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Protection of Witnesses, Victims, and Staff in Monitoring, Reporting, and Fact-finding Mechanisms

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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

Recent decades have seen a proliferation of inquiry missions, investigations, and other processes aimed at ensuring the documentation of and accountability for international human rights violations, war crimes, and other violations of international law. This trend has resulted from many factors, including the globalization of information, the emergence of the “responsibility to protect” concept, and the creation of the International Criminal Court (ICC). The end of the Cold War has also allowed the United Nations (UN) and humanitarian agencies to spread their reach. These various inquiry processes are largely *ad hoc*. Their mandates, timeframes, and practices differ. Professionals in the field observe a lack of consistency in the processes of establishing such missions, as well as the absence of standard operating procedures.¹

The Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR) has identified a number of topics for research in relation to this identified gap.² One of these areas concerns the protection of victims, witnesses and staff cooperating with inquiries and investigations. The paradox underlying the issue of protection is that, while statements from witnesses and victims account for the predominant evidence when investigating human rights violations, the very fact that victims and witnesses decide to come forward and contribute to the establishment of the truth — in view of facilitating justice for, and preventing, human rights violations — can put these individuals at risk. Courts and other investigative bodies cannot afford to increase the exposure to danger of the individuals who have already suffered human rights violations — or the witnesses of these incidents — when the objective is to stop these violations and/or provide redress. “Victims of oppression want protection more than anything else,” underlines a practitioner.³

This challenge is multiplied in the context of MRF missions, which often take place in locations where the perpetrators of violations either formally remain in power or have a proven nuisance capacity, and where, in the absence of cooperation from the authorities, statements from witnesses and victims provide for the core body of

¹ Cherif Bassiouni, “Appraising UN Justice-Related Fact-Finding Missions,” 5 *Washington University Journal of Law & Policy* No. 35, 40 (2001).

² These topics include mandate interpretation; the selection and application of legal lenses; protection of witnesses, victims, and staff; standards of proof; public communication and report drafting; and recommendations and follow-up measures.

³ Robert Elias, quoted in Sluiter, Göran, “The ICTR and the Protection of Witnesses,” 3 *Journal of International Criminal Justice* No. 4, 962 (2005).

evidence. In these often-volatile contexts, security risks also arise for staff members of MRF missions participating in on-the-ground operations.

This paper examines how past MRF missions have grappled with these risks. The paper is based on a study of fifteen missions:

- 1) International Commission of Inquiry on Libya (hereafter the Libya Commission) Bahrain Independent Commission of Inquiry (hereafter the Bahrain Commission) The Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (hereafter the Flotilla Panel)
- 2) Independent, International Commission of Inquiry on d'Ivoire (hereafter the Côte d'Ivoire Commission)
- 3) Kyrgyzstan Inquiry Commission (hereafter the Kyrgyzstan Commission)
- 4) The Secretary-General's Panel of Experts on Accountability in Sri Lanka (hereafter the Sri Lanka Panel)
- 5) 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 (hereafter the Flotilla Fact-finding Mission)
- 6) Mapping Exercise of Serious Violations Committed Between 1993 and 2003 in the Democratic Republic of the Congo (hereafter the DRC Mapping Exercise)
- 7) International Commission of Inquiry for Guinea (hereafter the Guinea Commission) Independent International Fact-Finding Mission on the Conflict in Georgia (hereafter the Georgia Fact-finding Mission)
- 8) United Nations Fact Finding Mission on the Gaza Conflict (hereafter the Gaza Fact-finding Mission)
- 9) High-Level Fact-Finding Mission to Beit Hanoun Established Under Resolution S- 3/1 (hereafter the Beit Hanoun Fact-finding Mission)
- 10) Commission of Inquiry on Lebanon (hereafter the Lebanon Commission)
- 11) Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste (hereafter the East Timor Commission)
- 12) International Commission of Inquiry for Darfur (hereafter the Darfur Commission)⁴

A desk review of the mandates and reports for these fifteen missions was undertaken, and based on certain issue areas identified, interviews were conducted with several practitioners associated with these missions. Among several aspects of interest

⁴ See the Annex of this paper for more information about each of these missions.

regarding MRF missions, issues examined include what the risks are, in terms of protection, for witnesses, victims, and MRF staff; what measures can be taken to mitigate these risks; the possibilities and potential needs for standards regarding witness and victim protection, and also for staff and members of these missions; and areas for which methodological approaches could benefit from improvement.

This paper proceeds in three sections. Section I focuses on protection of witnesses and victims. The section examines, first, the sources of the obligations to protect witnesses and victims, second, the nature of the threats that have and could arise, and third, the measures that have been adopted by the fifteen MRF missions that constitute this paper's focus. Section II addresses the protection of staff, focusing — as with Section I — on the sources of responsibility to protect staff, the threats that exist, and protective measures that have been adopted. Section III, based on the very rich body of experiences ascertained through the desk review of MRF reports and interviews with practitioners conducted for this study, suggests ways forward. Specifically, this section identifies issues for which consensus has emerged among practitioners and also highlights areas for which some level of divergence remains in the methodologies and practices employed by different missions.

I. PROTECTION OF WITNESSES AND VICTIMS

A. Sources of the responsibility to protect witnesses and victims

This section will look into the sources of responsibility regarding witness protection. As enshrined in numerous treaties, UN resolutions, and certain soft law international or regional instruments, a general obligation exists for states to protect victims while investigating and prosecuting human rights violations. In national and international judicial processes, this responsibility falls within the statutes of courts and tribunals. For MRF missions, this responsibility is rooted in a variety of sources. While sometimes MRF mandates address protection, this sense of responsibility also emanates from other areas, such as general norms of professional behavior and personal senses of responsibility held by certain practitioners.

1) Mandates and Terms of Reference

The majority of the mandates and Terms of Reference for the fifteen missions on which this paper is based make no reference at all to the mission's responsibility to protect victims and witnesses. Meanwhile, the mandates and Terms of Reference for seven of the fifteen missions do make some reference to protecting witnesses and victims. Table 1 presents the relevant portions of these documents that detail the responsibilities of the mission — as well as other actors, such as relevant governments — to ensure the protection of witnesses and victims. In Annex 1 of this paper, a complete table includes additional information about the missions' mandates and reports.

**Table 1: References to witness/victim protection in mandates,
terms of reference, and reports for monitoring, reporting, and fact-finding missions**

Mission	Mandate/ Terms of Reference mentions witness/victim protection?	Report mentions witness/victim protection?
Libya Commission	No	Yes
Bahrain Commission	<p>“In connection with its work, which the Commission will determine on its own and without any interference by the government, the Commission will be able to meet with alleged victims and witnesses of alleged violations in secrecy and in accordance with measures that it shall develop to protect the privacy and security of individuals it meets with, in line with international human rights norms.” (Royal Order 28 of 2011, Article Five)</p> <p>“The Commission shall have the authority to decide on all matters concerning the scope of its work and its methods of operation. The government shall ensure that no person or member of that person’s family who has made contact with the Commission or cooperated with the Commission shall in any way be penalized, negatively affected or in any way harassed or embarrassed by any public official or representative of the government.” (Royal Order 28 of 2011, Article Seven)</p>	Yes
Flotilla Panel	No	No
Côte d'Ivoire Commission	No	No

Kyrgyzstan Commission	<p>“In accordance with the laws of the Kyrgyz Republic, [the Government of Kyrgyzstan] shall, in particular, guarantee to the Commission: (...) [p]rotection for all those who appear before or provide information to the Commission in connection with the inquiry; no such person shall, as a result of such appearance or information, suffer harassment, threats of intimidation, ill-treatment, reprisals, or any other prejudicial treatment (...).”</p> <p>(Terms of Reference, as cited in the mission’s final report, p. 2)</p>	Yes
Sri Lanka Panel	No	Yes
Flotilla Fact-finding Mission	<p>“Protection should be guaranteed of victims and witnesses and all those who are in contact with the Mission in connection with the inquiry. No such person shall, as a result of such contact, suffer harassment, threats, acts of intimidation, ill-treatment or reprisals.”</p> <p>(Terms of Reference, para. 7(g))⁵</p>	Yes

⁵ This case is a self-given Terms of Reference adopted by the mission based on interpretation of the succinct United Nations Human Rights Council mandate.

DRC Mapping Exercise	<p>“The Mapping Team should be able to meet and interview individuals in conditions of privacy and confidentiality, where necessary. It will be essential that the minimal security conditions exist for the investigations to be carried out. With regard to the protection of witnesses — including the protection of their confidentiality — in cases that may arise as a direct result of the work of the Mapping Team, MONUC will endeavour to provide support within the limited scope of its current efforts in this area. The authorities of Democratic Republic of the Congo and all relevant national actors should undertake to facilitate the work of the Mapping Team and, in collaboration with MONUC, to guarantee the protection against reprisal/persecution of all persons and organizations that will have contact with the Mapping Team.” (Terms of Reference, para. 3.2)</p> <p>“Sensitive information gathered during the mapping exercise should be stored and utilized according to the strictest standards of confidentiality. The team should develop a database for the purposes of the mapping exercise, access to which should be determined by the High Commissioner for Human Rights.” (Terms of Reference, para. 4.3)</p> <p>“The Mapping Team should devise a strategy concerning the tracing of witnesses. Consent of witnesses to the sharing with MONUC and transitional justice bodies of information provided by them must be sought.” (Terms of Reference, para. 4.5)</p>	Yes
Guinea Commission	No	Yes
Georgia Fact-finding Mission	No	No
Gaza Fact-finding Mission	No	Yes

Beit Hanoun Fact-finding Mission	No	No
Lebanon Commission	<p>“In order to enable the Commission to discharge its mandate, the following facilities should in particular be provided: (...) [p]rotection of victims and witnesses and all those who are in contact with the Commission in connection with the inquiry; no such person shall, as a result of such contact, suffer harassment, threats, acts of intimidation, ill-treatment or reprisals.” (Terms of Reference, para. 6)</p>	Yes
East Timor Commission	<p>“The terms of reference make clear that the Commission would enjoy the full cooperation of the Government of Timor-Leste and would be provided with the necessary facilities to enable it to discharge its mandate. In particular, the Commission was to be guaranteed: “[p]rotection of victims and witnesses and all those who were in contact with the Commission in connection with the inquiry, including the assurance that no such person would, as a result of such contact, suffer harassment, threats, acts of intimidation, ill-treatment or reprisals (...).” (Terms of Reference, as cited in the mission’s final report, p. 11)</p>	Yes
Darfur Commission	No	Yes

As the above information details, mandates often make no mention of protection, and references to protection, when made in mandates and Terms of Reference, tend to be fairly broad. Regardless, practitioners still perceive a sense of responsibility regarding protection. For example, though — as noted above — the Darfur Commission mandate makes no mention of protection, the mission elaborated the need for specific protective measures. The Commission's report states:

[The Commission] set forth the following criteria for evaluating the degree of cooperation of both the Government and the rebels: (...) (iii) free access to all sources of information, including documentary material and physical evidence; (iv) appropriate security arrangements for the personnel and documents of the Commission; (v) protection of victims and witnesses and all those who appear before the Commission in connection with the inquiry and, in particular, guarantee that no such person would, as a result of such appearance, suffer harassment, threats, acts of intimidation, ill-treatment and reprisals; and (vi) privileges, immunities and facilities necessary for the independent conduct of the inquiry. A letter was sent to the Government outlining these criteria.⁶

Similarly, though the mandate for the Sri Lanka Panel made no mention of protection, this mission adopted extensive protective measures, and in contrast, the report laments the absence of sufficient witness protection in the local inquiry mechanism, the Lessons Learnt and Reconciliation Commission. The report states:

Accountability mechanisms exist, in large measure, to serve victims and should put them at the centre of the process. To this end, international standards provide that victims and witnesses should generally only be called upon to testify on a 'strictly voluntary' basis; social work and mental health practitioners should be permitted to help victims both before and after testimony; and 'expenses incurred by those giving testimony shall be borne by the State.'⁷

This trend — according to which practitioners express the importance of protection regardless of the extent to which the mission's mandate references protection — suggests that practitioners derive this protective responsibility from sources beyond the mandate. This more general sense of normative responsibility, and the professional and legal origins of these notions, will be examined in detail below.

⁶ "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General," 2005, p. 14.

⁷ "Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka," 31 March 2011, p. 105.

