

ON MONITORING, REPORTING, AND FACT-FINDING MECHANISMS

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INTRODUCTION

A simple glance at recent news headlines reveals the growing prevalence of international missions tasked to monitor and report on potential violations of international law. In the past few months alone, the United Nations (UN) dispatched a team to monitor the ceasefire in Syria, and the United Nations Human Rights Council (UNHRC) mandated a commission of inquiry to examine Israeli settlements in the West Bank, extended the mandate of the International Commission of Inquiry on Syria, and mandated a new Special Rapporteur on human rights and the environment. These missions are part of a rapidly growing trend. The international community — imbued, since the end of the Cold War, with a new sense of responsibility for international legal accountability and civilian protection — has increasingly employed monitoring, reporting, and fact-finding (MRF) mechanisms to collect information on the vulnerabilities of civilian populations and investigate potential violations of international law.

But the recent proliferation of MRF mechanisms has outpaced endeavors of MRF policymakers to reflect on past practice. As a consequence, MRF actors have struggled — and continue to struggle — with a paucity of sufficient resources and guidance. This *Reflection* contemplates how this state of affairs arose, examines the key challenges that result, and ponders possible pathways forward.

THE EMERGENCE OF MONITORING, REPORTING, AND FACT-FINDING

Modern MRF dates back at least to 1913, when the Carnegie Endowment for International Peace initiated a commission to investigate potential violations of international law committed during the Second Balkan War.[1] In subsequent decades, various MRF initiatives arose under the rubric of the League of Nations, and in the post-World War II era, from various mandating bodies, including the United Nations Security Council (UNSC), the UNHRC, the European Union (EU), and the Arab League. MRF, lacking a centralized mandating body, arose from different institutional sources and developed in an ad hoc manner.

As a result, the MRF community — a diverse array of political actors (such as government mandators and donors) and practitioners (such as commissioners, investigators, legal experts, and interpreters) — has become locked in a conundrum. On the one hand, the multiplicity of MRF mandating bodies — including international, regional, and national entities — is

beneficial, providing political actors with various venues for reaching consensus around initiating MRF mechanisms. On the other hand, institutional barriers have fragmented the MRF community, hindering the development of adequate guidelines, training opportunities, and rosters of qualified and available MRF leaders and investigators. Hence, though different individuals engaged in engineering and implementing MRF mechanisms face distinct challenges — for example, the challenges of political actors aiming to create an MRF mission differ from those of investigators engaged in technical data gathering and analysis — the MRF community is united by a need for increased guidance and understanding of how MRF mechanisms function.

KEY CHALLENGES

More robust guidance could mitigate numerous challenges that MRF actors have faced. In particular, MRF mandate drafters have sometimes unknowingly crafted mandates that have led to ineffective implementation. For example, the mandate for the Commission of Inquiry on Lebanon, authorized by the UNHRC after the 2006 Lebanon War, included an investigation of the military activities of Israel but not Hezbollah. In the final report, the mission's commissioners critiqued the one-sided mandate, writing, "[A]ny 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." [2] But, as the report continues, an investigation of Hezbollah "would exceed the Commission's interpretative function and would (...) usurp the Council's powers." [3] The mission's restrictive mandate, as the commissioners suggest, inherently prevented a comprehensive investigation.

Similarly, investigators lacking proper procedural guidance can unknowingly undermine their own MRF efforts. MRF practitioners largely agree that a bedrock principle of investigation methodology should be to 'do no harm' to witnesses and victims. Adherence to this dictum entails taking caution in selecting interviewees, because interviewing a victim who has already been contacted by other organizations increases the risk that, through repeatedly telling the story of the alleged crime, the victim might be retraumatized. [4] Additionally, procedures for protecting the identities of individuals who cooperate with MRF missions are necessary to guard interviewees from possible reprisal attacks. In the absence of such procedures, an MRF mission might inadvertently wind up causing harm — psychological or physical — to the very people the mission is designed to help.

Additional investigation methodology dilemmas arise from the quasi-judicial nature of MRF mechanisms. While criminal courts and tribunals use the evidentiary standard of "proof of facts beyond a reasonable doubt," MRF missions use less strict standards, such as the "balance of probabilities," which entails, as one writer states, "comparing information that confirms a fact or violation with information that questions it." [5] But how can MRF actors determine the most appropriate standard of proof, systematize the process of comparing conflicting information, and articulate these procedures in MRF reports? MRF actors —

operating under mission-specific methodologies, and sometimes with no explicit methodology at all — often struggle with addressing these questions.

