

HUMAN RIGHTS FACT FINDING MISSIONS

A Seminar organised by
Raoul Wallenberg Institute of Human Rights and Humanitarian Law
International Bar Association
and
British Institute of International and Comparative Law
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SEMINAR REPORT

The seminar was opened by the Director of the British Institute of International and Comparative Law, Professor Robert McCorquodale, in the presence of the Ambassador of Sweden, HE Mr Staffan Carlsson. After welcoming delegates, Professor McCorquodale provided a brief introduction to the background and aims of the Guidelines, and then introduced the Keynote Speaker, Geoffrey Robertson QC.

Keynote Address

Geoffrey Robertson QC began by pointing out that the ethical and legal dimensions of fact finding missions raised a number of questions, for example:

1. Whether to open an investigation; and
2. Can investigators be called to court.

He then went on to differentiate five types of fact finding missions:

1. Mission of inquiry, which has statutory power to call witnesses (eg Richard Goldstone in South Africa). These are usually set up as a result of international pressure.
2. UN Rapporteur; usually from the UN or other international agency (semi-official inquiry).
3. Fact finding mission set up by an NGO usually led by a prominent jurist.
4. Independent expert, sent out by an NGO but carried out in confidence.
5. Permanent missions, eg Human Rights Watch monitors.

In the second part of his speech Mr Robertson gave a detailed history of human rights reporting:

1. During World War I most reporting was propaganda; however the blue books dealing with the Armenian Genocide written by Viscount Bryce were the first examples of human rights reporting.
2. League of Nations: In September 1931, when Japan invaded Manchuria in China, the League of Nations sent out a fact finding mission headed by Lord Nitten. They travelled by ship and took eight months to arrive. In September 1932 they produced a report but by that time the Emperor had been deposed and Japan's invasion was a *fait accompli*. In December 1934 Italy invaded Abyssinia. A

- committee was set up to investigate. Britain and France still sought Mussolini as an ally and put pressure on the committee to water down the report; the report took over nine months.
3. In 1959 Amnesty was founded. The first inquiry was into West Africa, partly funded by the British government which damaged its credibility. Inquiries should not be paid for by interested parties.
 4. A couple of American lawyers exposed the Central American death squads and US support for the contras. A *New York Times* journalist was sacked as a result of pressure from the Reagan administration.
 5. Richard Goldstone, when asked to investigate war crimes allegations against the Israeli Defence forces, insisted on being given the right to investigate Hamas as well.

Issue of confidentiality:

Two sources who spoke to Richard Goldstone in Kenya were killed. Should a source be protected if they knowingly give false information?

Tips for fact-finders:

Fact finders should obey local laws. An interview should not be taken if there is a possibility of being overheard. Leading questions should be avoided. The interviewee should be constantly questioned as to how they know what they claim to know. The interviewer should constantly be looking for corroboration.

Should a fact finding mission draw legal conclusions?

What happens if the law is unclear, eg genocide in Darfur. The US government claimed genocide took place, the Cassesse fact finding mission stated that it did not, the Office of the Prosecutor of the International Criminal Court (ICC) sought an arrest warrant for genocide; however, the Pre-Trial chamber ruled that there was insufficient evidence.

Status of the fact-finder

- 1) Competence;
- 2) Compellable (*Washington Post* reporter in ICTY trial);
- 3) What rights have journalists to protect their sources? *ECHR Goodwin v UK*. Should there be an amendment to article 8 to protect fact finding missions (the Red Cross opposes any such amendments).

Publication of the report

- 1) The Burmese government were the first to sue an NGO in London for libel. English libel law places the burden on the reporter (eg Global witness case)
- 2) Final point: the report should be readable.

What is Fact Finding?

In the first full session, chaired by **Sarah Williams** (Dorset Fellow in Public International Law, BIICL), the **Hon Justice Robert Sharpe** (Court of Appeal, Ontario), discussed NGO missions which would result with a published report. He emphasised that

individuals' interests are at stake. Therefore the fact finders must be even-handed and the mission should comport with basic norms:

- 1) Who should be a fact-finder?
- 2) What process should he/she follow?
- 3) How should he/she draw conclusions?

A fact finder should be an individual who is competent and fair and seen that way. He/she should be independent, impartial and with no agenda. The individual should have appropriate training, openness and be a good listener.