2) Professional responsibility

The sense of obligation to protect witnesses and victims is evidently grounded primarily in notions of professional responsibility held by the MRF mission members and investigators. The United Nations High Commissioner for Human Rights has referred to the professional experience and skills of deployed personnel:

The human rights officer considers **whom** to interview, and in **what language**, **who** will **translate**, **where** the interview should be held in order to protect the security of the witness, **how** the interview should be **recorded** so as to protect the **security** of the information, **what** the interviewer needs to **know** before the interview, **how** to deal with **cultural differences** which inhibit communication.⁸

This professional responsibility is encapsulated by the “do no harm” imperative, which offers a broad dictum that guides practices and approaches. Statements from MRF practitioners confirm the sense that a responsible approach to protection is a key aspect of professional behavior in this field. One practitioner offers a comment that suggests the professional responsibilities that investigators bring to bear: “We were all very experienced human rights investigators. The issue of witness protection came up on day one.”⁹

In some cases, even though protection procedures have not been systematized mission-wide, it has evidently been assumed that investigators would apply appropriate measures. One practitioner stated, “I didn’t receive specific training. I think they relied on the fact that I had worked at the UN before and had security training.”¹⁰ Though “there were no formal guidelines,” there was “a common understanding that I would apply security procedures.”¹¹ Additionally, as another practitioner notes, “The quality

⁸ “Human Rights Investigations and their Methodology: Lecture by Ms. Navanethem Pillay United Nations High Commissioner for Human Rights,” February 24, 2010, available at <http://unispal.un.org/UNISPAL.NSF/0/C9222F058467E6F6852576D500574710> (accessed June 5, 2013).

⁹ Confidential HPCR interview conducted via telephone in Summer 2013 with a high-level MRF practitioner, name of interviewee on file.

¹⁰ HPCR interview conducted via telephone on 8/13/13 with Théo Boutruche - IHL/Human Rights Expert, Georgia Fact-finding Mission.

¹¹ Ibid.

of the people have the biggest impact on the security of the witnesses,”¹² further highlighting the link between the professional experience of MRF investigators and an MRF mission’s protective capacities.

3) Treaties, United Nations resolutions, protocols, and guidelines

The professional sense of responsibility examined in the previous section likely arises in part from the legal architecture of investigative mechanisms. For example, the report for the Gaza Fact-finding Mission defines the legal framework for witness protection, though of the fifteen missions on which this paper focuses, this report is the only one to do so. The report states:

In the implementation of its mandate the Mission has called for the protections that are required under the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, better known as the Declaration on Human Rights Defenders, to be accorded to all who gave testimony at the public hearings. The Mission also was guided by Commission on Human Rights resolution 2005/9 which “urges Governments to refrain from all acts of intimidation or reprisal against (a) those who seek to cooperate or have cooperated with representatives of United Nations human rights bodies, or who have provided testimony or information to them.”¹³

The Beit Hanoun Fact-finding Mission report shares a definition of victims derived from an international instrument, underscoring that such sources sometimes play a direct role in shaping practitioners’ perceptions of the relationship between MRF missions and the victims of the incidents that MRF missions investigate:

In identifying victims, the mission was guided by the definition of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.¹⁴ The victims of the shelling are persons who individually or collectively suffered harm, including physical or mental

¹² HPCR interview conducted via telephone on 7-26-13 with Philip Trewhitt - Investigation Team Leader, Commission of Inquiry on Libya.

¹³ “Report of the United Nations Fact Finding Mission on the Gaza Conflict,” A/HRC/12/48, 15 September 2009, p. 43.

¹⁴ United Nations General Assembly resolution 60/147, para. 8.

injury, emotional suffering, economic loss or substantial impairment of their fundamental rights as a result of the shelling; they include the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.¹⁵

In addition to shaping conceptions of what constitutes a ‘victim,’ the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted in 2005 by the United Nations General Assembly, also establishes a clear responsibility of states to protect victims of human rights violations while investigating and prosecuting these violations. A wide range of international and regional instruments establish this obligation of states and no doubt shape the environment in which MRF practitioners’ normative notions of protection obligations arise. International legal sources include core human rights treaties, including, for example, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which in Article 13 states:

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.¹⁶

¹⁵ “Report Of The High-Level Fact-Finding Mission To Beit Hanoun Established Under Resolution S-3/1,” A/HRC/5/20, 18 June 2007, pp.13-14. For reference, the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” offer the following definition of a victim: “For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. (...) A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.”

¹⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

Regional texts include a number of provisions in various instruments of the European Union, such as the Council of Europe Recommendation (97) 13 on the Intimidation of Witnesses and the Rights of the Accused; the Council of Europe Recommendation (2005) 9 on the Protection of Witnesses and the Collaborators of Justice, which notably lists criteria in view of benefitting of a witness protection program;¹⁷ and the European Council Framework decision of 15/03/2001, which in Article 8 stipulates:

(...) each member State shall ensure a suitable level of protection for victims and, where appropriate, their families or persons in a similar position, particularly as regards their safety and protection of their privacy, where the competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy.¹⁸

Interestingly, the European Union instruments assume that protective measures are taken to protect witnesses against the acts of private actors (such as organized crime) but not of states themselves.¹⁹

In Africa, the Robben Island Guidelines confer the states' responsibilities for the protection of victims — and witnesses — of torture. The document obliges states to:

Punishment, Article 13.

¹⁷ These criteria include: "involvement of the person to be protected (as a victim, witness, co-perpetrator or accomplice) in the investigation and/or in the case;" "relevance of the contribution;" "seriousness of the intimidation;" "willingness and suitability to being subject to protection measures or programs;" "assessment whether there is no other evidence available that could be deemed sufficient to establish a case related to serious offense;" "and proportionality between the nature of the protection measures and the seriousness of the intimidation of the person concerned."

¹⁸ Gert Vermeulen, ed., EU Standards in Witness Protection and Collaboration with Justice (Ghent: Institute for International Research on Criminal Policy, 2004), 35.

¹⁹ For example, the preamble for Council of Europe Recommendation (97) 13 on the Intimidation of Witnesses and the Rights of the Accused notes "that there is growing recognition of the special role of witnesses in criminal proceedings and that their evidence is often crucial to securing the conviction of offenders, especially in respect of organised crime and crime in the family," and the preamble for Council of Europe Recommendation (2005) 9 on the Protection of Witnesses and the Collaborators of Justice "[c]onsider[s] that in some areas of criminality, such as organised crime and terrorism, there is an increasing risk that witnesses will be subjected to intimidation (...)."

Ensure that alleged victims of torture, cruel, inhuman and degrading treatment or punishment, witnesses, those conducting the investigation, other human rights defenders and families are protected from violence, threats of violence or any other form of intimidation or reprisal that may arise pursuant to the report or investigation.²⁰

The guidelines also offer this clarification concerning the definition of victims:

From the point of view of the Robben Island Guidelines, the concept of “victim” includes the family and communities affected by the torture and/or ill-treatment inflicted on one of its members.

It is also crucial that the victim be protected from any further victimization and other forms of reprisals. Witnesses should also be fully protected.²¹

Several practitioners interviewed as part of the research for this paper also noted several specific guidelines and protocols that have guided professional practice relating to protection. Practitioners have mentioned referring, during implementation, to the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Istanbul Protocol”);²² the Minnesota Protocol for a Legal Investigation of Extra-Legal, Arbitrary and Summary Executions;²³ and the Lund-London Guidelines.²⁴

²⁰ Jean-Baptiste Niyizurugero and Patrick Lessène, “The Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa: Practical Guide for Implementation,” APT/ACHPR/OHCHR, Addis Ababa, 2008, p. 73.

²¹ Ibid., at p. 68.

²² The “Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” (“Istanbul Protocol”) focuses on investigating and documenting torture and other cruel and inhuman treatments. It refers to ethical codes relating to health practitioners in its sections 56-65 but also provides specific guidance concerning the protection of witnesses by commissions of inquiry in its sections 107-119. The text is available at <http://www.refworld.org/docid/4638aca62.html> (accessed January 17, 2014).

²³ See “Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions,” available at <http://www.theadvocatesforhumanrights.org/4Jun20046.html#III> (accessed January 17, 2014). The protocol provides as a general measure in its Article 4(c) that: “Witnesses should be interviewed individually, and assurance should be given that any possible means of protecting their safety before, during and after the proceedings will be used, if necessary.” In a section focusing on commissions of inquiry, the protocol recommends a set of procedures, including

Additionally, a recent initiative led by the International Institute of Higher Studies in Criminal Sciences has produced the Siracusa Guidelines for International, Regional and National Fact-finding Bodies, intended to serve as “a practical guide for establishing and operating a fact-finding body investigating human rights violations.”²⁵ The document presents a wide array of guidelines on the design and implementation of, and follow-up to, fact-finding bodies, focusing specifically on protection in certain provisions, as will be addressed in greater detail later in this paper. These guidelines — along with the numerous treaties, international and regional instruments, protocols, and other guidelines mentioned above — constitute a body of material that will likely continue to shape MRF practitioners’ perceptions of the protection responsibilities that exist during an MRF mission’s implementation.

4) Statutes and practices of international courts and tribunals

MRF missions stand in counterpoint to international criminal courts and tribunals. On the one hand, practitioners in both contexts feel bound by a common normative responsibility for protection. On the other hand, in MRF missions, practitioners must operate with a more limited institutional, administrative, and logistical capacity. Therefore, though MRF missions lack the capacity to provide the same level of protective measures as international criminal courts and tribunals, these more formal investigations provide a certain reference point that might inform how MRF practitioners can strike a balance between fulfilling professionals’ normative protective responsibilities and operating realistically within the logistical confines of limited MRF capacity.

MRF missions, as well as courts and tribunals, share the quality that, without witnesses, there would be little on which to base legal findings. Hence, in order to function

measures concerning witness protection: “9. Protection of witnesses; (a) The Government shall protect complainants, witnesses, those conducting the investigation, and their families from violence, threats of violence or any other form of intimidation; (b) If the commission concludes that there is a reasonable fear of persecution, harassment, or harm to any witness or prospective witness, the commission may find it advisable: (i) To hear the evidence in camera; (ii) To keep the identity of the informant or witness confidential; (iii) To use only such evidence as will not present a risk of identifying the witness; (iv) To take any other appropriate measures.”

²⁴ See “Guidelines on International Human Rights Fact-finding Visits and Reports (The Lund-London Guidelines),” Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University and the International Bar Association, available at <http://www.factfindingguidelines.org/guidelines.html> (accessed January 17, 2014).

²⁵ M. Cherif Bassiouni and Christina Abraham, eds., Siracusa Guidelines for International, Regional and National Fact-finding Bodies, (Cambridge: Intersentia, 2013).

effectively, courts and MRF missions need to protect their sources. United Nations High Commissioner for Human Rights Navi Pillay, who also served as a judge on the International Criminal Tribunal for Rwanda, and for several years as the Tribunal's president, eloquently summarized this challenge:

The whole capacity of a country to render justice to the victims and end impunity regarding past and current abuses could come into question if the justice system is unable to secure convictions because of failures in the production of witness evidence.²⁶

This dilemma has also been referenced in publications from a wide array of organizations, including the Office of the High Commissioner for Human Rights (OHCHR),²⁷ the Organization for Security and Co-operation in Europe,²⁸ and Human Rights Watch.²⁹

²⁶ "Witness Protection in Kosovo," OHCHR, May 8, 2012, available at <http://www.ohchr.org/EN/NewsEvents/Pages/WitnessProtectionInKosovo.aspx> (accessed January 17, 2014).

²⁷ "Human Rights Investigations and their Methodology: Lecture by Ms. Navanethem Pillay United Nations High Commissioner for Human Rights," February 24, 2010, available at <http://unispal.un.org/UNISPAL.NSF/0/C9222F058467E6F6852576D500574710> (accessed January 17, 2014).

²⁸ Valery Perry, the acting program director of the Organization for Security and Co-operation in Europe Mission to Bosnia and Herzegovina has stated: "Witness testimony is the lynchpin of successful prosecutions in war crimes cases, but not enough is being done to ensure that trials take place without violating the rights of victims (...). These failures are jeopardising the right to life, security and privacy of witnesses, and can have particularly devastating effects on those who are also the victims in these cases." See Velma Šarić, "Bosnian Witness Protection Rapped," Institute for War & Peace Reporting, June 1, 2010, available at <http://iwpr.net/report-news/bosnian-witness-protection-rapped> (accessed September 15, 2009).

²⁹ See "Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro," Human Rights Watch, October 2004, available at <http://www.hrw.org/reports/2004/icty1004/7.htm> (accessed January 17, 2014). This publication states that "(t)he successful prosecution of war crimes cases depends on the availability of credible witnesses, which in turn requires that witnesses are confident that they can testify truthfully without fear of retribution. Achieving accountability through national war crimes trials, therefore, requires measures to protect witnesses prior to, during, and after trials. In some cases, effective witness protection requires a long-term witness protection program or resettlement in another country."

Because of this challenge, protection is a mainstay in the operations of international courts and tribunals. For example, the statute for the ICC articulates a broad perspective on the court's protective responsibilities:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes.³⁰

This article is more developed than similar provisions of certain international tribunals, such as Article 22 of the International Criminal Tribunal for Former Yugoslavia (ICTY) statute³¹ or Articles 19.1 and 21 of the International Criminal Tribunal for Rwanda (ICTR).³² While all provide for the protection of witnesses, the ICC statute, which has built on the experience of its predecessors, includes the specificity of victims and witnesses of sexual or gender-based violence in the general provisions. The ICC statute further specifies in Article 43.6:

The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall

³⁰ Rome Statute of the International Criminal Court, Article 68.1.

³¹ Article 22 of the ICTY Statute states: "The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity."

