The Design and Planning of Monitoring, Reporting, and Fact-finding Missions

By Rob Grace

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AUTHOR

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THE MONITORING, REPORTING, AND FACT-FINDING PROJECT

This Working Paper has been drafted as part of the Monitoring, Reporting, and Fact-finding (MRF) project being undertaken by the Program on Humanitarian Policy and Conflict Research (HPCR) at Harvard University. This multi-annual research and policy project is geared toward conducting intensive research on past and current MRF mechanisms, aiming ultimately to aid the international community’s endeavor to protect vulnerable citizens in armed conflicts and hold violators of international law accountable.

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INTRODUCTION

The design and planning process is crucial to the implementation of monitoring, reporting, and fact-finding (MRF) mechanisms. In the first phase of an MRF mission’s creation, a political entity — either a national body or an intergovernmental body, such as the United Nations Security Council (UNSC), the United Nations Human Rights Council (UNHRC), or the Council of the European Union — crafts a mandate outlining the broad contours of the mechanism’s scope. In the second phase, the decision-making process shifts to technical implementers, who review the mandate and make decisions about the specifics of the mission’s investigative scope, plan the activities the mission will undertake, and hire the necessary staff.¹

However, many disagreements exist about how MRF actors should weigh different factors in their design and planning decision-making processes. One reason for the lack of professional consensus regarding a standard operating procedure is the *sui generis* nature of each MRF mission. MRF missions operate in various types of environments, and different MRF mandates vary widely from one another. Additionally, though one could consider the two phases of an MRF mission’s creation to exhibit contrasting qualities — the first phase is political while the second phase is technical — in fact, political considerations sometimes inform MRF practitioners’ methodological decision-making processes. Just as, in the first phase, the compromises struck within a mandating body appear to necessitate a case-by-case approach for each MRF mandate, in the second phase, the delicate political environment in which MRF missions operate requires a certain degree of flexibility.

Still, practitioners have expressed a desire for a methodological point of reference to gain a solid understanding of the implications of different methodological choices. To this end, this paper examines areas of methodological agreement and disagreement, trends of professional decision-making, and normative perceptions that practitioners hold about best practices regarding the design and planning of MRF mechanisms. In particular, this paper focuses on fifteen ad hoc MRF missions implemented over the past decade.² The pool of fifteen missions listed below includes a wide array of different

² This paper considers that mechanisms such as commissions of inquiry, fact-finding missions, mapping exercises, and panels of experts — due to the temporary, ad hoc nature of these
ad hoc MRF mechanism types, allowing for an evaluation of how distinct MRF methodologies might inform one another. The fifteen missions are:

1) International Commission of Inquiry on Libya (hereafter the Libya Commission)
2) Independent, International Commission of Inquiry on Côte d'Ivoire (hereafter the Côte d'Ivoire Commission)
3) Bahrain Independent Commission of Inquiry (hereafter the Bahrain Commission)
4) The Secretary-General's Panel of Experts on Accountability in Sri Lanka (hereafter the Sri Lanka Panel)
5) The Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (hereafter the Flotilla Panel)
6) Kyrgyzstan Inquiry Commission (hereafter the Kyrgyzstan Commission)
8) Mapping Exercise of Serious Violations Committed Between 1993 and 2003 in the Democratic Republic of the Congo (hereafter the DRC Mapping Exercise)
9) International Commission of Inquiry for Guinea (hereafter the Guinea Commission)
11) Independent International Fact-Finding Mission on the Conflict in Georgia (hereafter the Georgia Fact-finding Mission)
13) Independent Special Commission of Inquiry for Timor-Leste (hereafter the Timor-Leste Commission)
14) Commission of Inquiry on Lebanon (hereafter the Lebanon Commission)
15) International Commission of Inquiry for Darfur (hereafter the Darfur Commission)

mechanisms’ mandates, and due to differences between the aims of these missions versus the aims of other mechanism types, such as IHL and human rights monitoring components of peace operations and special rapporteurs — constitute a unique domain of MRF. For more information on differences, in terms of aims and methodologies, between various MRF mechanism types, see Grace and Bruderlein, supra note 1, at 1-17.
The paper first presents a table that separates out the mandate for each mission listed above into distinct elements: legal lenses, types of incidents, parties to examine, temporal scope, geographic scope, and authorized activities. The paper then analyzes how practitioners on these missions approached fulfilling their mandates. Section I assesses how commissioners interpreted the mission’s investigative scope. Section II examines the factors that guided decisions about the activities that the mission would undertake. Section III offers an overview of common staffing dilemmas. Based on this analysis, Section IV offers some concluding remarks.
Table 1: Mandate Scope Elements

<table>
<thead>
<tr>
<th>MISSION</th>
<th>LEGAL LENSES/ TYPES OF INCIDENTS</th>
<th>PARTIES TO EXAMINE</th>
<th>TEMPORAL SCOPE</th>
<th>GEOGRAPHIC SCOPE</th>
<th>ACTIVITIES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Libya Commission⁴</td>
<td>&quot;all alleged violations of international human rights law&quot;</td>
<td>None</td>
<td>None</td>
<td>&quot;in Libya&quot;</td>
<td>• “investigate”</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>• “establish the facts and circumstances of such violations and of the crimes perpetrated”</td>
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<td></td>
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<td></td>
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<td></td>
<td>• “where possible identify those responsible”</td>
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<td></td>
<td></td>
<td></td>
<td>• “make recommendations, in particular, on accountability measures”</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>• “report to the Council at its seventeenth session”</td>
</tr>
<tr>
<td>Côte d’Ivoire Commission</td>
<td>&quot;allegations of serious abuses and violations of human rights&quot;</td>
<td>None</td>
<td>&quot;following the presidential election of 28 November 2010&quot;</td>
<td>&quot;in Côte d’Ivoire&quot;</td>
<td>• “investigate the facts and circumstances”</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>• “in order to identify those responsible for such acts and to bring them to justice”</td>
</tr>
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<td></td>
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<td></td>
<td></td>
<td></td>
<td>• &quot;present its findings to the Council at its seventeenth session”</td>
</tr>
</tbody>
</table>

³ Additional information regarding the mandates for these fifteen missions can be found in the Annex at the end of this paper.

⁴ For the Libya Commission, this table includes language from the mission’s original mandate: UNHRC resolution S-15/1, adopted by the UNHRC in February 2011. Though the UNHRC extended the mission’s mandate in June 2011 with UNHRC resolution 17/L.3, this second resolution did not alter the scope of the mission’s work.
<table>
<thead>
<tr>
<th>Country</th>
<th>Mandate</th>
<th>Consequences</th>
<th>Final Stage</th>
<th>Additional Instructions</th>
</tr>
</thead>
</table>
| Bahrain Commission| “violations of international human rights norms”\(^5\)                   | “by any participants”                              | "in Bahrain"                       | • “investigate and report on the events”  
• “engage in fact-finding”  
• “make such recommendations as it may deem appropriate”  
• produce a “final report, to be submitted to His Majesty no later than 30 October 2011” |
| Sri Lanka Panel   | “alleged violations”                                                    | None                                              | "the final stages of the war"      | • “advise the Secretary-General on the modalities, applicable international standards and comparative experience relevant to the fulfillment of the joint commitment to an accountability process, having regard to the nature and scope of alleged violations”  
• “submit its report to the Secretary-General within four months of the commencement of its work” |

\(^5\) The Bahrain Commission mandate also specifies that the mission should examine allegations of “police brutality,” “violence by protestors and/or demonstrators,” “arrests and detentions,” “disappearances or torture,” “media harassment,” “unlawful demolition of religious structures,” and “any involvement of foreign forces and foreign actors.”
<table>
<thead>
<tr>
<th>Flotilla Panel</th>
<th>&quot;the incident&quot;</th>
<th>None</th>
<th>&quot;that occurred on 31 May 2010&quot;</th>
<th>None</th>
</tr>
</thead>
</table>

- “receive and review interim and final reports of national investigations into the incident”
- “may request such clarifications and information as it may require from relevant national authorities”
- “examine and identify the facts, circumstances and context of the incident”
- “consider and recommend ways of avoiding similar incidents in the future”
- “prepare a report including its findings and recommendations and submit it to the Secretary-General” and “strive to submit its final report to the Secretary-General within six months taking into account the progress of the national investigations. This timeline may be adjusted by the Secretary-General depending on the progress of the panel’s work”
<table>
<thead>
<tr>
<th>Kyrgyzstan Commission</th>
<th>&quot;the events&quot;</th>
<th>None</th>
<th>“of June 2010 (...) including the causes and course of events as well as actions taken in the aftermath”</th>
<th>“in Osh and its surrounding provinces in the Kyrgyz Republic”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Flotilla Fact-finding Mission</td>
<td>&quot;violations of international law, including international humanitarian and human rights law&quot;</td>
<td>None</td>
<td>&quot;resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance&quot;</td>
<td>None</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>&quot;investigate&quot;</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>&quot;report on their findings to the Council at its fifteenth session&quot;</td>
</tr>
<tr>
<td>Country</td>
<td>Mission Statement</td>
<td>Start Period/Duration</td>
<td>Location Description</td>
<td>Objectives</td>
</tr>
<tr>
<td>---------------</td>
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</tr>
</tbody>
</table>
| DRC Mapping   | "the most serious violations of human rights and international humanitarian law" | None                                              | "within the territory of the Democratic Republic of Congo"                           | • "conduct a mapping exercise”  
• "assess the existing capacities within the national justice system to deal with such human rights violations that may be uncovered”  
• “formulate a series of options aimed at assisting the government of the DRC in identifying appropriate transitional justice mechanisms to deal with the legacy of these violations, in terms of truth, justice, reparation, and reform”  
• " draft a report on the exercise”                                                                                                                                                                   |
| Guinea        | "the events"                                                                      | None                                              | None                                                                                 | • “establish the facts”  
• “qualify the crimes”  
• “determine responsibilities and, where possible, identify those responsible”  
• “make recommendations, including, in particular, on accountability measures”  
• “submit its report to the Secretary-General within two months from the start of its activities”                                                                                                   |
| Commission    |                                                                                  |                                                   |                                                                                      |                                                                                                                                                                                                          |
| Gaza Fact-finding Mission$^6$ | "all violations of international human rights law and international humanitarian law" | None | "committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after" | "in the context of the military operations that were conducted in Gaza" | “investigate” |