Justice Sharpe then gave a couple of examples from his own experience:

Kenya: the mission was looking at allegations of corruption at the highest levels in the judiciary system. Senior Judges from Uganda, Tanzania and the constitutional court in South Africa took part in the mission. They were all from common law countries so had a good understanding of the Kenyan system yet were still outsiders so were seen to be impartial.

Pakistan: with regard to the IBA mission to investigate the circumstances surrounding the sacking of the President of the Supreme Court of Pakistan, the IBA wanted an Islamic lawyer as part of the group; however, a Malaysian lawyer who travelled with the mission was refused a visa.

Justice Sharpe then made these final points:

- People who are being investigated have a right of notice and a right to respond.
- A mission should have clearly defined and publicly known goals. Usually there is a problem with getting the other side to talk.
- Assessing credibility; conclusions should be based on evidence which is considered reliable.
- A certain period should be set aside to write the report as all too often mission members go back to their lives and it is difficult to get them to write the report.

Wilder Tayler (Deputy Secretary-General, International Commission of Jurists), then talked about the different purposes of fact finding missions. He pointed out that a fact finding mission is normally part of an on-going process and is, in actuality, more fact confirmation. A skeleton of the report should already be written before leaving for the fact finding mission. He also questioned point 29 of the draft rules (the Guidelines may be downloaded at <http://www.factfindingguidelines.org/>).

Christian Ahlund (Executive Director, ILAC) discussed fact finding missions from the perspective of his experiences with ILAC (International Legal Assistance Consortium) and ECRI (European Commission against Racism and Intolerance). He noted that with ILAC the report must be written with the cooperation of the Government. Fact finding will focus more on what will facilitate a reform programme and less on the human rights

abuses of a particular government. The political will of the government who invites ILAC is very important.

The ECRI is similar to the UN Human Rights Committee but it is not political. Members of the Committee are not representatives of their national governments. The purpose of the ECRI is to see to what extent a national government is in compliance with the ECHR. A country is usually visited every 4-5 years. ILAC does not withhold criticism of a country, eg its criticisms of Rwanda in 2007.

1. Experts are there for a short period of time.
2. They are conducting work in an unfamiliar environment
3. There is only a short time to collect information, yet it must be checked to see that it is reliable information.

The report should be written by one reporter who is designated by the group.

The final speaker in this session was **Professor Charles Garraway** (British Red Cross), who discussed fact finding missions in the international humanitarian law (IHL) context. He noted that truth is the first casualty in war.

Article 19 of the Additional Protocol I to the Geneva Conventions set up an International Humanitarian Fact finding Commission (IHFC) to investigate IHL violations. The Commission requires 20 declarations to come into force. States must sign up to the Commission for it to have jurisdiction over them.

The Commission is made up of 15 members. Some world areas are much unrepresented such as Africa and Asia. The members are usually lawyers, doctors or military experts. The Commission has yet to be asked to investigate any violations. Professor Garraway gave three possible reasons for this:

- 1) States do not know about it;
- 2) The reports are confidential, states generally want to use the contents of a report for their own ends;
- 3) The major difference between fact finding regarding human rights and IHL is that human rights missions are to bring states to account. IHL is a matter of balance – it cannot give a conclusion based on one side and can only raise questions that need to be answered.

Interviewing vulnerable groups

This session was chaired by **Dr Louise Arimatsu** (International Humanitarian Law Project, LSE). **Mona Rishmawi** (Office of the High Commissioner for Human Rights) discussed her experiences working for the UN High Commission for Human Rights. The Commission had to think creatively about how to protect human rights. The Commission has offices in 50 states, some of which are mandated by the Security Council. There are thematic special Rapporteurs and country specific Rapporteurs.

- 1) Most important aspect: principle of do no harm. How to implement this? What power does a fact finder have to do harm? The example was given of Darfur where the co-operation of the Sudanese government was lacking.

- 2) Looking for mechanisms at national level. If there are reprisals, these will be exposed. Special categories of interviewees are particularly vulnerable:
 - (i) Detainees: insist interview is unsupervised; conduct random interviews, not just with those complaining of abuse.
 - (ii) Internally displaced persons: refugee camps can be full of informants.
 - (iii) Victims of sexual violence: stigma and fear of reprisals.
- 3) Be careful to listen victims, interviewer can have pre-conceived ideas; victims have a need to regain dignity.
- 4) Hold perpetrators accountable
- 5) Proposals:
 - (i) Institutional reform (UN Special Rapporteur).
 - (ii) Name perpetrators. Confidential annexes with identification of perpetrators and the identification of the victims.
 - (iii) Remedy for the victims.

