopts for information gathering, allow the Handbook to grapple with the methodologically eclectic nature of the domain of MRF.

Information about the selected missions—listed in inverse chronological order, according to the date of release of the final report—appears below.

## ***1) International Commission of Inquiry on Libya (Libya Commission)***

The United Nations Human Rights Council authorized this mission in February 2011 with United Nations Human Rights Council Resolution S-15/1. The context of the mission was the Qaddafi regime's crackdown on Arab Spring protesters, though the mission also examined the armed conflict that subsequently emerged. The mission conducted field visits, during which the mission met with over 350 people, and presented its findings at the seventeenth session of the United Nations Human Rights Council. In response, in June 2011, the Council extended the mandate of the mission. The mission presented an oral update during the eighteenth session of the Council and presented the mission's final report at the Council's nineteenth session.

## **2) Bahrain Independent Commission of Inquiry (Bahrain Commission)**

The Government of Bahrain created this mission by Bahraini royal decree in June 2011. The authorization of the mandate followed a crackdown conducted by the Bahraini government after protests had erupted in the country in February 2011. The mission established an office in Bahrain, conducted on-site visits, and collected statements through interviews with 5,188 individuals. The Chair of the Commission presented the mission's report to the King of Bahrain in a public ceremony held in Bahrain in November 2011.

## **3) The Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (UNSG Flotilla Panel)**

On May 31, 2010, the Israeli Defense Forces boarded a flotilla of six ships in an operation that led to the loss of nine lives and injuries to many others. In response, the United Nations Secretary-General created this Panel to examine information related to the incident and "recommend ways of avoiding similar incidents in the future." Based on the mandate, the Panel's information gathering focused on reviewing interim and final reports of national investigations undertaken in Israel and Turkey—namely, in Israel, the Public Commission to Examine the Maritime Incident of May 31, 2010 (commonly called the Turkel Commission, after retired Israeli Supreme Court Judge Jacob Turkel, who chaired the Commission), and in Turkey, the Turkish National Commission of Inquiry. The Panel produced a final report that is dated September 2011.

## **4) Independent, International Commission of Inquiry on Côte d'Ivoire (Côte d'Ivoire Commission)**

The United Nations Human Rights Council authorized this mission in April 2011 with Council Resolution 16/25. The context that prompted the creation of the mission was the armed conflict that erupted after the November 2010 Ivorian presidential election. To implement the mandate, the mission conducted field visits to Côte d'Ivoire and Liberia and presented its findings at the seventeenth session of the Council in June 2011.

## **5) Kyrgyzstan Inquiry Commission (Kyrgyzstan Inquiry Commission)**

The mandate for this mission arose as a result of the engagement of a wide array of actors. The initiative was prompted by several Nordic countries, and the mandate was officially endorsed by the President of Kyrgyzstan, after consultations with the Office of the High Commissioner for Human Rights, in September 2010. The investigative focus of the mission was the internal disturbance that had occurred in Kyrgyzstan—and specifically, in Osh and surrounding provinces—in June 2010. The mission established public offices in Kyrgyzstan and conducted over 750 interviews. The mission released its final report in May 2011.

## **6) The Secretary-General's Panel of Experts on Accountability in Sri Lanka (Sri Lanka Panel)**

Days after the conclusion of the Sri Lankan Civil War in 2009, the United Nations Secretary-General issued a joint statement with the President of Sri Lanka that addressed the importance of accountability for violations of IHL and IHRL that had occurred during the civil war. Then, in June 2010, the Secretary-General announced the creation of a Panel “to advise him on the implementation of the said commitment with respect to the final stages of the war.”<sup>99</sup> The Panel gathered information from a wide array of sources, though the Sri Lankan government denied access to the Panel to visit Sri Lanka. Additionally, the Panel’s report states of the Panel’s methodology, “The Panel has not conducted fact-finding as that term is understood in United Nations practice, as it does not reach factual conclusions regarding disputed facts, nor did it carry out a formal investigation that draws conclusions regarding legal liability or culpability of States, non-state actors, or individuals.”<sup>100</sup> The Panel produced a final report in March 2011.

## **7) 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 (UNHRC Flotilla Fact-finding Mission)**

The United Nations Human Rights Council created this mission with Resolution 14/1, adopted in June 2010. The adoption of this mandate followed the Flotilla incident, during which Israeli Defense Forces boarded a flotilla of six ships in an operation that led to the loss of nine lives and injuries to many others. The mission gathered information from a wide array of sources, including eyewitness accounts from witnesses and victims acquired through interviews conducted by the mission. The mission was not granted access to Israel but did travel to Turkey, Jordan, and the United Kingdom, where the mission was able to inspect the *Mavi Marmara*, the ship on which the nine passengers had died. The mission reported its findings at the fifteenth session of the United Nations Human Rights Council in September 2010.