$^6$ For the Gaza Fact-finding Mission, this table includes language from the mission’s renegotiated mandate, adopted through an agreement struck between the Chair of the mission and the president of the UNHRC. The original mandate — UNHRC resolution S-9/1 — differed in several respects, including temporal focus, geographic scope, and parties to examine. This table includes the renegotiated mandate because practitioners who served on the mission perceived this agreement — not the UNHRC resolution — to be the mission’s operative mandate.
<table>
<thead>
<tr>
<th><strong>Georgia Fact-finding Mission</strong></th>
<th>&quot;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&quot; (internal footnotes omitted)</th>
<th>None</th>
<th>&quot;time span of the investigation will be sufficiently broad to determine all the possible causes of the conflict.&quot;</th>
<th>&quot;The geographical scope (...) of the investigation will be sufficiently broad to determine all the possible causes of the conflict.&quot;</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Beit Hanoun Fact-finding Mission</strong></td>
<td>“the situation of victims” and “the needs of survivors”</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
</tbody>
</table>
|  |  |  |  | • “investigate”  
• “results of the investigation will be presented to the parties to the conflict, and to the Council [of the European Union], the Organisation for Security and Cooperation in Europe (OSCE) and the United nations (UN), in the form of a report”  
• “travel to Beit Hanoun”  
• “assess the situation of victims”  
• “address the needs of survivors”  
• make recommendations on ways and means to protect Palestinian civilians against any further Israeli assaults”  
• “report to the Council no later than the middle of December 2006 on progress made towards the fulfillment of its mandate” |
<p>| Timor-Leste Commission | “incidents” that occurred in April and May 2006, encompassing issues that contributed to the crisis, including issues related to the functioning of the security sector | None | “relevant to incidents on 28 and 29 April, 23, 24 and 25 May [in 2006] and related events” | None | “establish the facts and circumstances”&lt;br&gt;“clarify responsibility for the above-mentioned events”&lt;br&gt;“recommend measures to ensure accountability for crimes and serious violations of human rights allegedly committed during the above-mentioned period”&lt;br&gt;“report its findings within three months of its establishment through the United Nations High Commissioner for Human Rights to the Secretary-General and the National Parliament of Timor-Leste” |</p>
<table>
<thead>
<tr>
<th><strong>Lebanon Commission</strong></th>
<th>“the systematic targeting and killings of civilians by Israel in Lebanon”</th>
<th>“types of weapons used by Israel and their conformity with international law”</th>
<th>“Israeli attacks on human life, property, critical infrastructure and the environment”</th>
<th>“by Israel”</th>
<th>None</th>
<th>“in Lebanon”</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Darfur Commission</strong></td>
<td>“reports of violations of international humanitarian law and human rights law” and potential “acts of genocide”</td>
<td>“by all parties”</td>
<td>None</td>
<td>“in Darfur”</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>“investigate”</td>
<td>“investigate [the systematic targeting]”</td>
<td>“examine [the types of weapons used by Israel]”</td>
</tr>
</tbody>
</table>
I. DETERMINING THE MISSION’S INVESTIGATIVE SCOPE

This section examines the methodological dilemmas that arise during the process of determining an ad hoc MRF mission’s investigative scope. The section individually assesses each mandate scope element detailed in Table 1, focusing, for each scope element, on practitioners’ perspectives on different avenues pursued in response to various interpretive dilemmas.

A. Legal Lenses

The legal lenses that commissioners choose to employ have far-reaching consequences on the implementation of the mission. In particular, the legal lenses inform the types of incidents that the mission will examine, the kinds of information that the mission will gather to demonstrate that violations may have occurred, and the process by which the mission evaluates the data. Some missions have enjoyed unproblematic legal lens selection processes. For example, the Darfur Commission mandate authorizes the mission “to investigate reports of violations of international humanitarian law and human rights law” and “determine also whether or not acts of genocide have occurred.”7 The practitioners leading the mission perceived that “the mandate was not ambiguous. We knew from the mandate that we had to look at IHL [international humanitarian law], human rights, and genocide.”8 But other cases have proved more controversial, from the perspective of both practitioners and governments. One particular area of professional disagreement — on which the rest of this section will focus — is the question of whether MRF missions operating under mandates that specify only human rights can also incorporate other legal lenses, such as IHL and international criminal law (ICL).

MRF practitioners have offered several rationales for incorporating IHL and/or ICL when operating under human rights mandates. First, MRF practitioners have deemed these bodies of law to be closely related and not completely separable. For example, the Côte d’Ivoire Commission was mandated — as Table 1 notes — to investigate “allegations of serious abuses and violations of human rights.”9 However, the mission’s final report examines alleged violations of IHL and ICL in addition to abuses and violations of human rights, and practitioners who served on the mission have indicated

7 UNSC resolution 1564 (2004), para. 12.
8 HPCR interview on 9/21/11 with Fannie Lafontaine - Human Rights Officer/Special Assistant to the President, Independent International Commission of Inquiry on Darfur.
9 UNHRC resolution 16/25, para. 10.
that they perceived these legal frameworks to be closely linked.\textsuperscript{10} The commissioners on the Libya Commission — which also examined alleged violations of IHL and ICL though the mandate specified only human rights — have offered an elaborate legal rationale. According to one commissioner:

\begin{quote}
We didn’t think it was stepping outside the mandate. We concluded the broad human rights legal framework encompassed human rights and IHL as \textit{lex specialis} applicable in times of armed conflicts. Also, the resolution that created the commission required us to establish the facts and circumstances not only of human rights violations but also “of the crimes perpetrated,” regardless of their nature.\textsuperscript{11}
\end{quote}

The commissioners on the Libya Commission also emphasized that the situation had evolved in ways that the UNHRC could not have foreseen when adopting the mission’s mandate. As the commission’s report notes, an armed conflict developed in February 2011,\textsuperscript{12} and as one of the commissioners states, “It [the application of IHL] could not have been anticipated by the UNHRC because there was no armed conflict when the commission was set up,” and the commissioners deemed the incorporation of IHL and ICL to be “consistent with the mandate.”\textsuperscript{13}

Additionally, practitioners have expressed that incorporating legal lenses not specifically articulated in the mandate is sometimes necessary to undertake a comprehensive investigation. As one of the Libya Commission commissioners states, “If we had not looked at IHL violations, there is no question we would have been criticized for avoiding so many violations.”\textsuperscript{14} Hence, the use of legal lenses other than human rights was deemed not only to be within the scope of the mandate but also crucial to the perceived credibility of the mission.

\textsuperscript{11} HPCR interview conducted on 3/22/13 with Philippe Kirsch – Chair, United Nations Commission of Inquiry on Libya; Commissioner, Bahrain Independent Commission of Inquiry. (Philippe Kirsch served as the Chair of the Libya Commission from October 2011 – March 2012 after M. Cherif Bassiouni, the mission’s first Chair, stepped down from this position.)
\textsuperscript{13} HPCR interview with Philippe Kirsch, supra note 11.
\textsuperscript{14} Ibid.
Furthermore, practitioners on both the Libya Commission and the Côte d’Ivoire Commission have stated that the commissioners adopted these decisions without much controversy within the mission. Commissioners on the Côte d’Ivoire Commission voiced no concern that using additional legal lenses would constitute stepping outside the mission’s mandate, and conversely, took the view that “it was not possible to talk about human rights violations in a situation of conflict like what you saw in Cote d’Ivoire without incorporating international criminal law and IHL.” Commissioners on the Libya Commission anticipated no pushback from outside entities about this choice. For the Libya Commission, this perception seemed confirmed when the mission encountered no resistance to the use of IHL and ICL when briefing representatives from the mission’s mandating body, including the President and Bureau of the UNHRC, as well as the coordinator of the United Nations African Regional Group. Additionally, in neither of the two subsequent UNHRC debates convened in June 2011 and March 2012 did any states object to that interpretation, and the June 2011 resolution that extended the commission’s mandate voiced no objection and simply requested the commission “to continue its work.”

However, some governments — and inter-governmental entities — have objected to the use of IHL by investigative entities operating under human rights mandates. The North Atlantic Treaty Organization (NATO) — despite agreeing with the Libya Commission’s assessment that “international humanitarian law is the lex specialis applicable to armed conflict” — took issue with the commission’s mandate interpretation and did not perceive that an investigation of NATO fell within the commission’s mandate. A NATO representative asserted that the Libya Commission’s mandate “was given in the specific context of gross repression and manifest human rights violations committed by and against Libyans in the context of political protests in that country” and classified the commission’s investigation of NATO as an “expansion of the Commission’s work” beyond the scope of the mandate.

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15 Confidential HPCR interview conducted in Spring 2013 with a high-level MRF practitioner, name of interviewee on file.
17 HPCR interview with Philippe Kirsch, supra note 11.
18 HPCR interview on 5/3/13 with M. Cherif Bassiouni – Chair, Bahrain Independent Commission of Inquiry; Chair, United Nations Commission of Inquiry on Libya (March – October 2011).
19 HPCR interview with Philippe Kirsch, supra note 11.
21 Ibid., at 37
Other investigative entities have encountered similar resistance. For example, various American states — including the United States, Colombia, and El Salvador — have not accepted the competence of the Inter-American Commission on Human Rights (IACHR) to apply IHL. The United States has also argued that the UNHRC — as well as the United Nations Commission on Human Rights, the predecessor of the UNHRC — and special rapporteurs mandated by the UNHRC lack the competence to examine IHL violations.

Disagreements have also arisen from within the domain of MRF practitioners. One practitioner expressed concern about “commissioners who interpret the mandate too freely and too expansively” and who might feel inclined “to step outside the mandate.” This practitioner states:

We take it for granted that judges and juries must operate within the confines of their respective mandates. That’s essential to the Rule of Law. Why should commissioners view themselves as having a broader interpretive power than their mandate provides? I think it’s very dangerous for two reasons: first, it might undermine their credibility, and second, it discourages governments and international bodies from resorting to this potentially useful technique for fear that they will be creating “run-away” commissions.