GUIDING PRINCIPLES

But as the general acceptance of the ‘do no harm’ principle suggests, there is a baseline vision of ideal MRF practices around which MRF practitioners have coalesced. Overall, MRF practitioners tend to express the importance to MRF missions of three guiding principles: neutrality, impartiality, and independence. Neutrality requires MRF missions to refrain from taking sides on issues related to the relevant political conflicts. Impartiality entails maintaining an objective methodology in the implementation of an MRF mechanism, particularly in terms of gathering evidence from multiple sources. Independence implies operating without interference from outside entities, such as host states, opposition forces, and donors.

These guiding principles aim to insulate an MRF mission’s implementation phase — in which investigators undertake technical data gathering and analysis — from the initial mandate-drafting phase — in which political actors agree to create an MRF mission and decide on the mission’s broad contours. By compartmentalizing a mission’s technical and political aspects, MRF actors can increase the chances of leading an objective, accurate data gathering process that is likely to be perceived by relevant actors as legitimate.

But MRF practitioners have struggled to operationalize these guiding principles since the beginning of modern MRF history. In 1914, the Government of Greece harshly criticized the Carnegie Endowment’s 1913 Balkan mission for failing to collect and analyze information in an impartial manner.[6] And almost a century later, contemporary MRF missions often evoke similar responses. For example, critics of the United Nations Fact-finding Mission on the Gaza Conflict (commonly known as the Goldstone Commission) have argued that the one-sided nature of the mission’s original mandate, the composition of the mission, and the commissioners’ legal analysis reflect bias and delegitimize the mission’s conclusions.[7]

THE PATH FORWARD

So how might the MRF community rise above its current fragmented state and work to surmount these challenges? First, more research is necessary. Though many MRF actors have written about challenges encountered on particular MRF missions,[8] little comparative analysis of MRF mechanisms exists. A holistic examination of the world of MRF that draws connections between different MRF mechanism types would help MRF actors better understand the common dilemmas that past MRF actors have faced.

Second, MRF actors would benefit from authoritative methodological standards. The Office of the High Commissioner for Human Rights (OHCHR) has a methodology unit that periodically assesses experiences of past missions, but OHCHR has not made the resulting

guidelines public. A process that draws on OHCHR's experience and focuses specifically on developing standards for MRF actors operating at regional and national levels — a burgeoning trend, as evidenced, for example, by the Arab League monitoring mission in Syria and the Bahrain Independent Commission of Inquiry, both implemented in response to Arab Spring uprisings — could bolster the effectiveness of the MRF community as a whole. Providing technical implementers with comprehensive guidance on interpreting mandates, establishing investigation methodologies, and making staffing decisions could build on MRF's guiding principles to help ensure that political considerations do not unnecessarily affect these technical decisions.

Third, building a community of practice would help MRF practitioners continue to develop their professional skills. Currently, MRF actors lack a forum to share information with one another, and — though organizations such as the International Institute for Criminal Investigations and Justice Rapid Response are committed to training investigators — no training opportunities exist for MRF actors operating on the commissioner level. This gap in available MRF training is particularly troublesome given the importance of commissioner decision-making and the lack of time — due to the rapid nature of MRF implementation — for on-the-job training.

The dilemmas the MRF community faces are not new. Indeed, these challenges have existed since the Carnegie Endowment heralded the modern age of MRF almost a hundred years ago. But as demonstrated by the pervasive MRF activity of recent years, the international community's reliance on MRF continues to increase. And as MRF's importance magnifies, as does the severity of leaving MRF's key dilemmas unaddressed.

[1] For the full report, see Carnegie Endowment for International Peace, "Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars," 1914, available at <http://archive.org/stream/reportofinternat00inteuoft#page/n0/mode/2up>

[2] "Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-

2/1," A/HRC/3/2, p. 3.

[3] Ibid.

[4] Theo Boutruche, "Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice," 16 *Journal of Conflict and Security Law* No. 1, 120 (2011).

[5] Ibid., p. 113.

[6] “Greeks Denounce Carnegie Board,” The New York Times, June 8, 1914 (<http://query.nytimes.com/>

<http://query.nytimes.com/mem/archive-.-free/pdf?res=F00610F73C5412738DDDA10894DE405B848DF1D3>).

[7] See, for example, “MFA briefing to the foreign press on the Goldstone Report,” October 1, 2009, available at <http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2009/MF...> and Robert O. Freedman, “A Biased War Report: U.N. Human rights Council’s Gaza Study Was Destined To Unfairly Criticize Israel,” The Baltimore Sun, October 20, 2009 (http://articles.baltimoresun.com/2009-10-20/news/0910190045_1_human-righ...).

[8] See, for example, Michael P. Scharf, “Cherif Bassiouni and the 780 Commission: The Gateway to the Era of Accountability,” An Occasional Paper of the Frederick K. Cox International Law Center, 2006; and Arthur Lenk, “Fact-Finding as a Peace Negotiation Tool – The Mitchell Report and the Israeli-Palestinian Peace Process,” 24 *Loyola Los Angeles International & Comparative Law Review* Rev. 289 (2002).