## **8) Mapping Exercise of Serious Violations Committed Between 1993 and 2003 in the Democratic Republic of the Congo (DRC Mapping Exercise)**

Numerous entities—including the United Nations Secretary-General, the Office of the High Commissioner for Human Rights, the Department of Political Affairs, the Office of Legal Affairs, and the Office of the Secretary-General’s Special Adviser on the Prevention of Genocide—were involved in the creation of this mission. However, the formal authorization for the mission fell under the umbrella of the mandate for the United Nations Organization Mission in the Democratic Republic of the Congo, with Terms of Reference approved by the Secretary-General. The Terms

<sup>99</sup> Sri Lanka Panel report, *supra* note 15, at para. 5.

<sup>100</sup> *Ibid.*, at para. 9.



of Reference authorized the mission to “conduct a mapping exercise of 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.”<sup>101</sup> The mission’s final report states that the mission’s methodology “has much in common with international commissions of inquiry, commissions of experts and fact-finding commissions” but stresses that mapping is a distinct exercise with its own methodology.<sup>102</sup> The mission’s findings were based both on firsthand information gathered by the mission and on pre-existing findings deemed to be credible by the mission. The final report was released in August 2010.

### **9) International Commission of Inquiry for Guinea (Guinea Commission)**

The United Nations Secretary-General established this mission in October 2009. The context that prompted the creation of the investigation was a governmental crackdown that occurred on September 28, 2009 in Guinea on political protesters. The mission conducted a field visit to Guinea, during which the mission interviewed 687 individuals. The mission produced a final report that is dated December 2009.

### **10) Independent International Fact-Finding Mission on the Conflict in Georgia (Georgia Fact-finding Mission)**

The Council of the European Union authorized the creation of this mission in December 2008. The mission was created in response to the Russo-Georgia War that had occurred in August 2008. The implementation of the mandate entailed conducting a field visit to different regions in Georgia to gather information from eyewitnesses. The final report of the mission was released in September 2009.

### **11) United Nations Fact Finding Mission on the Gaza Conflict (Gaza Fact-finding Mission)**

In February 2009, the United Nations Human Rights Council authorized the creation of this mission with Resolution S-9/1. However, this original mandate focused the mission’s investigative attention solely on Israel, excluding other parties to the conflict. The Chair of the mission rejected this mandate and operated under terms agreed upon with the President of the Council. These renegotiated mandate terms allowed the mission to focus on all relevant parties and also expanded the temporal and territorial scope of the mission. The mission deemed this more expansive scope to constitute the mission’s operative mandate. The mission traveled to relevant areas in Gaza but did not receive the cooperation of Israel so was not able to travel to Israel and the West Bank. Additionally, the mission held public hearings in Gaza in June 2009 and in Geneva in July 2009. The mission completed its final report in September 2009.

<sup>101</sup> DRC Mapping Exercise report, *supra* note 32, at p. 542.

<sup>102</sup> *Ibid.*, at paras 94-97.

### ***12) High-Level Fact-Finding Mission to Beit Hanoun Established Under Resolution S-3/1 (Beit Hanoun Fact-finding Mission)***

The United Nations Human Rights Council authorized the creation of this mission in November 2006 with Resolution S-3/1. The Council created this mission to gather information related to an incident that had occurred on November 8, 2006, during which Israeli Defense Forces had fired shells in the Gaza Strip that led to the death and injury of many individuals. The mission initially endeavored to gain access to Gaza through Israel but did not receive permission from Israeli authorities to do so. Then, in May 2008, the mission undertook a field visit to Gaza, entering through Egypt. The mission produced a final report in September 2008.

### ***13) Commission of Inquiry on Lebanon (Lebanon Commission)***

In August 2006, the United Nations Human Rights Council adopted Resolution S-2/1, which authorized the creation of this mission. The focus of the mission was the armed conflict that had occurred between Israel and Lebanon in July and August 2006. The commission sought cooperation from the governments of both Israel and Lebanon, though only the Government of Lebanon cooperated with the mission. The mission conducted two field visits to Lebanon and produced a final report that is dated November 2006.

### ***14) United Nations Independent Special Commission of Inquiry for Timor-Leste (Timor-Leste Commission)***

In June 2006, the United Nations Secretary-General requested that the United Nations High Commissioner for Human Rights establish this mission. The focus of the mission was the internal disturbance that had occurred in Timor-Leste in April and May 2006. The mission undertook field visits to Timor-Leste, during which the mission conducted interviews with a wide array of actors. The mission completed its final report in October 2006.

### ***15) International Commission of Inquiry for Darfur (Darfur Commission)***

In September 2004, the United Nations Security Council mandated this mission with Resolution 1564 (2004). This mission was a component of the Security Council's response to the non-international armed conflict that had begun in Darfur in February 2003. The implementation of the mandate included field visits that the mission took to Sudan in November 2004 and January 2005. The mission completed its final report in January 2005.



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