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24 Confidential HPCR interview conducted in Spring 2013 with a high-level MRF practitioner, name of interviewee on file.
25 Ibid.
Such statements indicate that discord about this issue arises not merely from states seeking to justify evading an investigation. Indeed, though commissioners on both the Libya Commission and the Côte d’Ivoire Commission anticipated no disagreement when incorporating IHL, this area represents a professional dilemma about which practitioners have not yet reached consensus.

B. Types of Incidents

As Table 1 indicates, practitioners frequently operate under broad mandates. For example, the Libya Commission was mandated “to investigate all alleged violations of international human rights law in Libya” with no temporal restraints.26 Similarly, the Darfur Commission mandate tasked the commission “to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties,” and “to determine also whether or not acts of genocide have occurred,” also with no temporal restriction.27 Due to financial, logistic, security, and human resource limitations, a broad mandate often does not align with an MRF mission’s capacity, and commissioners, lacking the ability to gather information about all incidents that fall within the mission’s scope, must define more precisely the types of incidents that will constitute the mission’s focus.

Relevant portions from select MRF reports, as presented below, reveal different approaches to articulating and grappling with a mission’s limitations:

- **Libya Commission.** “In view of the time frame within which it had to complete its work, the Commission necessarily had to be selective in the choice of issues and incidents for investigation. The report does not purport to be exhaustive in documenting the very high number of relevant incidents that occurred in the period covered by the Commission’s mandate. Nevertheless, the Commission considers that the report is illustrative of the main patterns of violations.”28

- **Gaza Fact-finding Mission.** “This report does not purport to be exhaustive in documenting the very high number of relevant incidents that occurred in the period covered by the Mission’s mandate. Nevertheless, the Mission

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26 UNHRC resolution S-15/1, para. 11.
27 Darfur Commission mandate, supra note 7.
28 First Libya Commission report, supra note 12, at para. 5.
considers that the report is illustrative of the main patterns of violations. In Gaza, the Mission investigated 36 incidents.29

- **Lebanon Commission.** “Considering the call from the Council for the Commission to accomplish its mandate promptly and with necessary dispatch, the time constraint, the intensity and geographical reach of hostilities, the displacement of the affected civilian population, and the preliminary nature of technical, financial, scientific and related studies currently being conducted by the Government of Lebanon and other national institutions, the Commission’s report cannot constitute a full and final accounting of all alleged violations. Accordingly, the Commission primarily oriented its inquiry on what within the terms of its mandate representatively stand out and emerge as serious international humanitarian law and human rights violations.”30

- **Darfur Commission.** “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.”31

But how exactly do missions determine that the incidents selected for examination are “illustrative of the main patterns of violations,” as the Libya Commission and the Gaza Fact-finding Mission reports state; “most representative of acts, trends and patterns relevant to the determination of violations of international human rights and humanitarian law,” as the Darfur Commission report states; or “representatively stand out and emerge as serious international humanitarian law and human rights violations,” as articulated by the Lebanon Commission report? In fact, MRF reports

rarely articulate the precise methodology that the mission employs in this regard. One exception to this trend of practice is the DRC Mapping Exercise. The report for this mission specifies a systematically determined “gravity threshold” that the mission used to select incidents for examination. As the report states:

Given the scale of the violations committed in the ten years of conflict in the DRC, it was necessary to select from the most serious of these crimes. A gravity threshold with a set of criteria enabling the Team to identify incidents of sufficient severity to be included in the final report was used for incident selection. These criteria fell into four categories: 1) nature of the crimes and violations linked to a given incident, 2) scale (number) of crimes and violations linked to an incident, and number of victims, 3) how the crimes and violations were committed and 4) impact of crimes and violations on communities, regions or the course of events.\(^\text{32}\)

The report also explains how the mission adapted the gravity threshold based on the region in the DRC that the mapping team was examining:

In spite of the scale of extreme violence that characterises the violations in some of the country’s regions, it was also necessary to take into consideration less serious violations in seemingly less affected regions in order to provide an overview of the entire country. With this in mind, the gravity threshold was adapted to each region.\(^\text{33}\)

A mapping exercise is in some ways methodically distinct from commissions of inquiry and other ad hoc MRF mission types. Specifically, the explicit purpose of a mapping exercise, as articulated in one policy document published by the Office of the High Commissioner for Human Rights (OHCHR), “is to provide the basis for the formulation of initial hypotheses of investigation by giving a sense of the scale of violations, detecting patterns and identifying potential leads or sources of evidence.”\(^\text{34}\) However,

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\(^\text{32}\) “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. 6 (internal footnotes omitted).

\(^\text{33}\) Ibid., at para. 9 (internal footnotes omitted).

given that commissions of inquiry also frequently seek to select incidents demonstrative of patterns, a framework similar to that used by the DRC Mapping Exercise might prove to be applicable.

C. Temporal and Geographic Scope

The temporal and geographic scopes articulated by MRF mandates are also frequently broad. For example, the mandates for the Libya Commission and the Darfur Commission authorize investigation of an extensive conflict covering an entire country (in the case of Libya) or region of a country (in the case of Darfur) and, as mentioned above, both omit any mention of temporal scope. Other mandates present a temporal and/or geographic focus but offer the mission with ample interpretive leeway to further delineate the scope as the investigation proceeds. For example, the Georgia Fact-finding Mission mandate specifies, “The geographical scope and time span of the investigation will be sufficiently broad to determine all the possible causes of the conflict.” As suggested by the portions of MRF reports cited in the section above, security and logistical concerns often play a significant role in determining the contours of a mission’s geographic scope. Regarding temporal scope, on certain missions included in Table 1 that lacked clear temporal delineations, commissioners sought clues from other aspects of the mandate. This section touches on two of these examples — the Libya Commission and the Darfur Commission — and then assesses the temporal scope of the Bahrain Commission, which serves as a unique example of the complexities of operating under broad temporal mandates.

Inferring The Temporal Scope

The Libya Commission and the Darfur Commission — which, as noted earlier, both received a mandate that was silent about temporal scope — inferred the mission’s temporal focus. As one of the commissioners on the Libya Commission explains, though the mission could have interpreted the investigative scope to stretch back several decades, “we also thought if we began to go back too far that it would not be possible to do a proper job.” To satisfy the expansive temporal scope, the commissioners “decided to include a great deal of background” in the report, but in terms of methodology, “we started with the events of February 2011,” one reason being

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35 Libya Commission mandate, supra note 26; and Darfur Commission mandate, supra note 7.
37 HPCR interview with Philippe Kirsch, supra note 11.
that “it was those events that triggered the UNHRC resolution. It was implicit.”38 The Darfur Commission used a similar rationale. As the final report states:

With regard to the time-frame, the Commission’s mandate is inferred by the resolution. While the Commission considered all events relevant to the current conflict in Darfur, it focused in particular on incidents that occurred between February 2003, when the magnitude, intensity and consistency of incidents noticeably increased, until mid-January 2005 just before the Commission was required to submit its report.39

Additionally, the commissioners of the Darfur Commission gleaned temporal cues from other methodological considerations. In particular, the mandate authorized the mission “to investigate reports of violations of international humanitarian law and human rights law (...).”40 As one commissioner states, “We had to fix the temporal scope to the time when the reports began to occur. It was fixed keeping in view the wording of the mandate.”41 This reasoning contributed to the commissioners’ decision to begin the mission’s investigative focus in February 2003, the date when reports of IHL and human rights violations began to emerge.42 As these examples indicate, though a mandate might not explicitly delineate temporal contours, mandates sometimes provide useful implicit contextual indicators.

The Temporal Scope of The Bahrain Commission

The Bahrain Commission’s approach to the mission’s temporal scope illustrates certain complexities about broad temporal mandates. The mandate for the Bahrain Commission provides a certain degree of temporal leeway by authorizing the commission to investigate not only “the events occurring in Bahrain in February/March 2011” but also “any subsequent consequences arising out of the aforementioned events (...).”43 As the mission’s final report indicates, the mission adopted a unique approach to defining what constitutes “subsequent consequences arising out of the aforementioned

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38 Ibid.
39 Darfur Commission report, supra note 31, at para. 11.
40 Darfur Commission mandate, supra note 7.
41 HPCR interview on 4/24/13 with Hina Jilani – Member, International Commission of Inquiry on Darfur; Member, United Nations Fact Finding Mission on the Gaza Conflict.
42 Ibid.
events.” Specifically, the report includes a section entitled, “Deaths That Took Place Outside The Commission’s Temporal Mandate.”44 The reason that the commissioners chose to include this section was that the mission found evidence of deaths that were not necessarily direct consequences of the events of February and March 2011, but the commissioners deemed these incidents contextually relevant. As the Chair of the mission explains:

We construed the mandate to be that which happened during a certain period of time. There was no causal connection to these individual events. We felt it was outside the mandate, but there was some type of causal connection so that we could not ignore it. It’s not directly connected but you can’t say it’s completely unconnected.45

However, articulating the mission’s temporal scope in this manner risks causing confusion about the limits of the mission’s authority, especially in light of the aforementioned concerns raised by some practitioners about the importance of adhering closely to the mandate’s limitations. Indeed, the Bahrain Commission report itself states in the introduction, after reprinting the mandate, “the Commission is bound by what is included in the above mandate and the investigations reflected in this Report are within the scope of that mandate.”46 For this reason, commissioners on future missions might benefit from articulating the mission’s temporal contours in a manner that assures the report’s audience that the incidents examined fall within the mission’s mandated authority.

D. Parties To Examine

MRF mandates are frequently silent about the parties that the mission should examine. As Table 1 demonstrates, the mandates for the Libya Commission, the Côte d’Ivoire Commission, the Sri Lanka Panel, the Flotilla Panel, the Kyrgyzstan Commission, the Flotilla Fact-finding Mission, the DRC Mapping Exercise, the Guinea Commission, the Gaza Fact-finding Mission, the Georgia Fact-finding Mission, the Beit Hanoun Fact-finding Mission, and the Timor-Leste Commission do not explicitly state which parties should constitute the mission’s investigative focus. Of the missions included in Table 1, mandates for only two missions — the Bahrain Commission and the Darfur

45 HPCR interview with M. Cherif Bassiouni, supra note 18.
46 Bahrain Commission report, supra note 44, at 1.
Commission — specifically note that the mission should examine all sides engaged in the relevant context.47

However, consensus exists among MRF practitioners that, whenever possible, even if not specifically noted in the mandate, missions should gather information about all relevant parties.48 Questions arise, though, about how MRF practitioners should grapple with one-sided mandates. This section examines as case studies the experiences of three missions — the Lebanon Commission, the Beit Hanoun Fact-finding Mission, and the Gaza Fact-finding Mission — which adopted different approaches to dealing with one-sided, or potentially one-sided, mandates. The section then examines some complexities of human rights mandates, which can inherently focus a mission’s attention on the actions of governments.