³² Article 19.1 of the ICTR statute states: "The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses," and Article 21 states: "The International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity."

include staff with expertise in trauma, including trauma related to crimes of sexual violence.³³

Article 54.1(b) further provides that the Prosecutor shall:

Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.³⁴

A similar provision is found under the ICTY statute,³⁵ and also in the statute for the Special Court for Sierra Leone (SCSL).³⁶ In an article comparing the statutes and practice of international tribunals with regards to the protection of victims of rape, Sylvia Pieslak suggests that the ICC has more comprehensive and more effective mechanisms than both the ICTY and the ICTR. She explains:

³³ Rome Statute of the International Criminal Court, Article 43.6.

³⁴ Ibid., at Article 54.1(b).

³⁵ See generally "Introductory Remarks by Navanethem Pillay at the OHCHR Expert meeting on witness protection for successful investigation and prosecution of gross human rights violations and international crimes," September 29, 2009, available at <http://www.unhchr.ch/hurricane/hurricane.nsf/0/E5E9ACC8131CFA5AC1257643004ED6F0?openDocument> (accessed January 17, 2014). As the High Commissioner noted in her remarks: "ICTY Rule 34 set up a Victims and Witnesses Support Unit under the authority of the Registrar to: (i) recommend the adoption of protective measures for victims and witnesses, (ii) ensure that they receive relevant support, including physical and psychological rehabilitation, especially counseling in cases of rape and sexual assault; and (iii) develop short term and long term plans for their protection in the face of a threat to their life, property or family. The ICTR also created a Witness and Victims Support Section pursuant to the Tribunal's Statute and Rules of Procedure and Evidence, under the authority of the Registrar."

³⁶ Article 16, para. 4 of the statute of the SCSL states, "The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children."

Article 36 not only mandates an equal representation of female and male, but it also states that the court will include judges with legal expertise in areas such as violence against women. Article 54 compels the Prosecutor to consider the nature of violent crimes against women, when rendering decisions. Article 42 states that the Prosecutor will recruit expert advisers in issues such as sexual violence. Lastly, Articles 43 and 68 address female witness/victim protection services. While Article 68 requires the court to take measures necessary to protect the dignity and privacy of sex crime victims, Article 43 creates the Victims and Witnesses Unit in the Registry, requiring that the Unit have experts in trauma such as that resulting from sexually violent crimes.³⁷

These provisions have had a direct consequence on the conduct of the prosecution with regards to the way witnesses have been handled, especially when witness testimony concerns sexual and gender-based violence:

Other additional witness protection provisions directed at women include Rules 18 and 19 that ensure training of the Victims and Witness Unit staff regarding matters related to gender and may include experts in “gender and cultural diversity.” With respect to evidentiary provisions, Rule 63 states that the court will not require corroboration in sexual violence cases. Rule 70 defines the nature of consent in rape prosecutions, in order to protect women and also stipulates that the court may not use prior sexual conduct. Additionally, Rule 71 states that the court will not admit evidence of prior or subsequent sexual conduct. Under Section III: Witness and Victims of the ICC Rules of Procedure and Evidence, Rule 86 requires the court to take into account the needs of sexual or gender violence victims in their decisions. Under rule 88, the court states that the court must pay attention to the views of victims, so as to order measures that might facilitate the testimony of a sexual violence victim. Thus, both the ICC Statute and the Rules of Procedure and Evidence include provisions that will allow for the effective prosecution of sexual violence crimes against women. The court might then bring those perpetrators of sexual violence crimes against women to justice.

The court has crafted provisions, both specifically and generally, for the protection of female victims, when they act as witnesses in their own trials. These

³⁷ Sylvia Pieslak, “The International Criminal Court’s Quest to Protect Rape Victims of Armed Conflict: Anonymity as the Solution,” 2 *Santa Clara Journal of International Law* Issue 1, 145-146 (2004).

witness protection provisions are essential not only because without them a large number of female rape victims would not testify because of social norms that place shame on these women, but also because there are not enough measures to protect the witness from physical threats and from societal contempt. Therefore, the ICC has crafted several provisions that protect women during the trial process.³⁸

Another category of victims and witnesses that is treated with special care is people facing risks of re-traumatization because of the need to remember painful memories — which sometimes re-opens unhealed wounds — for the benefit of the prosecution. A report on a seminar held in 2010 to examine the ICC’s witness protection efforts suggests the importance of conducting a prior assessment of the psychological vulnerability of the witnesses:

To avoid potential harm where the risk is identified, the OTP established the practice of conducting a preliminary psychological assessment (i.e. prior to the investigative interview). Furthermore, OTP investigators have received training on how to identify vulnerable witnesses. It was also reported that an examination of the investigators compliance to these practices is carried out afterwards. As soon as any relevant issue is detected, the OTP informs the VWU which may then take the appropriate measures.³⁹

Similarly, a report documenting the SCSL “Best Practices” also notes the importance of discerning which witnesses are likely to be at risk for re-traumatization. The document states as a recommendation:

Distinguish between those witnesses whose accounts involve particularly traumatic events and those whose do not, since the former group are likely to find the whole statement-taking process considerably more difficult, and use specialist interviewing techniques to assist a witness who is struggling with painful feelings, having problems recalling the details of an event, or otherwise

³⁸ Ibid.

³⁹ “Summary Report on the Seminar on Protection of the Victims and Witnesses Appearing Before the International Criminal Court,” November 24, 2010, para. 21, available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/protection/Pages/victims%20and%20witnesses%20protection.aspx (accessed January 17, 2014).

finding the process difficult.⁴⁰

As with the ICC, the ICTY, and the ICTR, for the SCSL, these protective responsibilities derive from the Court's mandate. The statute for the SCSL includes witness protection in Article 16, paragraph 4, which states:

The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.⁴¹

Rule 34 of the SCSL's Rules of Procedure and Evidence elaborates on the activities of the Victims and Witnesses Unit,⁴² and as noted in the aforementioned "Best Practices" report, some witnesses for the court have been taken into "total protective care," which includes housing for the witness and his/her family in a safe house; 24-hour guard from a close protection officer (case-dependent); provision of a financial subsistence allowance; medical cover; schooling for any minors or dependents of the witness; temporary provision of a mobile phone (case-dependent), and post-testimony relocation either within Sierra Leone, or the West Africa region.⁴³

Based on the practices and statutes of various international courts and tribunals this paper refers to, the following list summarizes the various measures offered as part of witness protection programs, and which include but are not limited to:

- Security Risk Assessment and Individual Risk Assessment
- 24/7 emergency call and response system
- The protection of the witness' identity, including by the conduct of in-camera proceedings

⁴⁰ "Best-Practice Recommendations for the Protection & Support of Witnesses," Special Court for Sierra Leone, 2008, p. 13, available at <http://www.scsl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3D&tabid=176> (accessed January 17, 2014).

⁴¹ SCSL statute, Article 16, paragraph 4, available at <http://www.scsl.org/LinkClick.aspx?fileticket=uClnD1MJeEw%3D&> (accessed January 17, 2014).

⁴² Rule 34 of the SCSL is available here: <http://www.scsl.org/LinkClick.aspx?fileticket=1YNrqhd4L5s%3D&tabid=70> (accessed January 17, 2014).

⁴³ SCSL Best Practices Recommendations, *supra* note 40, at 6.

- Controlling the questioning of a witness to avoid harassment and intimidation
- No requirement for corroboration for crimes of sexual violence
- The prosecutor may withhold evidence that is dangerous for specific witnesses, and instead submit a summary of the contents
- Counseling
- Housing of the witness and family in a safe house
- Post-testimony relocation, in country or abroad
- Assessment of situation of victims at risk of re-traumatization

MRF missions typically cannot adopt such extensive measures, due to the very nature and design of these mechanisms. One practitioner pointedly remarks on the differences between MRF missions on the one hand, and courts and tribunals on the other hand, regarding protection: “I don’t think you can use the term witness protection for a commission of inquiry because we don’t have witnesses.”⁴⁴ Factors that distinguish MRF missions from courts and tribunals in this regard include:

- Nature of work: while most international courts entail an adversarial process, thus sometimes creating conflicting obligations of ensuring witness protection and due process (rights of the defense), MRF missions work confidentially and do not share interviewee statements with suspects.
- Duration: while courts and tribunals are either permanent or work for a number of years, MRF missions are *ad hoc* by nature, and rarely exceed a few months.
- Location: MRF missions are usually (when granted territorial access) conducted in the location where the crimes were allegedly perpetrated, which exposes the witnesses and victims but also the staff to greater risks, as the perpetrators might still be on site. Though certain aspects of the operations of courts and tribunals (such as initial investigations of prosecutors) also have this quality, formal proceedings usually occur elsewhere.
- Capacities: while courts will rely on a body of well-established professionals with a recognized technical expertise (judge, prosecutor etc.), MRF missions resort to a varying range of professionals and skills, due to the difficulty of assembling qualified staff on short notice. Budget-wise, there is also a higher

⁴⁴ HPCR interview conducted via telephone on 8-8-2013 with Sareta Ashraph - Legal Advisor, Commission of Inquiry on Libya and Gaza Fact-finding Mission.

- constraint on MRF missions, which usually lack the capacities of funding a full-scale witness protection program.
- Nature of the mandate: the mandates of MRF missions sometimes encompass broader aspects, such as reconciliation, and do not always focus solely on the establishment of truth, sometimes prioritizing other dimensions, such as diplomatic and political considerations.

Given the various factors mentioned above, how do MRF missions meet the challenges of protection while lacking the resources and procedures available to courts and tribunals? One practitioner states: “There is very little that you can provide to interviewees in terms of real witness protection as an organization, which does not mean that there’s nothing to do. What you can provide them is an ethic of work that will not compromise their safety.”⁴⁵ Though, as another practitioner states, regardless of the extensiveness of a certain entity’s protective capacities, the common conundrum facing both MRF practitioners and professionals associated with courts and tribunals is: “It doesn’t matter how many procedures you have. At the end of the day, there are always risks.”⁴⁶ The next section will examine how MRF practitioners have grappled with this reality.

B. Threats to witnesses and victims

The two main risks to witnesses and victims identified by relevant secondary literature, MRF mission reports, and interviews with practitioners are: 1) retaliation, including intimidation and threats of retaliation; and 2) re-traumatization of interviewees because of the memories brought up while re-telling stories of traumatic events. This section examines both of these risks in detail.

1) Retaliation

As noted earlier, many MRF missions are conducted in a context where violations have not ceased and where the alleged perpetrators hold a certain level of power. Victims might know personally their persecutors and might still live in the vicinity of these individuals.

⁴⁵ HPCR interview conducted in person on 6/8/13 with Luc Cote - Executive Director of the East Timor Commission, the DRC Mapping Exercise, and the Kyrgyzstan Commission.

⁴⁶ HPCR interview conducted via telephone on 7-26-13 with Philip Trewhitt - Investigation Team Leader, Commission of Inquiry on Libya.

Because of the inherent risks in such scenarios, concerns about retaliation often lead witnesses and victims to exhibit caution about communicating with certain missions. For example, the report of the Bahrain Commission states:

The Commission faced a number of limitations in the conduct of its investigation. The Commission was aware that there was a degree of fear among the alleged victims and witnesses of torture. This may have resulted in individuals being reticent about providing information to the Commission or even refusing to provide information altogether. On some occasions, complainants expressed their unwillingness to share all the information relating to their detention because they were afraid of reprisals. In some cases, witnesses were able to provide evidence thus obviating the need for the alleged victim to provide information.⁴⁷

In Darfur, there were also serious concerns about reprisals, relating to both the Sudanese national justice system and the context of the Darfur Commission. The report states:

(...) many victims informed the Commission that they had little confidence in the impartiality of the Sudanese justice system and its ability to bring to justice the perpetrators of the serious crimes committed in Darfur. In any event, many have feared reprisals in the event that they resort to the national justice system.⁴⁸

In some cases, fears of reprisals are brought about by specific threats issued to witnesses and/or victims. According to the Darfur Commission report:

The Commission also wishes to stress that there have been episodes indicative of pressure put by some regional or local authorities on prospective witnesses, or on witnesses already interviewed by the Commission. For instance, in the first week of November 2004, in El Fashir (North Darfur) a government official, reportedly the chief of the local office of the National Security and Intelligence Service, gave money to some IDPs and urged them not to talk to the Commission. It was also reported to the Commission that the Sudanese authorities had deployed infiltrators posing as internally displaced persons (IDPs) into some camps such as Abushouk. In the same camp various

⁴⁷ "Report of the Bahrain Independent Commission of Inquiry," 2011, p. 301.