Graham Dossett (Human Rights Centre, University of Essex) gave a PowerPoint presentation on interviewing vulnerable groups. He pointed out that one of the hardest things to achieve for an interviewer is to stay silent and let the interviewee talk. He talked about six overarching issues in investigative interviewing such as:

- 1) Two-way process;
- 2) Establishing trust;
- 3) Planning and preparation helps both the interviewer and interviewee;
- 4) Personal style (assured and personable);
- 5) Interview location;
- 6) Suggestibility (must guard against interviewee encouraged to provide expected response).

Mr Dossett laid out the basic principles of investigative interviewing such as: approaching interview with an open mind; be fair – persistent questioning is unfair; and he noted especially that the vulnerable needed to be treated carefully. Finally, Mr Dossett laid out a model for an interview structure with the acronym PEACE, standing for planning and preparation, engage and explain, account clarification and challenge and finally evaluation.

Carla Ferstman (Director, Redress) discussed the need for redress for victims of torture and other international crimes. This usually occurred long after the fact finding mission. Characteristics of victims of international crimes:

- 1) Still at risk (eg detainees).
- 2) Severely traumatised.
- 3) Urgent health or social-economic needs.
- 4) They are individuals.

The victims' telling of the story will be at their own pace. The rhythm is very telling of their experience. Victim may not differentiate between facts they perceived themselves or those which they had been told.

- 1) Preparation: It is often difficult to know what to expect. Women interviewers are often better with victims of sexual violence.
- 2) How will the information received be used? There is the issue of confidentiality. Any consent given must be voluntary.
- 3) Threat of reprisals.
- 4) Victims of trauma may have different type of recall so one should be aware of the danger of secondary traumatising of the victim.
- 5) Data storage is vital.

Andrew Mawson of Human Rights Watch asked the panel their opinion on the best way to use interpreters. Mr Dossett acknowledged the potential problems and gave an example of an interpreter working for the police who unbeknownst to them offered to help the asylum seekers the police were interviewing. Mr Dossett then gave the following hints:

- 1) The interpreter should use the first person only.
- 2) Ask short questions.
- 3) Ask for the story in short, useable chunks.
- 4) Discuss the content of the interview with the interpreter beforehand but keep back some questions until the interview.

Practical Issues

The first speaker in this session, chaired by **Alan Stephens** (Clemens Nathan Research Centre), was **Purna Sen** (Head of Human Rights, Commonwealth Secretariat). She discussed fact finding missions from a sociological perspective. She emphasised that the human rights agenda is bigger than a simple black and white establishing of a fact. Fact and truth can be a contested concept. Rapport and trust are essential for good interviewing. Not everybody can be a good interviewer; it needs an understanding of humanity.

Then **Andrew Mawson** (Human Rights Watch) discussed security issues relating to fact finding missions such as

- 1) local people;
- 2) information security;
- 3) mission members themselves.

Field Security should be a key pre-mission discussion between mission members and staff at headquarters. Preparation is vital.

- (i) They should ensure they are doing no harm.
- (ii) Personal safety of mission members overrides everything.

Other points to note:

- Staff are normally very aware of the first principle, however they should be more aware of their own safety, even senior staff members may need to be reminded.
- Should names be linked to the information which they gave?

- Informers should be aware of limits of what an NGO can provide.
- What happens if information falls into wrong hands? It could be friendly NGOs or local media. One suggestion is to save a draft into hotmail.
- Security issues include preventing accidents. Amnesty International always informs Governments that they are coming. Human Rights Watch does not always do so.
- Identify security contacts. Each team member should have independent communication devices.
- Mission debriefing is very important. Counselling should be made available for staff members without management necessarily being involved.

Effectiveness of the Mission

The second day of the seminar started with a panel on the effectiveness of fact-finding missions, which was chaired by **Sir Nigel Rodley KBE** (Human Rights Centre, Essex University).