Accepting the Mandate’s Limitations: The Lebanon Commission

The UNHRC created the Lebanon Commission “[t]o investigate the systematic targeting and killings of civilians by Israel in Lebanon (...).”49 Because the mandate authorized an investigation of violations committed only by Israel, the commissioners concluded, according to the mission’s final report, “the Commission is not entitled, even if it had wished, to construe it as equally authorizing the investigation of the actions by Hezbollah in Israel. To do so would exceed the Commission’s interpretive function and would be to usurp the Council’s powers.”50 However, the mission’s final report also notes the inherently problematic nature of this approach. The report asserts:

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

47 The mandate for the Bahrain Commission specifies that the mission should examine potential violations “by any participants.” See Bahrain Commission mandate, supra note 43, at Article Nine, para. 3. Similarly, the mandate for the Darfur Commission authorizes the mission to investigate reports of violations committed “by all parties.” See Darfur Commission mandate, supra note 7.
48 Grace and Bruderlein, supra note 1, at 17-20.
49 UNHRC resolution S-2/1, para. 7(a).
50 Lebanon Commission report, supra note 30, at para. 7.
humanitarian law of the specific acts of IDF in Lebanon requires that account also be taken of the conduct of the opponent.\textsuperscript{51}

One legal expert notes that this limitation also hindered the mission’s technical ability to make accurate assessments under IHL:

In some instances the failure to consider Hezbollah’s actions even undermined the Commission’s consideration of Israeli conduct of hostilities, since an intricate understanding of Hezbollah’s command structure, strategic objectives and military operations was essential in determining whether targets destroyed by Israel were military targets and whether the incidental impact on civilians that resulted from the attacks was excessive in relation to the military advantage gained.\textsuperscript{52}

These assertions offer a counterpoint to the question examined earlier: what are the limits of a commissioner’s authority to interpret — or even reinterpret — MRF mandates? While some practitioners perceive risks to expansive mandate interpretations, the experiences of the Lebanon Commission indicate that restrictive mandate interpretations also carry risks, and in particular, can hinder a mission’s ability to conduct a thorough and technically credible investigation.

\textit{Adopting a Broad Mandate Interpretation: The Beit Hanoun Fact-finding Mission}

The UNHRC mandated the Beit Hanoun Fact-finding Mission in 2006 to examine incidents that had occurred in the context of Operation Autumn Clouds, a military operation conducted by Israel in Gaza in 2006. In particular, the mission’s mandate was to “(a) assess the situation of victims; (b) address the needs of survivors; and (c) make recommendations on ways and means to protect Palestinian civilians against any further Israeli assaults (…)”.\textsuperscript{53} Because of the mandate’s focus on victims and survivors and on protecting Palestinians from future attacks by Israel, the mission could have interpreted the mandate in a one-sided manner. However, the mission’s report states that “the mission employed a methodology under which it (…) [p]laced the factual

\textsuperscript{51} Ibid., at para. 6.
\textsuperscript{53} UNHRC resolution S-3/1, para. 7.
situation under review within a broader context of events in Gaza,” 54 which included
an assessment of the legality of Palestinian militants firing Kassam rockets into Israeli
territory.55 Though the Government of Israel refused to cooperate with the mission and
did not grant members of the mission visas to enter Israel,56 the mission still sought to
gather information from and about both sides of the conflict, and the mission’s final
report offers a balanced set of recommendations, directing recommendations not only
to Israel but also to Hamas.57 This case study indicates that, contrary to the restrictive
approach taken by the Lebanon Commission, another option available to commissioners is to apply a broad mandate interpretation that allows the mission to produce a balanced report.

Renegotiating the Mandate: The Gaza Fact-finding Mission

The UNHRC adopted another one-sided mandate in 2009 with UNHRC resolution S-9/1, which, in response to Operation Cast Lead conducted by Israel in Gaza, authorized an MRF mission:

(...) to investigate all violations of international human rights law and
international humanitarian law by the occupying Power, Israel, against the
Palestinian people throughout the Occupied Palestinian Territory, particularly in
the occupied Gaza Strip, due to the current aggression (...).58

However, in this instance, Justice Richard Goldstone, when approached to lead the
mission, concluded that the mandate “was stacked against Israel, and would have been
a one-sided investigation.”59 For this reason, Justice Goldstone struck an agreement
with the President of the UNHRC that the mission would operate under an “even-

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54 “Report of the high-level fact-finding mission to Beit Hanoun established under Council
55 Ibid., at para. 75.
57 For example, the report states, “Those in positions of authority in Gaza have not only an
international humanitarian law obligation to respect international humanitarian law norms
relating to the protection of civilians, but also a responsibility to ensure that these norms are
respected by others.” See Beit Hanoun Fact-finding Mission Report, supra note 54, at para. 77.
58 UNHRC resolution S-9/1, para. 14.
59 See transcript of interview conducted by Bill Moyers with Richard Goldstone for “Bill Moyers
60 Ibid.
finding Mission references UNHRC resolution S-9/1,61 the report clearly states that — in terms of investigative focus — the mission conducted its work under the renegotiated mandate, which was:

(...) to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after.62

The commissioners did not deem the UNHRC resolution to be relevant to the mission’s work. As one commissioner states, “When the fact-finding mission officially came together, it came together under a mandate that had been given to us by the President of the Council.”63 Furthermore, the mission encountered no resistance from any members of the UNHRC, either during the mission’s implementation or after the release of the report, confirming for the commissioners the sense that the renegotiated mandate legitimately operated as the authoritative mandate for the mission.64 However, despite this perception, the Government of Israel raised the issue of the renegotiated mandate, among other factors, to justify Israel’s decision not to cooperate with the mission. As a representative of Israel wrote to Justice Goldstone:

[T]he legal basis of the proposed mission is HRC Resolution S-9/1. This resolution, beyond its inflammatory and prejudicial language, clearly provides that the mandate of the Mission is limited to investigating “violations” by “the occupying Power, Israel against the Palestinian people” (...). [A]s a matter of law, no statement by any individual, including the President of the Council, has the force to change the mandate of the Mission.65

This issue continued to arise in the contentious debates that developed about the mission’s operations and findings, with some individuals agreeing with the

62 Ibid., at para. 1.
63 HPCR interview with Hina Jilani, supra note 41.
64 Ibid.
Government of Israel about the nature of the mandate’s legal authority, \(^{66}\) while other individuals found the mandate renegotiation to be not only unproblematic but generally indicative of the mission’s objective nature. \(^{67}\) The prevalence of this issue in these debates suggests that mandate renegotiation is a potentially controversial avenue that might not always entirely succeed in insulating a mission from perceptions of bias that stem from the original mandate language.

**Human Rights Mandates and Evenhandedness**

Despite the consensus among practitioners about the importance of examining all sides of a conflict, in some cases, MRF missions are tasked with investigating a context in which only one side has committed violations. This issue arises for MRF missions mandated to gather information about situations short of armed conflict, in which a government may be the only entity worthy of investigative attention. For example, the Guinea Commission was mandated to “investigate the facts and circumstances of the events of 28 September 2009 and related events in their immediate aftermath,” a context that involved government violence perpetrated against political demonstrators. \(^{68}\) In such situations, MRF actors have asserted that the principle of evenhandedness — in which MRF actors strive to treat parties equally by granting all sides the same degree of investigative attention — is not applicable. \(^{69}\)

However, in such cases, some measures may be taken to assure a certain degree of balance. For example, the Bahrain Commission, mindful of the sensitive political climate in which the mission operated, took care to shape a historical narrative in the report that didn’t just present one side of oppressors and one side of victims but rather

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\(^{69}\) Confidential HPCR interview conducted in Spring 2013 with a high-level MRF practitioner, name of interviewee on file.
offered a more balanced view of the events that had occurred. Such measures may allow MRF actors to take steps to correct the inherent one-sided nature of certain human rights mandates.

II. PLANNING THE MISSION’S ACTIVITIES

While the previous section examined what context an MRF mission investigates, this section examines what activities the mission undertakes to fulfill the mandate. This section first examines two contrasting approaches to gathering and assessing information that might serve as distinct models for future MRF practice. The section then focuses on the question of when and how MRF practitioners have decided to identify the names of suspected perpetrators in MRF reports. Finally, the section presents an overview of different perceptions that MRF actors hold about engaging in activist activities during the implementation of an MRF mission.

A. Gathering and Assessing Information: The Contrasting Approaches of the Two Flotilla Missions

The two MRF missions mandated under the auspices of the United Nations to examine the 2010 Flotilla incident — in which Israeli naval commandos boarded a flotilla of six ships endeavoring to break Israel’s naval blockade of Gaza — offer different models for how MRF missions can balance their sometimes competing aims of, on the one hand, gathering information and offering legal assessments, and on the other hand, contributing to efforts to ease international tensions or facilitate national reconciliation processes. This section assesses these two missions: the Flotilla Fact-finding Mission mandated by the UNHRC and the Flotilla Panel mandated by the United Nations Secretary-General (UNSG). Though the differences in these two missions arose from their distinct mandates, the contrasting approaches undertaken may prove instructive to mandate interpretation processes on future missions.