⁴⁸ Darfur Commission report, *supra* note 6, at 5.

eyewitnesses reported an episode that could be taken to amount to witness harassment.⁴⁹

The Gaza Fact-finding Mission also reported that witnesses had received “anonymous calls and messages on private phone numbers and e-mail addresses” and that “the contents seemed to imply that the originators of these anonymous calls and messages regarded those who cooperated with the Mission as potentially associated with armed groups.”⁵⁰ The report also specifies that some witnesses and victims “have declined to appear before it or to provide information or, having cooperated with the Mission, have asked that their names should not be disclosed, for fear of reprisal.”⁵¹

Witnesses’ fears of reprisals after receiving threats also affected the ability of the Guinea Commission to collect information:

The Commission also noted that the hospital staff was terrified at the thought of giving it any information and that several people said they had been warned not to talk. Some people, although realizing that they were taking a risk, nonetheless agreed to share bits of information discreetly with the Commission.⁵²

Quite uniquely, the Georgia Fact-finding Mission reports that there were no problems regarding protection. Right from the introduction, the report states: “It should be mentioned here that there were never any attempts by any side to interfere with [the fact-finding mission’s] independent mandate.”⁵³ It is worth noting that, whether by choice or by obligation based on the mandate, some missions have interviewed very few witnesses. The Georgia Fact-finding Mission, for certain issues within the mission’s mandate, largely based its research on the official correspondence of relevant governments and reports of human rights organizations.⁵⁴

⁴⁹ Ibid., at p. 16.

⁵⁰ Gaza Fact-finding Mission report, *supra* note 13, at para. 148.

⁵¹ Ibid.

⁵² “Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea,” S/2009/693, 2009, p. 54.

⁵³ “Independent International Fact-Finding Mission on the Conflict in Georgia Report,” Volume I, September 2009, p. 7.

⁵⁴ See generally “Independent International Fact-Finding Mission on the Conflict in Georgia Report,” Volume II, September 2009.

Interestingly, some MRF reports provide evidence of positive outcomes on the treatment of interviewed victims, indicating that in some contexts the actual risks of retaliation and other forms of abuse were mitigated thanks to the intervention of the mission. For example, the report of the Bahrain Commission states:

On 22 October 2011, the Military Prosecution submitted a letter to the Commission, which denied that any torture had taken place at Al Qurain Prison. The letter also asserted that only two of the 14 political detainees had previously claimed that they were tortured before being transferred from the custody of the NSA to the BDF. The Military Prosecution referred these individuals to BDF Hospital for medical examinations. The Commission received these medical reports, which confirmed that when the two detainees were transferred from the NSA to BDF custody there was evidence of bruises and inflammation on their bodies. (...) After the detainees' allegations of mistreatment in Al Qurain Prison and the death of three detainees in Dry Dock Detention Centre, the Military Prosecution replaced the administration at Al Qurain Prison and ordered that the 14 political leaders as well as the individuals charged with murder or attempted murder of police officers be transferred from Dry Dock Detention Centre to Al Qurain Prison.⁵⁵

In many cases, threats of retaliation have actually manifested. One MRF actor states that "two witnesses who gave evidence to Phillip Alston in Kenya suffered lethal reprisals."⁵⁶ It was also reported that witnesses were killed in connection with testifying at the International Criminal Tribunal for Rwanda in Arusha.⁵⁷ The non-governmental organizations (NGOs), African Rights and REDRESS, have reported several such crimes.⁵⁸ The International Criminal Tribunal for the former Yugoslavia has also

⁵⁵ Bahrain Commission report, *supra* note 47, at 297.

⁵⁶ Geoffrey Robertson, "Human Rights Fact-Finding: Some Legal and Ethical Dilemmas," Thematic Paper No. 1, Human Rights Institute of the International Bar Association, p. 3.

⁵⁷ Sluiter, *supra* note 3, at 965.

⁵⁸ A report co-published by REDRESS and African Rights offers this quotation from an individual who has worked in Rwanda: "The insecurity of genocide survivors and witnesses continues to grow from today to tomorrow. Some are murdered, others have had their livestock killed or their houses burned. They receive leaflets warning them that they will be massacred. There are many other forms of threats and intimidation, and so many examples." See "Survivors And Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes," African Rights and REDRESS, November 2008, p. 7, available at <http://www.redress.org/downloads/publications/Rwanda%20Survivors%2031%20Oct%2008.pdf> (accessed January 17, 2014).

experienced difficulties: as a Human Rights Watch report mentions, in several cases, it was not possible to render justice because witnesses had been threatened and the court was not able to protect them.⁵⁹

One important consideration regarding retaliation is that the threat can arise in many forms. Threats of retaliation can come not only from local political, military, and economic elites but also from family members and neighbors.⁶⁰ The threat of retaliation can persist long after the conflict has ended, a particularly crucial concern for MRF missions, which, as will be examined later, typically have limited to no capacity to ensure protective measures for interviewees after the mission has concluded.⁶¹ Risks are also not limited only to acts of violence. As one MRF practitioner states, “It was never my sense that witnesses were under threat or in physical danger. Probably the biggest fear was some kind of material reprisal, that a witness would lose their job or status.”⁶²

For victims of gender-based and sexual violence, particular risks stem from the stigma commonly attached to these types of incidents in many contexts. As one MRF practitioner states: “If there’s a girl who is known to have been raped, she is possibly going to be disowned by her family, possibly divorced, her sisters might be divorced. In the worst case, a male family member might kill her.”⁶³ The resulting challenges for investigators are underlined by Sylvia Pieslak, who asserts:

⁵⁹ This Human Rights Watch report states: “The Norac trial, named after one of four co-accused in the case, dealt with the murder of fifty civilians near Gospic in 1991, most of them ethnic Serbs. The president of the court stated during the trial that witnesses in the trial were receiving anonymous threats. He remarked that it was ‘very difficult to undertake any measures of adequate protection of witnesses from possible threats.’” Additionally, the report also mentions, “The Lora trial dealt with the torture and killing of Serb civilians in 1992 in the Lora military prison in Split. Out of fear, a number of key witnesses—Lora survivors who now live in Serbia or in Bosnia — did not appear in court. Several witnesses stated at the trial that they had been threatened and, therefore, could not testify freely. All eight accused were acquitted due to lack of evidence.” See Human Rights Watch, *supra* note 29.

⁶⁰ “Testifying to Genocide: Victim and Witness Protection in Rwanda,” REDRESS, November 1, 2012, pp. 23-26, available at <http://protectionline.org/files/2012/11/121029ProtectionReport.pdf> (accessed January 17, 2014).

⁶¹ Anna Marie L.M. de Brouwer, Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR (Oxford: Intersentia, 2005), 232.

⁶² HPCR interview conducted via telephone on 7-30-13 with Christina Abraham - Chief of Staff, Bahrain Independent Commission of Inquiry.

⁶³ HPCR interview conducted via telephone on 7-31-13 with Erin Gallagher - Gender Advisor and Sexual Violence Investigator, Commission on Inquiry on Libya.

(...) women are unwilling to testify not only because there are not enough measures to protect them from physical threats, but also because of the social norms that place shame upon raped women.⁶⁴

2) Traumatization

The risk that witnesses and victims could experience re-traumatization through re-telling stories of violent incidents is widely addressed in policy literature relevant to various investigative mechanisms. A “Best Practices” document produced by the SCSL emphasizes the importance of avoiding re-traumatization:

Best practice should also guard against the further traumatising of witnesses who have experienced human rights abuses as they participate in the process. It should also ensure that the experience of testifying in a war crimes tribunal is positive and not excessively distressing, frustrating or dangerous; this will encourage future witnesses to testify.⁶⁵

These dangers also particularly affect survivors of sexual violence and torture, as documented by a study conducted by the Institute for Women’s Policy Research:

“Every time they go to testify, they are going through their trauma which will mark them until the end of their life,” said Irena Antic, a journalist at Federal Radio in Sarajevo who has followed these issues closely. “In many situations, even the closest members of their family don’t know what happened to them. Our society, which is still a little conservative, doesn’t provide the necessary help. And what our society doesn’t recognise is that these women need help on every level, and in some ways it’s still a stigma.”⁶⁶

As with the risk of retaliation, the risk of re-traumatization can also endure long after the incident has occurred. The authors of the report, *Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes*, underline the need, in the context of

⁶⁴ Pieslak, *supra* note 37, at 155.

⁶⁵ SCSL Best Practice Recommendations, *supra* note 40, at 6.

⁶⁶ Rachel Irwin and Velma Šarić, “Poor Protection for Balkan Trial Witnesses,” Institute for War & Peace Reporting, November 22, 2012, available at http://iw3.iwpr.net/sites/default/files/poor_protection_for_balkan_trial_witnesses_-_web.pdf (accessed January 17, 2014).

formal judicial processes, for protective measures and support systems that are not limited to the duration of the investigation/prosecution:

The experience of testifying about the horrific events of the genocide, often before a variety of judicial bodies, exposed many survivors to re-traumatisation. There is a need to strengthen domestic initiatives designed to provide witnesses with psycho-social support. Similarly, while survivors testifying before the ICTR in Arusha could receive some form of counselling while in Arusha, this has not been sustained once they returned to Rwanda. The domestic witness protection processes offer an opportunity for more sustained and engaged support. It is also necessary to take steps to avoid re-traumatisation through the training of judicial personnel in order to ensure that survivors do not find it difficult to testify.⁶⁷

As noted earlier, MRF missions typically lack the capacity to undertake the more extensive measures adopted by courts and tribunals, but in the context of an MRF process, practitioners widely assert that the risk of re-traumatization should inform the manner in which interviews are conducted. The Lund-London Guidelines articulate this widely held normative notion:

Members of the delegation should be alert to the possibility of stress or trauma experienced by interviewees and be ready to terminate the interview if necessary. Wherever possible, the delegation members should ensure that interviewees are referred to appropriate victim support services.⁶⁸

C. What protective measures have been adopted

This section examines how — despite the aforementioned restraints under which MRF missions operate — MRF practitioners activate the professional responsibility for protection to guard against the risks discussed in the previous section. As the below analysis demonstrates, a professional consensus has emerged about numerous areas of practice. However, other methodological issues persist as open questions about which consensus has not yet been reached.

One important point to mention before delving into this assessment is that for certain missions there are discrepancies between how MRF reports articulate the mission's

⁶⁷ African Rights and REDRESS, *supra* note 58.

⁶⁸ Lund-London Guidelines, *supra* note 24, at paras 45 and 46, p. 6.

approach to protection and how practitioners discussed their experiences in interviews conducted for this paper. For example, the report for the Darfur Commission expresses that the protection of witnesses and victims was taken very seriously at all stages during the implementation of the mission. However, an investigator who served on the mission notes many problematic issues. This practitioner stated that she didn't recall any specific directive given to all of the investigators about witness protection, and investigators were not given the name of someone to contact if there was an issue of concern. Additionally, at times, a governmental "humanitarian aid coordinator" followed members of the mission — even though the team was supposed to be exempt from being followed by a government representative — during the process of conducting fieldwork. Investigators were told to revisit interviewees after interviews to ensure that the individuals were not harmed. However, this proved logistically impossible because a check-up would entail, in some cases, driving several hours to return to a certain village, and given the time and resource constraints of the mission, such measures were not feasible. Furthermore, investigators told interviewees that if they encountered harassment after speaking with the mission, interviewees should contact the United Nations Refugee Agency (UNHCR), though the investigators were not always entirely certain that UNHCR would actually be helpful if contacted.⁶⁹

Another aspect of protection is that there is an inconsistency between the tools and capacities available to UN versus non-UN missions. To take but one example, the UN has its own classification system for confidential documents,⁷⁰ a facility that is not available to other missions. Hence, different MRF missions, depending on factors such as the mandating body and the entities that provide the mission with logistical support, sometimes differ from one another in terms of their comparative protective capacities.

Having underlined these inconsistencies, the rest of this section will examine the main elements of witness protection. The section examines, first, measures adopted before deployment, second, measures adopted during the interview process, and third, measures adopted that are geared toward protecting interviewees after interviews have concluded.

⁶⁹ HPCR interview conducted via telephone on 7-19-13 with Debbie Bodkin - Investigator on the International Commission of Inquiry on Darfur.

⁷⁰ Detailed in "The Secretary General's Bulletin: information sensitivity, classification and handling," ST/SGB/2007/6, February 12, 2007.

1) Before the mission is deployed

Two of the most important pre-deployment measures that can be taken are designing mission-specific guidance and conducting staff trainings. Some missions develop mission-specific guidance. As one practitioner states, “If the mandate is given by the Human Rights Council, the mission will be organized by OHCHR, which will ensure that the Terms of Reference of the mission takes protection into consideration.”⁷¹ A good example of a mission that integrated protection considerations into the mission’s investigation design is the DRC Mapping Exercise, which in the report states:

A document outlining the methodology to be followed by the Mapping Team was drafted on the basis of United Nations-developed tools, in particular those of OHCHR. These methodological tools covered the following areas in particular: a gravity threshold for the selection of serious violations, standard of evidence required, identity of perpetrators and groups, confidentiality, witness protection, witness interviewing guidelines with a standardised fiche d’entretien, and physical evidence guidelines (including mass graves), among others.⁷²

The Siracusa Guidelines also recommend the adoption of an “[o]perational Plan [that] should take account of other internal protocols of the fact-finding body, such as for witness protection, safety and security, employment procedures, [and] the release of evidence and investigation plans (...).”⁷³

Training is a key aspect of implementing mission-specific protection methodologies. One practitioner stated that on his mission, investigators received “a very basic training,” covering topics such as securing documents and taking care not to use interviewees actual names in internal reports.⁷⁴ Another practitioner highlights that the purpose of training is primarily to build on practitioners’ already existing expertise:

⁷¹ HPCR interview conducted in person on 6/8/13 with Luc Cote - Executive Director of the East Timor Commission, the DRC Mapping Exercise, and the Kyrgyzstan Commission.