Dan Saxon (Senior Prosecuting Trial Attorney, International Criminal Tribunal for the former Yugoslavia) (ICTY) discussed fact finding missions with a particular emphasis on the interview. His discussion was in three parts:

1. Preparation of the interview.
2. Conduct of interview including logistics.
3. Protection and security.

An International Criminal Tribunal needs evidence to prove guilt beyond a reasonable doubt.

1. Preparation of the interview:

The most important person is your interpreter. Need to select competent, trustworthy and experienced interpreter. Language skills must be very high. Ask for samples, university work and experience. Seek advice from other institutions and NGOs. Need interpreters who are capable of working near armed conflicts. Is the interpreter sophisticated enough to understand social and cultural differences? The interpreter's background needs to be checked. The interpreter should be a cultural interpreter as well (eg point out any 'faux pas'). The interpreter should be involved in the planning of the interview. The background of the witness and the purpose of the interview should be discussed with the interpreter. What facilities will be there? Is there a need for water? Will the interview create a security risk to you, the interpreter or the witness? Review previous interviews which are about the same thing. Review all documents pertaining to a high ranking witness, eg military orders, disciplinary measures etc can show credibility.

2. Conduct of the Interview:

If possible interview the witness alone. Be aware of cultural sensitivities. If additional parties are present, makes sure they do not speak. Need to explain to witness who you are, where you are from, what you need and the possibility of appearing in court. Will the witness need relocation? How will that happen? Are there other kinds of protection possible? Be careful about giving promises you cannot keep, eg protecting identity.

Need to consider how the witness can contact you. A system must be put in place. If at all possible record all interviews. You must control the interview; neither the witness nor the interpreter should control it. Interpreter must not paraphrase. Do not ask leading questions. Begin questions with 'w' words, eg, 'When did you cross the border' is much better than, 'Did you cross the border last year?' Has the witness other evidence, eg police records, scars, physical injuries. Ask witness for help with physical aids. Show patience. Always seek out exculpatory evidence. Is witness collateral damage or a combatant?

3. Protection and security.

Never discard your notes, evidence anything with the interview. Debrief your interpreter. Maintain contact with witness.

The final speaker of the conference, **Professor Philip Leach** (London Metropolitan University), gave a PowerPoint presentation on the fact finding missions conducted by the European Commission and the European Court of Human Rights. Research on the topic has been recently completed by the Human Rights and Social Justice Research Institute at London Metropolitan University. Fact finding missions have taken place in 92 cases of severe gravity (74 missions were undertaken by the Commission and 18 by the Court). There was a finding of a violation of the ECHR in 71 cases. Professor Leach further mentioned the disincentives to conducting such missions, including a state's refusal to cooperate or the associated costs. He also discussed the logistics regarding witness hearings and the conduct of on-the-spot investigations.

Launch of the Guidelines

Dr Phillip Tahmindjis (Human Rights Institute, International Bar Association) discussed the development of the fact finding guidelines.

The fact finding guidelines were developed as there was no set standard. Many of the international tribunals as well as national courts such as the House of Lords and the South African Constitutional Court referred to NGO reports. Many bodies have their own set functions. Commissions of Inquiry are very different to NGO fact finding missions. The 1980 Belgrade minimum draft rules were not particularly detailed. They were also criticised for being too inflexible and relied upon IGOs rather than NGOs.

The decision was taken, therefore, to focus on NGOs. The reports of NGOs were analysed in detail and authors of the reports were interviewed. In 2004 a seminar was held in Lund. The first draft was written by Dr Tahmindjis. In 2008 a second seminar was held in the British Institute of International and Comparative Law where the current draft was hammered out.

In the discussion that followed, an ex-legal advisor to the Israeli Government praised the guidelines and felt that they could have great potential not just for NGOs. He suggested that points 4 and 5 should include a term which notes that the terms of reference for a fact finding mission should not be an adjunct to a political decision. He gave the example of

the recent fact finding mission to Gaza. A legal advisor at the ICC felt that payments to witnesses (eg for travel costs) should also be considered in the guidelines. Ms Rishawi suggested that there should be a link from the guidelines website to the guidelines for UN Rapporteurs.

The website for the guidelines is now live (www.factfindingguidelines.org) from where the guidelines can be downloaded. As well, there is an endorsements section. Alternatively, send any comments to Phillip Tahmindjis (phillip.tahmindjis@int-bar.org). The guidelines will be an ongoing process.