One methodological difference between the two missions was the sources of information on which the missions relied. The Flotilla Fact-finding Mission was mandated “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 (...).” To this end, the mission undertook on-

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70 HPCR interview on 4/12/13 with Sir Nigel Rodley – Commissioner, Bahrain Independent Commission of Inquiry.
71 UNHRC resolution 14/1, para. 8.
the-ground investigations that involved interviews with witnesses and victims. As the mission’s report asserts, the mission deemed these interviews to be essential and “gave particular weight to the direct evidence received from interviews with eyewitnesses and crew (...).”72 According to one of the commissioners on the mission, eyewitness accounts were deemed valuable to the mission’s credibility, especially given the sensitive political climate surrounding the mission. As the commissioner recounts:

There was a lot of emotion floating around already, so we had to be extra careful. We were concerned to come up with a methodology that was credible. We would talk to eyewitnesses, we would not base our mission on hearsay. We felt that there had to be credibility from a technical standpoint and about the methodology of the investigation. It had to be very technically credible for the findings to be accepted. There is that link. It was also the eyewitness version of what happened that helped with this.73

Contrastingly, the mandate for the Flotilla Panel necessitated a different approach. The Terms of Reference specifies that the mission “will receive and review interim and final reports of national investigations into the Incident (...).”74 Essentially, the mission was designed to base its findings primarily on information gathered by the Turkish National Commission of Inquiry and the Israeli Public Commission to Examine the Maritime Incident of May 31, 2010 (frequently referred to as the Türkel Commission, after Jacob Türkel, the Chairman of the commission), both of which were also mandated to examine the Flotilla incident and which operated concurrently with the Flotilla Panel.75 Because of this restriction, the Flotilla Panel could not conduct its own interviews to

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73 HPCR interview on 4/3/13 with Mary Shanthi Dairiam – Commissioner, United Nations Fact-finding Mission on the Flotilla Incident.
gather information from eyewitnesses. Additionally, representatives from the governments of Israel and Turkey served on the Panel, granting both countries buy-in, and a certain degree of control, over the process.

But disagreement exists among practitioners about the merits of this approach. The Flotilla Fact-finding Mission report critiques the Flotilla Panel’s methodology by stating “that public confidence in any investigative process in circumstances such as the present is not enhanced when the subject of an investigation either investigates himself or plays a pivotal role in the process.” Conversely, the Flotilla Panel report states that though “[t]he Panel was required to obtain its information from the two nations primarily involved in its inquiry, Turkey and Israel,” this aspect of the Panel’s methodology “is thoroughly understandable in the context of the Panel’s inquiry (...)” Furthermore, as one MRF practitioner has stated:

It does require cooperation from the state and from the accusers. Otherwise there is no proceeding at all. It’s not desirable that those who are being investigated are part of the process. On the other hand, if you’re going to have an inquiry of this sort at all, you’re better off getting some cooperation or you’re better of not doing it at all.

A second methodological difference between the two Flotilla missions was the contrasting levels of emphasis that the two missions placed on legal analysis. The mandate for the Flotilla Fact-finding Mission — “[t]o 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” — was purely legal. In contrast, the Terms of Reference for the Flotilla Panel included no legal language. The Panel was mandated to “examine and identify the facts, circumstances and context of the incident” and to “consider and recommend ways of avoiding similar incidents in the future.” Consequently, the Panel offered a legal assessment but included this section only in the report’s annex in order to place

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76 Flotilla Panel report, supra note 74, at para. 6.
77 Ibid., at para. 9.
79 Ibid., at para. 6.
80 Confidential HPCR interview conducted in Spring 2013 with a high-level MRF practitioner, name of interviewee on file.
81 Flotilla Fact-finding Mission mandate, supra note 71.
82 Flotilla Panel report, supra note 74, at paras 3(3)(a) and 3(3)(b).
more emphasis on factual findings and what should happen next.\textsuperscript{83} The report of the Flotilla Panel also states:

The Panel will not add value for the United Nations by attempting to determine contested facts or by arguing endlessly about the applicable law. Too much legal analysis threatens to produce political paralysis. Whether what occurred here was legally defensible is important but in diplomatic terms it is not dispositive of what has become an important irritant not only in the relationship between two important nations but also in the Middle East generally. The Panel has been entrusted with some policy responsibilities and that was not the case with the domestic investigations whose reports we have received.\textsuperscript{84}

In one sense, the goals of the Flotilla Panel and the Flotilla Fact-finding Mission were the same. The Flotilla Panel perceived that the objective of the mission was to produce an authoritative objective account factually of what happened.\textsuperscript{85} Similarly, one of the commissioners on the Flotilla Fact-finding Mission stated as a reason for joining the mission, “this inquiry hopefully will establish the truth. If that happens, that in itself is good.”\textsuperscript{86} However, the ultimate aims of the mission stand in stark contrast to one another. While the Flotilla Fact-finding Mission focused on making legal assessments, the Flotilla Panel prioritized the policy component of the mandate that authorized the mission to “recommend ways of avoiding similar incidents in the future.”\textsuperscript{87} The Flotilla Panel calibrated its activities toward this end, de-emphasizing legal analysis in an effort to place primary importance on the mission’s diplomatic ends.

The majority of past MRF practice is more congruent with that of the Flotilla Fact-finding Mission rather than that of the Flotilla Panel. As the following relevant portions from different MRF reports indicate, practitioners in general tend to place great importance on eyewitness accounts:

- **Libya Commission.** “The quality of the evidence and information obtained by the Commission has varied in its accuracy and reliability. The Commission has

\textsuperscript{83} Confidential HPCR interview conducted in Spring 2013 with a high-level MRF practitioner, name of interviewee on file.

\textsuperscript{84} Ibid., at para. 15.

\textsuperscript{85} Confidential HPCR interview conducted in Spring 2013 with a high-level MRF practitioner, name of interviewee on file.

\textsuperscript{86} HPCR interview with Mary Shanthi Dairiam, supra note 73.

\textsuperscript{87} Flotilla Panel report, supra note 74, at para. 3.
opted for a cautious approach in this report by consistently referring to the information obtained as being distinguishable from evidence capable of being used in criminal proceedings, whether national or international. It has also been cautious in distinguishing between information and reports received and testimony it heard first-hand, as well as facts which it has observed first-hand.”

- **Guinea Commission.** “In fulfilment of its mandate, the Commission decided that in order to obtain the quality of evidence needed to establish the facts, the information received must be checked against independent sources, preferably eyewitness accounts, and independently verified evidence assembled to demonstrate that a person may reasonably be suspected of having participated in the commission of a crime.”

- **Gaza Fact-finding Mission.** “In establishing its findings, the Mission sought to rely primarily and whenever possible on information it gathered first-hand. Information produced by others, including reports, affidavits and media reports, was used primarily as corroboration.”

- **Beit Hanoun Fact-finding Mission.** “The mission wishes to underline the importance of its travelling to Beit Hanoun to witness first-hand the situation of victims and survivors of the shelling, in particular to comprehend the deep distress of the victims of the shelling and of the population generated by the ongoing blockade. This depth of human suffering is only partially conveyed through the third-party reports on the situation.”

As Table 1 also indicates, several MRF mandates authorize the crafting of recommendations along lines that resemble those of the Flotilla Panel. Specifically, the Kyrgyzstan Commission was mandated to “[m]ake recommendations, including, in particular on accountability measures, so as to ensure non-repetition of the violations

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88 First Libya Commission report, supra note 12, at para. 237. Additionally, the mission’s second report states, “As with its first report, the Commission took a cautious approach in assessing the information gathered. It relied where possible on its own observations and first-hand accounts. The Commission bore in mind that it was not seeking evidence of a standard to support a criminal conviction, but an assessment based on a ‘balance of probabilities’ to determine whether a violation had occurred.” See second Libya Commission report, supra note 20, at para. 6.

89 Guinea Commission report, supra note 68, at para. 22.


and to contribute towards peace, stability and reconciliation,” 92 and the Beit Hanoun fact-finding Mission was mandated to “make recommendations on ways and means to protect Palestinian civilians against any further Israeli assaults (...).” 93 Given this trend, the two Flotilla missions might offer two distinct methodological blueprints for gathering and assessing information.

B. Determining Responsibilities for Alleged Violations

A general consensus exists among MRF practitioners that missions should exercise extreme caution when deciding to identify individuals suspected of criminal responsibility. As one MRF practitioner states of a mission on which he served, “We were careful not to identify individuals to attribute criminal responsibility. It would have been totally irresponsible because we didn’t have the information to do it. The danger is for a body in a very powerful position to damage a person for life and to do it without the beginnings of the level of information required to make a prima facie case.” 94 Another MRF practitioner affirms, “You don’t have due process of law. I think we have to assure due process of law for the perpetrators. My general position concerning truth commissions is not to publish the names but just to prepare confidential lists to submit to appropriate authorities.” 95 Similarly, the Darfur Commission report explains the mission’s decision to withhold names from the public report by citing due process concerns; the danger that “this could lead to premature judgements about criminal guilt that would not only be unfair to the suspect, but would also jeopardize the entire process undertaken to fight impunity;” and concerns about witness protection, because “[i]n many instances it would not be difficult for those who may be suspected of bearing responsibility to identify witnesses who have spoken to the Commission, and intimidate, harass or even kill those witnesses.” 96

However, many MRF mandates have specifically requested that missions determine responsibilities. Of the MRF missions included in Table 1, eight mandates — the Libya Commission, the Côte d’Ivoire Commission, the Bahrain Commission, the Kyrgyzstan Commission, the DRC Mapping Exercise, the Guinea Commission, the Timor-Leste

93 Beit Hanoun Fact-finding Mission mandate, supra note 53.
94 HPCR interview with Sir Nigel Rodley, supra note 70.
95 HPCR interview conducted on 5/3/13 with Paulo Sérgio Pinheiro – Chair, Independent Special Commission of Inquiry for Timor-Leste.
Commission, and the Darfur Commission — included such authorization. Additionally, in some cases, certain actors desire and expect the mission to publicly name names. In the case of the Timor-Leste Commission, the government of Timor-Leste, which had requested the commission, held such an expectation, and in the case of truth commissions, survivors of atrocities might sometimes endeavor to pressure commissioners to identify specific individuals deemed responsible for violations. In response to these conflicting expectations, missions have pursued different approaches. The below table presents an overview of the different approaches adopted by the eight missions mentioned above. The section then examines three different avenues: declining to name names, naming names privately, and naming names publicly.