⁷² “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, p. 47.

⁷³ Siracusa Guidelines, Guideline 5, *supra* note 25, at 40.

⁷⁴ HPCR interview conducted in person on 6/8/13 with Luc Cote - Executive Director of the East Timor Commission, the DRC Mapping Exercise, and the Kyrgyzstan Commission.

The staff hired by the CoI [commission of inquiry] already had significant human rights investigative training and experience. Otherwise they wouldn't have been hired. The OHCHR has a well-established methodology and the chief as well as the CoI coordinator will have ensured that the training provided was in this vein and supplemented the existent knowledge.⁷⁵

One challenge for implementing mission-specific trainings is logistics. Since staff members often arrive on the mission at different times, it is difficult to train everyone at once.⁷⁶ Furthermore, though certain missions have successfully built on existing guidelines to develop and implement mission-specific methodologies regarding protection, the question remains how practitioners can pass this knowledge along to benefit future missions. One practitioner states:

Most Commissions are a one-off, meaning when the mandate ends, the bulk of the staff go home. Later, another mandate comes up and a new Commission is formed with new people. OHCHR provides the institutional memory it can, and that knowledge is increasing as more commissions of inquiry operate. Lessons learned and Best Practices exercises are conducted as a matter of course at the end of every mandate.⁷⁷

2) During the interviewing process

A variety of measures were adopted to protect witnesses and victims during MRF investigations. As this section demonstrates, for some issues, consensus exists in terms of best practices. For other areas, different approaches have been adopted.

⁷⁵ Confidential HPCR interview conducted via telephone in Summer 2013 with a high-level MRF practitioner, name of interviewee on file.

⁷⁶ One practitioner states, "The logistics of training are very difficult, and that cannot be underestimated in any way. You have different people coming in at different times. For commissions, most don't last that long. Training has been less successful because the whole system is not set up to let people be trained as a group. The recruitment system is bureaucratic. People come in when the paperwork is finished. They come in at different times. A military expert can't give a briefing and training because he needs to go to the field and people are arriving at different times." HPCR interview conducted via telephone on 8-8-2013 with Sareta Ashraph - Legal Advisor, Commission of Inquiry on Libya and Gaza Fact-finding Mission.

⁷⁷ HPCR interview conducted via telephone on 8-8-2013 with Vic Ullom - Legal Advisor, Commission of Inquiry on Libya.

a. Selecting interviewees

MRF practitioners widely agree that, when selecting interviewees, care should be taken to avoid interviewing individuals who are at risk for re-traumatization. As one MRF actor notes, interviewing a victim who has already been interviewed by another organization “increases the risk for re-traumatization of the victim.”⁷⁸

MRF missions typically consult with NGOs on the ground to develop methodologies for selecting and approaching interviewees, as well as conducting interviews. For example, according to the report of the Guinea Commission:

The members of the Commission met with representatives of Forces vives and of non-governmental organizations (NGOs) working in the field of human rights in order to introduce themselves and to agree on a working method that would ensure that interviews could be conducted without endangering witnesses, victims or their families. They also met with staff of the United Nations specialized agencies with offices in Guinea.⁷⁹

Several missions have avoided conducting interviews with individuals already interviewed by other agencies, or returning to re-interview the same witness a second or third time, for the same reason. Additionally, MRF missions have frequently chosen not to interview specific categories of people that were deemed particularly vulnerable. For example, the report for the Gaza Fact-finding Mission states, “The Mission decided not to interview children.”⁸⁰ In the same vein, the report of the Guinea Commission mentions:

In light of the statement by the President of the Republic of Guinea that he could not control all members of the military, who are the alleged perpetrators of the human rights violations, and in order to better protect witnesses, the victims and their families, the Commission decided to minimize individual contact with these persons by not interviewing them at their homes or places of work. In order to preserve the evidence for any future criminal prosecution, the Commission did

⁷⁸ HPCR interview conducted via telephone on 10/17/11 with Théo Boutruche - Legal Expert for the Independent International Fact-finding Mission on the Conflict in Georgia.

⁷⁹ Guinea Commission report, *supra* note 52, at para. 12.

⁸⁰ Gaza Fact-finding Mission report, *supra* note 13, at para. 159.

not visit the locations that witnesses had identified as mass graves, despite the various corroborating accounts it had received.⁸¹

Several guidelines and best practice documents also refer to this practice. For example, the Lund-London Guidelines recommend exercising caution in this regard,⁸² and the SCSL Best Practice Recommendations recommend that investigators “[d]istinguish between those witnesses whose accounts involve particularly traumatic events and those whose do not, since the former group are likely to find the whole statement-taking process considerably more difficult.”⁸³

b. The context of the interview

The method of approaching an interviewee was brought forward by several practitioners interviewed for this paper. One key concern is that practitioners use discretion when approaching interviewees. The danger is that a big white car, for example, can attract attention and give away that witnesses are actually going to meet with the UN, potentially exposing these individuals to risks of retaliation. A Human Right Watch policy piece stresses the importance of being mindful of the types of vehicles that interviewers use:

At the investigation stage, consideration needs to be given to ensuring that in conducting interviews and transporting people to trials, witnesses' identities are not inadvertently divulged. For instance, if investigators travel to interview witnesses in clearly marked vehicles, the entire village then knows which individuals have spoken to investigators. If witnesses who agree to provide

⁸¹ Guinea Commission report, *supra* note 52, at para. 13.

⁸² See Lund-London Guidelines, *supra* note 24, at para. 36, which states, “The delegation is under no obligation to advise the government of the people it intends to meet. If the government or any other party finds out this information and there are concerns as to the safety of an interviewee, then the NGO may wish to cancel the interview or to abandon the mission and should seek a guarantee from the government that the interviewee or prospective interviewee will not be persecuted, victimised or otherwise put in a worse position for having been willing to cooperate with the delegation. The same principle applies if the interviewee is threatened as a result of identification by other people.”

⁸³ SCSL Best Practice Recommendations, *supra* note 40, at 20.

testimony are then picked up in the same type of vehicles, and flown to testify in clearly marked aircraft, their identities have in effect been revealed.⁸⁴

As one practitioner states, one option is to move interviewees to a different location:

To protect people, it's a question of technique, of how you approach them. Make sure you are in a safe place for them when you take the statement. The best way to do it is to move them. So what we did most often was we managed to arrange for them to meet us in another community. It could be in another village or another city. Then, when you meet witnesses, you are certain you are not compromising security because no one sees it.⁸⁵

To facilitate such discretion, on one mission, investigators were given money to pay for witnesses to move from one location to another and for investigators to rent anonymous cars.⁸⁶ Such measures are particularly important for victims of sexual or gender-based violence. According to one practitioner:

I can't advertise that I'm looking for victims of rape. The basic lesson here is that if people know you are the SGBV specialist or that you are looking for rape victims, everyone will know what happened to the people who talk to you, further exposing the victim to public marginalization and stigma.⁸⁷

Practitioners agree on the importance of, as the report of the Libya Commission states, "tak[ing] all reasonable measures to meet victims, witnesses and others in confidential settings, to prevent such persons suffering any harm or reprisals."⁸⁸ This aspect is

⁸⁴ "Recommendations for an Effective Special Court for Sierra Leone," Letter from Richard Dicker to Legal Advisors of U.N. Security Council Member States and Interested States, Human Rights Watch, March 8, 2002, available at <http://www.hrw.org/news/2002/03/07/recommendations-effective-special-court-sierra-leone> (accessed January 17, 2014).

⁸⁵ HPCR interview conducted in person on 6/8/13 with Luc Cote - Executive Director of the East Timor Commission, the DRC Mapping Exercise, and the Kyrgyzstan Commission.

⁸⁶ Ibid.

⁸⁷ HPCR interview conducted via telephone on 7-31-13 with Erin Gallagher - Gender Advisor and Sexual Violence Investigator, Commission on Inquiry on Libya.

⁸⁸ "Oral Update by the International Commission of Inquiry on Libya to the Human Rights Council," September 19, 2011, p. 10.

captured by the Siracusa Guidelines,⁸⁹ reflecting that this notion is widespread among practitioners. One practitioner specifically stresses the importance of interviewing prisoners and refugees in confidential settings, stating also that MRF practitioners should endeavor to interview newcomers in refugee camps “before they come under the sway of local camp leaders.”⁹⁰ However, practitioners recognize that privacy is not always possible:

Sometimes it is impossible to do an interview alone. One of the most difficult things is finding a quiet private place to interview people, especially in a camp. It’s possible but it takes some planning and work, it may mean kicking people out of a tent or room, it may mean many interruptions by children, family, neighbors, when you do have that privacy.⁹¹

Privacy concerns also arise in light of evolving perspectives about various ‘new technology’ communication platforms that practitioners have integrated into MRF processes. As one practitioner states: “We used Skype and had been told by our IT colleagues that it was secure until the Snowden affair. We no longer think it’s secure.”⁹²

⁸⁹ See Siracusa Guidelines, Guideline 10.6.1, *supra* note 25, at 46, which states, “The fact-finding body should take measures to protect the confidentiality and safety of all involved in the interview, including with respect to selecting the location of the interviews.”

⁹⁰ Robertson, *supra* note 56, at 26. In this paper, Geoffrey Robertson also states, on p. 27, “Ideally, prisoners and refugees and all persons who may be subject to pressure from custodians or others should be interviewed alone. This is a counsel of perfection, because investigators will often need a translator present and the choice may be problematic, especially if there is no choice and the translator is officially imposed. Interviewing prisoners alone does insulate their testimony from influence, although it is important to remember that some victims – especially of sexual crime – are inhibited by the subject matter and do need support before they can bring themselves to speak freely. Many traumatised victims of rape or torture simply will not divulge their excruciating experience to a stranger. In these circumstances, there can be no hard and fast rules about interviewing witnesses without anyone else present: a friend or counsellor may be a necessary companion.”

⁹¹ HPCR interview conducted via telephone on 7-31-13 with Erin Gallagher - Gender Advisor and Sexual Violence Investigator, Commission on Inquiry on Libya.

⁹² HPCR interview conducted via telephone on 8-8-2013 with Vic Ullom - Legal Advisor, Commission of Inquiry on Libya.

c. The conduct of the interview

During the conduct of interviews, one key risk, as mentioned earlier, is re-traumatization. For practitioners with extensive backgrounds dealing with victims of trauma, the appropriate conduct for interviewers to avoid re-traumatization is clear. One practitioner states:

I think if I saw it happen, I would end the interview. I did have a situation with another investigator where we met a 13 year-old girl in the hospital. This girl had just been told two days earlier that her mother had died. We didn't have a need or desire to have her retell her story or go into any of it with her. We chatted with her, we talked a little bit, but not about the shelling, it was an easy decision for both of us, it was just not appropriate.⁹³

In other instances, MRF practitioners evidently had a less extensive professional background dealing with trauma victims. As one commissioner states:

[Interviewees] 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.⁹⁴

The SCSL Best Practices Recommendations also suggests the importance of investigative expertise in this regard:

Use specialist interviewing techniques to assist a witness who is struggling with painful feelings, having problems recalling the details of an event, or otherwise finding the process difficult.⁹⁵

⁹³ HPCR interview conducted via telephone on 7-31-13 with Erin Gallagher - Gender Advisor and Sexual Violence Investigator, Commission on Inquiry on Libya.

⁹⁴ HPCR interview conducted via telephone on 4/3/13 with Mary Shanthi Dairiam - Commissioner, United Nations Fact-finding Mission on the Flotilla Incident.

⁹⁵ SCSL Best-Practice Recommendations, *supra* note 40, at 20.

However, given the realities of the *ad hoc* state of MRF practice — in particular, the challenges of quickly assembling a skilled MRF team — sometimes a learning curve for certain MRF practitioners during mission implementation is evidently unavoidable.