Table 2: Missions Authorized to Determine Responsibilities

<table>
<thead>
<tr>
<th>MISSION</th>
<th>MANDATE LANGUAGE</th>
<th>RESPONSE</th>
</tr>
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<tbody>
<tr>
<td>Libya Commission (first report)</td>
<td>“where possible identify those responsible”</td>
<td>Declined to identify individuals</td>
</tr>
<tr>
<td>Libya Commission (second report)</td>
<td>“where possible identify those responsible”</td>
<td>Included in the report names of “senior figures who are publicly known,” but for other individuals, compiled a private list of names that the mission handed over to the OHCHR</td>
</tr>
<tr>
<td>Côte d’Ivoire Commission</td>
<td>“investigate the facts and circumstances (...) in order to identify those responsible for such acts and to bring them to justice”</td>
<td>Compiled a private list of names that the mission handed over to the OHCHR</td>
</tr>
<tr>
<td>Bahrain Commission</td>
<td>“The Commission is free to make any recommendations, in particular recommendations for further official investigation or prosecution of any person, including public officials or employees.”</td>
<td>Declined to identify individuals in the report</td>
</tr>
</tbody>
</table>

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97 HPCR interview with Paulo Sérgio Pinheiro, supra note 95.
<table>
<thead>
<tr>
<th>Commission</th>
<th>Decision</th>
<th>Reason</th>
</tr>
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<tbody>
<tr>
<td>Kyrgyzstan Commission</td>
<td>“Determine responsibilities and, where possible, identify those responsible”</td>
<td>Declined to identify individuals but identified groups to which alleged perpetrators belong; also assessed “institutional and political responsibility,” for which the report identifies individuals</td>
</tr>
<tr>
<td>Guinea Commission</td>
<td>“determine responsibilities” and “where possible, identify those responsible”</td>
<td>Included names of certain individuals in the report</td>
</tr>
<tr>
<td>DRC Mapping Exercise</td>
<td>“gather basic information (e.g., establishing (...) the alleged perpetrators, etc.)”</td>
<td>Declined to identify individuals but identified groups to which alleged perpetrators belong</td>
</tr>
<tr>
<td>Timor-Leste Commission</td>
<td>“clarify responsibility”</td>
<td>Included names of certain individuals in the report</td>
</tr>
<tr>
<td>Darfur Commission</td>
<td>“identify the perpetrators of such violations [human rights law, international humanitarian law, and genocide] with a view to ensuring that those responsible are held accountable”</td>
<td>Compiled a private list of names that the mission handed over to the UNSG</td>
</tr>
</tbody>
</table>

*Declining to Name Names*

As Table 2 indicates, four reports — the first Libya Commission report, the Bahrain Commission report, the Kyrgyzstan Commission report, and the DRC Mapping Exercise report — declined to identify individuals suspected of criminal responsibility. While the Bahrain Commission offered no specific rationale for this choice, the first Libya Commission report cites the time constraints under which the mission operated, while the reports for the Kyrgyzstan Commission and the DRC Mapping Exercise offer additional rationales based on the mission’s mandate and methodology. The relevant passages from these reports appear below:
• **Libya Commission (first report).** “The commission was able to accomplish its mandate in a relatively short period of time, particularly for a period of ongoing conflict. It considers that further work has to be done in order to investigate fully the numerous allegations it continues to receive at a time when the conflict is still ongoing. Future work would also permit an assessment of the veracity of the allegations received, particularly with regard to the use of mercenaries, the use of child soldiers, sexual violence and violations against migrant workers. Finally, the commission feels that, at this stage, it is not in a position to identify those responsible, as requested by the Human Rights Council in the resolution establishing its mandate.”98

• **DRC Mapping Exercise.** “Unlike some commissions of inquiry with a specific mandate to identify the perpetrators of violations and make them accountable for their actions, the objective of the Mapping Exercise was not to establish or to try to establish individual criminal responsibility of given actors, but rather to expose in a transparent way the seriousness of the violations committed, with the aim of encouraging an approach aimed at breaking the cycle of impunity and contributing to this. This decision is further explained by the fact that, in light of the methodology adopted and the level of evidence used in this Exercise, it would have been imprudent, and unjust, to seek to ascribe personal criminal responsibility to any given individual, which is first and foremost a matter for legal proceedings based on the appropriate level of evidence.”99

• **Kyrgyzstan Commission.** “The KIC [Kyrgyzstan Inquiry Commission] was not mandated to conduct a criminal investigation, which remains the responsibility of the authorities of Kyrgyzstan. Neither is it a prosecuting authority or tribunal. The KIC is not in a position to identify named individuals as being responsible for the crimes that have been documented. This results in part from the limitation of its mandate, but other factors are also relevant, including: the short timeframe for its work; the limited investigative capacities available to it; and its inability to require individuals to testify.”100

Despite declining to name names of individuals deemed criminally responsible, the Kyrgyzstan Commission did respond in two ways to the mission’s mandate to

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98 First Libya Commission report, supra note 12, at para. 236.
100 Kyrgyzstan Commission report, supra note 92, at para. 7.
“[d]etermine responsibilities and, where possible, identify those responsible.”101 First, the report identifies groups to which alleged perpetrators might belong. This section of the report includes an assessment of incidents in which members of the military, the police, and armed non-state actors may have perpetrated criminal acts.102 For the military, this includes a list of attacks in which, as the report states, “The KIC considers that there were some members of the military involved (...).”103

Second, in addition to examining criminal responsibility, the Kyrgyzstan Commission examined “institutional and political responsibility of various actors and institutions.”104 In this area, the report identifies specific institutions and individuals responsible for the violent incidents that fell within the mission’s investigative purview.105 The Timor-Leste Commission had previously taken a similar approach. This mission, mandated “to clarify responsibility” for "incidents [that had occurred] on 28 and 29 April, 23, 24 and 25 May [in 2006] and related events or issues that contributed to the crisis,“106 interpreted this aspect of the mandate to “involve both individual and institutional responsibility.”107 As the Executive Director of the mission states, “This was quite original in this report. A minister may not be criminally responsible for what happened but politically he is. Maybe it was not intended by the mandate, but it’s a nice example of how you can stretch your mandate.”108

**Naming Names Confidentially**

One approach that has become common for commissions of inquiry is, rather than naming names in the mission’s public report, to compile a confidential list of suspects worthy of further criminal investigation. As Table 2 indicates, the second Libya

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101 Ibid., at para. 2.
102 Ibid., at paras 328-349.
103 Ibid., at para. 348.
104 Ibid., at para. 10.
105 In particular, the report mentions the Provisional Government, the Special Representative of the Provisional Government for Southern Kyrgyzstan, the Commandant of Osh city and province, the Commandant of Jalalabad, the Mayor of Osh, the Governor of Osh Province, and the Prosecutor General. See Ibid., at paras 367-400.
107 Ibid., at para. 11.
108 HPCR interview on 4/22/13 with Luc Côté – Executive Director of the Independent Special Commission of Inquiry for Timor-Leste, the Mapping Exercise in the DRC, and the Kyrgyzstan Inquiry Commission.
Commission report, the Côte d’Ivoire Commission report, and the Darfur Commission report chose this option. However, each mission articulated this choice in a somewhat different manner. The Côte d’Ivoire Commission report simply states that the mission compiled a confidential list without offering a rationale for this choice or any further information about the list’s contents. The second Libya Commission report offers a succinct rationale, which was “partly to prevent reprisals and partly to avoid prejudicing future fair trials.” The Darfur Commission report offers a more comprehensive rationale. Specifically, this report provides information on the standard of proof and methodology used to identify individuals, the methodological rationale (encompassing six paragraphs) for keeping the names confidential, additional logistical restraints that hampered the mission’s ability to identify perpetrators, and general information about the contents of the confidential list.

Given that every other mission included in Table 2 offers a rationale in some form for the mission’s choice to include or exclude the names of alleged perpetrators in MRF reports, the Côte d’Ivoire Commission option (i.e., omitting any description of the mission’s rationale or methodological approach) appears to be incongruent with the trends of recent practice. Conversely, the Libya Commission option (offering a succinct rationale) and the Darfur Commission rationale (offering a comprehensive rationale) might serve as two distinct models for articulating rationales on future missions.

**Naming Names Publicly**

Two of the missions included in Table 2 — the Guinea Commission and the Timor-Leste Commission — decided to include names of suspected perpetrators in the mission’s public report. The Timor-Leste Commission adopted a two-tiered approach to articulate the mission’s certainty about the individuals’ involvement. The first tier identifies individuals that the commission recommends for prosecution, while the second tier...

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112 Ibid., at paras 524-529.
113 Ibid., at paras 18-19.
114 Ibid., at paras 531-532.
115 For example, the report states, “Evidence before the Commission establishes that UIR[Unidade Intervenção Rápida (Rapid Response Unit)] officer Octavio de Jesus fired at least six shots, some into the crowd. The Commission recommends that he be prosecuted.” See Timor-Leste Commission report, supra note 106, at para. 113.
identifies individuals that the commission recommends for further investigation.\textsuperscript{116} Meanwhile, the Guinea Commission, for the individuals named, also offers differing levels of investigative certainty, which are:

- \textit{Prima facie} evidence that certain individuals incurred criminal liability,\textsuperscript{117}
- Sufficient grounds to assume direct criminal liability,\textsuperscript{118}
- Individuals whose “role and the degree to which they were involved in the events of 28 September and the days that followed should be examined in the context of a judicial investigation,”\textsuperscript{119} and
- Individuals “whose presumed involvement in the events suggests that they should be the object of a more in-depth investigation.”\textsuperscript{120}

The reticence that practitioners have expressed about naming names publicly suggests that missions should always carefully calibrate this decision in responsible alignment with the mission’s standard of proof. Indeed, one practitioner stressed that the Timor-Leste Commission is distinct from other commissions of inquiry due to the nature of the violations examined:

To a large extent it was not very political because everybody knew that the military did shoot those people. It needs to be a very specific mandate in order to

\textsuperscript{116} For example, the report states, “The Commission recommends that further investigations be undertaken to identify the other PNTL [Policia Nacional de Timor-Leste] members present under the command of Abílio Mesquita. If these men can be identified, the Commission recommends that they also be prosecuted. The Commission also recommends that further investigations be undertaken to establish whether Leandro Issac had any culpable involvement in the crimes committed.” See Ibid., at para. 124.