Another element of the relationship between an MRF mission and interviewees is informed consent. The norm of MRF practice is that investigators have a responsibility to ensure that interviewees understand how their statements will be used, and that interviewees, based on this understanding, provide consent for this use. However, there are certain complexities that arise during the practical application of informed consent. First, in some cases, there have actually been unintended ambiguities in the consent options offered. One practitioner recounts:

We had a simple, straightforward consent menu that proved to be insufficient when the ICC formally requested the materials. When we covered the consent options with our interviewees, one specific question we asked was whether they would permit us to share the information with the ICC. We didn't specify, either to the interviewee or in our record of the conversation, if that consent included the ability to give both to the prosecution and the defence. When the defence later requested the information we didn't know if we could give it. We had a sense that the interviewee was hoping it would be used for prosecution, to achieve 'justice'. We were concerned that we would be misusing their consent. We have since amended our consent options.⁹⁶

Second, many times it is not clear whether or not interviewees actually understand the measures to which they are consenting. Some missions have developed a method for dealing with such scenarios. A practitioner states of the forms used for informed consent, "There's a box where the investigator will write: 'I do not believe this person understood what they were consenting to.'" ⁹⁷ However, it appears that these determinations are not always clear-cut. "We have had many discussions about how much information you have to give the interviewee so that they're giving real informed consent," states one practitioner.⁹⁸

⁹⁶ HPCR interview conducted via telephone on 8-8-2013 with Vic Ullom - Legal Advisor, Commission of Inquiry on Libya.

⁹⁷ HPCR interview conducted via telephone on 8-8-2013 with Sareta Ashraph - Legal Advisor, Commission of Inquiry on Libya and Gaza Fact-finding Mission.

⁹⁸ HPCR interview conducted via telephone on 8-8-2013 with Vic Ullom - Legal Advisor, Commission of Inquiry on Libya.

Third, the question arises that, even if an interviewee grants consent, what are the mission's responsibilities if the mission perceives that the interviewee is unduly putting himself/herself at risk? A practitioner references this common dilemma:

Our concern about their protection can override the consent option. People in a detention center who said, 'I want the world to know' — there's a lot of bravado — but someone who is testifying against someone now in power might not be wise.⁹⁹

d. Data management

Retaining the anonymity of interviewees, if necessary for protection

An important aspect of protecting interviewees from threats of retaliation is retaining the anonymous character of interviewees' contributions to MRF reports. Different missions have adopted different approaches in this regard. Some missions have used numbers, instead of names, to identify interviewees in internal and external reports. For example, in the DRC Mapping Exercise report, one can deduce from the manner in which the report references witness accounts — for example: "See the witness statements of W132, W 249 and W 287" — that the team recorded accounts by assigning a number to each witness.¹⁰⁰ The Gaza Fact-finding Mission also refers to witness numbers in its report,¹⁰¹ and in the report, mentions various protective measures taken during implementation:

Also in keeping with normal practice for this type of report and to continue to protect their safety and privacy, the names of the victims, witnesses and other sources are generally not explicitly referred to in the report and codes are used instead. The names of individuals who publicly testified at the hearings held by the Mission or who have explicitly agreed to be named (see below) are, however, identified.¹⁰²

⁹⁹ HPCR interview conducted via telephone on 8-8-2013 with Sareta Ashraph - Legal Advisor, Commission of Inquiry on Libya and Gaza Fact-finding Mission.

¹⁰⁰ DRC Mapping report, *supra* note 72, at 321, footnote 1180. The fact that the number is the sole reference also suggests that there was only one list, even if the investigators were split into several groups.

¹⁰¹ Gaza Fact-finding Mission report, *supra* note 13, at 292, 302, and 305.

¹⁰² *Ibid.*, at 47.

Due to the publication of certain names in the report, the Gaza Fact-finding Mission also recommended to the Government of Israel that:

The Government of Israel should refrain from any action of reprisal against Palestinian and Israeli individuals and organizations that have cooperated with the UN Fact Finding Mission on the Gaza Conflict, in particular individuals who have appeared at the Public Hearings held by the Mission in Gaza and Geneva and expressed criticism of actions by the State of Israel.¹⁰³

The Sri Lanka Panel adopted the policy of not naming witnesses (not even referring to a number). When providing specific evidence — e.g., a photograph of a massacre of children who were IDPs — the report mentions: “Source: Submission to the Panel by the photographer.”¹⁰⁴ The Bahrain Commission used names in the final report but only for individuals who were deceased or who were already publicly known.¹⁰⁵

The Libya Commission report withholds the identities of alleged perpetrators, in part, due to concerns about protection of interviewees: “In most cases, the Commission has withheld the names of individuals believed to hold responsibility for violations. This is partly to prevent reprisals and partly to avoid prejudicing future fair trials.”¹⁰⁶ The Darfur Commission took a similar step, stating precisely that withholding the names not only of the witnesses but also of the perpetrators can contribute to interviewee protection:

The decision to keep confidential the names of the persons who may be suspected to be responsible for international crimes in Darfur is based on three main grounds. (...) The third ground for confidentiality is the need to protect witnesses heard by the Commission (as well as prospective witnesses). In 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. It is for this reason that not only the name of the possible perpetrator will be withheld, but also the list of witnesses questioned by the Commission, as well as other reliable sources of probative material. These will be included in the sealed file, which, as stated

¹⁰³ Ibid., at 551.

¹⁰⁴ Sri Lanka Panel report, *supra* note 7, at 47.

¹⁰⁵ HPCR interview conducted via telephone on 7-30-13 with Christina Abraham - Chief of Staff, Bahrain Independent Commission of Inquiry.

¹⁰⁶ “Report of the International Commission of Inquiry on Libya,” A/HRC/68, March 2012, p. 6.

above, shall only be handed over to the Prosecutor.¹⁰⁷

There is also a professional consensus that missions should not mention the interview location — or any other specific details — that might allow the interviewee to be identified. One practitioner's comments highlight the importance of such measures, even if withholding certain pieces of information might affect the quality of the report:

Sometimes you read the report and it's too generic but it's purely for that reason of protecting the person. I find even when writing up interview notes, I might know it's a mother and daughter who are in a detention center but I'm not going to put that in the report.¹⁰⁸

However, it is evidently not always clear which facts are necessary to omit. "There were debates that you shouldn't disclose which detention center it is because that might allow the interviewees to be identified," states a practitioner.¹⁰⁹

Data protection

Data protection has been deemed a crucial issue by several missions, both for the safety of the witnesses and for members of the mission. Data protection measures include storing data in a secure location; using a safe for all records, notes, and pieces of evidence; prefer electronic data over paper; using only specific types of computers (not connected online, or with encryption systems); destroying paper copies of interview notes — when no longer needed, after being uploaded to a computer, for example — on a daily basis; and defining and tracking who has access to what type of data. One practitioner describes the very careful and sophisticated process used in order to protect data on a particular mission:

The mission created this method where every night they went back to the hotel where they had encrypted UN computers with a link back to headquarters. The hard drive itself was encrypted. If you break it, it erases all the data. Every night they would type up notes — some days it would be 10-15 interviews — then hit synch and it synchs with a computer in Geneva, then they would erase it off the

¹⁰⁷ Darfur Commission report, *supra* note 6, at 129 and 133.

¹⁰⁸ HPCR interview conducted via telephone on 7-31-13 with Erin Gallagher - Gender Advisor and Sexual Violence Investigator, Commission on Inquiry on Libya.

¹⁰⁹ *Ibid.*

computer. They were very cognizant of keeping the witnesses as safe as they possibly could.¹¹⁰

Similarly, the report for the Bahrain Commission specifies how the mission prudently handled the data received:

The database was located in a secure facility outside Bahrain (...). During the course of the investigation, the Commission created an extensive archive of records and materials. All of these records and materials were catalogued and stored in secure safes. In addition, the records were recorded electronically and stored digitally on a highly secured server outside Bahrain.¹¹¹

Other MRF reports specifically refer to the importance of keeping to strict standards regarding data protection. The Libya Commission report states, “The Commission’s records, including records of interviews, have been maintained and will be handed over to OHCHR at the end of its functioning, in accordance with established rules and procedures.”¹¹² The Sri Lanka Panel report refers to the *Secretary-General’s Bulletin on Information sensitivity, classification and handling*,¹¹³ and confirms that “nearly all of the Panel’s substantive records will be classified as ‘strictly confidential’ with, in some cases, additional protections regarding future use.”¹¹⁴ The DRC Mapping Exercise report specifies:

Sensitive information gathered during the mapping exercise should be stored and utilized according to the strictest standards of confidentiality. The team should develop a database for the purposes of the mapping exercise, access to which should be determined by the High Commissioner for Human Rights.¹¹⁵

¹¹⁰ Confidential HPCR interview conducted via telephone in Summer 2013 with a high-level MRF practitioner, name of interviewee on file.

¹¹¹ Bahrain Commission report, *supra* note 47, at 18.

¹¹² “Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya,” A/HRC/17/44, 2011, p. 16.

¹¹³ See generally “Information sensitivity, classification and handling,” ST/SGB/2007/6, February 12, 2007, available at <http://www.ilsa.org/jessup/jessup09/basicmats/sgb20076.pdf> (accessed January 17, 2014).

¹¹⁴ Sri Lanka Panel report, *supra* note 7, at 24.

¹¹⁵ DRC Mapping report, *supra* note 72, at 553.

Storage and use of data after the mission ends

How a mission plans for handling data after the mission's conclusion is also crucial, especially in light of the aforementioned fact that risks of retaliation can endure long after an investigation has ended. Many MRF reports articulate specific procedures in this regard. For example, the DRC Mapping Exercise report states: "Phase three (15 May 2009 to 15 June 2009) saw the closing down of the Mapping Exercise with the compilation of data, final updating of the database, the organization, digitization and classification of all the archives and the drafting of the final version of the report."¹¹⁶ The Bahrain Commission, due to demands from the public — which expressed concerns that statements made to the mission might be used against them someday by the government — burned all the physical evidence after the mission had concluded.¹¹⁷ The mission's report also states of the database:

[T]he Commission will preserve its database and electronic copies of these records, which will be preserved electronically on a secured hard drive outside Bahrain. The hard drive will be stored in a locked case in a secured facility and will not be accessible wirelessly. The hard drive will be preserved for a period of ten years, after which time it will be destroyed. The records stored on the server will be permanently erased.¹¹⁸

However, in other cases, MRF reports mention that internal documents will be made available to certain members of the public. For example, the Guinea Commission report states of information gathered by the mission, "public access to them may be granted, subject to authorization by the Secretary-General of the United Nations and while respecting the principles of confidentiality."¹¹⁹ Such an approach has direct implications for the issue of informed consent, due to the fact that this option, though the report articulates specifically who authorizes public access, leaves ambiguous which types of actors will be able to view the missions' documents.

Additionally, though many missions, as noted above, have approached data handling with a great deal of caution, interviews with practitioners have revealed that many investigators retained their interview notes from on-the-ground operations.

¹¹⁶ Ibid., at para. 111, p. 42.

¹¹⁷ HPCR interview conducted via telephone on 7-30-13 with Christina Abraham - Chief of Staff, Bahrain Independent Commission of Inquiry.

¹¹⁸ Bahrain Commission report, *supra* note 47, at para. 36, p. 20.

¹¹⁹ Guinea Commission report, *supra* note 52, at para. 21.

3) After interviews

There is a widespread perception that, when possible, protection should continue even after an investigation has concluded. For investigative efforts carried out by enduring organizations, such measures are possible. The Lund-London Guidelines state of fact-finding conducted by NGOs:

The safety of those interviewed or engaged by a fact-finding delegation should continue to be monitored by the NGO, particularly where safety concerns were already present. Any post-mission threats or hostile acts should be acted upon immediately by the NGO including, where necessary, notifying the government, assisting with protective measures and alerting the wider international community.¹²⁰

Even in the context of *ad hoc*, temporary missions, follow-up measures have sometimes been put into place. As noted by the OHCHR Mission Planning and Start-Up Unit, this was the case after the conclusion of the Guinea Commission:

OHCHR has developed operational guidelines based on experience and lessons learned which include overarching guiding principles and concrete measures and options to integrate protection considerations into the entire cycle of a commission/mission's life. Witness protection was, for example, a paramount concern that guided OHCHR actions in assisting the commission to carry out its mandate in Guinea and led to numerous precautionary steps being taken. Following the completion of the field mission, OHCHR established a post-mission protection presence in Conakry for three months to provide support and advice to persons facing threats to safety and prevent reprisals against them. A similar practice had been followed by the Darfur. However, this practice cannot be implemented for all COI due to financial constraints.¹²¹

Follow-up generally tends to be a highly problematic area. Sometimes even courts and tribunals have great difficulties. An internal ICTY audit in 2008 found the ICTY to be insufficient in this area:

¹²⁰ Lund-London Guidelines, *supra* note 24, at 9.

¹²¹ Sonia Bakar, "On Commission of Inquiry (CoI) and Fact-Finding Missions (FFM)," UiO/Norwegian Centre for Human Rights, November 1, 2012, available at <http://www.jus.uio.no/smr/english/research/areas/conflict/events/conferences/fact-finding/bakar.html> (accessed January 17, 2014).

VWS [the Victims and Witnesses Section] does not ensure systematic follow up of witnesses, through phone calls, direct contact or other modes, once they have returned to the region. The attendant risk is that satisfaction levels among witnesses are likely to be low during the post testimony phase.¹²²

For MRF missions, despite the experience of the Guinea Commission, follow-up measures are more commonly perceived by practitioners to be unfeasible, and in many contexts, entirely non-existent. “Zero” protective measures were able to be undertaken after the release of the DRC Mapping Exercise report, for example.¹²³ The following statement articulates a widely held view:

For commissions, protection of people is preventative because there is no real follow-up. Because commissions cease to exist, there’s no body that necessarily would follow-up, certainly compared to tribunals. (...) Once interviewees leave us, it is very rare that we would know what would happen to them.¹²⁴

Regardless, some protective measures have been adopted or suggested by MRF reports and practitioners that aim to look after the needs of interviewees after interviews conclude. The rest of this section provides an overview of these avenues.

a. Referrals

A widespread normative notion is that practitioners, when possible, should endeavor to refer interviewees with particular humanitarian or medical needs to organizations that can offer assistance. As the Lund-London Guidelines states:

¹²² “The Victims and Witnesses Section of ICTY: Gaps in psychological support and counseling and post testimony follow up should be addressed to ensure the effectiveness of support provided to witnesses,” Audit Report, Internal Audit Division, Office of Internal Oversight Services, December 26, 2008, available at <http://usun.state.gov/documents/organization/139317.pdf> (accessed January 17, 2014). This audit references, on p. 4, a study conducted by Eric Stover that found that witnesses had experienced a “sense of abandonment.” Eric Stover’s report was published in book form. See generally Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Philadelphia: University of Pennsylvania Press, 2005).

¹²³ HPCR interview conducted in person on 6/8/13 with Luc Cote - Executive Director of the East Timor Commission, the DRC Mapping Exercise, and the Kyrgyzstan Commission.

¹²⁴ HPCR interview conducted via telephone on 8-8-2013 with Sareta Ashraph - Legal Advisor, Commission of Inquiry on Libya and Gaza Fact-finding Mission.

Members of the delegation should be alert to the humanitarian needs of interviewees and, wherever possible, should ensure that interviewees are referred to appropriate humanitarian or other organisations, which might be able to meet those needs.¹²⁵

Referrals are especially crucial for victims of sexual violence. The manual, “WHO ethical and safety recommendations for researching, documenting and monitoring sexual violence in emergencies,” forcefully emphasizes the importance of referring victims of sexual violence to the appropriate services:

For these reasons, it is an ethical imperative that when conducting data collection activities that involve interviewing individuals about sexual violence, at least basic care and support services to which survivors may be referred are available.¹²⁶

The drive to offer referrals evidently arises in part from the collision between, on the one hand, the *ad hoc* nature of MRF missions, and on the other hand, the normative sense that investigators hold a long-term protective responsibility for the welfare of witnesses and victims encountered by the mission. MRF missions, in their limited capacities, cannot themselves assume responsibility for the long-term care of witnesses and victims — indeed such activities would fall well beyond the typical MRF mandate — but MRF practitioners can refer these individuals to other organizations that are in a position to offer assistance.

b. Coordinating follow-up measures with other organizations or agencies

Some practitioners have endeavored to coordinate follow-up measures with other entities, such as UN agencies, that are also involved in the local context. However, practitioners sometimes do not actually have much confidence in these measures. As noted earlier, investigators for the Darfur Commission referred interviewees to UNHCR

¹²⁵ Lund-London Guidelines, *supra* note 24, at 6.

¹²⁶ “WHO ethical and safety recommendations for researching, documenting and monitoring sexual violence in emergencies,” World Health Organization, 2007, p. 15, available at http://www.who.int/gender/documents/OMS_Ethics&Safety10Aug07.pdf (accessed January 17, 2014).

in the event that incidents of harassment occurred, but it was not always clear to these practitioners that UNHCR would actually be able to provide assistance. In some cases, practitioners provided their own personal contact details to witnesses so that these individuals could contact the investigator if problems arose. However, this appeared to be more of an individual practice undertaken by certain practitioners, rather than a mission-wide policy.

c. Seeking asylum for interviewees

The notion has been articulated that in some cases it might be appropriate for an MRF mission to seek asylum status for certain interviewees. The Guinea Commission report references this avenue:

The Commission, whose report is the fruit of an exhaustive search for the truth with the help of these witnesses, recommends that the African Union, ECOWAS, the European Union and all those States that are in a position to do so, take steps to remind the Government of Guinea of its obligations to protect victims and witnesses and to provide refuge in accordance with the provisions of international law governing asylum to all victims or witnesses who may be in danger.¹²⁷

In the same vein, a practitioner on a different mission mentioned that this option is one that MRF practitioners might consider in the future:

In some cases people wanted assurances in terms of asylum status. It arose as a question but in the end we never formally dealt with it. In principle, I think it's conceivable that a panel could write a letter to the authorities stating that this person has played a role in a particular investigation. I do not believe such an action is entirely inappropriate.¹²⁸

d. Diplomatic communications

MRF missions may also use diplomatic communications to address protection concerns that arise. This option was pursued by the Gaza Fact-finding Mission after the Israeli security forces detained an individual who had participated in the mission's public

¹²⁷ Guinea Commission report, *supra* note 52, at 59.

¹²⁸ Confidential HPCR interview conducted via telephone in Summer 2013 with a high-level MRF practitioner, name of interviewee on file.

hearings. The report mentions the measures that the mission undertook to follow-up on this incident:

Subsequent to the public hearings in Geneva, the Mission was informed that a Palestinian participant, Mr. Muhammad Srouf, had been detained by Israeli security forces when returning to the West Bank and became concerned that his detention may have been a consequence of his appearance before the Mission. The Mission wrote to the Permanent Representative of Israel in Geneva expressing its concern. In response, the Permanent Representative informed the Mission that the detention of the person concerned was unrelated to his appearance at the public hearing. Mr. Srouf was subsequently released on bail. The Mission is in contact with him and continues to monitor developments.¹²⁹

e. Recommendations in reports

Many missions, in public MRF reports, have recommended that certain protective measures be taken by various actors after the conclusion of the mission. In a certain way, this measure is conceptually similar to pursuing referrals. MRF missions, as temporary mechanisms, by nature cannot meet the long-term protection needs of witnesses and victims. However, MRF practitioners can call on other entities to assume this role. The quotes below from various MRF reports offer a sampling of report recommendations addressing protection:

- “[The Commission] further recommends a number of serious measures to be taken by the Government of the Sudan, in particular: (...) iv) ensuring the protection of all the victims and witnesses of human rights violations.” (Darfur Commission)¹³⁰
- “Protection should be guaranteed of victims and witnesses and all those who are in contact with the Mission in connection with the inquiry. No such person shall, as a result of such contact, suffer harassment, threats, acts of intimidation, ill-treatment or reprisals.” (Flotilla Fact-finding Mission)¹³¹
- “The Commission believes that the Government of Guinea has a very good opportunity to demonstrate to the international community its desire to break

¹²⁹ Gaza Fact-finding report, *supra* note 13, at 43.

¹³⁰ Darfur Commission report, *supra* note 6, at 6.

¹³¹ “Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance,” A/HRC/15/21, 2010, para. 7.

with a recent past that has been ugly and painful for the people of Guinea as a whole, by firmly committing to fulfill its obligations in this area and not to harm in any way whatsoever the victims and witnesses who have cooperated with the Commission.” (Guinea Commission)¹³²

¹³² Guinea Commission report, *supra* note 52, at 59.

II. PROTECTION OF STAFF

The threats to, and the protection of, staff members of MRF missions, are of a somewhat different nature than those for witnesses and victims. While the threats are similar — for example, threats to the physical security of staff and the risk that staff members, while engaged in on-the-ground operations, will suffer from secondary trauma — the nature of the protective responsibility is distinct. Whereas protection of witnesses and victims relates to the relationship of an MRF mission to the individuals with whom the mission engages, protection of staff relates to the responsibility that the MRF mission has to the security of its own members. As with the protection of witnesses and victims, several challenges in this area arise from the *ad hoc* nature, and the limited resource capacity, of MRF missions. This section addresses the sources of responsibility that MRF missions have to provide for the security of staff members, the nature of the risks, and the measures that have been, or could be, adopted to address these risks.

A. Sources of responsibility to protect staff

Similar to the protection of witnesses and victims, for the protection of staff, MRF mandates, despite constituting the authorizing document for MRF missions, often make no mention of the issue or simply address the topic with passing references. The table below presents the relevant portions of mandates for the fifteen missions of focus.

Table 2: Protection of Staff in Monitoring, Reporting, and Fact-finding Mandates and Terms of Reference

MISSION	MENTION OF STAFF PROTECTION IN MANDATES, TERMS OF REFERENCE, OR METHODS OF WORK
Libya Commission	None
Bahrain Commission	None
Flotilla Panel	<p>“The UN Secretariat will provide secretariat services to the panel and will arrange for the provision of necessary administrative, logistic and security support, including transportation and accommodation.” (Method of Work, para. 6)</p>
Côte d’Ivoire Commission	None

Kyrgyzstan Commission	“The Government, (including all relevant Departments) shall assist to the requests of the Commission for collection of the required information and testimony. In accordance with the laws of the Kyrgyz Republic, it shall, in particular, guarantee to the Commission: (...) Appropriate security arrangements for the personnel, documents, premises and other property of the Commission (...).” (Terms of Reference, as cited in the mission’s final report, p. 2)
Sri Lanka Panel	None
Flotilla Fact-finding Mission	None
DRC Mapping Exercise	“MONUC, in consultation with the OHCHR Field Safety and Security Unit, should ensure appropriate security arrangements for members of the Mapping Team. The members of the Mapping Team should be housed in secure premises. Secure office space should therefore be identified and allocated by MONUC for the duration of the mission, both in Kinshasa and in relevant field locations.” (Terms of Reference, para. 3.3)
Guinea Commission	None
Georgia Fact-finding Mission	None
Gaza Fact-finding Mission	None

Beit Hanoun Fact-finding Mission	None
Lebanon Commission	None
East Timor Commission	<p>“The terms of reference make clear that the Commission would enjoy the full cooperation of the Government of Timor-Leste and would be provided with the necessary facilities to enable it to discharge its mandate. In particular, the Commission was to be guaranteed: (...) Appropriate security arrangements for the personnel and documents of the Commission (...).” (Terms of Reference, as cited in the mission’s final report, p. 11)</p>
Darfur Commission	None

As the above table suggests — and as is the case with the protection of witnesses and victims — given that MRF authorizing documents make only sparse mentions of staff security, the responsibility for undertaking security measures evidently arises from other sources. Unlike protection of witnesses and victims, however, international law does not constitute a component of the architecture of these normative notions. As one expert states:

An organisation which sends fact-finders on a mission to a dangerous country will always bear responsibility for their safety and well-being. International law offers no special protection to a member of a fact-finding mission over and above that which the member is entitled by virtue of his or her status as a civilian.¹³³

Protective measures for staff evidently depend on the extent to which the deploying organization perceives a duty of care but also on organizational capacities. For this section as well, there appears to be discrepancy between UN and other mechanisms. UN personnel usually enjoy insurance, the security advice of a specialized agency — the United Nations Department of Safety & Security — and personnel are covered by the Convention on the Safety of United Nations and Associated Personnel, adopted in 1994 by the General Assembly.¹³⁴ Additionally, UN special rapporteurs enjoy immunity against prosecution, which was confirmed by the International Court of Justice in the *Cumaraswamy* case.¹³⁵

Practitioners can, where possible, rely on other UN agencies. In the DRC Mapping Exercise, the Terms of Reference foresees a specific role for the UN peacekeeping agency, for the protection of the team's members:

MONUC, in consultation with the OHCHR Field Safety and Security Unit, should ensure appropriate security arrangements for members of the Mapping Team. The members of the Mapping Team should be housed in secure premises. Secure office space should therefore be identified and allocated by MONUC for the duration of the mission, both in Kinshasa and in relevant field

¹³³ Robertson, *supra* note 56, at 40.

¹³⁴ See generally “Convention on the Safety of United Nations and Associated Personnel,” Office of Legal Affairs Codification Division, available at <http://www.un.org/law/cod/safety.htm> (accessed January 17, 2014).

¹³⁵ “Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,” Advisory Opinion, April 29, 1999, available at <http://www.icj-cij.org/docket/files/100/7619.pdf> (accessed January 17, 2014), quoted in Robertson, *supra* note 56.

locations.¹³⁶

Some MRF mandates, in addition to the passages regarding security indicated above in Table 2, have stated that the members of MRF missions should be accorded the privileges and immunities articulated in the Convention on the Privileges and Immunities of the United Nations.¹³⁷ Of the fifteen missions examined in this paper, mandates, Terms of Reference, and operating procedures for six missions — Bahrain Commission, the DRC Mapping Exercise, the East Timor Commission, the Kyrgyzstan Commission, the Flotilla Fact-finding Mission, and the Lebanon Commission — reference this measure.

For UN missions, the implementation of an MRF mandate will entail incorporating the United Nations Minimum Operating Security Standards (MOSS) into the operations of the mission. According to MOSS, based on a Security Risk Assessment particular to the relevant country, personnel on UN missions should have access to or be provided with an emergency communications systems; appropriate vehicles; sufficient training; and necessary security equipment, which in some contexts includes body armor, blast resistance film, and a trauma kit.¹³⁸ Though, as the section below will examine, the *ad hoc*, resource scarce nature of MRF missions sometimes makes it impossible for MOSS to be implemented.