\textsuperscript{117} For example, the report states, “The Commission finds that there is \textit{prima facie} evidence that President Moussa Dadis Camara incurred individual criminal liability and command responsibility for the events that occurred during the attack and related events in their immediate aftermath.” See Guinea Commission report, supra note 68, at para. 216.

\textsuperscript{118} For example, the report states, “The Commission finds that there is sufficient evidence showing that Lieutenant Toumba incurred direct criminal responsibility for the crimes committed during the events of 28 September and related events in their immediate aftermath.” See Ibid., at para. 232.

\textsuperscript{119} Ibid., at para. 243.

\textsuperscript{120} Ibid., at para. 252.
name names. This report was about: we want you to identify who was the shooter. It was much more of a criminal law investigation.\textsuperscript{121}

However, in the event that a future mission does determine that naming names publicly is responsible and appropriate, the Timor-Leste Commission report and the Guinea Commission report might offer instruction about how to articulate these findings.

\textbf{C. Engaging in Activist Activities}

In some instances, MRF practitioners have engaged in activities beyond gathering and assessing information. One commissioner on the Guinea Commission became involved in ensuring medical access to individuals who were dying and also assisted certain pregnant women in obtaining access to abortion services.\textsuperscript{122} Additionally, both the Libya Commission and the Bahrain Commission engaged in securing the release of detainees who were wrongfully detained.\textsuperscript{123} This section examines the rationales offered in favor of, and the risks that weigh against, such activities.

One rationale is that the act of assisting people in need, regardless of the mandate’s authority, has a strong normative pull that is often congruent with the mandate’s aims. As one practitioner states:

\begin{quote}
Was it anticipated in the mandate? No, but it wasn’t inconsistent with it. I am normally very strict in textual interpretation. But in a situation like that, when you’re in the field, you face unexpected circumstances. If you are in a situation where you see prisoners who are in very difficult circumstances as a direct result of human rights violations which are the core of your mandate, and you have a chance to have them released, will you not do it?\textsuperscript{124}
\end{quote}

A second rationale — relevant to both the Bahrain Commission and the Libya Commission — is that the mission encountered no pushback from governments or

\begin{flushright}
\textsuperscript{121} Confidential HPCR interview conducted in Spring 2013 with a high-level MRF practitioner, name of interviewee on file.
\textsuperscript{122} HPCR interview on 4/26/13 with Pramila Patten – Commissioner, United Nations Commission on Inquiry on Guinea.
\textsuperscript{123} For Libya, see first Libya Commission report, supra note 12, at para. 14. For Bahrain, see Bahrain Commission report, supra note 44, at paras 38-40.
\textsuperscript{124} HPCR interview with Philippe Kirsch, supra note 11.
\end{flushright}
other actors while engaging in such activities. In the case of the Bahrain Commission, the commission discussed the release of detainees with the King of Bahrain — who had mandated the commission — and found the King to be cooperative in this regard. Similarly, the Libya Commission detailed the mission’s activities relevant to detainees in the mission’s first report and heard no negative comments about these actions in the subsequent UNHRC debates.

A third rationale emphasizes the overall role that an MRF mission plays in the local context. As the Chair of the Bahrain Commission states:

Here I would draw a distinction between Bahrain and Libya. A UN mission has to be fact-finding and has to be based on the mandate. You can’t really be a do-gooder. So I would say that in a UN context, the line is much clearer than it is in a national commission when you know that the ultimate purpose is reconciliation. If you look at the Bahrain events and the Bahrain mandate, the whole purpose was to pave the way for national reconciliation. If that’s the case, then if you can minimize the harm in the course of the process then you’re advancing the overall goal of reconciliation.

However, other practitioners express concerns that such engagement risks compromising the mission’s impartiality. One practitioner states, “I think it’s completely not appropriate at all. I think if you begin to assume this role, it would be difficult to be in a position of balance. You have to be very balanced, I try to be very strict on that.” Another practitioner concurs, “The mission can be critiqued for not staying within the mandate. They can discredit the integrity of work. We can be accused of not being impartial and objective once we become interventionist.”

Another related concern involves how such activities may shape different actors’ expectations of the mission. As one practitioner states, “One ends up muddying the waters. We become actors rather than reporters,” and as another practitioner agrees,

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125 Ibid.
126 Confidential HPCR interview conducted in Spring 2013 with a high-level MRF practitioner, name of interviewee on file.
127 HPCR interview with Philippe Kirsch, supra note 11.
128 HPCR interview with M. Cherif Bassiouni, supra note 18.
129 HPCR interview with Paulo Sérgio Pinheiro, supra note 95.
130 HPCR interview with Sir Nigel Rodley, supra note 70.
131 Ibid.
“The problem is that it could compromise your mandate, if you intervene. The reason you are there is not because you’re a Special Rapporteur on torture.”  

Indeed, some Bahraini detainees and their relatives developed heightened expectations of the Bahrain Commission. The wife of one detainee, after learning that the report did not recommend “the immediate and unconditional release of prisoners,” stated, “These commissioners let us down,” calling the omission “inexplicable and unacceptable.”

But these risks do not necessarily lead to the conclusion that practitioners should never engage in activist activities. One practitioner has expressed that such activities might actually be appropriate — and justified under the mandate — if undertaken in the context of looking for information. A careful assessment of the various risks could help MRF actors make more informed choices.

III. STAFFING THE MISSION

Staffing the mission is another essential element of the design and planning phase. Indeed, many MRF practitioners have emphasized that the success of a mission depends greatly on the staff’s experience and expertise. Some dilemmas of staffing have institutional roots. For example, practitioners have expressed concern that the pool of readily available and experienced potential MRF staff members is too small, which necessitates the development of training opportunities and rosters of professionals that can be deployed on short notice. However, with the aim of helping MRF actors anticipate and proactively work to circumvent common staffing issues, this section presents information on key staffing dilemmas that have emerged as trends on the fifteen missions that constitute this paper’s focus. In particular, this section focuses on the expertise of MRF staff; the process of defining roles and responsibilities for commissioners and the secretariat, which is the technical investigative component of an MRF mission that, on UN missions, is typically staffed by the OHCHR; and bureaucratic constraints to staffing that have hindered past missions.

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132 HPCR interview with Luc Côté, supra note 108.
134 HPCR interview with Sir Nigel Rodley, supra note 70.
135 HPCR interview with Pramila Patten, supra note 122.
136 See Grace and Bruderlein, supra note 1, at 40-41.
A. Staff Expertise

Practitioners have indicated two particular areas in which MRF actors have found staff expertise to be frequently deficient. One area involves the managerial skills of the commission chairperson. MRF practitioners, mandate drafters, and governmental actors widely acknowledge the importance of selecting commissioners based on legal expertise, eminence, and impartiality. Indeed, various mandates explicitly mention the importance of these criteria. The Bahrain Commission mandate states, “The Commission consists of five eminent and internationally-renowned members, whose experience and reputation worldwide is well established;”¹³⁷ the Guinea Commission’s terms of reference, according to the mission’s report, “state that [the commission] will be composed of three members having a reputation for probity and impartiality;”¹³⁸ and the terms of reference for the Kyrgyzstan Commission states that the mission:

(...) will be composed of a panel of eminent personalities as well as a group of experts. (...) In the overall composition of the panel and experts, there will be the requisite expertise in human rights, conflict analysis, international humanitarian law and international criminal law; and knowledge of the country and language skills.¹³⁹

Some mandates also specify the importance of diversity. For example, the mandate for the Côte d’Ivoire Commission states that the commissioner selection process should “take[e] into consideration the importance of ensuring the equal participation and full involvement of women,”¹⁴⁰ and the Kyrgyzstan Commission’s terms of reference states, “The need for gender and geographical diversity amongst members of the Commission will also be taken into account.”¹⁴¹

However, no mandate to date has specified the importance of the managerial expertise of the commission chair. MRF practitioners have expressed concern that the neglect of this consideration in the chairperson selection process sometimes leads to problems during implementation. The mandate drafter for the Commission of Experts Established Pursuant to Resolution 780 (1992) to Examine Reported Violations of

¹³⁷ Bahrain Commission mandate, supra note 43, at Article Two.
¹³⁹ Kyrgyzstan Commission report, supra note 92, at para. 4.
¹⁴⁰ Côte d’Ivoire Commission mandate, supra note 9.
¹⁴¹ Kyrgyzstan Commission report, supra note 92, at para. 4.
International Humanitarian Law in the Former Yugoslavia (hereafter the Former Yugoslavia Commission) writes:

The composition of the Commission quickly brought it under fire. My colleagues at the State Department made no secret of our feeling that there was too much emphasis on academic qualifications and too little on investigative or managerial skills. This sentiment was soon publicly voiced by Roy Gutman, who wrote that the Chairman of the Commission, Frits Kalshoven “tells visitors he does not know why he got the job.”142

Two decades later, this problem persists. As one MRF practitioner states of a recent mission, “The chair plays a very critical role. He sets pace of work, moves the mission to next level of work. The chair lost time not knowing how to coordinate everybody because he did not have experience coordinating staff.”143 Another MRF practitioner stated that the chair of a different recent commission failed to exercise strong leadership on the administrative front, particularly in terms of setting deadlines.144 The persistence of this dilemma over the course of at least twenty years of MRF practice suggests that managerial experience should play a greater role in the chairperson selection process. However, in the absence of this development, other measures may help mitigate resulting hindrances. For example, one practitioner suggests that the OHCHR could provide a briefing in this area.145 Another practitioner asserted that in the absence of strong leadership from a chairperson, another commissioner began to assume this role.146 A methodological tool informing commissioners of the prevalence of this dilemma might alert commissioners of the potential need to proactively step forward to fill an emerging managerial void.

Another area that has sometimes proved problematic is a lack of expertise — of investigators and commissioners — in dealing with victims and witnesses who have experienced trauma. Some practitioners have observed a tension between what the mission wants from interviewees and what the interviewees want from the mission.