B. Risks, and measures for mitigating risks, for staff

Staff protection shares with witness and victim protection the dilemma that a divide exists between aspirational notions of best practice and the reality of what can be delivered. As mentioned earlier, the main risks for staff members are threats to physical security that arise due to the typically volatile contexts that MRF practitioners investigate and secondary traumatization that might be experienced during or after MRF interviews. This section examines both of these issues.

¹³⁶ DRC Mapping report, *supra* note 72, at 2.

¹³⁷ For the text of the convention, see “Convention on the Privileges and Immunities of the United Nations,” 1946, available at <http://www.un.org/en/ethics/pdf/convention.pdf> (accessed January 17, 2014).

¹³⁸ See generally “UN MOSS Instructions for Implementation,” available at <http://www.scribd.com/doc/188601144/UN-MOSS-Instructions-for-Implementation> (accessed January 17, 2014).

1) Physical safety

Physical security risks can arise from the fact that some local actors actually vilify certain international investigative entities. As the President of the UN Staff Union has said of the ICTY:

This organisation is not seen by all as a humanitarian or nation-building one (...). There are many people in the former Yugoslavia who actually perceive the ICTY as a punitive organisation. Those who work here are regarded as the enemy who contributed to arresting their national heroes. The tribunal has a social responsibility to protect these staff.¹³⁹

In the same vein, a writer offers this valid observation:

Some human rights reporters are only too pleased to give evidence to international courts. But others, especially those still in the field, are horrified at the prospect of losing their perceived neutrality by appearing to endorse the prosecution (...). Neutrality is vital to war correspondents and to human rights reporters working in war zones. Consequently, if a correspondent or reporter is perceived to be a spy for a prosecutor of an international criminal court, not only do they risk their own safety but also the safety of their colleagues. In this context there can be no meaningful distinction between the war correspondent and the human rights reporter or investigator, in terms of the importance of the information they gather or the public interest that its publication will serve. In both cases there is the danger that information will dry up if the court routinely orders them to identify their sources.¹⁴⁰

The experience of the Bahrain Commission further highlights the risks that MRF staff face due to the politically sensitive nature of MRF work. The Bahrain Commission became a political lightning rod during the mission's implementation, leaders members of the opposition in the country on one occasion to force their way into the mission's office. As the mission's Chief Investigator recounts, "Our offices were stormed, they invaded the offices, took charge of everything. When we failed to deal with them, they

¹³⁹ Rick Cottam, quoted in Afua Hirsch, "War crime tribunals facing crisis as staff quit," *The Guardian*, November 28, 2008, accessed on January 17, 2014 (<http://www.theguardian.com/world/2008/nov/29/war-crimes-tribunal-under-threat>).

¹⁴⁰ Robertson, *supra* note 56, at 33-34.

started insulting us. I was spit on. My female staff had been insulted. They posted hate messages on the wall.”¹⁴¹

However, MRF practitioners have indicated various types of restraints — for example, budgetary and institutional — that have limited certain missions’ staff protection capacities. One practitioner mentioned that he worked on a mission that proceeded even though the conditions did not meet MOSS standards.¹⁴² Non-UN missions have an even more reduced level of support. For example, on the Kyrgyzstan Commission, there was concern about the safety of investigators, especially since the commission was a non-UN mission, and in contrast to other contexts, there was no large UN presence on the ground. However, during the mission’s implementation, no security dangers for members of the mission materialized.¹⁴³

As for the protection of witnesses, it is advised to behave in a discreet manner, to take common sense measures, and to be aware that an MRF mission entails specific risks. One interviewed investigator reports that an MRF mission was seen as putting in danger other UN agencies by using their premises.¹⁴⁴ The members of the team decided to conduct interviews elsewhere to avoid any potential controversies.¹⁴⁵

Several missions reported that they had a security officer for the staff, while this was not granted for the witnesses and victims. The use of armed escorts was also referred to by several missions, as was the use of armored cars.¹⁴⁶

A complaint voiced by several practitioners is that the security assessment, when it exists, is typically conducted remotely, by security staff who are not always country experts, and its conclusions apply to large regions, if not to the whole country. This is not always perceived to be realistic, or detailed enough, to address the situation in

¹⁴¹ HPCR interview conducted via telephone on 8-2-13 with Khaled Ahmed - Chief Investigator, Bahrain Independent Commission of Inquiry.

¹⁴² Confidential HPCR interview conducted via telephone in Summer 2013 with a high-level MRF practitioner, name of interviewee on file.

¹⁴³ Confidential HPCR interview conducted via telephone in Summer 2013 with a high-level MRF practitioner, name of interviewee on file.

¹⁴⁴ Confidential HPCR interview conducted via telephone in Summer 2013 with a high-level MRF practitioner, name of interviewee on file.

¹⁴⁵ Confidential HPCR interview conducted via telephone in Summer 2013 with a high-level MRF practitioner, name of interviewee on file.

¹⁴⁶ Confidential HPCR interview conducted via telephone in Summer 2013 with a high-level MRF practitioner, name of interviewee on file.

which practitioners will engage. As a result, after a remotely conducted security assessment that advises a mission not to proceed, investigators are sometimes left with a dilemma: not conducting the investigation, at the risk of missing important pieces of information when the security is not in reality an obstacle, or breaking the security rules if practitioners perceive that the assessment is not relevant to the very specific area they want to visit.¹⁴⁷

In a worst-case scenario, an MRF mission might need to pull out of the country in which the mission is operating. Though this measure was not necessary in any of the fifteen missions examined for this paper, a framework of considerations that has shaped decisions made by the International Committee of the Red Cross could inform how MRF practitioners gauge whether this option is necessary on future missions:

A certain level of risk is considered acceptable only if it is justified by the humanitarian impact of the operation. A balance must always be struck between the risk an action entails and its anticipated effect. It is important to assess the effects of operational activities in terms of quality rather than quantity, and regularly to ask the question whether the impact of a planned activity is worth the risk it involves. If the answer is 'no', the operation should in principle be suspended, postponed or discontinued.¹⁴⁸

2) Psychological well-being

Psychological risks arise from the difficult working conditions of MRF processes. A 2007 UNHCR-commissioned external evaluation on UNHCR staff security articulates many risk factors also applicable to MRF practitioners:

Stress and staff security go hand in hand (...). Even when not directly under fire, persons living and working in or near war zones suffer from "cumulative stress". Nor is stress limited to staff working in high security-risk operations. Many field staff assigned to remote and inhospitable areas suffer hardships which are near-intolerable: inadequate or overcrowded working and living environments,

¹⁴⁷ Interviews conducted by the author in Autumn 2013 with high-level MRF practitioners, names of interviewees on file.

¹⁴⁸ Patrick Brugger, "ICRC operational security: staff safety in armed conflict and internal violence," 861 *International Review of the Red Cross* 91, 434-435 (2009), available at <http://www.icrc.org/eng/assets/files/other/irrc-874-brugger.pdf> (accessed January 17, 2014).

extreme and unhealthy climates, hostility of the local authorities and/or population, endemic violence and crime.¹⁴⁹

In the context of an MRF mission, psychological strains also arise for investigators from perpetual engagement with victims and witnesses who have suffered from trauma. A practitioner states of one mission that the issue of secondary traumatization “definitely came up, we did have investigators who were traumatized or who were suffering from some kind of stress,” but the mission did not have any formal support mechanism to deal with this issue.¹⁵⁰ This practitioner recommended as a best practice providing investigators with access to a mental health expert or resources that could be used to de-stress from the job, as well as preliminary training to investigators about how to mitigate the risks of secondary re-traumatization.¹⁵¹ Another recommendation that has been articulated is to “offer post-mission debriefing to members of the delegation and persons associated with the mission where necessary to deal with stress and psychosocial trauma that may be experienced after a mission.”¹⁵² Though practitioners widely recognize the importance of such measures, these crucial support mechanisms have not materialized consistently in actual MRF practice. One measure that could be pursued more aggressively and that would not have drastic resource implications is to emphasize to practitioners the importance of self-care. For example, a 2007 World Health Organization document on monitoring sexual violence recommends, “Given the potential for emotional or social harm to those collecting the information, as part of the training programme, team members should engage in candid and honest discussions about [self-care] and develop strategies to minimize such effects.”¹⁵³

¹⁴⁹ “Stress and Staff Security: A Management Challenge for UNHCR,” EC/47/SC/CRP.49, August 15, 1997, available at <http://www.unhcr.org/3ae68cf124.html> (accessed January 17, 2014).

¹⁵⁰ HPCR interview conducted via telephone on 7-30-13 with Christina Abraham - Chief of Staff, Bahrain Independent Commission of Inquiry.

¹⁵¹ *Ibid.*

¹⁵² Lund-London Guidelines, *supra* note 24, at para. 69, p. 9.

¹⁵³ World Health Organization, *supra* note 126, at 25.

III. CONCLUSION

As this paper has demonstrated, unlike courts and tribunals, which according to their mandates are obligated to undertake certain protective measures, MRF missions rarely have specific protective measures articulated in mission mandates. The protective obligation arises from other sources, leading at times to ambiguity about the extent of MRF practitioners' responsibilities and inconsistencies across different missions. The extent to which MRF missions can and do protect witnesses, victims, and staff depends less on the mandate and more the institutional locus (i.e., UN versus non-UN) and the personalities and professional experience of commissioners and other members of the mission. But despite the limitations of what *can* be done, for some issues consensus seems to have emerged about what *should* be done. Certain policy documents that have been produced — for example, the Siracusa Guidelines — reflect the shared aspirational vision of the growing community of practice of MRF practitioners. Such documents, as well the interviews with practitioners conducted for this paper, suggest areas of consensus presented in the table below. This table constitutes a preliminary compilation of key issue areas for further research and discussion by MRF professionals.

Table 3: Recommended protection practices for witnesses and victims

DO	DON'T
Before interviews	
<ul style="list-style-type: none">✓ Draft protocols before the start of the mission✓ Train the team on protection before deployment✓ Conduct a localized security assessment before deployment✓ Deploy experienced interviewers✓ Request that the local authorities, as well as other countries and embassies, protect witnesses at risk✓ Consult NGOs on the ground who have already investigated (to avoid re-interviewing the same person multiple times)	<ul style="list-style-type: none">✓ Do not advertise the types of interviewees you are looking for, especially if you are an SGBV expert✓ Do not re-interview individuals already interviewed by others if it is not absolutely necessary

During interviews	
<ul style="list-style-type: none"> ✓ Use discretion when approaching interviewees and when choosing interview location ✓ For SGBV, use female interviewers for female interviewees ✓ Be aware of special circumstances for interviews in closed places, such as prisons and refugee camps ✓ Show sensitivity during interviews ✓ Obtain, with specificity, informed consent from interviewees ✓ Inform the interviewee of risks ✓ Use secure communications (phone lines, emails) ✓ If necessary, refer interviewees to other organizations for any humanitarian or health needs ✓ If possible, refer interviewees to other UN agencies, including peacekeeping forces, post-interviewee support ✓ Allocate numbers for each witness in internal reports ✓ Maintain data security 	<ul style="list-style-type: none"> ✓ Do not instrumentalize witnesses and victims ✓ Do not endanger other human rights/UN workers ✓ Do not conduct interview with other people in the room, especially in prisons
After interviews	
<ul style="list-style-type: none"> ✓ Respect the confidentiality of interviewees ✓ Adopt a policy regarding publishing names (e.g., publish only names and cases that are already public) 	<ul style="list-style-type: none"> ✓ Do not mention interview location or any other detail (even to the ICC) if this will allow interviewees to be identified ✓ Avoid using/keeping paper data when possible

✓ Write report in a way that doesn't allow the interviewee to be identified (omit interview location and other details if necessary)	✓ Do not leave data behind ✓ Do not under-estimate the risk of secondary trauma for staff who worked on the inquiry
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Ideal staff protection procedures are detailed at length in various UN documents, including MOSS, and general principles that can be discerned as best practices include:

- Conduct a security assessment before deployment
- Provide MRF actors with informational security materials and trainings
- Establish emergency communications procedures
- Use discretion and common sense
- Use appropriate vehicles, and if necessary, armed escorts
- If necessary and possible, have a security officer / adviser in the team
- Provide psychological support and post-missions debrief for staff

However, open questions remain about what happens when these aspirational notions collide with the *ad hoc* reality of MRF implementation. A recurrent question throughout this research concerns the fact that, in the absence of detailed reference in the mandate, and in view of diversity of practice, a lot is left to personal assessment. Can MRF practitioners and their mandators be satisfied with this or is there more that these actors can do to ensure witness, victims and staff protection, without unburdening states of their responsibility to protect? Another dilemma concerns the very ethical foundations of human rights work such as that of an MRF mission. Given the fact that, on some missions, practitioners adopted extensive security measures for staff that were not applied to witnesses and victims, the following question arises: is it ethically acceptable that some persons will benefit from more protection than others, depending of their status as staff or witnesses?