143 HPCR interview with Mary Shanthi Dairiam, supra note 73.
144 Confidential HPCR interview conducted in Spring 2013 with a high-level MRF practitioner, name of interviewee on file.
145 HPCR interview with Mary Shanthi Dairiam, supra note 73.
146 Confidential HPCR interview conducted in Spring 2013 with a high-level MRF practitioner, name of interviewee on file.
This tension arises when investigators fail to anticipate the fact that interviewees exhibit more interest in telling their stories than in giving the mission only the facts necessary to demonstrate that violations of international law have occurred. As one MRF practitioner recollects, investigators on one mission had prepared questions and would ask these questions in a specific order, but:

The interviewees would not just want to go in that order. They wanted to tell their stories. They had been traumatized. Some were actually still shaking, some men actually cried. So we would say that some of the things they were saying were not relevant to the facts we needed. But there was another purpose that was being served. There was a process that was therapeutic for the individual. You need to find the space and let the victim tell their story. The commissioners had to realize this is not a courtroom.\footnote{HPCR interview with Mary Shanthi Dairiam, supra note 73.}

As with the lack of managerial expertise exhibited by certain mission chairpersons, this issue has also arisen repeatedly. Indeed, a practitioner who served on the Former Yugoslavia Commission recounts that some interviewers on that mission did not realize, “You have to listen to what’s important to the person before you ask what’s important to the prosecution. You must show them that you care about them.”\footnote{Confidential HPCR interview conducted in Spring 2013 with a high-level MRF practitioner, name of interviewee on file.}

Training and/or guidance in this area made available to investigators and commissioners before implementation could help practitioners devise interview strategies that are more sensitive to the needs of witnesses and victims struggling with recollections of traumatic events.

**B. Defining Roles and Responsibilities of Staff Members**

Related to the commission chairperson’s managerial role is the overall manner of how a mission will allocate responsibilities among commissioners and the secretariat. Specifically, confusion has sometimes resulted over how these different types of actors should collaborate on decision-making processes. On one mission, a commissioner and the head of the secretariat became engaged in a power struggle over who would control the mission’s investigative decisions. This dispute — rooted in a disagreement over who had the authority to determine the mission’s methodology — involved differing perceptions about how the mission’s mandate should be implemented and what topics
and actors the mission should investigate.\textsuperscript{149} On another mission, the opposite problem occurred. In this case, the technical team was “deferential to the mission” and, rather than attempting to assert control over the mission, awaited instructions from the head of the mission, who was actually unclear about how to best use the professional staff provided.\textsuperscript{150} One practitioner who served on this mission states, “Though there is an assumption that every mission knows how the secretariat can help them, my own recommendation would have been that we should have had a discussion right at the start on the role of the secretariat, what they can provide, what commissioners can expect, how best to use them.”\textsuperscript{151}

C. Bureaucratic Constraints

MRF actors have expressed concern that bureaucratic constraints often restrict the mission’s ability to hire and deploy the necessary staff. This dilemma has arisen specifically on missions extended beyond the initial mandate period. For the Libya Commission — initially mandated by the UNHRC in February 2011 and renewed in June 2011 — the mandate renewal caused bureaucratically imposed staff retention issues. As the Chair of the mission recalls:

One day I received notice — “Your staff has been disbanded.” There were only two people left. They said, “when you chose the staff it was for a 90 day assignment, and under UN rules, people can elect to go on missions for 90 days without losing their positions. Beyond 90 days you can’t do that. Beyond the 90 days it’s a whole new procedure.”\textsuperscript{152}

The new procedure entailed advertising the positions and electing an internal committee to select staff from the applicants, a process that took several months.\textsuperscript{153} In general, a lack of clarity about the length of a mission tends to bring about problems of staff retention. The mandate for the International Independent Investigation Commission — created by the UNSC in 2005 “to assist the Lebanese authorities in their investigation of all aspects of [the] terrorist act” that killed former Lebanese Prime

\textsuperscript{149} Confidential HPCR interview conducted in Spring 2013 with a high-level MRF practitioner, name of interviewee on file.
\textsuperscript{150} HPCR interview with Mary Shanthi Dairiam, supra note 73.
\textsuperscript{151} Ibid.
\textsuperscript{152} HPCR interview with M. Cherif Bassiouni, supra note 18.
\textsuperscript{153} Ibid.
Minister Rafiq Hariri — was renewed repeatedly over the course of several years by the UNSC.\textsuperscript{154} As one of the mission’s reports states:

The uncertainties surrounding the actual length of the Commission’s mandate had led to the gradual departure of significant numbers of key staff, primarily investigators, since September 2005. By the end of 2005, such downsizing of the Commission’s staffing level had reduced the number of investigators/analysts to 9 from previously 48 budgeted posts, and by February 2006, the number was 6. The Commission was forced to focus much of its initial attention on rebuilding a team based around the dedicated and professional capacity remaining without loss of momentum or direction for the investigation.\textsuperscript{155}

Bureaucratic factors can also adversely affect a mission’s ability to deploy sufficient staff to the field to conduct on-the-ground activities. The Libya Commission faced this situation, as the Chair of the mission recounts:

When we had to go in country, I would get a report from the UN staffers saying, “Well you’re planning on going with 15 people, you can’t do that.” And I would say, “I need 15 people. I’m the one that determines that.” They had an emergency evacuation plan and that plan was based on a plane that they had chartered that could fly into Libya to evacuate all UN personnel. The plane they had chartered could only fit 256 people. If you went at a time when UNICEF was there, or others, for example, and there were 246 people, you could only bring in 10 more. It’s like the tail wagging the dog. It’s like the bureaucracy wagging the mission.\textsuperscript{156}

Though these problems are institutional in nature and have no simple solution, as with an issue such as a commission chairperson who lacks managerial expertise, a prior awareness of challenges faced by past missions might help future commissioners anticipate such problems before they arise and proactively plan solutions.

\textsuperscript{154} UNSC resolution 1595 (2005), para. 1.
\textsuperscript{156} HPCR interview with M. Cherif Bassiouni, supra note 18.
IV. CONCLUDING REMARKS

The dilemmas that this paper assesses might be divided into three categories, each of which raises different questions for practitioners. This section presents these three categories and offers suggestions for how practitioners might address these issues moving forward. The three categories are:

1) **Potentially contentious choices that might affect perceptions of the mission’s credibility**

This category of dilemmas encompasses issues that are sometimes hotly debated among practitioners and states. These issues include: selecting legal lenses not explicitly mentioned in the mandate, dealing with one-sided mandates, deciding whether or not (and if so, how) to names names in MRF reports, and deciding whether or not to engage in activist activities. Many of these issues arise due to concerns about perceptions of the credibility of MRF missions. At the same time, many MRF practitioners have suggested that MRF missions will always be subject to intensive critiques, often in the form of politically motivated criticisms that might lack actual merit. One challenge in addressing these issues is the extent to which practitioners can mitigate the resonance of these critiques but at the same time not appear to suggest that such critiques necessarily have credibility. Another dilemma is how — and if — practitioners can reach a consensus about how best to approach these areas. The firm normative opinions held by many practitioners about these issues suggests that developing “guidelines” or “best practices” might be desirable. However, the fact that practitioners have not yet reached a professional consensus in these areas suggests that, while some might welcome the development of standards in this area, others might perceive standards to be too restrictive.

2) **Issues for which examples of past practice might inform future choices**

This category of dilemmas encompasses less potentially controversial and less methodologically problematic decisions. For example, as the analysis of this paper suggests, deciding on how to articulate the mission’s temporal and geographic scope and how to design and articulate the mission’s process of selecting incidents emblematic of patterns are areas that carry a relative low degree of political risk but represent areas for which past practice might usefully inform future choices. For this reason, practitioners might benefit from an enhanced ability to quickly survey methodological choices of past missions, in order to more accurately gauge the anticipated benefits and potential risks of different courses of action.
3) Common operational dilemmas

This category encompasses operational issues, such as the skillsets of staff members and bureaucratic constraints that might hamper the mission’s activities. As suggested earlier, these issues are generally systematic in nature, and of course practitioners working on a mission will not be able to fix, for example, the bureaucracy of the UN. However, given the fact that several commissioners evidently did not anticipate these challenges, commissioners might benefit from more opportunities to engage in professional exchange with one another in order to garner a definitive understanding of common challenges and to learn which proactive measures might help an MRF mission avoid — or at least prepare for — these dilemmas before they emerge.
Annex

*This Annex provides information about the mandates for the fifteen missions that constitute this paper’s focus.*

**International Commission of Inquiry on Libya.** This mission was mandated by UNHRC resolution S-15/1 on February 25, 2011. The mandate is available at: [http://www2.ohchr.org/english-bodies/hrcouncil/docs/15session/HRC-S-15-1_AUV.pdf](http://www2.ohchr.org/english-bodies/hrcouncil/docs/15session/HRC-S-15-1_AUV.pdf). With resolution 17/L.3 — adopted by the UNHRC on June 10, 2011 — the UNHRC extended the mission’s mandate but did not alter the scope of the mission except to elaborate that the mission should “continue its work, including through visits.” This resolution is available at: [http://blog.unwatch.org/wp-content/uploads/Libya.pdf](http://blog.unwatch.org/wp-content/uploads/Libya.pdf).

**Independent, International Commission of Inquiry on Côte d’Ivoire.** This mission was mandated by the UNHRC with resolution 16/25, available at: [http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4db962112](http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4db962112).


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. This mission was mandated by the UNHRC on June 23, 2010 by resolution 14/1, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/RES.14.1_AEV.pdf.


United Nations Fact Finding Mission on the Gaza Conflict. The UNHRC mandated this mission with resolution S-9/1, which the UNHRC adopted on February 27, 2009. The resolution is available at: http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=country&category=&publisher=UNHRC&type=SESSIONALREPORT&coi=PSE&rid=&docid=49997aebd&skip=0. However, before accepting the position as Head of the Mission, Justice Richard Goldstone struck an agreement with the President of the UNHRC regarding a renegotiated mandate. The language for this renegotiated mandate can be found on p. 13 of the mission’s report, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf.


Independent Special Commission of Inquiry for Timor-Leste. United Nations Secretary-General Kofi Annan communicated his intention to create this mission to the UNSC on June 13, 2006. The Terms of Reference for the mission can be found on pp. 10-11 of the mission’s report, available at: 
